What interpretation is 'possible' under section 3(1) of the Human Rights Act 1998?

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In section 3(1) of the Human Rights Act 1998 Parliament laid down that so far as 'possible' United Kingdom legislation (whenever enacted) must be read and given effect in a way which is compatible with rights ('the Convention rights') under the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe on 4 November 1950 as amended ('the Convention'). Why did Parliament lay down this rule (which I shall call the compatible construction rule) since it was already the law - at least on one view of the meaning of 'possible'?[1] What is 'possible' supposed to mean here? Does it mean corresponding to the literal meaning, or does it allow for a strained meaning - and if so to what extent? The question has been discussed before in this journal, in passages to which I shall refer. It is likely to give courts, officials and legal advisers some headaches before the ultimate House of Lords ruling sets us all straight. The present article analyses the difficulties in some depth, and will at the end suggest fairly precise answers. It approaches the problem obliquely.

The search for order

Through three editions, since its initial appearance in 1984, the first sentence of my 1,000-page textbook *Statutory Interpretation* has announced that the search is for order.[2] That search is being made increasingly difficult. Some have suggested it is anyway illusory.[3] If that is really so we are in deep trouble. Order, coupled with justice, is surely the first object of law.

At the turn of the second millennium it is scarcely right to look any more on British statute law as one formulation. A system of law corresponds to a political system. In the past we had the principle that each sovereign state has its own law, which might or might not resemble the law of a given other sovereign state. Does Britain still have its own law in this sense? I hardly think so.

The United Kingdom, though still looked on as an independent sovereign state, is less so than it was half a century ago. Now we have various interminglings. Britain is part of the European Union, which brings an intermingling with the system of Community law and the civil law, based on ancient Rome. The Human Rights Act 1998 explicitly connects British law to the requirements of the Convention. We have much more powerful and extensive treaty links than in the past, which require us to take increased notice of other countries' systems of law and of international law generally.

In the other direction Parliament has recently conferred, under the process known as devolution, limited legislative powers on individual portions of the sovereign territory of the United Kingdom. This too will produce consequences for the homogeneity of our law. Scotland, which already had its own system of common law and procedure, now has its own semi-autonomous Parliament. In the laws it makes this also may hark back to civilian roots and continental connections.

So in many areas we now have multiplex systems. Formerly we had single-level law, where for a particular case there is one text (say an Act of Parliament) or a series of same-type texts which need to be conflated

[1] See ***R v Khan*** [1997] AC 558. See also Bennion, ***Statutory Interpretation***, third edition 1997, s. 270. This work, updated by the 1999 supplement, is referred to as 'S.I.' in the following footnotes.
[2] S.I. p. 1.
[3] See e.g. Charles Sampford, ***The Disorder of Law: A Critique of Legal Theory*** (1989).

(say a group of Acts on the same topic). Now we have two or more levels. Typically, the provisions of the Act of Parliament itself have first to be tentatively construed, perhaps with difficulty, and then the (provisional) result has to be tested against an 'upper' text such as the Convention. Whatever values are served by this, order is not one of them. Legal certainty, and ability to find out what the law is, inevitably suffer.

The Global method of statutory interpretation

All these powerful influences need to be and are reflected in the method our courts adopt for construing legislation and arriving at the meaning it is found to have in law, which I have called its legal meaning.[4] This interpretative method is still securely based in the common law, but there is increasing osmosis between common law and civil law. That adds, in ways not yet fully worked out, to the already large number of different interpretative criteria or guides to legislative intention that are available to British judges and others seeking to arrive at the legal meaning of an enactment. Under the British system it is taken to be the legislator's intention that a particular enactment shall be construed according to such of these available criteria as are relevant; and that where they conflict (as they often do) the problem shall be resolved by weighing and balancing the interpretative factors concerned.[5] The task normally is to choose between two opposing constructions of the enactment, one put forward by either side.[6]

So under the present British method what the court does (or should do) is take an overall view, weigh *all* the interpretative factors that are relevant, and arrive at a balanced conclusion. This may be called the Global method of statutory interpretation, applying the OED definition of global as 'pertaining to or embracing the totality of a number of items, categories, etc; comprehensive, all-inclusive, unified; total'.[7] As I have said[8], the clue should not be missed that viewed in this way statutory interpretation keys into the whole system of our law; indeed that whole system is subject to the scheme of interpretation and in turn supports it. Study of our Global method forms the best and most useful introduction to the entire British legal system. It rejects the previous idea that statutory interpretation can be dealt with by a few simple rules of thumb. I have been criticised for writing in *Statutory Interpretation-*

> The natural and reasonable desire that statutes should be easily understood is doomed to disappointment. Thwarted, it shifts to an equally natural and reasonable desire for efficient tools of interpretation. If statutes must be obscure, let us at least have simple devices to elucidate them. A golden rule would be best, to unlock all mysteries. Alas, as this book demonstrates, there is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative *criteria*.[9]

Twining and Miers say that, for the purposes of the reader who wishes to obtain some foothold on the way in which judges approach interpretation, the above concise summary 'perhaps overstates the case'.[10] However my book sets out in considerable detail just what these myriad rules, presumptions, principles and linguistic canons consist of. The enquirer who desires a foothold must do some work to find it.

As I have said, there is increasing osmosis between common law and civil law. For this and other reasons there is a growing need to seek out and grasp the jurisprudential basis of the current Global method, based as it is on common law principles prevailing throughout most of the English-speaking world. This need is strengthened by the fact that it is now understood that the basis of our law is interpretative. In 1986 Dworkin wrote: 'Law is an interpretive concept'[11]. Andrei Marmor said in 1995 that in the previous fifteen

[4] See S.I. ss. 2, 3 and 150.
[5] See S.I. Part X.
[6] For the opposing constructions see S.I. s. 149.
[7] Oxford English Dictionary, second edition (1992).
[8] S.I. p. 2.
[9] S.I. p. 3.
[10] W Twining and David Miers, *How To Do Things With Rules* (4th edn., 1999), p. 281.
[11] *Law's Empire*, p. 410. In this article I follow Dworkin's American spelling and usage when quoting directly.

years interpretation had become one of the main intellectual paradigms of legal scholarship.[12] In 1998 Peter Birks called for a partnership in interpretative development of our law.[13] But without some consideration of jurisprudential theory there is a gap in any realistic treatment of interpretation, whether from the academic's or the practitioner's viewpoint. Even if the criteria I have elaborately set out in ***Statutory Interpretation*** are correct, who is to say that particular judges or officials will obey them? If they do obey them, will it be willingly and constructively or reluctantly, with the constant taking of petty objections? Will they on the other hand disregard them, perhaps in ignorance? Will such ignorance be wilful or hapless? Above all, on what basis do they, and ought they to, approach and apply this Global method?

For reasons which seem of ever more pressing importance as we await full implementation of the Human Rights Act 1998[14] and continue to wrestle with Community law interpretation, it is time to take a close look at the current interpretative attitudes of judges and officials. Helpful guidance in this is offered by Ronald Dworkin. His writings, applicable to Britain as well as the United States, are densely if elegantly argued and it is difficult to summarise them. In this article I will try to do this in relation to his views on statutory interpretation as expressed in the seminal work ***Law's Empire***. But first I must briefly set the European scene.

The Developmental method of statutory interpretation

Within the United Kingdom, a Community law may have direct effect or be transposed into specifically British legislation. If it has direct effect it must be construed by a British court in the same way it would be construed by the Court of Justice of the European Communities (CJEC). If it is transposed the position is more complex.

A Community law is said to be transposed into the national law of a member state when that state alters its national law so as to give effect to the Community law.[15] There are various methods of transposition. A member state 'may incorporate the provisions of the [Community law] into an existing legislative code, adopt a separate law or refer in a separate law to provisions of the general civil law'.[16] The first of these three methods is known as 'copyout', where legislation is enacted by which the exact terms of the directive are simply transposed as they stand into the national law. The copyout technique has disadvantages and some dangers.[17] Its defects were shown for example as respects the Unfair Contract Terms Act 1977, where '[t]here was no harmonising amendment of the 1977 Act and the problems of "fit" have been left to the courts to sort out'.[18]

Where copyout is not used, the Community law in question will not be treated as properly or correctly transposed unless the substantial effect of the national law, in whatever form, is seen to be the same as that of the Community law in question.[19] Either way the result is that in construing Community law operating in the United Kingdom the method of interpretation to be used by our courts is that practised by the CJEC and

[12] *Law and Interpretation, Essays in Legal Philosophy* (Oxford, 1995) p. v.
[13] Peter Birks, 'The academic and the practitioner' 18 *Legal Studies* (1998) p. 397 at p. 407.
[14] The Home Office announced in May 1999 that the implementation date will be 2 October 2000. Presumably this date is tentative since at the time of writing (5 November 1999) a commencement order has not yet been made.
[15] See Alec Samuels, 'Incorporating, Translating or Implementing European Union Law into UK Law' [1998] *Stat. L.R.* 80.
[16] *Faccini Dori v Recreb Srl* (Case C-91/92) [1995] All ER (EC) 1, *per* Advocate General Lenz at 6 (para. 8).
[17] For a discussion of these see Lynn E Ramsey, 'The Copy Out technique: More of a Cop Out than a Solution?' [1996] *Stat. L.R.* 218.
[18] Jack Beatson, 'Has the common law a future?'. See 6th Report of the Select Committee on the European Communities, *Unfair Contract Terms*, H.L. Paper 28, January 1992, p. 96 (evidence of Professor Treitel).
[19] Provided the substantial effect is the same, the transposition will be accepted by the CJEC even though an identical effect is not achieved: *Johnson v. Chief Adjudication Officer (No. 2)* (Case C-410/92) [1995] All E.R. (E.C.) 258 at 276 (para. 21).

not our own system based in the common law (which I am calling the Global method).[20] Of the CJEC method Lord Diplock said-

> The [CJEC], in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth.[21]

As indicated in this dictum, the CJEC adopts a purposive or teleological interpretation of statutes rather than a mainly literal interpretation.[22] Straightforward construction of the words used is eschewed in favour of a 'creative' stance.

> The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires.[23]

The British doctrine of purposive construction, comprised within the Global method, is markedly more literalist than the European variety, and permits strained construction only in comparatively rare cases.[24] It is increasingly obliged to give way to the European system, as Lord Clyde recently acknowledged-

> 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.[25]

The CJEC method may be called Developmental construction because in advancing the 'spirit' it is always ready to depart from the text, if the court deems this necessary.[26] It uses the text merely as a starting point, with the aim of developing the particular piece of Community law in the way the nations of the E.U. are presumed to intend within the context of the grand design.[27] This harks back to the civilian system of drafting legislation, as compared to the common law drafting method. As Lisbeth Campbell has pointed out, by a clever analogy with computer science terminology the product of the former method, when expressed (as it often is, but by no means invariably) in broad general principles, has been called *fuzzy law*. By contrast the elaborate, detailed product of common law drafting is called *fussy law*.[28] Another difference is that the Developmental method pays far less regard to precedent than the Global method does.

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[20] See Richard Wainwright, 'Techniques of Drafting European Community Legislation' [1996] *Stat. L.R.* 7*;* James O'Reilly, 'Coping with Community Legislation - A Practitioner's Reaction' [1996] *Stat. L.R.* 15*;* Thomas A. Finlay Q.C. (former Chief Justice of Ireland), 'Community Legislation: How Big a Change for the National Judge?' [1996] *Stat. L.R.* 79.

[21] *Henn and Darby v. D.P.P.* [1981] A.C. 850 at 905.

[22] See *Pinna v Caisse d'allocations familiales de la Savoie* (Case 359/87) [1989] ECR 585, *per* Advocate-General Lenz at 605-606 (para 29). See also *Coloroll Pension Trustees Ltd v Russell* (Case C-200/91) [1995] All ER (EC) 23, *per* Advocate-General Van Gerven at 42 (n. 18): '. . . it is clear that a teleological interpretation . . . is usual'.

[23] *Customs and Excise Comrs v ApS Samex* [1983] 1 All E.R. 1042, *per* Bingham J. at 1056.

[24] See S.I. s. 311.

[25] *Cutter v. Eagle Star Insurance Co Ltd* [1998] 4 All E.R. 417 at 426.

[26] Similarly the term 'dynamic or evolutive interpretation' has been used in relation to the Convention: see D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) p.7.

[27] For a trenchant criticism of Developmental construction see Sir Patrick Neil QC (now Lord Neill of Bladen QC), *The European Court of Justice: a case study in judicial activism*, August 1995, published by European Policy Forum.

[28] See Lisbeth Campbell, 'Drafting Styles: Fuzzy or Fussy?' *E Law - Murdoch University Electronic Journal of Law*, Vol. 3, No. 2 (July 1996).

It will be apparent on the argument so far that we now have available, in relation to different items of legislation operating within the United Kingdom, two distinct methods of statutory interpretation: the Global method and the Developmental method. These have many features in common, and are different mainly in the extent to which they allow or require a strained construction and the respect they pay to precedent. Under s. 3(1) of the Human Rights Act 1998 are we about to be confronted by a third method? I will defer examination of that question until I have first tackled the jurisprudential aspects outlined above. I will suggest that a modified version of Dworkin's 'law as integrity' should be seen as the jurisprudential basis for the Global method, and indeed the Developmental method too.

Law as integrity

Dworkin's book *Law's Empire* (1986) starts from the proposition that the rule of law requires that state coercion shall always be backed by law. The state's force must not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble those ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[29] The reference to 'past political decisions' here is a reference to (1) decisions of legislators framed as valid legislation and (2) decisions of courts that have the effect of making law. In the case of Britain these decisions together make up the statute book and the common law respectively.

Dworkin's entire argument predicates a particular 'community'. He is 'defending an interpretation of our own political culture, not an abstract and timeless political morality'.[30] The argument rests on our community's particular values and its own 'climate of public opinion'.[31] This community is a 'fraternity'.[32] Dworkin wishes legal interpreters (that is officials and judges), by their decisions, to place the political history of 'our' community in the best possible light.[33] Statutory interpretation must make the community's legal record the best it can from the point of view of political morality.[34] We should try to conceive our political community as an association of principle.[35] Interpretative decisions should subserve principles that provide the best justification available for the doctrines and devices of our law as a whole.[36] They should represent democracy as it really is and reflect the nation's character.[37] They should embrace popular convictions and national traditions, and show the nation's constitutional history in its best light.[38] They should respect long-standing traditions of the community's political and constitutional culture.[39] They should be a credit to law.[40]

Considering the nature of the system of law that serves this 'community', Dworkin gives us three conceptions as rivals for adoption as best fitting current legal practice: conventionalism, legal pragmatism, and law as integrity. Bravely disdaining relativism, he rejects the first two and comes down in favour of the last.[41] Conventionalism is dismissed because it offers no answers in difficult cases where there is a gap in the legislation or it is obscure, leaving the judge to decide as he thinks fit, and because under it 'judges would not think themselves free to change rules adopted pursuant to the reigning legal conventions just because on balance a different rule would be more just or efficient'.[42] Pragmatism would allow judges to make such changes, but goes too far in jettisoning the past and giving judges free rein to abandon legal

[29] P. 93. In this and the following footnotes page references, unless the contrary is indicated, refer to *Law's Empire.*
[30] P. 216.
[31] P. 349.
[32] P. 263.
[33] P. 248.
[34] P. 411.
[35] Pp. 263, 411.
[36] P. 400.
[37] P. 399.
[38] P. 398.
[39] Pp. 377-378.
[40] P. 391.
[41] P. 94.
[42] P.148. It seems that law as integrity would not permit this last either.

certainty and decide in a way they think best suits current conditions. 'Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward-and-forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.'[43]

The claims of integrity can be divided into two more practical principles, the principle of integrity in legislation (which asks those who create law by legislation to keep that law coherent in principle) and the principle of integrity in adjudication (which asks those responsible for deciding what the law is to see and enforce it as coherent in that way).[44] I will concentrate here on integrity in adjudication, because my main concern is to examine how judges construe and apply legislation. Integrity in adjudication explains how and why the past must be allowed some special power of its own in court, contrary to the pragmatist's claim that it must not, and why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest.[45] If a judge's own sense of justice condemned what a statute required 'he would have to consider whether he should actually enforce it . . . or whether he should lie and say that this was not the law after all, or whether he should resign. The principle of integrity in adjudication, therefore, does not necessarily have the last word about how the coercive power of the state should be used. But it does have the first word, and normally there is nothing to add to what it says'.[46] It instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author - the community personified - expressing a coherent conception of justice and fairness.[47] It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did and said in an overall story worth telling now.[48]

While I fundamentally agree with Dworkin, there are two respects in which I would be disposed to leave his argument so far as it relates to statutory interpretation. The first concerns the vagueness of the standards to which, as shown above, integrity is linked. Dworkin says judicial decisions should place the political history of our community 'in the best possible light'. Statutory interpretation must make our community's legal record 'the best it can from the point of view of political morality'. Integrity must observe principles that 'provide the best justification available for the doctrines and devices of our law'. The assumption seems to be that a judge will draw on his or her own unformulated instincts and experiences for the necessary standards: 'anyone's conception of justice is his theory, imposed by his own personal convictions'.[49]

Linked to this is Dworkin's apparent view that there are no objective rules of statutory interpretation. 'A judge must ultimately rely on his own opinions in developing and applying a theory about how to read a statute.'[50] This is heresy. Dworkin devotes much space for example in analysing the well-known will case of ***Riggs v Palmer***,[51] which turned on the question whether a man who murdered his grandfather was entitled to succeed under his will. Dworkin does not, as the Global method does, treat this question as falling to be determined by the principle that a person should not profit by his own wrong. Yet this principle, like many others, is generally applicable in statutory interpretation.[52] I suggest therefore that Dworkin's theory of integrity in law should be modified by stipulating that, when it comes to applying it to

[43] P. 225.
[44] P. 167.
[45] P. 167.
[46] P. 219.
[47] P. 225.
[48] Pp. 227-228.
[49] P. 97.
[50] P. 334.
[51] (1889) 115 N.Y. 506, 22 N.E. 188. See S.I. p. 596.
[52] See S.I. s. 349. The principle is one of the 'thousand and one interpretative criteria' (see above at n. 9).

statutory interpretation in common law countries, it should be linked to the Global method rather than resting on the personal judgment of individual judges.

The other way in which Dworkin's theory needs modification for present purposes concerns its relation to 'our' community. As pointed out earlier in this article, the simple idea that a body of law serves one community no longer applies in our case. A particular item of our law now needs to be interpreted according to the community in which it holds sway, whether the European Union, the nations who have ratified the Convention, the United Kingdom, or a devolved area within the United Kingdom. Thus Lord Slynn said of the Convention that it has to be construed according to 'what is acceptable throughout Europe'.[53]

Strained construction

Where, on the facts of the instant case and taken by itself, an enactment has a clear grammatical meaning, it is a strained construction to give it a different meaning. Where an enactment has two or more grammatical meanings (or in other words is ambiguous) it is a strained construction to give it a meaning other than one of the grammatical meanings. Where an enactment is semantically obscure, it is a strained construction to give it a meaning other than the grammatical meaning, or (in case of ambiguity) one of the grammatical meanings, of the corrected version.[54] This can be summed up by saying that a strained meaning of an enactment is any meaning other than its literal meaning.

When the interpretative factors favouring the opposing constructions in a particular case are ascertained and weighed it may be found necessary to apply a strained construction. For obvious reasons, judges are reluctant to admit they are doing this. It may seem to be trespassing on the function of the legislature to stretch the meaning of the words it has chosen to use. Yet in a wide variety of cases such distorting, though judicially unadmitted, is found by our courts to be necessary. Here is one example of many that could be given.[55] The Legal Aid Act 1988 s. 31(1) says that receipt of legal aid by a party 'shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised'. This is plain enough. It was considered by the House of Lords in ***Connelly v RTZ Corp plc***.[56] The court in Namibia, rather than the English High Court, was the convenient court on every ground except that the impecunious plaintiff could obtain legal aid in England but not in Namibia. It was held that s. 31(1) did not prevent the legal aid factor being used to deny a stay of proceedings instituted by the plaintiff in England. In justification Lord Goff said that it would be surprising and strange if the factor could not be so used, and that he was satisfied that on its true construction s. 31(1) did not have this effect. This is the sort of fuzzy law judges produce when, as so often, they apply a strained construction but do not wish to admit they are doing it.

Strained construction plays an important part in the Global method of statutory interpretation. As pointed out above, it is even more widely applied in the Developmental method. Dworkin would certainly accept it as necessary as part of law as integrity.[57] In the opening paragraph I asked whether 'possible' in the compatible construction rule is supposed to mean corresponding to the literal meaning, or allows for a strained meaning. I can answer that now. It certainly allows for a strained meaning, even if that is unacknowledged by the court applying it. The interesting question is ***how far*** it allows for a strained meaning.

Analysis

The compatible construction rule contemplates two kinds of interpretation: an interpretation of the Convention right in question and an interpretation of the enactment being judged by it. In determining the

[53] ***Fitzpatrick v Sterling Housing Association Ltd.*** (1999) ***The Times*** 2 November.
[54] S.I. s. 157.
[55] For other examples, and detailed argument on the matter, see S.I. ss. 157-162.
[56] [1997] 4 All ER 335.
[57] See e.g. pp. 16-19.

ambit of a Convention right a court must take into account relevant decisions etc. of the European Court of Human Rights and the European Commission of Human Rights[58], though one must not overlook the margin of appreciation afforded to individual countries.[59] Subject to this, it would be absurd to arrive at a legal meaning of a Convention right different from that likely to be found by the European Court of Human Rights. The situation is complicated enough without permitting there to be two markedly different meanings for one Convention right.

It has been suggested that the two concepts in the compatible construction rule, 'read and given effect', may each produce different outcomes, that under it an enactment may be 'read' in one way but 'given effect' in another.[60] With respect, I believe this is not the case. To read an enactment in a particular way is to give it that ***legal meaning***.[61] If the court's 'reading' of an enactment is that the legal meaning is X then the court must 'give effect' to X. Too much should not be read into the use by the drafter of two terms where one would have done: it follows an old proclivity.[62] All that the compatible construction rule is talking about in using the two terms is the legal meaning the court is to arrive at.

The rule speaks of 'compatibility' between United Kingdom legislation and the Convention rights. Here we must appreciate that a Convention right may be absolute or qualified, and the two types need different handling. I will now give three examples of the working of the rule.[63]

Example 1. Article 3 of the Convention, which states that no one shall be subjected to torture, is absolute. Suppose A has been held on remand for two years under enactment E1, which expressly authorises remand in custody but imposes no time limit. A argues that 'torture' in Article 3 includes mental torture and says he is suffering this from his long detention. He argues for a legal meaning of enactment E1 which incorporates an implied proviso precluding detention on remand for an unreasonably long period. The other side deny such an implication, and those then are the opposing constructions.[64] If the court finds that Article 3 does embrace mental torture, the questions on the compatible construction rule are: (1) Is the other side's construction compatible with the absolute right conferred by Article 3? (2) If the answer is no, is it 'possible' to read enactment E1 with the implication desired by A?

Example 2. Article 7(1) of the Convention says that no one shall be held guilty where the act in question did not constitute a criminal offence under national or international law at the time it was committed. It is qualified by Article 7(2), which says that this shall not prejudice trial and punishment for an act which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. Suppose B has been convicted of an offence created by enactment E2 (national law) which is not an offence under international law and was not an offence under national law at the time B's act was done. E2 is expressed to be retrospective to before that time. Article 7(1) has been contravened unless the conviction is saved by Article 7(2). Here the court has to decide the difficult question whether, although B's act was not an offence under international law, it was criminal according to the general principles of law recognised by civilised nations. If the answer is no the question arises of whether it is 'possible' to read enactment E2 in a way which is compatible with Article 7(1).

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[58] Human Rights Act 1998 s. 2.

[59] This allows a state 'a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right': see the work cited in n. 26 above at p. 12 and the detailed exposition at pp. 12-15. See also ***R v Director of Public Prosecutions, ex p. Kebilene and others*** [1999] 4 All ER 801, ***per*** Lord Hope of Graighead at 843-844 and David Pannick, 'Principles of Interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment', [1998] ***Public Law***, p. 545 at pp. 548-551.

[60] Geoffrey Marshall, 'Two kinds of compatibility: more about section 3 of the Human Rights Act 1998' [1999] ***Public Law*** 377.

[61] See above at n. 4.

[62] It is explained at S.I. p. 926.

[63] These three examples are further considered later.

[64] See above at n. 6.

Example 3[65] Enactment E3 makes it an offence to destroy a British passport. C, charged with committing this offence at a demonstration against British immigration laws, admits committing the act but pleads that he did it as free expression within Article 10(1) of the Convention. By his act he was, he argues, 'imparting information and ideas' as mentioned in Article 10(1). This is another qualified right, since Article 10(2) places limitations on its exercise. The only relevant limitation here is that relating to the prevention of disorder. The questions for the court are: (1) Was enactment E3 passed for the prevention of disorder? (2) If so, was that 'necessary in a democratic society' within the meaning of those words in Article 10(2)? (3) If the answer to (1) or (2) is no, can enactment E3 possibly be 'read' subject to an exception which would exonerate C?

Geoffrey Marshall called the compatible construction rule a 'a deeply mysterious provision'.[66] That is a just description. Francesca Klug has examined its legislative history.[67] I gratefully adopt her citations and will not repeat them. One thing the legislative history shows is that there was much vagueness and confusion in the minds of the Act's promoters about the intended meaning of the rule. This renders the legislative history largely useless here, because it is inconsistent and one can prove almost anything by citations from it. In his Tom Sargent Memorial Lecture on 16 December 1997[68] Lord Irvine of Lairg L.C. said that in applying the compatible construction rule the courts must strike a balance, going neither too far nor not far enough. Elsewhere he said 'the courts will be required to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so'.[69] He added that our courts may interpret Community law by 'straining the meaning of words or reading in words which are not there' and that this 'shows the strong interpretative techniques that can be expected in Convention cases'. All that suggests the compatible construction rule may require the Developmental method to be used in Convention cases, but this is left unclear.

An additional criterion, which may be called the fundamental rights criterion, is imported by the following dictum of Lord Hope of Craighead in ***R v Director of Public Prosecutions, ex p. Kebilene and others***[70]:

> In *A-G of Hong Kong v Lee Kwong-Kut* [1993] AC 951 at 966 Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in the previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *A-G of the Gambia v Momodou Jobe* [1984] AC 689 at 700 that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach will now have to be applied in this country when issues are raised under the Human Rights Act 1998 about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention.

In drafting the compatible construction rule it seems there was a failure to understand the current British method of statutory interpretation, which I am calling the Global method.[71] To begin with, the drafting overlooks the crucial fact that the Global method requires a two-stage approach.[72] It is not a matter of

[65] This is based on the example given in the article referred to in n. 60.
[66] 'Interpreting interpretation in the Human Rights Bill' [1998] *Public Law* 167.
[67] 'The Human Rights Act 1998, *Pepper v. Hart* and All That' [1999] *Public Law* 246 at 252-255.
[68] This is so far unpublished except on the Internet, though parts of it were quoted in debates on the Bill for the 1998 Act: see the article cited in the previous footnote at p. 254. See also the article cited in the next footnote.
[69] 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] *Public Law* p. 221 at p. 228.
[70] [1999] 4 All ER 801 at 838-839.
[71] The drafter of the New Zealand provision did no better. In the article mentioned in footnote 60 Geoffrey Marshall refers (p. 377, footnote 4), to its wording as 'wherever an enactment can be given a meaning that is consistent with [the Bill of Rights]'. This is simply s. 3(1) of the 1998 Act in a slightly different guise.
[72] See S.I. s. 204. The same applies to the Developmental method.

deciding at first sight whether words are ambiguous or obscure, and if so going on to decide what they mean. This is an error constantly made. The true rule is that there are two stages: (1) It must be decided, on an *informed* basis[73], whether or not there is a real doubt about the legal meaning of the enactment. (2) If there is, the interpreter moves on to the second stage, which is resolving the doubt. As Lord Upjohn said, 'you must look at all the admissible surrounding circumstances before starting to construe the Act'.[74]

Next, the basic rule of statutory construction must be applied. This states that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the various general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.[75] The 1998 Act now provides an addition to these general guides, which I am calling the compatible construction rule. What the drafter of the rule should have done was to say that the general guides are in future to be taken to include the strong principle that it is highly desirable that legislation should be taken to conform to the Convention (while Parliament reserves the right to say in a particular case that it intends to depart from it).[76] It is my submission that that is what Parliament must be taken as really intending by the compatible construction rule, and that it should be applied accordingly. I also submit that the rule should be applied using the Developmental method. The CJEC uses that method when taking notice of the Convention and consistency here is essential.

In the light of all this, I return to the three examples set out above.

Example 1. Assuming the answer to question (1) is no, the answer to question (2) must be found by assembling the interpretative factors either way. It could be argued that in favour of the other side's construction are such factors as the following: it corresponds to the plain meaning of E1[77], it represents the intention of Parliament[78], it protects the public to keep A in custody[79], it is administratively convenient[80], and so on. A's main argument is of course that his construction complies with the Convention, but he could add the following: in the case of a penal provision he should be given the benefit of any doubt[81], there is a presumption against restraint of the person[82], and so on. His trump card in arguing that the necessary proviso should be treated as implied is that even before the 1998 Act courts often found implications of this sort.[83] The court must now weigh each figurative bundle of factors and decide which is heavier.[84] One imagines A would succeed.

Example 2. Is it 'possible' to read enactment E2 in a way which is compatible with Article 7(1)? If the provision stating that E2 is retrospective is worded so as to show that Parliament intended to override the Convention, the answer is no. Otherwise the answer will depend on how the interpretative factors balance out on either side. If E2 was passed before the compatible construction rule was thought of, the weight of the 'bundle' of factors on B's side must be treated as increased by the addition of that rule. By how much it is increased is, as always, a matter for the court's judgment. What matters is that the court should apply the right test.

Example 3. Is it 'possible' to read enactment E3 in a way which is compatible with Article 10(1)? In posing this example Geoffrey Marshall suggested inserting after the words 'to destroy a British passport' the

[73] For the informed interpretation rule see S.I. Part XIII.
[74] *R. v. Schildkamp* [1971] AC 1 at 23. The two-stage approach is fully explained in S.I. s. 204.
[75] See S.I. s. 193.
[76] In *R v Director of Public Prosecutions, ex p Kebilene* [1999] 4 All ER 801 at 837 Lord Cooke of Thornden said that section 3(1) provides a major new canon of interpretation imposing "a strong adjuration".
[77] See S.I. s. 195.
[78] See S.I. s. 163.
[79] See S.I. s. 272.
[80] See S.I. s. 314.
[81] See S.I. Part XVII.
[82] See S.I. s. 273.
[83] See S.I. ss 172-175.
[84] See S.I. ss. 186-191.

words ‘except by anyone intending to express or communicate an idea or opinion’.[85] He then raised the question whether the compatible construction rule requires such an addition to be made whenever this is needed for compliance with the Convention. That would be too easy a way out. One must go through the steps required by the Developmental method as applied by the compatible construction rule.

Conclusion

My conclusions from the above discussion are as follows.

Section 3(1) of the 1998 Act (the compatible construction rule) should be taken as requiring the enactment in question to be construed according to the Developmental method, thus bringing in the wider European system of purposive construction. So it does not provide a third method; it drastically alters existing methods. The fact that this powerful new criterion has been added to the existing guides to statutory interpretation reopens all precedents. No pre-1998 Act court decision on the legal meaning of an enactment to which a Convention right is relevant can now stand unexamined. Even though it truly reflected the intention Parliament had when passing the enactment, the decision needs to be looked at again in the light of s. 3(1). Parliament’s original intention is no longer the sole deciding factor. While it retains its importance, it must now be reassessed in the light of the new rule. For pre-1998 Act enactments the interpretative criteria can therefore be ultimately reduced to ‘legislative intention plus compatible construction rule’, [to which must now be added the fundamental rights criterion mentioned above. One likely result is that there will be less room for implication.[86]

The new rule tinkers with the classic idea that the sole test is the legislator’s intention. Ex post facto, it adds a new slant. This will not apply to post-1998 Act enactments, for here Parliament in forming its intention must be taken to have the new rule in mind and wish it to be taken into account (unless of course Parliament expresses a contrary intention). The underlying interpretative philosophy should I suggest be the Dworkinian theory of law as integrity, modified as I have proposed. Overall all this should achieve the greatest degree of coherence and consistency possible in the circumstances. Order will be served.

2000.011 *Public Law* Spring, pp. 77-91.

[85] See the article referred to at n. 60, p. 380.

[86] Colin R. Munro suggests that an effect of .s 3(1) will be to displace ‘the normal presumption in favour of implied repeal’: *Studies in Constitutional Law* (2nd edn 1999), p. 169n.