Applying section 3(1) of the HRA

Francis Bennion examines the key interpretative provision of the Human Rights Act 1998.

In the fifties, sixties and seventies I spent much of my life in Whitehall earnestly drafting government legislation. At that time and previously the idea in the Parliamentary Counsel Office was that what was required was a single verbal formula. While it was always necessary for the drafter to have due regard to background law, that was acknowledged to be nothing much beyond English common law and the statutes enacted at Westminster. There was a faint suggestion that international law also mattered, but one seldom needed to pay much regard to that.

The advent of what is now the European Union produced the first change. It was highlighted in the unpredictability and expansiveness of the all-powerful Court of Justice of the European Communities (CJEC). Set up by the Treaty of Rome to be the Supreme Court of the Community, the CJEC is entrusted with making final and binding decisions on the legal meaning of provisions of Community law. These decisions, which can be altered only if the Governments unanimously agree to amend the Community treaties, can override, and even annul, national law. However the extent of CJEC jurisdiction is indicated in the treaty only briefly, by saying the court must ensure that ‘the law’ is observed. What constitutes ‘the law’ is not specified. For that vagueness one can blame the member states, or rather their negotiators.

It has led to the invention by the CJEC of a mass of expansive law, derisively called ‘creative jurisprudence’. It was reinforced by the Maastricht Treaty, which says that the CJEC must maintain, respect and build upon the *acquis communautaire.* This untranslatable phrase (from the French *acquérir,* to acquire) denotes the experience built up by Community institutions since their foundation. It was described by Advocate General Van Gerven as the entire body of the existing Community rules as interpreted and applied by the CJEC (Case C-152/91 [1994] 1 All ER 929). So Maastricht upheld past encroachments made by the CJEC.

One of the biggest areas of power buildup by the CJEC concerns the direct effect of Community treaties and directives. The system we were accustomed to in Britain was that nothing in a treaty becomes binding law unless and until Parliament has debated it and then put through an Act giving it force. All that was bypassed for the European Community. When Britain joined it, a once-for-all Act was passed by our Parliament. This, the European Communities Act 1972, says in effect that any provision made by or under the Community treaties which the CJEC says is directly enforceable in Britain (that is enforceable ‘without further enactment’) is indeed so enforceable.

As Lord Bingham of Cornhill has pointed out (*Customs and Excise Comrs v ApS Samex* [1983] 1 All E.R. 1042 at 1056), 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 development of the Community (now the European Union) requires.

The British doctrine of purposive construction is markedly more literalist than the European variety, and permits strained construction only in comparatively rare cases. It is increasingly obliged to give way to the European system, as Lord Clyde acknowledged in *Cutter v. Eagle Star Insurance Co. Ltd.* [1998] 4 All E.R. 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.

The CJEC method of interpretation may be called the Developmental method because in advancing the 'spirit' it is always ready to depart from the text. It uses the text 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. This harks back to the civilian system of drafting legislation, as compared to the common law drafting method whose products have hitherto been construed by the mainly literalist common law method of interpretation.

The result is that a proposition of British law is no longer to be construed by our courts as a single statement. Lurking in the background are actual or potential CJEC rulings which may modify or even contradict the statement's apparent legal meaning. That is quite bad enough for those who believe that, for the sake of citizens bound by it, a statement of law should mean what it appears to say. However we now have to brace ourselves for an additional complication of the same disruptive kind. In section 3(1) of the Human Rights Act 1998, which comes into force on 2 October 2000, Parliament has 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').

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*** [1999] 4 All ER 801 at 838-839:

> 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.

I reluctantly believe that section 3(1) of the 1998 Act 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, alongside the fundamental rights criterion just referred to. In his Tom Sargent Memorial Lecture on 16 December 1997 Lord Irvine of Lairg L.C. said that in applying section 3(1) the courts must strike a balance, going neither too far nor not far enough. Elsewhere (see 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] ***Public Law*** 221 at 228) our Lord Chancellor 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'. He added that 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'.

This 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 of Parliament when passing the enactment, the decision needs to be looked at again in the light of section 3(1).

Parliament's original intention is no longer the sole deciding factor. While it retains some importance, it must now be reassessed in the light of the new situation.

This novel rule tinkers with the classic idea that the sole test in statutory interpretation is the legislator's intention. Ex post facto, it adds a new slant. This distorting element 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).

Francis Bennion, a barrister and former Parliamentary Counsel, is the author of *Statutory Interpretation* (3rd edn 1997, supplement 1999). This is a condensed version of an article published in *Public Law* Spring 2000.

2000-053 *The JSB Journal* [Journal of the Judicial Studies Board] 2000 Issue 11.