

## **FIRST LORD ALEXANDER OF WEEDON LECTURE**

I am particularly happy to have been invited to give this first public law lecture in memory of Lord Alexander of Weedon, sponsored by Brick Court Chambers. Bob Alexander was my oldest friend at the Bar. We overlapped at King's College, Cambridge and shared a flat when we were starting in practice. I played a part in his move from Western Circuit Chambers to 1 Brick Court, and he later returned the compliment, when I decided that the time had come to make a move from Admiralty Chambers.

Bob Alexander was a man of relatively humble origins, and came to the Bar without any contacts in the law at all. His qualities were, however, quickly recognised and his career meteoric. He took silk in 1973 and was soon the first choice of many of the leading city firms. Lord Denning described him as the best advocate of his generation. In 1985 he was elected Chairman of the Bar and promptly judicially reviewed the Lord Chancellor, Lord Hailsham, on legal aid remuneration, with conspicuous success, having not only the merits but the benefit of the advocacy of Sydney Kentridge. In 1988 he accepted a life peerage from Margaret Thatcher.

The year before he had taken over the Chair of the Takeover Panel, and this obviously drew his talents to the attention of the City, for in 1989 he accepted an invitation to become Chairman of the National Westminster Bank, a position that he held for ten years, during which time he served as a member of the Advisory Group to the Governor of the Bank of England, President of the International Monetary Conference, Deputy Chairman of the Securities and Investment Board and one of the four trustees of the Economist Trust. He played a prominent part in the business of the House of Lords, including taking the Chair of the Audit Committee and the All Party Law Reform Group.

Some, and perhaps I am one of them, have regrets that his talents were diverted to the City rather than to the Bench. But he never lost his interest in the law and his concern for the rule of law, as evidenced by his year as Treasurer of the Middle Temple and his acceptance of the Chair of Justice. He would, I have no doubt, have been particularly pleased that his old chambers had chosen to commemorate his memory in this way.

There is one person whom I invited personally to this lecture who I am particularly sorry is not here. That is because he replied to my invitation from a hospice a few days before he died. I speak of Burley, for years the senior clerk of Brick Court Chambers. If Bob Alexander was arguably

the finest advocate of his generation, Burley was unquestionably the finest clerk, as many here have reason to know. I am grateful for the opportunity of this lecture to express publicly the admiration and affection which I and Bob felt for him.

When Bob and I started at the Bar the approach to interpreting statutes, and indeed construing contracts, was relatively straightforward. The cardinal principle was that the words used had to be given their natural meaning. There was little scope for looking outside the four corners of the relevant document.

A stepping stone on the road to a less restrictive approach to interpretation was the case of the *Diana Prosperity*, although this was only thought to be worth reporting in Part 1 of the Weekly Law Reports<sup>1</sup>. By a chain of long term time charters a British company called Reardon Smith had agreed to enter into a long term time charter of a tanker. The charter had a detailed specification which described the vessel down to the last rivet. It also stated, quite unequivocally, that the tanker would be built by Osaka Shipbuilding Ltd and described the tanker as Yard No. 354 at Osaka Shipbuilding.

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<sup>1</sup> *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989

Unfortunately Osaka's yard was not big enough to construct the tanker, so Osaka sub-contracted the building to a company called Oshima, with a yard 300 miles away from Osaka.

The tanker was built and complied with the contractual specification down to the last rivet. But the bottom had dropped out of the long term charter market and Reardon Smith wanted to get out of the charter. So they took the point that the tanker did not comply with the contract because it had been built by Oshima, whereas the contract specified that it would be built by Osaka. They had no case on the merits, but a pretty powerful case in law. It was the advocacy of Bob Alexander that persuaded Mocatta J, the Court of Appeal and the House of Lords that the tanker complied with the contractual description.

Giving the leading judgment in the Lords, Lord Wilberforce held that the reference to the tanker being built by Osaka was only a means of identifying the vessel and not part of her contractual description. In so finding he placed reliance on the background circumstances in which the contract was concluded. He said <sup>2</sup>:

“...what the court must do must be to place itself in thought in the

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<sup>2</sup> At p 997

same factual matrix as that in which the parties were... In the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would say that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.”

Thereafter the “matrix” became something of a skeleton key which opened the door to let in quite a volume of extraneous material that would previously have been held to be inadmissible as an aid to construction.

The *Diana Prosperity* was cited by Lord Steyn as applicable to the interpretation of statutes in the famous Hart lecture that he gave on *Pepper v Hart*<sup>3</sup>, and it is to that case that I now wish to turn as a second stepping stone in the voyage of statutory interpretation that I am following.

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<sup>3</sup> [1993] AC 593

Prior to *Pepper v Hart* the House of Lords had repeatedly stated that it was not legitimate for the court to consider statements made in Parliamentary debate as a guide to the meaning of the statutory provisions being debated. This was both for reasons of constitutional principle and for pragmatic considerations. Members of the House who had endorsed this rule in relatively recent times included no lesser jurists than Lord Reid, Lord Wilberforce, Lord Diplock and Lord Scarman.

The facts that caused the House to reconsider this rule arose in relation to the emotive topic of public school fees, particularly emotive, I suspect, to some in this audience and perhaps to some of their Lordships.

Schoolmasters at Malvern College had been permitted to send their children to the school under a concessionary scheme under which they paid only one fifth of the fees paid by other parents.

The Finance Act 1976 provided that they were liable to pay tax on the “cash equivalent of the benefit” of this concession.

The question was how you assessed the cash equivalent of the benefit. The choice lay between the marginal cost to the school of admitting the extra pupils, which was minimal, or their proportionate share of the overall cost of running the school, which was considerable. This issue had implications in other fields.

Aircrew were permitted to travel free if there were empty seats going begging on the basis that there was no cost attributable to providing them with this perk. The same was true of those who worked on the railways. Merchant seamen were permitted to take their wives on one free trip a year. Hotel employees received benefits in kind that did not involve significant additional costs to their employers.

The Court of Appeal, upholding Vinelott J, held that the cost of running the school had to be apportioned evenly in respect of all the pupils, so that the teachers had enjoyed a considerable taxable benefit.

The House of Lords sat to determine the case in a committee of five, the usual number. At the end of the hearing the majority of the Committee decided to uphold the Court of Appeal. But it seems that the Committee then learned of Ministerial statements in Parliament about the effect of the relevant provisions.

This resulted in the Committee increasing its size to seven and sitting to hear submissions by the taxpayers that the Lords should reverse their previous practice and look to Hansard for assistance in interpreting the statute.

What Hansard showed was that when the relevant provisions were being discussed in the House of Commons concern had been expressed as to the

effect that they would have on airline and railway employees, that an amendment had been made and that the Financial Secretary had then stated quite unequivocally that the effect of the provisions, as amended, was that “in house” benefits would be assessed on a basis of marginal cost only, so that the tax consequences would be nil, or very little.

The additions to the Committee included the Lord Chancellor, Lord Mackay of Clashfern. He was the only member of the Committee who opposed opening the door to looking at Hansard. He made it plain that he did so not on grounds of principle, but of practicality. The consequence of allowing in Hansard would be that lawyers would, in future, have to trawl through reports of Parliamentary debates. This would add greatly to the costs of litigation.

Lord Browne-Wilkinson, who gave the leading speech, swept these reservations aside. He held that, as a matter of law, there were sound reasons for making a limited modification to the existing rule. The nature of that modification was set out in a short passage in his speech <sup>4</sup>:

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<sup>4</sup> At p 634



“...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.”

Lord Browne-Wilkinson went on to explain why he considered that this change should be made as a matter of principle. In essence, his reasoning was that the court’s task was to give effect to the intention of Parliament, as manifested in the words used. Where those words were ambiguous, unclear or led to absurdity, why ignore a clear indication given in debate as to what Parliament intended?

“If the words are capable of bearing more than one meaning why should not Parliament’s true meaning be enforced rather than thwarted?”<sup>5</sup>

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<sup>5</sup> At p 635

The other five members of the Committee all agreed with Lord Browne-Wilkinson, endorsing the limits that he had placed on the circumstances in which it would be legitimate to consider Parliamentary material. The Schoolmasters' appeal was allowed – unanimously - for Lord Mackay was able to find in their favour without reference to what had been said in Parliament.

The decision in *Pepper v Hart* was delivered in November 1992. Those who are interested in the immediate consequences of that decision will find a good account in section 217 of the Fifth edition of Francis Bennion's impressive work on Statutory Interpretation. Suffice it to say that the courts did not find it easy to confine consideration of Hansard to the limited circumstances adumbrated by Lord Browne-Wilkinson. When counsel sought to refer to Parliamentary material the court could hardly refuse to look at this on the ground that the provision in issue was unambiguous, for that would have been to prejudge the case before hearing the argument. So inevitably references to Hansard were permitted *de bene esse*.

Once admitted they sometimes led the court to conclude that a statute was ambiguous where, otherwise, no ambiguity might have been found.

Even where the court ultimately concluded that there was no ambiguity, there was a natural tendency to refer to what had been said in Parliament as confirming the construction that the court had reached independently of it.

Then, on 16 May 2000 Lord Steyn delivered at University College Oxford the Hart lecture to which I have already referred<sup>6</sup>. This was a closely reasoned attack on *Pepper v Hart*, on grounds both of principle and practicality. So far as principle was concerned he argued that under our constitution the critical question was what the text of the law enacted by Parliament provided. The views of the government, ministers and whips had no relevance to the meaning of legislation. Legislation involved both Houses of Parliament. How could the statement of a minister in one House be deemed to evidence the intention of Parliament? The only relevant intention of Parliament was an intention to enact the statute as printed. Ministers spoke for the government, not for Parliament. *Pepper v Hart* treated the intention of the executive as the intention of Parliament.

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<sup>6</sup> “*Pepper v Hart*; A Re-examination” (2001) 21 Oxford Journal of Legal Studies 59-72

It provided an encouragement to Ministers to put a gloss on legislation by making statements in the House designed to see that legislation was given the meaning that they would like it to have. In constitutional terms *Pepper v Hart* was a retrograde step, permitting the executive to make law.

The practical consequences of *Pepper v Hart* were that due diligence now required lawyers to scan the various stages of Parliamentary proceedings, although almost invariably the search was fruitless, so that the cost of litigation had been substantially increased to very little advantage.

In the course of his lecture Lord Steyn floated an alternative justification for the result in *Pepper v Hart* which was not founded on the intention of Parliament. A Minister promoting a Bill should not be permitted to get the Bill through Parliament by saying that it meant one thing and then to argue in court that it bore the opposite meaning. A rule precluding this was akin to an estoppel and might provide a defensible and principled justification for *Pepper v Hart*. On this basis *Pepper v Hart* could only be used against the Government.

Lord Steyn's analysis of the relevant constitutional principles was compelling, but did it perhaps ignore the reality of the position that prevails where the Government has a decisive majority in Parliament?

In such circumstances it is likely to be the intention of the majority, albeit perhaps under the influence of the whip, that legislation shall have the effect that the Government wishes. If the promoting Minister has spelt out that intent, and the wording of the statute, albeit ambiguous, is capable of bearing the meaning that the Minister intends, there might be something to be said for an approach that gives effect to the joint intention of the Government and the majority in Parliament.

I cannot think of any extra-judicial statement that has had a greater influence on the development of an area of the law than Lord Steyn's lecture. In the *Spath Holme* case<sup>7</sup>, in which the judgment of the House of Lords was given in December 2000 the Court of Appeal had held that the language used was ambiguous and decided the case in accordance with Ministerial statements that they had held to be clear and unambiguous. The House of Lords agreed with neither proposition and reversed the Court of Appeal. Four members of the House went out of their way to emphasise the need to pay strict heed to the stringent limitations laid down in *Pepper v Hart* on the circumstances in which it was legitimate to have regard to statements in Parliament.

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<sup>7</sup> *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349

After this, a new generation of Law Lords repeatedly expressed reservations about the decision of their predecessors in *Pepper v Hart*, without going so far as to hold, in terms, that it was wrongly decided.

In *Robinson v Secretary of State for Northern Ireland*<sup>8</sup> the House refused to admit Ministerial statements as an aid to construction on the ground that these were insufficiently precise. Lord Hoffmann referred to Lord Steyn's lecture and suggested that the House might in future have to consider the conceptual and constitutional difficulties to which it had drawn attention.

Lord Hope in *R v A (No 2)*<sup>9</sup> expressed the view that resort to Hansard was only permissible for the purpose of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament, acknowledging that the source of this conclusion was Lord Steyn's lecture. He repeated this view two years later in *Wilson v First County Trust Ltd (No 2)*<sup>10</sup>. In that case the House of Lords emasculated *Pepper v Hart*, without holding in terms that it was wrongly decided.

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<sup>8</sup> [2002] UKHL 32, [2002] NI 390

<sup>9</sup> [2001] UKHL 25, [2002] 1 AC 45

<sup>10</sup> [2003] UKHL 40, [2004] 1 AC 816

Lord Nicholls might appear to have been approving the decision when he said that it removed from the law an irrational exception, but he then went on to make it plain that, while regard could now be had to ministerial statements in Parliament, these could only be treated as part of the background against which the statutory words fell to be construed. Such statements could not dictate the *meaning* to be given to legislation. He said that Lord Steyn had rightly drawn attention to the “conceptual and constitutional difficulties” in treating the intentions of the Government revealed in debates as reflecting the will of Parliament. He said <sup>11</sup>

“...the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight.”

Both of these were, I suggest, precisely what the House had done in *Pepper v Hart*.

I shall now leave *Pepper v Hart*, as an apparently wrong turning from which the House of Lords have largely drawn back, and turn to another departure from established principles of statutory construction.

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<sup>11</sup> At para 66

When we joined what was then the European Economic Community Bob Alexander and I enrolled on a series of Saturday lectures on European law and gave serious thought to specialising in this area. In the event it was another member of chambers, David Vaughan who followed this course, with conspicuous success. In 1972 Parliament passed the European Communities Act, which was designed to give effect in our domestic law to the consequences of joining the Community. The way that this was done was to give the relevant European treaties direct effect.

Section 2(1) of the 1972 Act provides:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties...as in accordance with the Treaties are without further enactment to be given legal effect...in the United Kingdom shall be recognised and available in law...”

Section 2(4) provides:

“...any enactment passed or to be passed...shall be construed and have effect subject to the foregoing provisions of this section”

The effect of these provisions has been held to be that where there is a conflict between a European law that takes direct effect and a UK statute, the European law takes precedence. Thus, by the 1972 Act, Parliament agreed a limitation on its own supremacy, or sovereignty.



It is, in theory, always open to Parliament to repeal the 1972 Act, but until it does so any legislation that it passes takes effect subject to any directly applicable European law. This position was recognised by the House of Lords in the *Factortame* litigation, in which David Vaughan led for the successful plaintiffs.

For the purposes of this lecture I am more interested in the effect of European law that does not have direct effect. Where a European law does not take direct effect domestic statutes must be interpreted, if possible, in such a way as to give effect to the European law in question. In the *Marleasing* case<sup>12</sup> the European Court of Justice held, in the case of a directive that did not have direct effect, that national law must be interpreted “as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.” This principle echoed that already adopted by the House of Lords in relation to legislation passed to give effect to European Directives in *Pickstone v Freemans plc* and *Litster v Forth Dry Dock & Engineering Co Ltd*<sup>13</sup>. In the latter case Lord Oliver held that this principle permitted an interpretation that would not be permissible under rules of construction applicable to a purely domestic statute.

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<sup>12</sup> *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, para 8

<sup>13</sup> [1989] AC 66; [1990] 1 AC 546

Some departure from the strict and literal meaning of the words of the statute was permissible and where necessary additional words could be added by implication. *Marleasing* required this approach to be applied to domestic legislation that *pre-dated* a directive.

What did the European Court mean in *Marleasing* by “as far as possible in the light of the wording...”? In a series of decisions the House of Lords held, in terms, that this approach to construction could not go so far as to distort the meaning of the domestic legislation – *Duke v GEC Reliance Ltd*; *Webb v EMO Air Cargo (UK) Ltd*; *White v White*.<sup>14</sup>

I have now finished sketching the relevant background to the enactment of the Human Rights Act 1998. For thirty years there had been support for a bill of rights of some sort by influential voices on all sides of the political spectrum. As long ago as 1976 the Home Office published a discussion document, drafted by Anthony Lester, which argued in favour of incorporation of the European Convention on Human Rights.

The Labour Party manifesto, on which it won a resounding victory in the May 1997 general election, included a commitment to incorporate the Convention into domestic law.

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<sup>14</sup> [1988] AC 618, 639; [1992] 4 All ER 929; [2001] UKHL 9, [2001] 1 WLR 481.

The principal reason for so doing was to give individuals the right to bring proceedings in this country for infringements of their human rights rather than forcing them to go to Strasbourg. This was described as “bringing rights home”. In October 1997 the Home Secretary, Jack Straw, presented a White Paper explaining the proposals in the Human Rights Bill which the Government was introducing.<sup>15</sup> This explained that the shape of the legislation was governed by the principle of the supremacy of Parliament. It stated:

“2.13 The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decision about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative.

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<sup>15</sup> Rights Brought Home: the Human Rights Bill (Cm 3782)

To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly this Government has no mandate for any such change.”

The White Paper continued a little later:

“2.16 On one view human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.”

To give effect to the principle of Parliamentary sovereignty, a skilful compromise was adopted. Section 4 of the Human Rights Act provides that the Court can make a declaration of incompatibility where it finds that an Act of Parliament is incompatible with the Human Rights Convention. But the section goes on to provide that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in question.

Section 19 of the Act provides that a Minister in charge of a Bill must, before the Second Reading of the Bill make a statement that in his view the provisions of the Bill are compatible with the Convention rights or alternatively a statement that although he is unable to make such a statement of compatibility the Government nevertheless wishes the House to proceed with the Bill.

I now come to the most critical provision. Section 3 of the Act provides, I quote:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”

The Human Rights Bill was put through Parliament in the heyday of *Pepper v Hart*, before it was almost drowned in the deluge of cold water that was unleashed by Lord Steyn's lecture. In Parliamentary debate Ministers proceeded on the basis that statements that they made would govern the interpretation that the courts would give to the legislation. Lord Irvine, the Lord Chancellor, when giving the Tom Sargant Memorial lecture in December 1997<sup>16</sup>, stated:

“...it should be clear from the Parliamentary history, and in particular the Ministerial statement of compatibility which will be required by the Act, that Parliament did not intend to cut across a Convention right. Ministerial statements of compatibility will inevitably be a strong spur to the courts to find means of construing statutes compatibly with the Convention.”

I am now going to give a few quotations from the Parliamentary proceedings in relation to the Human Rights Bill. In the interests of simplicity I shall insert the relevant sections of the final Act in place of the clauses of the Bill under discussion.

In the Committee stage in the Commons Jack Straw commented<sup>17</sup> :

“I wish future Judicial Committees of the House of Lords luck in working through these debates.

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<sup>16</sup> The Development of Human Rights in Britain under an incorporated Convention on Human Rights

<sup>17</sup> Hansard (HC Debates) 20 May 1998, col 983

One sometimes wonders about the wisdom of the *Pepper v Hart* judgment in terms of the work that it has given the higher judiciary.”

On the second reading in the House of Lords Lord Irvine said of section 3<sup>18</sup> that it

“provides that legislation, whenever enacted, must as far as possible be read and given effect in a way which is compatible with the Convention rights. This will ensure that, if it is possible to interpret a statute in two ways – one compatible with the Convention and one not – the courts will always choose the interpretation which is compatible.”

On the second reading in the Commons Jack Straw said of section 3<sup>19</sup> that

“We expect that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention”

At the Committee stage in the Commons he elaborated <sup>20</sup>:

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<sup>18</sup> Hansard (HL Debates) 3 November 1997, col 1230

<sup>19</sup> Hansard (HC Debates), 16 February 1998, col 778

<sup>20</sup> Hansard (HC Debates), 3 June 1998, cols 421-422

“...we want the courts to strive to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that the legislation is simply incompatible with them ...there was a time when all the courts could do to divine the intention of Parliament was to apply themselves to the words on the face of any Act. Now, following *Pepper v Hart* , they are able to look behind that and, not least, to look at the words used by Ministers. I do not think that the courts will need to apply themselves to the words that I am about to use, but, for the avoidance of doubt, I will say that it is not our intention that the courts, in applying [section 3] should contort the meaning of words to produce implausible or incredible meanings. I am talking about plain words in what is actually a clear [Act] with plain language – with the intention of Parliament set out in Hansard should the courts wish to refer to it.”

In the second reading in the Lords Lord Irvine said of section 4<sup>21</sup> that it

“provides for the rare cases where the courts may have to make declarations of incompatibility.”

On the third reading in the House he added<sup>22</sup>:

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<sup>21</sup> Hansard (HL Debates), 3 November 1997, col 1231

<sup>22</sup> Hansard (HL Debates), 5 February 1998, col 840



“...in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility”.

*R v A (No 2)* was the first case in which the House of Lords considered the implications of section 3. That case concerned the so-called rape shield imposed by section 41 of the Youth Justice and Criminal Evidence Act 1999. This prohibited adducing evidence or cross-examining a complainant in a rape case about her previous sexual experience save in restricted and specifically defined circumstances. The majority of their Lordships held that section 3 permitted and required them to read this provision as subject to the implied proviso that the prohibition did not apply where such evidence or cross-examination was required to ensure a fair trial. This robbed the section of much of its effect. It was, in my view, manifestly contrary to the clear meaning of the section and to the object of the section which was to shield the complainant from such evidence and cross-examination.

Lord Steyn gave the leading speech. In the course of it he referred to the Parliamentary statement by Lord Irvine that there would be no need for declarations of incompatibility in 99% of cases and that of Jack Straw that it was expected in almost all cases the courts would be able to interpret the legislation compatibly with the Convention.

He added that, as he had explained in his lecture, such statements could be used as an aid to interpretation *against* the executive. That was not, of course, the use that he was making of them. Furthermore his selection of those two statements was highly eclectic. He did not mention the more specific statement of Jack Straw that section 3 applied only so far as the plain words of the legislation allowed, nor Lord Irvine's statement that section 3 applied where it was possible to interpret a statute in two ways, one compatible with the Convention and one not. Indeed Lord Steyn said that the section applied even if there was no ambiguity in the sense of the language being capable of two different meanings. The niceties of language had to be subordinated to broader considerations. In this way the excessive reach of section 41 would be attenuated in accordance with the will of Parliament, as reflected in section 3 of the Human Rights Act.

Lord Steyn did not say in terms that the intention of the Parliament that enacted the Human Rights Act in 1998 should prevail over the intention of a Parliament that enacted subsequent legislation, but that was implicit in his reasoning and was a proposition that was to be explicitly advanced at a later stage of the development of this area of jurisprudence, as we shall see.

There is, with respect, little assistance to be gleaned from the speeches of the remainder of the Committee in *R v A (No 2)*, save that of Lord Hope. While he agreed with the result proposed by the majority, he did not agree that it was possible to read the relevant provisions in the same way as had the majority. As you will have appreciated, my sympathies lie with Lord Hope.

After this decision there were a number of cases in the House of Lords where general propositions were advanced in relation to the scope of section 3: The section deals with interpretation, not amendment, and the court has to be careful not to cross the line between the two – that is Lord Nicholls in *In re S*<sup>23</sup>.

The obligation imposed by section 3 is qualified by “so far as it is possible to do so”. It is not to be performed without regard to this limitation. The obligation relates to interpretation, not legislation. Legislation is reserved for Parliament. But a strained or non-literal construction may be adopted; words may be read in and words may be read down.

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<sup>23</sup> [2002] UKHL 10, [2002] 2 AC 291, paras 37-41

But the interpretation of a statute by reading words in to give effect to the presumed intention must always be distinguished carefully from amendment. That is Lord Hope in *R v Lambert*<sup>24</sup>.

And this is Lord Bingham, declining to use section 3 to reverse the clear intention of Parliament in *R (Anderson) v Home Secretary*<sup>25</sup>:

“To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism; it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3...”

None of this gives you a very clear picture of how far the court can properly go under section 3 in departing from what would otherwise be the natural meaning of the relevant provision. It may be that some of you think that the duty imposed by section 3 to read and give effect to legislation in a way that is compatible with Convention rights “*insofar as it is possible to do so*” should bear the meaning “insofar as the language

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<sup>24</sup> [2001] UKHL 37, [2002] 2 AC 545, 585

<sup>25</sup> [2002] UKHL 46, [2003] 1 AC 837, para 30

permits”, which happens, of course, to be more or less what Jack Straw said in Parliament. If so, you would be wrong.

The definitive decision on the approach to interpretation required by section 3 of the Human Rights Act is to be found in *Ghaidan v Godin – Mendoza*<sup>26</sup>. That case concerned the interpretation of a provision in Schedule 1 to the Rent Act 1977 that dealt with the rights of a person who was living with a protected tenant when the protected tenant died. If the survivor was living with the protected tenant “as his or her wife or husband” he or she became entitled to a protected tenancy. The issue was whether the phrase “as his or her wife or husband” embraced a partner in a homosexual relationship. This question had been answered in the negative by the House of Lords in a case where the protected tenant had died in 1994, that is, before the Human Rights Act was enacted. On this occasion the protected tenant had died after the Human Rights Act had come into force. His male partner argued that if the relevant provision was interpreted in the same way as before, this would constitute unlawful discrimination against him, contrary to article 14 of the Convention.

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<sup>26</sup> [2004] UKHL 30, [2004] 2 AC 557

Section 3 required the provision to be re-interpreted so as to include him in the definition of a person who had been living with the protected tenant “as his or her wife or husband”.

The House of Lords upheld this submission, with Lord Millett dissenting.

I must read what Lord Nicholls had to say about section 3 at some little length, albeit that I shall select what seem to me the key passages of his reasoning:

“Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country, Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights ‘so far as it is possible to do so’. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

One tenable interpretation of the word ‘possible’ would be that section 3 is confined to requiring courts to resolve ambiguities.

Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail.

Words should be given the meaning which best accords with the Convention rights.

This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed.

It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* ... is an instance of this.

From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.

The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

The mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation.



That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed.”

The important thing to note about this judgment is that Lord Nicholls held that the 1998 Parliament had succeeded in preventing effect being given to the legislative intent of subsequent Parliaments.

Lord Steyn agreed with the judgments of the majority. He once again referred to the same two Parliamentary statements that he had invoked in *R v A (No 2)*. This time he did not suggest that these were being used as an aid to interpretation *against* the executive. He referred to the considerable number of cases in which declarations of incompatibility had been made and questioned whether the law might have taken a wrong turning. He suggested that there were two factors contributing to a misunderstanding of the remedial scheme. The first was a disinclination to “flout the will of Parliament as expressed in the statute under examination”. He commented that this question could not “sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.”

Here Lord Steyn seems to be following Lord Nicholls in giving paramount effect to the earlier legislation. The second factor was “an excessive concentration on linguistic features of the particular statute”. Lord Steyn went on to state that section 3 had been modelled on the approach to statutory interpretation required by the European Court of Justice in *Marleasing*,

He described section 3 as “the prime remedial measure” for bringing human rights home. A broader approach to interpretation was required than concentration on the linguistic features of the legislation.

Lord Rodger expressed agreement with the speeches of the majority, but went on to make some further observations on section 3. He also invoked the approach to statutory interpretation required by the *Marleasing* decision. He emphasised that section 3 required not merely the courts but all public authorities to read statutory rights and obligations in a way compatible with Convention rights, insofar as possible. The proper approach was to read legislation in a way both compatible with Convention rights and consistent with the scheme of the legislation, thus “going with the grain” of it.

He drew attention to a number of ways in which it might be possible to adapt the meaning of a statute so as to make it compliant with Convention rights, including putting “the offending part of the provision into different words ... that will be compatible with those rights”.

This is what he said about the permissible limit of the exercise required by section 3:

“When the court spells out the words that are to be implied, it may look as if it is ‘amending’ the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.”

Lady Hale agreed with what the other members of the majority had said about section 3.

If there was any doubt as to whether Lord Nicholls had gone too far in holding that section 3 could oblige the court to disregard the legislative intention of subsequent Parliaments this was surely laid to rest by the speech of Lord Bingham, with which the majority agreed in *Attorney General's Reference (No 4 of 2002)*<sup>27</sup>. I was one of that majority. That appeal related to a provision of the Terrorism Act 2000 that, if given its natural meaning, quite unequivocally placed the legal burden of proof on the defendant. The majority held that this would infringe the presumption of innocence contrary to article 6(2) of the Human Rights Convention, but that section 3 of the Human Rights Act required the court to read down the relevant provision so as to impose on the defendant an evidential burden only. In the course of his speech Lord Bingham endorsed what he described as the “illuminating discussion” in *Ghaidan*. He said that that decision left “no room for doubt” on four important points. These were:

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<sup>27</sup> [2004] UKHL 43, [2005] 1 AC 264

“First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course.

Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R(Anderson) v Secretary of State for the Home Department ...* and *Bellinger v Bellinger ....* In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116).

All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: ‘So far as it is possible to do so ...’. While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify.”

In holding that the relevant provisions should be read down, Lord Bingham said “Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act”. The paramountcy of the earlier Act was thus expressly recognised.

The decision in *Ghaidan* was remarkable – just how remarkable has not, I think, been generally appreciated. The House of Lords decided two things in that case, the first explicit the second implicit. The explicit decision was one of statutory interpretation. The House held that the true interpretation of section 3 of the 1998 Act required, where necessary, that the courts, and indeed other public authorities, should give to provisions in subsequent statutes a meaning and effect that conflicted with the legislative intention of the Parliaments enacting those statutes.

The implicit decision was that this was something that it was constitutionally possible for the 1998 Parliament to do. Let me start with the implicit decision, for that is the more significant.

It has always been considered a fundamental principle of our unwritten constitution that Parliament cannot fetter the freedom of a future Parliament to pass any legislation that it chooses.

This is the way Lord Hope put it in *Jackson*<sup>28</sup>, the foxhunting case:

“...it is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact something which a subsequent statute dealing with the same subject matter cannot repeal”.

How can this principle be reconciled with refusing to give effect to the legislative intention of Parliament today because of what Parliament decreed in 1998? There is more than one possibility.

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<sup>28</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 113

The first is to postulate that *Ghaidan* was simply about the interpretation of the relevant statute; that the exercise remains that of determining the intention of Parliament having regard to the language used, but applying a strong presumption that Parliament did not intend the statute to mean something that would be incompatible with Convention rights. That is the proposition advanced by Lord Hoffmann in the subsequent case of *Wilkinson*<sup>29</sup>. This is what he said (para 17):

“The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But with the addition of the Convention as background, the question is still one of *interpretation*, ie, the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.”

This is not what the House held in *Ghaidan*. *Ghaidan* goes further than basing an interpretation on the actual language used in the light of a strong presumption that it should comply with the Convention. The principles laid down in *Ghaidan* cross the line that Lord Hope had sought to draw between interpretation and amendment.

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<sup>29</sup> *R (Wilkinson) v Inland Revenue Comrs* [2005] UKHL 30, [2005] 1 WLR 1718



They require the Court to sanitise legislation by giving statutory provisions a meaning that complies with the Convention in disregard, if necessary, of the language used and the legislative intention indicated by this language, provided always that this does not destroy the overall objective of the legislation. This is an important proviso. It means that the effect of departing from the legislative intention is likely to be peripheral. Nonetheless, even if section 3 of the Human Rights Act is treated as merely putting a fetter on the ability of subsequent Parliaments to enact peripheral provisions that conflict with the Convention, this involves some diminution of the supremacy of Parliament.

Can this be justified by reference to the precedent of the European Communities Act? To a large extent I believe that it can. Insofar as that Act has had the effect that European law trumps domestic statutes the 1972 Act has also diminished the supremacy of Parliament. The analogy is not precise, however. As I have pointed out the *Marleasing* principle has been held to stop short of an interpretation that distorts the meaning of United Kingdom statutory provisions.

What the 1972 Act demonstrates, however, is that the principle that Parliament cannot fetter the powers of a future Parliament is not, in practice, absolute.

In this context I would like to quote a passage in the judgment of Laws LJ in *Thoburn v Sunderland City Council*<sup>30</sup> which is both imaginative and illuminating:

“We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching, manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”

John Laws gives as examples of constitutional statutes: Magna Carta, the Bill of Rights, the Union Act, the Reform Acts, the European Communities Act and the Human Rights Act.

The courts have an important role to play in relation to these constitutional Acts. Not only do they have to interpret the Acts, when the interpretation is in doubt, but implicitly by giving effect to them, and sometimes explicitly, the courts determine their constitutional validity. See *Factortame* and *Jackson*.

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<sup>30</sup> [2002] EWHC 195(Admin), [2003] QB 151, 186

The courts have performed that dual role in relation to the Human Rights Act. They have interpreted section 3 of that Act as requiring subsequent statutes to be interpreted in a way that departs from the intention of those who have enacted them insofar as necessary to ensure that provisions that are peripheral to the main objective of the legislation do not infringe Convention rights. In so doing they have taken upon themselves a revising role that goes beyond mere interpretation.

Does this give effect to the intention of the Ministers who promoted the 1998 Act? Not if these are accurately represented by the statement made by Jack Straw expressly for the purpose of informing the courts pursuant to *Pepper v Hart*.

Is the House of Lords' interpretation of section 3 one that flows readily from the language of that section? I do not believe that it does. It accords to the phrase "so far as it is possible to do so" the meaning "so long as it is not incompatible with the underlying thrust of the legislation" or "so long as it goes with the grain" of the legislation or "so long as it does not change the substance of the provision completely" or "so long as it does not remove the pith and substance" or "so long as it does not violate a cardinal principle of the legislation". This is a creative interpretation of section 3.

How did the House of Lords get away with this creativity? The answer is that, although this was not the manner in which Ministers had intended section 3 to work, in practice it has suited them rather well. Ministers do not like declarations of incompatibility. Provided that the main thrust of their legislation is not impaired they have been happy that the courts should revise it to make it Convention compliant, rather than declare it incompatible.

In my experience, counsel for the Secretary of State usually invites the court to read down, however difficult it may be to do so, rather than make a declaration of incompatibility. *AF and others*,<sup>31</sup> the control order case, is a recent example of this approach.

Is there a danger that the new Supreme Court will get a taste for disregarding the legislative intention of Parliament? Some, including the present Master of the Rolls, have suggested that there is a danger that our physical severance from Parliament may go to our heads.

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<sup>31</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2009] 3 WLR 74

In his famous exposition of the principle of legality in *Simms*<sup>32</sup> Lord Hoffmann stated that fundamental rights cannot be overridden by general or ambiguous words. He also stated that this principle had been expressly enacted by section 3 of the Human Rights Act. In the recent freezing orders cases (*A and Others v HM Treasury*<sup>33</sup>) I expressed the view that in contrast to section 3, the principle of legality does not permit a court to disregard an unambiguous expression of Parliament's intention. I wonder whether in years to come the art of the possible will prove me wrong.

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<sup>32</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115

<sup>33</sup> *A v HM Treasury* [2010] UKSC 2, [2010] 2 WLR 378, para 91