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Statute Law

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Introductory note

For the convenience of readers this section of the Review conforms to the Code set out in the third edition (1997) of the author's textbook *Statutory Interpretation*. A reference to the relevant section of the Code is given after each heading in the notes below, where the book is referred to as 'Code'.

Reference to text writers (Code s 6)

Practice (p 22)

In relation to the exercise of statutory powers, 'matters of practice are not to be regarded as carved in stone but must be adjusted as changing requirements of litigation indicate the need for adjustment': *Stabilad Ltd v Stephens & Carter Ltd* [1998] 4 All ER 129, *per* Scott V-C at 134 (stay of payment out of security for costs under Companies Act 1985 s 726(1)).

Duty to obey legislation (Code s 8)

Reasonableness (p 25)

The law assumes that people will behave reasonably. 'In the company of the man on the Clapham omnibus, the officious bystander and the man skilled in the art there has now been established the reasonable recipient, a formidable addition to the imagery of our law': *Garston v Scottish Widows' Fund and Life Assurance* Society [1998] 3 All ER 596, per Nourse LJ at 598.

Ignorantia juris neminem excusat (Code s 9)

In *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 the House of Lords purported to make major changes in the doctrine of mistake of law - see Bennion, 'A Naked Usurpation?' NLJ (reference to follow).

Civil sanction for disobedience (the tort of breach of statutory duty) (Code s 14)

Subsection (17) (pp 61-62)

Lord Browne-Wilkinson said in *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353 at 371: '. . . the question whether there is such a common law duty and if so its ambit must be profoundly influenced by the statutory framework within which the acts complained of were done . . . a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty would be inconsistent with, or would have a tendency to discourage, the due performance of [the statutory duty]'. So it was held in *Harris v Evans* [1998] 3 All ER 522 that an inspector giving advice under the Health and Safety at Work etc Act 1974 did not owe a duty of care not to cause economic damage to the operator of machinery because this would defeat the Act by engendering untoward cautiousness and defensiveness on an inspector's part.

Administrative or executive agencies (Code s 15)

Fettering of discretion

A person upon whom a statutory discretion has been conferred must not adopt a practice in relation to its exercise which has the effect of fettering that discretion. The Criminal Justice Act 1982 s 1C confers on the Secretary of State a discretion from time to time to direct that that a young person may be detained in a prison or remand centre instead of a young offender institution. *Held* This did not authorise the Secretary of State to adopt a general practice of confining female young offenders in prison. Astill J said: 'In those circumstances, there cannot properly be said to be a discrete decision made about each young female offender. This is blanket policy; it is contrary to s 1C(2) of the 1982 Act and it is accordingly unlawful': *R v Accrington Youth Court, ex p Flood* [1998] 2 All ER 313 at 320.

Court supervision) (pp 65-66)

R v Wicks [1997] 2 All ER 801 was distinguished in *Dilieto v Ealing Borough Council* [1998] 2 All ER 885 (validity of breach of condition notice under Town and Country Planning Act 1990 s 187A held unsuitable for judicial review and therefore a proper ground for defence in criminal proceedings).

Prosecuting agencies (Code s 18)

Regarding the role of the Attorney General as guardian of the public interest, Lord Woolf MR said in *Attorney General v Blake (Jonathan Cape Ltd, third party)* [1998] 1 All ER 833 at 847 that he has a special status in relation to the courts, adding-

> 'He has a particular role and a particular responsibility. The role extends well beyond the field of criminal law, for example to the fields of contempt of court, charities and coroners' inquisitions. Its source in some instances is derived from statute. However, in relation to other functions, the role is an inherent part of his ancient office. It is the inherent power flowing from his office which enables the Attorney General either to bring proceedings ex officio himself or to consent to the use of his name [in] relator proceedings for the protection of the public interest in the civil courts . . . He has the overall responsibility for the enforcement of the criminal law.'

Lord Woolf (at 848), citing with approval the dictum of Devlin J in *Attorney General, ex rel Hornchurch UDC v Bastow* [1957] 1 All ER 497 at 501 that 'the Attorney General is the person who is primarily responsible for the enforcement of the law', said the Attorney General has the function of preventing the criminal law being flouted and so brought into disrepute.

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 72-74)

A jurisdiction conferred by Act cannot be widened by statutory instrument, unless of course the Act positively authorises this: *Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1998] 3 All ER 238.

Where a person or body on whom jurisdiction is conferred is not a court, and the nature and extent of the jurisdiction is not fully expressed, it is necessary to find implications as to this nature and extent, usually by analogy with court jurisdiction. Here is an example.

The Pensions Schemes Act 1993 s 146 states that the Pensions Ombudsman may investigate and determine any complaint or dispute of fact. In *Edge v Pensions Ombudsman* [1998] 2 All ER 547 it was held that although the word 'determine' seems to enable the Ombudsman to make any determination he thinks fit, by implication certain restrictions must be taken to apply, for example that the Ombudsman is not taken to be given power to make a determination that a court could not make, or to interfere with trustees in a manner contrary to the law of trusts, or to interfere with proprietary rights without giving the proprietors an opportunity to be heard.

Inherent jurisdiction (pp 76-78)

'. . . the inherent jurisdiction, valuable and beneficial though it is in its proper procedural sphere in relation to litigation, cannot be invoked by the court to arrogate to itself the power to give substantive relief . . .' (*Wicks v Wicks* 1998] 1 All ER 977, *per* Peter Gibson LJ at 996).

Interpretation by adjudicating authorities (Code s 20)

Judgment and discretion compared (p 83)

Determining under the Police and Criminal Evidence Act 1984 s 78 whether the admission of certain evidence 'having regard to all the circumstances . . . would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it' is a question of judgment not discretion, whereas determining whether to stay criminal proceedings as an abuse of process was held to be an exercise of discretion: *R v Chalkley* [1998] 2 All ER 155, *per* Auld LJ at 178. (On the latter point compare Example 20.1.)

In *R v East Sussex County Council, ex p Tandy,* [1998] 2 All ER 769 the House of Lords held that the duty imposed on a local authority to provide education under the Education Act 1993 s 298 (now re-enacted in the Education Act 1996 s 19) was not affected by the impecuniosity of the authority. Lord Browne-Wilkinson said (at 776-777)-

> '. . . [the local authority] does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s 298. But it can, if it wishes, divert money from other . . . applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by s 298 . . . To permit a local authority to avoid performing a statutory duty on the grounds [*sic*] that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power.'

See also Bennion, 'Local Government Finance: Is the Capping Regime Lawful?' 162 JP (1998) 796.

Differential readings (p 85)

Often differential readings are a matter of impression (see Code p 450). As Lord Nolan said of one enactment: 'The matter is one of impression which may present and has presented itself differently to different minds, but I can only say that to my mind the language is clear' (*R v Secretary of State for the*

Environment. ex p Camden London Borough Council [1998] 1 All ER 937 at 944).

Adjudicating authorities with original jurisdiction (Code s 22)

Tribunals (p 93)

As regards the framing of a preliminary point of law on which to base an appeal, Ward LJ said in *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852 at 855: 'I would discourage . . . tribunals from trying to identify preliminary points of law in cases in which the facts are in dispute and when it is far from clear what facts will ultimately be found by the tribunal and what facts should be assumed to be necessary to form the basis of the proposed point of law'. He said (ibid.) that that case was 'a paradigm example of an attempt to shorten proceedings which results in their being prolonged and ultimately inconclusive in nine cases out of ten'. The same could often be said of preliminary points of law taken in courts proper.

Adjudicating authorities with appellate jurisdiction (Code s 23)

Academic points (p 94)

Lord Mustill said in *Attorney General's Reference (No 3 of 1994)* [1997] 3 All ER 936 at 952 '[t]he courts have always firmly resisted attempts to obtain the answer to academic questions, however useful this might appear to be', adding that to some extent this applies even to a reference by the Attorney General under the Criminal Justice Act 1972 s 36(1), which has the peculiarity that 'it is not a step in a dispute, so that in one sense the questions referred are invariably academic'. On the reason for this judicial attitude Henry LJ said in *Director of Public Prosecutions v Hyde* [1998] 1 All ER 649 at 656 that if the party has no interest in the outcome he or she is likely not to be represented, with the danger that the adversarial system will not work as it is meant to 'as the case will not be resolved by the clash of competing arguments'.

Judicial review (Code s 24)

Public law (pp 102-103)

For reasons of comity (as to which see Code p 493) judicial review is not it available where the decision in question relates to activities of Parliament. See *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 All ER 93 (decision of Parliamentary Commissioner for Standards). Cf *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 WLR 621 (decision of ombudsman subject to judicial review because related to administration).

Where other remedy available (p 104)

It may be that instead of judicial review the decision in question can be more appropriately reviewed under a different juridical regime, for example that relating to charitable proceedings as defined by the Charities Act 1993 s 33(1): see *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705. On whether judicial review will lie where another remedy is available see also *R v Bristol City Council, ex p Everett* [1998] 3 All ER 603 at 617 (alternative remedy a complaint to a magistrates' court under the Environmental Protection Act 1990 s 82).

Ultra vires delegated legislation (Code s 58)

The burden is on the party asserting invalidity to establish it on a balance of probabilities: *Boddington v British Transport Police* [1998] 2 All ER 203, *per* Lord Irvine of Lairg LC at 210. Lord Diplock said in

Hoffman la Roche (F) & Co AG v Secretary of State for Trade and Industry [1975] AC 295 at 365: 'Although such a decision is directly binding only as between the parties . . . the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the [invalid] law . . .' This is true however only where the decision is binding, ie not obiter or vitiated by inadequate argument, or by being *per incuriam*, or otherwise. The argument of invalidity may be raised in any proceedings, including a prosecution, except where the enactment in question otherwise provides (as in *Plymouth City Council v Quietlynn Ltd* [1988] QB 114 and *R v Wicks* [1998] AC 92: see *Boddington v British Transport Police* [1998] 2 All ER 203, *per* Lord Irvine of Lairg LC at 215-216).

In *Boddington v British Transport Police* [1998] 2 All ER 203 the House of Lords adopted the reasoning in the last three sentences of the penultimate paragraph of the Comment on Code s 58. Following *DPP v Head* [1959] AC 83 (see Code s 329), they overruled *Bugg v DPP* [1993] QB 473 and decided that there is no such distinction as was there laid down between the substantive and procedural invalidity of byelaws.

Boddington v British Transport Police [1998] 2 All ER 203 also showed that even though an item of delegated legislation is not itself ultra vires, an administrative act done under it may be. The Transport Act 1962 s 67(1) gives power to make byelaws 'with respect to the smoking of tobacco in railway carriages'. A byelaw made under this power prohibited smoking wherever a notice to that effect was displayed. *Held* The byelaw was not ultra vires in itself, though the administrative decision determining that such a notice was to be displayed in a particular place might be ultra vires. (In fact the notices in the case were found not to be ultra vires.)

Presumption against retrospective application (Code s 97)

It is important to grasp the true nature of objectionable retrospectivity, which is that the *past* legal effect of an act or omission is retroactively altered by a later change in the law. However the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of an act or omission *in itself*. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it. The Estate Agents Act 1979, which introduced a new scheme for the regulation of estate agents, authorises the making of an order prohibiting a person from engaging in estate agency work if he appears unfit to practise on any of various grounds including that he 'has been convicted of an offence involving fraud or other dishonesty or violence'. *Held* This includes a conviction incurred before the commencement of the 1979 Act because that indicated unfitness just as much as a conviction incurred after the commencement would (*Antonelli v Secretary of State for Trade and Industry* [1998] 1 All ER 997).

See also the note on *Antonelli v Secretary of State for Trade and Industry* at p 000 below, related to Code s 130.

Retrospective operation: procedural provisions (Code s 98)

Evidence

Enactments relating to evidence are equated to procedural enactments: *Bairstow v Queens Moat Houses plc* [1998] 1 All ER 343 (effect of statement in Civil Evidence Act 1995 s 16 that, subject to any transitional provisions made by order, Act not to apply retrospectively). In the debates on the Bill for the Civil Evidence Act 1995 Lord Hailsham of St Marylebone said: 'Purely procedural and evidential changes in the law should apply as from the moment when the law is enacted to proceedings which are currently before the courts' (cited in *Bairstow v Queens Moat Houses plc* [1998] 1 All ER 343 at 351).

Ireland (Code s 123)

As to the treatment of Ireland as a 'home' country see Immigration Act 1971 s 1(3) (no United Kingdom immigration controls between Ireland and the United Kingdom) and *Re Gilligan* [1998] 2 All ER 1 at 15.

Application of Act to foreigners and foreign matters within the territory (Code s 129)

Privileges and immunities (pp 280-282)

By a further judicial development the House of Lords decided by 3 to 2 that state immunity does not extend to crimes under international law, such as torture and hostage taking: *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte* [1998] 4 All ER 897 (nullified and sent for rehearing on ground that a member of Appellate Committee disqualified: *In re Pinochet Ugarte,* Times 18 January 1999).

Application of Act to foreigners and foreign matters outside the territory (Code s 130)

Whether a reference to an 'offence' or a 'conviction' includes an offence committed abroad or a foreign conviction depends on the legislative intention as discerned from the enactment's purpose. The Estate Agents Act 1979 s 3(1) authorises the making of an order prohibiting a person from engaging in estate agency work if he appears unfit to practice on any of various grounds including that he 'has been convicted of an offence involving fraud or other dishonesty or violence'. *Held* This includes a conviction for arson in the United States because that indicated unfitness just as much as a conviction in the United Kingdom would have done (*Antonelli v Secretary of State for Trade and Industry* [1998] 1 All ER 997).

See also the note on *Antonelli v Secretary of State for Trade and Industry* at p 000 above, related to Code s 97.

Opposing constructions of an enactment (Code s 149)

In *Clark & Tokeley Ltd (t/a Spellbrook) v Oakes* [1998] 4 All ER 353 the Court of Appeal considered the Employment Protection (Consolidation) Act 1978 Sch 13 para 17(2), which says that where a business is transferred the employment of a person who is employed 'at the time of the transfer' shall be treated as employment by the transferee. Mummery LJ said (at 364): 'As it appears . . . that the expression "at the time of the transfer" is reasonably capable of more than one meaning (a moment of time *or* a period of time) this court should attempt to resolve that ambiguity in a manner consistent with the purpose of these provisions and with regard to the consequences of the alternative constructions'.

When strained construction needed (Code s 158)

Perverse departure from literal meaning

Where none of the reasons justifying a strained construction is present the court ought to apply a literal construction, and it may be perverse not to do so. For example in *Bacchiocchi v Academic Agency Ltd* [1998] 2 All ER 241 the Court of Appeal applied a strained construction to the Landlord and Tenant Act 1954 s 38(2) (clause in lease excluding compensation rendered void where specified condition fulfilled) without, it is submitted, there being any valid reason for doing so. For details see Bennion, 'Last Orders at *La Pentola*' (1998) 148 NLJ 953 and 986.

Interstitial articulation by the court (Code s 179)

'It is true that the House [of Lords] has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament': *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley* [1997] 4 All ER 833, *per* Lord Browne-Wilkinson at 838. Although this dictum is in terms limited to the House of Lords it must apply to all courts or the House of Lords would in some cases be applying a different system of law to that applied by the courts from which it was hearing appeals, which would be absurd. So in *R v Crown Court at Stafford, ex p Chief Constable of the Staffordshire Police* [1998] 2 All ER 812 at 817-818 Laws J said of the Licensing Act 1964-

> 'I must read rules into the statute by implication. Perhaps because the liquor licensing laws go back a considerable distance in time and are in their present form the product of many changes and amendments, they cannot be regarded as a coherent self-sufficient statutory code such that the court's only task is to apply the statute's letter. In order to give them effect there is no escape from a degree of judicial in-filling.'

Statutory definitions (Code s 199)

A definition is general if, like those contained in the Interpretation Act 1978, it applies to legislation generally. It is special or ad hoc if it is expressed to be confined to the Act in which it appears, or is otherwise restricted. However even when so confined it may be taken to have a wider application if it encapsulates a general principle. In *General Medical Council v British Broadcasting Corporation* [1998] 3 All ER 426 at 431 Robert Walker LJ said that although the definition of 'court' in the Contempt of Court Act 1981 s 19 is said only to apply for the purposes of that Act 'it was recognised by Lord Donaldson MR in *Pickering v Liverpool Daily Post and Echo Newspapers* plc [1991] 2 AC 370 at 380 as having a wider significance and being "intended to reflect the common law concept of what is a court . . ."'

The use of synonym and paraphrase in construing a statutory definition is generally unhelpful because they can impart a different nuance to the words to be interpreted: see *Customs and Excise Commissioners v British Field Sports Society* [1998] 2 All ER 1003 at 1011.

The Interpretation Act 1978 (Code s 200)

Powers and duties (p 447)

The Interpretation Act 1978 s 12(1) (powers may be exercised from time to time) does not apply where the scheme of the legislation so indicates, as in *R v Crown Court at Stafford, ex p Chief Constable of the Staffordshire Police* [1998] 2 All ER 812 (scheme of the Licensing Act 1964 indicates that justices cannot grant a special hours certificate in respect of premises for which one is already in force).

Pre-enacting history: the pre-Act law (Code s 210)

Subs (3): form of words with previous legislative history (the Barras principle) (pp 460-461)

In *Lowsley v Forbes (t/a L E Design Services*) [1998] 3 All ER 897 at 905 Lord Lloyd, citing the Code at page 460, said the *Barras* principle was entitled to great weight in the instant case. He added: 'Parliament having given its blessing to *W T Lamb & Sons v Rider* [1948] 2 KB 331 [by treating it as good law when enacting the Limitation Act 1980 s 24(1)] it is now too late . . . to hold that its reasoning is erroneous'.

In *R v Emmett* [1997] 4 All ER 737 the House of Lords overruled the decision in *R v Tredwyn* (1994) 99 Cr App R 154 on the legal meaning of the Drug Trafficking Offences Act 1986 s 3(1) (repealed). After the decision in *Tredwyn*, s 3(1) was re-enacted in similar terms in the Drug Trafficking Act 1994 s 11(7). Lord Steyn (at 743) peremptorily dismissed as 'implausible' the argument that Parliament thereby intended to indorse *Tredwyn*, but it seems that the *Barras* principle and the cases underlying it were not cited.

The *Barras* principle applies also where what has gone before is not a court decision but some other event which bore on the legal meaning of the enactment in question: see eg *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley* [1997] 4 All ER 833, per Lord Browne-Wilkinson at 839 (official report on meaning of enactment).

Codifying Acts (Code s 212)

Lord Herschell's rule (p 466)

Lord Herschell's rule does not apply where the code is not comprehensive, or expressly preserves common law rules. See eg *Eide UK Ltd v Lowndes Lambert Group Ltd* [1998] 1 All ER 946, *per* Phillips LJ at 950, relating to the Marine Insurance Act 1906. This 'does not purport to be a comprehensive code, but expressly preserves, by s 91(2), the rules of common law, including the law merchant, so far as consistent with the Act'.

Use of committee reports leading up to Bill (Code s 216)

For a recent example of reliance on departmental committee reports see *Redrow Homes Ltd v Bett Bros plc* [1998] 1 All ER 385, relating to the Copyright, Designs and Patents Act 1988 s 97(2).

Use of Hansard (Code s 217)

Comment Part Five: Clarity of Hansard Statement (p 479)

For a case where the Minister's statement was held not to be 'clear' see *Secretary of State for Social Security v Remilien* [1998] 1 All ER 129 (statement did not say under what power projected action would be taken).

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220)

Residuary right to admit Parliamentary materials (pp 521-523)

The judge referred to Hansard without considering whether the *Pepper v Hart* conditions were satisfied in *Bairstow v Queens Moat Houses plc* [1998] 1 All ER 343 at 351 (statement by Lord Hailsham of St Marylebone in debates on the Bill for the Civil Evidence Act 1995) and *R v Secretary of State for the Home Department, ex p Probyn* [1998] 1 All ER 357 at 362 (statement by the Home Secretary in debates on the Bill for the Criminal Justice Act 1991).

Adoption as part of advocate's argument (Code s 225)

It is stated in the Comment to Code s 225 that there does not appear to be any English authority for the use of this device. However in *R v Dudley Magistrates' Court, ex p Hollis* [1998] 1 All ER 759 Moses J said of the citation on behalf of a local authority, in relation to a dispute as to the legal meaning of the

Environmental Protection Act 1990 s 82(12), of a report by a university law department: 'We question the admissibility of this document . . . But we were prepared to consider its contents as expressing argument adopted by the council . . .'.

The long title (Code s 245)

There is a juridical difference, which can affect interpretation, between the title of an Act (now usually called the long title) and a preamble to an Act. Yet learned judges constantly confuse the two. At Code p 561 (footnote 1) six cases from 1964 onwards are cited where learned judges referred to the long title as 'the preamble'. Here are two more examples from the 1998 All England Law Reports: *Srathclyde Regional Council v Wallace* [1998] 1 All ER 394, *per* Lord Browne-Wilkinson at 398, 401 and *R v Land* [1998] 1 All ER 403, *per* Judge LJ at 405.

Nature of legal policy (Code s 263)

Changes in legal policy (pp 600-601)

A striking instance of a putative change in legal policy concerns maintenance, described by Lord Denning MR as 'improperly stirring up litigation and strife by giving aid to one party to bring and defend a claim without just claim or excuse': *Re Trepca Mines Ltd (Application of Radomir Nicola Pachitch (Pasic))* [1963] Ch 199 at 219. In 1908 the policy underlying the law of maintenance was described by Fletcher Moulton LJ as follows: 'It is directed against wanton and officious intermeddling with the disputes of others in which [the maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse'. Of this passage Millett LJ said in *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65 at 69 -

> 'The language and the policy which it describes are redolent of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all.'

This was despite the fact that the passage had been approved by Lord Mustill only five years earlier: see *Giles v Thompson* [1994] 1 AC 142 at 161.

Obedience to Parliament (p 604)

In *Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1998] 3 All ER 238 it was held that where Parliament had by the Courts and Legal Services Act 1990 s 58 exempted certain agreements for legal services from the law of champerty in relation to court proceedings, thereby changing public policy, it must follow that there could no longer be any public policy objection to such agreements where they related to arbitration.

Law should be just (Code s 265)

Legal policy

English law is developing in a way which increasingly promotes what the courts see as 'fair'. In *R v Customs and Excise Commissioners, ex p Mortimer* [1998] 3 All ER 229 the court had to construe a passage in the Excise Duties (Personal Reliefs) Order 1992 art. 5(3) which says that a person who imported etc. goods exceeding a certain quantity should be regarded as doing so for a commercial purpose 'unless, if required to do so, he satisfies the Commissioners to the contrary'. By a doubly strained construction

impelled by a desire for fairness the court held this meant that (a) the Customs were *compelled* to afford the person in question an opportunity to satisfy them to the contrary and (b) were also required to tell him the possible legal consequences of failure so to satisfy them.

Discretionary powers (p 616)

Akin to the rule that a statutory discretion is to be exercised justly is the rule that a general discretion must not be so exercised as to frustrate the intended working of an enactment. In *R v Dudley Magistrates' Court, ex p Hollis* [1998] 1 All ER 759 at 770 Moses J ruled that the apparently unfettered discretion as to the adjournment of proceedings conferred by the Magistrates' Courts Act 1980 ss 10 and 54 'must not be exercised in a manner which undermines the statute under which proceedings are brought or in a way which deprives a litigant of rights conferred by that statute' (see also Example 71.3). This was upheld by the House of Lords in *Bristol City Council v Lovell* [1998] 1 All ER 775, where Lord Hoffmann said (at 783) 'obviously [the discretion to grant an adjournment under CCR Ord 13 r 3(1)] must be exercised judicially and not for the purpose of defeating the policy of the statute or the rights which it confers . . .'

Law should be certain and predictable (Code s 266)

Sentencing

The principle of legal certainty extends to sentencing. 'The general principle of our law is . . . that a convicted criminal is entitled to know where he stands so far as his punishment is concerned. He is entitled to legal certainty about his punishment' (*Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577, *per* Lord Steyn at 602; approved Lord Slynn, *R v Secretary of State for the Home Department, ex p François* [1998] 1 All ER 929 at 935).

Presumption that literal meaning to be followed (Code s 285)

Statutory powers (pp 669-670)

'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such is the intention of Parliament' (*Pierson v Secretary of State for the Home Department* [1997] 3 WLR 492, *per* Lord Browne-Wilkinson at 502; cited *R v Secretary of State for the Home Department, ex p Simms* [1998] 2 All ER 491, *per* Kennedy LJ at 500). In *R v Secretary of State for the Home Department, ex p Stafford* [1998] 4 All ER 7 at 15 Lord Steyn said that this principle could not apply to the discretion conferred on the Home Secretary in relation to the release of prisoners under mandatory life sentence by the Criminal Justice Act 1991 s 35(2) (replaced by the Crime (Sentences) Act 1997 s 29(1)) 'since the necessary contextual background of a relevant common law principle' was absent. This is doubtful, since the guides to legislative intention or interpretative criteria have their general basis in the common law (see Code, pp 399-400).

Presumption that updating construction to be given (Code s 288)

Social changes (pp 693-696)

Under the enactments and common law dealing with distress it was formerly assumed that if a door was found locked it had been deliberately locked to exclude the sheriff's officer or bailiff, so that he could lawfully break in. It is different today. 'It is not wrong for a tenant, without more, to lock the door . . . if he does not know of the bailiff's intended re-entry at any particular time then to leave his door locked and to

absent himself about his normal affairs is his right': *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901, *per* Morritt LJ at 912-913.

Principle of the open court (pp 702-703)

Restrictions on the principle of the open court are admitted as respects the victim in prosecutions for rape or blackmail (see *R v Legal Aid Board, ex p Kaim Toder (a firm)* [1998] 3 All ER 541, *per* Lord Woolf MR at 551). Chambers hearings may be held in camera where the judge so orders (having power to do so), but are not otherwise to be treated as secret as opposed to private: *Forbes v Smith* [1998] 1 All ER 973; *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673. As Sir Christopher Staughton said, the court has to be most vigilant when both sides agree that information should be kept from the public (cited *R v Legal Aid Board, ex p Kaim Toder (a firm)* [1998] 3 All ER 541, *per* Lord Woolf MR at 549). In general, court proceedings are required to be subjected to the full glare of a public hearing 'because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available . . ': *R v Legal Aid Board, ex p Kaim Toder (a firm)* [1998] 3 All ER 541, *per* Lord Woolf MR at 549-550.

Presumption favouring rectifying construction (Code s 287)

Casus omissus (pp 682-684)

RSC Ord 29 r 11(2)(a) (made under the Supreme Court Act 1981 s 32) as amended allows an interim payment of damages in respect of a person 'whose liability will be met by . . . an insurer concerned under the Motor Insurers' Bureau agreement'. The drafting of this rule is defective in two ways: (1) the name of the agreement is actually the Uninsured Drivers' Agreement, and (2) the words should also cover the case where the liability will be met by the Motor Insurers' Bureau, which is not an 'insurer'. It was held in *Sharp v Pereria* [1998] 4 All ER 145 that this was a *casus omissus* and the court should rectify the wording. Millett LJ said that 'if possible' the rule should be given the correct construction. It was only 'possible' to do this by giving a strained construction (for strained construction see Code s 157). This decision is of interest in relation to the Human Rights Act 1998 s 3(1), which states that primary and subordinate legislation must be construed in a way which is compatible with the Convention rights '[s]o far as it is possible to do so'.

Nature of purposive construction (Code s 304)

There is a growing tendency to equate a purposive construction with a liberal construction (for strict and liberal construction see Code s 182). In *Re Ismail* [1998] 3 All ER 1007 the House of Lords held that there is a transnational interest in the use of extradition for the purpose of bringing to justice those accused of serious crimes, and that extradition statutes ought therefore to be given a broad and generous construction. Accordingly in the reference in the Extradition Act 1989 s 2(1)(a) to a person 'who is accused' the word 'accused' should be given a purposive interpretation in order to accommodate the differences between legal systems. Lord Steyn said (at 1012) that 'it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of their being an "accused" person is satisfied'.

Deeming provisions (pages 735-736)

A deeming provision contained in one enactment may affect the construction of a later enactment. The Children and Young Persons Act 1933 s 55(4) states that a parent or guardian may appeal against an order made under the section 'as if he had been convicted on indictment'. It was held in *R v Crown Court at Preston, ex p Lancashire County Council* [1998] 3 All ER 765 that this enables a costs order to be made in favour of a guardian under the Prosecution of Offences Act 1985 s 16(5) even though s 16(5) in terms

limits the power to making costs orders in favour of 'the accused'.

Purposive-and-strained construction (Code s 306)

The desire to achieve a purposive construction does not entitle the court to disregard the clear requirement of a statute as to the manner in which it is to operate: *Bairstow v Queens Moat Houses plc* [1998] 1 All ER 343 (effect of statement in Civil Evidence Act 1995 s 16 that, subject to any transitional provisions made by order, Act not to apply retrospectively). However Lord Clyde said in *Cutter v Eagle Star Insurance Co Ltd* [1998] 4 All ER 417 at 425: 'By giving a purposive construction to the word "road" what is meant is a strained construction, beyond the literal meaning of the word or beyond what the word would mean in ordinary usage . . . It may be perfectly proper to adopt even a strained construction to enable the object and purpose of legislation to be fulfilled'.

British and European versions of purposive construction (Code s 311)

Lord Clyde said in *Cutter v Eagle Star Insurance Co Ltd* [1998] 4 All ER 417 at 426: 'The adoption of a construction which departs boldly from the ordinary meaning of the language of the statute is . . . particularly appropriate where the validity of legislation has to be tested against the provisions of European law. In that context it is proper to give effect to the design and purpose behind the legislation, and to give weight to the spirit rather than the letter'. Lord Clyde went on to cite the passage from the *Marleasing* case given at Code p 1008, and then concluded: 'But even in this context, the exercise must still be one of construction and it should not exceed the limits of what is reasonable'.

Avoiding an anomalous or illogical result (Code s 315)

Anomaly in legal doctrine (pages 770-772)

If the Vagrancy Act 1824 s 6 (powers of arrest) were treated as partially repealed by the Police and Criminal Evidence Act 1984 s 26(1) 'the absurd position would arise that a citizen would be entitled to arrest a person under [s 6] whereas a constable would not': *Gapper v Chief Constable of Avon and Somerset Constabulary* [1998] 4 All ER 248, *per* Swinton-Thomas LJ at 250. It was therefore held in that case that this construction would not be followed.

Presumption that ancillary rules of law intended to apply (Code s 327)

Free-standing terms (p 809)

For an example of a free-standing term see *Eide UK Ltd v Lowndes Lambert Group Ltd* [1998] 1 All ER 946, *per* Phillips LJ at 951 (simple statement in Marine Insurance Act 1906 s 53(2) that broker has a 'lien' upon the policy describes 'an equally simple and well established type of security, namely the right to retain possession of physical property until a debt has been discharged').

Law regulating decision making (Code s 329)

In *Boddington v British Transport Police* [1998] 2 All ER 203 Lord Irvine of Lairg LC said (at 208) of the threefold requirement of legality, rationality, and procedural propriety-

> 'Categorisation of types of challenge assists in an orderly exposition of the principles underlying our developing public law. But these are not watertight compartments because the various grounds

> for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.'

Proportionality (p 820)

In *R v Secretary of State for the Home Department, ex p Stafford* [1998] 4 All ER 7 at 14 Lord Steyn said in relating to sentencing '. . . the proportionality of the sentence to the seriousness of the crime is the leading common law principle . . . This principle has also been enshrined in legislation : s2(2)(a) of the [Criminal Justice Act 1991]'.

Legitimate expectation (p 822)

In *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367 at 374 Roch LJ said-

> 'For a legitimate expectation which has consequences to which effect will be given in public law to arise, the decision maker must have made some express promise, undertaking or representation to the person or group of persons who seek to rely upon the legitimate expectation . . .the doctrine of legitimate expectation on present authority cannot reasonably be extended to the public at large . .'

Presumed application of rules of criminal law (Code s 334)

Right to silence (pp 840-841)

The Criminal Justice and Public Order Act 1994 s 34 makes only a limited modification to a firmly established rule of the common law, and where it does not apply the jury must, as before, be directed not to draw an adverse inference from the accused's silence: *R v McGarry* [1998] 3 All ER 805.

Rules of evidence (Code s 335)

'The purpose of expert evidence is to assist the court with information which is outside the normal experience and knowledge of the judge or jury': *R v Land* [1998] 1 All ER 403, *per* Judge LJ at 408 (expert evidence not admissible in trial under Protection of Children Act 1978 s 1(1)(c) on question whether child in indecent photograph aged under sixteen).

Standard of proof (pp 848-849)

In *Dunbar (administrator of Dunbar (decd)) v Plant* [1997] 4 All ER 289 the Court of Appeal approved the application of the civil standard of proof where in civil proceedings the question was whether a party had committed an offence under the Suicide Act 1961 s 2(1) of aiding and abetting suicide. In *McCool v Rushcliffe Borough Council* [1998] 3 All ER 889 the question was whether hearsay evidence that an applicant for a car hire licence had earlier committed an indecent assault on a passenger (even though he had been acquitted when the jury failed to agree) could be the basis for failing to be satisfied of fitness to hold the licence under the Local Government (Miscellaneous Provisions) Act 1976 s 51(1). Lord Bingham CJ said (at 894) 'where in civil proceedings it is sought to prove conduct amounting to or analogous to a criminal offence, the standard of proof must be analogous, at least, to that appropriate to criminal proceedings'. However here the true question was whether the authority were satisfied of fitness, not whether they were satisfied the offence had been committed, so the civil standard applied.

Presumption that ancillary maxims apply (Code s 337)

The distaste for maxims may be partly due to a dislike of the use of Latin, in which they are mostly couched. In 1998 May LJ said-

> 'The defence is that habitually referred to by the two Latin words, *doli incapax*. It is my view that the time has come to abandon all Latin tags of this kind; not least because there are, it may be, fewer people who truly understand what they mean and because they tend to obscure the legal concepts which they or a larger version of the Latin words are intended to convey.' (*In re O and others*, (CA) 31 March 1998, unreported.)

Such phrases may however be excusable as a useful form of shorthand between professionals (see Code s 366). In 1730 the use of Latin in court proceedings was forbidden by the statute 4 Geo 2 c 26. This was however repealed as spent by the Civil Procedure Acts Repeal Act 1879. Judges still use Latin maxims despite the disapproval sometimes expressed. In *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852 at 865 Ward LJ said of facts required to be considered under the Sex Discrimination Act 1975 s 5(3) : 'Thus, in those circumstances, there is no need for a comparator simply because res ipsa loquitur'. This was a reference to the maxim meaning 'the thing speaks for itself' (Croke's Reports (1603-1625) 508) which is often applied in actions for negligence (see eg *Scott v London and St Katherine's Docks Co* (1865) 3 H & C 596 at 601).

Hearing both sides: *audi altarem partem* (Code s 341)

Inform the party that he is being proceeded against (p 865)

This principle applies to interlocutory proceedings also, for example on an application to extend a time limit. In *Director of Public Prosecutions v Coleman* [1998] 1 All ER 912 at 918 Pill LJ said: 'A situation in which the prosecution can obtain an extension of time in which to challenge an acquittal without the defendant having the opportunity to make representations on the subject would in my view be intolerable'.

De minimis principle (Code s 343)

Fractions of a day (pp 870-871)

The exclusive rule was applied without argument in *Okolo v Secretary of State for the Environment* [1997] 4 All ER 242, which concerned the Acquisition of Land Act 1981 s 23(4). This requires an application to be made within six weeks from the date on which a notice is published. It was accepted that the six weeks started running at the beginning of the day, a Tuesday, after that on which the notice was published. The Court of Appeal, reversing Sedley J, held that the six weeks ended at midnight on the Monday, rather than on the Tuesday. Schiemann LJ said (at 247): 'The point in relation to the six weeks is very simple and, to my mind, one of first impression . . . if the notice is published on a Monday and you are given six weeks to challenge it, six weeks will have ended by midnight of the Monday in six weeks' time'. He held that for an unvarying period such as a week the corresponding date rule (see Code p 809) does not apply.

Necessity: *necessitas non habet legem* (Code s 347)

Where a patient who was autistic, profoundly mentally retarded, and incapable of consenting to treatment was confined in a mental hospital without protest in a case not within the express powers conferred by the relevant enactment it was held in *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1998] 3 All ER 289 that this could be justified by the doctrine of necessity. Lord Goff said (at 298): 'Such treatment and care can . . . be justified on the basis of the common law doctrine of necessity . . . It is not

therefore necessary to find such justification in the statute itself [the Mental Health Act 1983], which is silent on the subject. It might . . . be possible to discover an implication in the statute providing similar justification . . but it is difficult to imagine that any different result would flow from such a statutory implication.'

Benefit from own wrong (Code s 349)

'In the case of statutory duties the [forfeiture] rule is . . . based upon interpretation of the meaning intended by Parliament. It is not a rule imposed ab extra as in the case of contracts . . . So the rule is that we must interpret Acts of Parliament as not requiring performance of duties, *even where they are in terms absolute*, if to do so would enable someone to benefit from his own serious crime' (*R v Registrar General, ex p Smith* [1991] 2 QB 393, *per* Staughton LJ at 402; emphasis added). This may rule out a claim *in limine*, as where an application for ancillary financial relief under the Matrimonial Causes Act 1973 s 23 is vitiated by the fact that the marriage was annulled by reason of the applicant's bigamy (*Whiston v Whiston* [1995] Fam 198). Or it may operate where the court is given some discretion *aliunde*, as in *S-T (formerly J) v J* [1998] 1 All ER 431 (denial of relief under s 23 where 'marriage' of perjured transsexual annulled). The principle does not apply where the protagonist 'did not know the nature or quality of his act or that what he was doing was wrong': *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180, *per* Beldam LJ at 188. This is the test for criminal insanity laid down by *R v M'Naghten* (1843) 10 Cl & Finn 200.

Construction of Act or other instrument as a whole (Code s 355)

Lord Cooke of Thorndon said in *Effort Shipping Co Ltd v Linden Management SA* [1998] 1 All ER 495 at 512, 'Like every other legal document [the Hague Rules] have to be read as a whole . . .'.

Surplusage (pp 899-900)

Sometimes terms of virtually identical meaning are used together, as in the Children Act 1989 s 22(3)(a). This imposes a duty to 'safeguard and protect' the welfare of a child. It is mere surplusage, since either term would have sufficed on its own. Surplusage is to be distinguished from overlap. Legislation often provides two or more overlapping remedies: see eg *Harrods Ltd v Remick* [1998] 1 All ER 52 (the fact that a certain type of discrimination fell within the Race Relations Act 1976 s 30 or s 31 did not mean it could not also be caught by s 7 of the Act).

Different words to be given different meanings (pp 900-902)

It is bad drafting for an Act to use different words and yet say the difference is to be disregarded (for an example see the Copyright, Designs and Patents Act 1988 s 172(2), and for the resulting confusion see *Redrow Homes Ltd v Bett Bros plc* [1998] 1 All ER 385).

Generalia specialibus non derogant (p 903)

It was said by Lord Cooke of Thorndon in *Effort Shipping Co Ltd v Linden Management SA* [1998] 1 All ER 495 at 513 that the maxim *generalia specialibus non derogant* 'as its traditional expression in Latin indeed suggests, is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage. It falls within the category explained as follows in Francis Bennion's *Statutory Interpretation*:

> "A linguistic canon of construction reflects the nature or use of language generally. It does not depend on the legislative character of the enactment in question, nor indeed on its quality as a legal pronouncement. It applies in much the same way to all forms of language . . . Linguistic canons of construction are not confined to statutes, or even to the field of law. They are based on

the rules of logic, grammar, syntax and punctuation; and the use of language as a medium of communication generally. '"

Interpretation of broad terms (Code s 356)

The legal meaning of a broad term which is to be applied in relation to particular facts is arrived at as a matter of judgment in the light of the interpretative criteria. (For the deployment of judgment in statutory interpretation see Code pp 82-84 and s 151(3). For the interpretative criteria see Code s 180.) Differential readings (see Code s 20(4) and p 000 above) may be arrived at. In *R v Burt & Adams Ltd* [1998] 2 All ER 417 the House of Lord considered the broad term 'token' in the Gaming Act 1968 s 34(3)(b), which refers to a 'token' exchangeable for other items. The majority held as a matter of judgment that a teddy bear exchangeable for another form of prize was not a 'token'. Lord Lloyd said (at 420): 'In my judgment "token" in s 34(3)(b) is used in its ordinary sense, and does not include an exchangeable teddy bear'. However Lord Hoffmann, dissenting, held (at 426) that the form of the object was immaterial, since 'the identifying characteristic of a "token" must be the right to exchange it for something else'.

Ordinary meaning of words and phrases (Code s 363)

Cessation of existence (pp 924-925)

Normally a reference to a person or thing means one which is in existence. For example arbitration agreements provide that any relevant 'dispute' shall be referred to arbitration instead of being litigated. Such an agreement cannot apply unless there is in fact an existing 'dispute'. If it does apply the Arbitration Act 1996 s 9 provides for a stay of any legal proceedings brought. This replaced the Arbitration Act 1975 (repealed) s 1, omitting the provision in s 1 saying that a stay should be granted 'unless there is not in fact any dispute . . .' The omitted words had been inserted in the predecessor of s 1 to deal with cases where the courts were having to accept that there was a dispute even where there was no real dispute, as where there was in law no defence. *Held* The omission of the said words in the 1996 Act must be held to have a significance, so it is no longer possible to grant a stay on the ground that there is in law no defence to the claim (*Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23).

***Noscitur a sociis* principle** (Code s 378)

This principle requires words to be construed in the light of their surrounding words. The Capital Allowances Act 1990 s 18(1) defines the term 'industrial building or structure' as one used for 'a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process'. In *Girobank plc v Clarke (Inspector of Taxes)* [1998] 4 All ER 312 Nourse LJ said (at 315) 'the close proximity between the two phrases requires that the word 'goods' in the second should be given the same meaning as in the first'.

Expressum facit cessare tacitum (Code s 389)

The application of this maxim arises where a provision (X) may or may not give rise to an implication and elsewhere another provision (Y) contains an express statement to the contrary effect. The maxim suggests that the express statement in Y extinguishes the possibility of finding an implication on the same point in X. Provision X may be in the same Act as provision Y, or in a different Act. In *B v Director of Public Prosecutions* [1998] 4 All ER 265 it was in a different Act. The question arose whether the Indecency with Children Act 1960 s 1(1), which makes it an offence to commit an act of gross indecency, or incite the committing of such an act, with a child under the age of fourteen, contains an implication requiring knowledge that the child is under that age. *Held* Such an implication does not arise in view of the fact that

in the wide-ranging Sexual Offences Act 1956, it is expressly stated (in sections 6 and 19) where knowledge of the relevant age is required. The 1960 Act was passed to fill a lacuna in the 1956 Act 'wherein the specific defence which was sought to be advanced had been provided for in certain sections but pointedly omitted in others' (as Rougier J put it at 274).

Implication where statutory description only partly met (Code s 397)

The test described in this section of the Code has been called the dominant purpose test: see *R v Crown Court at Southwark, ex p Bowles* [1998] 2 All ER 193.

Where facts substantially correspond (pp 980-982)

Where the facts of the instant case substantially though not entirely correspond to a description in the relevant enactment, it is presumed that the enactment is intended to apply in the same way as it would if they entirely corresponded: see eg *Harrods Ltd v Remick* [1998] 1 All ER 52 (person may do 'any work for a person' within the Race Relations Act 1976 s 7(1) even though the work is also done for a different person as well); *Saab v Saudi American Bank* [1998] 4 All ER 382 (service of process under the Companies Act 1985 s 694A(2) 'in respect of the carrying on of the business of . . .a branch' is regular even though it is only partly in respect of that business); *R v Manning* [1998] 4 All ER 867 (document is 'made or required for any accounting purpose' within Theft Act 1968 s 17(1) even though that purpose is merely incidental).

In *Clark & Tokeley Ltd (t/a Spellbrook) v Oakes* [1998] 4 All ER 353 the Court of Appeal considered the Employment Protection (Consolidation) Act 1978 Sch 13 para 17(2), which says that where a business is transferred the employment of a person who is employed 'at the time of the transfer' shall be treated as employment by the transferee. *Held* Where the transfer took place over a period then, as Sir Christopher Staughton put it, (at 365-366), 'I would give it a benevolent, or at any rate a sensible, interpretation, and hold that it refers to a person who is an employee during any part of the time of the transfer'.

References to CJEC under article 177 of EC Treaty (Code s 416)

In *Institute of Chartered Accountants in England and Wales v Commissioners of Customs and Excise* [1998] 4 All ER 115 (in construing Value Added Tax Act 1994 s 4(1) regard should be had to the fact that statutory regulatory functions of professional body not an 'economic activity' under Council Directive (EEC) 77/388 art 4(1) and (2)) Beldam LJ gave an indication of what the approach should be to requests for an art 177 reference when he said (at 127):

> 'We were invited to refer the question of interpretation of the directive to the Court of Justice in accordance with art 177 of the EC Treaty. I have considered the differences between the national and the Community legislation and the pitfalls facing a national court venturing into what might be an unfamiliar field together with the need for uniform interpretation throughout the Community and the great advantages enjoyed by the Court of Justice in construing Community instruments as stated by Bingham MR in *R v International Stock Exchange of the UK and the Republic of Ireland Ltd, ex p Else (1982) Ltd, R v International Stock Exchange of the UK and the Republic of Ireland Ltd, ex p Roberts* [1993] QB 534. I have asked myself whether in arriving at the conclusion I have expressed I have any real doubt about the interpretation to be put upon the provisions of the Sixth Directive in the present case . . . I do not feel any real doubt about the conclusion that the institute's activities are not economic activities within art 4 of the Sixth Directive and consequently I would not refer the question.'