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Published by Buttertworths

All ER Annual Review 2001

Statute Law

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Introductory note

26.1. For the convenience of users this section of the Review conforms to the Code set out in the third edition (1997) of the author's textbook *Statutory Interpretation* as updated by the 1999 Supplement. 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'.

Real doubt as to legal meaning (Code s 3)

26.2. What is said in the Comment to Code s 3 about the nature of 'real' doubt may be compared to remarks by Lord Woolf CJ in *Swain v Hillman and another* [2001] 1 All ER 91 at 92. CPR 24.2 empowers the court to give summary judgment where the claimant 'has no real prospect of succeeding' or the defendant 'has no real prospect of successfully defending the claim or issue'. Lord Woolf said: 'The word "real" distinguishes fanciful [as opposed to realistic] prospects of success'.

Mandatory and directory requirements (Code s 10)

General (pp 30-31)

26.3. At end of insertion made in footnote 2 by Supplement p S5 add:-
The same applies to criticisms made of the distinction between directory and mandatory requirements in *Attorney General's Reference (No 3 of 1999)* [2001] 1 All ER 577 [HL]. For an analysis of the latter case see Example 10.10AA.

Dual obligation (p 32)

26.4. At the end of footnote 5 at Code p 32 add a reference to ***R v Weir*** [2001] 2 All ER 216.

Where discretion exists (p 37)

26.5. Insert the following new example after Example 10.10A-

> *Example 10.10AA* The Police and Criminal Evidence Act 1984 s 64(3B)(a) says that, where a sample is required to be destroyed under earlier subsections of s 64, information derived from the sample shall not be used for the purposes of any investigation of an offence. It was held in *Attorney General's Reference (No 3 of 1999)* [2001] 1 All ER 577 [HL] that, since s 78(1) of the Act gives the court a discretion to

exclude evidence obtained in such an investigation where fairness so requires, s 64(3B)(a) must be treated as directory only.

Purely technical contraventions (p 37)

26.6. At end of footnote 5 at Code p 37 insert: 'See also (as to service of notices) *Hewlings v McLean Homes East Anglia Ltd* [2001] 2 All ER 281.'

Administrative or executive agencies (Code s 15)

Local authorities (p 64)

26.7. In *R v Richmond London Borough Council, ex p Watson* [2001] 1 All ER 436 Buxton LJ said (at 447): '(1) A public body can only do that which it is authorised to do by positive law. In the words of Laws J in *R v Somerset CC, ex p Fewings* [1995] 1 All ER 513 at 524, that is a sinew of the rule of law. (2) In practical terms, the powers and duties of a local authority under that rule will only be found in statutory form. (3) A strong form of that inhibition on local authorities is to be found in the particular rule that financial charges can only be imposed by a public body with specific statutory approval . . .'

Investigating agencies (Code s 17)

Entrapment

26.8. Parliament sometimes confers specific investigatory powers on enforcement agencies. For example the Trade Descriptions Act 1968 s 27 (referred to by Lord Nicholls of Birkenhead in *R v Looseley: Attorney General's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897. at [3]) authorises investigating officials to make test purchases. There is no defence of entrapment in English law, though enticing action by a state investigating officer that would affront the public conscience may lead to a prosecution being stopped by the court as an abuse of process: *R v Looseley Attorney General's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897. Alternatively, evidence obtained thereby may be excluded under the Police and Criminal Evidence Act 1984 s 78.

26.9. In the reference in Supplement page S7 to *United States Government v Montgomery* the law report citation should be changed to [2001] 1 All ER 815 [HL].

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 72-74)

26.10. *Lane v Esdaile* [1891] AC 210 was followed in *R v Secretary of State for Trade and Industry, ex p Eastaway* [2001] 1 All ER 27 [HL] (House of Lords has no jurisdiction to hear an appeal from a refusal to grant permission to appeal from a refusal of permission to apply for judicial review). In *Foenander v Bond Lewis & Co* [2001] EWCA Civ 759, [2001] 2 All ER 1019 Brooke LJ said (at [18]) that the principle underlying these decisions is that 'if both a lower court and an appeal court at a lower level of the judicial hierarchy have decided that a proposed appeal has no real prospect of success, and there is no other compelling reason why the appeal should be heard (see CPR 52.3(6)), that must be the end of the matter'.

Appellate and reviewing courts (p 80)

26.11. In *Biogen Inc Medeva plc* (1996) 38 BMLR 149 at 166 Lord Hoffmann said-

> ‘Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge’s evaluation’. (Cited by Lord Scott of Foscote in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at 718 (breach of copyright)).

Interpretation by adjudicating authorities (Code s 20)

Nature of discretion (p 83)

26.12. Although ‘may’ can mean ‘shall’ (see Code p 34) it is necessary in judging this to perform a correct analysis. In *R v Commissioners of Inland Revenue, ex p Newfields Developments Ltd* [2001] UKHL 27, [2001] 4 All ER 400 at [18]-[22] Lord Hoffmann explained that ‘may’ in the opening words of the Income and Corporation Taxes Act 1988 s 416(6) is unlikely to confer a discretion since the provision does not indicate by whom the supposed discretion is to be exercised or on what basis. He added that ‘the word appears in an impersonal construction . . . its force is not facultative but conditional, as in “VAT may be chargeable”.’ See also Lord Scott of Foscote at [43], [44].

Adjudicating authorities with appellate jurisdiction (Code s 23)

Court of Appeal (pp 97-99)

26.13. The jurisdiction of the Court of Appeal is exclusively appellate, and this cannot be evaded by calling a purported appeal where it has no jurisdiction a ‘renewed application’ to the court below: *R v Secretary of State for Trade and Industry, ex p Eastaway* [2001] 1 All ER 27 [HL]. See also the note on *R (on the application of Lichniak) v Secretary of State for the Home Department and other cases* [2001] EWHC Admin 294, [2001] 4 All ER 934 at p 000 below, related to Code s 421.

Judicial review (Code s 24)

Where other remedy available (p 104)

26.14. In *R (on the application of Balbo B & C Auto Transporti Internazionali) v Secretary of State for the Home Department* [2001] EWHC Admin 195, [2001] 4 All ER 423 the Administrative Court denied judicial review of a notice of penalty under the Immigration and Asylum Act 1999 s 32 (clandestine entrants) on the ground that the Act laid down a special procedure in the course of which liability to the penalty could be contested.

Declaration or injunction (p 107)

26.15. An injunction ought not to made *contra mundum* (against the world at large): *Venables and another v News Group Newspapers Ltd and others* [2001] 1 All ER 908 at 915.

Interpreter’s need to understand nature of an Act (Code s 29)

26.16. It is necessary to understand that an Act usually has a *scheme*. The drafter will have designed it conceptually. Like an engine, its various elements interlock so as to function efficiently. Unless it is the subject of disorganised composition (for references to which see Supplement Index), it will not just flow on hither and thither in an undirected way. On the contrary it will form an organic unity, which is the reason for the linguistic canon requiring an Act to be construed as a whole (see Code s 355). In their work of interpretation, the courts take account of this. So in relation to an argument put forward on the Human Rights Act 1998 Lord Hope of Craighead objected that the argument was ‘inconsistent with the scheme of the

1998 Act': *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, at [112]. Similarly in his dissenting judgment in *Bettison and another v Langton and others* [2001] UKHL 24, [2001] 3 All ER 417, at [17] Lord Nicholls of Birkenhead said of a change in the law alleged to have been made by the Commons Registration Act 1965 s 15 that it would be 'inconsistent with the scheme of the legislation'.

Ultra vires delegated legislation (Code s 58)

Ambiguity (p 185)

26.17. See *R (on the application of McCormick) v Liverpool City Magistrates' Court, R (on the application of L) v Liverpool City Magistrates' Court* [2001] 2 All ER 705 (a construction of the Costs in Criminal Cases (General) Regulations 1986 reg 6(2) was preferred which did not render the provision ultra vires).

Implied repeal (Code s 87)

Presumption against implied repeal (pp 225-226)

26.18. As authority for the statement that the courts presume an implied repeal is not intended see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester)* Ltd [2001] 1 All ER 257, per Arden J at 273.

26.19. In *Middlesborough Borough Council v Safeer and others* [2001] EWHC Admin 525, [2001] 4 All ER 630 Silber J rejected the argument that the Road Traffic Offenders Act 1988 s 4 (power of certain local authorities to prosecute for specified offences) effected a partial implied repeal of the Local Government Act 1972 s 222 (power of local authorities to prosecute or defend proceedings). Instead he treated them as ongoing separate codes even though there was some overlap and therefore surplusage. See also the note on *R v Richmond London Borough Council, ex p Watson* [2001] 1 All ER 436 at p 000 below, related to Code s 268.

When implications are legitimate (Code s 174)

Must implication be 'necessary'? (p 387)

26.20. On necessary implication see *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner* [2001] 1 All ER 535, *per* Buxton LJ at 539-544.

Implied ancillary powers (pp 388-389)

26.21. It argues against the existence of an implied ancillary power if it is impossible to determine the precise limits of the alleged power, or it would interfere with property rights without compensation: *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276, [2001] 3 All ER 673 (see [42], [71]). (This decision reversed *British Waterways Board v Severn Trent Water Ltd* [2000] 1 All ER 347, cited at All ER Rev 2000, p 351.)

Commonsense construction rule (Code s 197)

Opening passage (pp 427-428)

26.22. In *Chelsea Yacht and Boat Co Ltd v Pope* [2001] 2 All ER 409 the Court of Appeal held on the ground of common sense that a houseboat on the Thames in London had not become part of the land (that is the river bed). Tuckey LJ said (at [26]): It is common sense

that a house built on land is part of the land . . . So too it is common sense that a boat on a river is not part of the land. A boat, albeit one used as a home, is not of the same genus as real property'. It was therefore held that the houseboat was not a 'dwelling house' within the meaning of the Housing Act 1988 s 1(1).

The Interpretation Act 1978 (Code s 200)

The term 'person' (pp 444-445)

26.23. In *Eastbourne Town Radio Cars Association v Customs and Excise Commissioners* [2001] UKHL 19, [2001] 2 All ER 597, at [32] Lord Hoffmann said 'an unincorporated association is . . . not a legal entity. It is a number of legal persons having mutual rights and duties in accordance with rules which constitute the contract under which they have agreed to be associated'.

Need to avoid unpredictability and lengthening of proceedings (Code s 203)

26.24. In private the judge is free to consult any materials that seem appropriate relative to the instant case: *Barings plc (in liquidation) and another v Coopers and Lybrand and others* (2001) Times 19 October.

Codifying Acts (Code s 212)

Replacement of a common law rule

26.25. Akin to codification is the replacement of a common law rule by an enactment which, while not intended to codify the rule, has a similar, though not the same, effect as the rule.

> *Example 212.1* The Public Order Act 1986 abolished the common law offence of affray. Section 3 of the Act created a statutory offence of affray with slightly different attributes. In *I v Director of Public Prosecutions, M v Director of Public Prosecutions, H v Director of Public Prosecutions* [2001] UKHL/10, [2001] 2 All ER 583 Lord Hutton said (at [11]) that in construing s 3 it was permissible to take into account common law decisions on affray. (See also the note on this case at p 000 below, related to Code s 216.)

26.26. In footnote 5 on Code p 466 add at the end a reference to *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2001] 1 All ER 944.

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

26.27. A committee report should not be relied on to alter the clear meaning of an enactment. The House of Lords came near the line (if they did not cross it) in *I v Director of Public Prosecutions, M v Director of Public Prosecutions, H v Director of Public Prosecutions* [2001] UKHL/10, [2001] 2 All ER 583 where Lord Hutton said (at [22]) that, although if the point were to be determined only by having regard to the words of the Public Order Act 1986 s 3(1) there would be force in the Crown's submissions, it had to be remembered that s 3(1) was enacted to give effect to a Law Commission report and the Government had stated that it was content to accept the Law Commission's formulation. Therefore it was held to be necessary to look at what the Law Commission intended the words to mean and give effect to that intention, even though it was not reflected in the literal meaning. (See also the note on this case at p 000 above, related to Code s 212).

Use of Hansard (Code s 217)

Comment Part One: General: Nature of parliamentary materials (p 473)

26.28. See the note on *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1 at p 000 below, related to Code s 219

Use of explanatory memoranda (Code s 219)

Explanatory memoranda on Bills (pp 488-489)

26.29. Regarding the 'notes on clauses' referred to in Supplement pp S32-S33, in ***R v A*** [2001] UKHL 25, [2001] 3 All ER 1, at [69] Lord Hope of Graighead said it was legitimate for the court to refer to these for the purposes of clarification.

26.30. In *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, the Court of Appeal (see [7], [53]) regarded such notes on clauses as 'parliamentary material' admissible under the rule in *Pepper v Hart* (as to this rule see Code s 217).

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

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

26.31. In ***R v A*** [2001] UKHL 25, [2001] 3 All ER 1 the House of Lords allowed counsel to cite Hansard on the legal meaning of the Youth Justice and Criminal Evidence Act 1999 s 41. This was not done under the rule in *Pepper v Hart* but 'to identify the mischief which led to the enactment of the statute' (see Lord Steyn at [25] and Lord Hutton at [144]).

26.32. In *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229 the Court of Appeal allowed counsel to cite Hansard on the Consumer Credit Act 1974 s 127(3). This was not done under the rule in *Pepper v Hart* (the legal meaning was clear) but to ascertain what 'led Parliament to enact a provision in those words' (see Morritt V-C at [35]).

26.33. In *R (on the application of Lichniak) v Secretary of State for the Home Department and other cases* [2001] EWHC Admin 294, [2001] 4 All ER, at [18] the Court of Appeal allowed counsel to cite Hansard on the Murder (Abolition of Death Penalty) Act 1965 s 1. This was not done under the rule in *Pepper v Hart* (again the legal meaning was clear). The court advanced no justification for allowing it to be cited.

International treaties (Code s 221)

26.34. Where a provision of a treaty is referred to in an enactment the provision is taken to have the internationally generally accepted meaning rather than one of a range of possible meanings: *R v Secretary of State for the Home Department, ex p Adan* [2001] 1 All ER 593 (reference in Asylum and Immigration Act 1996 s 2(2)(c) to removal 'otherwise than in accordance with' the Geneva Convention relating to the Status of Refugees).

The long title (Code s 245)

26.35. In *Young v National Power plc* [2001] 2 All ER 339 at [4] Smith J mistakenly referred to the long title of the Equal Pay Act 1970 as its 'preamble'.

26.36. In *Re Norris* [2001] UKHL 34, [2001] 3 All ER 961, at [12] Lord Hobhouse mistakenly referred to the long title of the Drug Trafficking Offences Act 1986 as its 'preamble'.

26.37. In *Middlesborough Borough Council v Safeer and others* [2001] EWHC Admin 525, [2001] 4 All ER 630, at [14] Silber J mistakenly referred to the long title of the Road Traffic Offenders Act 1988 as its 'preamble'.

26.38. A reference to these three cases should therefore be added in footnote 1 on Code p 561.

Archival drafting (Code s 260)

26.39. Archival drafting may import a common law rule by implication. For example in *Bettison and another v Langton and others* [2001] UKHL 24, [2001] 3 All ER 417 the House of Lords held that the Commons Registration Act 1965 s 15 (which converted grazing rights not limited by number into rights limited by a definite number) by implication attracted the common law rule that grazing rights limited by a definite number are severable from the land they benefit.

Legal policy (Code s 263)

Nature of legal policy (pp 598-600)

26.40. In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, [2001] 3 All ER 393, at [8] Morritt V-C discussed the nature of ecclesiastical law. He said the term canon law 'is properly applied to the law made by the churches for the regulation of legal matters within their competence'. He added that ecclesiastical law 'is a portmanteau term which embraces not only the canon law but both secular legislation and the common law relating to the church'.

Liberty removed not granted (pp 604-605)

26.41. In *Douglas and others v Hello! Ltd* [2001] 2 All ER 289 at [64]-[65] Brooke LJ said: 'English law, as is well known, has been historically based on freedoms, not rights . . . It is against this background of freedom-based law that the law of confidentiality has been developed'. See also the note on this case at p 000 below, related to Code s 270.

Law should be coherent and self-consistent (Code s 268)

Legal policy (p 624)

26.42. Circumstances may defeat the court's attempt to ensure consistency in the relevant law. In *R v K* [2001] UKHL 41, [2110] 3 All ER 897, the House of Lords was defeated by the ragbag nature of the Sexual Offences Act 1956, an unreconstructed consolidation Act drawn from many sources. Lord Millett concurred in the decision with misgiving 'for I have little doubt that we shall be failing to give effect to the intention of Parliament and will reduce s 14 of the Sexual Offences Act 1965 to incoherence' (see [41]). He added that 'the persistent failure of Parliament to rationalise this branch of the law . . . means that we ought not to strain after internal coherence even in a single offence. Injustice is too high a price to pay for consistency' (see [44]).

Duplication of powers or duties: gateway or freestanding? (pp 625-626)

26.43. It may be necessary to distinguish between a gateway and a freestanding power or duty. In *R v Richmond London Borough Council, ex p Watson* [2001] 1 All ER 436 it was argued that the duty to provide after-care services imposed by the Mental Health Act 1983 s 117 (which does not provide for charging beneficiaries) was a gateway duty, that is one requiring the authority to provide the services by using existing powers under other statutory provisions (for which they could have made a charge). *Held* The duty is freestanding (that is

operating without reference to other duties), so a charge could not be made in the absence of specific power. Buxton LJ said (at 447) that 'a duty imposed by one Act is to be assumed not to duplicate a duty already imposed by another Act'. See also the note on *Middlesborough Borough Council v Safeer and others* [2001] EWHC Admin 525, [2001] 4 All ER 630 at p 000 above, related to Code s 87.

Municipal law should conform to public international law (Code s 270)

European Convention on Human Rights (pp 632-634)

26.44. In *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 660; [1990] 1 AC 109 at 283 (the *Spycatcher* case) Lord Goff of Chieveley said '. . . whereas art 10 of the convention . . . proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it'. In *Douglas and others v Hello! Ltd* [2001] 2 All ER 289 at [64] this was cited by Brooke LJ as memorably expressing the difference between freedom-based law and rights-based law (as to this difference see Code s 263 at pp 604-605). See also the note on *Douglas and others v Hello! Ltd* [2001] 2 All ER 289 at p 000 above, related to Code s 263.

26.45. In *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 it was held that the right to freedom of expression in art 10 of the Convention provided no additional defence to an action for breach of copyright or any other right of intellectual property (affd *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2001] 4 All ER 666 with the proviso that rare circumstances (not present here) might arise where the right of freedom of expression comes into conflict with the protection afforded by copyright legislation).

Statutory interference with rights of legal process (Code s 281)

Right of litigious control (pp 659-660)

26.46. *Practice Note* [2001] 1 All ER 193 stated that from 11 January 2001 all judgments in the Court of Appeal and the Administrative Court would be issued in a common format and case numbering, with neutral citation. The numbering of a case will be independent of whether or not the case is selected for inclusion in the Law Reports or any other report. The new system will be extended to other parts of the High Court as soon as practicable. Where a case is included in the Law Reports it must be cited from that source. Other series of reports may only be used when a case is not reported in the Law Reports.

European Convention on Human Rights (p 661)

26.47. The requirement in art 6(1) that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing by an 'independent and impartial tribunal' does not preclude the taking of administrative policy decisions such as planning appeals by a government minister: see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23, [2001] 2 All ER 929; Bennion, 'The Human Rights Act 1998 and the government policy principle: Part 2' 9 CLW 20/2001, 1 June 2001.

Presumption favouring rectifying construction (Code s 287)

Errors of meaning (pp 679-682)

26.48. The drafter of the intestacy provisions of the Administration of Estates Act 1925 ss 46 and 47 failed to taken account of the possibility that a person might be disqualified from taking under the principle against wrongful self-benefit (see Code s 349). In *Re DWS (deceased)* [2001] 1 All ER 97 the Court of Appeal, faced with the choice between a strained construction which did great violence to the statutory language and one which did little violence, chose the latter.

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

Ongoing Acts (pp 686-689)

26.49. In *Birmingham City Council v Oakley* [2001] 1 All ER 385 the House of Lords held by 3 to 2 that *R v Ireland* [1998] AC 147 (giving of updating construction) should not be followed where it was argued that a water closet unaccompanied by a wash basin rendered premises dangerous to health under the Environmental Protection Act 1990 s 79.

Nature of purposive construction (Code s 304)

Deeming provisions (pp 735-736)

26.50. In *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy and others* [2001] EWCA Civ 79, [2001] 3 All ER 878, at [16] Robert Walker applied the principle stated here, namely that the intention of a deeming provision is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose but no further.

Avoiding an anomalous or illogical result (Code s 315)

Anomaly in legal doctrine (pp 770-772)

26.51. At the end of footnote 4 on p 771 insert-

> 'Any application to the court, however informal, is a "proceeding"': *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, per Lord Denning MR at 735 (cited *R (on the application of Toth) v Solicitors Disciplinary Tribunal* [2001] EWHC Admin 240, [2001] 3 All ER 180 at [25]).

Avoiding a futile or pointless result (Code s 316)

26.52. The 'rule' that Parliament does nothing in vain was cited in *R v Richmond London Borough Council, ex p Watson* [2001] 1 All ER 436, *per* Buxton LJ at 447.

Tax avoidance (Code s 321)

Westminster principle (pp 792-793)

26.53. In footnote 2 on page 793 at end insert: '*See also MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] 1 All ER 865 (meaning of 'yearly interest' in Income and Corporation Taxes Act s 338(3)(a)).

Presumed application of constitutional law rules (Code s 328)

Legal framework

26.54. In the absence of provision to the contrary in the Act, an Act of Parliament is to be applied having regard to the established legal framework of the state, such as the arrangement

by which certain matters are entrusted to courts with criminal jurisdiction and others to courts with civil jurisdiction. As Lord Hobhouse said in *Re Norris* [2001] UKHL 34, [2001] 3 All ER 961, at [23] 'The English system of criminal justice does not itself confer any civil jurisdiction upon the criminal courts and it takes clear and express provision in a statute to achieve that result'. It is important for many reasons to preserve the distinction between civil and criminal matters. The standard of proof is different, the courts' jurisdiction is different, the human rights aspects are different, and so on. For a discussion of the distinction between civil and criminal matters, conducted in relation to anti-social behaviour orders under the Crime and Disorder Act 1998 s 1 see ***R (on the application of McCann and others) v Crown Court at Manchester*** [2001] EWCA Civ 281, [2001] 4 All ER 264. See also ***Gough and another v Chief Constable of the Derbyshire Constabulary and other cases*** [2001] EWHC Admin 554, [2001] 4 All ER 289, at [35]. As to 'criminal cause or matter' see Code s 17.

Law regulating decision making (Code s 329)

Procedural propriety (pp 820-823)

26.55. In ***White v White*** [2001] 1 All ER 1 [HL] Lord Nicholls of Birkenhead said (at 4) that sometimes different minds can reach different conclusions on what fairness requires. 'Then fairness, like beauty, lies in the eye of the beholder'. He added (at 9): 'Generally accepted standards of fairness in a field such as this [divorce law] change and develop, sometimes quite radically, over comparatively short periods of time'.

Presumed application of rules of evidence (Code s 335)

Standard of proof (pp 848-849)

26.56. In ***B v Chief Constable of the Avon and Somerset Constabulary*** [2001] 1 All ER 562 at 573 Lord Bingham of Cornhill CJ said that the civil standard of proof does not invariably mean a bare balance of probability. It is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters. He held that in deciding whether the condition laid down by the Crime and Disorder Act 1998 s 2(1) (sex offender orders) is satisfied a court should apply 'a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard'. This dictum seems to drain a valuable legal concept of much of its useful meaning.

Estoppel in pais (p 851)

26.57. Where the effect of an estoppel in pais is to require the words of an enactment to be disregarded or modified it may be called an ***estoppel in the face of a statute***: see ***Yaxley v Gotts and another*** [2000] 1 All ER 711 at 734; ***Shah v Shah*** [2001] EWCA Civ 527, [2001] 4 All ER 138 at [16], [20]. In the latter case the signatories of a purported deed were held to be estopped from relying on the provision of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) stating that an instrument shall not be a deed unless it is signed ***in the presence of*** an attesting witness. Despite the clear wording of s 1(3), the Court of Appeal held that its social purpose did not require it to be assumed that Parliament intended to exclude the possibility of an estoppel in pais being raised.

Domestic sanctuary (Code s 344)

Modern view (pp 375-376)

26.58. In footnote 5 on page 375 add a reference to ***R v Central Criminal Court, ex p Bright*** [2001] 2 All ER 244, ***per*** Judge LJ at [89]-[95].

Judge in own cause (Code s 348)

26.59. The decision of Hooper J referred to in Supplement p S59 was affirmed by the Court of Appeal in *R v Local Commissioner for Administration in North and North East England, ex p Liverpool City Council* [2001] 1 All ER 462. In the latter case Henry LJ said (at 472-473) 'a local authority councillor is entitled to give weight to the views of party colleagues, but should not abdicate responsibility by voting blindly in support of party policy or party whip (see *Waltham Forest London BC, ex p Baxter* [1988] QB 419)'.

Presumption of correctness (Code s 350)

26.60. In relation to a highway shown on a definitive map under the National Parks and Access to the Countryside Act 1949 s 27, Lord Phillips of Worth Matravers MR said in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266, [2001] 3 All ER 166 at [38]-

> 'Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed . . . the standard of proof required to justify a finding that a right of way exists is no more than a balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists.'

Nature of deductive reasoning (Code s 358)

26.61. An aspect of the application of logic to statutory interpretation is that the courts use inference. This follows from the formula '(expressly or not)' contained in this section of the Code. What is not expressed may by inference be treated as implied.

26.62. The Sale of Goods Act 1979 s 57(4) (a codifying provision) says that it is not lawful for the seller in an auction to bid himself (or through agents) where the sale is not notified to be subject to that bidding right. In *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2001] 1 All ER 944 at 947 it was held that for the auctioneer to withdraw a lot because the bidding has not reached what he considers an appropriate level 'is tantamount to bidding on behalf of the seller'.

The hypothetical syllogism (Code s 359)

26.63. For an example of judicial use of the syllogism see *Royal Masonic Hospital and another v Pensions Ombudsman and another* [2001] 3 All ER 408, *per* Rimer J at [22].

***Expressio unius* principle** (Code s 390)

Disorganised composition (p 970)

26.64. In footnote 7 at end insert 'See also *Re B_J (a child) (non-molestation order: power of arrest)* [2001] 1 All ER 235 at 246.'

Effect of Community law on UK enactments (Code s 413)

26.65. In *White v White and another* [2001] UKHL/9 at [31], [2001] 2 All ER 43, Lord Cooke of Thorndon said that Code s 43 and Comment constituted a 'helpful discussion'.

Human Rights Act 1998

26.66. Except as mentioned on pp S41-S43, the 1999 Supplement to the author's textbook *Statutory Interpretation* (3rd edn 1997) did not deal with the Human Rights Act 1998 since most of its provisions had not then been brought into force. The forthcoming fourth edition of *Statutory Interpretation* will deal with that Act, but only so far as concerns its interpretation.

26.67. For that purpose a new Code Part XXX, comprising new sections 419-462, will be added at the end of the book. Part XXX will concentrate on the provisions and working of the 1998 Act. It will not attempt to cover to any depth the meaning and effect of the provisions of the European Convention on Human Rights set out in Schedule 1 to the 1998 Act, since this is a vast subject largely beyond the scope of the work. (For the extent to which the Code does at present deal with the Convention see Index to the 1999 Supplement.)

26.68. To assist readers of the present article, notes on relevant 2001 cases are included below under appropriate headings of the new Part XXX sections which are intended to be added in the fourth edition.

Nature of the Convention rights (Code s 419) [HRA 1998 s 1(1) and (2)]

26.69. In *Douglas and others v Hello! Ltd* [2001] 2 All ER 289 the Court of Appeal gave general guidance on the Human Rights Act 1998, which has been judicially described as 'distinguished by its lack of technicality' (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, [2001] 3 All ER393, at [7]). In *Douglas* Sedley LJ (at [128]) observed that s 6(1) of the 1998 Act requires the courts, as public authorities, to act consistently with the Convention. 'What this means is a subject of sharp division and debate among both practising and academic lawyers: does it simply require the courts' procedures to be convention-compliant, or does it require the law applied by the courts, save where primary legislation plainly says otherwise, to give effect to the convention principles? This is not the place . . . in which to resolve such a large question'. Brooke LJ (at [91]) discussed the implications to be drawn from the fact that art 1 of the Convention is not among the articles specified in s 1 of the 1998 Act as included in the expression 'the Convention rights'.

26.70. In *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433 the House of Lords stressed that while the proportionality principle applicable under the Convention may in some cases produce the same result as the common law *Wednesbury* test, this is not always so. Lord Cooke of Thorndon said (at [32]) 'the *Wednesbury* case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation'. This dictum would be disputed by many constitutional authorities.

26.71. In *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, at [104] Lord Hope of Craighead said-

> 'But art 13 of the convention, to which s 7 [of the Human Rights Act 1998] gives effect, is not one of the convention rights mentioned in s 1(1). I do not think it is open to the court to make a different choice from that which was made by Parliament.'

26.72. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, at [30] Lord Woolf CJ said: 'If courts of first instance

are encouraged to deal with Human Rights Act issues summarily . . . the Court of Appeal will have to be flexible in relation to its own procedures'.

Duty to take account of Convention jurisprudence (Code s 420) [HRA 1998 s 2]

26.73. In *Gough and another v Chief Constable of the Derbyshire Constabulary and other cases* [2001] EWHC Admin 554, [2001] 4 All ER 289, at [32] Laws LJ said that the court's duty 'is to take account of the Strasbourg jurisprudence, not necessarily to apply it'.

Compatible construction rule (Code s 421) [HRA 1998 ss 3 and 21(1)]

26.74. Unless the legislation under question would otherwise be in breach of the Convention, the Human Rights Act 1998 s 3(1) can be ignored: *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA 595, [2001] 4 All ER 604, *per* Lord Woolf CJ at [75] (cited by Lord Hope of Craighead in *R v A* [2001] UKHL 25, [2001] 3 All ER 1 at [58]). In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, at [75]-[78] Lord Woolf CJ gave further valuable guidance on s 3(1).

26.75. The fad has developed (see eg *R v A* [2001] UKHL 25, [2001] 3 All ER 1 at [25]) of saying that, when the Human Rights Act 1998 s 3(1) is applied to an enactment, the enactment is 'read down' in arriving at its legal meaning. This solecism is not helpful, especially in view of the fact that s 3(1) applies only where the reading it imposes is 'possible'. As Lord Steyn makes clear in a lengthy obiter dictum on the effect of s 3(1) (see *R v A* [2001] UKHL 25, [2001] 3 All ER 1 at [44], [45]) 'reading down' is nothing but a euphemism for strained construction (Lord Clyde confirms this at [136]). It would surely be better for the courts to avoid this euphemism and employ the more accurate and illuminating term 'strained construction'. On the effect of s 3(1) see also Lord Hope of Craighead at [108], [109], where he says that s 3(1) is only a rule of construction and does not entitle judges to act as legislators.

26.76. In *R v Offen and other cases* [2001] 2 All ER 154 the Court of Appeal applied the Human Rights Act 1998 s 3(1) to the construction of the Crime (Sentences) Act 1997 s 2 (now the Powers of the Criminal Courts (Sentencing) Act 2000 s 109).This requires the sentencing court, on conviction of a second 'serious offence', to impose a life sentence unless there are 'exceptional circumstances'. The effect of applying s 3(1) was to alter the construction of this phrase previously laid down by the Court of Appeal (which would otherwise have been binding) so as to limit 'exceptional circumstances' to the case where the offender constitutes a significant risk to the public. Lord Woolf CJ said (at [100]) that this would give effect to the intention of the legislature. It 'provides a good example of how the 1998 Act can have a beneficial effect on the administration of justice, without defeating the policy which Parliament was seeking to implement'.

26.77. In *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577 the House of Lords held that the effect of s 3(1) was that what hitherto been regarded as a legal or persuasive burden placed on an accused by the Misuse of Drugs Act 1971 s 28 should now be treated as a merely evidential burden.

26.78. In *R (on the application of Lichniak) v Secretary of State for the Home Department and other cases* [2001] EWHC Admin 294, [2001] 4 All ER 934, the Court of Appeal purported to rely on s 3(1) as giving it a jurisdiction to hear the case which, it is submitted, it plainly did not have. The case was an appeal against a life sentence imposed by virtue of the Murder (Abolition of Death Penalty) Act 1965 s 1. This is a sentence 'fixed by law' within the meaning of the Criminal Appeal Act 1968 s 9. This gives jurisdiction to the Court of Appeal on an appeal 'against any sentence (not being a sentence fixed by law)'. The meaning

of these provisions is crystal clear, and it must be regarded as per incuriam for the Court of Appeal to purport to give them a different meaning by virtue of s 3(1). Such a reading is obviously not on any view 'possible' as s 3(1) requires.

Judicial declaration of incompatibility (primary legislation) (Code s 422) [HRA 1998 s 4(1) and (2)]

26.79. The fact that an enactment *might* be applied in a way contravening a Convention right does not justify a declaration of incompatibility if it is 'possible' that the enactment *could* be applied in a way which does not contravene that right. In *Re K (a child) (secure accommodation order: right to liberty)* [2001] 2 All ER 719 the Court of Appeal used this ground when it declined to make such a declaration regarding the Children Act 1989 s 25 (power to make a secure accommodation order in respect of a child). Butler-Sloss P (at [41]) cited an extra-judicial observation of Lord Cooke of Thorndon that the Human Rights Act 1998 s 3(1) requires search for a possible meaning of an enactment that would prevent the making of a declaration of incompatibility. However in *Re K* it was not the legal meaning of the enactment that was in question but possible uses of the power it conferred. The court held that in the instant case the order made did not contravene the Convention right in question.

26.80. In *R v A* [2001] UKHL 25, [2001] 3 All ER 1 at [44] Lord Steyn cited with approval the statement by Lord Irvine of Lairg LC that 'in 99 per cent of cases that will arise, there will be no need for judicial declarations of incompatibility'. This indicates, what is already apparent, that the courts are on a course of neglecting to use the power to make such a declaration in favour of applying strained constructions under the Human Rights Act 1998 s 3(1). This is unfortunate for the health of statute law. A declaration of incompatibility is likely to be followed by a textual amendment of the enactment in question under the fast-track procedure (see s 10 of the 1998 Act). That has the great advantage of clarifying the enactment for the future and enhancing legal certainty. Judging by the speeches in *R v A* [2001] UKHL 25, [2001] 3 All ER 1 the application by the courts of s 3(1) is likely to leave highly uncertain the legal meaning of the enactment affected (see however the views expressed by Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, at [79]-[81]). It needs to be borne in mind that, as Morritt V-C said in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229, at [47], a declaration of incompatibility serves a legislative purpose in that it provides a basis for a Minister of the Crown to consider whether there are compelling reasons to make textual amendments to the legislation by remedial order. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, at [73] Lord Woolf CJ said 'if we decided there was a contravention of art 8, the Department would prefer us not to interpret s 21(4) [of the Housing Act 1988] constructively [ie under s 3(1) of the 1998 Act] but instead to grant a declaration of incompatibility'. Remarkably this suggests that civil servants may have a higher awareness than judges of the social value of certainty in law.

26.81. In *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229 the Court of Appeal held that the Consumer Credit Act 1974 s 127(3) was incompatible with the Convention rights under art 6(1) of the Convention and art 1 of the First Protocol. They held that s 3(1) of the Human Rights Act 1998 did not enable s 127(3) to be read and given effect conformably with these provisions. Accordingly they held (at [50]) that a declaration of incompatibility should be made by the court.

Joinder of Crown where incompatibility declaration expected (Code s 425) [HRA 1998 s 5.]

26.82. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, at [15]-[20] Lord Woolf CJ outlined the procedure required by the Human Rights Act 1998 s 5.

Ministers' statements of compatibility regarding Bills (Code s 426) [HRA 1998 s 19.]

26.83. In *R v A* [2001] UKHL 25, [2001] 3 All ER 1, at [69] Lord Hope of Graighead said of Ministers' statements of compatibility -

> '. . . these statements may serve a useful purpose in Parliament. They may also be seen as part of the parliamentary history, indicating that it was not Parliament's intention to cut across a convention right . . . No doubt they are based on the best advice that is available. But they are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have any persuasive authority.'

Illegality of incompatible acts and omissions of public authorities (Code s 432) [HRA 1998 s 6(1).]

26.84. In *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577 the House of Lords was faced with the question whether the Human Rights Act 1998 s 6(1) operates so as to require a court which decides an appeal after the time of the commencement of s 6(1) (2 October 2000) against a conviction before that time was required to allow the appeal if the conviction would have contravened a Convention right had the 1998 Act been in force at the date of the trial. The argument in favour of this reading was that if the court denied the appeal it would be acting 'in a way which is incompatible with a Convention right' within the meaning of s 6(1). The contrary argument was that this reading would give s 6(1) a retrospective effect and s 22(4) of the 1998 Act had provided expressly for such retrospective effect as the Act was intended to have, which did not include this. The House (Lord Steyn dissenting) decided, it is submitted correctly, in favour of the latter view. However in *R v Kansal (No 2)* [2001] *The Times* 4 December the House of Lords, by a majority of 3 to 2, expressed the view that this decision was wrong. Nevertheless they elected to follow it, thus treating it as good law in accordance with the old doctrine of precedent (that is prior to the Gardiner ruling that the House could overrule its previous decisions: [1966] 1 WLR 1234).

Relying on incompatible acts and omissions in legal proceedings (Code s 436) [HRA 1998 ss 7(1)(b), (3) and (6) and 22(4).]

26.85. The Human Rights Act 1998 s 7(1)(b) applies not only to a trial but to an appeal arising out of that trial: *R v Benjafield, R v Leal, R v Rezvi, R v Milford* [2001] 2 All ER 609 at [50]. Where the appeal takes place on or after 2 October 2000 the appellant is entitled to rely on ss 7(1)(b) and 22(4) even though the trial took place before that date: ibid at [51]. In such a case s 3(1) of the Act has retrospective effect: ibid at [53]. In *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, at [104] Lord Hope of Craighead, following Morritt V-C in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229 at [20], [21], said-

> 'The effect of s 22(4) is to limit the extent to which s 7(1)(b) can be applied retrospectively. It can be used retrospectively in proceedings brought *by* or at the instigation of public authorities. – that is to say to enable a person to rely on the convention right or rights *defensively* . . . The appeal is treated by the 1998 Act as if it were part of the same legal proceedings as those brought by or at the instance of the public authority, irrespective of the person at whose instance the appeal is brought. But it is plain that s 22(4) may not be used with retrospective effect in proceedings brought *against* a public authority.' (Italics by Lord Hope of Craighead.)

26.86. For an example of such defensive use of s 7(1)(b) by virtue of s 22(4) see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, [2001] 3 All ER 393.

Remedies for incompatible acts and omissions: damages (Code s 438) [HRA 1998 s 8(2)-(6)]

26.87. In *Marcic v Thames Water Utilities Ltd (No 2)* [2001] 4 All ER 326 Judge Havery QC applied the Human Rights Act 1998 s 8(4) (see [14], [15]). At [20] he referred to 'the voluminous report of the Law Commission (Law Com no 266) and the Scottish Law Commission (Scot Law Com no 180) entitled *Damages under the Human Rights Act 1998'*.

Special provision regarding Article 10 (freedom of expression) (Code s 461) [HRA 1998 s 12]

26.88. The Court of Appeal held that the Human Rights Act 1998 s 12(3) does not seek to give priority to one Convention right over another but simply deals with the interlocutory stage of proceedings where prior restraint is in question: *Douglas and others v Hello! Ltd* [2001] 2 All ER 289. In that case Keene LJ (at [152]) said the jurisprudence of the ECtHR is generally hostile to prior restraint by the courts. He added that on its literal meaning s 12(3) was not incompatible with the Convention, so no strained reading of the language of s 12(3) (under s 3(1)) was needed to render it compatible with the Convention rights.

26.89. In *Imutran Ltd v Uncaged Campaigns Ltd and another* [2001] 2 All ER 385 at [17] Morritt V-C ruled that the threshold test 'is likely to establish' in s 12(3) is slightly higher in the scale of probability than 'a real prospect of succeeding' as laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504. He also ruled (at [19]) that s 12(3) does not require the court to place an even greater weight on the importance of freedom of speech than it already does.

Defined terms (Code s 462)

act [HRA 1998 s 6(6)]

26.90. For a case where a failure to act by a public authority was held actionable under the 1998 Act see *Marcic v Thames Water Utilities Ltd* [2001] 3 All ER 698 (failure to carry out works needed to prevent flooding).

public authority [HRA 1998 ss 6(3)-(5) and 21(1)]

26.91. In *Venables and another v News Group Newspapers Ltd and others* [2001] 1 All ER 908 at 917 Dame Elizabeth Butler-Sloss P said 'It is clear that, although operating in the public domain and fulfilling a public service, the defendant newspapers [News Group Newspapers Ltd] cannot sensibly be said to come within the definition of public authority in s 6(1) of the 1998 Act. Consequently, convention rights are not directly enforceable against the defendants; see ss 7(1) and 8 of the 1998 Act. That is not, however the end of the matter, since the court is a public authority, see s 6(3), and must itself act in a way compatible with the convention . . .' *Held* In view of earlier authority, the Family Division was required to give horizontal effect (as between one private party and another) to art 10 of the convention. This did not mean creating a free-standing cause of action in reliance on art 10, but acting compatibly with it in adjudicating upon existing common law causes of action.

26.92. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, at [58]-[66] Lord Woolf CJ gave valuable guidance on what is a 'public authority', particularly having regard to the relevance of case law on which authorities are subject to judicial review. He drew a useful distinction (at [63]) between *standard* public authorities (which are public authorities generally), *functional* public authorities (which are public authorities only in certain respects, because of particular functions they perform), and courts and tribunals.

26.93. In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713, [2001] 3 All ER 393 the Court of Appeal held that a parochial church council is a public authority within the meaning of s 6(1) of the 1998 Act. This because it falls within either what Morritt V-C (at [33]) called the principal or the hybrid class of such authorities (see also [35]).

26.94. In *Royal Society for the Prevention of Cruelty to Animals v Attorney General and others* [2001] 3 All ER 530 Lightman J held that the RSPCA is not a public authority within the meaning of s 6(1) of the 1998 Act and has no functions of a public nature as mentioned in s 6(3)(b).