Bennion on Statute Law

Part II - Statutory Interpretation

Guides to Legislative Intention II: Principles Derived from Legal Policy

The present chapter deals with the eight principles derived from legal policy. These are:
1 law should serve the public interest
2 law should be just
3 persons should not be penalised under a doubtful law
4 'adverse' law should not operate retrospectively
5 law should be predictable
6 law should be coherent and self-consistent
7 law should not be subject to casual change
8 municipal law should conform to public international law. Some of these principles overlap. For example the principle against
doubtful penalisation and the principle against retrospectivity are both manifestations of the wider principle that law should be just. It is however convenient to treat them separately because of their individual importance.

Nature of legal policy

A principle of statutory interpretation derives from the wider policy of the law, which is in turn based on what is called public policy. The interpreting court is required to presume, unless the contrary intention appears, that the legislator intended to conform to this. Thus in ***Re Royse (deed)*** [1985] Ch 22, 27 Ackner LJ said of the principle that a person should not benefit from his own wrong that the Inheritance (Provision for Family and Dependants) Act 1975 'must be taken to have been passed against the background of this well-accepted principle of public policy'.
A principle of statutory interpretation can thus be described as a principle of legal policy formulated as a guide to legislative intention. Here it is necessary to remember the juridical distinction between principles and rules. A rule binds, but a principle guides: ***principiorum non est ratio.*** As we saw in the previous chapter, if an enactment incorporates a rule it makes that rule binding in discerning the purposes of the Act. But if it attracts a principle it leaves scope for flexible application.
General principles of law and public policy underlie and support

the specific rules laid down by the body of legislation. If it were not so the latter would be merely arbitrary. Even where a rule does appear arbitrary (for example that one must drive on the left), there is likely to be a non-arbitrary principle underlying it (road safety is desirable). However that sort of principle is an element of social policy. While it may point to the mischief and remedy of a particular enactment, and assist in purposive construction, it is not the kind of principle this chapter is concerned with.

What we are now considering is the body of general principle built up by the judiciary over the centuries, and referred to as legal policy. It is also referred to as public policy; but it is the judges' view of public policy, and confined to justiciable issues. Public policy in this sense has been judicially described as 'a very unruly horse' *(Richardson* v *Mellish* (1824) 2 Bing 252), and is not a concept that admits of precise definition. Nevertheless it is clear that it exists, and necessarily has a powerful influence on the interpretation of statutes.

Legal policy, equivalent to what the Germans call *Reschtspolitik,* consists of the collection of principles the judges consider it their duty to uphold. It is directed always to the wellbeing of the community, and is by no means confined to statute law. Thus without reference to any statute it was said by the court in *R* v *Higgins* (1801) 2 East 5 that all such acts and attempts as tend to the prejudice of the community are indictable. The framing of legal policy goes to the root of the judicial function as understood in Britain. The judges do not exactly invent legal policy: it evolves through the cases. Yet the function is an important creative one, even in relation to statutes. Friedmann remarked, that in his auxiliary function as interpreter of statutes, 'the task of the judge is to leave policy to the elected organs of democracy and to interpret such policy intelligently' (Friedmann 1949, p 315).

The constituent elements of legal policy are drawn from many sources. These include parliamentary enactments, past judgments, ideas of natural law, the writings of domestic jurists, and comparative jurisprudence. The sources are not all legal however. Religious, philosophical and economic doctrine enters in. Political reality flavours the mixture. International obligations are not forgotten. Common sense and savoir faire bind the whole together.

The underlying basis of legal policy is the welfare of the inhabitants: *Salus populi est suprema lex* (13 Co Inst 139). It follows that in the formation of legal policy public opinion plays its part, and should never be far from the judge's mind (eg *Foley* v *Foley* [1981] Fam 160, 167 where on a claim for maintenance by a divorced wife, Eveleigh LJ said 'public opinion would readily recognise a stronger claim founded on years of marriage than on years of cohabitation').

Neither principles of law nor those of wider public policy are static. In their judgments, the courts reflect developments in these

principles. In their Acts, legislators do likewise. There is an interaction between the two. As Lord Sumner said:

> The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. *{Bowman* v *Secular Society Ltd* [1917] AC 406, 467.)

However the court ought not to enunciate a new head of public policy in an area where Parliament has demonstrated its willingness to intervene when considered necessary *{Re Brightlife Ltd* [1987] 2 WLR 197). For the concept of public policy in the European Community see *R* v *Bouchereau* [1978] QB 732.

Principle that law should serve the public interest

It is the basic principle of legal policy that law should serve the public interest. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest. All enactments are presumed to be for the public benefit, there being no sound method of distinguishing between them in this regard. This means that the court must always assume that it is in the public interest to give effect to the true intention of the legislator, even though it may disagree with that intention. Every legal system must concern itself primarily with the public interest. Hence the numerous Latin maxims beginning with the phrase *interest reipublicae* (it concerns the state). One of these maxims, *interest reipublicae ut sit finis litium,* is of frequent application, though modern judges often prefer not to use the Latin form. In *R* v *Pinfold* [1988] 2 WLR 635 the Court of Appeal, Criminal Division, construed the Criminal Appeal Act 1968, ss 1(1) and 2(1) (which confer a right of appeal in cases of conviction on indictment) by applying the maxim. The convict had already instituted one (unsuccessful) appeal, and now sought to lodge a second appeal on the ground of new evidence. Delivering the judgment of the court Lord Lane CJ did not cite the maxim directly, but nevertheless relied on it. Dismissing the application he said ' . . . one must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit or a finality of legal proceedings, sometimes put in a Latin maxim, but that is what it means in English'. On the application of this maxim see also *Buckbod Investments Ltd* v *Nana-Otchere* [1985] 1 WLR 342 (reluctance of courts to allow appeal to be withdrawn rather than dismissed); *G* v *G* [1985] 1 WLR 647, 652 (maxim applies strongly in child custody cases, since children are disturbed by prolonged uncertainty).

A proper balance needs to be struck between individual and community rights. Nor is this an even balance, since our present and inherited law constantly takes the view that *jura publica anteferenda privatis* (public rights are to be preferred to private). Lord Denning quoted the statement by Lord Reid in *A-G* v *Times Newspapers Ltd* [1974] AC 273, 296 that 'there must be a balancing of relevant considerations', then added his own rider: 'The most weighty consideration is the public interest' *{Wallersteiner* v *Moir* [1974] 1 WLR 991, 1005). Too great an emphasis on the principle against doubtful penalisation can harm the public interest, for the public suffers if dangerous criminals escape on a technicality, or taxes are improperly evaded. In time of war or other national emergency the need to curtail some human rights is greater, as the case of *Liversidge* v *Anderson* [1942] AC 206 illustrated. Different aspects of the public interest may conflict. In the case of public interest immunity, for instance, 'the balance . . . has to be struck between the public interest in the proper functioning of the public service (ie the executive arm of government) and the public interest in the administration of justice' *(Burmah Oil Co Ltd* v *Bank of England (A-G intervening)* [1980] AC 1090, *per* Lord Scarman at p 1145.

Construction in bonam partem In pursuance of the principle that law should serve the public interest the courts have evolved the technique of construction *in bonam partem.* This ensures that, if a statutory benefit is given on a specified condition being satisfied, the court presumes that Parliament intended the benefit to operate only where the required act is performed in a *lawful* manner. Thus where an Act gave efficacy to a fine levied on land, it was held to refer only to a fine lawfully levied (Co Lift s 728). A more recent example concerned the construction of the Town and Country Planning Act 1947, s 12(5), which said that, in respect of land which on the appointed day was unoccupied, planning permission was not required 'in respect of the use of the land for the purpose for which it was last used'. In *Glamorgan County Council* v *Carter* [1963] 1 WLR 1 the last use of the land had contravened a local Act, so the court held that s 12(5) did not apply. For other examples see *Gridlow-Jackson* v *Middlegate Properties Ltd* [1974] QB 361 (the 'letting value' of a property, within the meaning of the Leasehold Reform Act 1967, s 4(1), could not exceed the statutory standard rent); *Harris* v *Amery* (1865) LR 1 CP 148 (voting qualification based on interest in land: actual interest illegal); *Hipperson* v *Electoral Registration Officer for the Distict of Newbury* [1985] QB 1060 (residential qualification for the franchise did not by implication require the residence to be lawful, though it did require that it should not be in breach of a court order).

Equally a person does not forfeit a statutory right because he has abstained from acting illegally, as by becoming intentionally homeless to avoid remaining as a trespasser (i? v *Portsmouth City*

Council, ex pane Knight (1983) *The Times,* 18 July) or to avoid infringing immigration laws *(R* v *Hillingdon London Borough Council, ex pane Wilson* (1983) *The Times).*
Construction *in bonampartem* applies where a disability is removed conditionally, since the removal of a disability ranks as a benefit (eg *Adlam* v *The Law Society* [1968] 1 WLR 6, where 'in continuous practice as a solicitor' in the Solicitors Act 1957, s 41(1) was read as 'in continuous *lawful* practices-

Principle that law should be just

It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction that leads to injustice.
Parliament is presumed to intend to act justly and reasonably *(IRC* v *Hinchy* [1960] AC 748, 768), and for this purpose justice includes social justice *(Williams & Glyn's Bank Ltd* v *Boland* [1981] AC 487, 510). Here courts rely on 'impression and instinctive judgment as to what is fair and just' *(Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004, 1054). Thus *inDe Vesci (Evelyn Viscountess) vO'Connell* [1908] AC 298,310 Lord Macnaghten said: 'The process vulgarly described as robbing Peter to pay Paul is not a principle of equity, nor is it, I think, likely to be attributed to the Legislature even in an Irish Land Act.'
In *Coutts & Co v IRC* [1953] AC 267, 281, where the Crown demanded estate duty of £60,000 although by reason of the death of a trust beneficiary the income of another beneficiary was increased by a mere £1,976 per annum, Lord Reid said:

In general if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results.

It sometimes happens that injustice to someone will arise whichever way the decision goes. Here the court carries out a balancing exercise, as in *Pickett* v *British Rail Engineering Ltd* [1980] AC 136. The case concerned damages recoverable by a deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934, and Lord Wilberforce said that there might in some cases be duplication of recovery. He went on (p 151):

To that extent injustice may be caused to the wrongdoer. But if there is a choice between taking a view of the law which mitigates a clear and

recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think our duty is clear. We should carry the judicial process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies.

The courts nowadays frequently use the concept *of fairness* as the standard of just treatment (eg *Cardshops Ltd* v *John Lewis Properties Ltd* [1983] QB 161). This is sometimes referred to as the 'aequum et bonum', after the maxim ***aequum et bonum est lex legum*** (that which is equitable and good is the law of laws).

Discretionary powers

The principle that law should be just means that Parliament is taken to intend, when conferring a discretionary power, that it is to be exercised justly. Thus in *R* v *Tower Hamlets London Borough Council, ex pane Chetnik Developments Ltd* [1988] 2 WLR 654 the House of Lords laid down the principle that where an apparently unfettered discretion is conferred by statute on a public authority it is to be inferred that Parliament intended the discretion to be exercised in the same high-principled way as is expected by the court of its own officers.

Principle against doubtful penalisation

A person is not to be put in peril upon an ambiguity. As an aspect of the principle that law should be just, legal policy requires that a person should not be penalised except under clear law, which may be called the principle against doubtful penalisation. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction that penalises a person where the legislator's intention to do so is doubtful, or penalises him in a way or to an extent which was not made clear in the enactment.

For this purpose a law that inflicts hardship or deprivation of any kind is treated as penal. There are degress of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. Accordingly this principle is not concerned with any technical rules as to what is or is not a penal enactment. The substance is what matters. Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. However it operates, the principle states that persons

should not be subjected by law to any sort of detriment unless this is imposed by clear words. As Brett J said in *Dickenson* v *Fletcher* (1873) LR 9 CP 1, 7:

Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

Deprivation without compensation

An obvious detriment is to take away rights without commensurate compensation. The common law has always frowned on this. Brett MR said: It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it.' *(A-G* v *Homer* (1884) 14 QBD 245, 257; approved *Consett Iron Co* v *Clavering* [1935] 2 KB 42, 58; *Bond* v *Nottingham Corpn* [1940] Ch 429, 435.)
The same applies where rights, though not taken away, are restricted *(London and North-Western Railway Co* v *Evans* [1893] 1 Ch 16, 27; *Mayor etc of Yarmouth* v *Simmons* (1879) 10 Ch D 518, 527). It applies both to the rights of an individual and those possessed by the public at large *(Forbes* v *Ecclesiastical Commissioners* (1872) LR 15 Eq 51, 53; *R* v *Strachan* (1872) LR 7 QB 463, 465).
Where a statutory procedure exists for taking away rights with compensation, the court will resist the argument that some other procedure can legitimately be used for doing the same thing without compensation *(Hartnell* v *Minister of Housing* [1965] AC 1134; *Hall* v *Shoreham-by-Sea UDC* [1964] 1 WLR 240).

Common law rights The principle against doubtful penalisation applies to the taking away of what is given at common law: 'Plain words are necessary to establish an intention to interfere with . . . common law rights' *(Deeble* v *Robinson* [1954] 1 QB 77, 81).

Detailed statutory codes Where Parliament finds it necessary to lay down a detailed system of regulation in some area of the national life the courts recognise that it may then be impossible to avoid inflicting detriments which, taken in isolation, are unjustified. The presumption against doubtful penalisation is therefore applied less rigorously in such cases *(Young* v *Secretary of State for the Environment* [1983] 2 AC 662, 671).

Standard of proof Where an enactment would inflict a serious detriment on a person if certain facts were established then, even though the case is not a criminal cause or matter, the criminal standard

of proof will be required to establish those facts (eg ***R*** v ***Milk Marketing Board, ex pane Austin*** (1983) ***The Times*** 21 March).

Types of detriment

We now consider in detail the various types of detriment to which the principle against doubtful penalisation applies. It is convenient to do this in conjunction with references to relevant provisions of the European Convention on Human Rights, since our courts are required by treaty to have regard to these.

First we look at impairment of human life or health. Then follow various kinds of interference, namely with freedom of the person, family rights, religion, free asssembly and association, and free speech. Next come detriment to property and other economic interests, detriment to status or reputation, and infringement of privacy. We conclude with impairment of rights in relation to law and legal proceedings, and with other infringement of a person's rights as a citizen. Criminal sanctions, with which the principle against doubtful penalisation is chiefly identified, appear in several of these categories. Capital and corporal punishment fall within the first. Imprisonment curtails freedom of the person and interferes with family rights. A fine is an economic detriment. All convictions impose a stigma, and therefore affect status or reputation.

Impairment of human life or health The leading aspect of the principle against doubtful penalisation is that by the exercise of state power the life or health of a person should not be taken away, impaired or endangered, except under clear authority of law. An exception as to preservation of human life is imported whenever necessary into a penal enactment. Even where the exception is not stated expressly, the probability that it is to be taken as implied necessarily raises doubt as to the application of the enactment, and thus the principle against doubtful penalisation applies. As was said long ago by an advocate in ***Reniger*** v ***Fogossa*** (1550) 1 Plowd 1,

> When laws or statutes are made, yet there are certain things which are exempted and excepted out of the provision of the same by the law of reason, although they are not expressly excepted. As the breaking of prison is felony in the prisoner himself by the Statute de Frangentibus Prisonam: yet if the prison be on fire, and they who are in break the prison to save their lives, this shall be excused by the law of reason, and yet the words of the statute are against it.

Similarly in ***R*** y ***Rose*** (1847) 2 Cox CC 329 an enactment penalising 'revolt in a ship' was held subject to an implied exception where revolt was justified to prevent the master from unlawfully killing persons on board.

When in a poor law case it was objected that the law gave an alien no claim to subsistence, Lord Ellenborough CJ said:

> . . . the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving; and [the poor laws] were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne. *(R* v *Inhabitants of Eastbourne* (1803) 4 East 103, 106.)

The law requires convincing justification before it permits any physical interference, under alleged statutory powers, with a person's body (eg *W* v *W* (1963) [1964] P 67); *Aspinall* v *Sterling Mansell Ltd [1981] 2* All ER 866; *Prescott* v *Bulldog Tools Ltd* [1981] 3 All ER 869). The court will be reluctant to arrive at a meaning which would hinder self-help by a person whose health is endangered (eg *R* v *Dunbar* [1981] 1 WLR 1536).

Article 2 of the European Convention on Human Rights requires everyone's right to life to be protected by law, and states that no one shall be deprived of his life intentionally save in the execution of a court sentence following conviction for a crime for which the law imposes the death penalty. Exceptions cover self-defence, lawful arrest, and action taken to quell riot or insurrection. Article 3 of the Convention follows the Bill of Rights (1688) in prohibiting torture, and 'inhuman or degrading treatment or punishment'.

Physical restraint of the person One aspect of the principle against doubtful penalisation is that by the exercise of state power the physical liberty of a person should not be interfered with except under clear authority of law. Freedom from unwarranted restraint of the person has always been a keystone of English law, and continues to be recognised by Parliament (eg the Supreme Court Act 1981, s *I8(h)(i)).* If follows that an enactment is not held to impair this without clear words. As Goff LJ said in *Collins* v *Wilcock* [1984] 1 WLR 1172, 1177, where a conviction for assaulting a police officer who took hold of the defendant's arm was quashed: 'the fundamental principle, plain and incontestable, is that every person's body is inviolate'.

Article 4 of the European Convention on Human Rights states that no one shall be held in slavery or servitude, or be required to perform forced or compulsory labour. Exceptions cover lawful imprisonment, military service, work to meet an emergency threatening the life or well-being of the community, and 'normal civic obligations'. Article 5 of the Convention states that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty except in one of a number of specified cases. These cover lawful imprisonment, care of minors, and detention of lunatics, alcoholics, drug addicts, vagrants, and persons with infectious diseases. Protocol 4 to the Convention forbids imprisonment merely on the ground of inability to fulfil a contractual obligation. It also states that, subject to obvious exceptions, everyone

lawfully within the territory of the state shall have the right to liberty of movement (including freedom to choose his residence), and freedom to leave the state.

Interference with family rights One aspect of the principle against doubtful penalisation is that by the exercise of state power the family arrangements of a person should not be interfered with, nor his relationships with family members impaired, except under clear authority of law.

English law has always concerned itself with the protection of the home. Unless the contrary intention appears, an enactment by implication imports the principle *domus sua cuique est tutissimum refugium,* which may be freely translated as 'a man's home is his castle'. An interpretation that would make a person homeless is adopted with reluctance (eg *Annicola Investments Ltd* v *Minister of Housing and Local Government* [1968] 1 QB 631, 644).

In considering the enactments relating to child care, Lord Scarman said:

> The policy of the legislation emerges clearly from a study of its provisions. The encouragement and support of family life are basic. The local authority are given duties and powers primarily to help, not to supplant, parents. A child is not to be removed from his home or family against the will of his parent save by the order of a court, where the parent will have an opportunity to be heard before the order is made. Respect for parental rights and duties is, however, balanced against the need to protect children from neglect, ill-treatment, abandonment and danger, for the welfare of the child is paramount. *(London Borough of Lewisham* v *Lewisham Juvenile Court JJ* [1980] AC 273, 307.)

The courts lean in favour of the transmission of an intestate's estate to members of his family, rather than that it should pass to the state as *bona vacantia* (eg *Re Lockwood, Atherton* v *Brooke* [1958] Ch 231).

Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his family life and his home, with exceptions for national security, public safety, economic well-being of the state, prevention of crime or disorder, protection of health or morals, and the freedom of others. Article 12 of the Convention says that men and women of marriageable age have the right to marry and to found a family. Protocol 1 states that no person shall be denied the right to education, and adds that the state shall respect the right of parents to ensure that education is in conformity with their own 'religious and philosophical convictions'.

Interference with religious freedom Another aspect of the principle against doubtful penalisation is that by the exercise of state power

the religious freedom of a person should not be interfered with, except under clear authority of law. English law is still predisposed to the Christian religion, particularly that form of it which is established by law (or in other words Anglicanism). However Parliament has discarded most of the former laws, such as the Corporation and Test Acts, which caused discrimination against persons of other faiths or none. The House of Lords dismissed as 'mere rhetoric' Hale's statement that Christianity is 'parcel of the laws of England' *(Bowman* v *Secular Society Ltd* [1917] AC 406,458). Yet the House of Lords has recently enforced, after an interval of more than half a century, the ancient offence of blasphemous libel as a safeguard solely of Christian believers *(R* v *Lemon* [1979] AC 617). The previous recorded conviction for this offence was *R* v *Gott* (1922) 16 Cr App R 87.

Article 9 of the European Convention on Human Rights states that, within obvious limitations, everyone has the right to freedom of thought, conscience and religion. This is stated to include freedom to change one's religion or belief, and freedom (either alone or in community with others, and either in public or private) to manifest one's religion or belief in worship, teaching, practice and observance. Lord Scarman has said that by necessary implication art 9 'imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others' *(R* v *Lemon* [1979] AC 617, 665).

Interference with free assembly and association The principle against doubtful penalisation requires that by the exercise of state power the freedom of a person to assemble and associate freely with others should not be interfered with, except under clear authority of law. Thus in *Beany* v *Gillbanks* (1882) 9 QBD 308, 313, where local Salvation Army leaders were convicted of unlawful assembly for organising revival meetings and marches which would have been entirely peaceful if a hostile group had not sought to break them up by force, Field J said:

> As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbances of the peace and terror to the inhabitants . . . Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts . . . the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition . . .

Article 11 of the European Convention on Human Rights states that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. There

are exceptions for members of the armed forces, police and state administration, and the other usual qualifications.

Interference with free speech One aspect of the principle against doubtful penalisation is that by the exercise of state power a person's freedom of speech should not be interfered with, except under clear authority of law. Lord Mansfield said: 'The liberty of the press consists in printing without any previous licence, subject to the consequences of law' *(R* v *Dean of St Asaph (1784) 3 TR 428 (note);* see also *R* v *Cobbett* (1804) 29 St Tr 1). Scarman LJ, in remarks concerning the Administration of Justice Act 1960, s 12(4), referred to 'the law's basic concern to protect freedom of speech and individual liberty' *(Re F (a minor) (publication of information)* [1977] Fam 58, 99). The dictum was approved by Lord Edmund-Davies on appeal (see [1979] AC 440, 465).
In *Re X (a minor)* [1975] Fam 47 it was sought to prohibit the publication of discreditable details about a deceased person on the gound that this might harm his infant child if the child became aware of them. *Held* the public interest in free speech outweighed the possible harm to the child, and the injunction would be refused.
Article 10 of the European Convention on Human Rights says that everyone has the right to freedom of expression. This includes freedom to hold opinions and receive and impart information and ideas without interference by public authority, and regardless of frontiers. Licensing of broadcasting and cinemas is allowed, but not licensing of the press. Other restrictions such as 'are necessary in a democratic society' are allowed. Article 6 of the Convention permits restrictions on the reporting of criminal trials.

Detriment to property and other economic interests The principle against doubtful penalisation requires that by the exercise of state power the property or other economic intersts of a person should not be taken away, impaired or endangered, except under clear authority of law.
It was said by Pratt CJ in the great case against general warrants, *Entick* v *Carrington* (1765) 19 St Tr 1030, 1060 that: 'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole'
Blackstone said that the right of property is an absolute right, inherent in every Englishman: 'which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'. He added that the laws of England are therefore 'extremely watchful in ascertaining and protecting this right' (Blackstone 1765, i 109). It follows that whenever an enactment is alleged to authorise interference with property the court will apply the principle against doubtful

penalisation. The interference may take many forms. All kinds of taxation involve detriment to property rights. So do many criminal and other penalties, such as fines, compensation orders and costs orders. Compulsory purchase, trade regulation and restrictions, import controls, forced redistribution on divorce or death, and maintenance orders are further categories. It must be stressed however that, as so often in statutory interpretation, there are other criteria operating *in favour* of all these and the result must be a balancing exercise.

Perhaps the most severe interference with property rights is expropriation. Buckley LJ said that:

> . . . in an Act such as the Leasehold Reform Act 1967, which, although it is not a confiscatory Act is certainly a disproprietory Act, if there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be dispropriated rather than otherwise. *(Methuen-Campbell* v *Walters* [1979] QB 525, 542).

Property rights include the right of a person who is sui juris to manage and control his own property. Nourse J referred to 'the general principle in our law that the rights of a person whom it regards as having the status to deal with them on his own behalf will not . . . be overridden' *(Re Savoy Hotel Ltd* [1981] Ch 351, 365).

The tendency is for the conferring of property rights to be by common law, and for their abridgement to be by statute. The courts, having created the common law, are jealous of attempts to deprive the citizen of its benefits (eg *Turton* v *Turnbull* [1934] 2 KB 197, 199; *Newtons of Wembley Ltd* v *Williams* [1965] 1 QB 560, 574). Where property rights given at common law are curtailed by statute, the statutory conditions must be strictly complied with. Thus Davies LJ said of the Landlord and Tenant Act 1954: 'The statute, as we all know, is an invasion of the landlord's right, for perfectly proper and sound reasons; but it must be construed strictly in accordance with its terms' *(Stile Hall Properties Ltd* v *Gooch* [1980] 1 WLR 62, 65).

On taxation the modern attitude of the courts is that the revenue from taxation is essential to the running of the state, and that the duty of the judiciary is to aid its collection while remaining fair to the subject, eg *IRC* v *Berrill* [1981] 1 WLR 1449 (construction rejected which would have made it impossible for Inland Revenue to raise an assessment).

Protocol 1 to the European Convention on Human Rights says that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one is to be deprived of his possessions except in the public interest and by due process of law.

Detriment to status or reputation Under the principle against doubtful penalisation it is accepted that by the exercise of state

power the status or reputation of a person should not be impaired or endangered, except under clear authority of law. Therefore the more a particular construction is likely to damage a person's reputation, the stricter the interpretation a court is likely to give.

The court accepts that any conviction of a criminal offence imparts a stigma, even though an absolute discharge is given. Thus in *DPP for Northern Ireland* v *Lynch* [1975] AC 653, 707 Lord Edmund-Davies spoke of'the obloquy involved in the mere fact of conviction'. If an offence carries a heavy penalty, the stigma will be correspondingly greater *{Sweet* v *Parsley* [1970] AC 132, 149). This is an important consideration in determining whether Parliament intended to require *mens rea.*

The European Convention on Human Rights does not reproduce the provision in the Universal Declaration of Human Rights 1948 stating that no one shall be subjected to 'attacks upon his honour and reputation' (art 12). However art 10 of the European Convention, in conferring the right of free speech, does include an exception 'for the protection of the reputation or rights of others'.

Infringement of privacy One aspect of the principle against doubtful penalisation is that by the exercise of state power the privacy of a person should not be infringed, except under clear authority of law. An important element in the law's protection of privacy springs from the principle that a man's home is his castle, discussed above (p 145). Even outside the home, the courts tend to require clear words to authorise an invasion of privacy. For example it was held that a predecessor of the Licensing Act 1964, s 186, which says that a constable 'may at any time enter licensed premises . . . for the purpose of preventing or detecting the commission of any offence', must be treated as subject to the implied limitation that it did not authorise a constable to enter unless he had some reasonable ground for suspecting a breach of the law *(Duncan* v *Dowding* [1897] 1 QB 575).

There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. This does not mean that, in deciding whether to order discovery under statutory powers, an authority is intended to ignore the question of confidentiality. It is to be taken into account along with other factors *{Science Research Council* v *Nasse* [1980] AC 1028, 1065). Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his private life and his correspondence, with exceptions for national security, public safety, economic well-being of the state, prevention of crime or disorder, protection of health or morals, and the freedom of others.

Impairment of rights in relation to law and legal proceedings One aspect of the principle against doubtful penalisation is that by the exercise of state power the rights of a person in relation to law

and legal proceedings should not be removed or impaired, except under clear authority of law. The rule of law requires that the law should apply equally, and that all should be equal before it *(Richards v McBride* (1881) 51 LJMC 15, at p 16). It also requires that all penalties be inflicted by due process of law, which in turn demands that there should be no unauthorised interference with that process. In general, no citizen should without clear authority be 'shut out from the seat of justice' *{Aspinall* v *Sterling Mansell Ltd* [1981] 3 All ER 866, 867). This applies even to a convicted prisoner *(Raymond* v *Honey* [1983] AC 1, 12). These principles are embedded in various ancient constitutional enactments. Thus a chapter of Magna Carta enshrines the Crown's promise that a man shall not be condemned 'but by lawful judgment of his peers, or by the law of the land'. It goes on: 'we will sell to no man, we will not deny or defer to any man either justice or right' (25 Edw 1 (1297) c 29). The statute 28 Edw 3 c 3 (1354) enacts that 'no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law'. The Bill of Rights (1688) forbids excessive bail, excessive fines, and cruel and unusual punishments; and requires jurors to be duly empannelled and returned. Alleged deprivation of the common law right to trial by jury will be strictly construed *(Looker* v *Halcomb* (1827) 4 Bing 183, 188).

The right to bring, defend and conduct legal proceedings without unwarranted interference is a basic right of citizenship *(In re the Vexatious Actions Act 1896—in re Bernard Boaler* [1915] 1 KB 21, 34-5). While the court has control, subject to legal rules, of its own procedure, this does not authorise any ruling which abridges the basic right. In the case of a defendant, the right covers 'the right to defend himself in the litigation as he and his advisers think fit [and] choose the witnesses that he will call' *(Starr* v *National Coal Board* [1977] 1 WLR 63, 71).

The removal of legal remedies is strictly construed *(Boulting* v *Association of Cinematograph, Televsion and Allied Technicians* [1963] 2 QB 606), as are provisions allowing technical defences *(Sanders* v *Scott* [1961] 2 QB 326). It is presumed that a party is not to be deprived of his right of appeal *(Mackey* v *Monks* [1918] AC 59, 91). A litigant who has obtained a judgment is by law entitled not to be deprived of that judgment without 'very solid grounds' *(Brown* v *Dean* [1910] AC 373, 374. An important aspect of rights in relation to law is the right not to have legal burdens thrust upon one. It is a detriment to be obliged to carry out statutory duties against one's will, or to incur the risk of being the subject of legal proceedings. This is so even though no economic loss is involved. *(R* v *Loxdale* (1758) 1 Burr 445; *R* v *Cousins* (1864) 33 LJMC 87; *Finch* v *Bannister* [1908] 2 KB 441; *Gaby* v *Palmer* (1916) 85 LJKB 1240, 1244.)

Articles 5 and 6 of the European Convention on Human Rights give elaborate protection for rights in legal proceedings. This covers

safeguards in case of arrest, the presumption of innocence, the right to a fair trial, the right of cross-examination, the publicity of proceedings, and other matters.

Other interference with rights as a citizen In addition to the rights previously referred to, the principle against doubtful penalisation requires that by the exercise of state power no other right of a person as a citizen should be interfered with except under clear authority of law. The policy of the law is to protect the rights enjoyed by a person as a citizen. In a notable dissenting judgment, Earl Warren CJ said: 'Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen'. *(Perez* v *Brownell* (1958) 356 US 64.)

Thus because of the importance attached to *voting rights* the courts tend to give a strict construction to any enactment curtailing the franchise *(Randolph* v *Milman* (1868) LR 4 CP 107; *Piercy* v *Maclean* (1870) LR 5 CP 252, 261 *Hipperson* v *Electoral Registration Officer for the Distinct of Newbury* [1985] QB 1060, 1067).

Protocol 1 to the European Convention on Human Rights requires the holding of free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinions of the people in the choice of the legislature. Protocol 4 requires that no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national. It also says that no one shall be deprived of the right to enter the territory of the state of which he is a national.

Principle against retrospectivity

As a further aspect of the principle that law should be just, legal policy requires that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

A person is presumed to know the law, and is required to obey the law. It follows that he should be able to trust the law. Having fulfilled his duty to know the law, he should then be able to act on his knowledge with confidence. The rule of law means nothing else. It follows that to alter the law retrospectively, at least where that is to the disadvantage of the subject, is a betrayal of what law stands for. Parliament is presumed not to intend such betrayal. As Willes J said, retrospective legislation is:

. . . contrary to the general principle that legislation by which the conduct

of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law *(Phillips* v *Eyre* (1870) LR 6 QB 1, 23).

Thus in the absence of a clear indication in an amending enactment the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced *(Re Royse (deed)* [1985] Ch 22, 29).

Degrees of retrospectivity Where, on a weighing of the factors, it seems that *some* retrospective effect was intended, the general presumption against retrospectivity indicates that this should be kept to as narrow a compass as will accord with the legislative intention *(Lauri* v *Renad* [1892] 3 Ch 402, 421; *Skinner* v *Cooper* [1979] 1 WLR 666).

Procedural changes Rules of legal procedure are taken to be intended to facilitate the proper settlement of civil or, as the case may be, criminal disputes. Changes in such rules are assumed to be for the better. They are also assumed to be neutral as between the parties, merely holding the ring. Accordingly the principle against retrospectivity does not apply to them, since they are supposed not to possess any penal character *(Yew Bon Tew* v *Kenderaan Bas Maria* [1983] 1 AC 553). Indeed if they have any substantial penal effect they cannot be merely procedural.

Pending actions Where an amending enactment is intended to be retrospective it will apply to pending actions, including appeals from decisions taken before the passing of the amending Art *(Hewitt* v *Lewis* [1986] 1 WLR 444).

Penalties for offences It has been held that an enactment fixing the penalty, or maximum penalty, for an offence is merely procedural for the purpose of determining retrospectivity *(DPP* v *Lamb* [1941] 2 KB 89; *Buckman* v *Button* [1943] KB 405; *R* v *Oliver* [1944] KB 68). This seems wrong in principle, as well as conflicting with our international obligations under the European Convention on Human Rights. Article 7 of this says: 'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'. In *R* v *Deery* [1977] Crim LR 550 the Northern Ireland Court of Criminal Appeal declined to follow the English authorities mentioned above. In 7? v *PenwithJJ, ex pane Hay* (1979) 1 Cr App R (S) 265 it was said by the Divisional Court that, where the maximum penalty for an offence is increased, this should not be applied to offences committed before the increase unless there is a clear legislative intention to this effect (see also commentary on *R* v *Craig* [1982] Crim LR 132 at [1982] Crim LR 191-2).

European Convention on Human Rights

Article 7 of the European Convention on Human Rights states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. As mentioned above, where the act or omission did constitute an offence when committed, no penalty is to be imposed which is heavier than the one applicable at that time. Article 7 is expressed not to prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to 'the general principles of law recognised by civilised nations'.

The principle laid down by art 7 is common to all the legal orders of the member states. It is among the general principles of law whose observance is ensured by the European Court *{R* v *Kirk (Kent) (No 63/83)* [1985] 1 All ER 453, 462).

Principle that law should be predictable

It is a principle of legal policy that law should be certain, and therefore predictable. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to reach a construction which was reasonably foreseeable by the parties concerned. As Lord Diplock said: 'Unless men know what the rule of conduct is they cannot regulate their actions to conform to it. It fails in its primary function as a rule.' (Diplock 1965, p 16).

This follows a maxim cited by Coke (4 Inst 246): *misera est servitus, ubi jus est vagum aut incertum* (obedience is a hardship where the law is vague or uncertain).

The classic modern statement of the need for predictability is that of Lord Diplock in *Black-Clawson International Ltdv Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.

One advantage of predictability is that it encourages the settlement of disputes without recourse to litigation. And where litigation has been embarked upon, predictability helps to promote settlements without pursuing the litigation to the bitter end.

It is the policy of the law to promote settlement of disputes.

Thus Lord Diplock, in referring to a judicial guideline as to the rate of interest to be adopted in relation to damages awards, said its purpose lay 'in promoting predictability and so facilitating settlements' *(Wright* v *British Railways Board* [1983] 2 AC 773,785).

Principle that law should be coherent and self-consistent

It is a principle of legal policy that law should be coherent and self-consistent. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that on the point in question the law lacks coherence or is inconsistent.

Consistency within the system of laws is an obvious benefit, as recognised by the maxim *lex beneficialis rei consimili remedium praestat* (a beneficial law affords a remedy for cases which are on the same footing) (2 Co Inst 689). It is encouraged by our legal system, under which until recently judges were all drawn from the practising Bar. One of the grounds on which Blackstone praised the old system of travelling assize judges was the resulting consistency in the law:

> These justices, though . . . varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolution . . . And hence their administration of justice and conduct of trials are consonant and uniform; whereby . . . confusion and contrariety are avoided . . . (Blackstone 1765, iii 354).

The dangers where a court cuts accross established legal categories and procedures were spelt out by Lord Dilhorne in *Imperial Tobacco LtdvA-G* [1981] AC 718, 741, a case where it was sought to obtain a civil law declaration on whether particular conduct constituted a criminal offence. In *Vestey* v *IRC* [1980] AC 1148 the House of Lords justified its departure from a previous decision of the House on the ground that it could now see what Lord Edmund-Davies called (p 1196) the 'startling and unacceptable' consequences of that decision when applied to circumstances never contemplated by the House when reaching it. Again, where a literal construction of the phrase 'a matter relating to trial on indictment' in the Supreme Court Act 1981, s 29(3) would mean that no appeal lay from certain Crown Court decisions, the House of Lords applied a narrow meaning of the phrase *(Re Smalley* [1985] AC 622, 636).

The integrity of legal doctrines should be safeguarded when courts construe legislation. Thus in *Mutual Shipping Corporation York* v *Bay shore Shipping Co of Monrovia* [1985] 1 WLR 625 it was held that the wide descretion given by the literal meaning of the Arbitration Act 1950, s 22 was subject to severe implied restrictions so as to preserve the finality of arbitration awards.

 Principle that law should not be subject to casual change

It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not be assumed to change either common law or statute law by a side-wind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is. As Lord Devlin said: 'It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.' *(National Assistance Board* v *Wilkinson* [1952] 2 QB 648, 661.)

There are many examples of the application of this principle. Thus the House of Lords refused to place on the Law of Property Act 1925, s 56 a construction which would overturn the doctrine of privity of contract *(Beswick* v *Beswick* [1968] AC 58). Similarly the Court of Appeal preserved the equity doctrine of mortgages in construing s 86(2) of that Act *(Grangeside Properties Ltd* v *Collingwoods Securities Ltd* [1964] 1 WLR 139).

In *Leach* v *R* [1912] AC 305 the House of Lords refused, in the absence of clear words, to acknowledge a departure from the principle that a wife cannot be compelled to testify against her husband. Lord Atkinson said (p 311) the principle 'is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment'.

In *Re Seaford* [1968] p 53, 68 the Court of Appeal refused to hold that the doctrine of relation back of a judicial decision to the beginning of the day on which it was pronounced 'was, as a result of the Supreme Court of Judicature Act 1873 made applicable, as it were by a side-wind , in matrimonial proceedings'. In *R* v *Owens* (1859) 28 LJQB 316 the court held that an Act allowing a mayor to stand as a councillor did not enable him to act as returning officer at an election for which he was a candidate since it would not be legitimate to infer from the language used that the legislature had intended to repeal by a side-wind the principle that a man shall not be a judge in his own cause.

Courts prefer to treat an Act as regulating rather than replacing a common law rule *(Lee* v *Walker* [1985] QB 1191, which concerned the power to suspend committal orders in contempt proceedings). Alteration of the common law is presumed not to be intended unless this is made clear (eg *Basildon District Council* v *Lesser (JE) (Properties) Ltd* [1985] QB 839, 849: 'it would be surprising if Parliament when limiting the effect of contributory negligence in tort [in the Law Reform (Contributory Negligence) Act 1945] introduced it into contract)'.

Principle that municipal law should conform to public international law

It is a principle of legal policy that the municipal law should conform to public international law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

Public international law is what used to be called the law of nations, or *jus gentium.* A rule of public international law which is incorporated by a decision of a competent court then becomes part of the municipal law *{Thai-Europe Tapioca Service Ltd* v *Govt of Pakistan* [1975] 1 WLR 1485, 1495. Or, under the principle known as *adoption,* a rule of international law may be incorporated into municipal law by custom or statute. It is an important principle of public policy to respect the comity of nations, and obey treaties which are binding under public international law. Thus Diplock LJ said:

> . . . there is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred. *{Salomon* v *Commrs of Customs and Excise* [1967] 2 QB 116. 143).

European Convention The European Convention on Human Rights (Cmnd 8969) entered into force on 3 September 1953. To date it has been ratified by 22 nations, including the United Kingdom. For these it imposes the usual obligations and rights under a treaty in public international law. The machinery for enforcement of these consists of the European Commission of" Human Rights and the European Court of Human Rights, both of which operate at Strasbourg. The United Kingdom has accepted the right of individual petition to the Commission, but has not made the Convention part of its municipal law.

It follows that the Convention does not directly govern the exercise of powers conferred by or under an Act *{R* v *Secretary of State for the Home Department, ex pane Fernandes* (1980) *The Times* 21 November; *R* v *Secretary of State for the Home Department, ex pane Kirkwood* [1984] 1 WLR 913). However it is presumed that Parliament, when it passes an Act, intends it to be construed in conformity with the Convention, unless the contrary intention appears.

Judicial notice Judicial notice is taken of rules and principles of public international law, even when not embodied in municipal law *{Re Queensland Mercantile and Agency Ltd* [1892] 1 Ch 219, 226). This also applies to treaties made by the British Crown. As Scarman

LJ said in *Pan-American World Ariways Inc* v *Department of Trade* [1976] 1 Lloyd's Rep 257, 261 (emphasis added):

> If statutory words have to be construed or a legal principle formulated in an area of the law where Her Majesty has accepted international obligations, our courts—*who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign power*—will have regard to the convention as part of the full content or background of the law. Such a convention, especially a multilateral one, should then be considered by the Courts even though no statute expressly or impliedly incorporates it into our law.

Citation of treaties The existence of the principle under discussion means that the court is obliged to consider any relevant rule of public international law, and permit the citation of any relevant treaty. For this reason it seems that Lord Parker CJ was mistaken when in *Urey* v *Lummis* [1962] 1 WLR 826, 832 he said it was not for the court to consider whether the United Kingdom had implemented the international Agreement regarding the status of forces of parties to the North Atlantic Treaty.

Uniform statutes An act passed to give effect to an international agreement will be construed in the light of meanings attached to the agreement in other contracting states, so as to promote uniformity *(Stag Line Ltd* v *Foscolo Mango & Co Ltd* [1932] AC 328, 350; *Riverstone Meat Co* v *Lancashire Shipping Co* [1961] AC 807, 8690. See further F A Man 'The Interpretation of Uniform Statues' (1946) 62 LQR 278; 'Uniform Statutes in English Law' (1983) 99 LQR 376.