

Introduction to English Law: Overview

This introduction is intended for two groups of students; those who already have a law degree, but from a non-common law jurisdiction, and those with a non law background who are studying in some specific area of law (e.g. Medical Law). We have tried to make it easy to access, bearing in mind that some of you will have relatively limited Internet access while you are studying.

This overview operates rather like a table of contents. It indicates the areas which are covered and provides links to more detailed treatment of the various topics. These take various forms. Most are documents to be read, including in some cases original primary sources such as legislation and case law, and one is a “podcast” – audio presentation based on PowerPoint presentation slides. You will need to access this separately

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The Nature of Law

Law is a very wide and complex concept. It means many things to many different people:

The philosopher sees in law the normative and coercive aspects of an ethical system. This concept may be of an idealised or flawed system. I.e. the philosopher may believe in perfection (or, at least, perfectibility) or he may acknowledge that what he discusses is the product of fallible beings and processes.

The politician operating within the political system sees in law an instrument of policy, a means to facilitate or compel the achievement of his legislative and political aims.

Law may be a means of carrying into effect the essential values of a society: e.g. the Human Rights Act 1998

The common citizen tends to see law as something strange and unapproachable. Contact with it is best avoided. It is nevertheless seen as a final guarantee of the maintenance of proper standards of behaviour.

Those who are opposed to the present constitutional arrangements of their home, either as political dissidents/revolutionaries in general, or as opponents of imperial or colonial regimes in particular, see law as a device of the oppressor, lacking moral legitimacy. They are prepared to actively disobey, either by "civil disobedience" or by violent means.

Various professional and industrial groups see law narrowly as it impinges on their own activities. Thus for example the transport industry is deeply concerned with the Road Traffic Acts, the Transport Act and all the regulations made under them.

Finally, to the professional lawyer the law represents the tools of the trade. Lawyers tend to view the law very dispassionately, except on sentimental occasions.

What is clear is that, particularly in a modern social market economy, law is perhaps the most vital of the mechanisms for resolving disputes and promoting efficient use of resources, as well as protecting the interests of all members of the society. It cannot be escaped.

CONCEPTUAL CONTENT OF 'THE LAW'

In practical terms it is important to appreciate that "the law" comprises three quite different aspects or sets of rules. These are illustrated here by reference to English examples which are designed to get you thinking about some of the ways in which English law works.

The Rule of Recognition

The first of these is sometimes called the "Rule of Recognition". It is also sometimes called the *Grundnorm* (which is a rather difficult German expression derived from the work of Hans Kelsen meaning very much the same). This rule is a key aspect of the constitutional law of any state, since it is in effect the rule (or, in practice, the set of rules) which prescribes how and by whom laws can be made, enforced and interpreted, and what features of an action by the designated legislators, executive and judiciary are essential to make that action official. Put very simply, the UK version of the Rule designates the Crown in Parliament as the sole primary legislator. **Any rules made by or under the authority of the Crown in Parliament have the force of law.**

In the absence of a formal written constitution, it can be argued and indeed David Cameron, the Prime Minister 2010 -2016, stated in June 2006 that it was the case, that this single sentence encapsulates our constitutional rules. (Cameron was quoting from the political theorist Vernon Bogdanor, who himself almost certainly did not invent the phrase.) Allowance now (pending the enactment of the formalities of Brexit) has to be made for the legislative competence of the organs of the European Union (EU), to which the Crown in Parliament has assigned a certain sovereign sphere of influence. Within that sphere it is arguable that the Rule of Recognition is now also based on the Treaty of European Union and the Treaty on the Functioning of the European Union (TFEU) (Maastricht), representing the entire *acquis* of the EU from the Treaty of Rome to the Treaty of Lisbon. This is an area which we will explore further in a later section. However, not only are there many areas largely untouched by EU law (criminal law, family law and the law of property are important examples), but it can be argued that the Treaties are accorded legal status only by virtue of the enactment of the European Communities Act 1972 which provides for the accession of the UK to the then European Economic Community, and the EU aspect of our legal arrangements is therefore a creature of the Crown in Parliament in legal terms. Indeed the judges have observed that the ECA is a 'constitutional' statute. Again, we will return to this issue later.

Additionally, note that the Rule of Recognition is a formal rule; it considers the formal or procedural adequacy of laws, and does not concern itself with their wisdom, morality or efficacy.

The Human Rights Act is designed to give a similar, but slightly lesser, status to the European Convention on Human Rights. It was in this context that David Cameron made the remarks referred to above, suggesting that a UK Bill of Rights would be preferable to the present incorporation of the ECHR itself. There is currently an active debate in relation to this, but it is still political, rather than legal in its scope. A Commission on a Bill of Rights was established under the coalition government 2010 -2015. This explored various aspects in considerable

academic depth but without any substantial proposals emerging. It appears to be the policy of the current government to proceed with such a Bill, but no concrete proposals have been published.

The existence and definition of the Rule of Recognition is not a purely academic exercise. The existence of such a rule is one of the key characteristics of a sovereign state. It is only sovereign states which create areas in which independent legal systems exist and operate.

Substantive Law

The second set of rules is called the substantive law. These rules are what is perhaps most commonly thought of as "the law". Collectively they govern how we must or must not behave to comply with the law and set out the legal consequences of our actions. In other words, they contain the substance of the law. By way of example and explanation:

The [Theft Act 1968](#) provides that anyone who dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property is guilty of theft.

The courts in a series of cases from *Hadley v Baxendale* (1854) to *Transfield Shipping v Mercator Shipping* (2008) have held that where a contract is broken the party in breach is liable to compensate the victim for all loss flowing naturally from the breach and all loss which the contract breaker ought reasonably to have had in contemplation as being not unlikely to have resulted.

In most cases it is not sufficient simply to state the rule. There are a number of elements, each of which requires analysis. In theft, each of the elements above has been the subject of close analysis – for example what is appropriation, and must it be against the will of the owner, and what is 'dishonesty'. Since 1982, dishonesty was interpreted as containing both an objective and a subjective element, but in *Ivey v Genting Casino* (2017) the Supreme Court held that it was a purely objective test: was the accused dishonest by the standards of an ordinary, reasonable individual (having the same knowledge as the accused)? In the second example, the critical issue has been where to draw the line on what is 'not unlikely'. Over the last 160 years there has been a considerable shift from 'quite likely' to 'not impossible'. This detailed analysis, and the charting of the way in which the law has developed are key aspects of the work of legal scholarship in all jurisdictions. One important distinction between civil law and common law jurisdictions is that, in the latter, case law can operate as an independent primary source of substantive law. We will look at this in more depth later.

Some of these rules, in particular those of the criminal law and the law of tort, define behaviour which is prohibited and the adverse consequences which result from doing what is prohibited.

While there are plenty of such negative rules, or prohibitions, it is harder to find mandatory positive requirements. There are a number in relation to taxation, and such miscellaneous matters as completing census forms, but they are relatively rare. The reason is, perhaps, that the state does not usually feel it necessary to require people to do things; it is prepared to give them an option.

It is therefore not surprising to find that many other rules indicate the circumstances in which things can be done. No one is obliged to drive a car, but the Road Traffic Act 1988 sets out the

requirements if it is to be done lawfully, in relation to driver licensing, insurance, taxation, construction and use of the vehicle and the manner of driving. No one is obliged to make a will, but the Wills Act 1837 lays down the formalities required and the Administration of Estates Act 1971 and the Inheritance (Provision for Family and Dependents) Act 1975 spell out respectively what happens to property where there is no will (intestacy), and what claims by dependants will override either a will or the intestacy rules.

There is a clear distinction between the two kinds of rule, in that one is an order, the other a guideline, but both affect the substance of the individual's rights and obligations.

Substantive law will typically have some kind of value-laden content. This ugly phrase is used to avoid an assertion at this stage that it has a moral or ethical content. This is not necessarily the case. Substantive law may be grossly unfair, or even inhumane. It may much more readily be debatable. It is for instance not absolutely reprehensible to lay down that there may be no secondary industrial action (where workers act 'in sympathy' with those directly affected), and some Conservatives and industrialists actively approve of such a prohibition. The International Labour Organisation, on the other hand, regards this as an improper restriction on the right to withdraw labour. The debate over anti-terror legislation and the linked debate on incitement to religious hatred provide a more topical example. The key point is however that there is some relationship, however imperfect, with the aims and aspirations of the relevant society (which may in their turn be imperfect or inconsistent).

Adjectival Law

The third and final set of rules constitutes the rules of adjectival or procedural law. This expression is based on a complex figure of speech drawn from grammar. It is correct to say that adjectival law describes and qualifies substantive law. These rules, in effect, are the operating system and methodology of the law. Without being in any way rigorous in analysis, they include:

The rules establishing the legislature and the courts (including statutory tribunals), defining their sphere of competence, appointing their judges and providing for appeals.

The rules of procedure specifying how cases are to be commenced and proceeded with, time limits and other administrative matters.

The law of evidence, which determines how matters in dispute are to be proved, and what items are accepted as probative, and under what limitations. E.g. the rules restricting hearsay.

Rules of interpretation.

The separation of substantive and adjectival law can never be absolute. It is impossible to appreciate substantive law in a vacuum; at the very least it is necessary to know the relative status of decisions to understand how important they are, and to apply the rules of interpretation so as to make sense of legal documents. Some understanding of the historical development of courts and procedures is a great help in understanding the development of the

substantive law. Procedure has a strong influence on the development of substantive rules: if there is no procedure whereby a particular sort of claim may be put before a judge, he cannot rule on the merits of the case. If this attitude is taken to extremes, it is possible to assert that there is no such thing as substantive law. The outcome of cases is determined wholly by the procedural rules. It is of course necessary, in order to endorse this approach, to accept that the value content of substantive law is somehow removed from the sphere of law to some other.

The content of the body of both substantive and adjectival law is in constant flux, as a result of the passing of new legislation and the making of new case law, to say nothing of the impact of EU law (pending Brexit) and the Human Rights Act. The law can therefore only ever be stated as at a given time. That statement is essentially provisional, i.e. it is valid unless and until the law is changed by a decision of a competent court or by legislation. To this extent a proposition of law resembles a scientific theorem, or "law." You will therefore always need to take great care to ensure that you are up to date.

Questioning the Law

Questions of Law

One entirely proper field of intellectual enquiry is to seek to understand the content and application of the various rules of substantive and adjectival law. One may legitimately ask "What is (and is not) euthanasia?" "What activities can a company lawfully undertake?" "What damages will I get as a result of this clinical negligence?" and of course "Is this evidence admissible?"

All these questions are essentially questions of law. In other words, they are asked about all legal systems, and are independent of the content of the particular system, although the specific answers will vary. Law is, in essence, being treated as something given, or a closed system. There is no necessary moral dimension to this system. The enquiry as to exactly what behaviour falls within the definition of theft can be logically distinguished from any question about why that behaviour is so categorised, let alone any philosophical, political, sociological or theological consideration of how we ought to treat thieves.

Questions about Law

There is another set of questions altogether, which can be described as questions about law. These questions do not deal with either the substance of law or the adjectival processes as given. They recognise that the law is the product of a series of choices, by legislators, judges, officials and citizens, and that these choices are contestable. In other words these questions address the context of law, from a wide range of perspectives. These may be theological, political, philosophical or pragmatic, but there always is a concern with the values adopted by the law. This is an approach that you will be encouraged, and indeed expected, to adopt in relation to the LLM.

It is now generally accepted that law does not exist or operate in a vacuum. There are a number of schools of thought in legal education and in academic law generally. Many of these are of transatlantic origin. You may find it appropriate to be critical of the law in the sense of challenging it to justify itself on any one of a number of possible grounds:

Gender/Feminism

Equal Opportunities

Economics

Class and culture

Ethics

Justice

Conformity to political ideals

Each of these areas of challenge will be met somewhere along the line; you will often be asked to consider the efficacy and appropriateness of the law as it has evolved in the light of the explicit aims of the legislature and judiciary, and in many such cases you may wish to bring in these other, unacknowledged, criteria in your critique. It is not uncommon for judges today to accept that they are making a 'policy' decision. The 'policy' that they invoke is simply their evaluation of these factors in the light of the arguments addressed to them by the advocates. They are at pains to stress the limits on this policy function. E.g. in the *Bland* case (*Airedale NHS Trust v Bland* [1993] UKHL 5) concerning the withdrawal of treatment from an adult in an irreversible profound persistent vegetative state, Lord Mustill stressed that the judges could not reach general conclusions on such matters as euthanasia. This was a matter for Parliament in the light of public opinion.

Only a few cases raise these policy issues; the majority fall within established criteria. It is however important to understand what the boundaries of the law and policy are. Cases on the boundary are disproportionately important. They are, or tend to be, "hard" cases in the sense that there is no obvious satisfactory moral answer, either because there is no apparent solution without significant costs to someone, or because there is a strong division of opinion.

For example, one major function of the tort of negligence is to compensate those injured at work, by clinical error, or on the highway and to encourage employers, health professionals and drivers to refrain from injuring others. It is legitimate to ask how successful and economically efficient it is at achieving these aims, and also whether the types of loss recognised are coherently and justly defined. Tort damages provide far less of the compensation for victims of injury than do social security and insurance payments. Tort damages are much more generous to the individual, but go to relatively few individuals. The administrative costs of social security are about 10% of the value of benefits, while the transaction costs (e.g. legal fees) of the tort system are about 90% of the value of damages. These figures date from the 1970s when the Pearson Commission reported, but they are still cited in the leading textbook in the field, *Accidents Compensation and the Law*. Lord Woolf in his report on Civil Justice indicated at the end of the 1990s that the transaction costs may now be higher, rather than lower. In New Zealand the tort system has been largely abolished in favour of a statutory no fault scheme. It is far from self-evident that we have the best, or even a good, scheme for allocating resources to needs. Successful claimants do well, but they are a small minority of sufferers. Very substantial amounts go to the lawyers and are therefore not available to relieve hardship.

Furthermore as most tortfeasors are insured, they do not even have the fear of the cost of claims to encourage them to be careful other than by the indirect threat of increased premiums or the withdrawal of cover. This may in practice be effective for businesses, in relation to professional, product and employer's liability. In the nature of things the volume of their activities means that claims can be expected and a cost/benefit analysis performed. They will then avoid behaviour which carries an unacceptable risk, either by abandoning risky behaviour or by increasing precautions. It strains credibility however to assert that the average road-user modifies his driving to take account of the risk of a claim. Accidents happen rarely, unpredictably and "to other people." It is legitimate to ask whether we too should develop other approaches to the question of compensating victims.

One claimed objective of the law is certainty and predictability, especially in relation to property rights and the rules governing business transactions. The value of such certainty is obvious. There is however a second, apparently irreconcilable, principle at work. This represents the urge to do justice in the particular case. Ideally, justice and certainty co-incide. In an imperfect world, they are often in conflict. The English Common Law stresses certainty at

the expense of flexibility; the rules exist and will be enforced. The equitable jurisdiction of the Chancery came into existence to mitigate some of the harshness of that rule. Equity, in etymological terms, is very close to "fairness", and the principles, or maxims, of equity are a series of rules of thumb for achieving fairness. It must however be understood that the fairness achieved by the developed equity jurisdiction is a very formalised and conventional fairness. It is far removed, for example, from the Islamic conception of the "just judge" who will decide only the case before him. He will draw inspiration from the general principles to be found in the Quran and the wisdom of earlier commentators, but these do not establish any precedent. Some English judges are more prone to deciding on the basis of "equity and the substantial merits of the case" and of these, only some are open about what they are doing. This tension, as we shall see later, is an important consideration in reading and interpreting cases.

A brief constitutional history of the United Kingdom

For the first four centuries of the common era, **Britannia** (the area of Great Britain south of Hadrian's Wall) was a province of the Roman Empire. When the power of Rome declined after 400 AD there was mass immigration of Angles and Saxons, Germanic tribes from north western Europe. Although they subjugated rather than eliminated the indigenous population, there is little evidence of the adoption of any of the existing Romanised legal or constitutional arrangements. Instead, Germanic institutions and principles were introduced. These Anglo-Saxon elites established a series of kingdoms, which gradually coalesced into a single kingdom of England. There was also a later Danish influx, particularly in the eastern parts of England, which became the Danelaw, although political unity was restored in the 11th century. At this time Wales was independent under Celtic princes, and Scotland and Ireland were also non-Anglo-Saxon countries with their own princes and kings (although much of the Scottish border country south of Edinburgh was part of England at this time).

The law was largely the customary law of the various tribes, although some codification was undertaken, e.g. under Alfred the Great. Law was administered largely in local and regional assemblies, or moots, under the auspices of the elders, relying on their collective knowledge and experience. These moots combined legal and administrative functions.

From the time of the **Norman Conquest** in 1066 (and to some extent prior to that) the supreme government of England belonged to the monarch, initially by right of conquest but then by dynastic succession (even though, in the cases of Henry IV and Henry VII, a remote dynastic claim was more relevantly made good by force of arms). These rights were personal, and could be inherited, but were recognised both in the customary general law of Europe, and in ecclesiastical law. As Shakespeare put it 'there's a divinity doth hedge a king'. In practice, the business of the state largely concerned external affairs, security, aspects of civil and criminal justice and the finances of the royal household, so there was relatively little to administer on a day-to-day basis. Such health, education and social service provision as existed was the responsibility of religious organisations. Some local administration was undertaken, but mainly in the towns, where there was a framework of administration under the control of the Mayor, Aldermen and Burgesses (principal inhabitants). The exact provision varied, but could include, as in Nottingham, upkeep of bridges, rudimentary public health controls, management of markets and fairs and administration of justice. In rural areas the lord of the manor was responsible for arranging the affairs of the manor itself, and Sheriffs acted as local representatives of royal authority in the Shires.

Emergence of a Parliament

Initially, the monarch actually exercised his powers of supreme government, the powers of the Crown, personally, with the assistance of a council of trusted nobles and educated churchmen, known as the Curia Regis (Royal Court) or the Great Council. Over time this developed specialised sub-divisions, some of which became courts of justice staffed by legally qualified judges (the **Courts of King's Bench** and **Common Pleas**), one became an executive committee for the closest advisers (the **Privy Council**), others became specialised administrative departments (such as the **Exchequer**, or finance division - the old Court of Exchequer was originally a tax tribunal) while the **High Court of Parliament** emerged from the Great Council to provide a forum for discussion of legislation and taxation with representatives of the nobility, the clergy and the leading inhabitants of the towns and counties. This was in fact quite typical of arrangements in European states of the time (13th-16th centuries).

What was not so typical was that as time went by the judges and the Parliament began to assert power to control the exercise of power by the Crown. Indeed the process started with the revolt of the barons against aspects of the rule of King John which led to the king conceding the [Magna Carta](#) (Great Charter) in 1215, which expressly acknowledged that the population, in particular the nobility, had certain rights which the Crown must respect. Ever since it has been asserted that while the king is supreme, he is nevertheless subject to law, although whether this means divine law, natural law or the common law has changed over time. Although John denounced Magna Carta as soon as he was safe from the barons, it was reissued by his son Henry III when he succeeded to the throne and on several subsequent occasions. It has an enormous symbolic value as the perceived root and origin of English liberties, although it is of no practical significance today. Indeed, while no-one directly associated with Magna Carta used the phrase **rule of law** in relation to it, later generations have interpreted it as indicating that the English Crown was subject to limitations, which could be formalised and amounted to a legal constraint, thus giving rise to the modern concept of the rule of law. This concept also contains elements borrowed from the Greek philosopher Aristotle, who argued that rule based on laws formulated by the use of reason was preferable to rule by the personal dictates of a ruler, however wise and enlightened, possessed of arbitrary power. We will consider its modern significance in more detail later.

By the 16th century, Parliament had assumed a form similar to today with the two Houses of Lords (including the hereditary nobility – the Lords Temporal, and the bishops – the Lords Spiritual) and Commons (the Knights of the Shires representing rural society and Burgesses representing towns and cities) meeting separately to enact legislation, consider requests for extraordinary taxation, and debate policy, including the grievances of the population. The Lords was still the predominant house and those actually exercising power on behalf of the Crown tended to be nobles or senior clergy, although this changed under Queen Elizabeth when more of the administration was undertaken by commoners, albeit of the gentry class. Although the Commons was at least in principle elected, its membership was drawn from a small 'political' class of rural gentry and urban merchants and professionals, and the franchise was restricted, by and large, to the same class, which also provided the administrators referred to above, and

the officials, principally Justices of the Peace in the countryside and Aldermen and burgesses/councillors in towns and cities, who exercised power locally. The rural peasantry and urban working and servant classes were generally excluded from political affairs altogether.

It had become customary for all major legislation to be made by Parliament as statute law, and for Parliament to approve of taxation - the granting of 'supply' [of money] to the royal treasury - insofar as the Crown could not 'live of its own', i.e. from the revenues of the royal estates, feudal payments and existing taxes and duties.

Wales had gradually been conquered during the medieval period, and in 1547 was effectively included within England for legal and constitutional purposes (The Laws in Wales Act).

The judges had by this time developed the prerogative writs, the most celebrated of which is *Habeas Corpus*. This allowed a person detained by the Crown to challenge the legality of his detention in the courts, thus giving practical effect to guarantees of due process which can be traced back to Magna Carta. The judges of the late 16th century, with Lord Coke to the fore, asserted that the common law prevailed over any other source of law (they even asserted in [Dr Bonham's Case](#) (1610) 8 Co Rep 114 that a statute which was contrary to fundamental principles (natural law) recognised by common law would be of no effect), and when James the First and Sixth came to the throne of England as the first Stuart monarch in 1603, they were quick to rule that he could not personally administer justice in the royal courts: [Prohibitions del Roy](#) (1607) 12 Co Rep 63 or legislate by means of royal proclamation: [Case of Proclamations](#) (1611) 12 Co Rep 74.

Who rules England? - the upheavals of the 17th century

As the 17th century drew on it became clear that a fault line was developing in English political society. Space does not permit a full account of the historical and constitutional developments of this seminal period, and there are many excellent histories of the period for those with an interest in the topic. These notes merely sketch the most significant legal and constitutional features. One key element of the fault line could be summarised as 'who rules England?' Charles the First was a devout believer in the divine right of kings, and accordingly asserted his right to rule personally, without Parliament. This had become the prevailing orthodoxy in continental Europe, particularly the Catholic monarchies - France, Spain and Austria, and the Stuarts were closely associated with these by dynastic links and political alliances.

Much of the political class (the 'Parliament men' as they were often called at the time) believed equally firmly that they were entitled to participate in government, and in particular to approve or reject proposals for taxation. Grievances over personal rule and non-parliamentary taxation were expressed in the [Petition of Right](#) (1628), and repeatedly thereafter. Charles in fact managed to rule without Parliament from 1629-

1640, raising funds by, for example, levying Ship Money. This was, according to the official account, a levy made under the royal prerogative to fund the navy. It was unpopular, but a majority of the judges declared it lawful in *R v Hampden*. Charles was eventually obliged to summon another parliament, but could reach no agreement with it; matters came to a head in 1642 when the King raised his standard at Nottingham to commence a military campaign against the Parliamentarians, thus commencing what has long been known as the **Civil War**, but is now referred to by historians as the War of the Three Kingdoms, to reflect the role of Scotland and Ireland.

Although the ensuing war resulted in the defeat and execution of the king and the creation of England's first, and so far only, codified and republican constitution, the [Instrument of Government](#) (1653), the experiment with republicanism, known as the Commonwealth, proved short-lived, and Charles the Second, elder son of Charles the First, was restored to the throne in 1660. No formal constitutional settlement was reached at this time. Most pre-war institutions were re-established, and while the king almost certainly believed in his divine right, he was an astute enough political operator to act in a way acceptable to the majority of the political class, respecting the role of Parliament, and acting through ministers who were acceptable to the political class.

On Charles' death, his brother James the Second succeeded to the throne. He was a devout Catholic, and was widely suspected of wishing to restore Catholicism as the state religion, despite there being a strong Protestant majority, and also of intending to reinstate direct rule under divine right. The combination of these factors was deeply unpopular and in 1688 James fled the country in the face of a growing insurrection. The leaders of the political class invited William of Orange and his wife Mary (daughter of James the Second), who had already entered England at the head of a largely Dutch army, to take the throne. This was the **Glorious Revolution** which brought an end to the long-standing dispute between the Crown and Parliament.

The new monarchs ascended the throne on terms which had been negotiated with the leaders of the opposition to James; these were set out in the [Bill of Rights](#) (1688) c.2 1 Will and Mar Sess 2. This is not a complete constitution. It deals primarily with the issues of the role of the Crown, and in particular its relationship with Parliament. In essence, William, in particular, was being engaged on terms. A rough analogy would be the contract of service of the chief executive of a major corporation.

There was clearly doubt as to the status of the Bill, as it was subsequently declared to be a statute by the Crown and Parliament Recognition Act 1689 (c. 1) The Bill itself was drafted by a 'Parliament' summoned under the authority of William and Mary, and commenced with a recital of the abuses perpetrated by James. It then identified the key issues between Crown and Parliament.

William not only had a good dynastic claim through his wife, he was also an effective and experienced ruler, who had been, and remained, Stadhouder (a form of elected monarch) of the Netherlands. It was expected that he would be an active ruler, but he was offered the Crown under the conditions set out in the Bill of Rights. This was not

designed, as already stated, to be a full constitution for England, but it did regulate the relative position of Crown and Parliament, with the King accepting Parliament's sole right to authorise taxation, accepting the rule of law and agreeing a number of other limitations on his powers. It is from this time that we can speak of the **Crown in Parliament** as the sovereign legislature. In 1700 the **Act of Settlement** completed some further arrangements, including the rules for succession to the throne, and also confirmed that judges could only be removed by Parliament.

The 18th century

In 1707 England and Scotland, which had been two nations under a single monarch since the death of Queen Elizabeth, became a single United Kingdom under the **Acts of Union**. The Scottish Parliament ceased to exist, but Scottish members were elected to the House of Commons, and some Scottish peers were summoned to the House of Lords. It was effectively a parliamentary absorption of Scotland, with the English Parliament becoming the **Union Parliament**, later the **Imperial Parliament**. However, Scots law remained distinct, and so did the Scottish legal system.

Over the early part of the 18th century a succession of monarchs played little personal part in the government of the country, leaving executive power in the hands of their appointed ministers. Queen Anne simply lacked intellectual competence while George I and to a lesser extent George II were principally concerned with their German territories and spared little time for the UK.

This was the period when **Montesquieu** made his celebrated observations of the UK's constitutional arrangements. What he saw was a system where Parliament comprised men of independent means loosely aligned in interest groups, with none of the rigid party discipline seen today. Although the ministers sat in Parliament they did not control it, and needed to make the case for each policy, levy of tax or legislative proposal on its merits. The ministers formed a collective - the term **Cabinet** had now come into use - exercising power in the name of the Crown. The judiciary continued to ensure that government was carried on according to law. From these observations Montesquieu developed his theory of the **separation of powers**, although it does not precisely reflect the actual position in the UK.

George III, during the period before he was incapacitated by porphyria, did play an active part in government, insisting that the ministry be composed of those in whom he had confidence, and setting at least the main policies personally. Unfortunately, this led to the successful rebellion of the majority of the North American colonies, resulting in the establishment of the United States of America.

Fortunately, at least for the economic welfare of the United Kingdom, and its political prestige, other colonies had already been established in the West Indies and elsewhere, and starting in the late 18th century a 'second' British Empire in Canada, India and Australia, and later in New Zealand and Africa began to be developed.

Ireland was added to the United Kingdom in 1800 (and all except Northern Ireland subsequently regained its independence in the early 20th century). This was a similar process to the Union with Scotland, in that Irish members were added to Commons and Lords in the Union Parliament, but the legal system remained distinct.

Reforms and the emergence of a modern Parliament

Although the formal structure of Lords and Commons remained largely unchanged, there had been developments. Ministers could be drawn from either House, and MPs could become prime minister, although from the late 18th century to the mid 19th century the prime minister was as likely to come from the Lords as from the Commons. The Commons had become seriously unrepresentative. Many members sat for rotten or pocket boroughs, the former having very few electors, whose votes were for sale to the highest bidder, while the latter were controlled by a single dominant landowner, who could nominate the members. Some large emerging cities and towns had no representation, while even in 'ordinary' seats the electorate was usually still a narrow one drawn from the propertied classes.

In the 19th century the Commons was, after considerable resistance, progressively reformed from 1832 onwards to make it more representative and the franchise was progressively extended until all adults were covered in 1928. The balance of power between Lords and Commons shifted accordingly, and today it is accepted that the Commons is the primary chamber. The Lords acknowledged from the latter part of the 19th century that the democratic mandate of the Commons gave it greater legitimacy. This reflected the fact that 'first past the post' election under a two party system usually produced a clear majority, and hence mandate, for the victorious party and its leaders.

To fend off radical demands for reform or abolition of the Lords, the **Salisbury convention** was developed; this indicated that the Lords could seek to revise, but would not ultimately block, legislation giving effect to 'manifesto commitments' forming part of the programme on which the Commons majority had been elected. In addition, **Money Bills** relating to the raising and spending of public finances were the almost exclusive concern of the Commons, with the Lords restricting themselves to a brief delaying power to allow criticisms to be considered. By this time a further convention had emerged that the Royal Assent would not be withheld to a Bill which had passed both Houses.

The convention was not followed in respect of the 1909 budget and other legislation from the then current Liberal manifesto; this led to a lengthy impasse, until eventually the Lords conceded (in the face of the declared readiness of the new king, George V, to create sufficient Liberal peers to swamp the Conservative majority in the Lords) and the [Parliament Act 1911](#) was passed, which formalised the limitations on the Lords in relation to Money Bills, and provided that if the Commons passed legislation in three successive sessions (reduced to two by the Parliament Act 1949) it could receive the Royal Assent without the Lords. This was seen at the time as a temporary measure pending the reconstitution of the Lords on a 'popular' footing, but this has not yet been

completed. The monarch continued to withdraw from active involvement in the process of government until the modern position of total disengagement was achieved.

Some commentators argue that this has de-stabilised the 1688 settlement, which assumed that there were three poles in Parliament, Crown, Lords and Commons, each with real and equivalent influence and power.

Today, that power and influence is largely concentrated in a House of Commons which, if there is a working majority for one party (as usually happens, because of the first past the post electoral system), can create an 'elective dictatorship' in which the ruling party can force through its policies and legislation with no legal constraints.

All these developments have been achieved by incremental means, and there has been no major constitutional crisis demanding a radically new constitutional settlement. It would however be wrong to suggest that constitutional development was harmonious over this period. The political establishment was mortally afraid that American and French revolutionary ideas would result in a revolution here from the 1780s through to the 1820s and repressive legislation was introduced at various times to prevent seditious activity. The **Great Reform Bill of 1832** which swept away the old corrupt rotten and pocket boroughs was extremely divisive and the possibility that it would not pass led, among other disorder, to Nottingham Castle (a seat of the Duke of Newcastle, a prominent opponent of reform) being burned down.

In the mid 19th century the **Chartist movement** achieved widespread but short-lived working-class support for a radical programme of democratic reform based on adult suffrage and annual parliaments. Nottingham actually returned a Chartist MP, Feargus O'Connor. This again led to considerable alarm on the part of the establishment. It is better to say that disruptive, and even revolutionary, tendencies were contained within the system. Advocates of our constitutional arrangements argue that that is a positive feature, indicating flexibility and evolutionary capacity, while opponents counter that opportunities for proper renewal of constitutional priorities, such as the primacy of the people over the establishment, have been missed, resulting in a constitution 'owned' by vested interests and not properly respectful of the democratic principle. However, there presently seems to be considerable interest in various aspects of fundamental, if peaceful, constitutional reform, as we shall see, so it may be that these tensions can be properly resolved.

The Irish question

The first major development of the 20th century was the ultimately partially successful campaign for **Irish Home Rule** and then independence. Three of the four provinces, Leinster, Munster and Connacht in 1922 initially formed the Irish Free State with a rough equivalent of Dominion status, and in 1947 became fully independent as the Republic of Eire. Six counties of the fourth province, Ulster, where there was a majority of principally Scots protestant Unionists rejected home rule and remained in the United

Kingdom as Northern Ireland; this province has always had limited self-government, although the powers have for lengthy periods been in abeyance, with direct rule from London, due to **the Troubles**. These were originally due to armed insurrection by the Nationalist **Irish Republican Army (IRA)** aimed at compelling the UK to grant independence to Northern Ireland with a view to it uniting with the three southern provinces. The identity of the IRA has changed over the years; it was originally the Official IRA, then a breakaway Provisional IRA, and more recently further offshoots such as the Real and Continuity IRA. More recently para-military groups also emerged on the Unionist side.

During the troubles there were regular bombings, shootings and other atrocities in Northern Ireland, and occasionally these spilled over to Eire and the rest of the UK. Negotiations between the UK and Irish governments and the various Northern Irish political and para-military groups led eventually to the **Good Friday Agreement**, which provides for the reinstatement of devolved rule, normalisation of arrangements with Eire and the sharing of political power between the principal political representatives of the Nationalists and Unionists (Sinn Fein and the Democratic Unionist Party respectively).

We will look at the current arrangements more closely when we consider devolution in the UK as a whole.

Empire to Commonwealth

During the 19th and early 20th centuries the first steps in emancipation of the more mature **Dominions** began with the grant of internal self-government to Canada and the various states of Australia, New Zealand and South Africa. This process continued through the 20th century, with the partition and independence of India in 1948 and of all other major colonies and Dominions from the 1960s onward.

The Empire formally changed into the **Commonwealth** following the independence of India. The Commonwealth is a loose association of independent states, some with Queen Elizabeth as Head of State, while others are Republics. Recently some states have joined which have no history of being British colonies.

Recent developments in Parliament

While the political landscape has changed considerably in the last 110 years, it has mostly done so within the same constitutional framework. The decline of the Liberal Party after 1918, the rise of the Labour Party and the more recent revival of the Liberal Democrats and rise of the Scottish Nationalist Party have been purely political phenomena. The composition of the House of Lords has been altered - with the institution of life peerages in 1972, the removal of the majority of hereditary peers in 1999, and the removal of the Law Lords to the **United Kingdom Supreme Court** in 2009, but this is the only significant internal institutional change until devolution.

Membership of the European Economic Community in the 1970s leading on to membership of the **European Union** (EU) today has had significant consequences, which are discussed later. The same is true of the incorporation of the European Convention on Human Rights by the Human Rights Act 1998.

The situation will change in various ways following the Brexit referendum. One change is that what was legally a consultative referendum has been treated as binding (despite the complete lack of clarity as to what the vote meant - each politician and commentator has tended to interpret it as providing blanket support for their own personal view). The other changes will depend in very large part on exactly what form the Brexit process takes. The present intention is that, while EU law will cease to apply in the UK at some point, all the existing pieces of EU law will be converted into UK law to prevent a legislative hiatus. However, this may be postponed for a considerable period, particularly if there is an interim agreement. Indeed some outcomes, such as EEA membership will have a much more limited effect than those which involve a severance of existing relationships. There is little point in speculating.

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The British Constitution

Overview

In 1689, as a result of the constitutional settlement between the English political classes and William III, ultimate political authority vested in the 'Crown in Parliament'. This body had sole legislative competence. Even today David Cameron can, correctly, say 'whatever the Crown in Parliament enacts is law - that is really the whole of the British Constitution' (he seems to have borrowed the phrase from Professor Vernon Bogdanor, one of his tutors at Oxford University, but the concept is of considerable antiquity). It is certainly true that this statement operates as a 'rule of recognition', as we have seen. This is the technical expression for the legal instrument which identifies the source of legitimate legal authority; it defines what is to be regarded as law in the United Kingdom.

All law in the UK is ultimately authorised by the Crown in Parliament, whether directly, in the case of statute law or 'Acts of Parliament', or indirectly as in the case of secondary legislation made under delegated powers contained in a statute, or case law, made by judges exercising a jurisdiction created or confirmed by statute. This state of affairs has been orthodox constitutional doctrine since the early 18th century, when Blackstone stated it to be the case in his authoritative *Commentary on the Laws of England*. Earlier common lawyers had asserted that the reason of the common law was anterior and superior to statute, but this ceased to be the case after the Glorious Revolution of 1688.

The first suggestion that the accepted orthodoxy might not be the final word on the matter came only a few years ago. In *Jackson v AG (2005)* some of the judges indicated

that the whole edifice of parliamentary sovereignty was in effect a rule of the common law, and could therefore be modified by the judges. Others, notably the then Senior Law Lord, the late Lord Bingham, did not accept this analysis. The implications for current constitutional practice are considered more fully later.

The accepted orthodox doctrine actually represents a most unusual allocation of ultimate authority. Political sovereignty, in republics such as the United States or Germany, is stated to rest with the people:

We the people of the United States ... do ordain and establish this Constitution for the United States of America from Preamble to the US Constitution

The German people have, by virtue of their constitution-making power determined this basic Law for the Federal Republic of Germany

Preamble to the Basic Law, 1949 (author's translation). It is, officially, not the definitive Constitution, but intended for a 'transitional period' which shows no sign of being brought to an end!

The same is true of some constitutional monarchies, such as Sweden and Belgium:

All public power in Sweden proceeds from the people

Swedish Instrument of Government, 1974

All power emanates from the Nation

Constitution of Belgium, Art 33.

Classic doctrine

Parliamentary sovereignty in its classic form was defined by Dicey. He identified three propositions:

No body other than Parliament has any authority to declare an Act of Parliament invalid or inapplicable.

Parliament may legislate on any topic whatsoever, and in what terms it chooses.

Parliament cannot bind its successors, so a later Parliament (or a later session of the same Parliament) can repeal and replace any existing legislation or rule of the common law.

The first rule indicates that there can be no challenge to the propriety of an Act. There have been several challenges, often to private bills, which are promoted to serve private interests, usually on the ground that the promoter has misrepresented facts to Parliament and has effectively obtained the Act by fraud. The courts will not entertain such arguments. Once a bill is enrolled on the Parliament Roll as an Act, that is conclusive proof of its status. Equally, there is no officially established and recognised mechanism for challenging the validity of a provision of an Act on its merits, such as incompatibility with international law.

This is in theory subject to the possibility of a judicial refusal, as outlined in *Jackson*, to give effect to repugnant legislation.

The second rule deals only, as Dicey fully accepted, with an absence of legal restrictions. It has always been the case that there are practical and political constraints on Parliamentary sovereignty. As a matter of constitutional theory Parliament can pass the Association Football (Prohibition) Act, or the Small Children (Compulsory Silence in Public) Act. However the former would be completely unacceptable to public opinion, and while the latter might be popular, it is contrary to international obligations under the International Convention on the Rights of the Child, and legislating contrary to this will attract adverse comment from the international community, which the government is normally anxious to avoid.

However, all such constraints are ultimately political, resting on what is acceptable to either domestic public opinion or to international opinion. Likewise, while in theory Parliament could legislate for France, or Australia, any attempt to do so would be of no effect as these states are outside Parliament's sovereign territory. Parliament has actually promised not to do the latter, but of course this promise is not legally binding. The Statute of Westminster 1931 provided that

'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof'.

The third rule carries within it the doctrine of implied repeal. It is usual for any repeal or amendment of earlier legislation to be express, firstly for clarity, and secondly because amendments need to be set out in the new legislation. However, there will be cases where the new legislation is incompatible with the old because there is an unrecognised conflict. The later legislation is held to impliedly repeal the earlier.

Under modern conditions, where the Commons contains members who are virtually all elected on party lines and subject to strict party discipline, it is generally correct to say that the executive controls Parliament, and it is therefore in effect Executive Sovereignty. This was particularly the case prior to the reform of the House of Lords when a Conservative government could rely on a natural conservative majority among the hereditary peers. This led to Lord Hailsham's warning of the risk of an 'elective dictatorship'. Today, with a partly reformed Lords, there is less certainty of the Executive being able to get its legislation through, as the individual peers are less subject to party discipline. However, the continued operation of the Salisbury/Addison convention, which continues to allow the government to secure the passage of legislation to give effect to its manifesto, and the 'reserve power' of the Parliament Acts mean that, provided there is no Commons rebellion, the government will 'get its business through.'

It is always possible for parliament to reject international norms, as we have seen with the rejection of proposals to give some convicted prisoners the right to vote. The European Court of Human Rights had indicated that the existing blanket disqualification is inconsistent with provisions of the European Convention on Human Rights, but populist influences and the distaste of some Conservative MPs for human rights generally led to the rejection of the proposals. However, a very restricted change, which allows prisoners who are on temporary licence or subject to a home detention curfew, to register to vote and to vote has now been agreed.

From 2010 – 2015 the situation was complicated by the existence of a formal coalition between the Conservatives and the Liberal Democrats, after the 2010 general election failed to produce a majority for a single party. One reason for seeking a coalition rather than

operating a minority government is the greater assurance that legislation will pass the Commons if all coalition MPs are (at least in theory) committed to support it.

There has been much debate over the status of the referendum decision on Brexit. In constitutional theory the UK is a representative democracy, not a direct democracy, and so a referendum does not represent a constitutional mandate. It would not be politically feasible to discount or ignore the decision, as this would merely incense those who voted to leave (especially as it appears that many did so on the grounds that they felt excluded and neglected by the political process, so ignoring the decision would compound this). The acute difficulty the government now has (as of June 2018) is that the result was a vote against the status quo, but not a positive vote for something else, and there is no clarity as to whether there is a specific model of Brexit which is achievable and acceptable (either in the sense of public opinion or Parliamentary opinion, given that a majority of MPs and peers are personally opposed to Brexit). This is a clear example of the 'flexibility' of the constitution creating uncertainty. However, the political process is ongoing, and it is too early to be sure what the outcome in constitutional terms will be.

The Jackson debate

In domestic terms the **Diceyan** doctrine remains the orthodox view. There are, however, some indications that the judges are prepared to countenance a reappraisal.

In *Jackson v AG* [2005] UKHL 56 hunting interests were seeking to have the Hunting with Dogs Act declared invalid. The challenge was based on the way the Act had been passed without the concurrence of the House of Lords using the Parliament Acts 1911 and 1949. Specifically, the argument was that the 1911 Act created a special, subordinate legislative body of Crown and Commons that could pass 'ordinary' laws, but not an Act amending its own 'parent', so the 1949 Act was *ultra vires* and void. This argument failed, but provoked a number of comments, particularly from Lord Steyn, who suggested that the doctrine of parliamentary sovereignty was a doctrine of the common law and therefore open to review by the judges, who might have to 'qualify' it if the Parliament Act were used to introduce 'oppressive and wholly undemocratic legislation' such as the abolition of judicial review or of the courts.

Lord Bingham, formerly Master of the Rolls, Lord Chief Justice and Senior Law Lord, also considered this topic in a speech in 2007; he went so far as to question whether in such extreme situations parliamentary sovereignty is consistent with the rule of law, although he denied the propriety of the judges denying effect to statutes. Lord Bingham has also addressed these issues in his book, *The Rule of Law*. This is clearly an important consideration in any thorough constitutional reform which is planned.

[Miller v Secretary of State for exiting the EU \(2017\)](#)

This case was brought by a number of individuals who were concerned at the manner by which the government proposed to formally institute the procedures for Brexit by giving notification under Art 50 TEU. Essentially the government took the view that this was an activity which fell within the scope of the conduct of foreign policy, in particular the negotiation of treaties, which

falls within the scope of the prerogative and could therefore be undertaken by the government without seeking Parliamentary approval. The objectors argued that implementing Brexit would inevitably affect a range of rights which had been granted under statute, and that in those circumstances the prerogative could not be used, as the principle of Parliamentary sovereignty required that any action to change or abrogate statutory rights must itself be undertaken by means of statute. The majority of the Supreme Court agreed with this assessment, and as a result a short Bill was introduced and passed authorising the giving of the requisite notification. The minority considered that the rights in question were not statutory in the ordinary sense, but derive purely from EU law and thus fell within the prerogative power. The case has not really provided any great clarity as to the extent to which Parliament will need to positively approve the terms of the Brexit treaty and any treaties regulating the new relationship. It should however be noted that under the Constitutional Reform and Governance Act 2010 a treaty cannot be ratified if the House of Commons refuses to approve it.

5.4 Parliamentary sovereignty and the EU – until Brexit takes effect

In 1971, the government negotiated accession to the entity which was then the European Economic Community (EEC), later became the European Community (EC), and is now, following the Treaty of Lisbon, the European Union (EU). At its root, this is an association of states which have agreed to collaborate closely in economic matters, creating a single internal market where goods, services, labour and capital are in free circulation. However, the scope of the entity has expanded considerably beyond this, not merely by dealing with ancillary issues such as regulation of competition, external trade policy, transport policy and harmonisation of social legislation, but by acquiring from the states competences in relation to justice and home affairs and some aspects of foreign policy.

The EEC/EC/EU is a very unusual entity. It is created by a series of treaties entered into by the member states as high contracting parties. Generally, such treaties operate in international law, and do not directly affect the rights and liabilities of individuals under national law. Indeed, English doctrine is that treaty based international law and domestic law are entirely distinct and do not interact unless and until effect is given to the international legal obligation by a statute. However, the nature of the EU is that it regulates part of the economy, and other related areas, and it creates direct rights and obligations: *Case 26/62 van Gend en Loos*.

The member states have agreed to pool their sovereignty and give priority to EU law where appropriate: *Case 6/64 Costa v ENEL*. This creates a major issue for the UK. Membership of the EU requires us to give effect to EU law in certain circumstances. National law which is inconsistent with EU law must be disapplied: *Case 35/76 Simmenthal*. This is clearly a problem for our constitutional theory, since if EU law is supreme in certain areas Parliament can no longer legislate as it sees fit, at least in the areas governed by EU law, which is a direct contradiction of the principle of Parliamentary Sovereignty. Initially, the issue was largely

concealed; in cases such as Case 152/84 *Marshall*, although it was accepted that EU rules must prevail, there was no high profile announcement.

The ordinary process of assimilating EU law is effected by sections 2 and 3 of the European Communities Act 1972. S3 provides that decisions of the ECJ are binding on all UK courts, including the House of Lords. S2 provides that the treaties and other rules of EU law will have legal effect in the UK:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly

This wording both incorporates the existing body of law (the *acquis communautaire*) and provides for future law. In one sense it is Parliament authorising this law, but in another it is an acceptance of an alternative valid source of law.

The issue became acute in the *Factortame* litigation, where UK legislation on regulation of merchant shipping was argued to infringe EU law on freedom of establishment in business and non-discrimination on grounds of nationality. Those affected wanted the relevant provisions disapplied pending a final ruling by the European Court of Justice. The House of Lords initially determined that it had no power to disapply the UK law, but when the European Court of Justice determined that such a power was necessary, the House of Lords conceded that it could make a declaration to this effect. It never became necessary to make a final ruling on the validity of the legislation, as it was amended following a ruling of the European Court, but the implications were now very clear. Strictly, the case established no new law, merely publicised what had been the case since 1972.

There is no doubt that Parliament can repeal the European Communities Act 1972 and the other acts which give effect to EU law in the UK. However, it cannot effectively do so while the UK remains a member state of the EU. Repeal would equate to withdrawal which can of course be undertaken as part of the Brexit process. In *Thoburn v Sunderland CC* [2002] 4 All ER 156 it was suggested that the European Communities Act has a quasi-constitutional status which exempts it from the doctrine of implied repeal.

How do we accommodate EU law into our constitutional system?

The EU (and its predecessors the EEC and the EC) constitute a unique arrangement whereby a number of states have agreed to 'pool' their sovereignty in certain defined areas. These relate principally to trade, economic affairs and related areas, and other large areas are not significantly affected. As early as the case of *van Gend en Loos* (1962) the ECJ held that the then EEC constituted a new and special legal system which takes priority over national law and procedure where necessary. This was confirmed in the *Costa* case (1964). Both these cases were decided before the accession of the UK, so it was clear that appropriate provision needed

to be made for effect to be given to European law. This was achieved by carefully drafted provisions of the European Communities Act. S2 (1) provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right " and similar expressions shall be read as referring to one to which this subsection applies.

The effect of this is that Parliament authorises effect to be given to what is now EU law, in accordance with the EU rules and authorities. This operates prospectively as well as in relation to the law as it was at the time the Act came into force. It is however Parliament which is requiring this, so our constitutional principles are respected. S3 then goes on to provide that all UK courts must follow the rulings of the ECJ, thus ensuring that our interpretation of EU law is consistent. It is clear that if Parliament were to repeal the ECA, then EU law would cease to have effect in the UK. It is therefore a case of lending out that part of our sovereignty which is pooled, not transferring it outright. Following the entry into force of the Lisbon Treaty, there is a procedure for the withdrawal of a state from the EU, and in practice it is likely that any decision to repeal the ECA would be in the context of an invocation of this procedure.

Problems can arise when later legislation appears to conflict with EU law. *Thoburn* makes it clear that there will be no implied repeal. The English courts, in cases such as *Pickstone*, *Litster* and *Webb* have made it clear that they have a very broad power to interpret UK legislation compatibly with EU legislation, going beyond the ordinary semantic approach to statutory interpretation.

In the rare case of a statute which is clearly incompatible with EU law, the courts are obliged to make an order disapplying the statute, at least until there has been a ruling by the European Court of Justice: *Factortame*. There is no precedent for the case where Parliament declines to repeal or amend legislation which has been authoritatively determined to be inconsistent with EU legal obligations.

5.5 Parliamentary sovereignty and devolution

Historically, the United Kingdom has been seen as a unitary, rather than a federal, system, with ultimate power concentrated in the central organs of the state, in particular the Crown in Parliament. The **Imperial Parliament** was seen as the central embodiment of the British Empire, not merely the mother country.

As with much of our constitutional arrangements, the reality is less tidy. England was certainly a jurisdiction with only one ultimate centre of power, in the central legislature and administration, although local judicial authorities existed from early times, and only ceased to have any relevance in the early C20. The American colonists sought independence to avoid a situation where they lacked either devolved authority or a voice in the UK Parliament and administration. Later, generations dealt more sensibly with the growing maturity and independence of colonies and Dominions. Canada, Australia and New Zealand acquired internal legislative and administrative competence in the 19th century and independence in the early 20th century.

In the UK, local administration has historically proceeded on the basis of the conferral of powers, so a particular local authority, whether it is the Mayor of London and the Greater London Authority, or a county, district or unitary authority, can only act in accordance with the statutory powers conferred by parliament. This remains the case in England. However, the other provinces of the UK now have a measure of delegated government. This has been the

case in Northern Ireland since the 1920s, although the extent to which the delegated powers have been operational has been dependant on whether terrorist activity has led to their suspension and the interim re-imposition of direct rule.

Scotland has had responsibility for primary and secondary legislation and administration of most internal aspects of government since 1998, and while Wales originally had a more limited version of internal self-government, the powers of the Welsh Assembly have been progressively extended, and it now not only has executive powers, but also primary legislative functions in defined areas.

In theory, the powers devolved to the provinces are so devolved by statutes of the Westminster Parliament, which Parliament is free to amend or repeal. However, in political reality, any attempt to do so other than in accordance with the wishes of the population and authorities of the province in question, would be highly contentious and probably impracticable. Indeed, the Scotland Act 2016 contains provisions which purpose to entrench the current devolved powers and responsibilities as a permanent feature of the British constitution. Although this is an important declaration of intent, it would seem that it is unlikely to create justiciable civil rights. The Supreme Court has always been reluctant to give full legal effect to such declaratory provisions, for example those contained in the Act of Union 1707. It also, in the *Miller* case, declined to give a legal as opposed to political effect to the Sewel convention, by virtue of which the Westminster government should consult with the devolved governments on matters of concern to them.

There is now a variable geometry in the sense that the three smaller provinces now have devolved administrations responsible for, *inter alia*, health and education, while in England these matters remain the concern of the Westminster Parliament and the UK government. A Scottish, Welsh or Northern Irish MP can vote on legislation and other parliamentary business affecting health and education in England, but not on the equivalent in their home province, as these are the responsibility of the devolved institutions. It is conceivable that these non-English MPs could have decisive voting power, even though the issues do not directly concern them or their constituents. This is, at least in principle, neither just nor democratic.

It is in fact the reverse of the 'West Lothian Question' identified in the C19 when English MPs could vote on matters of purely Scottish concern. This was resolved by the expedient of a Scottish Grand Committee of all Scots MPS which actually debated and approved such legislation prior to its formal adoption by the whole House.

Separation of Powers

What do we mean in general terms by the separation of powers?

This doctrine is principally associated with Montesquieu. In the mid 18th century he compared France and England/the United Kingdom. In France, all power was held by the king and exercised directly in his name by ministers. Legislation was by royal decree, as the equivalent of Parliament had not met for over 100 years, and the judiciary were confined to adjudication of private law suits, and had no power to review or regulate royal actions. Montesquieu regarded this as tyrannous and also ineffectual.

In England, power was held by the ministry (cabinet), acting in the name of a crown which was already distanced from actual government because Queen Anne and King George I had displayed little ability and interest respectively. Although drawn from Parliament, the ministers did not control it, as there were no disciplined parties in the modern sense. Parliament controlled finances, and approval for policies had to be sought individually. The judges were generally robustly independent and would rule government action unlawful in appropriate cases, especially in matters concerning the liberty of the subject and improper financial demands.

Montesquieu believed the system of checks and balances of one institution against the other was the secret of the political and economic success of the British at the time, although he over-stated the degree of separation between legislature and executive, even at the time. He argued for such a system of separation of powers and the associated checks and balances as a solution for France in the [Spirit of Laws](#) (L'Esprit des Lois).

His theory was later adopted by the framers of the [US Constitution](#), who completely separated the legislature from the executive, and also created a separate Supreme Court, which quickly gave itself ultimate authority to interpret and apply the constitution ([Marbury v Madison](#) (1805)), creating an explicit system of checks and balances. However, a majority of nations (e.g. Australia, Canada, Germany, Japan, Italy, India, Sweden) have actually adopted systems in which the government is composed of members of the legislature, as in the UK, although the independence of the judiciary (and in general its role as ultimate guardian of constitutional rights) is an almost universal feature of modern constitutions.

There are therefore, among those states which are generally considered properly constituted, and possessed of an effective set of constitutional arrangements, two principal solutions to the question - how far should the principal institutions of government be separate and distinct from each other. Common to both is the fundamental belief that the judiciary should be independent of the other two branches.

The first group can be described as Presidential; here the full separation principle is maintained, and the population selects its legislators in one set of elections and its executive or administration in another. This of course means that, particularly if these elections take place at different times or by different methods, there can be a legislature of one political persuasion and an executive of another. This is a state of affairs which the French call cohabitation and the US calls gridlock. In some systems the separation is virtually complete. In the USA the only overlap is that the Vice-President presides over the Senate (although he has no vote). No other dual mandate between Congress (the legislature) and the executive under the President is permitted. In France, ministers are generally selected from the National Assembly (legislature), but they stand down from this mandate temporarily, being replaced by a substitute until they

leave ministerial office. In these states the Head of State and Head of Government are usually the same person.

The second group can be described as Parliamentary; here the population votes for a legislature in the knowledge that the result of this election determines the composition of the executive, because this will be formed from the party or coalition of parties which has won a majority in the parliamentary elections. In some cases, including the UK and its former Dominions, members of the government (the Ministry) remain full members of the legislature and can therefore answer to it on a routine basis. In other cases, such as Estonia, while ministers are chosen from the Riigikogu, or parliament, they cease to sit and are replaced in the meantime by substitutes, rather as in France. In these states the Head of State is usually a symbolic one, a constitutional monarch or a president with restricted and generally largely symbolic or representative powers.

It is therefore clear that within the two major groupings there is considerable diversity of practice in detail. In its membership of the Parliamentary group of states the UK is, for once, in an orthodox constitutional position.

The extent to which the independence of the judiciary has been respected in the UK has varied. Initially the Justiciars and then the Justices of the common law courts were regarded as part of the general administration of the country, under the overall control of the Crown, and sometimes referred to as lions under the throne. (This is one reason why the royal arms still form part of the standard furnishings of a law court.) This applied with more force to the Lord Chancellor, whose role as a judge in the courts of equity was secondary to his role as one of the principal officers of the Privy Council and royal administration.

Even in the 17th and 18th centuries, when the independence of the judges in purely judicial matters was firmly established, some judges took an active role in political and governmental affairs. Notoriously Chief Justice Jeffreys was closely associated with the policies of King James the Second. Lord Mansfield combined being Chief Justice with a prominent place in the cabinet and until the 20th century it was normal for the Attorney General, the chief legal adviser to the government, to be appointed as Lord Chief Justice if a vacancy arose and he asked for it. The appointment process for judges was far from transparent until quite recently; the appointments were made on the advice of the Lord Chancellor, and the criteria were not published. This was only finally resolved by the creation of the [Judicial Appointments Commission](#) under the [Constitutional Reform Act 2005](#). Appointments are now very clearly independent, and made by a transparent process, with clear criteria for appointment at all levels. The status of the Judicial Committee of the House of Lords as being the de facto supreme court of the UK, while formally being a component part of one house of the legislature was more of a historical anomaly than a genuine thwarting of separation of powers. It too was removed by the same statute.

Until 2005, the role of the Lord Chancellor was living proof of the absence of separation of powers. He was at one and the same time the Speaker of the House of Lords, the Head of the English Judiciary and a senior cabinet minister. Now, under the [Constitutional Reform Act 2005](#), the Lords elect their own Lord (or Lady) Speaker, the Lord Chief Justice is head of the English Judiciary, and the Lord Chancellor retains only his ministerial position, currently combined with the role of Justice Secretary.

How well, overall, does the United Kingdom Constitution achieve the objective of securing the good governance of the nation?

Traditionally, the majority view has been that it does so very well:

the UK has been an effectively functioning democracy for several centuries; it supports a plural political system; civil liberties and human rights are in practice as well protected as anywhere; there is general respect for the law; the judiciary enjoys a high reputation for competence and impartiality; the police are subject to the rule of law; the level of corruption in public life is very low in comparative terms (even allowing for the level of venality revealed in 2009 in relation to MPs' expense claims).

There are however those who argue that this admittedly satisfactory state of affairs is not so much due to the institutions of the constitution, but to the political maturity of the electorate, and in particular the political class.

There are two main counter arguments:

As Lord Scarman suggested 20 years ago, and the last Labour Government acknowledged in the Governance of Britain documents which they produced, it is difficult to identify the elements of the constitution and set them out coherently. This leads to general ignorance of constitutional rights and, possibly, to a lack of identification by citizens with 'British values' as compared to say Germans and US citizens, who receive extensive education in constitutional matters.

There is no legal entrenchment of rights; ultimately the only sanction against legislative action to remove or curtail rights is a political one - the executive would not seek to legislate in certain areas for fear of the media and public reaction.

The Rule of Law

The United Kingdom is a state which operates a parliamentary system of government. Such systems inevitably depart from the strict doctrine of separation of powers as laid down by Montesquieu. There is an inevitable overlap between membership of the executive and of the legislature. Since there are a large number of parliamentary constitutions throughout the world, the United Kingdom is actually quite orthodox in this respect. The principal feature of the separation of powers in the UK is therefore the independence of the judiciary. This is also the principal feature of the rule of law as it is generally understood to apply to the UK. Again, the traditional authority on this is **Dicey**:

'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power ... Englishmen are ruled by the law and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else.'

In other words, I am entitled to be judged by an independent and impartial judge, who will apply the law of the land, whether my case is a private dispute or opposes me to the state in a public law context.

In this sense we regularly see the rule of law upheld - judges regularly hold that the state has acted outside the law and give judgment in favour of the subject accordingly, whether it be applying the Human Rights Act to the treatment of UK servicemen in Iraq and to the treatment of Iraqis by those servicemen, holding the Home Secretary in contempt of court for failing to honour an undertaking not to effect a deportation while legal proceedings were in train or holding that decisions not to approve the cost of medication are unreasonable. These high profile cases are merely the tip of an iceberg.

However, while the executive is subject to the rule of law in this sense, of course the legislature is not. Judges cannot, by virtue of the doctrine of parliamentary sovereignty, refuse to apply and give effect to a statute (except occasionally in areas governed by EU law). In other words, while the judges can ensure the government operates on the basis of the existing law, and does not make decisions which have no basis in law, they have no explicit power to disapply the law itself on the grounds that it is unjust, inconsistent with human rights, civil liberties or international standards of legality.

In many (not all) other states, the rule of law has an additional meaning. In those states, the constitution incorporates some form of Bill of Rights. This creates legal norms which bind not only the executive (and the citizen) but also the legislature. Legislation which does not conform to the Bill of Rights is unconstitutional and can be struck down by the courts, or at least by a designated court.

In the **United States** much of the current work of the Supreme Court concerns the constitutionality of laws regulating such matters as access to the internet (Congress shall make no law abridging the freedom of speech) or subjecting Guantanamo Bay detainees to trial by military court.

In **Germany** the *Bundesverfassungsgericht* or Federal Constitutional Court can strike down legislation which is inconsistent with rights guaranteed in the *Grundgesetz* or Basic Law.

In **Canada** the courts can strike down legislation which is contrary to the [Canadian Charter of Rights](#) (although in this case, if the legislation expressly so states, the Charter can be disapplied)

Internationally, the concept of the rule of law is that all organs of the state, legislature, executive and judiciary must act according to the fundamental legal norms of the state (which obviously bind the citizen as well). It is important to recognise that the concept in the UK is significantly narrower, as it does not apply to the legislature. You should, however, recall that judges such as Lords Steyn and Bingham have started to make very tentative suggestions that it is necessary for the rule of law in the UK to be reinforced in precisely this area, as we have already seen in the discussion of parliamentary sovereignty. Lord Steyn, with Lord Hope, tends to prefer the view that ultimately the judges may override Parliament. Lord Bingham disagrees with this proposition, seeing it as a reversal of the proper order of precedence¹:

I cannot for my part accept that my colleagues' observations are correct. It is true of course that the principle of parliamentary sovereignty cannot without circularity be ascribed to statute, and the historical record in any event reveals no such statute. But it does not follow that the principle must be a creature of the judge-made common law which the judges can alter: if it were, the rule could be altered by statute, since the prime characteristic of any common law rule is that it yields to a contrary provision of statute. It has to my mind been convincingly shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others

officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.

¹ King's College London Commemoration Oration, 2007 <http://www.kcl.ac.uk/content/1/c6/01/45/18/TheRuleofLawandtheSovereigntyofParliament.pdf>

What are the strengths and weaknesses of the rule of law as it applies in the UK?

Strengths:

We have a robustly independent judiciary, which fully meets its responsibility to ensure that the executive operates within the law, and which is drawn from a legal profession which has high standards of technical competence and also of ethics.

There is a well established tradition of legality, so that there is a general assumption that the law will be applied and will achieve a just outcome.

The executive fully accepts the legitimacy of the decisions of the judiciary and gives effect to them.

Weaknesses:

There is no entrenched Bill of Rights, so the judiciary cannot evaluate and pass judgment on legislation.

Parliament is subject only to political constraints on its activity. We do not therefore comply with internationally recognised standards comprised in the Act of Athens and other statements of the [International Commission of Jurists](#)

NOTTINGHAM
TRENT UNIVERSITY

Sources of Law

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European Union Law

- Listed first because of the principle of supremacy
- Includes a range of different instruments:
 - Treaty Articles
 - Directives
 - Legislative Regulations
 - Administrative Regulations
 - Decisions
 - Case law

Parliamentary Legislation

- Statutes of the United Kingdom Parliament
 - Passed in the same terms by both Houses, with Royal Assent
 - Deal with principles and broad outline, with some detailed provisions



- Necessary to incorporate international legal instruments into UK law
- In Northern Ireland, Scotland and Wales the devolved institutions also legislate on devolved matters
- Secondary Legislation (variously known as Statutory Instruments, Regulations, Statutory Rules and Orders etc.)
 - Made in pursuance of powers conferred by Parliament
 - Powers exercised by Ministers
 - By laws made by local authorities and statutory undertakers (e.g. railways and docks)
 - Cover the fine detail

Case Law

- An actual source of law, unless and until replaced by statute/EU law
- Cases interpret and apply statute
- The doctrine of precedent



Custom

- Originally important – but custom became incorporated into case law as early precedents
- Now possibly significant in relation to the custom of certain commercial sectors
- Otherwise of negligible significance



Sources of EU Law

Treaties

The primary sources of law are the Treaties – the TEU and TFEU. Each in turn has been negotiated between the member states through an intergovernmental conference (IGC). The latest IGC led to the Lisbon Treaty, which in turn provided for a quite radical rewriting and reordering of the existing treaties. This reminds us that the EU is ultimately an association of sovereign states, collaborating for specific purposes. Of course these purposes are now so extensive that it is easy to think that the EU has general competence to deal with all aspects of law and policy. This is, however, not the case. The EU has only the competences conferred on it by the Treaties. This is laid down in Art 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Art 4 TEU makes clear that competences not conferred on the EU remain with the member states. It is not always the case that the principles set out in Art 5 are fully respected in practice. One complaint is that the EU has over legislated and over-regulated; in other words the relevant institutions have not had sufficient regard to subsidiarity and proportionality. This is one reason why the [Protocol](#) (Protocol No2) referred to above was introduced. It is also one motivation behind the attempt by the UK government to open a debate on the repatriation of powers.

The TFEU sets out the forms of competence, and defines the areas of competence. Art 2 TFEU deals, inter alia, with exclusive, shared and supplementary competence:

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. ...

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

There is a short list of areas where the EU has exclusive competence, set out in Art 3 TFEU:

The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

There is also a similar short list of areas of supplementary competence, set out in Art 6 TFEU:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.

While all other relevant areas are therefore areas of shared competence, it must be recalled that this does not relate to all areas, but merely those within the scope of the treaties. The indicative list in Art 4 TFEU of the principal such areas gives a good idea of the range covered:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

Art 4 also defines two special areas:

In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

It is also necessary to look at the specific treaty provisions regulating a particular area. These will specify both the extent of the relevant competence and the means by which it can be exercised. If these are not respected an application may be made to the ECJ for annulment under Art 263 TFEU.

Acts of the Institutions

While the Treaties delimit the scope of EU competence, even the more detailed chapters of the TFEU can only set out the broad outlines. Provision is therefore specifically made for five types of 'act' by the EU institutions. These are intended to allow the necessary detailed provisions to be incorporated. The ECJ has also treated instruments as acts if they are intended to have legal effect, even if they do not meet the description given. The 'official' acts are described in Art 288 TFEU:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

The treaties can be loosely compared to primary legislation in the national context. This is supplemented by detailed secondary legislation, made within specific areas and by defined procedures. The same applies at EU level. Regulations and Directives represent this secondary legislation. They are quite different in their intended scope.

Regulations are intended to state legal rules which apply throughout the EU, as the rules made at EU level are intended to directly govern a particular area. For example, in the field of road transport, as vehicles and drivers can readily cross frontiers, it was decided at an early stage to lay down a single set of rules regulating maximum driving periods and also minimum

rest periods. These rules directly applied to drivers and vehicle operators. There was also a single system of recording duty, using a device called a tachograph. National regulators carried out inspections, but contraventions are prosecuted as a breach of the relevant regulation. National legislation deals with the level of penalty and procedural issues.

Directives have a different function. There are some areas where harmonisation or approximation of the law is desirable, but it is not practicable to do so by a regulation. This is often because these are areas where the member states already have their own legal rules, and the harmonisation affects only one element. One example is company law. All the original EU states developed company law in the nineteenth century. While the underlying objective was the same – to create a business entity which had its own identity and legal personality, independent of the investors and entrepreneurs involved – the detail varied considerably. It was felt that some aspects should be harmonised in the interests of transparency, for example the minimum capital requirement for a public company (plc); this would mean that a business dealing with a public company anywhere in the EU would know that it had a minimum share capital in cash or assets. The best way of doing this is to set the objective, and then leave member states to work out whether, and if so, how, they need to modify existing legislation. That is why Art 288 defines Directives as it does. This also explains why most directives provide for a fairly lengthy implementation period; this is to give member states time to draft and enact the necessary measures. In theory at least, once it has been implemented, the directive will melt into the background. Those affected are expected to rely on the national implementing legislation as the source of the legal rights and liabilities. However, it is often not as simple as that. Unless the implementing legislation is simply a word for word adoption of the directive there can be arguments over whether the directive has been faithfully transposed.

Decisions may be purely executive, administrative (i.e. taken in accordance with established principles of consultation etc.), quasi-judicial (e.g. Commission decisions on competition infringements) or judicial (i.e. decisions of the Staff Tribunal, General Court or ECJ). Strictly they produce legal effects for those directly affected, but they may have a wider impact – a court decision, for example, may be seen as a precedent. Non-judicial decisions are open to an action for annulment under Art 263 TFEU, while judicial decisions may be appealed.

We do not need to consider recommendations and opinions to any extent, as they do not give rise to legal effects – although they may be important in policy terms.

Supremacy

EU law is supreme over national law. This was laid down by the Court in Case 6/64 [Costa v ENEL](#). It was however a controversial ruling, and it took some time before the national authorities, in particular the German Constitutional Court, accepted it. Indeed, the German court still maintains that its ultimate source of law remains the German Basic Law, and EU legal supremacy operates in this context. In the UK, this principle was given effect to by s 2 of the European Communities Act 1972. There has been considerable debate over the impact of EU legal supremacy on the constitutional doctrine of parliamentary sovereignty. You will cover this in your Public Law module.

United Kingdom Sources

Statutes

These are enactments of the UK Parliament. Except in cases where a statute is in conflict with EU law the courts are not concerned with the validity or effectiveness of a statute which has been properly passed. The situation where there is such a conflict is discussed later.

Types of Statute

There are two major sub-divisions

Private and Public Acts

A private act of parliament is sponsored by an individual or company/corporation to make provision for matters of concern to it. Local authorities promote them to obtain extra powers, harbour commissioners use them for the same reason. They apply only in a defined area or to defined persons. The promoter is responsible for convincing parliament of the utility and desirability of his proposals, and objectors may put their contrary case to a committee of one or other House (in practice usually the Lords). A public act is *prima facie* of general application, and although debated in the two houses, any outside bodies with views can only make these heard by persuading an MP or peer to put their points in debate.

Government and Private Members Acts

These are both public acts. The distinction is that a government measure represents government policy, and is drafted by the official parliamentary draftsmen on the basis of instructions prepared by departmental civil servants to the requirements of the minister responsible. It will normally be based on proposals issued in the form of a green and/or white paper for public discussion, although increasingly draft bills are being used at this stage. Measures of technical law reform may be based on a report of the Law Commission. A private member's Bill represents a project of law reform which commends itself to an individual MP. It may have been drafted by an outside pressure group.

Procedure

A Bill may be introduced into either House (although money bills are always introduced into the Commons first, and cannot be delayed or rejected by the Lords: Parliament Act 1911, s 1).

It receives a purely formal first reading. It is then debated more fully on second reading, where the main principles are discussed. There is then a Committee stage where the detailed drafting of the Bill is scrutinised and challenged. In the case of particularly important Bills the whole House forms the Committee. There is then a third reading where the Bill as amended is finally approved or rejected. The procedure is then repeated in the other House. If the Bill is amended in the second House, these amendments must be accepted or rejected by the first house. If the Lords reject a non-money Bill, they must accept it if it is put forward again in the next session (Parliament Act 1911, s 2). They thus have a delaying and revising function only. The final, formal, requirement is the Royal Assent.

Consolidating Acts

These are passed to tidy up the existing statute law in a particular area, and put it all in one statute. They are not supposed to change the substance of the law, so differences in terminology are assumed to be immaterial.

Codifying Acts

These are designed to bring into convenient statutory form the law in a given area, which has earlier been non-statutory. As the intention is to give effect to the earlier law it is permissible to refer to it when considering the statute, but there is no absolute rule that the earlier law is to remain unaltered.

The Statutory Process

In practice, statutes come into existence for a range of purposes:

To make provision for activities which the government considers to be desirable in order to give effect to its policies and objectives for the better governance of the state, improvement of the economic position etc. These may be politically controversial, but so long as the government (assuming it to have a majority to start with) retains the support of the party/ies comprising it, it will be passed. Support in the votes on such legislation is based on loyalty to the party rather than any belief in the merits of the legislation. Even

where the legislation is muddled or technically flawed, it is likely to be passed rather than amended. The efforts of the opposition are therefore primarily directed at political propaganda rather than any attempt to ameliorate the legislation as it goes through the process. Much therefore depends on the quality of the draftsmanship in the first place.

To reform the law in some established area, in response to recommendations by the Law Commission or some other official body. Such legislation is not usually politically controversial in the same way. However there will be various interest groups at work, and individual parliamentarians with expertise, or at least strong opinions. This may lead to amendments which are unfortunately drafted. Something of this kind happened in relation to the Theft Act 1968. The official draft bill included a "general" offence of fraud, but this was replaced as a result of interventions by lawyer parliamentarians with two more specific offences. The result was, as the House of Lords held in *R v Preddy*, that certain common forms of mortgage fraud could not be brought within the ambit of these offences. This was not what was intended (such activity was an offence previously), but it is the likely result of amendment on the hoof.

Statutory Instruments

These are subordinate legislation made formally by a Minister (and in practice drafted by his civil servants) in pursuance of powers granted by statute. The traditional forms are Regulations and Orders, but they now also take the form of Codes of Practice (e.g. under PACE and Social Security legislation). They are open to challenge on the basis that they include provisions which are outside the delegated powers (*ultra vires*). Subject to this they are interpreted in the same way as a statute. The same applies to local by-laws. The detailed procedure for statutory instruments varies. Some are simply made, others are laid before Parliament and come into effect if not objected to, while others must be approved by a parliamentary resolution. This is intended to reflect the extent to which they are likely to contain controversial matter, or deal with issues of principle, rather than administrative detail. The growth of secondary legislation is one of the reasons for the growth of judicial review. either in the form of challenges to the vires of the instrument, or the vires of decisions made pursuant to the instrument by a statutory adjudicator or tribunal, rather than by a judge.

It is clearly impracticable for all the minutiae of technical rules and regulations to go through the full parliamentary process. There is insufficient time, and, in many cases, the subject matter is purely technical and administrative. There is also a need for some regulations to be flexible, in the sense that they may need to be altered at short notice. There is however a change in legislative style that goes beyond this. It is sometimes called 'Henry VIII' legislation, because of a claimed resemblance to the legislation of that monarch. In essence the underlying statute is simply an umbrella, shell or enabling power, which provides for the relevant Minister to make regulations in a wide general area. One example is the Deregulation and Contracting Out Act 1994. The act presumes that there are a substantial number of statutes and statutory instruments which are not in the public interest because they impose burdens on industry and commerce which are disproportionate to any benefits which they secure. The act gives power to repeal these by regulation with minimal publicity and debate. While there are certainly some provisions which are obsolete, or which genuinely impose a burden out of proportion to the

benefit secured, many such rules have either a health and safety or consumer aspect. Producer interests are naturally anxious to do away with the useful as well as the superfluous and it is by no means clear where the public interest lies.

Such 'Henry VIII' legislation gives very considerable power to the government and removes this from the normal scrutiny process applied to substantive new legislation.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Human Rights Act 1998

The UK was one of the principal creators of the ECHR (it was largely drafted by UK government draftsmen). ECHR was intended as a declaration of adherence to the principles of the rule of law and the political values of Western liberal democracy. Unusually it also provided a mechanism (the European Court of Human Rights (ECtHR)) for adjudication of claims that states had violated the rights declared in ECHR.

The UK has always accepted that it is bound in international law by the ECHR and has allowed applications to the ECtHR and accepted the resulting adjudications. The Convention rights did not however form part of UK law. Initially it was assumed that our common and statute law must be compatible and the ECHR merely restated our basic assumptions. More recently it has become apparent that there are discrepancies. The convention rights are both substantive and procedural, and UK procedures have often been found to infringe the right to a fair trial or to protection from non-judicial deprivation of liberty.

The Human Rights Act 1998 was designed to 'bring the ECHR rights home'. It has the following main effects:

All UK legislation must be construed 'so far as possible' to give effect to Convention rights.

In doing so the judges must have regard to ECtHR decisions, but these are not binding.

Where it is not possible the statute will prevail, although the court may issue a 'declaration of incompatibility' which is intended to force the government to legislate. Note that this effectively preserves the sovereignty of parliament in this field.

All public bodies (including the courts) other than Parliament must act in accordance with convention rights. If they do not, victims may rely on the Convention rights to obtain redress.

It is generally felt that HRA has had a significant impact in modifying the attitude of the executive, as well as allowing the judges to develop improved substantive law in such fields as freedom of expression and privacy, and improving procedural fairness. We will look at the Act

in more detail later. This introduction is more to alert you to the existence of a new source, if not strictly of law, at least of legal ideas within the existing structure.

The Common Law

This is in practice judge-made law, although the myth of its historical origin is slightly different. The myth suggests that the common law is the immemorial custom of the realm, which thus represents the collective genius and sense of justice of the English nation. The function of the judges is to find the law by analysing existing authorities (primarily decided cases, but some texts by authors of authority) in which relevant aspects of this law have been laid out, and to determine its application to the present facts. In doing this they simply apply, they do not create. The common law now includes judicial pronouncements on the effect of statutory provisions. Decisions of the ECJ rank above, not as part of, the ordinary judge-made law, by virtue of s 3 of the European Communities Act. Decisions of ECtHR, however, are influential rather than binding.

Academic Works

It is no longer true that only dead authors are authoritative, and in practice the judges appear more ready both to listen to the citation of academic opinion, and to make explicit reference to it in their decisions. It is not clear whether this represents greater weight being attached to these opinions, or merely a greater openness on the part of the judges in admitting it. There is a subtle difference between referring to a major textbook (such as Clerk & Lindsell on Tort) and saying "The law is laid down in a passage on p222" and discussing and endorsing the opinion of an academic in an article. In the former case the judge is treating the academic work as a source, in the latter it is a persuasive argument.

Custom

In theory a decision based on custom is based on the common law. It is merely a part of the law that has not been found and declared previously. In practice custom only operates within a trade or profession, or possibly a locality, and is therefore not really common law, more a species of private rule (or *privilege*). It is a very minor feature nowadays.

Handling Judge-made Law

The common law tradition, as we have seen, regards earlier cases as forming a source of law, or precedent. It is permissible for the parties to litigation to rely on these decisions to support their own case. Analysing and understanding how this is done is a major tool of the trade for

both academic and practising lawyers. So far as the latter are concerned it is important even in the absence of litigation, since proper analysis of earlier decisions will enable them to advise their client how to conduct his affairs to his best advantage. This applies for example to tax and estate planning. If there is a successful tax avoidance scheme, approved by the courts, it can be adopted. When drafting a will, it is generally seen as safest to adopt a form of words which has been assigned a particular meaning in an earlier case in order to achieve the same result. The process is not a purely mechanical one, and there may be a need for adaptation to meet different circumstances. Similar considerations apply to the drafting of contractual terms. If parties wish to achieve a particular result, they will often use a standard form contract which has been held to produce this result, or will construct a contract using phrases and provisions which have already been interpreted by the courts. It is in these contexts that there is an important need for consistency and certainty in the law. Hobhouse LJ said in *The Nukila* [1987] 2 Lloyd's Rep 146 at 152:

Turning to the authorities it must at the outset be recognized that, whether or not they are strictly binding upon us, they must, insofar as they represent the existing authoritative statements of the law only be departed from if they are clearly wrong. This principle has been stated on a number of occasions in the field of commercial law where it is recognized that the parties enter into contracts on the basis of the law as it has been stated in the applicable authorities. For a Court, in deciding a dispute under a commercial contract, later to depart from those authorities risks a failure to give effect to a contractual intention of those parties as evidenced by their contract entered into on a certain understanding of the law.

Similarly Lord Dunedin said in *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* (1922) 10 Ll.L.Rep. 703; [1922] 2 A.C. 250 at p. 257:

My Lords, in these commercial cases it is of the highest importance that authorities should not be disturbed and if your Lordships find that a certain doctrine has been laid down in former cases and presumably acted upon you will not be disposed to alter that doctrine unless you think it clearly wrong.

There are a number of issues contained within the general topic of handling the common law which must be handled sequentially:

Why should decisions be binding.

Which decisions are binding

What part of the decision is binding

How can an apparently binding, but inconvenient, decision be circumvented

Although they can be handled sequentially, these issues are not unconnected, and as you will often see in the study of law, it is often difficult to see the clear pattern until you have considered all the elements.

Why should decisions be binding

To answer this question we must look at the origin of the common law. It was considered to be the existing law of England, already established and authorised by custom and practice, but not yet spelled out. Litigants did not ask judges to invent new rules or remedies, but to restore them to their rights in accordance with the existing law. Parliamentarians and petitioners were constantly asking the Crown or the judiciary to look back to established rights. These were often rights of property, and the most valuable form of property at the time when this practice took root was land, so most of the case law concerns disputes over ownership of land, but light is also thrown on the attitudes of society by the habit of towns and cities to seek charters confirming their traditional rights and privileges of electing mayors, holding markets and collecting tolls. They were not seeking new entitlements, but confirmation of existing ones. The judge in such a society is not overtly asked to be innovative, but to restate pre-existing law as it applies to the facts of the case. In a modern context, this attitude is reflected in the approach to commercial certainty as set out in the judicial statements already quoted.

Such a concept of law suggests a wholly stagnant society, and English society has rarely been so. It has in practice always been necessary for judges to assist the law to progress by deciding what are in fact novel cases arising out of novel social conditions. Traditionally the judges have disavowed any explicit innovatory activity. In deciding a novel case by analogy they were, they asserted, not making new law but applying old principles to new facts. The extent to which judges have respected this restriction on their explicit powers varies. In the last thirty years judges have begun to acknowledge openly that they can and do innovate. It is a power which is used sparingly, partly to avoid disturbing arrangements made in reliance on the law as understood at the time and partly because the judges accept that they are not equipped to make decisions with extensive general implications on the basis of arguments and evidence addressed to a specific dispute. This, as the judges routinely remark, is the function of Parliament, which reflects public opinion in a democratic manner, and can conduct a full debate and review.

English judges do however within these limitations make new law, and they inevitably do so in a political, social and economic context. The judges who declared in the 16th century that Uses (a predecessor of the Trust) were invalid at common law because they separated beneficial ownership from feudal obligations and restricted the free alienation of land were making a political and economic decision, just as the Chancellors who allowed the Trust to take effect in equity did. The Chancellors, as it transpired, were more in tune with political and economic reality in wishing to permit landowners more flexibility in family provision and it is their decision which "stuck" and forms the basis of modern English property law. When Lord Mansfield, in *Somerset's case* in the 18th century, declared that slavery was inconsistent with the erstwhile slave's presence in England he was overriding earlier decisions which accepted slavery and making a political decision.

Even such notorious judicial radicals as Lord Denning were at pains to justify their departures from traditional wisdom by reference to authority, and claimed to be finding the law in earlier decisions and the principles enshrined therein in the same manner, it would seem, as their more conservative brethren. It has, however, been demonstrated, either by the other judges at the time or by subsequent research, that the legal and logical basis of many of these unorthodox judgments is flawed (although that has not necessarily stopped them being adopted).

It is almost inevitable that a system of the kind we have been describing will place great weight on rights of property. This can be traced in many contexts: the relative severity of sentence for property offences as against crimes of violence; the preference of the rights of the original owner as against the acquirer when goods are stolen or obtained by fraud; the

limitation on restrictions imposed on occupiers of land in the public interest. Similarly, law seen in this way is an immensely conservative force in society, and it is, to an extent inevitable that it should be so, since much of the economic and social life of the country proceeds on the basis that the law is certain and consistent and will remain so. This is expressly recognised by judges on a regular basis in upholding decisions despite a cogent argument based on fairness or change of circumstance, particularly in areas where it can be assumed that commitments have been made on the basis that the current view of the law was right, particularly property dispositions and commercial transactions.

Continental legal systems do not share this origin. In most cases they are based on a legal code which is quite explicitly the work of a defined body of jurists and politicians at a specific time. Most such codes derive directly or indirectly from the work of the framers of the *Code Napoléon* who were influenced in their turn by Roman law as studied in renaissance Europe, the general philosophical ideas of the enlightenment, and to a limited extent by the native customary laws of the various provinces of France. It is of the essence of a codified system that the judges are the authorised interpreters and guardians of the code, but do not themselves make law. It is also usually conceded that the code, being a product of human endeavour, is humanly fallible, and incomplete. The Constitution of the USA is an interesting hybrid in this respect. Although in one sense just as much a product of the enlightenment as the French Constitution and Code, it has been interpreted by common lawyers in a robustly common law tradition. It now clearly has almost sacred status; it can be interpreted but not challenged or restated.

Despite this radically different attitude to law, it is notable that the codified systems have developed something akin to a doctrine of precedent. The French call it *jurisprudence constante*, and the Germans *ständige Rechtsprechung*. In each case, it means that a judge called upon to interpret the code in relation to a dispute before him is entitled to consider how other judges have interpreted the relevant provisions and follow that interpretation, notwithstanding that it is his constitutional duty to interpret the code himself. There is no good reason for the application of the law to vary capriciously with the whim of the judge, and many good reasons for there to be a consistent approach. It must however be understood that the judge chooses to make his consistent ruling based on previous practice. He is not constrained to. The common law judge is, at least in theory, so constrained, and must rule in accordance with existing binding law where it exists whether it chimes with his sense of law and justice or not. We shall, however, see that this theoretical obligation is not always honoured; sometimes a judge will fudge the issue in order to reach a decision which he regards as just as between the parties. There are also cases where the analysis of prior law avails little because the litigation in question raises issues which are not covered by precedent. In such cases a policy decision must be taken.

The similarity between the results obtained by the two systems, and some relatively superficial assimilation of techniques should not blind us to the fact that two entirely different intellectual processes are at work in the common law and civil law methods. The task of the common law judge is to establish the law by an inductive process of reasoning, bringing together the existing rules and comments and creating a synthesis. The task is then renewed for the next case. For the civilian, this synthesis has been performed by the codifier, and an authoritative statement of the law made. This is then deduced from the known text and applied to the facts in hand.

Codification of the common law is possible. The Sale of Goods Act, Partnership Act, Bills of Exchange Act and Factors Act were all the fruits of a late Victorian attempt to codify commercial law. There is a draft Criminal Code in circulation, and other common law jurisdictions have codified various areas (e.g. the US Uniform Commercial Code). The Law Commission or ad hoc teams fulfil the role of the codifying commission. The relationship

between the code and the previous law is the same, but of course as the code comes to be interpreted in later cases, these decisions become binding, rather than persuasive.

Which Decisions are Binding: Procedural Issues

Clearly not every decision is equally authoritative. All decisions are of course authoritative as between the parties to the litigation. The question is whether they are authoritative in the sense that they provide a definite answer to future disputes.

The first point to note is that an authoritative decision, or precedent, is only authoritative as to the law. There is no precedent of fact. This point cannot be stressed too strongly. What must be looked for is the legal principle. However, legal issues do not arise in a vacuum, but in the context of a specific dispute. In order to ascertain the legal nature of the dispute, and therefore the legal rules to apply, it is necessary to establish which factual issues contribute to the legal issue, in other words which facts are material to the legal nature of the dispute.

The essence of the common law approach is therefore to establish the material facts and select the relevant rules of law. It is therefore a process of selection and narrowing. Originally the formal rules of procedure were designed to assist in this respect. The claimant was allowed to state his initial claim fairly widely, but thereafter the parties were required to state their case formally in increasingly narrow terms until a single disputed issue, either of law or fact, was established, and it was to this point that evidence was directed and on which legal argument was based. This brief description does no real justice to a very sophisticated set of rules and principles, but as they no longer apply, it is unnecessary to burden you with more detail. You should however remember that any case decided before the late nineteenth century (and a surprising number of them remain relevant) was prepared and argued under these procedures.

If the parties agreed the facts but disagreed as to their legal effect the case was argued on a demurrer, usually before a court comprising four judges. If the dispute was initially factual, the facts were found by a jury and the parties could then argue as to the legal effect of the facts as found. In any event, it was usually clear what the issue and ruling were, although if the case genuinely raised two or more separate issues the system found it hard to cope.

This system was rejected in favour of a system of pleading designed to clarify the issues, and to resolve what matters were not in dispute. There is however no need to narrow matters to a single issue, or to choose at an early stage whether to argue fact or law. It is surprising how often when reading a report of a case at first instance one sees that the whole basis of the case has been altered at the last moment. Indeed Lord Denning once remarked that there was (or should be) no need for a party to set out his cause of action (i.e. the legal basis of his claim) in advance at all. It was enough that he set out the facts on which he relied. The court, with the assistance of counsel, could work out the legal implications of those facts.

It has for many years been an article of faith that the new system was more flexible, less technical and more apt to produce justice. Recently there has been concern that it leads to prolixity, and to a waste of time on proving facts which are not probative of any matter which is actually in issue. There is therefore now much more emphasis on clarifying the precise issues, and greater use is made of skeleton arguments to clarify the nature of the legal arguments.

Which Decisions are Binding: The Hierarchy of Authority

Some decisions are inherently more likely to be authoritative than others because in them the court is addressing an issue of general relevance, and either filling a gap in previous decisions,

or modernising the approach of the law, while in others the issue is either factual or of interest only to the parties (e.g. decisions on the interpretation of a particular document; unless the identical terms appear in the identical context it is unlikely that the court will regard a later case as being on all fours and the earlier case will be irrelevant). There is however another, institutional, basis of authority. This has to do with the seniority of the court which made the decision in question.

The Court of Justice of the European Communities (CJEC or ECJ)

This is now the highest court in the legal system of which the UK forms part. Its decisions are binding on all UK courts, including the UKSC, by virtue of s3 of the European Communities Act 1972. It is not itself bound by any rule of law to follow its previous decisions, but it tends to do so. This tendency has become more marked in the last decade. In part this is because there are now many more decisions which can be prayed in aid. There is however a discernible change of style, with basic points being established in judgments by citation of earlier decisions rather than a reasoned explanation based on first principles. It is generally acknowledged that common lawyers both on the ECJ bench and arguing before it have influenced the process.

The Supreme Court

Under the Constitutional Reform Act 2005 the former appellate jurisdiction of the House of Lords was transferred to the Supreme Court of the United Kingdom, which commenced operations in October 2009. Decisions of the Court are binding on all other courts in the UK. It is not bound by its own previous decisions, i.e. it can reconsider a point and modify its decision. The power to do so was stated by the House of Lords in a Practice Direction in the 1960s. This has not been formally re-issued by the Supreme Court, but continues to apply. The House of Lords rarely used the power to reverse itself, although there are one or two issues, such as the scope of attempt in criminal law, which have caused much anguish and reversal of opinion. This renders somewhat ironic the passage in the Direction which refers to the need for certainty in the criminal law. More weight has been given to the other proviso about not interfering with the basis on which contracts and other property transactions have been entered into. Decisions on Scots and Northern Ireland appeals are equally binding in England unless the law is different. (Generally contract and tort cases are based on the same law, while property cases are not.)

The Court of Appeal

Decisions of this Court are binding on all other courts and tribunals (e.g. Employment Tribunals) in England and Wales.

The Court of Appeal binds itself, subject to certain exceptions:

Where there are conflicting decisions of the CA it can decide which to follow.

Where there is a decision of SC/HL which is inconsistent with a CA decision, the former prevails.

It is not bound to follow a decision made *per incuriam*. I.e. a decision made without taking account of a relevant statute or case.

When he was Master of the Rolls (i.e. it head of the Court of Appeal), Lord Denning sought unsuccessfully to establish a general right for the CA to depart from earlier decisions. There is

no need for the CA to be able to reverse itself. An appeal will lie in any appropriate case to the SC, and where there is a clear decision in the CA there is provision for a leapfrog appeal which bypasses the CA and the expense of a futile hearing there.

Divisional Courts

These are formally sittings of the Queen's Bench Division, but they are normally presided over by a Lord Justice. Much of their work is hearing appeals from magistrates courts on points of law and procedure. Their decisions bind magistrates courts.

Apart from the above there are no courts whose judgments bind others as a matter of law. These are therefore the only sources of binding precedent. There are however a number of sources of decisions which are persuasive precedents.

The European Court of Human Rights

Decisions of ECtHR were persuasive to a limited extent even before the enactment of the Human Rights Act. Guidance could be sought on issues where there was no direct English authority, or where UK statutes were designed to achieve the same objective as ECHR: *Nottingham City Council v Amin* (2000).

Courts now have to "have regard" to these decisions, but it must be noted that decisions relating to another member state may need to be treated with particular caution: the case may relate to laws or procedures which are substantially different, allowance must be made for some states with no long history of human rights observance, and there is a 'margin of appreciation' whereby the ECtHR accepts that in some cases there are varying standards and the national courts are often better placed to assess what is appropriate than a pan-European body.

The Judicial Committee of the Privy Council

This is technically not an English court and therefore outside the hierarchy. The modern practice is however to recognise that the PC is in effect the Supreme Court under another name, and to treat its decisions as equally authoritative. Cf *Re Polemis* and *The Wagon Mound (No 1)*. They are certainly cited as freely to supply legal arguments.

Other Common Law Courts

Decisions in Commonwealth courts, especially those of Australia, Canada and New Zealand, and in US courts, are persuasive so long as the law of the other jurisdiction remains comparable with English common law on the matter in issue. As American common law has been diverging for 200 years, it is now often of less utility as a comparator. The degree of persuasiveness will also depend on the eminence of the judges. The same is true of Scots and Irish decisions where they adopt the common law. It should be noted that there has been a decline recently in the extent to which Canadian and Australian judges have drawn assistance from English cases. There is some evidence that there is a Commonwealth common law which is diverging from the English version in some areas (and the Privy Council has acknowledged this). However, as there has been greater reference by English judges to Commonwealth decisions, we may also be seeing a shift in the pecking order. It is usual for a low status

system to seek guidance from a high status one. At present the position seems to be one of rough parity.

First Instance Decisions

First instance decisions in the High or Crown Court are not formally binding on other judges at first instance, or on the County Court or magistrates. Nevertheless a High Court judge will usually hesitate before declining to follow an earlier decision, especially if there is a series of consistent decisions. This presupposes that there is no higher authority. This is often the case in property matters, where a ruling by a Chancery Judge is regarded as final, and reluctance to disturb a ruling, even where it is possible, is all the greater when it is likely that property dispositions have been made on the strength of the earlier ruling. Rulings in the County and Magistrates Courts are rarely reported. They are only weak persuasive authority even if reported, since there is no guarantee that the legal issues have been fully researched and argued, and the esteem in which the judges are held is not great.

Law Reporting

Strictly a case is not an authority unless there is a report of it authenticated by a barrister. Originally reports were prepared by barristers privately. Some of the early reports are in effect the reminiscences of the advocates for the parties and/or the judges. They are sometimes far from impartial, and often far from contemporary. Later reporters were professionals, but the quality of their work varies. Modern reports (in this context dating from the establishment of the Incorporated Council of Law Reporting in the 1860s) are generally technically excellent.

The Law Reports are the premier reports. The text of the judgment is revised by the judges; they also summarise counsel's arguments, which is sometimes instructive.

The All England Reports (and the Reprint, which contains the most relevant of the old cases) are also good.

There are a number of series of specialised reports. Details are contained in the [NOW Legal Resources Learning Room](#). They tend to report more decisions in their sphere than there is space for in the general series. Some of them, in common with the reports in the national press (especially *The Times*), only provide a précis of the decision. This can be misleading, as one is reliant on the editor to summarise accurately. When the Hillsborough case on nervous shock was reported in the newspapers at Court of Appeal level, only one judgment was summarised. In fact, although there was unanimity on the main issue of proximity to the incident, this judge was in a minority on the issue of proximity of relationship, but this was not apparent from the précis, which was therefore misleading.

It is good practice to rely on the best available report. Increasingly the transcript of the report is freely available on-line, through BAILII: <http://www.bailii.org/databases.html#uk> There are also other paid for legal databases, which also provide reports, and also analysis and academic articles.

All decisions now have a 'neutral reference' for the transcript which identifies the court, date, and decision number, e.g. [2010] UKSC 21.

A modern problem is that the number of cases decided and reported has increased, and accessibility of reports has improved as a result of better library facilities, use of LEXIS, Westlaw, LAWTEL etc. Many of these cases add nothing to the law, but as they are there in the

databases, solicitors and counsel must look them up, just to be sure that they are not significant. Having looked them up, the temptation is to cite them to the judge, partly to prove one's thoroughness and erudition, and partly in the hope that the judge will seize on a formulation of a basic legal proposition which is slightly more favourable to the client's case than the generally accepted one (a legitimate tactic) or that the judge will be seduced by factual similarity. The problem has become so acute that a Practice Direction was issued by the Master of the Rolls in May 1996 forbidding the citation in court of unreported decisions unless counsel could certify that there was a substantive proposition of law (not merely a convenient form of words) not to be found in a reported case.

This is not in any way to decry the value of research. However the point is that, once the research has been done, it is necessary to select the proper materials in order to deploy an argument. There is a lot of cant about "thinking like a lawyer." If this phrase means anything, it is the ability to sift through the raw facts of a situation, whether it be the plaintiff's case in a negligence action, or instructions for a complex settlement of the property of a wealthy industrialist to minimise tax, select the significant or "material" facts, and apply the relevant rules of law so as to achieve the client's objectives to the maximum extent legally permissible, and as economically (in terms of money and other resources) as may be.

You should never forget, although academic lawyers often do, that law is a practical exercise. In the everyday world people wish to conduct their lawful affairs efficiently, vindicate their rights if they are infringed and be effectively protected against wrongful accusation or interference by the state or others. There is great merit in the law being coherent and accessible in order to achieve these practical goals.

What Part of the Decision is Binding, or: Ratio and Obiter

All judgments are divided into three parts, an account of the facts of the case, a discussion of the relevant law and an actual decision. In a decision at first instance the account of the facts will include the judge's findings on the matters of fact which were in dispute, while in an appellate decision the account of the facts is essentially a summary of the facts found below to assist comprehension. In most cases only the leading speech will contain the facts in detail, and there is a growing tendency for appellate courts to refer to the trial judge's account of the facts. This is inconvenient for the reader, who thus needs access to both reports.

Sometimes the appellate judges will interpret the facts in a different way. They are reluctant to do so in a way which implies a different view of the veracity or reliability of witnesses, because they have not had the "advantage of hearing and seeing the witnesses," but there is no absolute prohibition even on this.

Some judges now go to the trouble of setting out their judgments with sub-headings, and this is very useful to the reader, who is guided to the relevant passages more easily. When this is not the case the distinction within a given judgment between the general discussion of the law and the actual decision of the case is not always clear.

Decisions of the ECJ do not adopt the same pattern. They do contain an account of the facts of the case, and an analysis of the legal issues raised by those facts, but there is little if any discursive treatment of the law, and the actual decision is comprised in a single fairly terse paragraph for each issue.

Ratio Decidendi and Obiter Dicta

The legal interest of a case centres on the actual decision and the basis for it. This is the *ratio decidendi*, literally the reason for the decision, sometimes shortened to "ratio". Everything

else is ***obiter dicta***, literally sayings by the way, sometimes shortened to “obiter”, or “dicta”. These dicta may include dissenting judgments, discussion of arguments submitted by counsel which are rejected by the judge as a basis for deciding this case, analysis of hypothetical or analogous cases and generalisations beyond what is necessary to decide the case.

If the case was decided by a court which will bind the present one, it is crucial to extract the ratio, as this alone has binding force. If the case being considered is only of persuasive authority, it is less vital, since all *obiter dicta* are persuasive. It is generally thought that the ratio of a case has been more carefully thought through, since it represents the judge's actual disposal of the case and adjudication of the rights of the parties, whereas *obiter dicta* have no direct effect, and may represent provisional thinking which has not been rigorously assessed in the same way (indeed judges often refer in obiter to a “provisional conclusion” or words to like effect). Subject to this observation it is of course entirely a matter for the judge how persuasive he finds a particular case or argument.

These issues can be conveniently explained by reference to a celebrated decided case. [*Donoghue v Stevenson \(1932\)*](#). This case which, as it happened, arose in Scotland, has been regarded as the foundation of the modern law of negligence. The pursuer (Scottish terminology for claimant) alleged that when visiting a cafe in Paisley her friend bought her an ice-cream confection called a ginger beer float. The ginger beer, which was manufactured by the defender (defendant), came in the traditional opaque bottle. The pursuer poured part of the contents of the bottle over her ice-cream and consumed it happily. When she emptied the bottle the remains of a decomposed snail floated out. The pursuer, it was alleged, then became seriously ill, although it is not clear whether this was the result of ingesting toxins or was psychosomatic. She also offered to prove that the defender's system of manufacture was careless in that empty bottles were stored in a shed to which snails etc. had access. In the past it had been held that responsibility for defective products was exclusively contractual. This did not help Mrs Donoghue, because she was not the buyer and had no contractual claim. The defender denied the relevance of her case, i.e. he asserted that, even if she could prove all she alleged, she still had no case in law. The case was litigated to the HL on this preliminary point, and, as usual in such cases, the truth of the pursuer's case (and hence the existence of the snail, her illness, and the unsatisfactory storage conditions) was assumed.

The House held, by 3-2, that there was a legal duty of care owed by those who put goods into circulation in circumstances where it was expected that they would be used or consumed without any intermediate inspection or modification to take reasonable care to ensure that they would not cause physical injury when used or consumed in the ordinary way. The speeches of the two dissentients, who refused to accept the existence of such a duty, are of course *obiter dicta* in their entirety. Because the basic proposition has now been universally accepted these speeches are of no value as obiter.

Lord Atkin went on from the case in hand to formulate the circumstances in which a duty of care should arise in the absence of a contractual liability. He postulated a general principle, known as the neighbour principle, in which he sought to recast the biblical injunction to “love thy neighbour” in a form which could be applied by the courts. He stated this in general terms as a duty not to harm those persons who are so closely and directly affected by one's activities that one ought reasonably to have them in contemplation as being so affected. This is equally clearly obiter; it goes far beyond the circumstances of the case. However, as it caught the prevailing judicial mood it has become one of the most cited and most followed dicta ever. It is however fair to say that its fame dates from the 1960s and 1970s, when judges referred to it with approval as the logical basis for their decisions in a new generation of cases exploring the boundaries of negligence. Following the decisions of the Supreme Court in [*Robinson v CC West Yorkshire*](#) (2018) and [*Steel v NRAM*](#) (2018) which stress the need to extend liability to novel

duty situations on an incremental basis it is not clear how far the neighbour principle will continue to be influential.

The scope of the ratio was in turn refined by a number of decisions which clarified that the rule did not apply to cases where the goods were modified or incorporated into a larger whole (e.g. *Evans v Triplex Glass*), which reminds us that the ratio is not in the last analysis, what the judge says, but how the judgment is analysed and evaluated in later cases. In other words it is the later interpreters who define the scope of a ratio. This of course means that the ratio is never set in stone, since further reinterpretation is always possible.

The primacy of the later interpreter was illustrated with force in [Mutual Life v Evatt](#). In this case the Privy Council were analysing the earlier HL case of [Hedley Byrne v Heller](#). This case established that there could, in principle, be liability for the negligent infliction of economic loss by way of a negligent mis-statement. This liability will only arise if there is a special relationship (either as a result of contract or some other special circumstance) where one party assumes responsibility for advising or protecting the other. The majority in the later case decided that the earlier decision was to the effect that there could be liability only in relation to the defendant's professional expertise, rejecting a wider construction based on a general business liability which was preferred by the minority. The members of the minority were in fact two of the judges who had decided *Hedley Byrne* and could therefore be assumed to know what they meant to decide in that case, but this was immaterial.

In theory it is the function of counsel to bring an authority to the attention of the judge, and to formulate the ratio that they contend for. In practice there are certain cases which are so well known that they need only the merest reference, if any, since the ratio is so well established. Further some judges will base their decision on cases which they are aware of but which were not cited.

As the above example shows, it is always for the later court to determine the ratio of the earlier decision, but this determination is constrained both by awareness of other interpretations of the *ratio* and by the knowledge that the decision is either itself appealable, or at least will be open to public scrutiny. This does not prevent the interpretation varying over time, but does make it a slow and relatively subtle process.

Thus in the early case of [Hadley v Baxendale](#) the court held that a plaintiff could recover damages for a breach of contract which were either the natural consequence of the breach (e.g. the cost of a replacement) or which could be said to be in the contemplation of the parties, usually as a result of discussion. This indicated a degree of actual knowledge. This decision is still the basis of the law today, but in their interpretation of it over the years the judges have extended the second limb in particular to a very considerable extent, so that there is now liability for consequences which ought to have been foreseen as not unlikely. This is a much more generous test to the plaintiff, since it includes not only actual knowledge, but the knowledge which a reasonable person might be expected to have (and also that it must be only an 'outside chance' rather than a likelihood. It has, however, come about by reinterpretation of authority rather than by any new departure. This extract is taken from [Transfield Shipping v Mercator Shipping](#) a decision of the Court of Appeal dating from 2007:

Hadley v. Baxendale itself is of course a case about a contract of carriage, between a carrier and a mill-owner. They were not in the same business. The carrier was carrying the mill-owner's broken mill-shaft, so that it could be copied and replaced, and the carrier was told as much. But he was not told that the mill could not work without a new shaft, because it had no spare. The broken shaft was delayed, and the mill-owner suffered loss of profits as a result. But those losses were held to be too remote. In the ordinary way a carrier would not have known that a mill would not have a spare mill-

shaft, and the "special circumstances" were not communicated to the carrier. The case demonstrates, in my judgment, as has come to be generally recognised, that there are not so much two rules, as two means by which a defendant may possess the knowledge necessary to make his liability a fair one. That knowledge may either arise from the "usual course of things", or from the communication of special circumstances, a point clearly made in the next case I cite.

Victoria Laundry (Windsor) Ld v. Newman Industries Ld [1949] 2 KB 528 concerned a contract of sale, of a boiler needed by a firm of launderers and dyers who were expanding their business. It was made known to the seller that the boiler was urgently required. The boiler was delayed in its supply. As a result the launderers suffered loss of profits, both in general and also of some especially lucrative new dyeing contracts. The critical part of the actual decision is contained in the following passage in the judgment of this court given by Asquith LJ (at 542/3):

"Secondly, that while it is not wholly clear what were the "special circumstances" on the non-communication of which the learned judge relied, it would seem that they were, or included the following: - (a) the "circumstance" that delay in delivering the boiler was going to lead "necessarily" to loss of profits. But the true criterion is surely not what was bound "necessarily" to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to "loss of business"; (b) the "circumstance" that the plaintiff needed the boiler "to extend their business." It was surely not necessary for the defendants to be specifically informed of this, as a precondition for being liable for loss of business. Reasonable persons in the shoes of the defendants must be taken to foresee without any express intimation, that a laundry which, at a time when there was a famine of laundry facilities, was paying 2,000l. odd for plant and intended at such a time to put such plant "into use" immediately, would be likely to suffer in pocket from five months' delay in delivery of the plant in question, whether they intended by means of it to extend their business, or merely to maintain it, or to reduce a loss; (c) the "circumstance" that the plaintiff had the assured expectation of special contracts, which they could only fulfil by securing punctual delivery of the boiler. Here, no doubt, the learned judge had in mind the particularly lucrative dyeing contracts to which the plaintiffs looked forward... We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected."

The distinction made here was between the normal expectation of the profits of persons in the business of launderers and dyers, and the unusually high profits obtainable on particular contracts. But there was no difficulty in the proposition that in the ordinary course of business, the wrongful delay in delivery of goods may cause a loss of profits for which the defendant will be held liable.

The principles restated by Asquith LJ at 539/540 have been influential, subject to the observations by Lord Reid in *The Heron II* (at 389E/G) that the test formulated as "reasonably foreseeable as liable to result" was acceptable only so long as it was intended to be understood as "foreseeable as a likely result": for "A great many extremely unlikely results are reasonably foreseeable". Of particular interest is principle (4) –

"(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v. Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable" (at 539).

The Heron II also concerned, like *Hadley v. Baxendale*, a contract of carriage, in fact a voyage charter with charterers, Czarnikow, who were sugar merchants, as the shipowners knew. A cargo of sugar was delivered late to its destination at Basrah. The shipowners were held liable for the difference between the value of the sugar in the Basrah sugar market at the date when the cargo should have arrived and its lower value at the date of arrival. Lord Reid's "not unlikely" test has been set out above. The other members of the House expressed themselves in similar, if not identical terms: see the headnote at 351E/F, eg Lord Pearce and Lord Upjohn spoke of a "serious possibility" or "real danger" (at 414F/415D, and 425C). However, the effect of the test cannot properly be appreciated without matching it with the facts as to the shipowners' knowledge, for instance as stated by Lord Reid at 382D/F:

"It may be well first to set out the knowledge and intention of the parties at the time of making the contract so far as relevant or argued to be relevant. The charterers intended to sell the sugar in the market at Basrah on arrival of the vessel. They could have changed their mind and exercised their option to have the sugar delivered at Jeddah but they did not do so. There is no finding that they had in mind any particular date as the likely date of arrival at Basrah or that they had any knowledge or expectation that in late November or December there would be a rising or a falling market. The shipowner was given no information about these matters by the charterers. He did not know what the charterers intended to do with the sugar. But he knew that there was a market in sugar at Basrah, and it appears to me that, if he had thought about the matter, he must have realised that at least it was not unlikely that the sugar would be sold in the market at market price on arrival. And he must be held to have known that in any ordinary market prices are apt to fluctuate from day to day: but he had no reason to suppose it more probable that during the relevant period such fluctuation would be downwards rather than upwards – it was an even chance that the fluctuation would be downwards."

Moreover, it is to be observed that in *The Heron II* the House of Lords declined to follow a previous decision of this court in *The Parana* (1877) 2 PD 118: as to which Lord Reid pointed out that at that earlier time the rule in *Hadley v. Baxendale* was applied more strictly, citing the "reasonably certain" language of this court's judgment in *The Parana* (at 123). He then continued (at 392C/E):

"If that was the right test then the decision was right, and I think that that test was in line with a number of cases decided before or about that time (1877). But, as I have already said, so strict a test has long been obsolete. And, if one substitutes for "reasonably certain" the words "not unlikely" or some similar words denoting a much smaller degree of probability, then the whole argument in the judgment collapses."

The Pegase [1981] 1 Lloyd's Rep 175 was another case of delayed delivery of a cargo, this time of chromite sand to be delivered under a bill of lading to receivers who required the sand for their business as resellers of such material to foundries. Arbitrators rejected

the loss of profits claim made by the receivers against the shipowners, and the receivers appealed by way of a special case. Robert Goff J remitted the award to the arbitrators for them to make an appropriate award in the light of the principles stated in his judgment, in which he succinctly stated his conclusions regarding a wide-ranging review of the jurisprudence (see at 181/183). For instance:

"Now, as I have already said, the law has not stood still since *Hadley v. Baxendale*. First, the principle originally enunciated in that case has been restated, in particular in two cases ... *Victoria Laundry* ... and ... *The Heron II* ... The general result of the two cases is that the principle in *Hadley v. Baxendale* is now no longer stated in terms of two rules, but rather in terms of a single principle – though it is recognized that the application of the principle may depend on the degree of the relevant knowledge held by the defendant at the time of contract in a particular case. The approach accords very much to what actually happens in practice; the Courts have not been over-ready to pigeon-hole the cases under one or other of the so-called rules in *Hadley v. Baxendale*, but rather to decide each case on the basis of the relevant knowledge of the defendant ...

Lord Denning (a very celebrated judge in the second half of the 20th century) was very fond of carrying out his own research and then deciding cases on the basis of that research rather than the case as argued in court. In one way this is a good thing; clearly the erudition of judges should be harnessed, and it could be said that there is no point in reserving judgment unless such research is to be done. On the other hand, such conclusions have not been subjected to the cut and thrust of forensic debate, and might not stand up to it. Indeed some of Lord Denning's own research has been followed up, and it is suggested that he was guilty of selective citation and other errors. As a result, arguments which appeared persuasive at the time are now doubted, as in the *High Trees House* case.

There is a further difficulty with the ratio in cases where there has been more than one judgment. English appellate courts sit collegially, usually in panels of three or five, although two is possible for the sake of expedition in the Divisional Court and Court of Appeal and seven, nine or eleven can be empanelled for greater solemnity in the Supreme Court (e.g. when an earlier decision is to be overruled, or the case has major implications).

Each judge is entitled to deliver his own judgment. Sometimes they do not, and there is a single decision, which may be the judgment of the court, or the work of one member of the court after all have agreed in principle. The other judges simply concur, or possibly add comments on peripheral issues. Such decisions are not seen as inherently weightier than others, but tend to be easier to interpret and apply since there is clearly only one source of the ratio, even though that one judgment is no more likely to be free of ambiguity or room for interpretation than any other.

There may of course be dissenting judgments, but these are by definition obiter. This does not mean that they are without influence. The dissent of Denning LJ, as he then was, in *Candler v Crane Christmas & Co* formed the express basis of the decision of the HL in *Hedley Byrne v Heller* fifteen years later, and the HL dissent of Lord Atkin in *Liversidge v Anderson* is seen as a high point in the judicial defence of human and civil rights.

The ECJ, following what appears to be normal continental practice, always delivers a single collegiate judgment in the name of all the judges sitting, although in fact there may be differences of opinion both as to the result and as to the reasoning. These never see the light of day.

Further problems arise where the judges, although agreed on the result, exercise their privilege of delivering separate judgments. At the least, each will put his own stamp on the decision by the use of a different form of words, and this will give counsel in future cases wide scope for arguing in favour of a particular interpretation by relying on the judgment which adopts a tone closest to that which meets his purpose. This fate has befallen *Hedley Byrne* among many others.

The problem is compounded if the judges, while agreeing on the result, reach that conclusion for different reasons. This became almost a hallmark of Lord Denning's judgments in his last years on the bench. It has indeed been suggested that some of his more radical judgments were consciously intended to lay down markers for future development of the law along lines favoured by Lord Denning, but which were not generally accepted, rather like *Candler v Crane Christmas & Co*. Thus far his hopes have not been realised, as the period following his retirement has been one of retrenchment rather than progress.

In such cases the ratio is the basis of decision relied on by the majority. This can itself be problematical, as the case of *Chaplin v Boys* demonstrates. The facts are complex and abstruse (which may explain the outcome and certainly explains why you are not expected to read the case at this stage). The judge at first instance found for A. The Court of Appeal, by 2-1 found for B. The two judges in the majority each relied on a different reason and the judge in the minority had a different reason for considering that A should succeed. All rejected the reason given by the judge at first instance. The House of Lords rejected A's appeal by 3-2. Three arguments were relied upon in reaching this decision. No more than two judges relied upon any ground, and those who were not for a given ground expressly rejected it. The minority would have found for A on other grounds not relied on below. Although B undoubtedly won, it is difficult if not impossible to ascertain a ratio in a case of this kind.

Dealing with Unwanted Precedents: Judicial Lawmaking

In theory, as we have seen, common law judges do not make law, they merely declare how the law applies in a novel situation. This is of course in no sense an adequate account of what judges do. This is not the time to discuss what judges actually do in deciding cases. You have too little data to evaluate the propositions relating to what is both a politically and Politically contentious issue. It is however a point on which you ought to be developing your own perspective, and one which your lecturers will be happy to debate at any time. Until relatively recently the judges as a body firmly maintained the theoretical position as their standpoint. In some case it was no doubt true, in that the judge in question was never consciously influenced by anything other than precedent and orthodox legal submissions from counsel and decided the case accordingly.

Other judges were however well aware that they were being asked not merely to fill gaps, but to make new departures. Sometimes this was a slow process, as in the move from a subjective to an objective test for the formation of a contract, which occupied the middle third of the C19, while sometimes it came suddenly, as in *Smith v Baker* where the HL disallowed the defence of *volenti* (or consent to the risk) in an industrial accident case on the basis that a worker carried on in a dangerous occupation because he wanted the wages, not because he consented to the risk of injury. It was not of course possible to admit to judicial lawmaking, so even the most epoch making cases are ostensibly decided on the basis of earlier authority.

Respect and Subversion

The common law method is a combination of respect for authority when this is perceived by the judge in the light of his conception of law and the society served by that law as being still

right and appropriate, or at least binding, and express or tacit subversion of that authority when it is perceived as out of date or otherwise inappropriate.

A decision which does genuinely respect authority is easy to formulate. The earlier cases are analysed and the parallels with the instant case established. The decision then follows logically.

A decision which acknowledges authority as binding while the judge feels that the law needs reform is also relatively easy. The same process is undertaken, but the judge adds to the decision a comment on the unsatisfactory nature of the law he has just applied, coupled with a suggestion that Parliament should consider an appropriate reform.

A subversive decision requires more subtlety. The main tool of tacit subversion is a creative approach to authority.

This may involve the reinterpretation of an earlier case, as has happened over the years to *Hadley v Baxendale*.

It may involve seeking to widen the ambit of an earlier case which is approved of so as to put the current case on all fours with it and therefore to be treated alike. This may be legitimate if the similarity is indeed there, and it is sometimes difficult to draw the boundary. Indeed it is possible that some judges do not consciously realise that they have crossed the boundary.

Conversely it may involve narrowing the *ratio* of a decision which the judge does not wish to follow so as to distinguish it from the present case. This process of distinguishing is of course also used quite legitimately to discriminate between unlike cases.

It may involve the denial of legitimacy to the earlier authority, by arguing that the decision was *per incuriam*, i.e. made without considering some relevant authority, statute or rule of law. One celebrated example is Lord Denning's dismissal, as a puisne judge, of the HL decision in *Foakes v Beer*, to the effect that a promise to forgive part of a debt is not binding for want of consideration as being *per incuriam* the Judicature Act 1873 which provided that the rules of equity should prevail over the rules of law. His Lordship thought that a court of equitable jurisdiction would have enforced such a promise. This was accepted at the time, but is now generally doubted.

A further tactic is to analyse the case so that there are found to be two conflicting lines of authority, and either to declare that the preferred one is weightier and must be followed, or that they are equal and the judge therefore has a free choice. As with distinguishing cases and drawing analogies this is a tactic which may be used either legitimately or illegitimately. In

each case the accusation of illegitimacy will come from those who are not persuaded by the logical or rhetorical force of the arguments deployed.

The acid test is whether the allegedly illegitimate argument is adopted in future cases. Thus when Lord Wilberforce set out in *Anns v Merton LBC* a "two stage test" for the existence of a duty of care in negligence, this was for a time accepted and indeed extended, with the effect of extending the classes of case in which an action would lie. Then it began to be felt that the balance had been tilted too far, and in a series of decisions the test was restricted, not applied and disapproved. It has now been wholly discredited. This has of course merely led to the replacement of one orthodoxy with another (see, in this particular case *Caparo v Dickman*). Sometimes the new departure is never adopted. This was the fate of a ruling by the House of Lords (led by Lord Roskill) in *Junior Books v Veitchi* that economic loss, which is normally recoverable only in contract and not in tort, was nevertheless recoverable in tort when the relationship of the parties was a particularly close one, as in the case of a building owner and a nominated subcontractor.

Acceptable Judicial Innovation

It is now accepted that the UKSC has a legitimate and overt, if limited, capacity to extend the law, providing it does so within existing categories. The Court of Appeal, and indeed judges at first instance have the same power, but it is significantly constrained by the existence of binding authority. It is rare for decisions at first instance to acquire significant authority as stating an extension of the law, but there are instances, such as *Wilkinson v Downton* and *Midland Bank v Hett, Stubbs & Kemp*.

The Court of Appeal has more scope in this respect. One significant example is the line of cases in the 1940s and 1950s which protected consumers against exorbitant exemption clauses in Hire Purchase and sale agreements. These were prima facie permissible because of the doctrine of freedom of contract, but were in practice an abuse of the bargaining power of the finance houses. The chosen mechanism was a rule of construction, the *contra proferentem* rule, which states that any provision in an agreement is to be narrowly construed against the interests of the party at whose instance it was inserted. This enabled the courts to give effect to a consumerist principle of fairness of contract in such cases, the explicit introduction of which would have required, and ultimately got, the sanction of Parliament, in the form of the Hire Purchase Acts, Unfair Contract Terms Act, Supply of Goods (Implied Terms) Act and Supply of Goods and Services Act (now the Consumer Rights Act 2015).

The UKSC is of course free to act on principle. This means that it is free to determine the limits of a rule. This was what occurred in the Hillsborough disaster litigation. It was well established that a person could claim damages for nervous shock (i.e. post traumatic stress disorder or some other recognised psychiatric illness) arising from actual sight of harm or threat of harm to his close family, or the immediate aftermath of that harm. The claimants in Hillsborough sought to extend this in two ways. Firstly they wanted the concept of close family extending to cover all blood relationships and close friendship. Secondly they wanted watching a disaster unfold on television to be equated to actual presence. They succeeded at first instance, but failed on appeal. The failure on the first point was partial, as it was accepted that evidence could be brought to prove the closeness of a relationship other than that of parent and child or spouses, which were presumed close enough. Failure on the second point was total. The House of Lords was not prepared to authorise an extension of liability which went beyond what it was just and reasonable to impose on those responsible for disasters. The existing limitation to those actually on the scene was upheld.

The ECJ is primarily concerned with statutory interpretation. It has however already given a number of landmark decisions. These in turn are relied on as authoritative, and so a species of EU common law is developing. It is really too early to determine the shape of this, and in any case the jurisprudence of the court is better studied all of a piece so we will leave it till later.

Human Rights

Introduction

These notes cover some basic principles of Human Rights law as well as both the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the UK legislation and case law.

It is important to note that, while the UK has, in theory, respected the general principles, and has indeed helped to develop some of them, it did so by its own means, which typically involved specific restrictions of the powers of the state, rather than through a positive endorsement of a constitutional statement of political, civil or human rights. Until 2000 even the ECHR did not apply directly in the UK, although citizens did have the right to apply to the European Court of Human Rights (ECtHR) in Strasbourg, and the UK government accepted the judgments of the ECtHR.

Since 2000 the Human Rights Act 1998 (HRA) has substantially incorporated the substantive provisions of the ECHR into UK domestic law. However, it has done so in a very sophisticated manner, so as to respect the doctrine of Parliamentary Sovereignty, and the courts are taking some time to establish exactly how the HRA interacts with the rest of the law. This is a topic we will be considering in some depth.

Please also note that some cases are indicated in bold in the text. These are some of the most important cases in the field, both in the European Court of Human Rights and the English courts.

Principles, Origins and Developments

Human Rights are, effectively, all the entitlements which society recognizes as inherent to all its members. Not all societies recognize the same rights and not all have the same status.

The generally accepted origin of a 'rights based' approach is social contractarianism. Philosophers such as Locke sought to provide a theory of society by reference to a contract between the citizen and the state. Citizens provide the state with resources and coercive powers on condition that these are used to ensure 'life, liberty and the pursuit of happiness.' These arguments, as developed by later Enlightenment thinkers such as Montesquieu (*L'Esprit des Lois*), were very influential in the later 18th century, and are fully articulated in the '*Rights of Man*' by Tom Paine, and given legal effect by the American and French revolutions. Each produced a seminal human rights document.

The United States Constitution as originally drafted was very much concerned with the machinery of government. It was soon supplemented by a body of ten amendments collectively called the 'Bill of Rights'. These remain crucially important to the operation of US society to this day, and indicate clearly the rights regarded as crucial at the end of the 18th century.

The French in turn produced their own version, reflecting the same general principles but applied to French conditions. Both of these are provided as annexes to these notes.

In each case it was a 'middle-class'/'intellectual' revolution against a 'monarchical'/'absolutist' former regime. These rights were being claimed for 'society' at large, which at the time meant primarily for the educated, propertied classes, rather than for the 'excluded and the wretched of the earth'. Indeed until much later the notion of full citizenship for all was not a core part of the agenda.

The particular set of rights we are directly concerned with are those central to the modern liberal 'Western' democracies. They have a close family resemblance to the 18th century versions we have looked at, but have also evolved with time. The then current set of rights, principally, but not exclusively, civil and political, rather than social and economic rights, was conceived of as being one of the essential distinctions between the Allies (the original 'United Nations') and the German, Italian and Japanese dictatorships to which they were opposed in the second world war.

The post-war period provided an exceptional 'window of opportunity' in which states turned in horror from genocide and mass terror and actually 'enacted virtue'. These rights found expression in the United Nations Universal Declaration of Human Rights. The Universal Declaration was, and remains, declaratory only. It has been supplemented by further universal documents (e.g. the Convention on the Rights of the Child and the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights. These are 'policed' by the UN Human Rights Committee, in the sense that the position in various states is monitored and reported on, but carry no legal enforcement mechanism unless a state voluntarily accepts this, which the UK has not.

A number of Western European states determined to formulate their own, regional, version of the Universal Declaration. They did so against the background of Nazi atrocities and disregard of legality, and with an eye to similar abuses east of the Iron Curtain.

The resulting document, the European Convention on Human Rights and Fundamental Freedoms (ECHR), clearly has a close relationship with the Universal Declaration. In many cases the wording is identical or virtually so. However many of the social rights are not included (the right to work, to social security, to leisure and to access to culture, for example, while the right to property and education are in a protocol).

The unique feature of the ECHR is however that it not only declared rights but provided a means of enforcement. The signatory states agreed to an adjudication procedure. Originally the primary mechanism was for one member state to lay a complaint about another, with an optional right of individual petition.

State cases are rare (though often momentous cf the *Greek case* and *Ireland v UK*) and the individual applicant is the norm (and the right is now mandatory: Art 34). The original procedure provided for an initial consideration by the European Human Rights Commission, which produced a report similar to a judgment. These are regarded as useful sources of commentary, especially where the case did not proceed to the court. This system was overhauled in the 1990s, and there is now a single court, which deals with all applications from the start. The Convention comes under the auspices of the Council of Europe.

The number of applications to the Court has grown very substantially. There were over 60,000 in 2010 and 2011, but the great majority prove to be inadmissible, or to be 'repeat cases', new examples of an issue (such as serious delay in the Italian civil justice system) which has already been considered, and the number of substantive decisions on the merits is about 1,500 annually. There is a considerable backlog of cases, which increased substantially in recent years, but now appears to be under control. There are currently over 55,000 cases 'in the system', although Russia, Ukraine, Turkey and Romania account for over 50% between them. This total number has reduced from 160,000 four years ago. Cases are allocated to a particular

judge, and are initially considered by a committee of three judges, who may unanimously reject the case. If not the case is allocated to a Chamber of seven judges, who will rule on both admissibility and the merits, unless they decide that the case is so important that it should be heard by a Grand Chamber of 17 judges. It is also possible to ask for a decision of a Chamber on the merits to be reconsidered by the Grand Chamber. There are a total of 47 judges, one for each participating state, but the full court sits only for administrative purposes such as electing the presiding judges. Various proposals for streamlining the procedures have been made. For those interested, the annual report of the Court for 2017 is at

https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=#n15168722630008924978554_pointer and the statistical summary as at 31 December 2017 is at https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf

CONTENT AND APPLICATION OF THE CONVENTION

We have already looked at the background to the ECHR; this is clearly reflected in the

Preamble to the Convention:

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Much of what is agreed relates of course to the procedures of the ECtHR. Only the first 18 of 59 Articles deal with substantive issues.

Scope and Coverage

ECHR applies to anyone within the territory of the state. It is not dependent on nationality or status (Art 1).

States may include territories for which they are responsible (e.g. in the case of the UK, Isle of Man, Channel Islands and Gibraltar).

ECHR may be relied on before ECtHR only where all domestic remedies are exhausted. It has been held that this only applies to actually available remedies, so where legal aid is refused for an appeal, that appeal is not actually available.

Nature of the Convention rights

The convention rights are largely civil. They include the classical liberal rights to life, liberty and freedom from interference (although property appears in a protocol). Economic rights are not included, and only some social rights. Those included are those in the foreground in the aftermath of WWII.

While the rights are universal, it tends to be those on the margins of society who need the protection they afford. Democracy is 'majoritarian', it privileges the interests of 'average' or 'normal' people. Heterosexuals have a legal framework for their relationships ready to hand – homosexuals and transsexuals do not.

Three classes of rights can be distinguished, based on the extent to which they are absolute; while most commentators agree on this three-way classification, the terms used vary:

Unconditional rights (e.g. Art 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.) These are apparently absolute and peremptory in tone. The only interpretation required is of the meaning of the terms.

Conditional rights (e.g. Art 2, where the right to life is stated unconditionally, but a number of specific derogations are specified). In these cases it is necessary to examine whether the derogation applies.

Qualified rights (E.g. Art 10, which initially states a broad right to freedom of expression qualified by a broad set of restrictions which are 'prescribed by law' and 'necessary in a democratic society' for a variety of specified reasons). These require the most complex analysis:

Is there a prima facie infringement of the right (which may involve a close examination of the scope and rationale of the right, although in many cases it is fairly obviously the case) If so is any restriction 'prescribed by law' (i.e. imposed by a clear and accessible legal rule) If so, is it imposed for one or more of the specified reasons.

If so is it 'necessary in a democratic society'. This has been reinterpreted as 'does it meet a pressing social need'. It is accepted that democratic societies may approach matters differently and have different priorities and values, so there may be a range of answers ('the margin of appreciation') but the basic approach is whether what has been done is the minimum necessary to achieve the legitimate objectives of society with the least possible encroachment on the rights of the individual.

A good example is *Handyside v UK*. H published the 'Little Red Schoolbook'. He was successfully prosecuted under the Obscene Publications Act on the basis that certain passages relating to sex and drugs failed to indicate what was legal and what was not and might 'deprave and corrupt' some adolescent readers.

Vertical and Horizontal Effect

The Convention binds States. It therefore has what is known as 'vertical effect'. An individual can rely on it against the State. This means the State in a broad sense, including the central executive, local or devolved executive organs, the police and armed forces and also the courts. It does not bind individuals directly, but the liability of the state may be engaged if it does not adequately protect an individual from actions by another which infringe his rights. Corporal punishment may be inhuman or degrading treatment. When imposed by the state (as in *Tyrer v UK* – judicial birching in the Isle of Man) this clearly comes within Art 3. In *A v UK* it was ruled that the UK had not adequately protected A, who had been severely beaten by his stepfather, who successfully relied in criminal proceedings on a defence of parental chastisement, endorsed by the courts, which was held to give excessive leeway to the defendant. This is sometimes referred to as the positive obligation of the state.

This positive obligation is particularly important in relation to Art 2. It requires the state both to take particular care of those in its custody as prisoners or patients, and also requires that there be a full and independent investigation of any death where agents of the state are implicated. This will typically involve deaths resulting from military or police action, but may include medical malpractice in public hospital.

Balancing Exercises

Some of the rights are mutually conflicting. This means that a balance has to be struck. This will principally affect the qualified rights, where the impact of other rights is simply one of the factors to be considered when striking the balance.

One fruitful area of conflict is that between Art 8 (privacy) and 9 (religious freedom) on the one hand and Art 10 (expression) on the other. In *Otto Preminger Anstalt v Austria* the issue was whether the right of the claimant to express himself by showing a film entitled *Das Liebeskonzil* (*Council in Heaven*) prevailed over the religious susceptibilities of 90% of the local population who were devout Catholics. The film intended to satirise aspects of Catholic doctrine, and did so in a fairly heavy-handed, and potentially offensive way. The Austrian constitution guaranteed freedom of expression subject to the rights of others being properly protected. The courts had carried out a weighing of the interests of the film institute and the population at large and the court (disagreeing with the commission) considered that this fell within the margin of appreciation.

Unconditional or conditional rights may be in the equation as well. It has been said recently that protection of life is a primary human rights responsibility. Measures have been introduced to control 'terrorists' which will impinge on, in particular Art 10. Again a balance must be struck.

A Living Instrument

The convention is not a static document. It is 'a living instrument which ... must be interpreted in the light of present-day conditions.' This was said in *Tyrer v UK* in the context of whether judicial corporal punishment could (in 1978) be regarded universally as degrading punishment. The phrase is regularly used by ECtHR.

In *Tyrer* the argument was essentially about whether the fact that birching would perhaps not have been seen as inhuman/degrading in 1950 was relevant. It was not that there was an earlier decision setting a precedent.

More recently, since the ECtHR is being frequently asked to revisit issues, it may have to consider whether earlier assessments remain appropriate. So in *Selmouni v France* treatment

of a suspect by police which was bad, but in earlier years would probably have amounted to 'inhuman or degrading' was held in the 1990s to be properly characterized as torture, albeit using the same form of words as in earlier cases.

Even more recently the ECtHR has in effect overruled its earlier decisions on whether transsexuals have the right to marry and associated rights under Art 8. Such a right had been denied in *Cossey v UK*, *X, Y & Z v UK* and *Sheffield & Horsham v UK*, as recently as 1998. The reversal came in *Goodwin & I. v UK* and the court stated its position in these terms:

"While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. ... However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement. ... In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review."

Derogation

ECHR recognizes that there may be situations of emergency (political or otherwise) during which certain convention rights may have to be disapplied. This is controversial. Some authorities point out that it is precisely when a state is under pressure from terrorists or other threats that it should demonstrate its human rights commitment to the full. Only certain rights may be derogated from, by a simple, though formal, procedure. The derogation itself is open to challenge. However it is in this sphere that the doctrine of the 'margin of appreciation' has perhaps been most fully developed: *Brannigan v UK*. This case concerned the question of whether a derogation from certain ECHR provisions by the UK was actually legitimate. The UK asserted that the situation in Northern Ireland was serious enough to justify this; the court rejected arguments that the UK authorities had over-reacted. Those authorities were far better placed to evaluate the situation.

The Margin of Appreciation.

The ECHR is a very broad ranging document, both in its subject matter and in its geographical scope. Some of its provisions regulate areas which are politically sensitive, and others regulate areas where there is a diversity of traditions.

A central court, even with judges selected to reflect a broad spectrum of Europe, cannot necessarily reach conclusions which correctly reflect reality in two main situations:

Where the issues in hand are primarily moral, social or ethical, rather than political. As we have seen, in *Handyside*, *Otto-Preminger* and, until recently, in relation to trans-sexuals, the court was not prepared to assert a common standard, but deferred to the state.

In relation to derogations. In *Brannigan* the court accepted that the UK authorities were better informed and had a day-to-day involvement that rendered them better able to assess what the situation required. While this is not an unfettered discretion, it has been heavily criticized as an abdication of responsibility.

The individual rights.

Note that this discussion is of the rights as they have been interpreted and developed by the ECtHR. We will later also look at the way some of these rights have been interpreted under HRA.

The right to life (Art 2).

The negative right to life (i.e. not to be killed by the state) is clearly established. It is for the state to show that a death caused by its agents is within the derogations. Thus in *McCann, Farrell & Savage v UK* (the *Death on the Rock* case) the onus is on the state to show that lethal force was necessary to protect others.

The positive duty to protect life is more complex.

The state is under a duty to investigate deaths, in particular where there may have been a breach of the negative right: *Jordan & Others v UK*. It must ensure that those affected can participate effectively in the enquiry, for example by funding legal representation.

State agents must take care of those for whom they are directly responsible: *Constantinou & Andronicou v Cyprus* (killing a hostage in a shootout) and (less convincingly) *Osman v UK* (stalking victim).

Whether, and if so in what circumstances, the state can be liable for failure to provide medical treatment or other necessities of life is actively debated, but there is little direct authority.

Torture, inhuman and degrading treatment (art 3).

As has been noted, this is an unqualified right. There has been considerable discussion of what the threshold is for torture and the other limbs.

The threshold for torture has historically been a high one: 'deliberate inhuman treatment causing very serious and cruel suffering' *Ireland v UK*. This case concerned the activities of the UK law enforcement agencies in relation to interrogation techniques used on republican terrorist suspects. These included the 'five techniques' of sensory deprivation. It appears to require serious wrong-doing by the police or other security forces, which may or may not be a matter of policy: *Selloumi v France*.

Inhuman activity seems to be behaviour falling short of torture. It can apply to extradition and deportation if the fate awaiting the victim will be inhumane: *Soering v UK* (the 'death row' phenomenon); *Chahal v UK* (state sponsored torture), but not where there is merely a vague fear: *Vilvarajah v UK*.

Degrading treatment or punishment is the most flexible concept. Corporal punishment was in *Tyrrer (and A)*, but not in *Costello-Roberts v UK* (punishment in a private school). It may also apply to behaviour which is not specifically covered by the Convention (such as racial or sexual discrimination) if it is sufficiently severe.

Liberty and security (Art 5).

This needs to be read with the right to a fair trial, which is procedural; Art 5 is partly procedural and partly substantive.

The first element of Art 5 is that liberty can be withheld only in defined circumstances (criminal conviction, enforcement of court orders, mental health cases etc.) and by a judicial process which respects national and ECHR standards *Winterwerp v Netherlands*. The executive has no powers to detain and so the role of the Home Secretary in sentence confirmation and parole has been repeatedly held to contravene Art 5 (most recently in *Thompson & Venables v UK*).

Detention on remand is a slight anomaly, since this is not by way of punishment or protection. It appears to represent a form of balancing of individual and collective rights.

The second element is to restrict the time of detention for investigation without judicial control. There must be a 'prompt' judicial hearing. In *Brogan v UK* which concerned detention for interrogation at a time when there was no derogation in force in relation to Northern Ireland periods over 4 days were held excessive.

The procedural aspect requires basic facilities for the defence: reasons for detention, access to legal advice etc.

Fair Trial (Art 6).

Although procedural (or perhaps because procedural) this is a current favourite of the legal profession. The basic right is to a fair trial, which has a number of aspects.

Art 6 only applies to criminal matters and 'civil rights' which does not cover the whole field of private law (it does not for example cover aspect of employment of public servants).

The trial must be prompt (Art 5 also requires this). What constitutes promptness depends on the nature of the case: *Wemhof v Germany*.

The trial must be open and public although this can be overridden in the interests of others (e.g. child witnesses).

The tribunal must be impartial and independent: most legal systems distinguish sharply between administrative and judicial functions. The UK does not always do so. This has meant that some decision making by administrators will not itself satisfy this requirement. However it is enough if there is an effective appeal (which may be by judicial review): *Albert & Le Compte v Belgium*; *Bryan v UK*; *Alconbury* (see later)

The concept of a fair trial has been expanded by the ECtHR. It incorporates common concepts of appropriate procedure, although these do vary from state to state. The ECtHR has routinely said that it is not concerned with the rules of criminal evidence as such.

No self incrimination: Saunders v UK.

Equality of arms (access to the prosecution case, resources to conduct the case)

Presumption of innocence, and burden of proof: *Salabiaku v France*

Privacy (Art 8).

Although usually described as the right to privacy, Art 8 actually covers the right to privacy, to family life, to freedom from search of the home and inviolability of correspondence. All operate in different spheres.

The privacy right has been broadly interpreted to include dignity, autonomy and freedom from intrusion. Although Art 8 specifies that there shall be no interference with its rights 'by a public authority' it seems to be accepted that there is a strong positive obligation, so that a failure to prevent intrusion by, e.g. the tabloid press may be covered.

Sexual activity is covered: *Dudgeon v UK*; *Lustig-Prean et al v UK*

This now includes the position of post-operative transsexuals: *Goodwin v UK*; *I v UK*

Environmental issues are also covered: *Lopez-Ostra v Spain*; *Hatton v UK*.

Family life may include the rights of third party family members: *Berrehab v Netherlands*

Interception of communication is permitted if objectively justified, and conducted in a manner which is 'according to law'. *Malone v UK*; *Halford v UK*. In the former case it emerged that control of interception was discretionary and secretive. By the time of the later case there were safeguards in place concerning public communications systems, but the case concerned surveillance of calls made through the complainant's employers internal telephone network. In the absence of specific warnings that surveillance was possible this was held to be an unwarranted interference.

Freedom of expression (Art 10).

The ECtHR has established a hierarchy of types of expression:

At the top is political speech (or at least speech on matters of legitimate public concern and interest). In this area free expression is a powerful aspect of democracy itself as it provides the possibility of informed debate: *Lingens v Austria*. It can therefore only be restricted in very limited circumstances: *Jersild v Denmark*; *Prager & Oberschlick v Austria*; *Barfod v Denmark*; *Lhideux v France*; *Sunday Times v UK*. This case related to coverage of the Thalodomicide case, held in English law to amount to contempt on the basis that it might affect the judges hearing the case. This was, in the context of the case not an adequate ground for suppressing all discussion and commentary.

Other social expression is subject to a wider margin of appreciation. It has less political value and attitudes vary: *Handyside v UK*; *Otto Preminger v Austria*; *Wingrove v UK*; *Müller v Switzerland*

Commercial expression has the least protection: *Verlag Markt Intern v Germany*.

Freedom of Association (Art 11).

This has recently been successfully used to challenge laws penalizing trade unionists, but is generally seen as a sub-set of Art 10. See *Wilson & Others v UK*

Non-discrimination (Art 14) Although this article can only operate in conjunction with one of the substantive rights, it can be crucial. See *A & Others v Home Secretary* [2004] UKHL 56 (the Belmarsh detainees case).

Free enjoyment of property (Protocol One Art 1).

This is a heavily qualified right. The state may regulate the use of property in the public interest (e.g. by planning laws) but must not do so capriciously (e.g. by allowing long term planning blight); *Sporrong & Lönnroth v Sweden*. Leasehold reform legislation which 'expropriated' ground landlords in return for allegedly inadequate statutory compensation was within the legitimate scope of the state's sphere of operation: *James et al v UK*. Note however that the state is given a very wide margin of appreciation here to reflect that fact that decisions on planning etc. have to accommodate many private interests.

The Human Rights Act 1998

The Human Rights Act 1998 incorporates into UK law the substantive provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR). These are known as Convention Rights

Pre HRA Position

While ECHR bound UK internationally it did not do so internally, as it had not been so ordained by parliament.

UK has always reacted to decisions of the ECtHR (e.g. changes in status of Mental Health Review Tribunals and the Parole Board, custody time limits).

However the ECHR itself had only marginal significance in UK law: *R v Secretary of State for the Home Office, ex p Brind* [1991] 1 All ER 720.

In the period before the HRA came into force there was a greater willingness to ensure that decisions were 'HRA proof', e.g. *Jones v DPP*.

Human Rights Act 1998.

'Bringing rights home' by incorporating the substantive rights under the ECHR into English law.

Allegedly freeing the English judges to apply the ECHR and thus avoid future references to the ECtHR.

Hugely hyped, and expected to provide a good living for the profession for the next decade: however this did not happen to the extent predicted.

The Framework of the Act

Parliamentary Sovereignty

One of the main objections to incorporation of the ECHR (or the enactment of any other Bill of Rights document) was that this cannot be done consistently with UK constitutional theory and practice. To be effective such a document must be 'entrenched' with a special status and this directly conflicts with the right of Parliament to make and repeal any law.

The HRA preserves parliamentary sovereignty:

Primary legislation cannot be struck down or disapplied: s 3 (2) (b)

Parliament is excluded from the definition of 'public authorities' subject to the Act: s 6 (3)

The only legal obligation imposed on Parliament by the Act is the requirement for a statement by the Minister in charge of all Government Bills that the Bill is compatible with the Convention rights, or why it is appropriate to proceed with the Bill even though it is not: s 19.

The intention is that Parliament and HM Government will be politically constrained both to act and legislate compatibly and to remove any incompatibility detected by the courts under s 4.

Vertical and Horizontal effect

The main effect of HRA (as of ECHR) is vertical (i.e. operating between the state and the individual).

The state is broadly interpreted. S 6 (1) provides that "It is unlawful for a public authority to act in a way that is incompatible with a convention right." 'Public authority' is not defined, but it includes:

A court or tribunal: s6 (3) (a) and (4).

The 'public' acts or omissions of 'any person certain of whose functions are functions of a public nature': s 6 (3) (b), (5) and (6).

There is an analogy with the concept of an 'emanation of the state' in EU law, although the parallel is not precise. Government departments, local authorities, executive agencies, police authorities, the NHS are all clearly covered.

There is a grey area in relation to self regulatory organisations. If in the past these have been held to be susceptible to judicial review or control they are likely to be within the Act. Religious bodies are likely to be covered so far as they run public facilities such as schools but not in respect of who they admit to membership or to participate in sacraments or other privileges. See *PPC of Aston Cantelow v Wallbank*.

A victim of an alleged breach of s 6 (1) may raise this in proceedings: s 7 (1).

There is no provision for action to be taken by a representative body which is not a victim (such as Liberty or Greenpeace). This is a narrower rule than the general rule for 'legitimate interest' in judicial review. The narrower rule is specifically applied to judicial review proceedings within s 7 by s 7 (3). It does not prevent such a body supporting action taken by the victim.

The action may be to bring a claim within a time limit of one year (subject to any lesser limit, e.g. the three months for judicial review, but extendable in the discretion of the court): s 7 (1) (a) and (5). It may also be to rely on Convention rights in proceedings brought 'by or at the instigation of a public authority' or in any appeal: S 7 (1) (b) and (6). This is clearly using the right as a shield rather than as a sword.

The act will not be unlawful if it is directly mandated by primary legislation, or is by way of giving effect to, or enforcement of, directly or by means of secondary legislation, primary legislation which is incompatible with a Convention right: s 6 (2).

There is no provision for a direct horizontal application of HRA. Private individuals and corporations are not directly obliged to comply with HRA, or with the Convention rights. However there may be an indirect horizontal effect in two ways:

When a court or tribunal is adjudicating on a private law dispute, it must interpret relevant legislation (and, it would seem, as part of its s 6 (1) obligation, rules of the common law) so as to be compatible with the Convention rights 'so far as it is possible to do so': s 3 (1). In *Douglas & Others v Hello! Ltd* (2001) The Times 16.1.01 the Court of Appeal stated that English law now recognised a right of privacy, partly because this was an incremental development of the law relating to breach of confidence, and partly because of the impact of Art 8 ECHR. Later judgments have however emphasized the former aspect rather than the latter. See *A (Flitcroft) v B plc*; *Campbell v MGN*. This area of the law is still developing.

If the state is found not to have made adequate provision for protection of Convention rights against abuse by private individuals the ECtHR has found it to be in breach. In *A v UK* [1996] 27 EHRR 611 the European Court held that the UK had not adequately protected A's rights in this regard because of the scope of the parental chastisement defence. As a result in *R v H (Reasonable Chastisement)* (2001) The Times 17.5.01 a new framework of directions on this issue was formulated:

[In] such a case the jury should now be directed in detailed terms as to factors relevant to whether the chastisement in question was reasonable and moderate; and a judge should direct the jury considering the matter of the reasonableness or otherwise of such chastisement that they must consider the following: (i) the nature and context of the defendant's behaviour; (ii)

the duration of that behaviour; (iii) the physical and mental consequences in respect of the child; (iv) the age and personal characteristics of the child; (v) the reasons given by the defendant for administering the punishment.

The two principles above have a similarity to the *von Colson/Marleasing* doctrine of indirect horizontal effect and the *Francovich/Brasserie du Pêcheur* doctrine of state liability for nonimplementation of Directives in EU law.

The position of the courts

The courts are public authorities, and therefore must ensure that they comply in their actions with the Convention rights. This can arise in a number of contexts:

Arrangements for hearings. These must be in public (unless there is a clearly defined countervailing interest, as in some family proceedings). Effective access must be afforded to those with disabilities.

Hearings without notice (i.e. where the defendant will not be present) must be specifically justified. S 11 (2) HRA reinforces this in cases where there is an application for relief affecting the exercise of Art 10 rights to freedom of expression.

Procedural decisions made by the court:

Case management decisions. Lord Woolf the then Lord Chief Justice warned that Convention rights under Art 6 should not be routinely pleaded in this context: *Daniels v Walker* (2000) The Times 17.5.00.

Bail decisions

Custody time limit decisions

Allocation decisions made by the court.

Decisions on the fairness of trials: Alconbury; Procurator Fiscal v Stott; Lambert

The courts must interpret legislation in accordance with S 3.

There has been debate over the extent of the obligation on the courts to interpret legislation compatibly. (Similar issues have arisen in relation to interpretation of UK statutes in the light of EU legislation, and the courts have been very conservative.) In relation to HRA the approach was initially an extremely robust one, summed up by Lord Steyn in *R v A* [2001] UKHL 25:

‘On the other hand, the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F; and my judgment, at p 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see “Rights Brought Home: The Human Rights Bill” (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments

that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention": Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 *against* the executive: "Pepper v Hart: A re-examination" (2001) 21 Oxford Journal of Legal Studies 59. In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

In my view section 3 requires the court to subordinate the niceties of the language [of the statute] to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material.'

However later cases have toned down this approach. In *Re S* [2002] UKHL 10, the House of Lords was considering whether the Children Act 1989 could be interpreted so as to give the courts a means to monitor the performance by social service departments of their undertakings under interim care orders. It decided that to do so constituted amendment rather than interpretation. Lord Nicholls said:

[S 3 (1)] is a powerful tool whose use is obligatory. It is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further, the section applies retrospectively. So far as it is possible to do so, primary legislation 'must be read and given effect' to in a way which is compatible with Convention rights. This is forthright, uncompromising language.

But the reach of this tool is not unlimited. Section 3 is concerned with interpretation. This is apparent from the opening words of section 3(1): 'so far as it is possible to do so'. The side heading of the section is 'Interpretation of legislation'. Section 4 (power to make a declaration of incompatibility) and, indeed, section 3(2)(b) presuppose that not all provisions in primary legislation can be rendered Convention compliant by the application of section 3(1). The existence of this limit on the scope of section 3(1) has already been the subject of judicial confirmation, more than once: see, for instance, Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183, 204, para 75 and Lord Hope of Craighead in *R v Lambert* [2001] 3 WLR 206, 233-235, paras 79-81.

In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.

Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in *R v A (No 2)* [2002] 2 AC 45, 68D-E, para 44 are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise.

I should add a further general observation in the light of what happened in the present case. Section 3 directs courts on how legislation shall, as far as possible, be interpreted. When a court, called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to its obligation under section 3, it is important the court should identify clearly the particular statutory provision or provisions whose interpretation leads to that result. Apart from all else, this should assist in ensuring the court does not inadvertently stray outside its interpretation jurisdiction.

Similarly in *Bellinger v Bellinger* [2003] UKHL 21 the House declined to interpret the Marriage Act to allow for gender re-assignment cases, holding that the Act clearly stated that gender was fixed at birth, and instead made a s 4 declaration of incompatibility with the Art 8 rights of a post-operative transsexual to marry in the new gender.

This appears to indicate a more cautious approach, probably induced by criticism of the *R v A* decision, or at least its implications.

Subsequently, in *Ghaidan v Godin-Mendoza* [2004] UKHL 24 Lord Nicholls, Lord Steyn and Lord Rodger attempted to explain the principles to be applied. They made it clear that S3 allowed interpretation, not amendment. The task of the court is to establish the intention of Parliament in enacting the provision in question. Once this is done (in a manner similar to that adopted in relation to EU law cases) the court must establish a form of words which will achieve this; this may involve adding words and changing the apparent sense of the actual language used as long as the purpose is served. This case is now accepted as the final stage in the process of development of the court's approach.

Lord Nicholls:

Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

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 nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

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.

On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially

on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

From this the conclusion which seems inescapable is that 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. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

Both these features were present in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291. There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In *Bellinger v Bellinger* [2003] 2 AC 467 recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures.

Lord Steyn

It is necessary to state what section 3(1), and in particular the word "possible", does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word "possible" in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable.

Parliament specifically rejected the legislative model of requiring a reasonable interpretation.

Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159 the European Court of Justice defined this obligation as follows:

"It follows that, in applying national law, whether the provisions in questions were adopted before or after the directive, the national court called upon to interpret it is

required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty"

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

Parliament had before it the mischief and objective sought to be addressed, viz the need "to bring rights home". The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort. How the system modelled on the EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention": Hansard (HL Debates,) 5 February 1998, col 840 (3rd reading) and Hansard (HC Debates,) 16 February 1998, col 778 (2nd reading). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with Convention rights. This is the remedial scheme which Parliament adopted.

Three decisions of the House can be cited to illustrate the strength of the interpretative obligation under section 3(1). The first is *R v A (No. 2)* [2002] 1 AC 45 which concerned the so-called rape shield legislation. The problem was the blanket exclusion of prior sexual history between the complainant and an accused in section 41(1) of the Youth Justice and Criminal Evidence Act 1999, subject to narrow specific categories in the remainder of section 41. In subsequent decisions, and in academic literature, there has been discussion about differences of emphasis in the various opinions in *A*. What has been largely overlooked is the unanimous conclusion of the House. The House unanimously agreed on an interpretation under section 3 which would ensure that section 41 would be compatible with the ECHR. The formulation was by agreement set out in paragraph 46 of my opinion in that case as follows:

"The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

This formulation was endorsed by Lord Slynn of Hadley at p 56, para 13 of his opinion in identical wording. The other Law Lords sitting in the case expressly

approved the formulation set out in para 46 of my opinion: Lord Hope of Craighead, at pp 87-88, para 110, Lord Clyde, at p 98, para 140; and Lord Hutton, at p 106, para 163. In so ruling the House rejected linguistic arguments in favour of a broader approach. In the subsequent decisions of the House in *In re S (Minors) (Care Order: Implementation of Case Plan)* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467, which touched on the remedial structure of the 1998 Act, the decision of the House in the case of *A* was not questioned. And in the present case nobody suggested that *A* involved a heterodox exercise of the power under section 3.

The second and third decisions of the House are *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 which involve the



interpretative obligation under EEC law. *Pickstone* concerned section 1(2) of the Equal Pay Act 1970, (as amended by section 8 of the Sex Discrimination Act 1975 and regulation 2 of the Equal Pay (Amendment) Regulations 1983 (SI 1983/1794) which implied into any contract without an equality clause one that modifies any term in a woman's contract which is less favourable than a term of a similar kind in the contract of a man:

"(a) where the woman is employed on like work with a man in the same employment ...

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment . . .

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment".

Lord Templeman observed (at pp 120-121):

"In my opinion there must be implied in paragraph (c) after the word 'applies' the words 'as between the woman and the man with whom she claims equality.' This construction is consistent with Community law. The employers' construction is inconsistent with Community law and creates a permitted form of discrimination without rhyme or reason."

That was the ratio *decidendi* of the decision. *Litster* concerned regulations intended to implement an EU Directive, the purpose of which was to protect the workers in an undertaking when its ownership was transferred. However, the regulations only protected those who were employed "immediately before" the transfer. Having enquired into the purpose of the Directive, the House of Lords interpreted the Regulations by reading in additional words to protect workers not only if they were employed "immediately before" the time of transfer, but also when they would have been so employed if they had not been unfairly dismissed by reason of the transfer: see Lord Keith of Kinkel, at 554. In both cases the House eschewed linguistic arguments in favour of a broad approach. *Pickstone* and *Litster* involved national legislation which implemented EU Directives. *Marleasing* extended the scope of the interpretative obligation to unimplemented Directives. *Pickstone* and *Litster* reinforce the approach to section 3(1) which prevailed in the House in the rape shield case.

A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word

"possible" in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the

ECHR to decide on the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not "possible" and made a declaration under section 4. Interpretation could not provide a substitute scheme. *Bellinger* is another obvious example. As Lord Rodger of Earlsferry observed ". . . in relation to the validity of



marriage, Parliament regards gender as fixed and immutable": [2003] 2 WLR 1174, 1195, para 83. Section 3(1) of the 1998 Act could not be used.

Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

Lord Rodger

In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 373F Lord Cooke of Thorndon described section 3(1) as "a strong adjuration" by Parliament to read and give effect to legislation compatibly with Convention rights. Nevertheless, the opening words of subsection (1) show that there are limits to the obligation. That is reflected in subsection (2)(b) and (c) as well as in the next section, section 4, which applies in those cases where a higher court is satisfied that, despite section 3(1), a provision is to be regarded as incompatible with a Convention right. In that event the court may make a declaration of incompatibility. While it is therefore clear that there are limits to the obligation in section 3(1), they are not spelled out. In a number of cases your Lordships' House has taken tentative steps towards identifying those limits. The matter calls for further consideration in this case.

In addressing the question, it is useful to bear in mind section 6(1) and (2):

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions." Subsection (3) goes on to define "public authority" as including a court.

Inevitably, when section 3 comes to be considered by a court, the focus is on the approach which section 3(1) requires the court to adopt when reading a statutory provision that, on a conventional interpretation, would be incompatible with a

Convention right. Nevertheless, the section is not aimed exclusively, or indeed mainly, at the courts.

In contrast to section 4 - which applies in terms only to "a court" of the level of the High Court or above - and in contrast also to section 6 - which applies only to public authorities - section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government, but the section is not confined to them. The broad sweep of section 3(1) is indeed crucial to the working of the 1998 Act. It is the means by which Parliament intends that people should be afforded the benefit of their



Convention rights - "so far as it is possible", without the need for any further intervention by Parliament. In *R v A (No 2)* [2002] 1 AC 45, 67 - 68, para 44, and in his speech today, Lord Steyn has referred to what ministers told Parliament about how, they anticipated, the obligation in section 3(1) would work in practice. However that may be, section 3(1) requires public authorities of all kinds to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to them in a way which is compatible with the Convention rights of the people concerned. In practice, even before the 1998 Act came into force, many public authorities had reviewed the legislation affecting them so as to be in a position to comply with this obligation from the date of commencement. This was a wise precaution. Once the 1998 Act came into force, whenever, by virtue of section 3(1), a provision could be read in a way which was compatible with Convention rights, that was the meaning which Parliament intended that it should bear. For all purposes, that meaning, and no other, is the "true" meaning of the provision in our law.

The second point to notice is that, so far as possible, legislation must be "read and given effect" compatibly with Convention rights. The use of the two expressions, "read" and "given effect", is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, section 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular Convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the local authority will be in breach of article 14 in relation to the other article concerned and, in terms of section 3(1), will have failed to give effect to the legislation in a way which is compatible with Convention rights. So, even though the heading of section 3 is "Interpretation of legislation", the content of the section actually goes beyond interpretation to cover the way that legislation is given effect.

Next, the Act discloses one clear limit to section 3(1). It is not concerned with provisions which, properly interpreted, impose an unavoidable obligation to act in a particular way. This can be seen from a comparison of paras (a) and (b) of section 6(2). According to para (a), section 6(1) does not apply, and a public authority therefore acts lawfully, if, as a result of primary legislation, "the authority could not have acted differently." An example might be a provision requiring a local authority to dismiss an application if the applicant failed to take a particular step within seven days. Even if this results in the violation of a Convention right, the local authority must dismiss the application and, in doing

so, it acts lawfully: it cannot act differently in terms of the legislation. By para (b), on the other hand, the public authority also acts lawfully if, in the case of one or more provisions of primary or secondary legislation "which cannot be read or given effect in a way which is compatible with the Convention rights", the authority was acting so as to give effect to or enforce those provisions. Para (b) echoes the language of section 3(1) and therefore deals with the (different) situation where, in terms of section 3(1), it has not proved possible to read and give effect to a provision in a way which is compatible with Convention rights. In that situation, as section 3(2)(b) provides, the validity, continuing operation and enforcement of the legislation are not affected and so it is lawful for a public authority to act in terms of the legislation. In that case too, section 6(2) disapplies section 6(1).

If incompatible provisions that require a public authority to act in a particular way, and leave it with no option to act differently, do not fall within the scope of section 3(1), this can only be because, by definition, it is not possible to read them or give effect to them in a way which is compatible with Convention rights. This makes sense. If a provision requires the public authority to take a particular step which is, of its very nature, incompatible with Convention rights, then no process of interpretation can remove the obligation or change the nature of the step that has to be taken. Nor can the public authority give effect to the obligation by doing anything other than taking the step which the Act requires of it. In such cases, only Parliament can remove the incompatibility if it decides to repeal or amend the provision. The most that a higher court can do is to make a declaration of incompatibility under section 4.

What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision. So from section 6(2)(a) and (b) one can tell that, however powerful the obligation in section 3(1), it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that *x* is to happen into one saying that *x* is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament. In *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, for instance, the Court of Appeal held that it was impossible for the court to use the interpretative obligation in section 3(1) in effect to recreate the fixed penalty scheme enacted by Parliament so as to turn it into a scheme that was compatible with article 6. As Simon Brown LJ observed, at p 758C - D, it would have involved turning the scheme inside out - something that the court could not do. Only Parliament, not the courts, could create a wholly different scheme so as to provide an acceptable alternative means of immigration control.

Another illustration of this limitation on the obligation under section 3(1) is to be found in the decision of your Lordships' House in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. Section 29 of the Crime (Sentences) Act 1997 provided that, "if recommended to do so by the Parole Board, the Secretary of State may ... release on licence" certain life prisoners, viz convicted murderers. The House was satisfied that it was incompatible with the Convention rights of Mr Anderson, who had been convicted of murder, for the power to release him to lie with the Home Secretary rather than with a judicial body. Counsel for Anderson submitted accordingly that, under section 3(1) of the 1998 Act, section 29 of the Crime (Sentences) Act could be read and given effect in a manner which would be compatible with his Convention rights. In effect, this would have amounted to reading the section in such a way as to deprive the

Home Secretary of the express power to release him. The House rejected this submission since it was clear that, under section 29, the power of release and the power to determine how long a convicted murderer should remain in prison for punitive purposes were to lie with the Home Secretary and with no-one else. In these circumstances, in the words of Lord Bingham of Cornhill [2003] 1 AC 837, 883C - D, para 30:

"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 of the 1998 Act ..."

The "judicial vandalism" would lie not in any linguistic changes, whether great or small, which the court might make in interpreting section 29 but in the fact that any reading of section 29 which negated the explicit power of the Secretary of State to decide on the release date for murderers would be as drastic as changing black into white. It would remove the very core and essence, the "pith and substance" of the measure that Parliament had enacted - to use the familiar phrase of Lord Watson (in a different context) in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, 587. Section 3(1) gives the courts no power to go that far. In these circumstances the House made a declaration of incompatibility, which left it to the minister and ultimately to Parliament to decide whether to remedy the incompatibility by amending or repealing section 29 and, if so, how.

In reaching this conclusion Lord Bingham had regard to the well-known words of Lord Nicholls of Birkenhead in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313, para 39, where the relevant distinction is drawn:

"The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

Whatever can be done by way of interpretation must be done by the courts and anyone else who is affected by the legislation in question. The rest is left to Parliament and amounts to amendment of the legislation. As Lord Nicholls pointed out, it is by no means easy to decide in the abstract where the boundary lies between robust interpretation and amendment, but, he added, at p 313, para 40:

"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms."

The problem facing the House in *In re S* was, in some ways, the opposite of the problem that was to come before the House in *R (Anderson) v Secretary of State for the Home Department*. In the earlier case, the interpretation of the Children Act 1989 which the Court of Appeal had adopted in reliance on articles 6 and 8 of the Convention did not involve removing any power from a statutory body. Rather, in the view of the House, the starring system devised by the Court of Appeal involved conferring on the courts a power to supervise the way in which local authorities discharged their parental responsibilities under final care orders. This was to depart substantially from "a cardinal principle" of the Children Act, that the courts are not empowered to intervene in the way local authorities

discharge their responsibilities under such orders: [2002] 2 AC 291, 314, para 42. Lord Nicholls, with whom all the other members of the House agreed, went on to hold, in para 43, that the innovation made by the Court of Appeal "passes well beyond the boundary of interpretation". There was no provision in the Children Act that lent itself to the interpretation that Parliament was conferring this supervisory function on the court. On the contrary, conferring such a function was inconsistent in an important respect with the scheme of the Act. "It would constitute amendment of the Children Act, not its interpretation." In that situation it was not possible to "read in" to the Act or any of its provisions a power to set up such a system. That would be to produce a meaning that



departed substantially from a fundamental feature of the Act and so crossed the boundary between interpretation and amendment.

Again, it is important to notice that the problem identified by the House did not derive from any perceived difficulty in finding language to frame a power to require a report on the progress of the local authority; rather, the problem was that, however the courts might frame the power, they would be introducing something which was not to be found in the Children Act - and, more particularly, something which was actually inconsistent with one of its cardinal principles. If such a change to the Act was to be made, Parliament would have to make it.

In the second passage from his speech in *In re S* which I have quoted in paragraph 112 above, Lord Nicholls made the further point that a departure from a fundamental feature of an Act of Parliament may be more readily treated as crossing the boundary into the realm of amendment where it has important practical repercussions which the court is not equipped to evaluate. It appears to me that difficult questions may also arise where, even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions of that kind. In effect these powers or duties, if sufficiently far-reaching, would be beyond the scope of the legislation enacted by Parliament. If that is right, the answer to such questions cannot be clear-cut and will involve matters of degree which cannot be determined in the abstract but only by considering the particular legislation in issue. In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change.

Although he was disagreeing with the other members of the House on the interpretation point, the approach of Lord Hope of Craighead in *R v A (No 2)* [2002] 1 AC 45, 87, para 109, is similar to the reasoning of Lord Nicholls in *In re S*. In Lord Hope's view, "the entire structure of section 41" of the Youth Justice and Criminal Evidence Act 1999 contradicted the idea of reading into it a new provision entitling the court to give leave for evidence to be led of the complainant's previous sexual behaviour with the accused whenever this was required to ensure a fair trial. It seemed to him that "it would not be possible" to read in such a provision "without contradicting the plain intention of Parliament" in section 41(2) to forbid the exercise of such a discretion unless the court is satisfied as to the matters identified by that subsection. In his view Parliament had taken a deliberate decision not to follow examples to be found elsewhere of provisions giving the court an overriding discretion to admit such evidence. In the phraseology of Lord Nicholls in *In re S*, for Lord Hope this was a

"cardinal principle" of section 41 and it was not open to the courts to read the section in such a way as to depart substantially from it.

It was in this context that Lord Hope expressed the view, [2002] 1 AC 45, 87, para 108, that it will not be possible to achieve compatibility with Convention rights by using section 3(1) "if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible" or, indeed, if the legislation contains provisions which do so by necessary implication. Lord Hope repeated this observation in *R v Lambert* [2002] 2 AC 545, 585, para 79, and, for the reasons I have already given, I agree with it. But this is not to say that, where a provision can be read compatibly with the Convention without contradicting any principle that it enshrines or the principles of the legislation as a whole, such an interpretation is not possible



simply because it may involve reading into the provision words which go further than the specific words used by the draftsman.

When Parliament provided that, "so far as it is possible to do so", legislation must be read and given effect compatibly with Convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation "so far as possible, in the light of the wording and the purpose of the [Community] directive in order to achieve the result pursued by the latter...": *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159, para 8 (emphasis added). Both *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1AC 546 show how, long before 1998, this House had found it possible to read words into domestic regulations so as to give them a construction which accorded with the provisions of the underlying Community directive. As Lord Oliver of Aylmerton noted in *Litster*, at p 577A - B, *Pickstone* had established that "the greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom's Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations...."

Lord Oliver was satisfied that the implication which he judged appropriate in that case was entirely consistent with the general scheme of the domestic regulations and was necessary if they were effectively to fulfil their purpose of giving effect to the provisions of the directive.

For present purposes, it is sufficient to notice that cases such as *Pickstone v Freemans plc* and *Litster v Forth Dry Dock & Engineering Co Ltd* suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. 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.

When Housman addressed the meeting of the Classical Association in Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than by supplying half a dozen words. The key is that the emendation must start from a

careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a

way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect. For this reason, in the Community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed about its exact form. See, for example, Lord Keith of Kinkel and Lord Oliver in *Pickstone v Freemans plc* [1989] AC 66, 112D and 126A - B.

Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. The statute book is the work of many different hands in different parliaments over hundreds of years and, even today, two different draftsmen might choose different language to express the same proposition. In enacting section 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words. Equally, it cannot have been the intention of Parliament to place a premium on the skill of those called on to think up a neat way round the draftsman's language. Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf *R v Lambert* [2002] 2 AC 545, 585, para 80 per Lord Hope of Craighead. It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it.

Ghaidan, perhaps surprisingly, seems to have held for the last 10 years or so as a statement of the approach to be taken. There has been considerable academic debate, but little further judicial intervention. We can therefore suggest the following basic propositions:

Ordinary interpretation is used first. Only if it does not resolve the matter does s 3 become applicable.

S 3 must be used ahead of s 4. It is not 'optional'.

It is the 'grain' 'thrust' or 'purpose' of the legislation which is important, not the precise words used. Words may be read in, or out, or down, as long as this does not interfere with the essential objectives of the legislation. However (i) The court may not undermine important objectives, or 'vandalise' the statute: *Anderson*; (ii) the proper scope of s 3 is to render what is enacted compliant, not to add new provisions: *Re S*; (iii) the courts must beware of intervening where there are ramifications that cannot be fully examined: *Bellinger*.

Much has been made of the enhanced rôle of the judges when deciding cases under the Human Rights Act; they will be 'politicised', 'opposing their unelected élitism to the democratic will of the people expressed through Parliament'; 'brought into conflict with the elected government of the day'. There has undoubtedly been a raising of judicial profile and a more anxious scrutiny of the qualifications of the judges. Technical legal prowess will not be enough. However it must not be forgotten that judges have in the past on occasion been fairly forthright about the deficiencies of legislation and both the principles behind and the practical implementation of government policy.

Recourse to the ECtHR will still be possible in relation to the interpretation given to Convention rights by the UKSC or in other unappealable decisions. Evidence from other jurisdictions where ECHR is already incorporated suggests that the number of such cases will be small, but incorporation will not end recourse to ECtHR. There will also be recourse where the government does not act on a declaration of incompatibility. The most recent statistics do indeed suggest that the United Kingdom generates relatively few cases for the ECtHR. Unfortunately, some of them have proved politically controversial, in particular decisions to the effect that the blanket ban on convicted prisoners voting is inconsistent with Convention rights.

Incompatible Legislation

As already noted there is no power to strike down primary legislation: S 3 (2) (b). If it is not possible to resolve an apparent incompatibility by the principal requirement to interpret it conformably with Convention rights (S3 (1)) then the incompatible provision remains the law, and regulates the rights and liabilities of the parties: s 4 (6).

A declaration of incompatibility may be made in respect of incompatible primary legislation and incompatible secondary legislation where the primary legislation prevents a compatible interpretation: s 4 (1) – (4). There is no obligation to do so, e.g. where the legislation in question has already been repealed or amended.

The declaration may only be made by the High Court, Court of Appeal, Courts-Martial Appeal Court and House of Lords: s 4 (5). The Crown must be given notice where a court is considering making a declaration of incompatibility, and is entitled to be joined as a party to the proceedings: s 5 (1) & (2).

The making of a declaration of incompatibility has no legal consequences. It was envisaged that any government would treat it as a vital political necessity to remedy the situation. S 10 provides powers for a Minister to amend the offending legislation by order where there is a final and unappealable declaration of incompatibility. The power also applies where, after 2.10.00 the ECtHR decides that UK legislation is incompatible with ECHR. It is of course also possible for an amendment to be made by an amending statute.

A number of declarations have been made. They cover *inter alia* mental patients (e.g. provisions of the Mental Health Act placing the burden of proving fitness for release on the patient incompatible with Art 5: *R (H) v Mental Health Review Tribunal* (2001) *The Times*

2.4.01), now cured by 'fast-track' amendment and two other mental Health Act procedural rules), and several sentencing issues. Declarations have been made by the courts in other areas but overruled on appeal, e.g. *Alconbury* [2001] UKHL 23 (procedural fairness of planning appeals), *Wilson v First County Trust* [2003] UKHL 40 (unenforceability of consumer credit agreement due to technical defect) and *A v SSHD* (indefinite internment of dangerous alien terror suspects).

Scope of application: time

The bulk of HRA came into force on 2.10.2000.

The interpretative obligation applies from that date to legislation, whatever its date. The court will interpret legislation in light of the HRA even where the facts giving rise to the litigation predate October 2000.

In general the right to complain of the acts of public bodies will apply to such acts committed after commencement: s 22 (4).

Exceptionally, as from 2.10.00, where proceedings are brought by a public authority (most obviously a prosecution) an individual may assert a breach of a Convention right 'whenever the act in question took place': s 22 (4). This was an important transitional provision, but is of little current importance.

The nature of the Convention rights.

Do not make the mistake of assuming that HRA is relevant only to those practising Criminal, 'Civil Liberties' or traditional Public law.

Article One of the 1st Protocol relates to peaceful enjoyment of possessions and prohibition of compulsory expropriation. This is of major importance to corporate clients. Possessions are very broadly defined. Cf *James v United Kingdom* which was an (unsuccessful) claim by the Duchy of Westminster that leasehold enfranchisement amounted to unlawful expropriation; *Sporrong & Lönnroth v Sweden* which was a (successful) claim based on long-term planning blight. Even the rights attaching to a cause of action have been tentatively assumed to be possessions: *National & Provincial BS and Others v United Kingdom* (1997).

Corporate clients are as concerned as any others about issues of due process. This is likely to focus on various tribunals and other regulatory bodies

Article 10 rights of freedom of expression are of direct concern to corporate clients in media and media related sectors. One focus is likely to be regulation of e-commerce and ecommunication generally.

Right to life and inhuman treatment cases will arise in relation to euthanasia (*Pretty, Purdy*), rights to treatment and the rights of mental patients. Article 8 rights to privacy and family life have potential impacts on treatment, fertility issues and other medico-legal areas.

Convention provisions are not, generally, absolute. They come in three broad categories. The UK courts have also adopted a different approach based on this categorization.

Unconditional provisions, such as the right not to be subjected to torture, inhuman or degrading treatment (Art 3). It may be unclear where the boundary lies: *Ireland v United Kingdom*. The context may affect the decision: *Tyrer v United Kingdom*; *Costello-Roberts v*

United Kingdom; A v United Kingdom. A number of the procedural guarantees in Art 5 and Art 6 are also unconditional, but have required interpretation as to their scope. As Lord Steyn put it in *R v A*:

'It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. *R v Forbes*, [2001] 2 WLR 1, 13, para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play.

It is also important to look at the whole picture. It is the whole procedure which must be fair. In *Alconbury* the Secretary of State was empowered to make decisions on planning appeals where he had an interest in the property or project. This did not meet the criteria of fairness and independence. However the statutory appeal to the courts together with the availability of judicial review with a sufficient remit to investigate the issues was held to be compliant. Similar rulings have been made in relation to a wide range of administrative or quasi-judicial decision-making processes.

Restricted provisions, such as the right to life (Art 2). The article itself defines situations in which the state may nevertheless justifiably use deadly force. Similarly Art 5 gives a right to liberty and security of person, but also lays down a number of derogations. In the case of Art 2 there have been a number of decisions on the duty of the state to safeguard those in its custody, and in the case of Art 5 a number on both the operation of detention under the Mental Health Act and the functions of the Parole Board.

Balanced provisions. These normally take the form of a broad statement of the right, e.g. Arts 8 – 11. This is then qualified by allowing for derogations. These must be according to law, necessary in a democratic society and imposed for one or more of a stated list of reasons. The actual content of the list varies with the context. In some cases one Convention right may be directly opposed to another; in particular freedom of expression (Art 10) may need to be balanced against privacy (Art 8) in the context of defamation and against freedom of conscience (Art 9): *Otto Preminger Anstalt v Austria*. This has led to a number of cases: *Douglas/Zeta-Jones*, *Theakston*, *Campbell*, *Flitcroft*, *Murray (JK Rowling)*, *Mosley*, *Goodwin*, *Terry* and *Giggs* are perhaps the most high profile.

In considering such cases there is a multi-stage approach:

Is the right 'engaged' – in other words do the matters complained of come within the scope of the Article; is there a *prima facie* interference? If yes:

Is the interference prescribed by law (or an equivalent phrase depending on the article)? This means that there must be a statute or other law, or a clearly established rule of common law. If not the state is in breach. If yes:

Does the reason given for the interference correspond to one or more of the permitted reasons set out in the second part of the Article? If not the state is in breach. If yes:

Is the interference 'necessary in a democratic society', i.e. does it meet a 'pressing social need' in a manner that is 'proportionate'? This is likely to be the most complex aspect of the investigation, as most restrictions are imposed for what are perceived to be valid reasons – often to secure the rights of others, and the question of what is appropriate is as much a social and political as a legal question.

Established approaches to interpretation

ECHR has always applied to a number of states with different cultures and traditions. ECtHR has recognised that this diversity requires a flexible approach. States have a 'margin of appreciation' in applying their own law in areas affected by convention rights, particularly those in balanced provision. This margin varies with the context. Cf *Handyside v UK*.

There has been debate over the extent to which the English courts will utilise this doctrine under HRA. Certainly they will use it to 'aim off' when considering the applicability of ECtHR decisions relating to other countries, cf *Amin v Nottingham City Council*. One argument as to the general position is that they will automatically be applying the Convention rights in a UK context and do not need a margin themselves, the other, more plausible one, is that the process of contextualisation is itself the application of a margin of appreciation, albeit that there is no need to explicitly recognise the availability of alternative standards. The judges have repeatedly indicated that they are engaged in a balancing operation between the rights of the individual and those of society, cf e.g. the early case *Procurator Fiscal v Brown* [2001] DRA 3 (PC), per Lord Steyn:

The real question is whether the legislative remedy in fact adopted is necessary and proportionate to the aim sought to be achieved [identifying and prosecuting drivers of vehicles]. There were legislative choices to be made. The legislature could have decided to do no more than to exhort the police and prosecuting authorities to redouble their efforts. It may, however, be that such a policy would have been regarded as inadequate. Secondly, the legislature could have introduced a reverse burden of proof clause which placed the burden on the registered owner to prove that he was not the driver of the vehicle at a given time when it is alleged that an offence was committed. Thirdly, and this was the course actually adopted, there was the possibility of requiring information about the identity of the driver to be revealed by the registered owner and others. As between the second and third techniques it may be said that the latter involves the securing of an admission of a constituent element of the offence. On the other hand, such an admission, if wrongly made, is not conclusive. And it must be measured against the alternative of a reverse burden clause which could without further investigation of the identity of the driver lead to a prosecution. In their impact on the citizen the two techniques are not widely different. And it is rightly conceded that a properly drafted reverse burden of proof provision would have been lawful.

Even apparently unconditional rights such as the right to a trial within a reasonable time (Art 6 (1)) are contextual. Each state has its own procedures, and some are quicker than others. ECHR does not require all to move at the speed of the fastest. The complexity of the case is relevant, but the case must be considered in the round, as in *Eckle v. Germany*:

"The reasonableness of the length of the proceedings must be assessed in each instance according to the particular circumstances. In this exercise, the Court has regard to, among other things, the complexity of the case, the conduct of the applicants and the conduct of the judicial authorities."

The Scots courts concluded that the proper approach is:

"In the end of the day the question whether more than 'a reasonable time' had elapsed depends on our assessment of the various factors to which we have referred, against the background of our general knowledge as to the criminal justice system in Scotland." *McNab*, approved and adopted in *HM Advocate v McGlinchey & Renicks*.

'According to law' (and slight variants) is a common criterion for the application of derogations. It indicates that there must be a reasonably clear, definite and accessible set of rules created lawfully: *Kruslin v France* (telephone tapping).

Common law rules are in principle acceptable. The test is whether the relevant rule is accessible and provides a reasonable degree of guidance as to the way in which a case will be disposed of: *Sunday Times v UK* (Thalidomide). There are two areas where this may not apply:

'Old' rules which have been left vague: Hashman & Harrup v UK

Areas where the judges formulate 'new' common law rules or radically modify or develop an existing rule. One possibility is the doctrine of necessity as applied in *L v Bournemouth*, another is any 'common law' doctrine of privacy.

'Necessary in a democratic society' has been interpreted as importing a doctrine of proportionality. The proposed derogation must give rise to the least interference with the rights in question consistent with the protection of the legitimate interest concerned. This requires a much more detailed balancing of the various factors than the traditional *Wednesbury* test. The ECtHR approach is similar to that of the ECJ. The issue of what is necessary is often addressed together with that of the margin of appreciation. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 Lord Clyde adopted (in Lord Steyn's words) 'a precise and concrete analysis of the criteria. In determining whether a limitation is arbitrary or excessive a court should ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Statutory interpretation

Most of the time of the courts is now taken up with disputes where the relevant law is clearly to be found, in whole or in part, in one or more of the thousands of statutes or statutory instruments currently in force, rather than in earlier judicial decisions. Conversely quite a lot of modern common law is the "common law of statutory interpretation," i.e. the cases in which the courts have set out the principles they adopt when asked to interpret statutes and statutory instruments of various types and in various circumstances. These cases then form precedents, both in respect of the actual interpretation, and in respect of the techniques to be adopted.

U.K. courts are of course bound to apply, and therefore to interpret, EU legislation. This exercise is however subject to different criteria, and is best studied with other aspects of EU law.

The status of statutes and the role of the judiciary

The original attitude of the common lawyers to statutes was that, being new law, they were *prima facie* inferior to the common law, which was of course by definition a supreme source of law, as representing the collective wisdom of the people and the judiciary. Originally it was presumed that a statute did not amend the common law. Doctrinally, it is now accepted that a statute or EU rule will, if appropriately worded, abrogate or alter a rule of the common law, although there is still a presumption that the law is not to be altered.

The doctrine of Parliamentary Sovereignty gives Parliament sole legislative capacity. Parliament is constitutionally free to pass or repeal any statute it chooses. There is no concept of entrenched legislation in UK constitutional law (subject to the caveat that the Scots consider the provisions of the Act of Union to be entrenched), although in practice the political implications of a repeal of the Parliament Act or the European Communities Act are such as to give them much greater protection than ordinary statutes. It follows that the judges have no power to rule on the propriety of a statute.

It is clear therefore that Parliament is master, in the sense that it determines what the statute law of the UK is. The role of the courts is to interpret the intention of Parliament as expressed in the words of the statute, and apply it to the facts of the instant case. We are accustomed to refer grandly to the intention of Parliament as though it is always the considered expression of the Legislature upon due consideration, but it should be borne in mind that the detailed drafting of statutes is done by parliamentary draftsman who, although experts, are fallible humans, that amendments can be introduced by non lawyers and are often not fully analysed, and that statutes may reflect political imperatives, not logic. Thus ss28 and 29 of the Criminal Justice Act 1991 sought on the one hand to ensure that an offender is sentenced to his just deserts based on the seriousness of the current offence, so that his record is not to be taken into account, while nevertheless allowing the sentencer to take account of mitigating and aggravating factors, which may include the circumstances of previous convictions. The Government were, rightly, wedded to the principle of just deserts, but faced a revolt of Law Lords and JPs who wished to continue to take the record into account as an aggravating factor. The provision came into force briefly, causing all the problems of interpretation that were forecast and was then swept away when a new Home Secretary decided to backtrack on the policy.

For many years an elaborate game was played over the intention of Parliament in relation to the availability of a civil action for breach of statutory duty (e.g. in the health and safety at work field). This intention was not expressed, and the ingenuity employed in deducing it was marvellous. It would have been so easy for the intention to be expressed one way or the other, and this is what is now done, as in the Safety of Sports Grounds Act and the Consumer Protection Act.

Use of inappropriate words

Parliament is assumed to know the existing law, including the meaning assigned to technical legal language or "terms of art." If those words are misapplied, they will be given their established meaning, notwithstanding that this frustrates the obvious policy of the legislation. In other words the intention of Parliament is derived from a study of parliamentary language, not political debate. So when in the Restriction of Offensive Weapons Act 1959 it was made an offence to "offer for sale" a flick-knife, the offence was not made out in the case of a shopkeeper who had such a knife on display in his shop window. It was well established that such display of goods was an invitation to treat, not an offer for sale: *Fisher v Bell* (1960). An even more extreme example failed to make the statute book. Ken Weetch MP promoted a private member's Bill to remove the solicitors' conveyancing monopoly, by creating a category of authorised conveyancers. In a spirit of premature political correctness the Bill was drafted in the feminine gender throughout. Unfortunately, although by virtue of the Interpretation Act the masculine includes (or embraces) the feminine, the reverse does not apply. Thus the Bill, if enacted would have allowed only females to exercise the new rights. The Bill also restricted solicitors in various ways and created a number of criminal offences, which could only have been committed by lady solicitors. It is possible to draft a statute in the feminine gender (e.g. the Nurses Midwives and Health Visitors Act), but there must be a specific interpretation clause indicating that the feminine embraces the masculine.

Ambiguity

Many words in the English language have several meanings or shades of meaning. Furthermore these may change with time. Parliament is not immune from ambiguity. One example arose in the "Fare's Fair" litigation between the GLC and Bromley LBC. A Labour controlled GLC implemented a manifesto pledge to improve London Transport by reducing fares and improving services, which, in the short term, required an increased subsidy. There was a clear political warrant for the policy, but its lawfulness was challenged. The 1950 statute which conferred power on the GLC required them to adopt an economic transport policy. The case turned on the meaning of "economic" which governed this particular usage. Bromley argued for a narrow view; a policy was economic only if it produced a surplus or a minimum deficit to be funded by the boroughs. This was an accountants profit and loss and balance sheet view of economics. The GLC argued for a wider view; economic in the sense of tending to enhance the economy of the London region. This view stressed "off balance sheet considerations" such as reduction of pollution, traffic congestion and fuel consumption.

The narrow view prevailed. Although the natural response of the radical is to berate the conservatism of the judiciary, it is fair to point out that Parliament in the 40s and 50s would not have been familiar with the concept of "off balance sheet" accounting, and also that the deficit was being funded somewhat inequitably, in that all boroughs paid proportionately to population, while those such as Bromley, largely served by BR, got less benefit from the scheme than others north of the Thames.

An alternative argument is, however, that, where Parliament has clearly given to a local authority or other public body powers which involve a discretion as to the adoption of policy, and not merely responsibility for administering a centrally determined policy, the court should

only interfere by way of judicial review where the authority is manifestly acting outwith the scope of the policy discretion, and is either acting perversely or for an obviously collateral purpose. This argument of course relies on a more purposive approach to interpretation, while the narrow approach is more semantic. As we shall see, while the latter approach was the one traditionally adopted by the judiciary in most cases, the former approach is now becoming more generally accepted.

It must however be said that, however attractive this thesis, particularly when the recently developed concept of subsidiarity is prayed in aid, the courts have in the past fairly resolutely and consistently rejected it. Thus in the 1920s the decision of the Labour Poplar Council to pay its workers a decent wage, as opposed to the going rate, was held to be an improper use of rate-payers money. This in turn reflects the primacy accorded to property rights by the common law. It all goes to show that an apparently narrow semantic and contextual argument can be opened out to address issues of basic legal *Weltanschauung*. Whichever view is preferred, it is clear that the apparently technical process of interpretation has very significant political content.

As has been stated in relation to pure common law the UKSC has a wider role than other courts and can address issues of principle. The same applies in relation to statutory interpretation. One case will illustrate the way in which the UKSC approaches this issue. It is the marital rape case *R v R*. The prosecution urged that the exemption of a husband from liability for the rape of his wife should cease. The exemption ultimately rested on an assumption dating back to the 17th century that the marriage vows were an unconditional and permanent consent to marital intercourse. In moral and social terms this was clearly repugnant to 20th-century sensibilities. The defence urged that the exemption be retained on the narrow ground that the definition of rape is to have unlawful sexual intercourse with a woman without consent. The word "unlawful" must have a meaning and this meaning was "non-marital." This argument was rejected.

A narrow literal construction was rejected in order to give effect to a broader concept of justice. However this was not perceived as being primarily a case of statutory interpretation. It was treated as being largely a matter of common sense and the removal of a rule which was apt to lead to inconvenience and injustice.

Uncertainty of Scope

It is impossible to cover all eventualities in a statute. Indeed, there are those who argue that many of the problems of statutory interpretation in the UK arise from the attempts of the parliamentary draftsman to do just that, producing an unnecessarily convoluted text precisely because he cannot, unlike his continental counterpart, simply set out his principles and leave it to the judges to decide cases as they arise in accordance with those principles. Two good examples are s2(1) of the European Communities Act, and also s3 of the Unfair Contract Terms Act.

Principles and rules of interpretation

What we have is a number of general principles, and several specific rules of interpretation and construction. These involve interplay between the courts and the legislature (in practice, the parliamentary draftsman). They are of vital importance, particularly in the field of criminal law, which is largely statutory in origin, and in judicial review and control of governmental and quasi governmental organisations. Such bodies are commonly exclusively statutory in origin; statute therefore defines their powers and duties and the purposes for which these can be

deployed. Any challenge to the exercise of these powers, or a request for clarification of their scope will be essentially an exercise in statutory interpretation.

To the extent that the government of the day has invested political will in the operation of these bodies, any judicial review is bound to have political implications, even if the judges seek to insulate themselves from these political influences. It is also the acid test of the independence of the judiciary. This appears to be intact when one considers the number of cases, both high and low profile which have been decided against the government since the war, irrespective of the political hue of the government of the day, culminating in the Home Secretary being found in contempt of court for failing to halt or reverse a deportation in despite of a court order.

There are many factors bearing on interpretation. In most cases lawyers seek clarity and certainty, but in this field (as in analysis of cases) there is an insistence on keeping the rules "soft" or "fuzzy." This retains freedom of action for the judges. Although the various rules are discussed one by one, it must be remembered that they are not a rigid hierarchy. While judges do not have complete freedom to select the rule that suits them, they have a large measure of discretion. As well as the rules there are a number of assumptions which help to inform the selection:

General Assumptions

The presumption that penal and revenue statutes are to be construed against the state and in favour of the individual where there is any doubt.

The presumption that the court will promote rather than frustrate the policy of the statute in all other cases.

The presumption that the government has been elected to govern.

The judges are very conscious that they are not acting in a vacuum. The interpretations which they apply will directly and indirectly affect individuals and companies in many ways. Two expressions of this are:

A choice of statutory interpretation is "a matter of policy ... not a semantic or linguistic exercise" *per* Lord Denning MR *R v Crown Court at Sheffield ex p Brownlow* [1980] 2 All ER 444, 451.

"Judicial construction [should be] related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and nonretroactive effect and, no doubt, in some contexts, to social needs" *per* Lord Wilberforce *BlackClawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, 828.

Rules of Interpretation

The Literal Rule

If the provision in question has a single literal meaning, this should be applied, even if it is quite clear that the intention of Parliament is being thwarted. Cf *Fisher v Bell* where Parliament had passed legislation which was intended to prohibit the importation, manufacture, sale, possession and use of flick knives and lock knives. A shopkeeper was prosecuted for having a flick knife on display in his shop as part of his stock in trade. Clearly this was an activity which

Parliament had intended to criminalise. However the relevant provision created an offence of "offering" a flick knife.. It had earlier been established that when goods are put on display in a shop, it is the customer who makes an offer to purchase. The display of the goods does not constitute an offer in the legal sense. The shopkeeper was given the benefit of this drafting error. It would have been entirely possible to make it an offence to "offer or expose" the knife for sale, and indeed this amendment was made as soon as the problem was appreciated. The court was clearly aware that its decision flouted the clear intention of Parliament, but considered it more important to preserve the integrity of statutory language.

This rule is claimed to have the merit of objectivity, in that the judge does not seek to ascertain or interpret the intention of Parliament. It also concentrates the mind of the draftsman, so that he doesn't make the same mistake twice. The lesson of *Fisher v Bell* has been learned in later statutes.

Against this is the objection that words do not have a single objective meaning. The judge will interpret the word in the light of his professional and possibly personal conditioning. Furthermore, if the intention of Parliament is in fact clear despite the inappropriate language, it is wasteful not to give effect to it.

The Golden Rule

Under this rule the literal meaning is taken unless this produces a manifestly absurd result. This can be used as a way of distinguishing between two plausible meanings and thus avoiding possible ambiguity, by preferring the sensible meaning to the absurd meaning. So the word "marry" in the definition of the crime of bigamy was interpreted in the 19th century case of *R v Allen* as "go through a form of marriage" rather than "contract a [valid] marriage" which would have made the offence impossible to commit. This is because a "marriage" could only be contracted between a man and a woman neither of whom is currently married to anyone else. However, the mischief of bigamy is that it creates the appearance of a marriage, and this can of course be undertaken on multiple occasions.

The rule can also be used where the literal meaning produces absurdity (or repugnance to sound sense) but an alternative meaning or gloss produces the "right" result. This approach has been used to assimilate UK statutory wording with the wording of EU legislation on the same theme where the two were pulling in the same direction, but not wholly consistently phrased.

The golden rule has the merit of avoiding arbitrary and petty results, but it does depend to some extent on the interpretative attitude of the judge, and can be objected to on the basis that the judge is legislating by substituting his interpretation for what Parliament actually enacted.

The Mischief Rule

This rule is clearly purposive, albeit to a limited extent. I.e. the judge is required to determine what Parliament was seeking to achieve by the provision, and apply that interpretation which achieves that aim. In its classic form as the rule in *Heydon's Case* (1584) the judge looks at the existing law, and at the *mischief* which the statute is aimed at remedying. A modern example is *Kruhlak v Kruhlak* (1958) where the words "single woman" in the context of

affiliation proceedings was interpreted to mean any woman not living with her husband or supported by him; i.e. it could include a divorcee or widow. The mischief was the need to ensure financial support for illegitimate children, whatever the marital status of the mother. Similarly in *Knowles v Liverpool Council* (1993) a broad interpretation was given to the expression "equipment" in the Employers Liability (Defective Equipment) Act 1969, in order to give effect to the broad aims of the legislation in the light of the known mischief, which was that workmen were not receiving compensation when injured by defective items they were using because responsibility for the defect could not be allocated to a particular defendant.

Obviously the ascertainment of the mischief and the subsequent choice of meanings gives ample scope for judicial creativity, but not judicial legislation, in that the intention of Parliament is, ostensibly, being given effect to.

Purposive Interpretation

This builds on the mischief rule, but is not dependent on the possibility of looking back to identify the problem; it may be enough to identify the social, commercial or administrative purpose which underlies the legislation in question. It has traditionally been objected to as judicial legislation, but is now respectable at least in relation to EU legislation. As this prevails, it is legitimate to do violence to the meaning of a statute to give effect to the EU provision.

Problems arose as the precise nature of the relationship of EU and UK law was explored. They first surfaced in the employment law field and most of the cases seem to relate to equal treatment issues.

McCarthy's v Smith [1979] ICR 785. This was an equal pay case. The plaintiff wished to be compared with a man who worked in the same job, but at a different time. UK legislation appeared to confine comparability to cases where the employment was simultaneous. EEC law (Art 141) indicated the contrary. The doctrinal question was whether s2(4) gave actual primacy to EEC law or created a rule of construction that the EEC provision was to be applied so far as possible consistent with the due application of the UK statute. When the case was initially before the Court of Appeal, the majority of the CA held the former, while Lord Denning, dissenting, preferred the latter. However in a later hearing of the same case after the ECJ had given a ruling, Lord Denning appeared to accept that Treaty provisions, at all events, took precedence, not as superior to UK law, but as part of that law, and the other judges agreed.

There are however alternative approaches to this issue.

Garland v BREL [1983] 2 AC 751. The House of Lords adopted the Rule of Construction approach. This was justified on the basis that, at all events in the case of a casual discrepancy, the express intention of parliament in the ECA should prevail. Considerable latitude in interpretation was granted, over and above the normal rules to allow this to occur. However in the case there was no need to do undue violence to the statute. Note that this is not entirely consistent with the ECJ's approach in *Simmenthal*, which was that the EU law automatically prevailed as a matter of substance and Treaty obligation. This decision is, at least in principle, binding on the English courts.

Duke v GEC Reliance [1988] AC 618. The plaintiff claimed unlawful sex discrimination by reason of being required to retire at 60, when male colleagues were allowed to work until 65. Her employer was in the private sector, so the *Marshall* case which subjected public sector employment to the EU rules did not apply. The UK legislation was independent of EU law. In other words it was not enacted in order to give effect to an EU rule. Coincidentally, it did

concern an area of law where the UK had legislated after joining the EU, and which was also the subject of EU legislation which existed in draft at the time of the UK legislation. The UK government intended to legislate consistently with the EU legislation, but got it wrong. The error was an understandable one, as EU law was in a state of development. The House of Lords reaffirmed the Rule of Construction approach. They were considering an issue covered by the ruling in the *Marshall* case. This demonstrated that the UK government had misapplied the equal treatment directive. Nevertheless, the incorrect interpretation was accepted as binding, since the correct interpretation was not consistent with any legitimate construction, however purposive, of the words used. Mrs Duke was employed by a private employer and could not rely on the directive itself. As discussed later, this approach was only dubiously consistent with ECJ case law at the time, and is now inconsistent with *Marleasing*.

Pickstone v Freemans [1988] 3 CMLR 221. This case again concerned equal pay. However, the timing of events was such that the UK legislation under consideration had been introduced specifically to remedy the discrepancies detected in earlier Art 226 proceedings. A similar approach, i.e. purposive 'construction' of the statute, was apparently taken, but the deviation that was required from the natural meaning was such that it was a case of ignoring the literal meaning and inserting words in order to secure conformity. Nevertheless this was done, specifically because the UK legislation was designed to give effect to EU law. The difference of approach was justified by the fact that the UK legislation in this case had been introduced specifically to give effect to a Community obligation, and Parliament had been assured by the government that it had this effect. In *Duke*, the legislation was independent of the EU rule. This is surely a case of a rule (i.e. that the court was construing the intention of parliament) being used to preserve the decencies, rather than a reflection of the actual mental processes involved.

In this case the EU law (now Art 157 TFEU) was directly effective, leading to the question of whether a similar approach should be taken in other cases, i.e. applying the *von Colson* decision of the ECJ, by regarding the court itself as under an Art 4.3 TEU obligation to give effect to EU law, even where this was not itself directly effective. The answer came very soon.

Litster v Forth Dry Docks [1989] 1 All ER 1194. In this case the House of Lords decided that this approach was justified; i.e. the very broad 'purposive' approach to interpretation should be used wherever it was necessary to bring UK legislation introduced in order to comply with EU obligations into line with the relevant EU rules. It was again a case where the UK legislation was specifically intended to implement EU law, although the latter was a Directive and therefore not horizontally directly effective.

The courts may still balk at extending the rule further to cover UK legislation which is not implementative and is in conflict with non directly effective EU law, or to the as yet hypothetical (if hackneyed) example of a UK law deliberately contravening EU rules. Art 226 proceedings, or *Francovich* non-contractual liability will be the only remedies. C.f. *Webb v EMO (No 1)* referred to below, and the implied threat to this effect from Lord Keith.

Interim remedies

Factortame I [1990] 2 AC 85. The UK government sought to prevent foreign interests acquiring part of the UK fish quota by imposing restrictions on ownership of UK registered vessels. This appeared to conflict with a prohibition in the Treaty on discrimination on grounds of nationality. [This was confirmed in Case C-221/89 *Factortame II*]. This case created much more heat than light. The decision of the ECJ (Case C-213/89) that, in a case where UK legislation was arguably in conflict with EU law, the position of those aggrieved must be preserved was eminently predictable. In most cases of dispute justice could be done at the end of the day by a money payment. Where this is not so, the usual reaction is an interim

injunction to preserve the position. UK principles do not permit courts to fail to give immediate and unconditional effect to the will of Parliament expressed in statutory form. But UK principles yield to EU law, and therefore it was incumbent on the UK to produce some mechanism. The obviousness of the legal issue, that a requirement for UK ships to be 75% UK owned discriminated on grounds of nationality against Spanish owners of ships currently registered, was eclipsed by the outrage at the affront to the dignity and "sovereignty" of Parliament. In truth the problem is the régime for fisheries, with national quotas for catches co-existing with free movement for ship owners.

Further Developments

Questions of equal treatment have continued to exercise the English courts. As unequal treatment is in principle rendered unlawful by English statute, it is only the possible discrepancy between English and EU rules which raises issues of EU law as such. In ***Webb v EMO Air Cargo*** the Court of Appeal ([1992] 2 All ER 43) held that, notwithstanding *Marleasing*, the obligation of the English court was only to give effect to the EU rule if this could be done without undue violence to the meaning of the UK statute. The House of Lords decided that the particular issue, namely whether the dismissal of a pregnant woman who has been employed (it was assumed, wrongly) to cover maternity leave herself, and where a man requiring sick leave at the same time would also have been dismissed is to be treated as a dismissal on the ground of pregnancy should be referred to the ECJ. This issue was not covered in Case C177/78 *Dekker* (refusal to employ to avoid the adverse insurance consequences of a known pregnancy - unlawful) or Case 179/78 *Hertz* (dismissal for ill health deriving from complications of pregnancy - lawful). If there was no breach of the EU rule, then there is no need to address the alleged discrepancy. If it proved to be necessary, Lord Keith indicated that *Duke* would be relied on. I.e. the UK provision is to be construed so as to give effect to the EU rule only if this can be done without distortion. *Marleasing*, which appeared to impose a much wider obligation was distinguished as being a decision on "a provision of Spanish law ... of a general character." In his Lordship's view, the Spanish court would have been "bound and entitled to give effect to [a specific Spanish rule] notwithstanding the terms of the directive." With respect, this is not what the ECJ said, which was that an interpretation inconsistent with the directive was precluded. The ECJ decision in *Wagner-Miret* is however much closer to Lord Keith's opinion. However there is still a strong presumption that a consistent interpretation can be found.

Hopes expressed at the time of the initial House of Lords decision in *Webb* that the issue would not surface just yet, because the ECJ would remove the basis for conflict by approving the English approach comparing the pregnant woman with a hypothetical sick man have been dashed. The ECJ in Case C-32/93 *Webb* stated that, with the possible exception of a woman employed on a short term contract (which was not the case here):

"There can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the work for which she was recruited with that of a man similarly incapable for medical or other reasons."

The fact that Mrs Webb was recruited to cover for another employee's maternity leave is irrelevant, given that it was a permanent, rather than a temporary appointment. This is a different view of the facts than that adopted by the House of Lords, but appears to be correct. Neither the ECJ nor Advocate General Tesouro address the hypothetical issue of a temporary employee.

The final outcome of the *Webb* case was that in a brief judgment [1995] 4 All ER 577 Lord Keith concedes that the reasoning of the ECJ is correct when applied to a long-term contract.

He states that in the light of this the question is how to fit the terms of the UK test into the broad principles of the EU directive as interpreted by the ECJ. This is a major, if very low key, retreat from the strident tones of the earlier speech, largely masked by the concession that he had earlier failed to give proper weight to the long-term nature of Ms Webb's employment. The question of how a short term employee is to be treated is left open, with the implication that she has no protection.

The dictum of Glidewell LJ in *Webb*, "The Directive is, of course, addressed to governments. The court's task is to interpret and apply its own national legislation," is clearly a lapse. The directive is addressed to member states, which includes judicial organs, whose functions are stated in *Marleasing*. Advocate General Tesouro refers to this at para 6 of his opinion in *Webb*.

It is necessary to establish exactly what the English courts are saying, and what the basis for this attitude is. *Von Colson* was the authority on the duties of national courts when *Duke* was decided. It applies in terms to implementing legislation and concerns remedies, which are acknowledged as being, in principle, a matter for the national court. It is in this context that the obligation "to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law so far as it is given discretion to do so under national law" was interpreted. It was perhaps open to the House of Lords in *Duke* to interpret *von Colson* as it did, when it did. On the other hand Cases 24 & 97/80 *Commission v. France* (which predates *Duke*) suggest that there is no liberty to disregard a ruling in the way that *Marshall* was disregarded in *Duke*. In other words, *Duke* proceeded on a false basis of the powers open to the English court, or at least, the obligations imposed by existing EU case law.

Whether or not *Duke* was rightly decided at the time, account must now be taken of *Marleasing*. The only scope for the application of *Duke* after *Marleasing* is the proviso "so far as possible." Lord Keith interpreted this broadly. He referred to the Spanish rule which was disappplied as general rather than specific in character, asserting that the Spanish court was entitled and bound to apply a specific incompatible Spanish provision. For *Marleasing* to apply, "the domestic law must be open to an interpretation consistent with the directive, whether or not it is also open to an interpretation inconsistent with it".

Wagner-Miret is not really an excuse for reverting to *Duke*. It does allow for the rare case of legislation that cannot be reconciled, but in *Pickstone* and *Litster* the House of Lords has clearly held that the English courts can, in effect, disapply the words of UK statutes and substitute the meaning of the EU legislation which they are intended to implement. If this can be done in this context, then clearly it 'can' be done in the context of UK legislation which is not implementative, as Lord Keith acknowledges in *Webb (No 2)*. All that is still unclear is whether *Webb (No 2)* represents a definite and general new rule, or whether there are still rearguard actions to be fought by the defenders of *Duke*.

The real problem is essentially a cultural one. The ECJ operates in a typically civilian, code based environment. The function of the judge is essentially teleological, seeking an interpretation which serves the purposes of the legislation, starting from the express statement of that purpose in preambles and recitals and then moving from the general to the particular. English judges have tended to be much more concerned with detailed textual analysis of legislation which is much more close grained and comprehensive. This is of course a generalisation. There are ECJ decisions which turn on detailed textual analysis, e.g. Case 10/61 *Commission v Italy* (which turned on the different shades of meaning in the expressions 'duties applied' and 'duties applicable') or on the analysis of a considerable body of evidence: Cases 40-48/73 *Suiker Unie*. Equally, the English judges can adopt a teleological approach when applying the Golden or Mischief rules.

Human Rights Act

It is appropriate to note here that where Convention rights are in issue, there is a new statutory basis of statutory interpretation, namely to give effect to the rights so far as possible: s 3 HRA. As Lord Simon of Glaisdale (a former Lord Chancellor) said in the House of Lords debate on the Report Stage of the Human Rights Bill (19.1.98):

"One must draw a distinction--it is useful to do that at this stage--between antecedent statutes which are found to be incompatible and prospective ones; in other words, statutes enacted after the provisions of this Bill come into force. The Government tried, rightly and ingeniously, to minimise the circumstances whereby an Act of Parliament would be found to be inconsistent with the provisions of the convention. They did that by stipulating, as your Lordships know, a new rule relating to statutory construction. Instead of the courts seeking what is the natural meaning of a word or phrase they were to seek a possible meaning, which means a reasonably possible meaning, consistent with the convention. That has been generally accepted and the Government are to be congratulated on coming up with that solution. Admittedly, that leaves some measures which, however construed, will be found to be incompatible with the convention rights".

This echoes statements by the Lord Chancellor, Lord Irvine of Lairg, in the Tom Sargant Memorial Lecture in 1997:

"The Act will require the courts to read and give effect to the legislation in a way compatible with the convention rights 'so far as it is possible to do so'. This ... goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the convention rights unless the legislation itself is so clearly incompatible with the convention that it is impossible to do so. Moreover, 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. Whilst this particular approach is innovative, there are some precedents which will assist the courts. In cases involving European Community law, decisions of our courts already show that interpretative techniques may be used to make the domestic legislation comply with the community law, even where this requires straining the meaning of words or reading in words which are not there. The court will interpret as consistent with the convention not only those provisions which are ambiguous in the sense that the language used is capable of two different meanings but also those provisions where there is no ambiguity in that sense, unless a clear limitation is expressed. In the latter category of case it will be 'possible' (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected rights was intended so as to make it 'impossible' to read it as conforming".

We will look at the actual approach adopted under the Human Rights Act later. It should however be noted that it is modelled very closely on the approach developed by the English courts for dealing with the interface between UK law and EU law.

The Problematic Nature of Statutory Interpretation

The weaknesses of these rules collectively can be summed up as follows:

There is no hierarchy of rules. The judge can select the rules he feels appropriate to the case. Alternatively, there may be a tendency to allow the rules to slide into each other, but again allowing a pretty wide latitude to the judge to pick the tools which will achieve the result he 'wants' to achieve.

Judicial interpretation will be affected by the judge's professional understanding (i.e. his membership of the "interpretative community" of English judges, with all that implies in terms of education, social attitudes, legal tradition etc). It may be influenced by aspects of adventitious fairness or unfairness arising from the instant facts and might be affected by personal prejudice. It is required to some extent, whichever rule is applied, and is certainly required in the process of selecting which rule to apply.

We do however seem to be moving to a situation where, even leaving aside the special rules applicable in relation to both EU and ECHR issues, there is a new orthodoxy – the judge today seeks to interpret the words of the statute as they appear in context. This does not allow violence to be done to the text, but it does respect the surrounding circumstances. However, it is still too soon to consign the old rules and the commentary on them to the dustbin of history.

General Rules of Construction

These are rules applied to situations of common occurrence.

Interpretation Act

This act covers such points as the singular including the plural (unless the context demands otherwise) and the masculine including the feminine. It fixes definitions of expressions such as "month" and "year." It also covers points such as apportionment of time.

Eiusdem generis rule (noscitur a sociis)

Where two or more specific words are followed by a general expression, this must be read subject to the limitations imposed by the specific words. Thus in construing "Home, office, room or other place," the specific words indicate a building or premises and the general words must be construed accordingly. "A place within the meaning of the Act" must therefore be a building and not a stand or pitch in the open air.

Expressio unius exclusio alterius

This is a sort of converse of the rule above. If there is a list of specific terms with no general words, the provision will not apply to another item, whether or not similar. The rule will not apply if the list is expressed to be non-exhaustive or by way of example only

Consistency of Construction

It is presumed that expressions are used consistently in the same document. A clear context may give the meaning and this can be applied to an ambiguous or doubtful context.

Presumptions

These are general ideas which apply *prima facie*, i.e. they can be displaced by sufficiently cogent evidence to the contrary.

Non retrospectivity. A statute is presumed to operate only for the future, either from the date of enactment or a later date of operation. The presumption can be over-ridden, e.g. the War Crimes Act.

Preservation of existing law. This includes a number of applications. Firstly it is strongly presumed that an earlier statute will be repealed or amended only by express provision. The common law has a presumption, now weak, that a statute will not amend the common law. A consolidating act is presumed not to change the law. Thus the land law was changed by the Law of Property Acts 1922 and 1924, which were codifying and reforming acts and then consolidated, with other legislation, by the LPA 1925.

No expropriation without compensation. Property rights are not presumed to be removed without due recompense. This argument is being used, largely unsuccessfully, to challenge the revocation of licences: e.g. ITV stations, investment advisers.

Aids to construction

Generally all the words forming part of the Act (Titles, Headings and Schedules) are available. Many acts contain internal interpretation sections. Marginal notes are excluded; they are inserted by the draftsman not Parliament.

Extrinsic aids, except dictionaries, are normally prohibited.

Reports of the Law Commission, or other bodies which led to the introduction of a Bill, are not admissible directly to construe the Act, but may indicate the state of the previous law, and the mischief aimed at.

Until 1992 reference to the Parliamentary debates in *Hansard* was expressly forbidden, on the basis that it was for the Court to interpret the words Parliament had enacted, rather than to analyse the thought processes behind the legislation. This well established rule was abolished in the seminal case of *Pepper (Inspector of Taxes) v Hart*

The underlying issue in this case was the tax treatment of a fringe benefit, namely the right of public school masters to have their children educated cheaply at the school where they taught. Prior to the introduction of the Finance Act 1976 it was clear that such benefits were not taxable, because there was a specific provision to that effect in the earlier legislation. Problems had arisen with the taxation of concessionary travel for railway and airline workers. These had

been resolved by a decision of the Special Commissioner of Income Taxes in favour of the tax payers' argument that the value of the benefit was the marginal cost of providing the concessionary travel, which was in practice nil, since the train or plane in question would have operated in any event. The Revenue had unsuccessfully argued that the value was a proportional share of the cost of the operation. This ruling was accepted as applying by analogy to the provision of education, although there was a marginal cost for accommodation, books etc.

S61(1) of the Finance Act 1976 charged to tax in the case of a director or higher paid employee the cost of any benefit provided to him or members of his household by reason of his employment. S63(2) provided that "the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and ... includes a proper proportion of any expense relating partly to the benefit and partly to other matters."

For some years the Revenue continued to deal with fringe benefits in the form of free or concessionary access to services provided by the employer as they had done under the earlier legislation, namely by assessing only the marginal cost. They then decided that the change in statutory wording justified them in reasserting the average cost argument. The taxpayers contended for the marginal cost. It was common ground that the contribution actually made (20% of the usual fees) more than covered the actual marginal cost of food, laundry stationery etc. It was also common ground that, as the school in question was non profit making, the proportional cost was roughly equivalent to the full fee. The issue was therefore the interpretation of the relevant provisions, especially s63(2).

This issue (which clearly had very substantial ramifications for other similar fringe benefits) ultimately came before the House of Lords and was argued in the usual way before a committee of five Law Lords. They were, it appears, divided on the question of interpretation of s61 and s 63 by the application of orthodox principles. The majority accepted that the breadth of the statutory language, especially the last clause of s63(2), justified the Revenue's interpretation. It would however be unfair to examine the basis of these decisions in depth because they are not fully articulated in the speeches. Before giving judgment "it came to [their] Lordships' attention that an examination of the proceedings in parliament which led to the enactment of sections 61 and 63 might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words."

In order to do this it would be necessary to allow reference to Hansard as an aid to construction of a statute. This was not currently permitted, but the present practice could be abandoned within the terms of the 1966 Practice Statement regulating the conditions under which the House could decline to follow its previous rulings. In recognition of the importance of the new issue, two further Law Lords, including the Lord Chancellor, were added to the committee, and there was a further hearing.

The Attorney General argued that reference to Hansard could amount to impeaching or questioning proceedings in Parliament in breach of article 9 of the Bill of Rights 1689, or alternatively the breach of some wider but unspecific privilege of Parliament. These arguments were fairly summarily and unanimously dismissed. Article 9 related to freedom of debate and speech. Examining the record to ascertain what was said did not amount to an infringement of either. It was for the courts to determine the extent of privilege, and none was or should be recognised in this area. There was thus no constitutional reason why the courts should not take Hansard into account.

The House therefore had to consider whether it was right in principle to do so, and whether there were any countervailing practical considerations. Six of their Lordships unequivocally accepted both that it was right in principle in certain cases, and that there were no

countervailing arguments. Lord Mackay dissented on the practicalities, suggesting that the cost of research in Hansard in every case would be grossly wasteful. He was agnostic on the issue of principle, noting that earlier enquiries had not recommended any change in practice, but indicating that he would not have opposed a change on grounds of principle alone.

Lord Browne-Wilkinson summed up the objections to change as follows:

"Thus the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers) to construe the meaning of the words finally enacted; second, the practical difficulty of the expense of researching parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, the improbability of finding helpful guidance from Hansard."

His Lordship pointed out that it is permissible to have recourse to White Papers, official reports and to the work of the Law Commission to identify the "mischief" at which a statute is aimed, and that the statements of the sponsor of the Bill will be an equally valid aid. Following *Pickstone v Freemans* it is permissible to refer to Hansard in relation to secondary legislation.

The "mischief rule" only operates where the statutory words are ambiguous or obscure. In such cases, it may be observed, the court is already seeking to repair the damage done by inadequate drafting rather than giving effect to the legislative intention. Why should it not have access to a full repair kit? His Lordship's conclusion was that:

"[R]eference 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 being 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 see that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

It was recognised that there might be an increase in the cost of litigation occasioned by the need to research Hansard. Argument had been presented on the experience in Commonwealth countries where there was now recourse to legislative debates. This indicated that there were no serious problems of expense or access to materials. The majority view was that the cost was likely to be small, as it would be quickly clear whether there was any relevant statement or not, and that in some cases costs would be saved, because Hansard would give an answer which foreclosed the litigation. In any event this issue of costs would weigh only if very heavy against the interests of justice which required access to all relevant material.

In the case of s63 it was clear on examining Hansard that the original intention had been to tax free or concessionary services on the value to the recipient (i.e. market value), but that that intention had been abandoned. The Secretary to the Treasury stressed on many occasions when answering questions in relation to various groups, including teachers, that the intention was now to tax the marginal cost only. In the light of this unambiguous material the whole House, including those who had earlier taken a different view on the textual analysis, allowed the taxpayers' appeals on the substantive issue.

In none of the speeches is there an express reference to the maxim that there is no equity in a taxing statute; in other words that there can only be a charge to tax if it is imposed by clear words. Lord Mackay comes close to it in saying that he regards the taxpayers' construction as being possible and that "any ambiguity should be resolved in favour of the taxpayer." The Lord Chancellor was clearly speaking *obiter* since he was not part of the original panel. Clearly Lords Bridge, Oliver and Browne-Wilkinson saw no operative ambiguity; the Revenue's construction

was, to them, the right one from a textual analysis. Otherwise there must have been an ambiguity which would have brought the maxim into play. The textual analysis equally clearly gave the wrong answer. The rule enunciated is not limited to taxing statutes, or penal statutes, where a similar presumption of construction applies, but there is clearly a distinction to be drawn between the type or degree of ambiguity etc. which will allow the invocation of Hansard and that which will entail the application of the maxim.

Will it for instance be possible for the Revenue (or for the Crown in criminal proceedings) to refer to Hansard to seek a construction adverse to the subject, or will this be ruled improper as an attack on the liberty of the subject.

Many examples of contentious drafting do not involve ambiguity, but use of incorrect expressions, e.g. the provisions which sought unsuccessfully to criminalise shopkeepers and others who "offered" prohibited items for sale: *Fisher v Bell*. No doubt the intention was to catch those who exposed these items for sale. Will the new ruling allow the investigation of the antecedents of flawed as opposed to obscure legislation?

In the present case the legislative history was explicit and unambiguous. How far will the court go in pursuing the sponsor's intention if there are answers in debate which put a new spin on the original statement?

A different approach

In recent times judges seem to be adopting a rather different approach to statutory interpretation generally. It is however too soon to throw out the old rules and learning. The new approach focuses on the provision in its context. Precise words are seen as a vehicle for conveying an idea. This approach is most developed in Human Rights Act cases, but it is generally applicable. The most recent example is the case of *Ghaidan v Godin-Mendoza* which we shall look at in detail in relation to the Human Rights Act.

The key feature of this approach is to seek the proper interpretation of the legislation in context. It is sometimes called a holistic approach. The starting point is the dictionary meaning of the words, but as we have seen, this is often problematic. Where the obvious literal meaning is either unavailable or manifestly inappropriate the main point of reference is the presumed intention of parliament; it is implicit that there is such an intention, and that this prevails over the precise wording.

This is a much more teleological (design related) approach than the Golden Rule, and is not tied to the earlier state of the law like the Mischief Rule. There is a fairly clear influence from the exposure of English judges to EU legislation, the ECHR and other international legal instruments, which tend to require interpretation in this way.

History and Development of the EU

Historical Background

For most of recorded history, Europe has been politically divided into a number of separate politically independent entities, or states. The precise pattern has varied. During the Roman Empire there was a political union, at least in southern Europe (and extending to North Africa and Western Asia), which lasted for nearly 600 years (c200 BCE to 400 CE). After a period of fluidity known as the Dark Ages, the Carolingian and Holy Roman Empires re-established a degree of unified rule, although again only over parts of Europe, and, in this case, not a particularly centralised form of administration. Nation states such as England, Scotland, Denmark, the Netherlands, Sweden, France, Poland and Lithuania emerged in the middle ages, although other areas were fragmented into a large number of petty states, e.g. Italy and Germany. At the end of the C18 the rapid military and political expansion of France under Napoleon Bonaparte, linked to the spread of the ideas associated with the French revolution, led to an extensive but short lived French inspired political community, but during the C19 Europe settled into a pattern of nation states, including now also Spain, Italy and Germany, with only the Austro-Hungarian and Russian Empires organised on other than nation state principles.

There were academic and theoretical models developed at various times for the creation of some form of European Union, but none of these led to any practical action. It can be argued that the process of unification of Germany in the C19 is a prototype for the development of the EU. It started with a customs union (the Zollverein) to foster greater economic links, followed by political union in the second German Empire; although under Prussian leadership, the components of the empire, such as Bavaria and Saxony, retained a large degree of internal independence. Of course today Germany is a federal republic, with the states still enjoying considerable internal autonomy.

The peace settlement after the First World War resulted in the breakup of the Austro-Hungarian and Russian Empires. This in turn led to the creation of a number of new nation states in central Europe, the Balkans and the Baltic area. Although these co-operated in the global League of Nations, at least until the rise of Fascism and Nazism, there was no real move to create specifically European institutions in the inter-war period.

After the Second World War, however, there were a number of initiatives to create supranational entities in Western Europe. This was due in large part to the need for a common front against the Soviet Union dominated eastern European area, but there were other factors at work. In the defence and security sector, the main organisation was the North Atlantic Treaty Organisation (NATO), essentially a defensive alliance against the Communist Warsaw Pact. This included the USA, Canada and Turkey as well as most states of Western Europe (Sweden and Ireland, as neutral states, have chosen not to join, other states joined later as their political circumstances permitted). The Western European Union, a form of mini-NATO, without the USA, continues to exist, but with little real importance. Proposals for a European Defence community failed to get off the ground in the early 1950s.

This was the context in which politicians in Western Europe started to consider the possibility of economic and political co-operation. Winston Churchill first referred to a United States of Europe in his Zurich speech in 1946. It is clear that he intended this to extend only to continental Europe, excluding the United Kingdom. One of its roles was intended to be to defuse rivalries between nation states, especially France and Germany. Statesmen such as

Schuman, Monnet and Adenauer developed this concept, operating from a position which combined idealism and pragmatism. There was from the start a notion of the 'ever closer union of the peoples of Europe', which some saw as leading to a federal state equivalent to the USA, but at least involving a considerable degree of shared decision-making and common policies. At the same time there was a recognition that a merely aspirational idea of union would not be particularly well received at a time when the economic reconstruction of a heavily war-damaged society was the main task of the political classes. The result was a 'twin-track' approach, well summarised by Robert Schuman, the French statesman:

L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait. [Europe will not be made all at once, nor as a unitary construction; it will be made through concrete achievements, creating first practical solidarity] May 1950 <http://www.robert-schuman.org/robertschuman/declaration2.htm> (translation John Hodgson).

It is however fair to say that there have always been those whose approach is primarily pragmatic, seeing 'Europe' as a means to improve economic conditions by expanding markets and removing barriers to inter-state trade, and those who have a more ambitious political agenda. These latter are sometimes called 'federalists', although there is often a misunderstanding of this expression, particularly in the UK. Many 'euro-sceptics' object to the growth of what they describe as a 'super-state'. Some descriptions of this, particularly those designed for public, rather than expert, consumption, assert that 'federalism' means the transfer of all powers to the central institutions. This is not the case. A federal system is one where there is a carefully articulated distribution of powers between the different institutions, including the member states, with a system of checks and balances to ensure that there is no abuse of power. While there will always be tensions between the different institutions (as the United States of America demonstrates) it is important to note that the EU operates only in defined areas, and on the principles of conferment and subsidiarity. These mean, respectively, that the EU can act only where and to the extent that the treaties negotiated and accepted by the member states allow it to, and that it should only act where it is accepted that action at an EU level is necessary because action at national or local level will not be effective. It is important, whenever you are considering statements of political opinion and policy announcements, to have this well in mind.

The Coal and Steel Community and the European Economic Community

The initial mechanism chosen for economic and political collaboration was a European Coal and Steel Community (ECSC). At this period, these were the key industrial commodities, both in terms of the economic rebuilding of Europe following the destruction of the World War, and as the 'sinews of war'. There was a dual motivation. On the economic front the aim was to increase production and improve distribution, so as to drive forward post-war reconstruction. On the political front the aim was to ensure that states which had been at war in 1870, 1914-18 and 1939-45 were so economically interconnected that they could not rearm against each other on the other hand. Italy and the Benelux states (Belgium, the Netherlands and Luxembourg) which had already started to develop enhanced economic collaboration among themselves joined in what was initially a Franco-German initiative. Other states, including the United Kingdom, were invited to participate, but declined. The ECSC treaty was signed in 1950 and the ECSC commenced operation in 1952 for a fixed period of 50 years. It has therefore now ceased to exist.

Initial experience of the ECSC was so positive that the members determined to expand the principles and procedures to the economy as a whole, and in 1957 the Treaty of Rome

established the European Economic Community (EEC), which came into operation in 1958 for an indefinite period. The aims and objectives of the EEC appear from the Preamble in which the six founding states declare:

DETERMINED to establish the foundations of an ever closer union among the European peoples,

DECIDED to ensure the economic and social progress of their countries by common action in eliminating the barriers which divide Europe,

DIRECTING their efforts to the essential purpose of constantly improving the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee a steady expansion, a balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and by mitigating the backwardness of the less favoured,

DESIROUS of contributing by means of a common commercial policy to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and overseas countries, and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a European Economic Community.

The means by which the EEC should operate were set out in Arts 2 and 3 of the Treaty:

Article 2 It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Article 3 For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect;
- (b) the establishment of a common customs tariff and a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital;

- (d) the inauguration of a common agricultural policy;
- (e) the inauguration of a common transport policy;
- (f) the establishment of a system ensuring that competition shall not be distorted in the Common Market;
- (g) the application of procedures which shall make it possible to co-ordinate the economic policies of Member States and to remedy disequilibria in their balances of payments;
- (h) the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market;
- (i) the creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising of their standard of living;
- (j) the establishment of a European Investment Bank intended to facilitate the economic expansion of the Community through the creation of new resources; and
- (k) the association of overseas countries and territories with the Community with a view to increasing trade and to pursuing jointly their effort towards economic and social development.

Note that, although the phrase 'Common Market' became a nickname of the EEC, it is actually a technical economic expression, which indicates the means by which economic co-ordination is to be achieved. A common market is one where there are three elements:

A customs union – in other words there is a single common customs tariff applied to goods which enter the area of the common market from outside;

An internal free trade area where goods are in free circulation without internal frontiers, tariffs or other barriers to trade.

Free movement of all the factors of production – not only goods, but labour, services and capital.

The initial phase in the creation of the EEC, abolition of internal tariffs and the establishment of the common customs tariff, occurred relatively smoothly and within the transitional period envisaged. The 1950s and 1960s were periods of increasing economic prosperity in the EEC region, and this assisted with the removal of barriers to trade, as states and economic actors saw the benefits of the greater trading opportunities provided by the larger 'home' market. One area where considerable intervention was necessary was in relation to the labour market, as workers were reluctant to relocate without adequate arrangements in place to ensure that their pensions and social security entitlements were transferable, and also that social measures were in place to allow their families to relocate with them. Another issue that required considerable attention was economic regeneration. Many regions were dominated by 'twilight' industries, such as coal and iron mining in regions where reserves were becoming exhausted. Regional funding initiatives were adopted to promote the development of new industries, and this rolling cycle of regeneration has continued to the present. Much agricultural production at this time was by small, relatively inefficient units and the initial intention of the Common Agricultural Policy was to modernise this sector, by encouraging

smaller farmers to rationalise their holdings. Unfortunately, the system of support applied had the effect instead of cushioning these small farmers and allowing them to continue to farm uneconomically. The size of the farming and rural vote was such that it became impossible to get the Policy back on track for many years. In the mean time, the EEC became, in effect, a purchaser of last resort for surplus agricultural produce and had therefore to manage the agricultural sector from day to day.

The progress of the EEC was interrupted by global economic disruption in the 1970s, largely caused by sudden large oil price rises. Member states resorted to various measures to protect their domestic economies in these adverse circumstances, and progress towards the complete realisation of the common market stalled. It became clear at this time that the existence of many thousands of national regulations on the composition and marketing of most products was significantly inhibiting the removal of trade barriers.

The basis of monetary union was established at this period, although initially on the basis of linking of exchange rates, rather than a single currency. Incidentally, monetary union had been a long-term objective from the outset.

The first expansion of the EEC occurred in the mid 1970s when the UK, Denmark and Ireland joined. They were followed by Greece, Spain and Portugal once these states had satisfactorily demonstrated their democratic credentials following periods of right-wing dictatorship. Austria, Finland and Sweden eventually followed in the 1990s, and at the same time the creation of the European Economic Area allowed Iceland, Liechtenstein and Norway access to the Single Market without participation in the EU/EC as such.

The Single European Act (SEA) was a revision to the Treaty designed to facilitate the completion of the Common Market, which was redesignated the Single Market, although this was to a great extent a matter of presentation, as the substance of the arrangements changed little. However legislative and administrative procedures related to the Single Market were simplified and improved. As a result the Single Market was completed in 1992.

The European Union

The next stage was the establishment of the European Union in 1993 under the Maastricht Treaty. This provided for three pillars – the EEC, now renamed the European Community, Foreign Affairs and Security and Justice and Home Affairs. The Maastricht Treaty also laid the foundations for the introduction of the Eurozone, an actual currency union with a single currency rather than harmonisation of exchange rates. A further large expansion then took place in 2004 with the accession of Cyprus, Malta and eight states from central and eastern Europe. Slovenia had been part of Yugoslavia, Poland, Hungary, the Czech Republic and Slovakia had been part of the Soviet sphere in the Cold War, and members of Comecon, the Soviet economic collaborative entity. Estonia, Latvia and Lithuania were former constituent republics of the USSR itself. The last eight states were all at a significantly lower level of economic development and prosperity than the existing EU states. The next accession, in 2007, was of Bulgaria and Romania, two more relatively economically underdeveloped former Comecon states. The most recent accession, in 2013 is that of Croatia, another constituent of the former Yugoslavia. The effect of the accessions has been to move the geographic centre of the EU significantly to the east.

The final stage of the process of development of the EU to date is the consolidation of all activity and institutions into the EU through the Lisbon treaty. One principal objective of this Treaty is to create a set of institutions which is robust and flexible enough to administer a union of 28 states. It has to be understood that although there is a single EU, many of the

member states have entered specific reservations, so there are elements of variable geometry. The most obvious such element relates to the single currency, the Euro, and the institutions, principally the European Central Bank, which support it, The United Kingdom, Denmark and Sweden, although in principle eligible for membership, negotiated exemptions, albeit in slightly different terms, as they had political reservations. It is likely that these will be maintained indefinitely. This is the explicit policy of the UK Coalition government, and was the implicit policy of the last Labour government. Sweden actually decided by a clear majority in a referendum not to join the Euro.

A number of the 2004 accession states have met the criteria for entry to the single currency. Cyprus, Malta, Slovakia, Slovenia and Estonia have already adopted the Euro; Latvia will do so in 2014 and Lithuania is scheduled to do so in 2015. The United Kingdom initially opted out of the 'Social Chapter' of the Maastricht Treaty, which related principally to terms and conditions of employment, such as the maximum 48 hour working week, and still does not fully participate in some criminal justice activities. The United Kingdom and Ireland have opted out of the Schengen system of single visas for third country nationals and member states which are constitutionally neutral, such as Sweden and Ireland, do not participate in the military aspects of the common security policy. The EU appears to be sufficiently flexible to accommodate this diversity of approach, although it can and does create tensions from time to time.

Current and Future Developments

It is today rare to find influential figures who seriously argue that a 'United States of Europe' equivalent to the United States of America is feasible or even desirable in any realistic political time frame. This would require there to be a single federal state, with a constitution, and a single head of state, executive and legislature for those topics allocated to the federal level. This was relatively easy for the USA to achieve. The original 13 states had a common heritage as English colonies. They shared a common language, culture and legal system, and broadly followed the same religion. They came together following a common liberation struggle against the colonial power, and shared a common set of aspirations for their state and its constitutional nature. They were also relatively small and young states without any great weight of political and cultural tradition. The subsequent geographical expansion, ethnographical diversification and latterly economic and military pre-eminence of the USA came after sufficient time had elapsed for the institutions and political culture of the state to settle down. Even then, the dispute over states rights, particularly in relation to slavery, which came to a head in the American Civil War, almost destroyed the federal constitution. In Europe there are substantial linguistic, ethnic and religious divisions, and it is composed of states which generally have a long history and very distinct constitutional and cultural traditions. Among them are traditional alliances and also longstanding and deeply felt traditional rivalries and enmities. In addition, many have significant ties to former colonies outside Europe, particularly the United Kingdom, France, Portugal and Spain.

In reality, the debate today is between those who wish to develop the original Common or Single Market aspects of the EU, extending these to the remainder of geographical Europe¹ and beyond to the states bordering the Mediterranean and Black Seas, and perhaps slightly further into Eurasia and the Middle East, and those who wish to see greater, but still limited and targeted, harmonisation and integration within the existing boundaries in areas such as education, healthcare and the administration of civil and criminal justice. In the short term the effect of the global economic crisis, in particular on the weakest Eurozone economies, has taken centre stage. There are serious debates on whether the Eurozone is economically and fiscally viable, and those states with the resources to support the weaker ones clearly resent

being obliged to do so. At the time of writing (July 2015) it remains unclear whether Greece will actually leave the Eurozone, and what consequential effects there may be. However these developments are primarily significant for economic and political reasons; legal changes may well follow, but even abandonment of the Euro would not immediately lead to the unravelling of the legal structures of the EU.

So far as the future is concerned, there are a number of aspects to consider.

In the United Kingdom there is clearly a vocal minority, well represented in the parliamentary Conservative party, and by UKIP, who appear ideologically, almost viscerally, opposed to the EU and all its activities (and also to many other 'European' activities unconnected to the EU, such as the operation of the European Convention on Human Rights). The Prime Minister is committed to a 'rebalancing' of relationships, presumably to remove some of the principal areas of discontent, prior to a referendum on UK membership. At present an in-depth review of the [Balance of Competences](#) is being undertaken by various departments of government. The series of reports are available [here](#). The UK government has invited other member states to participate, but has had a limited response, although the Netherlands and Germany are potential collaborators. Annoyingly for Eurosceptics, the evidence is that the present relationship is broadly satisfactory. None of the reports indicates the need for a significant transfer of competences back to the UK. However, future developments will depend on the policy of the government elected in May 2015. David Cameron has indicated in broad terms the areas for discussion.

The Eurozone has clearly undergone a traumatic period. While this seems to be largely due to a mismatch between the performance of the strongest Eurozone economies, such as Germany, the Netherlands, Austria and Finland and the weakest, such as Ireland and Spain with the aftermath of serious property bubbles to deal with, and Greece and Portugal with systemic public sector overspending, there appears to be some agreement on the need for closer fiscal and financial integration within the Eurozone, which may interfere with the relationship between Eurozone and non-Eurozone states. The real problem is that the original Delors scheme for the single currency required economic and monetary union, but only the latter has fully progressed.

There are still several candidate states: Turkey, the Former Yugoslav Republic of Macedonia, Montenegro and Serbia are currently formally candidates for membership. Iceland would be an ideal candidate, but for the aftermath of its banking crisis, which has caused a hiatus, as compensation is still due to certain member states. As a result, it has withdrawn its candidacy. Turkey has been a candidate for many years. It currently has associate status, but full membership appears a distant prospect. Apart from this, the other candidates (Montenegro, Serbia and FYR of Macedonia), and potential candidates, Albania, Kosovo and BosniaHerzegovina) represent the remaining areas of the Balkans not yet integrated.

There a clear neighbourhood policy, with specific schemes for the southern (or Mediterranean) neighbours and the eastern neighbours (Ukraine and the Caucasus) which offer free trade and collaboration, but do not offer any immediate prospect of membership – unlike the initial eastern expansion following the collapse of the Soviet Union. There is also a specific agreement with Russia. However, relations with Russia are currently strained as a result of Russian intervention in Ukraine, and perceived further threats to the Baltic States.

Commercial policy remains a major concern, and a free-trade area with the USA is currently in negotiation (the TTIP).

The 'Ministry Model'

When the original European Coal and Steel Community (ECSC) was founded, it was necessary to set up institutions to manage it. What was planned was, in effect, the equivalent of placing the coal and steel industries of the six participating states under international management. As the ECSC was a governmental organisation, and coal and steel were effectively nationalised industries, the management structure deployed was, more or less, the equivalent of an international ministry of Fuel and Resources. The Treaty was the equivalent of the primary legislation regulating the sector and defining the scope of governmental action.

In overall charge of policy was a committee of the national ministers responsible for this area. As all were equal, the chairmanship of this committee rotated on a six-monthly basis. In addition to strategic decision-making and the setting of policy, the ministers were responsible for approving the secondary legislation necessary. The official title of the Committee was the Council of Ministers. It had ultimate political and executive authority. Since it comprised members of national governments who are answerable to their national colleagues and electors, it can be said to be democratically accountable, albeit only indirectly.

A body of civil servants dealt with the day to day administration of the policy set by the Council. At the top level were a number of senior administrators with executive responsibilities, who also provided policy advice to the Council, and took responsibility for the drafting of secondary legislation for approval by the Council. Below them were the functionaries who dealt with routine administration, and of course a substantial number of translators to ensure that contributions at meetings and documents were accessible in all the languages of the member states. Eventually this became known as the Commission.

A Parliamentary Committee, composed of delegations from each national Parliament, provided a degree of scrutiny and oversight, rather as a select committee scrutinises the work of a ministry at national level. They were entitled to provide an opinion on draft secondary legislation, debate issues of policy, and question ministers and officials.

A specialised court was established to deal with disputes over the interpretation and application of the Treaty, the propriety and interpretation of secondary legislation and any challenges to the exercise of decision-making powers by the Commission. It was important that there should be a single, consistent body of law in these areas, and of course, the various national courts could only make rulings valid in their own jurisdiction; furthermore, they would not necessarily accept and follow decisions of other courts even as persuasive authorities. A specialised court, drawn from jurists in all the member states was therefore established, becoming known as the European Court of Justice. It also had to act as an employment tribunal for the officials of the Commission.

Development of the Institutions

This structure operated effectively in the first years of the Coal and Steel Community, and the model was adopted for the European Economic Community and EURATOM when they were established a few years later. Initially there were separate institutions for the three communities, but these were merged in the 1960s by the Merger Treaty. In essence this 'ministry model' continues in existence, although it has been substantially modified in respect of the constitution, sphere of action and inter-relationship of the principal institutions. Many other institutions have been added, either consultative bodies such as the [Economic and Social Committee](#) (ECOSOC) and [the Committee of the Regions](#), bodies with a specific remit, such as the [European Central Bank](#) or the [Office for Harmonisation in the Internal Market](#) (OHIM), which is responsible specifically for the administration of the EU trade mark and design right registration systems, or bodies to underpin the operation of the system, such as the Committees of Permanent Representatives (COREPER) established by Art 240 TFEU where the senior diplomatic representatives of the member states meet to prepare and co-ordinate the work of the Council on a regular basis and the Comitology system which allows the member states to exercise oversight of the operational management of policy areas by the Commission.

Some of the major changes have been to the Parliament. Firstly it is now officially the [European Parliament](#) (EP), and is directly elected by the electors of the member states. One persistent criticism of the EU has been that it is undemocratic, and initially it was true that there was no directly elected element, although the Council was indirectly accountable to national political scrutiny. Today, it is difficult to identify any formal democratic deficit. The EP has very extensive powers:

To question the Commission, orally or in writing (Art 230 TFEU).

To conduct enquiries into any aspect of policy.

To elect the President of the Commission and approve the appointment of the Commission as a whole (Art 18 TEU).

To remove the Commission as a whole by a vote of no confidence (Art 18 TEU and Art 234 TFEU).

To set the EU Budget acting with the Council (Art 314 TFEU).

To approve secondary legislation.

It has been argued that the EP is not a 'proper' legislature, as legislation is formally initiated by the Commission, which is responsible for producing the initial draft. However, in practice, in national legislatures, such as the UK Parliament, the vast majority of legislative proposals are official ones, which are drafted by the civil service on behalf of the executive. All that is missing is the possibility of 'private members' legislation. It should also be noted that the EP is entitled under Art 225 TFEU to request the Commission to introduce legislation in a particular area; although the Commission is not obliged to do so, it must formally account for a refusal. In practice there is discussion between the Council, Commission and EP over the legislative programme.

It is important to appreciate that the EU institutions operate on a basis of discussion and consensus. The discussions do not just involve the EU institutions, but also the member states,

the social partners (i.e. the employers and trade unions) and other lobbyists. There are complex networks of formal committee structures, but also many less formal contacts. Many of the leading figures in EU political circles have played different roles over the years.

Commissioners may be former national ministers (Roy Jenkins, Leon Brittan, Jacques Delors, Catherine Ashton), or political leaders (Neil Kinnock). MEPs may become national ministers (Nick Clegg, Geoff Hoon), EU officials may become MEPs (Marta Andreasen). Political parties provide a form of network, and the EP operates with a very formal system of recognition of party groupings, which is why the negative attitude of the UK Conservatives to the European Peoples Party is seen as a major issue in Europe. Industry and other lobbyists are also active. One result of this demand for consultation and consensus is that the prescribed procedures do not always work as they are drafted to work.

The EP also has significant functions in relation to the approval of the budget, and the approval of the Commission, especially the president. It can also pass a vote of no confidence in the Commission as a whole.

Legislative procedure

The greatest formal difference in the position of the EP over the past 30 years or so since it became directly elected is seen in the legislative process. The [ordinary legislative procedure](#), (formerly known as the 'co-decision procedure') as set out in Art 294 TFEU, entails joint action by the EP and the Council. It was introduced in the Maastricht Treaty, and has been steadily extended. A commission proposal goes to both the EP and the Council. This draft will itself have been the result of extensive consultation. It may well be based on a Council initiative as part of one of the various policy agendas agreed from time to time. There may be expert reports, a green paper and a white paper (or 'road map', as they are now described) to gauge public opinion. The Economic and Social Committee, and probably the Committee of the Regions, will have been formally consulted and will report their opinion. If the EP accepts the draft, or makes only amendments which the Council accepts, the measure is approved at 'first reading'. Note that the EP votes by simple majority and the Council by qualified majority. This is a weighted majority designed to ensure that a proposal can neither be forced through by a particular group of states nor blocked by a wholly unrepresentative minority. Otherwise the Council produces its own version, or 'common position', which goes back to the EP. There is a detailed explanation provided, and the Commission will also make its views known. The EP may (but very rarely does) reject this outright; if it does so the proposal falls. More usually it will either accept the common position or propose further amendments. These are returned to the Council. The Council may approve the amended version. If it decides to accept an EP amendment which the Commission does not endorse, the Council must vote unanimously. If there is no agreement at this 'second reading', a Conciliation Committee is established so the EP and Council can negotiate a compromise. In practice the hard negotiation takes place in an informal 'trialogue' between EP, Council and Commission, with the Conciliation Committee formally approving an agreed text if one emerges. Both EP and Council must then pass the agreed text at 'third reading'. This is clearly an exhaustive process, and by no means a rapid one; it has the merit that all views are taken into account, directly or indirectly, although it is not particularly newsworthy, especially as much of the real debate takes place out of the public eye. It is also the case that much of the legislation being discussed is technical, and of direct interest only to the industries or other economic sectors directly involved.

The other legislative procedures are of much less significance. Originally the only obligation was to consult the EP, but this procedure has been largely superseded. The co-operation procedure, under which the EP could propose amendments, but had no veto, although the Council has to be unanimous to override the EP's view, is used only in specialised areas, as is the assent procedure, which involves a single vote, yes or no, on a simple question, such as whether a particular applicant state should be admitted to the EU.

The European Council and Council

The Council has also developed, and since the Lisbon Treaty, it has evolved into two quite separate institutions, although they have confusingly similar names. They remain the overall driver of policy in the EU.

The [European Council](#), which has its own elected President, and comprises the heads of government of the member states, sets the long and medium term policy and legislative programmes for the EU, and directs the Commission as to how it should apply its resources. By this means the EU is still steered by its member states; what has changed is that there are now 27 of these, so achieving consensus has become much more difficult. However, while the activity of the European Council takes place in a legal framework, it is essentially a political body.

The [Council of the EU](#) deals with specific industrial and economic sectors, and is responsible for adopting secondary legislation, together with the EP. It still adopts the revolving chair principle (except for the foreign affairs council, which is chaired by the [High Representative for Foreign Affairs and Security Policy](#)), and the 'troika' of the current, past and future states holding the chair remains significant. The state holding the chair can adopt particular priorities for its period in office.

The Commission

The [Commission](#) continues to constitute the Civil Service of the EU. It currently directly manages much less of the economy. In the 1960s and 1970s the Commission effectively managed the day to day operation of most of the agricultural sector. It set prices, established quotas, acted as a purchaser of last resort and traded extensively within and outside Europe. This is no longer the case. In this, as in other areas, the Commission is largely a commissioner of activity by others. Management of policy is devolved to the states or to specialised agencies. The Commission still sets policy, attempts to ensure proper accountability for the projects it sponsors and seeks to ensure that member states comply with their obligations. It has become a strategic rather than an administrative entity in most respects.

The Courts

The judicial work of the EU has expanded. The 'Court of Justice' now comprises three separate judicial bodies. We now have, the [EU Civil Service Tribunal](#), a specialised tribunal to deal with disputes concerning the employment of officials, a [General Court](#) which deals with cases brought by non-state litigants (e.g. appeals against competition decisions) and the [Court of Justice of the European Union](#) (ECJ) which deals with cases brought by or against states and also preliminary references from national courts. Even so, there continue to be proposals for a rationalisation of the workload of the court.

Enforcing rights in national courts

Commission enforcement

Initially the assumption appears to have been that the application and enforcement of EU legal rules would very much be a matter for the Commission. Under Art 258 the Commission is responsible for ensuring that member states comply with their obligations. It monitors whether they have implemented directives at the appropriate time, investigates complaints and conducts its own investigations. Usually any problems are resolved informally, but if not the Commission can commence a formal investigation, followed by legal proceedings to establish the liability of the state, and, if necessary, enforcement proceedings. This is not a rapid process, and progress and the final outcome are subject to the decisions made by the Commission whether to pursue particular matters. In any event, while action by the Commission may terminate the non-compliance by the state, it will not provide a specific remedy for the victims.

Regulations

There has, of course, always been one exception. Regulations are expressly stated to be directly applicable, and create rights and liabilities which can be relied on in proceedings before the national courts. So there has always been an element of direct use of EU law in proceedings in national courts.

Treaty Articles

From an early stage, questions were asked as to whether there were other areas where EU law created direct effects – i.e. legal rights and obligations. This was rather unorthodox – Treaties were generally seen as operating in the area of public international law, and on that view, the only legitimate enforcement process was by the Commission, or by the other High Contracting Parties – i.e. the member states. The ECJ had to decide the issue in [Case 26/62 van Gend en Loos](#). This is one of the most important decisions the Court has made. The Dutch authorities had levied a customs duty on goods that van Gend en Loos (a transport company) were importing. At the time national duties had been frozen as part of the initial establishment of the Common Market. The goods in question had been reclassified into a higher customs tariff category. This was lawful in Dutch law, but it was argued that it conflicted with the Treaty article which stated that there should be no new or higher duties in the transitional period. Van Gend en Loos argued that the Dutch authorities were legally bound to apply the Treaty. The Court agreed, holding that the Commission's powers did not exclude direct use of EU law..

The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only

imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

Subsequently, the test for whether a provision has direct effect is generally considered to be whether it is 'clear, precise and unconditional'. While this case concerned the use of EU law 'vertically', that is, against a member state, it later became clear that Treaty articles could impose obligations on private entities, such as employers. So in Case 43-75 [Defrenne v SABENA](#) the Treaty article (now Art 157 (1) TFEU) providing for equal pay was held to have direct effect against the employer.

Directives

It is clear that directives are not directly applicable – indeed they are supposed to 'disappear' once states have incorporated the substance of them into their domestic law. However, this does not always happen. Sometimes states fail to transpose the directive at all. In other cases questions arise about the accuracy with which the transposition has taken place.

Direct Effect

In Case 41/74 [Yvonne van Duyn v Home Office](#) the Court held that a Directive could have direct effect. The case involved the State, so this was vertical effect. It has repeatedly been held since that directives can only have vertical direct effect, and must meet the clear, precise and unconditional test. There is a further criterion. A directive only acquires the force of law after it passes its transposition date, so it only has direct effect from then. See Case 148/78 [Pubblico Ministero v Tullio Ratti](#) where there were two directives, applying to different products. The defendant was able to rely on the terms of the earlier directive, which was overdue for transposition, but not the later one, which was still in the implementation period. There is however a caveat to this. In Case C-129/96 [Inter-Environnement Wallonie](#) it was held that a state could not take action during the implementation period which would inevitably continue to operate later, and was incompatible with the directive.

Where a directive has direct effect, the rights and liabilities concerned are given effect to by the courts to the exclusion of inconsistent national law, which is simply ignored

Emanation of the State

It is the case today that it is not always clear which bodies constitute 'the state' for the purposes of vertical effect. The test established by the court in Case C-188/89 [Foster v British Gas](#) was that to qualify as an 'emanation of the state', it must be 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State, and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals'. Note, however, that applying this test is sometimes very difficult in practice. The Grand Chamber judgment of the ECJ in Case C-413/15 [Farrell v Whitty](#) (2017) held that not all the factors referred to in *Foster* needed to be present as long as the function was being performed for the state and with some specific legal powers.

Indirect Effect

EU law may also have so-called indirect effect. This is an aspect of the obligation of member states to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union':

Art 4 (3) TEU. In this case this is an obligation to interpret relevant national law compatibly with EU law, in order to ensure the *effet utile* or 'useful effect' of the latter – there is no point in having entitlements under EU law which are rendered ineffective by the absence of national rules and procedures to give them effect. In practice, indirect effect applies mainly to directives; it is the only route to take when the case involves horizontal effect, but may also apply vertically, for example where the EU rule does not relate to the content of the right but to procedures and remedies. This was the case in Case 14/83 [von Colson & Kamann](#) where the principle was applied to the remedy for sex discrimination at work – German law had accurately transposed the substantive requirements of the Equal Treatment directive, but the Labour Court had initially ruled that there was no provision allowing them to grant a full remedy. The ECJ made it clear that such a remedy was required – although EU law did not mandate any particular remedy.

The concept was further reviewed in Case C-106/89 [Marleasing](#), which concerned the horizontal effect of an untransposed banking directive.

The national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

In order to reply to that question, it should be observed that, as the Court pointed out [in *von Colson*], the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, 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.

The use of the phrase 'as far as possible' indicates that it is not an absolute obligation, and in particular, it does not require an interpretation which is *contra legem* – i.e. one which is not logically or otherwise available – see e.g. Case C-334/92 *Wagner-Miret*. However, it is for the national courts to determine exactly how they approach the question of their powers of interpretation.

The UK Position

The approach of the UK courts has developed over time. It was initially quite conservative, but following [Pickstone v Freemans plc](#) it has been clear that, where there is an explicit intent to give effect to EU law, the UK legislation will be read accordingly, even if provisions in it would 'naturally' be read otherwise. The general intent prevails over the ordinary rules of interpretation. The speeches in *Pickstone* focus on the specific legislation and the detailed issues of interpretation, but the last few paragraphs of Lord Templeman's speech indicate the

general proposition. Subsequently an identical approach to interpretation of the European Convention on Human Rights was introduced in the Human Rights Act 1998, and the most authoritative statement of how far this interpretative principle extends is to be found in the human rights case of [Ghaidan v Godin-Mendoza](#). In summary, it is a purposive approach, used where ordinary interpretation does not assist, and an interpretation, including if necessary some minor modification of the wording, can be said to be 'going with the grain' of the UK legislation. It will not be used to subvert a significant objective of the legislation, where extensive additions are required or (usually in human rights cases) where the issues are too complex for judicial resolution.

If all else fails

There are however certain cases where neither direct nor indirect effect will help. There is another possible course of action – recourse to the principle of Member State Liability (MSL). This is a wider principle, applicable in a range of situations, although non-transposition and mis-transposition are significant ones.