Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

Threading the Legislative Maze - 10

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In the last article[1] I explained that the guides to legislative intention, otherwise known as the interpretative criteria, can be broken down into four distinct types: (1) common law and statutory rules; (2) principles derived from legal policy; (3) presumptions based on the nature of legislation; and (4) general linguistic canons applicable to any piece of prose. I dealt in that article with the first type. In this article I describe the nature of the second type, namely principles derived from legal policy.

The nature of a policy principle

A *principle* of statutory interpretation embodies the policy of the law, which is in turn based on public policy. So far as concerns statutory interpretation by the courts, the content of public policy (and therefore of legal policy) is what judges think and say it is. However in this the court is sometimes guided by legislation, even though not directly applicable in the instant case, as indicating Parliament's view of the content of relevant policy. As a matter of constitutional coherence, the views of the judicature and the legislature ought not to be allowed to get out of line. This means that ultimately Parliament's view of policy, where it has been declared in legislation, must prevail. In line with this, the court presumes, unless the contrary intention appears, that the legislator, when drafting legislation, intends to conform to established legal policy.

No Act can convey expressly the fullness of its intended legal effect. Indeed only a small proportion of this can be conveyed by the express words of the Act. For the rest, Parliament assumes that interpreters will draw necessary inferences. An Act does not operate in a vacuum, but as a part of the whole *corpus juris* or body of legal rules and principles. General principles of law and public policy underlie and support the rules laid down by the whole body of legislation. If it were not so the rules would be merely arbitrary. Even where a rule does appear arbitrary (for example that one must drive on the left), there is a non-arbitrary policy principle underlying it (road safety is socially desirable).

What we are now concerned with is the body of general principles which has mainly been built up by the judiciary over the centuries, and is referred to as legal policy. As we have seen, it is also referred to as public policy; but it is the judges' view of public policy, and is confined to justiciable issues. Public policy has been judicially described as 'a very unruly

[1] Previous articles in the series are in volume 162 (1998) at pages 356, 436, 516, 596, 696, 856 and 995 and in volume 163 (1999) at pages 264 and 364.

horse'.[2] It is not a concept that admits of precise definition.[3] Nevertheless it exists, and in the form of legal policy has a powerful influence on the interpretation of statutes.

Legal policy consists of the collection of principles the judges consider the law has a general duty to uphold. The products of these principles are sometimes referred to as constitutional rights (or in a more limited sense, discussed below, human rights). Laws J said 'constitutional rights have effect by their recognition at common law and by the special rule of construction which the common law applies to [any] statutes by which they are sought to be overridden'.[4] The principles cannot be numbered, and are constantly being developed. Legal policy is equivalent to what the Germans call *rechtspolitik*. It is directed always to the wellbeing of the community. Thus it was said in an early case laying down legal policy very broadly that 'All such acts and attempts as tend to the prejudice of the community are indictable'.[5] Among the basic principles of legal policy are the following: that law should serve the public interest, that it should be fair and just, that it should be certain and predictable, that it should be self-consistent and not subject to casual change, and that it should not operate retrospectively.

The constituent elements of legal policy are drawn from many sources. These include parliamentary enactments, past judgments, ideas of natural law, and the writings of jurists. The sources are not all legal however. Religious, philosophical and economic doctrine enters in. Political reality flavours the mixture. International obligations are not forgotten.[6] Common sense and *savoir faire* bind the whole together. The principles may be laid down judicially in the course of statutory interpretation or in a purely common law context. In the latter event they may in a future case affect statutory interpretation.

As an example of the purely common law context we may take the case of *R v Lemon* [1979] AC 617. The House of Lords were called on to decide a question which Lord Scarman described as 'one of legal policy in the society of today'.[7] This was whether the common law offence of blasphemous libel requires proof only of an intention to publish the offending matter, or whether what Lord Diplock[8] called 'the mental element or mens rea' in the offence requires proof that the accused actually intended to cause offence to Christians. Their Lordships agreed that, as Lord Scarman said[9], the point was open for their decision as a matter of principle. Lord Scarman went on: 'And in deciding the point your Lordships are not saying what the law was in the past or ought to be in the future but what is required of it in the conditions of today's society.' In reaching its decision the House took many considerations into account, including developments in the law of evidence and penal policy, the tendency of recent Acts in comparable fields, the decline in the public importance of the Church of England, the absence of convictions for blasphemy during the preceding half century, the need for consistency in various departments of the law of libel, the need for social tranquillity in a multiracial society, and Britain's international obligations under the European Convention on Human Rights. The House divided by 3 to 2 in favour of the stricter view that intention to publish is sufficient to establish the offence.

Changes in legal policy

[2] *Richardson v Mellish* (1824) 2 Bing 229.
[3] *Egerton v Brownlow* (1853) 4 HL Cas 1; *Besant v Wood* (1879) 12 Ch D 605; *Davies v Davies* (1887) 36 Ch D 369.
[4] *R v Lord Chancellor, ex p Lightfoot* [1998] 4 All ER 764 at 778.
[5] *R v Higgins* (1801) 2 East 5.
[6] See below.
[7] Page 664.
[8] Page 632.
[9] Page 662.

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. '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.'[10]

On some points, legal policy may change drastically over a long period. Lord Devlin referred to certain aspects of mid-nineteenth century legal policy as 'a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation'.[11] Such a description would scarcely fit legal policy a century and a half later.

Legal policy changes in response to signals from all quarters, some subtle. The prevailing wind that is legal policy in a particular area backs or veers accordingly. Of its nature, said Lord Devlin, the law cannot be immediately responsive to new developments. It needs as a corrective 'the observation of the man up aloft who gauges the strength and direction of the winds of change'.[12] The more perceptive judges pick up the signals first.

The judicial development of the public law remedy of judicial review which began in the 1970s required among other things a broadening of the concept of *locus standi*. Slade LJ said in a 1985 case: 'The speeches of their Lordships in *R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 well illustrate that there has been what Lord Roskill described at p. 656G-H as a 'change in legal policy', which has in recent years greatly relaxed the rules as to locus standi.'[13]

However the court ought not to enunciate a new head of public policy in an area where Parliament has demonstrated its willingness to intervene where considered necessary. When Hoffman J was asked to declare that to allow parties to determine by agreement between them that a floating charge would become crystallised if the chargor ceased trading was an innovation which was contrary to public policy he declined, saying-

> 'The public interest requires the balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors. These arguments for and against the floating charge are matters for Parliament rather than the courts and have been the subject of public debate in and out of Parliament for more than a century. Parliament has responded [in various ways]. The limited and pragmatic interventions by the legislature make it in my judgment wholly inappropriate for the courts to impose additional restrictive rules on the ground of public policy. It is certainly not for a judge of first instance to proclaim a new head of public policy which no appellate court has even hinted at before.'[14]

Legal policy and statutory interpretation

Because it takes Parliament as intending that general principles of legal policy should apply unless the contrary intention appears, the common law has developed specific principles of statutory interpretation by reference to those general principles. For example, from the general principle that it is undesirable that a person should be allowed to profit from his own wrong we have the principle of construction that if the literal meaning of an enactment would

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[10] *Bowman v Secular Society Ltd* [1917] AC 406, *per* Lord Sumner at 467.
[11] *The Judge* p. 15.
[12] *The Enforcement of Morals* p. 126.
[13] *R v HM Treasury, ex p Smedley* [1985] QB 657 at 669.
[14] *Re Brightlife Ltd* [1986] 3 All ER 673 at 680-681.

permit a person so to profit it may be correct to infer an intention by the legislator that a strained construction should be given in such cases. In the context of a particular enactment a principle can usually be expressed either in general form or as a principle of statutory interpretation. Thus one can say to the citizen 'It is desirable that you should not be permitted to take advantage of your own wrong' or one can say to the court 'If the literal meaning of the Act enables a person to take advantage of his or her own wrong, it is likely that Parliament intended words of exception to be taken as implied'.

Even an interpretative criterion which appears to be limited to the construction of Acts will be found on analysis to have a wider base. For example the principle that a penal statute should be strictly construed is only an aspect of the principle of justice and fairness that a person should not suffer under a doubtful law, whether written or unwritten. In a difficult case the number of relevant interpretative criteria may be high, and the task of the court in assessing their relative weight correspondingly difficult. Dworkin says of legal principles generally that 'if we tried to list all the principles in force we would fail'. He adds: 'They are controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle'.[15]

In a particular case different elements of legal policy, for example the safeguarding of personal liberty and the need for state security, may conflict. The court then needs to weigh the conflicting elements and decide which should have predominance. However the conflict may be more apparent than real. Lord Donaldson MR, commenting on the dictum of Mann LJ that 'this court is aware of the tension which arises between considerations of liberty and the freedom to live where one wishes and considerations of national security upon the other hand', said that although they give rise to tensions at the interface, 'national security' and 'civil liberties' are on the same side. 'In accepting, as we must, that to some extent the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties.'[16]

Legal policy and international obligations

It was said above that international obligations are not forgotten when it comes to considering what legal policy has to say on a particular matter. It is indeed 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.

A treaty is not law unless an Act of Parliament has made it so; otherwise the government could legislate by making a treaty.[17] Again, where the words of an enactment have a wider application than the provisions of a relevant treaty, the treaty will not be held to cut down their ordinary meaning.[18] However, a rule of public international law which is incorporated by a decision of a competent court then becomes part of the municipal law.[19] Again, under the principle known as *adoption*, a rule of international law may be incorporated into municipal law by custom or statute.

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[15] R Dworkin (ed), *The Philosophy of Law* p. 64.
[16] *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 at 906-907.
[17] *Littrell v United States of America (No 2)* [1995] 1 WLR 82, *per* Rose LJ at 88.
[18] *The Norwhale* [1975] QB 589.
[19] *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 1 WLR 1485 at 1495.

The courts treat the need to observe treaties as a general matter of legal policy.[20] In a case on the Warsaw convention, Lord Denning MR put the point even more strongly: 'The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it: and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it.'[21]

This dictum of the late Lord Denning has been given statutory effect in relation to the European Convention on Human Rights by the Human Rights Act 1998 s 3(1), which says that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with Convention rights. Apart from section 22(4), the operative provisions of the 1998 Act are not expected to be brought into force until 2001.[22]

Many of the principles embedded in the European Convention correspond to, and are indeed derived from, those of British legal policy. This appears from the passage in the preamble recording that the states parties agreed upon the Convention 'Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; [and] Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law . . .'

When the Human Rights Act 1998 comes fully into operation the position will therefore be that many principles of legal policy which hitherto have been embedded in common law will thenceforth be given statutory force. They will also of course continue to be directly enforceable at Strasbourg under the regime established by the Convention.

Summary

- A *principle* of statutory interpretation embodies the policy of the law, which is in turn based on public policy.

- So far as concerns statutory interpretation by the courts, the content of public policy (and therefore of legal policy) is what judges think and say it is. However in this the court is guided by relevant legislation.

- No Act can convey expressly the fullness of its intended legal effect, so Parliament assumes that interpreters will draw necessary inferences.

- General principles of law and public policy underlie and support the rules laid down by the whole body of legislation. If it were not so the rules would be merely arbitrary.

- Legal policy consists of the collection of principles the judges consider the law has a general duty to uphold, such as: that law should serve the public interest, that it should be fair and just, that it should be certain and predictable, that it should be self-consistent and not subject to casual change, and that it should not operate retrospectively.

- Neither principles of law nor those of wider public policy are static. On some points, legal policy may change drastically over a period.

- The court ought not to enunciate a new head of policy in an area where Parliament has demonstrated its willingness to intervene when considered necessary.

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[20] *A-G v British Broadcasting Corpn* [1980] 3 WLR 109, *per* Lord Scarman at 130.
[21] *Corocraft Ltd v Pan American Airways Inc* [1968] 3 WLR 1273 at 1281.
[22] For s 22(4) see Bennion, 'A Human Rights Act Provision Now in Force' 163 JP 164.

- Because it takes Parliament as intending that general principles of legal policy should apply unless the contrary intention appears, the common law has developed specific principles of statutory interpretation by reference to those general principles.

- Even an interpretative criterion which appears to be limited to the construction of Acts will be found on analysis to have a wider base.

- In a particular case different elements of legal policy, for example the safeguarding of personal liberty and the need for state security, may conflict.

- It is a principle of legal policy that municipal law should conform to public international law.

- This has been given statutory effect in relation to the European Convention on Human Rights by the Human Rights Act 1998 s 3(1).

- Many of the principles embedded in that Convention correspond to, and are indeed derived from, those of British legal policy.

- When the Human Rights Act 1998 comes fully into operation many principles of legal policy which hitherto have been embedded in common law will thenceforth be given statutory force.

- They will also continue to be directly enforceable at Strasbourg under the regime established by the Convention.

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