An act of parliament is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the King himself, if particularly named therein. And it can not be altered, amended, dispensed with, suspended or repealed, but in the same forms and by the same authority of parliament.\footnote{Blackstone, *Commentaries*, Vol. I, p. 185.}

Parliament generally changes law for the worse, and . . . the business of the judges is to keep the mischief of its interference within the narrowest bounds.\footnote{Pollock (1882: 85).}

I shall . . . state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.\footnote{Lord Blackburn in *River Wear Commissioners v. Adamson* [1877] 2 AC 743 at 763.}

I remember only too well my first intervention as a new Minister at the Treasury on the Finance Bill in the very early hours of the morning on a subject about which I knew absolutely nothing but on which I had a marvellously thick book of briefing from the Inland Revenue. I appropriately read out the response to some detailed points that had been made by one of the Opposition spokesmen who stood up afterwards to say how well I had dealt with the point he had raised and welcomed my first intervention in Finance Bill Committees. However, I discovered from my private office afterwards that I had read out the wrong reply to the amendment. Clearly, it made not the slightest bit of difference.\footnote{Lord Hayhoe, as reported in *Hansard*, 27 March 1996, reflecting upon the circumstances in which ‘explanations’ on proposed legislation are given in parliament. In the Westminster Parliament, exchanges sometimes take place late at night in nearly empty chambers while members have dinner, drink and discuss in places often away from the actual building but are called back to vote. Often a bill reflects a party political debate with party ‘whips’ ensuring that party members vote on one side or the other. The questions are often difficult but political warfare sometimes leaves little time for reflection. These are not ideal conditions for the making of authoritative statements about the meaning of a clause in a bill.}
INTRODUCTION

We begin with a mixture of views on constitutionalism, political reality and separation of powers therein expressed. Statutory interpretation as performed by the judiciary is a subset of constitutional practice. The first, from Blackstone, can be seen as a representative statement of the doctrine of parliamentary supremacy. The second, from Pollock, may be seen as a more or less accurate description of the judicial mindset in Victorian times. While the common law could be presumed to be the repository of the community’s collective wisdom as expressed through its judiciary, legislation was the imposition of a political will for reform. This could, and was perhaps best presumed to be, partisan and unreflective of the nuances of social life. This approach led to restrictive interpretation by literalist methods which sometimes blocked social progress. It remained the approach of English judges until some time after World War II, yet Lord Blackburn’s comments show that it is not correct to hold that one approach dominated.

The first part of this chapter outlines the concept of the contemporary practice of statutory interpretation. Understanding statutory interpretation has not been helped by references – in decades of student orientated texts at least – to a model of ‘rules’ of interpretation, which, if they ever did convey any feel of what went on, were a relatively constrained account of options in practice. Instead we need to see it as a dynamic engagement with legal texts. We will not in this chapter present a guide to interpretation; instead, after setting the scene, we will concentrate upon certain recent developments, namely the impact of Pepper v. Hart, European methods of interpretation and the interpretative provisions of the Human Rights Act (HRA)1998. Our stance is to focus on the parameters, or limits, of judicial interpretation. Although the vast bulk of everyday practices of interpretation seem to pose few constitutional issues, we argue that the general practice operates within constraints of institutional legitimacy; any act of statutory interpretation involves matters of constitutional propriety. Indeed, writing in 1999 about the Human Rights Act, Lord Irvine spoke of the judiciary as ‘an integral component in a constitutional machinery that seeks to secure accountable government’. Similarly, Lord Steyn has argued: ‘The language used by Parliament does not interpret itself. Somebody must interpret and apply it. A democracy may, and almost invariably does, entrust the task of interpretation to the neutral decision-making of the judiciary’. What are the current limits of this interpretive role? We will suggest that contemporary practice can be seen as evolving, informed by a democratic vision where the courts and Parliament operate in dialogue about the relationship of legislation and human rights.

STATUTORY INTERPRETATION AND INSTITUTIONAL LEGITIMACY

Statutory interpretation has very little to do with so-called ‘rules’ of interpretation. Whether or not these rules accurately reflect the approach of the courts in the past,
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they are largely irrelevant to the contemporary practice. At best, the priority of the literal approach stressed a general problematic: interpretation needs to be kept within certain constitutional constraints. The main question in this chapter is thus a variation on one of the key points of the previous chapter: what picture can be drawn of the constitutional arrangements in which interpretation takes place? To what extent can interpretation be seen as law making, and, if so, what are the acceptable constraints of judicial legislation? This is, of course, a question of institutional legitimacy. Again we may have settled on a practice wherein interpretation takes place on a daily basis in such a fashion that the majority of cases do not appear to raise this problem of where the boundaries of interpretation lie. If the language of a statute is clear then interpretation is presumably entirely secondary to the application of the statute to the facts. While all interpretation occurs within an interpretative community and there are interesting issues in explaining interpretation in an increasingly pluralist social body, we are more concerned in this text with the constitutional propriety of interpretation in those instances where statutory language is ambiguous or capable of carrying different meanings, or where the law places on judges a particular set of interpretative demands stemming either from European law or the interpretative provisions of the Human Rights Act. The choice of one meaning rather than another may amount to law making. As the courts cannot be seen to overstep the boundaries in their legislative role, and intrude upon the province of Parliament, the real issue, in terms of the constitution of the practice, is where this boundary lies.

In elaborating this issue, we need to remind ourselves of some important arguments from the previous chapter. One should be careful when discussing rules of statutory interpretation not to impose too great a degree of rigidity or level of generality that fails to reflect what the judges are actually doing when they interpret statute. There are a couple of points to bear in mind. Any discussion of these ‘techniques’ as ‘rules’ is problematic, not least because we will be concerned with a practice as a rule in a non-legal sense: a rule as a guide to action. Future references of the rules of statutory interpretation will be understood as referring to the techniques that compose judicial practice. There is a second problem. Statements of practice in one case may or may not be understandable as general theories of interpretation. Judges tend not to give methodological statements that reflect in a general sense what they are doing. This begs another question: if judges practice statutory interpretation without a textbook, then why do textbooks have chapters on statutory interpretation?

This chapter offers an engagement with a number of key cases in order to try and determine how different judges in different areas of law deploy the techniques of interpretation. It is only at this level that anything useful or relevant can be said about statutory interpretation.

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6 In Duport Steels Ltd v Sirs [1980] 1 WLR 142, Lord Scarman stressed: ‘In the field of statute law the judge must be obedient to the will of Parliament as expressed in the enactments. In this field Parliament makes and unmakes the law, the judge’s duty is to interpret and to apply the law, not to change it to meet the judge’s idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment’ (p. 169).
It is worth considering another point that will run through this chapter. If we were trying to describe contemporary judicial practice, then we would have to take into account European ‘purposive’ methods of interpretation. The rules of interpretation have the virtue of reminding us that – at least in a historical perspective – purposive interpretation was always part of the common law.\(^7\) Indeed, Twining has argued that purposive interpretation by British judges is justified not by references to European law, but to common sense.\(^8\) Twining argues that interpretation of statutes can be analysed as falling into two stages. The first stage is to acquire a general sense of both the legal and factual context and the intention of the legislature; the next stage is to read the particular words in their primary and natural meaning, if they are ordinary words, or according to their technical meaning. If this leads to an absurd interpretation, the interpreter may put forward an interpretation that avoids the absurdity. With reference to this second stage, there are limits to the kind of materials to which the interpreter can make use. Another misleading aspect of statutory interpretation is that it suggests that there may be more of a clear distinction between literal and purposive interpretation than there in fact is in practice. It suggests a rather artificial approach that imagines a judge asking first about whether the words are unambiguous and if not, then how can they be read so as to give effect to the intention of Parliament.\(^9\)

Twining is describing modern judicial practice. It is largely determined by pragmatism, and an engagement with the language of the Act in question in its legal context. This goes a long way to suggesting how judges approach statutory interpretation in those cases where no European or human rights issues might impinge; or, indeed, where no reference to Pepper v. Hart is necessary. We need, therefore, to move towards an engagement with these problematic and developing areas. However, for the moment we can ask some further questions about the suppositions that inform modern practice, and examine the role of the presuppositions of statutory interpretation.\(^10\) The presumptions reflect the cast of the common law and the orientation of practice towards pragmatic questions of context and sense. A review of the presumptions may develop this argument.

\(^7\) The literal approach reflects the relatively recent dominance of Parliament over the courts.
\(^8\) Twining (1992: 368). We also need to be careful with the argument that community or civilian manners of interpretation should be adopted, or are being adopted by English judges. The problem is in part definitional. It is not entirely clear what is meant by continental ways of interpretation, other than stating that they are purposive. As the mischief rule is purposive, English judges have always had recourse to purposive interpretation; Re Marr would also suggest that the judges themselves do not necessarily see purposive interpretation as European. It is a question more of preserving the idea that the court defers to Parliament. In European law purposive interpretation may be legitimate, but there is the risk that if followed too far, it would involve the courts in making rather than interpreting the law. Besides, as Twining writes: ‘the pragmatism of English judges makes discussion of the proposition that they ought in general to adopt a purposive approach a little unrealistic’.\(^9\) Glanville Williams has suggested that a more accurate description of the judge’s practice would read as follows: ‘What was the statute trying to do? Will the proposed interpretation [be] ruled out by the language of the statute?’ What does this mean? He explains: ‘lateral and purposive interpretation may be seen to represent varying emphases on how these questions are to be answered; in particular, on how far a judge is prepared to go in deciding whether a proposed interpretation is or is not sustained by the language of the statute. In short, context, language and purpose are all relevant, but there is still no settled priority rules for weighting these factors’. Cited in Twining (1992: 369).
\(^10\) The presumptions are: against the alteration of the common law; that \textit{mens rea} should be an element in criminal offences; against the retrospective application of statute; against the deprivation of individual’s liberty, property or rights; a presumption that legislation does not apply to the Crown; a presumption against breach of international law and a presumption that words take their meaning from their context.
The first presumption, against the alteration of the common law, suggests that interpretation is inherently conservative: the law appears as a repository of meanings that are authorised by its history. Thus, rather than presuming a change in the law, a judge will presume that the law is coherent and without gaps. There are also presumptions that have a particular slant towards rights or liberties. That the HRA contains an interpretative provision suggests that these presumptions may not have been as effective as they might have been in protecting rights and liberties. Nevertheless, we could say that common law interpretation appears to have always had a commitment to preserving these values. The presumptions against breach of international law can be seen as informing a notion that common law is coherent with international law, unless Parliament has stated otherwise. It suggests some interesting points about the relationship of national and international legal norms, but we cannot engage with this material in this chapter. The presumption that legislation does not apply to the Crown is historic and suggests the privileges accorded to the Crown. The seventh presumption reflects on the aids to construction that can be utilised. Within this catalogue, there is a basic distinction between intrinsic and extrinsic evidence, and a grouping of rules that relate to presumptions about how certain verbal formulations are to be understood. We could say that this represents the legal employment of certain grammatical rules. These rules reflect more upon the micro-economic level of interpretation, and stress that statutory interpretation is inherently a form of textual close reading. It is as much about resolving grammatical and syntactical problems as it is about the operation of specifically legal principles of interpretation. The presumptions remind us that statutory interpretation is about rules that are necessarily involved in acts of reading that operate within a specifically legal context.

**PEPPER V. HART**

To return to our principle of analysis: we will examine statutory interpretation through a close reading of some central cases. One of the most important cases defining contemporary practice is *Pepper v. Hart*. Here the Judicial Committee of the House of Lords sat nine strong (over half of the total membership of the Judicial Committee) to hear an appeal in which the plaintiff claimed that the advocates of the bill had a quite different intention for the Act than the one put forward by the Inland Revenue. The minister had actually said on the floor of the House of Commons that teachers in private schools who had their children take up spare places at discounted fees would not be taxed on the difference as if this was a financial benefit in kind, whereas the Inland Revenue wanted to tax the teachers as if the teachers had received the benefit of the discounted school fees (as the clear words of the Act seemed to indicate). The Lords took the opportunity to consider whether when applying a statute the judges should consider only the words of the Act or whether they could look at *Hansard* to
see evidence of the clear intention of the progenitors. They decided in favour of the teachers.

To what extent did Pepper v. Hart revolutionise methods of interpretation by allowing judges access to Parliamentary materials to which they would not otherwise have access? The case shows that defining the parameters of judicial interpretative practice involves questions of constitutional propriety and the very function of the forensic process. Indeed, the subsequent case law attempts to define a line between the political and the judicial that may be very difficult to hold.

Prior to Pepper v. Hart, the courts had not been able to look at the Hansard debates as an aid to interpreting statute. Although the case changed this rule, it went on to narrowly define the occasions when a court could make reference to Hansard. To enable a reference to Hansard, legislation must be ambiguous. To resolve the ambiguities, the court can make use of ministerial statements. This clearly means that the courts cannot make use of statements made by MPs in debate or argument, and the statements themselves have to be clear.

How can this approach be justified? Why should the rule that had always structured judicial practice be relaxed? Lord Browne-Wilkinson began the leading speech in Pepper v. Hart by reviewing the arguments as to why references to Hansard should still be prohibited. The primary reason was constitutional. The courts must look only to the words used in the Act, as otherwise there is a risk of judicial legislation. Lord Browne-Wilkinson then touched upon a related issue. Hansard material may not be forensically suitable, as it may have been said in the heat of debate, or from a politically partisan position. Difficulties in providing access to definitive text of debates, and cost implications, had also militated against the use of Hansard in the court.

If these are the arguments for preserving the existing practice, what are the issues that compel change? It would appear that practice itself has already moved beyond the constraints of the old approach: the courts have departed from the old literal approach of statutory construction and now adopt a purposive approach, seeking to discover the Parliamentary intention lying behind the words used and construing the legislation so as to give effect to, rather than thwart, the intentions of Parliament. Where the words used by Parliament are obscure or ambiguous, the Parliamentary material may throw considerable light not only on the mischief which the Act was designed to remedy, but also on the purpose of the legislation and its anticipated effect.

This speech stresses that there is a historical shift in judicial interpretation. This is, in part, due to the impact of purposive styles of European interpretation; it is no wonder that Pepper builds on Pickstone v. Freemans. Note that a difference has to be observed in the interpretation of domestic and European legislation. It is with the latter that the court can be ‘more flexible’. However, there is another factor in the
argument that suggests that purposive interpretation cannot be so neatly limited to European law. Lord Griffith’s speech elaborates this point. He argued that the increasing volume of legislation carries with it the risk that ‘ambiguities in statutory language’ are not apparent at the time the bill is drafted.

How should the new approach be defined? It is necessary to return to fundamental principles. The task of the court is to interpret the intention of Parliament. If the court cannot use *Hansard* to interpret ambiguous language then it may become frustrated in this task.18

What does this mean? How is the purposive approach to be defined? It is a question of carefully plotting the parameters that are discoverable in the cases where *Pepper v. Hart* has been applied.19 In *R. (on the application of Spath Holme Ltd) v. Secretary of State for the Environment, Transport and the Regions*,20 the House of Lords considered an argument that it was necessary to make a reference to *Hansard*. The reference would show that the powers of a minister granted by the Landlord and Tenants Act 1985 to restrict rent increases were narrow and applied only to the restriction of inflation in the economy. Rejecting this approach, the court stressed the importance of the first limb of the ratio of *Pepper v. Hart*. Unless this first condition was satisfied, there was a danger that any case that raised an issue of statutory construction would necessitate disproportionate costs as lawyers researched the relevance of Parliamentary statements. However, there is also a constitutional element to the House of Lord’s argument that returns us to one of the structuring concerns of statutory interpretation. Whereas it may be acceptable to rely on the statements of the minister sponsoring the bill, the court cannot consider Parliamentary exchanges in debate. Such matters are

18 *Pepper*, at 617. In summary: Lord Browne-Wilkinson’s guidelines show that a reference to *Hansard* is only acceptable when three conditions applied. First, the legislation in question was ‘ambiguous or obscure, or led to an absurdity’. Second, that the material to which reference would be made were ‘statements by a minister or other promoter of the Bill’ with material that might support these statements which, third, had to themselves amount to a clear statement.

19 *Mellaish (Inspector of Taxes) Appellant v. B.M.I. No. 3* [1996] AC 454 affirmed that the rule in *Pepper* was narrow; the case should not be seen as an opportunity to begin to ‘widen’ the kinds of materials that could be considered to interpret legislation. This rule was clarified still further in *Three Rivers DC v. Bank of England No. 2* [1996] 2 All ER 363. The court asserted that speeches made in Parliament could be used by a court to ascertain both the true meaning of statutory language and the intention of Parliament in passing a particular Act. More recently, the issue of the correct use of *Hansard* has arisen with respect to construing the Human Fertilisation and Embryology Act 1990 s. 28(3). The question facing the court in *U v. W (Attorney General Intervening) No. 1* [1997] Eu. LR 342 was whether a licence was required for certain forms of fertility treatment. The court held that *Hansard* could be used to resolve the issue of whether or not the restriction on licences was justifiable. This was because relevant issues arose in the discussion of the bill in the House of Lords. The second and third parts of the *Pepper v. Hart* conditions also applied. However, in an interesting adaptation of the test, it was held that *Hansard* could be referred to even though the first part of the *Pepper v. Hart* conditions did not apply.

20 *R. (on the application of Spath Holme Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] 1 All ER 195. It is worth briefly examining two recent cases to see how *Pepper v. Hart* continues to be used. In *Chilcott v. Revenue and Customs Commissioners* [2009] EWHC 3287 (Ch). The Court of Chancery considered – and rejected – the argument that in order to prevent an ‘injustice produced by a literal interpretation’ Parliamentary materials should be considered, and the court should read the relevant section of the Income and Corporation Taxes Act ‘as if the unjust provision were not incorporated’. The court could resolve ambiguities in an Act, but it could not re-write legislation. *Morgan v. Fletcher* [2009] UKUT 186 (LC) also concerned an issue of fairness, but is a very different case from *Chilcott*. *Morgan* involved arguments over the meaning of service charges under the Landlord and Tenants Act 1985. The relevant section was ambiguous and a report and ministerial statements were used to clarify the relevant words. The court decided that the tribunal had acted in error in changing the proportions in which different tenants paid service charges.
unsuited for the forensic process. Furthermore, such scrutiny comes close to breaching Article 9 of the Bill of Rights. This prohibits the court from questioning proceedings in Parliament. The case concluded with the court asserting that as the meaning of the relevant section was not ambiguous, there was no need to make use of *Hansard*.\(^{21}\) *Spath Holme Ltd* thus goes some way to determining the form of the post-*Pepper v. Hart* practice. We can see that, while *Pepper v. Hart* acknowledges that a new practice is necessary, this practice has to be informed by a conventional understanding of the role of the courts. The techniques of purposive interpretation are thus ‘revolutionary’ only to a degree. They work within the existing constitutional settlement. It is worth clarifying this point still further. Just because a new practice is under development, this does not mean that the institutional or doctrinal structure of law is also being transformed. A significant development in a practice is thus entirely consistent with the continuity of other institutions. Furthermore, the fundamental ‘shape’ of the practice remains continuous with its general orientation, despite its own transformation. Purposive interpretation might thus realign, but it does not fundamentally alter the relationship between Parliament and the courts.

**PURPOSIVE INTERPRETATION**

So, might it be the case that the judicial practice of statutory interpretation is increasingly purposive? It is interesting, in this respect, to consider an American authority from 1945. Learned Hand J, explained in *Cabell v. Markham*\(^{22}\) that the ‘literal sense’ remains the ‘most reliable’ way of interpreting words; but ‘a mature and developed jurisprudence’ also ‘remember[s] that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning’. Purposive interpretation has always been a technique of common law judges.\(^{23}\) Lord Bingham, who cited this case in *R. (on the application of Quintavalle) v. Secretary of State for Health*\(^{24}\) suggested that – in contemporary judicial practice – the ‘pendulum has swung towards purposive methods of construction’. These interpretative tendencies have been encouraged by ‘the teleological approach of European Community jurisprudence, and the influence of European legal culture generally’. But, how purposive should a court be? Lord Bingham argued that: ‘the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently.’ So, we might think that the extent to which a court will use a purposive method relates to the area of law under consideration.

This point appears to be confirmed by the main authorities. *Quintavalle*, and an important earlier case, *Royal College of Nursing v. DHSS*, concerned advances in

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21 Also relevant to the argument in this case was the status of the 1985 Act as a consolidating statute. The normal rule for the interpretation of this kind of statute is that it is not permitted to look at the law that it replaced as an aid to its interpretation. It was only possible to make use of the old law when the Act itself was ambiguous.

22 *Cabell v. Markham* (1945) 148 F 2d 737, at 739.


24 *R. (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 AC 687.
medical technology and techniques. Could the relevant statutes be interpreted purposively so that they covered new concerns? In *Royal College of Nursing v. DHSS*, Lord Wilberforce (dissenting) pointed out that the starting point is to ‘have regard to the state of affairs existing, and known by Parliament to be existing, at the time’ that the Act became law. The courts then have to consider whether a ‘fresh set of facts . . . fall within the parliamentary intention’. Lord Wilberforce proposed a test. A new set of facts could be held to fall within Parliament’s intention if the facts cover ‘the same genus of facts as those to which the expressed policy has been formulated’. This is, of course, a rule of thumb. Further guidance can be obtained by reference to ‘the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed’. Thus, judges would be ‘less willing’ to ‘extend’ the meaning of a statute if ‘it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive’. Extending the meaning of the Act would be even less permissible if ‘the subject matter is different in kind or dimension from that for which the legislation was passed’. The key point is that judges ‘cannot fill gaps’.

Remember that we are not concerned with HRA or European Union law. We are attempting to determine the acceptable degree of purposive interpretation outside of these areas. Lord Bingham in *Quintavalle* provided an updating of Lord Wilberforce’s argument that the court could not fill in gaps. He pointed out that a narrow adherence to the literal rule may even lead to the ‘frustration of the will of Parliament’ because ‘undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute’. Context, for Lord Bingham as for Lord Wilberforce, is the guide: ‘the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment’.

Whilst the key points are clear, these are still very general guidelines. How could they be applied? We can take up this question in our analysis of *R. v. Human Fertilisation and Embryology Authority, ex parte Blood*. This case concerned Mrs Blood’s argument that sperm from her terminally ill and unconscious husband could be used for her posthumous insemination. The Court of Appeal refused to interpret the Human Fertilisation and Embryology Act 1990 in such a way as to obviate the need for written consent from Mr Blood for the ‘cryopreservation’ of the sperm. The applicant’s argument was that – given the context of their loving relationship, desire for a family, and her husband’s family’s consent – the relevant part of the statute could be interpreted as allowing an exception to cover those couples in a ‘common joint enterprise’. Sir Stephen Brown did not accept this argument. Why? Perhaps his reluctance to interpret the statute broadly was to do with the evidence that the court had heard: he stressed that taking the samples were Mrs Blood’s ‘unilateral’ decision. However, Sir Stephen Brown was also reluctant to interpret purposively in such a ‘highly sensitive and ethically controversial’ area. This would seem a little strange, given that in

25 *Royal College of Nursing v. DHSS* [1981] AC 800.
Quintavalle, the court chose to interpret purposively in an area that was just as controversial: regulations relating to embryo experiments. Likewise, in Royal College of Nursing v. DHSS, the court held that nurses could take part in a medical procedure not envisaged by the Abortion Act 1967.

A great deal may depend on the actual wording of the statutes concerned; but, other factors are important as well. We can examine another authority. In an unrelated area of law, the House of Lords held in R. v. Z. that the reference to the IRA as a prescribed organisation under the Terrorism Act 2000 could be interpreted to cover a breakaway organisation, the real IRA. So, we have to ask questions of context. As Lord Carswell put it:

If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision.

Lord Carswell’s reference to ‘the mischief’ which the statute chooses to engage is not a reference to the mischief rule. Rather, he is identifying the ‘purpose or mischief’ – that of combating terrorism – that allows the Act to be legitimately interpreted in a broad manner. To read back from this case to Regina v. Human Fertilization and Embryology Authority, the decision to interpret purposively in one case and not in the other seems somewhat arbitrary; surely it would be possible to have argued in the earlier case that the facts were such that they fell outside of the mischief that Parliament sought to resolve; and that it was indeed possible to argue that – on the facts – consent could have been deemed to those in a joint enterprise. The general conclusion is that, whilst the general boundaries of the practice of purposive interpretation can be sketched with reasonable precision, there are too many subjective factors in play to say with great certainty whether or not any given statute will be interpreted narrowly or broadly.

**EUROPEAN INTERPRETATION**

To what extent has the court’s interpretation of European law influenced the forms that judicial practice is taking? Lord Denning provides a starting point:

No longer must they [the judges] examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to purpose or intent. To quote the words of the European Court in the Da Coasta case they must deduce from the wording and the spirit of the Treaty the meaning of the Community rules . . . They must divine the spirit of the Treaty and gain inspiration from it. If they
fill a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same.29

The impact of European methods of interpretation is undoubtedly having an important impact on the practice of statutory interpretation. But think about what Lord Denning is saying. The claim about ‘no longer’ needing to examine words in meticulous detail are somewhat misleading. We have seen above that common law judges always made use of a form of purposive interpretation. The need to interpret European law lifts this into a new context; it may even be that this means that the courts have to follow European law rather than English law if there is a conflict. We will deal with this matter presently. For the moment, let us focus on one of our key concerns: how do European methods of interpretation shape or reshape the constitutional parameters of interpretative practice. We need to return to the principle of the supremacy of European law. Lord Denning outlined this doctrine in Macarthys v. Smith:

It is important now to declare – and it must be made plain – that the provisions of Article 119 of the Treaty of Rome take priority over anything in our English statute on equal pay which is inconsistent with Article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.30

European law takes priority over English statutes because Parliament has so provided. How does the doctrine of sovereignty relate to judicial interpretation? Our concern could be phrased as follows: in understanding the judicial interpretation of community law and the extent to which it allows a distortion of the literal meaning of statute, to what extent is judicial creativity limited by their perception of constitutional boundaries?

FIRST STEPS: GARLAND V. BRITISH RAIL ENGINEERING LTD

Once again, answering this question means looking at the development of the judicial practice. In Garland v. British Rail Engineering Ltd31 the House of Lords held that s.6 (4) of the Sexual Discrimination Act should be interpreted in such a way as to make it consistent with Article 119 of the EEC Treaty. The problem was that the words of the relevant section were capable of two different and opposed interpretations: one that suited the applicants and one that suited the respondents. Lord Diplock argued, and

the rest of the House concurred, that the meaning of the section which was consistent with Article 119 had to be preferred. Lord Diplock also made use of a principle of interpretation ‘too well established to call for citation of authority’ that a statute passed after an international treaty had to be interpreted as consistent with the obligations that the country had undertaken. Interestingly, he avoided the question of whether or not a provision expressly intended by Parliament to contravene European obligations would be so interpreted by the court.

THE FORKING PATH: DUKE V. GEC RELIANCE

The parameters of this mode of interpretation can be seen in the later case Duke v. GEC Reliance.\textsuperscript{32} In this case the House of Lords interpreted sections 2(4) and 2(6) of the Sexual Discrimination Act. It was asserted that the 1975 Act was not meant to give effect to the Directive on Equal Treatment issued in 1976. As s.2 (4) of the EC Act did not allow a court to ‘distort’ the meaning of the statute, European employment rights should not be available in English law. This is surprising. One would expect that the court would have to construe the British statute in such a way as to make it harmonise with Community law. However, the court followed an earlier precedent. Marshall\textsuperscript{33} promoted a much narrower approach to the interpretation of statute; stressing that if the domestic statute had not been ‘intended’\textsuperscript{34} to give effect to European obligations, then the court was limited by the words of the Act. On the facts of the present case, as the provisions of the 1976 Act could not carry the interpretation urged by the appellants, the court had to give effect to the literal meaning of the Act. The 1986 Sex Discrimination Act was passed to bring retirement ages into line with European law, but, as this Act was not retrospective, it did not help the appellant’s case. What conclusions can we draw from these two cases? Although the issues raised are similar, and the same sections of the 1975 Act are interpreted in both cases, it would seem that the central difference relates to the court’s understanding of the 1976 directive and its effect in English law. As the 1986 Act did not have retrospective effect, it was not possible to apply a strained interpretation to the 1975 Act to make it consistent with the directive. Some commentators have argued that Duke was wrongly decided.\textsuperscript{35} Marshall had held that a directive could not create obligations between individuals. In Marleasing, the European Court of Justice (ECJ) had relied on an earlier authority, Van Colson, to assert that a court had to interpret national law as consistent with European obligations whether or not the national law pre- or post-dated a directive.\textsuperscript{36} From this perspective, it would appear that the courts have a much bolder role to play

\textsuperscript{34} Marshall v. Southampton and South West Hampshire Area Health Authority [1986] 2 All ER 584, cited in Duke at 639.
\textsuperscript{35} Mead (1991).
\textsuperscript{36} The ECJ argued that the obligation to enforce directives was a duty under Article 5 and Article 189 of the Treaty of Rome.
in the interpretation of national legislation, and that judicial practice could make use of the Van Colson doctrine to assert, against Duke, that there was an overriding objective to ensure judicial protection of European rights.\textsuperscript{37}

**THE PATH REGAINED: PICKSTONE V. FREEMANS**

*Pickstone v. Freemans*\textsuperscript{38} shows the court approaching the interpretation of national legislation far more robustly than they had in *Duke*. In this case, the House of Lords had to interpret s.1 (2) of the Equal Pay Act 1970. The Act had been amended to make it coherent with obligations arising under Article 119 of the Treaty of Rome. The key question was whether the amendment of the Act actually did give effect to the obligations under the treaty. In approaching the interpretation of the Act, their lordships began from a purposive position. Lord Nicholls, for instance, determined that the purpose of the Article was twofold: to ensure consistency in the legal systems of member states across the community, and to improve working conditions. These objectives are furthered by a directive, and by ECJ cases that clarify the precise terms of community law. A problem arose because on at least one interpretation of the relevant sections of the UK Act, it did not accord with European law. Furthermore, the ‘broad’ interpretation of the section that would have made the law coherent was difficult to square with the wording of the Act.

What, then, should be the correct approach? Lord Diplock’s argument in *Garland* provided a point of reference. Only express wording in an Act passed prior to the date that the UK had joined the Community would allow a court to conclude that it was not intended to be consistent with European law. The court was thus justified in particularly ‘wide’ departures from the wording of the Act ‘in order to achieve consistency’. Argument focused on whether ‘exclusionary’ words in the Act had the effect of limiting the section in such a way as to not give full effect to Convention Rights.\textsuperscript{39}

What are the consequences of this argument? The literal interpretation would compel the conclusion that the Act was in breach of European law; furthermore, it would not be consistent with the principle articulated by Lord Diplock. In Lord Oliver’s opinion, the Act was reasonably capable of bearing the interpretation that would make it consistent with European law. Ultimately, it was held that a purposive interpretation allowed the appellant’s case to succeed. Their argument was helped by

\textsuperscript{37} See *Marleasing SA v. La Commercial Internacional de Alimentacion SA* [1992] 1 CMLR 305. The issue in these cases is also the extent to which European law is enforceable against private parties as well as the state. *Marleasing* went beyond *Marshall*, and extended European law rights to private parties.

\textsuperscript{38} *Pickstone v. Freemans* [1988] 3 WLR 265.

\textsuperscript{39} This impacts on interpretative techniques. Lord Keith argued that it was ‘plain’ that Parliament could not have ‘intended’ to depart from its European law obligations. Under the circumstances of the case, he felt it was entirely legitimate that the court should consider the draft regulations. Lord Oliver was concerned that the case did indeed raise issues that made for a ‘departure’ from the normal rules of statutory interpretation. It would not normally be open to a court to depart from a literal interpretation of an Act simply because the Act was passed to give effect to an international treaty. Furthermore, parliamentary materials cannot normally be relied upon as aids to construction. However, European law was different. Parliament had in s.2 (1) of the EC Act, incorporated European law into domestic law.
the fact that the court took into account the Equal Pay Regulations of 1983 that had brought the statute in line with Community law. Although these draft regulations had not been subjected to the same Parliamentary process as a bill, they had been passed to give effect to a decision of the ECJ. It was thus legitimate to take into account Parliament’s purpose in interpreting the draft regulations.

ON THE ROAD: LITSTER V. FORTH DRY DOCK & ENGINEERING CO. LTD

In Litster v. Forth Dry Dock & Engineering Co. Ltd the House of Lords went even further than Pickstone. The court gave a purposive interpretation to a statutory instrument that concerned rules relating to the transfer of employees’ rights in the event of the sale of a business. The court ‘implied’ words into the terms of the regulation so as to make it compatible with obligations under European law. Lord Oliver provided a useful summary of the court’s approach in Litster. The court must first of all determine the precise nature of the obligations concerned by construing the wording of both the relevant directive, and the interpretation given to that directive by the ECJ. If it can be ‘reasonably construed’ in such a manner, UK legislation must then be purposively interpreted so as to give effect to European law. This approach can allow the courts to depart from the literal meaning of the words used.

OFF THE MAP? WEBB V. EMO AIR CARGO AND GRANT V. SOUTH WESTERN TRAINS

Pickstone v. Freemans and Litster certainly seem to show the development of a new judicial practice that moves beyond the restraints on statutory interpretation prior to 1972. However, it would be wrong to assume from these cases that practice has so moved on that literal interpretation is ‘dead’. The starting point remains a literal reading of the statute. Thus, in Carole Louise Webb v. EMO Air Cargo (UK) Limited No.2 the 1975 Sex Discrimination Act was again subject to interpretation. As the House of Lords could interpret the relevant sections of the Act in such a way, there was no need to distort the language of the statute or to otherwise alter the literal sense. It is also worth remembering that the law of the EU itself limits the purposive approach.

This can be seen in Grant v. South Western Trains. The ECJ refused to prohibit discrimination based on sexual orientation. In theory, they might have been able to

broaden the terms of Article 119 and the relevant directives.\(^{43}\) However, the court felt that as community law did not recognise homosexual marriages, this issue could only be dealt with at a national level. \textit{Grant} indicates one extreme constitutional line that Community law will not cross. It is interesting that this raises a question of sexual morality. The consequence of this means that while issues of sexual discrimination have frequently formed the context for tensions between UK and Community law that have occasioned debates on the acceptable boundaries of judicial discretion, the resistance to equal rights for gays and lesbians means that it is unlikely to give rise to acts of bold interpretation.\(^{44}\)

Recent cases have further clarified the terms of the interpretative powers of the court. \textit{Pfeiffer v. Deutsches Rotes Kreuz}\(^{45}\) stressed this point: ‘the principle of interpretation in conformity with Community law requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that [a Directive] is fully effective’. An elaboration of this principle can be seen in \textit{Revenue and Customs v. IDT Card Services Ireland Ltd}.\(^{46}\) In interpreting a tax directive, the Court of Appeal applied \textit{Ghaidan} (see below) even though the case did not raise a human rights point. In interpreting European Union law, the court asserted that the correct approach was to ensure that the court kept within the fundamental terms of the legislation in question. In so doing, a wide power of interpretation did not breach the principle of legal certainty.

**THE POLITICS OF INTERPRETATION UNDER THE HUMAN RIGHTS ACT**

The interpretative provisions of the Human Rights Act have had a major impact in judicial interpretative practices. Our consideration of the new practices has to begin by

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\(^{43}\) \textit{Webb} was followed in \textit{Alabaster v. Woolwich} [2005] EWCA Civ 508 by the Court of Appeal, when they dis-applied the requirement for a male comparator under the Equal Pay Act 1970 to allow an increase in maternity payments under the relevant EC law. \textit{Webb} was also followed in \textit{Hardman v. Mallon} [2002] IRLR 516. In \textit{AC v. Berkshire West Primary Care Trust} [2010] EWHC 1162 (Admin) the QBD held that the policy of a care trust to consider requests for breast augmentation from transsexual patients as ‘non core’ procedures was not discriminatory. The Equality and Human Rights Commission had intervened relying on \textit{Webb}, but the court did not accept their argument and distinguished \textit{Webb}. They pointed out that, whilst a transsexual ‘seeking genital reconstruction surgery’ might be able to ‘rely on Webb for breast augmentation’ it was necessary to take into account limitations on NHS budgets and the fact that some requests for surgery from transsexual patients could be legitimately refused.

In \textit{R. v. South Bank University v. Coggeran} [2000] ICR 1342 \textit{Webb} was also distinguished. The case concerned the exclusion of a student from her University course. The Court of Appeal held that although the Board of examiners should reconsider Coggeran’s dismissal from the course, the trial judge had mistakenly compared ‘the dismissal of pregnant women from employment and the exclusion of a woman from an educational establishment’ for a pregnancy related illness. This approach broadened the relevant Directive to too great an extent.

\(^{44}\) For other limitations on European law, see \textit{R. v. Immigration Appeal Tribunal Ex p. Bernstein} [1988] 3 C.M.L.R. 445. Bernstein was refused a work permit on the basis that the job she sought was ‘modestly paid’ and ‘did not justify recourse to a foreign worker’. On appeal, the applicant argued that the Treaty of Rome and Council Directive 76/207 required the Sex Discrimination Act 1975 to be interpreted in such a way as to apply to immigration proceedings. The Court of Appeal did not agree. Bingham LJ succinctly summarised the position: the Directive did not ‘oblige member-States to observe the principle of equal treatment in granting permits to non-Community nationals outside the Community seeking leave to enter and work in a member-state [.]’ (33).

\(^{45}\) \textit{Pfeiffer v. Deutsches Rotes Kreuz} [2005] 1 CMLR 44.

\(^{46}\) \textit{Revenue and Customs v. IDT Card Services Ireland Ltd} [2006] EWCA Civ 29.
looking at section 3 of the Act. Note first of all that the range of this provision – it applies to primary and secondary legislation ‘whenever enacted’ – before or after the Act. The effect of s.3 (2) b, however, is that the incompatibility of a piece of primary legislation with the HRA does not mean that this legislation is held to be void. In other words, parliamentary sovereignty is left in place. We are thus concerned with the realignment of a judicial practice rather than its complete redefinition. The pressing question is: how will the courts interpret legislation in the light of s.3? The government White Paper, ‘Rights Brought Home’ stated that s.3 would go ‘far beyond’ the rules prior to the HRA which had allowed the court to take into account the ECHR in interpreting legislation and clarifying ambiguity: ‘The courts will be required to interpret legislation so as to uphold convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so’. While this clearly articulates a rule of interpretation, it leaves a great deal of discretion in the hands of the interpreter to determine whether or not it is impossible to interpret legislation as compatible with the Convention. We are concerned once again with the constitutional boundaries of the judicial practice.

One of the first key authorities is Wilson v. First County Trust. Let us consider Lord Nicholls’ argument. He addressed the idea that the courts are themselves public authorities, and therefore bound by the HRA. Would this mean that as the courts are bound by the Act, they would be compelled to discount an Act of Parliament that was inconsistent with the Act? This would clearly be a very broad interpretation of the Human Rights Act. Indeed, it would effectively make the Human Rights Act itself sovereign, and bring to an end the sovereignty of Parliament. As this was never the intended effect of the Act, it could not be a valid interpretation. In interpreting a statute in the light of the HRA, it was necessary to abide by constitutional principles and give effect to the will of Parliament; however, the court could consider the ‘proportionality of legislation’. In approaching the issue of proportionality, the court was fulfilling a reviewing role. Parliament retained the primary responsibility for deciding the appropriate form of legislation. The court would reach a different conclusion from the legislature only when it was apparent that the legislature had attached insufficient importance to a person’s Convention right. The readiness of the court to depart from the views of the legislature depended on the circumstances, one of which was the

47 Moreover, it does not allow a court to hold subordinate or secondary legislation to be invalid if the primary legislation does not allow the incompatibility with the HRA to be remedied.
49 Wilson v. First County Trust [2003] HRLR 33. Mrs Wilson had argued that a loan that she had taken from a pawnbroker and not repaid was unenforceable, because the agreement did not contain all the prescribed terms, contrary to the Consumer Credit Act of 1974. In particular Mrs Wilson was objecting to a fee for preparation of documents that she had been charged and which was not mentioned in the loan agreement. Her argument was that the 1974 Act made the agreement unenforceable. The County Court held that the agreement was enforceable, and Mrs Wilson had appealed to the Court of Appeal, which reversed the County Court’s judgment. The Court of Appeal also made a declaration under s.4 of the HRA. The Court of Appeal argued that the 1974 Act was incompatible with the rights guaranteed to the creditor by Article 6(1) of the European Convention on Human Rights (‘the Convention’). The Secretary of State, who had been added to the proceedings, appealed, and the House of Lords allowed the appeal.
subject matter of the legislation. The more the legislation concerned matters of broad social policy, the less ready a court would be to intervene.\textsuperscript{50}

The interpretation of sections 3 and 4 has shown itself to be one of the sites where the scope of the Act has been fought out. As Nicol has observed,\textsuperscript{51} those judges ‘who wish the HRA to ensure that the Convention rights as interpreted by the European Court of Human Rights become the supreme law of the land’ take a broad approach to section 3 that enables the court to strain the literal meaning of an Act to find a Convention compliant interpretation.\textsuperscript{52} Nicol opposes this interpretative faction to those who understand the Act as ‘a unique participatory instrument’, which must involve the courts and Parliament in a dialogue over the extent of human rights in common law. This tendency prefers narrower interpretations of section 3, with the concomitant reliance on declarations under section 4. Thus, underlying the disagreements over the scope of the Act are different understandings of ‘constitutional fundamentals’.\textsuperscript{53} Has this argument been resolved in the wake of \textit{Anderson} in favour of the narrow interpretation of section 3? We will examine this claim, and Kavanagh’s counter argument\textsuperscript{54} in the following section.\textsuperscript{55}

\textbf{OPENING THE FIELD: \textit{R v. A}}

In \textit{R. v. A.},\textsuperscript{56} the House of Lords interpreted Section 41 of the Criminal Evidence Act 1999 in the light of Article 6. Section 41 prevented evidence being given about the complainant’s sexual history without the leave of the court. The instances where the court could allow this kind of evidence were narrowly drawn. Despite the clarity of the wording of the section, the House of Lords interpreted the Act so as to make it compatible with Article 6. In Lord Steyn’s judgment, the interpretative powers given to the court under section 3 were broad enough to allow a ‘linguistically strained interpretation’, even when there was no ambiguity in the Act. Can \textit{Re S.} be seen as a reaction to the ‘judicial overkill’ of \textit{R. v. A.}? The Court of Appeal interpreted the Children’s Act 1989 in such a way as to make it compatible with Articles 8 and 6. The House of Lords disagreed with this approach, asserting that section 3 did not allow a court to read a statute in such a way as to depart from ‘a fundamental feature of the Act’.

\textsuperscript{50} Ibid., H17. These are nuanced arguments. Insofar as it is possible to draw a conclusion, the House of Lords might be suggesting that legislation would be interpreted to protect Convention rights if the court thought it necessary when considering the ‘proportionality of legislation’. In so doing, the Court would defer to Parliament, but would reserve for itself the power to ‘reach a different conclusion from the legislature’ if ‘the legislature had attached insufficient importance to a person’s Convention right’.


\textsuperscript{52} This approach obviates the need to issue a declaration of incompatibility, and the tension that might result if Parliament does not agree.

\textsuperscript{53} Ibid., 274.


\textsuperscript{55} Kavanagh, ibid.

[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 practical repercussions which the court is not equipped to evaluate.\(^{57}\)

This argument rests on the distinction between the functions of the executive and the courts. The former are far more able to create policy and assess its impact, as the court is fundamentally passive and limited to responding to the evidence given by parties to a dispute. Judges must therefore restrain the uses that they make of section 3. Lord Nicholls was especially critical of Lord Steyn’s position. It was not the case that the court’s interpretative duty would only be limited by express words indicating that Parliament intended that an Act was incompatible with the Convention. There thus appears to be a departure from \(R.\ v.\ A\) in \(Re\ S.\) – a line of reasoning that was confirmed in \(Anderson\).\(^{58}\)

### PLOUGHING A NEW FURROW? \(R.\ (ON\ THE\ APPLICATION\ OF\ ANDERSON)\ V.\ SECRETARY\ OF\ STATE\ FOR\ THE\ HOME\ DEPARTMENT\)

The argument pressed upon the House of Lords in \(Anderson\) was that as the sentencing powers of the Home Secretary in section 29 of the Criminal (Sentences) Act 1997 were incompatible with Article 6, their Lordships should read into this section a requirement for the Home Secretary’s power to be limited by the recommendation of the trial judge and the Lord Chief Justice. The House of Lords refused to accept this position, and were unanimous in their agreement that reading section 29 in this way would exceed the interpretative powers of section 3. Lords Bingham, Steyn and Hutton agreed with Lord Nicholl’s speech in \(Re\ S.\)

Nicol observes that even Lord Steyn performed a ‘volte face’ and appeared to retreat from the arguments made in \(R.\ v.\ A.\) Precisely because a panel of seven Law Lords decided \(Anderson\), it represents a resolution of the argument about the scope of the court’s interpretative powers in the understanding of the position of the court articulated by Lord Nicholls. Later cases, such as \(Bellinger\ v.\ Bellinger\)\(^{59}\) are coherent with \(Anderson\). In the former, Lord Steyn referred to Lord Nicholl’s speech and, in the latter, a certificate of incompatibility was issued, rather than subject the Matrimonial Causes Act 1973 to a strained reading.

Are we therefore to accept that \(Re\ S.\) and \(Anderson\) represent the correct statement of the limits of section 3? Kavanagh argues that the significant differences of fact between \(R.\ v.\ A.\) and \(Re\ S.\) mean that \(Re\ S.\) cannot be given the status accorded to it by Nicol. \(R.\ v.\ A.\) concerned judicial interpretation of a specific section of the 1999

\(^{57}\) \(Re\ S.\) [2002] UKHL 10, at 41.

\(^{58}\) \(R.\ (on\ the\ application\ of\ Anderson)\ v.\ Secretary\ of\ State\ for\ the\ Home\ Department\) [2002] UKHL 46.

\(^{59}\) \(Bellinger\ v.\ Bellinger\) [2002] 1 All ER 311.
Act. In Re S., there were no sections of the Children’s Act 1989 that could be singled out. The Court of Appeal was thus forced to consider (in Hale LJ’s words), not so much what the Act said, but what it did not say. Re S. cannot, therefore, be seen as dealing with the same issue as R. v. A. Furthermore, whereas the consequences of the Court of Appeal’s decision in Re S. would have had significant cost implications for local authorities, R. v. A. concerned an area in which the courts have much greater competence: the regulation of the forensic process. Re S. cannot be read as a more general statement of a correct judicial attitude to section 3. As Kavanagh puts it:

Section 3(1) should not be used as a way of radically reforming a whole statute or writing a quasi legislative code granting new powers and setting out new procedures to replace that statute. However, that does not necessarily mean that the decision rules out the type of ‘reading in’ which was adopted in R. v. A.61

If this argument is correct, then cases such as Anderson must be seen as specific responses to statutes, rather than as evidence of a coherent judicial attitude adopted to section 3. The refusal of the House of Lords in Anderson to read limitations into the power of the Home Secretary under section 29 of the 1997 Act can be explained by reference to the context in which the case was heard. The ECtHR had just issued two rulings against the UK holding that section 29 was in breach of Article 6. As the government was thus ‘legally obliged’62 to change the law, there would have been no point in making a strained interpretation of section 29 and, thus, the better course of action was to issue a certificate of incompatibility. Bellinger shows that the ‘case by case’ or ‘limited’ law making powers of the court were not suitable to interpret the Matrimonial Causes Act in a radical way; it was correct to issue a declaration of incompatibility so that Parliament could assess the policy implications of changes in the law.

What do we make of these two positions? Perhaps the precise scope of section 3 is still open and that (for the most part) the Law Lords are seeking a working relation, rather than a confrontation with Parliament. Klug63 has specifically taken the notion of dialogue as the key to understanding the operation of the Act:

Behind the construction of ss.3 and 4 was a carefully thought-out constitutional arrangement that sought to inject principles of parliamentary accountability and transparency into judicial proceedings without removing whole policy areas to judicial determination. In other words it sought to create a new dynamic between the two branches of the State.64

Klug argues that Lord Hope’s approach in R. v. A is much closer to the spirit of the Act than that of Lord Steyn. The ‘dialogic’ relationship envisaged by the Act requires the

60 Supra, n. 11, at 538.
61 Ibid., 540.
62 Ibid., 542.
64 Ibid., at 130.
judges to have the ‘courage’ to issue declarations, and to actively engage the dialogue with the executive, rather than to see them as a last ditch measure. Declarations cannot therefore be seen as a distortion of the judges’ relation to Parliament; rather, they are part of a vision of the legislature, the executive and the judiciary ‘influencing’ each other. Whether or not this means that Anderson correctly states their position is open to question. However, evidence on declarations of incompatibility also suggests that the Act is opening up a dialogue between the courts and the executive.

MENDING FENCES? GHAIDAN V. GODIN-MENDOZA

A good example of a broad interpretation of an Act under the HRA is Ghaidan v. Godin-Mendoza. The case saw the House of Lords dealing with a question of property law that related to succession to a tenancy under paragraph 2 of schedule 1 to the Rent Act 1977. The defendant was contending that the Rent Act discriminated against him as a homosexual in depriving him of rights over the flat of his deceased partner. What precisely was the issue in Ghaidan? Paragraph 2(2) makes a distinction between a heterosexual and a homosexual couple who are living together. For the former, the survivor can take over the tenancy if the property was in the name of the deceased, whereas for the latter, the survivor cannot. The survivor in a gay relationship is not deprived of all rights over the property. He/she is entitled to an assured tenancy. However, in terms of both rent protection and rights against eviction, the survivor of the homosexual relationship is clearly not in as beneficial a situation as the survivor of the heterosexual relationship.

The Court of Appeal had held that the Act amounted to an infringement of the defendant’s rights under Articles 8 and 14 of the Convention. The Court of Appeal had used s.3 of the HRA to read the Act in a broad way, thus allowing the defendant to take over the tenancy of the flat. The House of Lords dismissed the appeal against this ruling, and confirmed the approach of the Court of Appeal. It was thus not necessary to issue a declaration of incompatibility, as the Act could be read in such a way as to make it Convention compliant. The House of Lords did note, however, that the new meaning of the Act must be ‘consistent with the fundamental features of the legislative scheme’.

Lord Nicholls pointed out that there are a number of ways of reading s.3 as there is a certain degree of ambiguity in the word ‘possible’. A narrow reading would hold that s.3 only allowed courts to resolve ambiguities in statutory language in favour of Convention-compliant interpretations. A much broader interpretation of the section has been preferred, which allows the courts to give a different meaning to the language of the statute in order to make its meaning consistent with the Convention. This could involve reading in words, as in R. v. A. There is no need for the language of the Act to be ambiguous for the Court to take this course of action. This means that the court

66 Ibid., 558.
67 Ibid., 570–1.
can ‘depart from the unambiguous meaning the legislation would otherwise bear’. Normally, the court would have to determine the intention of Parliament by using the language in the Act. However, s.3 means that the court may have to ‘depart from the intention of the enacting Parliament’.68

We can begin to appreciate how the Human Rights Act makes for a potentially radical departure from conventional methods of interpretation. However, this does not extend to the idea that the court is now an equal partner with Parliament when it comes to legislation. The fundamental requirement is that the courts should follow Parliamentary intention in interpreting an Act. The question becomes: how would a court know that it is legitimate to depart from Parliamentary intention? The answer to this question depends on the degree to which Parliament intended that the ‘actual’ words of a statute, as opposed to the concept that those words express, is to be ‘determinative’ of the Act’s meaning. What does this mean? Lord Nicholls argues that the determinative factor cannot be the word of the Act, since the HRA allows them to be interpreted against their obvious sense. It would be possible, therefore, for a court to read words into an Act. This would be consistent with the fact that s.3 ‘requires’ that courts read in words to make an Act compliant with the Convention.69 There is a limit to this process. Although the court can read in words, Parliament could never have intended that ‘the courts should adopt a meaning inconsistent with a fundamental feature of legislation’ (ibid.). This would cross the line, and show the courts interfering with the sovereign rights of Parliament.70

DEFINING THE PARAMETERS OF THE NEW PRACTICE

The sample of cases that we have been examining suggests that we are at the cutting edge of a new kind of judicial practice. Perhaps we can think of the practice of

68 R. (on the application of Wilson) v. Wychavon DC [2007] EWCA Civ 52 saw the Court of Appeal attempt to define the ‘range’ of the Ghaidan principles. Reference was made to Lord Nicholls’ speech. Lord Nicholls pointed out that Parliament was charged with ‘the primary responsibility for deciding the best way of dealing with social problems’ and the court’s role was one of review. The only legitimate grounds on which the court could reach ‘a different conclusion from the legislature’ is ‘when it is apparent that the legislature has attached insufficient importance to a person’s Convention rights’. The court’s willingness to undertake a review depends on context. For instance, the court will only rarely consider matters of ‘[n]ational housing policy’ – as it is up to Parliament to determine where ‘a fair balance’ lies ‘between competing interests’. However, the court will be more willing to consider ‘alleged violations’ of convention rights based on race, gender or sexual orientation. In such instances, ‘the court will scrutinise with intensity any reasons said to constitute justification’ and reasons given must be ‘cogent’ to justify ‘differential treatment’. ‘Stop notices’ under the Town and Country Planning Act could be used to prevent gypsies developing land on which they had settled without planning permission. As the legislation did not apply to normal dwellings, the applicants were arguing that the provisions were discriminatory and in breach of their Convention rights. However, the court considered that the legislation was proportionate on grounds of environmental protection. In considering whether or not legislation was proportionate, the court had to accord a large measure of discretion to Parliament. This authority can be contrasted with R. v. Webster [2010] EWCA Crim 2819.

The Court of Appeal used Ghaidan to justify ‘reading down’ s1(2) of the Public Bodies and Corrupt Practices Act 1889, and the Prevention of Corruption Act 1916 s.2 so as to make them compatible with Article 6 of the Convention. This effectively changed the meaning of the statutes – as they had originally placed a ‘reverse burden of proof’ on the defendant in breach of the presumption of innocence.

69 Ibid., 572.

70 Ibid.
statutory interpretation as the judges entering into some form of dialogue with Parliament. This would certainly have the authority of Jack Straw, who, in a Parliamentary debate, argued that:

Parliament and the judiciary must engage in a serious dialogue about the operation and development of the rights in the Bill. . . . this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens.71

If we accept that the idea of dialogue is useful then it is necessary to determine the precise terms in which it operates. If this is a democratic dialogue, then it cannot simply be a judicial usurpation of legislative power in the name of human rights. As Lord Irvine’s words quoted in the introduction suggest, the dialogue must take place within a constitutional settlement that stresses separation of powers. However, it is necessary to accept that the dialogue does open up a new judicial vocabulary. Does this take us back to the proportionality test? The proportionality test is a powerful mechanism that can allow either the broad interpretation of statutory language or the reading in of words in order to make legislation Convention compliant. However, the test, as shown by Ghaidan v. Godin-Mendoza, must itself be subject to some constraints, otherwise the courts would be moving far beyond the powers given to them by the Human Rights Act, as the intention of the Act was to preserve parliamentary sovereignty. The approach in Ghaidan was legitimate because the interpretation proposed by the House of Lords was consistent with the fundamental policy objectives of the legislation, which were to provide security of tenure. Clearly, where a judicial interpretation moved beyond the policy of legislation, the courts could not effectively legislate in Parliament’s place. It could thus hesitatingly be suggested that after the Human Rights Act, as the intention of the Act was to preserve parliamentary sovereignty. The approach in Ghaidan was legitimate because the interpretation proposed by the House of Lords was consistent with the fundamental policy objectives of the legislation, which were to provide security of tenure. Clearly, where a judicial interpretation moved beyond the policy of legislation, the courts could not effectively legislate in Parliament’s place. It could thus hesitatingly be suggested that after the Human Rights Act, as the intention of the Act was to preserve parliamentary sovereignty. The approach in Ghaidan was legitimate because the interpretation proposed by the House of Lords was consistent with the fundamental policy objectives of the legislation, which were to provide security of tenure. Clearly, where a judicial interpretation moved beyond the policy of legislation, the courts could not effectively legislate in Parliament’s place. It could thus hesitatingly be suggested that after the Human Rights Act, as the intention of the Act was to preserve parliamentary sovereignty.

This is perhaps coherent in some way with Klug’s interpretation of the Act.72 She argues that sections 3 and 4 bring an end to ‘judicial deference to the legislature’; in particular, judges need to appreciate that s.4 allows them to enter into a dialogue with Parliament. It would be a mistake to see s.4 as mandating a change of law, rather the Act ‘was specifically structured to allow the courts to uphold rights while also retaining parliamentary authority’. Klug suggests that the HRA was intended to ‘inject principles of parliamentary accountability and transparency into judicial proceedings without removing whole policy areas to judicial determination’. Changes in judicial practice would have to be seen as driven by the ‘new dynamic’ that the Act attempts to create.73

This would suggest that the precise terms of the practice or dialogue of statutory interpretation in the wake of the HRA are focused on sections 3 and 4. Kavanagh has

72 Klug (2003).
73 Ibid., 130.
made similar points. We can consider her response to the criticisms of *R. v. A.* The critical issue is of the nature of the obligation under s.3(1), and whether it allows or requires the court to depart from the intention of Parliament expressed in the words of the statute. Placing *R. v. A.* in the context of *Lambert*, Kavanagh asks why this authority has been singled out for criticism, when in *Lambert* the court went against the clear intention of Parliament. This begs the question about how parliamentary intention is understood. Recent authorities on s.3(1) suggest that there are two legislative intentions at play, namely that which is underlying the statute in question, and that which is ‘expressed’ in s.3(1). Section 3(1) only becomes relevant when there is a ‘conflict’ between these two intentions. How should this conflict be resolved? If one applies the doctrine of implied repeal, the later Act would repeal the earlier, but as the HRA applies to legislation ‘whenever enacted’, then it would apply to legislation after 1998. The ‘effect’ of s.3(1) is thus quite specific:

Ordinarily, Parliament intends its legislation to be understood in accordance with its ordinary meaning. By empowering judges to go beyond the ordinary meaning, s.3(1) instructs judges to go against that legislative intention.

This is supported by the AG reference 4 of 2002 which describes s.3(1) as ‘very strong and far reaching’ and can require a departure from the ‘intention of Parliament’. This would justify the approach of Lord Steyn in *R. v. A.*, but also in his wider reflections on the justification for a more expanded role for the judiciary. Elaborating these arguments is best left for Chapters 10 and 11 but we need to move away from static understandings of the court somehow mechanically trying to discover the intention of Parliament through a literal reading of an Act. We also need to understand the practice of statutory interpretation as a dialogue. In this dialogue the courts do not usurp the legislative power of Parliament, but on a mandate given to them by Parliament itself, engage in articulating legislation that is compliant with human rights.

**CONCLUSION**

Statutory interpretation is a pragmatic practice within constitutional limits. In attempting to define the parameters of the contemporary practice of statutory interpretation we have avoided any approach that stressed the centrality of the rules of interpretation and have attempted instead to see how, in important cases, judges

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74 Commentators have been critical of Lord Steyn in *R. v. A.* Ekins (2003) argues that approaches such as that of Lord Steyn subvert the fact that the judges are trying to determine Parliament’s intention: ‘Thus, statutory interpretation in a rights-conscious era remains a search for legislative intent and judgment and s.3 should therefore be understood simply as a rule that stipulates defeasible presumptions of legislative intent and which acts as a tiebreaker in the event of genuine interpretative uncertainty . . . Given the indeterminacy of rights adjudication and the democratic unaccountability of the judiciary, we would do well to be grateful for that fact’ (p. 650).


76 Attorney General’s Reference (No. 4 of 2002) [2004] UKHL 43 [2004].
actually interpret the statutory language with which they have been presented. We have hazarded a general thesis. Alongside the presumptions of interpretations, which describe the concern with the general structure of the law as meaningful language, there is a structuring concern with the parameters of the practice. This can only be described in constitutional terms. Where does the boundary lie between interpreting a statute and creating new law? This raises the issue of institutional legitimacy. For us the development of the practice is itself bound up with three important recent developments: the ruling in Pepper v. Hart, the impact of European interpretative methods, and the powers of interpretation created by the Human Rights Act. As a general point, describing judicial practice requires an engagement with specific legal issues, the tensions in approach that show an interaction between different judicial understandings of practice, and the spaces in the law that allow these arguments to be made.

Building on the previous chapter, we could say that practices always allow for a degree of dispute over their central terms and suppositions. Over time, these disputes may become resolved, or at least less ‘hot’, and the practice assumes a conventional form. Given the impact of so many recent legal developments in statutory interpretation, it would not be surprising to find some degree of dispute over the precise constitution of legitimate techniques. However, this can exist alongside a more or less settled understanding of the fundamental orientation of the practice. What we find in recent statutory interpretation is just this mixture of coherence and dispute. Thus a central strand in the emerging practice of statutory interpretation can be seen as an ongoing dialogue with Parliament over the relationship between domestic legislation and human rights.