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ARTICLES

THE CHANGING JUDICIAL ROLE: HUMAN RIGHTS, COMMUNITY LAW AND THE INTENTION OF PARLIAMENT

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INTRODUCTION

A MEMBER of the Bar who appeared before us recently said he was an engineer by training and that what he did when he was looking at a problem was to turn it by 90° and examine it on a different plane. What I propose to do this evening is to talk a little about statute law and statutory interpretation and to use those subjects as a platform from which to draw some conclusions about the judicial role. I hope to look at some of the issues from a new angle and to provoke some discussion when I have finished speaking.

Before I start, I am going to provide you with a roadmap to show the route I intend to take. I will be spending most of my time on my principal premise. My principal premise is that statutory interpretation is now capable of being analysed into two distinct models, which I call the Agency Model and the Dynamic Model. I will start with the Agency Model. In the course of describing the Agency Model, I propose to make a short detour into the rule of law. In principle, legislation should comply with the rule of law. Then I will turn to the Dynamic Model. This has only been developed over the last 35 years but it is distinct from the Agency Model. In the course of looking at the Dynamic Model, I will look at the extremely liberal approach to interpreting legislation under section 3 of the Human Rights Act 1998. I will contrast this with the courts' more restricted approach to the question whether, having taken account of Strasbourg jurisprudence, they should ever go beyond it. I will call that the "take account" point after section 2 of the Human Rights Act 1998 which provides that when determining any question in connection with a Convention right the court "must take account of" Strasbourg jurisprudence. The

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development of the Dynamic Model is one of the factors which has led to a debate about whether judges now have too much power. When I come to my conclusions, I shall draw attention to this debate and make three points in response. They will be about checks and balances, the "take account" point and the sources which judges use when determining questions derived from a statute.

I should say at the outset that what I am going to talk about represents my thinking at the present time. My thinking is not fixed and I might well take a different view if the matter was argued out in front of me. I would also make the general point that when I refer to "the Convention" or "Convention" "rights", I am of course referring to the European Convention on Human Rights and the rights guaranteed by that Convention.

The Agency Model

I. The General Approach to Statutory Interpretation

Statutes are the means by which the legislature imposes its will on the citizen. Statutory interpretation therefore has constitutional implications. When the court decides a question of statutory interpretation, it is deciding how far the state can go in controlling some aspect of an individual's activities. Statute law is increasingly important in the United Kingdom because of the sheer volume of statute law enacted each year by Parliament and also by the devolved Parliaments of the United Kingdom, that is the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly. Some legislation is enacted to fulfil international obligations, such as the obligation to implement Community instruments, that is, legislative measures of various kinds adopted by the European Community and requiring implementation in the member states Statutory interpretation is the prerogative of the courts, including tribunals, and the courts alone. We do not, for instance, have a principle such as exists in the United States of America whereby, in a case involving a challenge to executive action carried out on the basis of the executive's view as to the meaning of an ambiguous statute, the court does not ask whether the interpretation is correct, but simply whether the administrative agency's interpretation is a permissible one.[1]

The principles of statutory interpretation are not codified. They are governed by the common law and are therefore capable of endogenous development by the courts to meet new technical problems or social needs. Since the principles of interpretation are governed by the common law, it might be thought that statutes mean what judges say

[1] *Chevron* v. *Natural Resources Defense Council* (1984) 467 US 837.

they mean, rather than what Parliament may have intended. But that is not so: in general, the court's function is to ascertain the intention of Parliament and that is done from the language that Parliament has used. Thus we can say that the basic model for statutory interpretation is an "Agency Model". The essential feature of this model is that the judge sets out to interpret what is written in front of him, rather than to think about constitutional issues. In doing this he is fulfilling as faithfully as he can the will of the democratically elected Parliament. I should make it clear that the expression "the intention of Parliament" is a term of art which refers to the intention of Parliament to be found (almost exclusively) in the legislative provision under consideration.

It follows naturally from the court's function in interpretation that judges cannot rewrite statutes. Moreover, they must always act within judicial constraints. But, in practice, there are situations where it is not clear what Parliament would have intended if it had thought about the situation that has emerged and presents itself in the case before the court. Parliament may have intended one thing but the language which it has used may not bear that meaning. The court has to find the meaning of the statute from the language used and the indications given in the statute read as a whole. This means that it is possible that its interpretation will turn out not to have been what Parliament in fact intended. Since the role of the courts is to interpret legislation, and not to rewrite it, the courts cannot cure a gap in a legislative scheme. However, by careful interpretation they may be able to prevent the gap from arising in the first place.

In principle, the same method applies to all kinds of legislation, whatever the subject matter. In determining the intention of Parliament from the language used, the main rules that the court applies are that the statute must be read as a whole and that all the words must be given a meaning. There are other rules such as the limited class, or *eiusdem generis*, rule. Under this rule, where there are a number of specific terms followed by a general word, the general word is to be interpreted as limited to the same class of thing as the earlier specific terms. Some of the rules appear to contradict others, such as the rule that every word must be given a meaning as opposed to the rule that permits the court to reject words in certain circumstances as surplusage. It could be said that the rules are simply a form of language like a diplomatic language that the court is using to systematise the complex process of reasoning it is actually undertaking.

After a statute is passed, changes often occur, for example, changes in social conditions or technological developments. Exceptionally, a statute is limited to a state of affairs existing at a particular point in time, but more generally it is silent about its effect in changed

circumstances. As already explained, the courts cannot fill gaps in legislation, and so they have to determine whether the existing statute applies to the changed state of affairs. The legislation may express a clear purpose that can only be fulfilled if it is applied to the new state of affairs. The House of Lords held that this was the case where the statute provided for a process of statutory licensing for in vitro fertilisation of human embryos and a new method of creating embryos outside the human body was discovered.[2] In other cases, it may be that the legislation refers to a concept, which is sufficiently wide to embrace changes in circumstances. This is the case, for instance, in companies legislation, which requires company accounts to show "a true and fair view". The content of the concept of a true and fair view may change over the course of time but the concept itself is unaltered.

In some jurisdictions, the courts, when interpreting a statute, can take into account what was said in Parliament when the Bill was considered. In England and Wales, the use of legislative history as an aid to the interpretation of the statute was not permitted prior to 1993. It can now be used as an aid to interpretation only if the statute is ambiguous and if a government minister, or other promoter of the Bill, made a statement in Parliament dealing clearly with the point of dispute.[3] This is a very limited exception to the general rule excluding legislative history. The court cannot, for example, use legislative history to show that a particular change in the law was considered and rejected in the course of pre-legislative scrutiny.

I want to make one last important point about statutory interpretation. Very few judges have ever written about statutory interpretation. Of course, there are books written by scholars in statute law, constitutional law and legal philosophy but what the books do not tell you is this: that, in practice, when the court is interpreting a statutory provision, whether it is an important general provision or a highly technical piece of secondary legislation, it will often approach the matter by peeling away the layers of meaning and by analysing the policy choices that have been made to arrive at the form of words that has been used. In other words, statutory interpretation is an intensive exercise that involves *drilling down* into the substratum of meaning of the statutory provision. This is a point to which I want to come back. It applies whether the judge is in agency mode or in the dynamic mode, which I have yet to describe.

I now want to make one or two points about statute law itself. Statutes are enacted on the basis that principles of the general law apply to supplement the statute unless Parliament has excluded them

[2] *R. (Quintavalle)* v. *Health Secretary* [2003] UKHL 13, [2003] 2 A.C. 687.
[3] *Pepper* v. *Hart* [1993] A.C. 593.

expressly or by implication. The principles in question may be principles of public law or of private law. For example, where a statute creates a public body and gives it powers, it will be presumed by the courts when they interpret the statute that the public body will, in the exercise of its powers, be subject to the supervisory jurisdiction of the courts on the principles of administrative law developed by the courts. These general principles of law do not need to be set out in the statute and in general it is better not to set them out. To set them out may throw doubt on their application in statutes where they are not set out, and developments in the case law may not apply. If the principles set out in the statute go beyond the principles permitted by the courts, a citizen may unintentionally obtain additional remedies over and above those to which the citizen would be entitled in similar situations under public law. Of course, where a statute extends not just to our own jurisdiction but to jurisdictions of other parts of the United Kingdom, the principle that statutes are enacted on the basis that the principles of the general law apply means that the statute may have a different effect in another part of United Kingdom.

II. The Rule of Law

The most important of the general principles of law is undoubtedly the rule of law itself. I am going to take this opportunity to say a little about the rule of law and what that concept means. The rule of law is absolutely fundamental, and in principle all statute law should comply with the rule of law. When the Constitutional Reform Act 2005 reformed the office of Lord Chancellor, it was thought desirable to state that the reforms to his office did not affect his function to uphold the rule of law. Accordingly, section 1 of that Act provides:

> This Act does not adversely affect-
> (a) the existing constitutional principle of the rule of law, or
> (b) the Lord Chancellor's existing constitutional role in relation to that principle.

The rule of law has never been comprehensively defined. It is like a tree that is perpetually developing and has many branches. The fundamental principle of the rule of law is that there is a state of affairs in which law rules and in which people are equally subjected to the law. The branches of the rule of law include access to justice, the principle of limited government, the principle of separation of powers, the principle that the law must achieve a certain quality and the principle that the law must guarantee certain basic rights. The Senior Law Lord of the United Kingdom, Lord Bingham of Cornhill, has set out a number of the features of the rule of law in a lecture now

published in the Cambridge Law Journal,[4] and it is well worth reading in full. He said that the core of the existing principle of the rule of law is that all persons and authorities within the state, whether public or private, should be bound by, and entitled to the benefit of, laws publicly and prospectively promulgated and publicly administered in the courts. He said that it was important to understand the implications of the rule of law, and he conveniently broke these down into eight sub-rules, which he stated he did not intend to be exclusive. Those sub-rules were that:

(i) the law must be accessible, and so far as possible intelligible, clear and practicable;
(ii) questions of legal right and liability should ordinarily be resolved by the application of the law, not by the exercise of discretion;
(iii) the laws of the land should apply equally to all save to the extent that objective differences justified differentiation;
(iv) the law must afford adequate protection of fundamental human rights;
(v) means must be provided for resolving without prohibitive cost or inordinate delay bona fide disputes which the courts themselves are able to resolve;
(vi) ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers;
(vii) adjudicative procedures provided by the state should be fair, and
(viii) the existing principle of the rule of law requires compliance by the state with its obligations in international law.

Very many scholars have also written about the rule of law. One of the most relevant for the purposes of this lecture is Professor Lon Fuller from Harvard. In his book, *The Morality of Law* Professor Fuller created a character called King Rex, who attempted to legislate for his kingdom. Professor Fuller concluded that an attempt to create a legal system might miscarry in at least one of eight ways. Indeed, he went on to conclude (although this conclusion is not necessary to my argument) that a total failure in any one of eight ways that he identified would result in something that could not properly be called a legal system at all "except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." The eight elements of law, which according to Professor Fuller are necessary for a society aspiring to institute the rule of law, were as follows:

[4] [2007] C.L.J. 67.

(i) Laws must exist and be obeyed by all, including government officials.
(ii) Laws must be published.
(iii) Laws must be prospective in nature, so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
(iv) Laws should be written with reasonable clarity to avoid unfair enforcement.
(v) Laws must avoid contradictions.
(vi) Laws must not command the impossible.
(vii) Law must stay constant throughout time to allow the formalisation of the rules.
(viii) Official action should be consistent with the declared rule.

Elements (iv), (v) and (vi) can be applied directly to statute law. For instance, statute law should generally be prospective in nature and avoid contradictions and not command the impossible. Professor Fuller's rules may occasionally have practical implications for the work of the courts. I would like to give the example of a case in which I sat called *FP (Iran)* v. *SSHD*.[5] This case concerned the power of the Lord Chancellor to make rules for asylum appeals. The statutory power provided that, in making these rules, the Lord Chancellor should "aim to secure… that the rules are designed to ensure the proceedings before the tribunal are handled as fairly, quickly and efficiently as possible….". The power also enabled the Lord Chancellor to make a rule requiring a tribunal to hear an appeal in the absence of the parties.

The Lord Chancellor made a rule requiring the tribunal to hear an appeal in the absence of a party or his representative if it was satisfied that the party or his representative had been given notice of the date, time and place of the hearing and had given no satisfactory explanation for his absence. This rule was in contrast to the rule which applies in normal civil proceedings,[6] which enables the court to proceed to a trial in the absence of a party, but provides that that party may apply for the judgment to be set aside. The court may grant that application if the applicant acted promptly has a good reason for not attending the trial and has a real prospect of success. There was no equivalent in the asylum rules. If the appellant did not receive notice of the appeal hearing, he would be unable to give any explanation for his absence and thus could never satisfy the requirement that he should provide a satisfactory explanation for his absence, even though the

[5] [2007] EWCA Civ 13.
[6] Civil Procedure Rule 39.3.

rule had purported to give them that opportunity. The tribunal would have to hear and determine his appeal in his absence even if he was able subsequently to produce a good explanation for his absence. An appellant might be able to prove that he had a satisfactory explanation for his absence because, for example, he had had an accident and been in hospital when the notice was sent and had not seen it until it was too late. In the cases before us, the parties had failed to appear because they did not receive any notice of the appeal hearing. They had changed their addresses and asked their solicitors to give notice of change of address to the tribunal, which those solicitors had failed to do.

The Secretary of State argued that the appellants' remedy was to apply for judicial review of the tribunal's decision. However, judicial review is not available where there is a mistake of fact which is the responsibility of the party applying for judicial review or his legal representatives, or if the mistake involves disputed questions of fact.

In the circumstances, the relevant rule removed the right of a party to provide a satisfactory explanation for his absence by providing that the tribunal must proceed in his absence even if he did not know he had to put forward such an explanation. I held that the situation in which a party was given a right and it was then taken away before he had a chance to exercise it did not fulfil the basic requirements of the rule of law as identified by Professor Fuller. The rule was accordingly held to be *ultra vires* the Lord Chancellor's rule-making power. The Lord Chancellor accepted the court's decision and altered the rules.

But the important point to note about *FP (Iran)* is the scope of the rule-making power. The rule had to be fair. There is no such general rule applying to Acts of Parliament. It would be wrong to suppose that a statute has never been passed which offends the rule of law as described by Lord Bingham or Professor Fuller. For example section 33 of the Taxes Management Act 1970 provides that a person's right to recover a payment of tax made under a mistake due to an error in a return is to a payment at the discretion of the Inland Revenue in certain limited circumstances. This may offend the first sub-rule enunciated by Lord Bingham but no one has ever suggested that it is not on that account a valid and binding law.

The Dynamic Model

I. Introduction

I now turn to the Dynamic Model and I start by referring to the relationship between statutes and obligations in international law. International treaties are not enforceable in our domestic law unless

they are approved by Parliament. But, where an international treaty is adopted into English law, an important statutory presumption arises, which is the springboard for a more dynamic approach to statutory interpretation than the Agency Model, which I have hitherto discussed. It is presumed by the courts that, where Parliament has made an international treaty part of our domestic law, then, when it enacts subsequent legislation, it intends that legislation to comply with its international obligations. This is now of crucial importance in relation to Community law and human rights. I am going to start by considering the interpretation of legislation when human rights are said to be involved.

II. The Dynamic Model in relation to legislation when human rights are said to be involved

The legislative framework for the court's interpretative duty in the context of human rights is contained in section 3 of the Human Rights Act 1998. This imposes a specific mandatory obligation on the courts to interpret legislation "so far as it is possible to do so" in conformity with the Convention rights. This approach is built on the presumption that domestic law must be interpreted in accordance with international treaty obligations adopted by Parliament. Accordingly, section 3(1) of the Human Rights Act 1998 provides:

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

The courts have been given powers to make declarations of incompatibility in respect of legislation which cannot be interpreted so as to be compatible with Convention rights. But any such declaration does not affect the result in the particular proceedings or constitute any precedent on which other parties can rely. It simply acts as a signal to Parliament and also to the government that it should consider introducing some measure to amend the enactment in question. The scheme of the Human Rights Act 1998 was intended to preserve Parliamentary sovereignty in that regard.

What does the interpretative duty mean in practice? Significantly, in relation to the interpretation of legislation under the Human Rights Act 1998, we move from an Agency Model to the "Dynamic Model". The judge is not simply looking at the wording and trying to apply it. He is looking at the wording critically. He is considering whether it complies with the Convention. This approach works on the basis that what Parliament intended was that statutes should have the effect of operating in conformity with human rights unless the contrary

conclusion could not be achieved as a matter of interpretation. But, in truth, it is no longer a matter of looking at Parliamentary intention. This is highlighted by the fact that the new approach applies to legislation whenever passed. At the highest level of generality, the court is acting as the guardian of human rights and constitutional rights. Its role is a dynamic one, and hence I call the model in this context the Dynamic Model.

Just how dynamic is this model? After a little trial and error on the part of the House of Lords, if I may respectfully say so, there was an important case called *Ghaidan* v. *Godin-Mendoza*.[7] This case concerned the question whether statutory rights of succession in respect of a tenancy were transmitted to a person who lived with a deceased original tenant of the same sex. The relevant condition in the statute was that the person should have lived with the deceased original tenant "as his or her wife or husband". If the legislation did not benefit same sex couples, it would discriminate against them in violation of article 14 of the Convention read with article 8 of the Convention. The House of Lords held that the statute in question applied to the survivor of a same-sex relationship as much as it did to a surviving spouse. The court gave important guidance as to the limits of section 3 of the Human Rights Act 1998. I will merely refer to the speech of Lord Nicholls.

Lord Nicholls held that the effect of section 3 was that the court might be required to depart from the unambiguous meaning of the statute. The question of difficulty was how far the court should go. He held that the answer to this question did not depend upon the actual wording used by Parliament. He continued:

> 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 the 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 court 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

[7] [2004] UKHL 30, [2004] 2 A.C. 557.

> 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.[8]

Ghaidan is a powerful statement of the courts' preparedness to interpret legislation so that it is compatible with human rights. It is very far from being aimed at the interpretation of legislation as a reflection of what Parliament must have intended. Francis Bennion says that the Human Rights Act 1998 has revolutionised our constitution. He is right in that. It also revolutionised statutory interpretation where there is a challenge on human rights grounds. Human rights challenges are significant, and so the exception made by the Human Rights Act is a significant one.

Where a question arises as to compatibility with the Convention, therefore, the courts do not have to seek the intention of Parliament in the particular text. The courts must adopt what is sometimes called a "strained construction" in order to achieve compatibility with the Convention. I do not consider that future generations will necessarily regard this sort of interpretation as "strained". Rather they will see it as an illustration of a more dynamic approach or the Dynamic Model. The court in this context is no longer an agent simply for the purpose of ascertaining Parliamentary intention. The court has at the highest level of abstraction an independent role as guardian of the rule of law and human rights. The interpretative obligation is a very extensive one and the test of "going with the grain of the legislation" takes little account of the fact that in reaching its Convention-compliant interpretation of the legislation the court may have in effect to make a selection from a number of possible ways in which the legislation could have been drafted on a Convention–compliant basis.

When there is an issue as to compatibility with the Convention, the question may arise whether the legislative act is necessary in a democratic society or serves a legitimate aim. Article 8 of the Convention, for instance, provides that there can be interference by public authorities with the private or family life of an individual if that is necessary in a democratic society, proportionate and in accordance with the law.

[8] [2004] UKHL 30, [32]–[33].

In respect of these questions, the judiciary is required to decide some novel and profound questions of moral and political significance. The decisions of the higher courts may have substantial societal and political implications. What is there to assist them? In the United States, there are two schools of thought. Some believe that judges should apply the view of the constitution which would have been adopted by those who ratified the constitution in the eighteenth century. But why are the views of the original founders of the Constitution superior? Their view of, say, equality may be quite different from the view that might be generally accepted in the twenty-first century. The opposing point of view is that the judges should reach their own decision as of the date of their decision on what the Constitution requires. Questions of interpretation can only be decided in the context and culture in which they arise. On the other hand, this approach is open to the objection that it can confer too much power on the judges. People who favour this approach sometimes go further and say that, because Parliament is so busy and unable to deal with matters of detailed law reform, it should be for the judges to update laws when they need to be updated. But this runs even deeper into the objection that it confers much too much power on judges.

The American debate does not apply as such in our jurisdiction. But we still have to ask ourselves where we should seek to find the answers to the difficult questions posed by the qualified Convention rights. Is public opinion relevant? It may be divided or not fully informed. It can be said that even recognition of relative institutional competence – that is, a decision that the executive or Parliament is better able to form a view on a particular matter – constitutes a form of moral or political judgment by judges that in that situation the courts should exercise restraint. The question has to be asked: what is there to assist the judges, when travelling into apparently uncharted territory in cases involving the application of qualified rights, apart from (to the extent available) analogical reasoning from the common law and sound moral and political reasoning? I shall attempt a partial answer to that question when I come to my conclusions.

Before leaving the Convention, I want to talk about the "take account" point. It is now established in English law that, save in special cases, the duty of national courts is "to keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less." (*per* Lord Bingham in *R (Ullah)* v. *Special Adjudicator*.)[9] This is in one sense consistent with the function of the Strasbourg court as the organ for authoritative interpretation of the Convention. But it does not acknowledge that the Strasbourg court is only laying

[9] [2004] UKHL 26, [2004] 2 A.C. 323, 350.

down minimum guarantees. Moreover article 53 of the Convention itself recognises that citizens of the contracting states may have more far-reaching rights. Again, *Ullah* on the face of it sits uneasily with the duty in section 2 of our Human Rights Act 1998 imposed on courts, when "determining a question which has arisen in connection with a Convention right", to "take account" of Strasbourg jurisprudence, rather than to follow it. From that it might appear that it was intended that the courts should be free in an appropriate case to go further than Strasbourg case law or even (though this would have to be an exceptional case) not as far as Strasbourg case law.

The result of the "take account" point is that the courts take a restrictive approach to the question when to depart from Strasbourg jurisprudence. We can contrast this approach with the expansive view taken of section 3 of the Human Rights Act 1998. It is true to say that the question of what the Convention requires could well be a more difficult question than how to interpret a domestic statute, but it does not follow from this that the decision whether or not to use section 3 does not also involve substantial policy questions of the kind normally reserved to the legislature. It is therefore arguably paradoxical that the courts have not taken a more restrictive approach to section 3 as well.

III. The Dynamic Model and the interpretation of directive-based legislation

I now want to turn to Community law. At the time of the passing of the European Communities Act 1972, there was a fork in the road. The judges could have gone down the route marked "Diceyan Parliamentary Sovereignty" and held that, if Parliament failed to legislate in accordance with Community law, Parliament must have intended to derogate to that extent from the Treaty of Rome. But that did not happen. The courts took the other route marked "Community Law-Compliant Interpretation", and interpreted legislation, so far as they could, so that it was compatible with Community law. The traditional doctrine of parliamentary sovereignty took on a new meaning. Parliament must have approved of the courts' approach because, as we have seen, it copied it when it enacted the Human Rights Act 1998. But the two forms of compatible interpretation are not identical. In the context of Community law, there is a fixed reference point, namely the law as laid down by the European Court of Justice whereas the Strasbourg court only lays down minimum guarantees.

European Union legislation is much less exact than our own domestic law. Bismarck said: "Laws are like sausages, it is better not to see them being made." I sometimes think that he must have had

Community legislation in mind. Community legislation frequently represents a compromise between the different member states, and leaves matters to be resolved by the courts. It is also drafted with less precision than we are accustomed to in the United Kingdom. The interpretation of Community legislation presents particular difficulties for any national judge, because it involves balancing more interests than are generally required to be balanced in a domestic situation.

When the court has to find the meaning of legislation designed to implement Community legislation, it has to consider the problem at two levels: firstly, the meaning of the underlying Community legislation, and, secondly, the meaning of the domestic legislation.

As to the interpretation of domestic legislation, the principle in England and Wales is that the court must interpret the domestic legislation so far as possible in conformity with Community law. The leading authority is *Litster* v. *Forth Dry Dock & Engineering Co Ltd*.[10] The *Litster* case involved the Acquired Rights Directive (77/187/EEC). This directive is designed to safeguard the rights of employees when their employer's undertaking is transferred to another company. The persons protected by the United Kingdom implementing legislation were persons who were "employed immediately before the transfer". The employer in question became insolvent and had entered receivership. The issue was whether this wording quoted above covered employees who were dismissed one hour before the transfer by receivers. The House of Lords held that, to give effect to the underlying directive as interpreted by the Court of Justice, there had to be read into the words "a person so employed immediately before the transfer" the words "or who would have been so employed if he had not been unfairly dismissed in the circumstances described in regulation 8(1)". In other words, the House of Lords made a significant change to the wording of the legislation by adding words that were not there. This is not possible in statutory interpretation under purely domestic law. If the courts took the same approach to a purely domestic statute, it would probably be regarded as impermissible judicial legislation.

As regards the interpretation of the underlying Community legislation, the Court of Justice held in *Pfeiffer* v. *Deutsches Rotes Kreuz*:[11]

> 118. In this instance, the principle of interpretation in conformity with Community law thus 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 Directive 93/104 is fully effective, in order to prevent the maximum weekly working

[10] [1990] 1 A.C. 546.
[11] Cases C-397/01 to C-403/01.

> time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, *Marleasing*, paragraphs 7 and 13).

In the recent case of *Revenue and Customs Commissioners* v. *IDT Card Services Ireland Ltd*,[12] it was contended that the distributors of phone cards in the United Kingdom were not liable to VAT on phone cards issued by an Irish company and redeemed by an associated Irish company. The supply of telecommunications services is liable to VAT under Community law but it was sought to take advantage of a difference in the rules between the United Kingdom and Ireland. The United Kingdom imposed VAT on the supply of telecommunications services to the end user and exempted distributors of phone cards unless the supplier who was liable to pay VAT failed to do so, whereas Ireland imposed VAT on the supply of the phone card to the end-user. In these circumstances the exemption on the face of it applied because the Irish company supplying telecommunications services could not be said to have failed to pay VAT which it was not liable to pay.

The Court of Appeal held that there was a general principle in the Sixth VAT Directive against the avoidance of non-taxation and that the United Kingdom exemption did not apply where the principle of the avoidance of non-taxation would be violated. The Court of Appeal held that the relevant test was that in *Ghaidan* v. *Godin–Mendoza,* namely, whether the interpretation that would be required to make the statute in question compliant with Community law would involve a departure from a fundamental feature of the legislation or go against the grain of the legislation. The court recognised that that decision concerned interpretation under section 3 of the Human Rights Act 1998 but held that the differences were immaterial and applied the same principle to the interpretation of directive-based legislation.

The taxpayer contended that the interpretation in accordance with *Ghaidan* would offend the Community law principle of legal certainty. The Court accepted that the person affected by legislation must be able to foresee the manner in which it is to be applied and that that must particularly be so where the legislation has financial consequences for him such as flow from the imposition of the requirement to account for VAT. Moreover, a taxpayer was entitled to structure his business so as to limit his liability to tax and to take advantage of any loopholes that he could find. However, the Court of Appeal held that it was well-known that the provisions of the implementing legislation had to be interpreted in conformity with the Sixth Directive and that the supply of telecommunications services constituted a taxable supply for the purposes of the Sixth Directive. Therefore the principle of legal

[12] [2006] EWCA Civ 29, [2006] S.T.C. 1252. Permission to appeal to the House of Lords was refused.

certainty was not infringed. Nor was it an objection to the application of the *Marleasing* principle that it might result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestic law. The court referred to *Centrosteel Srl* v. *Adipol GmbH*,[13] where the effect of interpreting Italian law in accordance with the directive on commercial agents was that a contract made by an agent who was not registered in accordance with the purely domestic provisions of Italian law was enforceable and not void.

IV. Is the approach to statutory interpretation different in relation to devolution questions?

In the last decade there has been a transfer of legislative power by the Westminster government to the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly. The devolved powers are different in the case of Wales but that difference is not material for the purposes of this paper. The devolution dimension is a whole new area of statute law, calling for appropriate statutory interpretation.

The devolution arrangements in the United Kingdom do not constitute a fully federal system. As I explained in *R. (Horvath)* v. *Secretary of State*:[14]

> The United Kingdom devolution arrangements lack some of the characteristics of a federal system. The Westminster Parliament has not given up its sovereignty over the devolved administrations and that means that in theory, subject to constitutional conventions, it could restrict or revoke the powers that it has given to the devolved administrations. Furthermore, there is no provision for judicial review of legislation passed by the Westminster Parliament on the grounds that it deals with devolved matters. The only qualification to that principle is if the court decides that the legislation of the Westminster Parliament violates Community law. If any such question arises, the courts of any part of the United Kingdom can refer a question to the Court of Justice for a preliminary ruling. In addition, there is no separate legislative body for England as opposed to Wales, Scotland or Northern Ireland. The judicial systems for England and Wales are not separate. There is no dual system of courts in any part of the United Kingdom. Moreover, the United Kingdom ministers have, as I have described, a reserve power with respect to the implementation of Community law.

So the devolved assemblies are not independent sovereign parliaments, and they must act within powers conferred. The United Kingdom has no assembly of representatives of the devolved bodies.

[13] C-456/98 [2000] E.C.R. 1–6007.
[14] [2007] EWCA Civ 620.

Relations with the Community are not devolved matters but in some cases the devolved assemblies can implement Community directives. In the *Horvath* case, a directive had been implemented by the devolved jurisdictions in different ways. There was a challenge to the English regulations on the grounds that the differential implementation of a Community measure for different parts of the United Kingdom violated the principle of non-discrimination in the EC Treaty. The Court of Appeal refused to set aside a reference to the Court of Justice for a preliminary ruling on this question. The EC Treaty binds the member state. The Strasbourg court has applied the same principle and held that the Convention binds the contracting states to the Convention and they are responsible for actions of autonomous regions within the contracting state.[15] Accordingly, it has to be seen if the European Court of Justice will distinguish the situation where a unitary member state violates its obligations under the EC Treaty by implementing a directive in a way which discriminates unjustifiably between those affected, from the situation in *Horvath*, where the differentiation resulted from the internal constitutional arrangements of the United Kingdom.

The legislation enacting the devolution arrangements specifies the powers reserved to the Westminster Parliament. Hitherto, there has been no real dispute about those powers or the dispute had been resolved by some practical solution, such as legislative competence motions within the devolved Parliaments. But, with the recent changes in the political composition of the devolved Parliaments, disputes may start to occur which require the intervention of the courts.

The function of the courts deciding those issues may then be similar to that of the European Court of Justice when it considers whether a directive prevents a member state from enacting its own legislation on a particular subject. In those cases, the Court of Justice appears to have proceeded on the basis of looking not simply at the directive in question, but also at the wider objectives of the European Union. Indeed, it could be said that its approach has often been centralising, with a nod in the direction of subsidiarity. Its function would seem to involve a special balancing of the interests of the member states and those of the Community and its institutions. This area could lead to further developments in the field of statutory interpretation. There is comparative material in the United States, Canada, India, South Africa and Germany to draw on.

[15] *Assanidze* v. *Georgia* App no 71503/01, 8 April 2004.

Conclusions

I. Recapitulation of the Agency and Dynamic Models

The principal approach used by the courts in England and Wales is one where the judge seeks to find the intention of Parliament as expressed in the language Parliament has used. I have called this the Agency Model. Here the judge applies important presumptions, including the presumption that Parliament intended to fulfil its international obligations adopted into English domestic law. But this model is not the complete picture. The Agency Model imposes a different discipline from that imposed by the direction in the Human Rights Act 1998 that judges should interpret legislation, whenever passed, so far as possible in conformity with Convention rights. I have suggested that future generations will not regard this type of interpretation, that is, Convention-compliant interpretation, as a "strained interpretation", as it is sometimes described. They will recognize that the basis in this context is that the judge is no longer an agent of ascertaining Parliamentary intention and that his function is as guardian of constitutional norms, including human rights. This model I have therefore called the Dynamic Model. The Dynamic Model is also applicable to the interpretation of domestic statutes, which have to be given a dynamic interpretation in order to make them compatible with Community law.

II. Drawing the threads together

The Dynamic Model leads naturally to arguments about changes in the judicial role and about whether judges now have too much power. This was the theme of the Justice 2007 Tom Sargant lecture given by Professor Conor Gearty. The provocative title of the lecture was "Are judges now out of their depth?" He skilfully conjured up the graphic picture of judges, stripped down to their swimwear, in the deep end of a swimming pool, physically challenged and perhaps overwhelmed. He advanced three propositions. His first proposition was that, although judges are not yet out of their depth, they must be on constant guard against becoming so. Indeed, he thought that the guard of some had been dropping of late. His second proposition was that, if judges do find themselves out of their depth, they must on no account swim. They should move back to the shallow end, where they belong. Professor Gearty's third proposition was that it was essential for the integrity of the judicial function to clarify the judicial role along these lines. While he did not favour judges being too cautious, the "deep end", as he graphically called it, was for elected representatives and not the judges. With respect to Professor Gearty, it is difficult to avoid

circularity here, because "the deep end" is often defined as that which is outside the competence of the judiciary.

Interestingly, a similar debate has been taking place in Germany. The traditional view of the relationship between the legislature and the judiciary was that of master and servant. The then President of the Federal Supreme Court of Germany, Professor Dr Hirsch, in a journal article,[16] in which he referred (among other things) to the Europeanisation of German domestic law, questioned whether this analogy was correct today. The judges breathe life into the dead letter of the written law. They help legislation to become what it should be. The President expressed a preference for the analogy of the pianist and composer to that of servant and master. The legislator is the composer. The judge is the pianist interpreting the binding requirements of the legislator. The judge has discretion in doing so but he must not falsify the piece. What more could a European or national legislator want than to have his laws interpreted by a judge with the same skill as that with which Horowitz or Rubinstein interpreted Chopin? But this article led to a protest. One critic said: "In a country in which one judge might be Horowitz and another Rubinstein, judges pose a threat to freedom." One must not carry this analogy with German law too far, because German judges have more discretion in statutory interpretation than English judges in some respects, and the analogy of the pianist could be read as suggesting that there is some latitude for the proclivity of the individual. The law is far greater than any individual judge. The law is not the fiefdom of any individual judge to develop as he wants. Even so, the debate in Germany is not without interest. It echoes the distinction I have drawn between the Agency Model and the Dynamic Model.

This debate about the proper role of the judiciary in a modern democracy raises deep political and philosophical questions. The answers to these questions cannot be summed up in a few words. But there are three points that I would make by way of a conclusion to this lecture.

First, co-incident with what is seen as a shift in power to the judiciary, there has been a spontaneous growth of checks and balances. The public has become more involved in various ways in the work of the courts. There has been an exponential growth in institutions involving the community in the organisation of the justice system. For example, there are numerous user committees and justice councils, such as the Civil Justice Council, the Family Justice Council and the Criminal Justice Council. There is also the Sentencing Guidelines Council. In these ways the public has much greater

[16] "Auf dem Weg zum Richterstaat?" (2007) 62 Juristen Zeitung, 854–858.

involvement in the administration of justice than they have had in the past. This is bound inevitably to have an effect on judges. There is bound over time to be a greater sense of connectedness between the courts and judges and the communities that they serve. The law used to be administered on the basis of a top-down process. Now it is more of a bottom-up process. Added to that there have been changes in the way judges act. They have reduced the use of legal Latin, which many people find off-putting, and the judges are about to abandon their wigs in civil cases. There is a new system of judicial appointments, with substantial lay membership, and a new system of judicial complaints and discipline. Both new systems have a statutory basis. So, there has, to some extent, been a spontaneous growth of checks and balances.

My second point relates to the "take account" point. The self-denying ordinance in *Ullah* is that, save in special cases, the courts should go as far as Strasbourg jurisprudence but no further. There are technical grounds for criticising that holding. The reason given by the House of Lords in the *Ullah* case was that the Strasbourg court was empowered to give authoritative pronouncements on the Convention. But this gives little weight to the point that the Strasbourg court is merely laying down minimum guarantees. Moreover, the Convention specifically authorises contracting states to give further rights if they wish. Also, it seems paradoxical to have the self-denying ordinance when the courts have taken such extensive powers under section 3 of the Human Rights Act 1998. In its favour, it can be said that the self denying ordinance has the advantage of relieving courts of the need to look, save on rare occasions, at the way constitutional courts in other parts of the world have developed constitutional rights. Those courts are deciding constitutional rights for their own societies and therefore it may not be appropriate to transplant them to our own jurisdiction. Moreover, it is often said that the implementation of Human Rights Act 1998 has not led to a constitutional crisis. This must be due in part to the restrained approach which the judges have taken to developing human rights jurisprudence.

But the "take account" point illustrates another point, which I want to make. It reflects, and speaks volumes about, the relationship between the judiciary and Parliament. There is an unwritten principle of judicial restraint. There is respect for the will of Parliament, and an exercise of judgment by the judges as to when to concretise that respect by leaving a particular decision to another organ of the constitution. The "take account" point may mean that, if the United Kingdom wants to go further than Strasbourg, Parliament will have to enact a domestic Bill of Rights. That will be a matter of politicians. It could, of course, give additional rights, for instance in the area of freedom of speech or housing. A domestic Bill of Rights would require a great

deal of thought by judges and it might lead to yet further developments in statutory interpretation.

The third and final point I want to make is this. Statutory interpretation is an important area because every exercise in statutory interpretation involves, to a greater or lesser degree, a working out of the constitutional relationship between the legislature and the individual. Community law and human rights have caused the judges to develop new techniques of statutory interpretation over the last 35 years. Many issues which formerly did not come before the courts are now doing so, for example (to take a recent example of my own) the question whether it would be a violation of the Convention right to freedom of thought, conscience and religion to hold that a minister of religion was an employee of a church if such a relationship were contrary to the religious beliefs of the church in question. Not infrequently, though, I accept, not always, issues of human rights and Community law involve questions of statute law. Sometimes it is a question of statutory interpretation; sometimes it is a question of working out the proper scope of a statutory discretion. When the court is dealing with any question of interpretation, it digs deep into the statutory language, peeling away the different layers of thinking and working out the various policy choices that Parliament must have made to make the provision that it did in fact make. Even if the court comes to the conclusion that the Dynamic Model requires it to adopt its own conforming interpretation, that is, an interpretation which is not the natural interpretation but which is required to make the provision compatible with Convention rights or Community law, it may well find in the deeper layers of the legislation a seam of material to assist it. Indeed, it may discover that there is a range of policy choices and that it should be cautious about using the interpretative obligation in section 3 of the Human Rights Act 1998. Intensive statutory interpretation of this kind does not always provide the answer to a problem, but it may provide significant guidance in some cases. That is something that we should all remember.