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Statute Law

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Introductory note

[1] This section of the Review conforms to the Code set out in the fourth edition (2002) of the author's textbook *Statutory Interpretation* as updated by the 2005 Supplement to that work. Material originating in 2005 which appears in the Supplement is not repeated here.

[2] A reference to the relevant section of the Code is given after each heading in the notes below, where the main work is referred to as 'Code'. Page numbers refer to the fourth edition pagination except where they have an S prefix, when they refer to the 2005 Supplement.

Interpreter's duty to arrive at legal meaning (Code s 2, p 14)

[3] A word or phrase may have 'a special legal meaning derived from its legislative history': *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304, at [29].

Duty to obey legislation (Code s 8, p 26)

[4] *How far compliance need be exact* As to service of a notice or other document electronically see *Clark v Midland Packaging Ltd* [2005] 2 All ER 266.

Ignorantia juris neminam excusat (Code s 9)

[5] On p 29, at end of footnote 10, insert: See further *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General* [2005] EWCA Civ 78, [2005] 3 All ER 1025.

Mandatory and directory requirements (Code s 10)

[6] *General* (pp 30-31) There is a recent tendency of some judges to criticise the long-standing and useful distinction between mandatory and directory requirements as too rigid. However, as Lord Carswell said in *R v Soneji and another* [2005] UKHL 49, [2005] 4 All ER 321, at [63], there is 'value still in the principles enshrined in the dichotomy, particularly that which relates to substantial performance'.

[7] *Jurisdiction* (pp 36-37) Where a court order is a nullity because made without jurisdiction it has no effect for the purposes of any enactment referring to such an order: see for example *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 4 All ER 52, at [23], [28] (decision without jurisdiction purporting to be made under Arbitration Act 1996 s 44 not to be treated as made under that section for purposes of subs (7) thereof, requiring leave to appeal). See further the *Scherer* principle (Code, p 114).

[8] In the 2005 Supplement p S5 there is a reference, in connection with footnote 6 on p 33, to *R v McFaul, R v Knights and another* [2002] EWCA Crim 2954, [2003] 3 All

ER 508. The *Knights* decision was approved in ***R v Knights and another*** [2005] UKHL 50, [2005] 4 All ER 347.

The tort of breach of statutory duty (Code s 14)

[9] *Misfeasance in public office* (Code pp 55-56) In footnote 1 on p 56 at end insert: *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] 4 All ER 303.

Administrative or executive agencies (Code s 15)

[10] *Government departments* (pp 67-69) In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129, at [11], Lord Hoffmann, citing *Harrison v Bush* (1855) 5 E & B 344 at 352, 119 ER 509 at 513, said that the office of Secretary of State is in theory one and indivisible. (For the reasons given in the Comment to Code s 15 this is clearly not the case.) It was held at [32] that a Government official who is a decision-maker in relation to an enactment is not, because of knowledge held by another official 'deemed to know anything which he did not actually know'.

[11] *Delegation of administrative powers: the Carltona principle* (pp70-71) As to the imputation of knowledge held by one relevant Government official but not by another see *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129, at [11].

Courts and other adjudicating authorities (Code s 19)

[12] *Jurisdiction* (pp 80-83) There is statutory authority for drawing a distinction between a court or tribunal (a) exceeding its powers and (b) exceeding its 'substantive jurisdiction': Arbitration Act 1996 s 68(2)(b) (see *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43, [2005] 3 All ER 789, at [51]).

[13] In footnote 4 on p 81 at end insert: For a different rule in public law and public interest cases see Code p 109.

[14] *Ouster of jurisdiction* (pp 83-85) On page 83, after first paragraph under this heading, insert-

> The basic distinction is between courts of full jurisdiction and courts of limited jurisdiction. In a case where the issue was the legal meaning of a provision in the Companies Act 1948 s 441 (repealed) that a 'decision of a judge of the High Court . . . on an application under this section shall not be appealable' Lord Diplock explained this distinction as follows (Re Racal Communications Ltd [1981 AC 374 at 384, cited G v Secretary of State for the Home Department [2004] EWCA Civ 265, [2005] 2 All ER 882, at [19])-
>
> > 'There is . . . an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required, to construe the words of the statute by which the question submitted to his jurisdiction was defined. There is simply no room for error going to his jurisdiction, nor . . . is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can

be corrected only by means of appeal to an appellate court, and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.'

[15] *Open court principle* (pp 90-92) For the last heading on p S10 of 2005 Supplement ('After last line insert') substitute: 'After last line of Comment on s 19 insert'.

[16] After material inserted in p 92 by pp S10-S11 of 2005 Supplement insert-

> The court has no power under the Contempt of Court Act 1981 s 11 to restrain publication of evidence given in open court: ***R v Hasan*** [2005] UKHL 22, [2005] 4 All ER 685, at [2].

Interpretation by adjudicating authorities (Code s 20)

[17] *Nature of discretion* (pp 96-97) Four lines from the bottom on page 96, for 'House of Lords' substitute 'Court of Appeal'.

[18] *Discretion confused with judgment* (pp 97-98) As to the erroneous contention by the Office of Fair Trading that it has a discretion (rather than a duty to exercise judgment) under the Enterprise Act 2002 s 33(1) see ***UniChem Ltd v Office of Fair Trading*** [2005] CAT 8, [2005] All ER 440.

Doctrine of judicial notice (Code s 21)

[19] *Judicial notice of fact* (pp 103-104) In ***R (on the application of Gillan and another) v Metropolitan Police Commissioner and another*** [2004] EWCA Civ 1067, [2005] 1 All ER 970, at [50], Lord Woolf CJ indicated that the court would take judicial notice of the prevalence of terrorism: 'The scale of terrorist incidents around the globe is so well known that it hardly requires evidence to establish that this country is faced with a real possibility of terrorist incidents.'

Adjudicating authorities with appellate jurisdiction (Code s 23)

[20] *Academic points* (p 109) In footnote 8 on page 109 insert at end: See further ***Bowman v Fels*** [2005] EWCA Civ 226, [2005] 4 All ER 609 (principle of hearing public law cases even where there is no ***lis*** extended to private law cases of public importance).

[21] *Judicial and administrative discretion* (p 110) In footnote 4 on page 110 insert at end: See further ***Re J (a child) (return to foreign jurisdiction: convention rights)*** [2005] UKHL 40, [2005] 3 All ER 291, at [12].

[22] *Court of Appeal* (pp 113-116) In ***G v Secretary of State for the Home Department*** [2004] EWCA Civ 265, [2005] 2 All ER 882, at [13], Lord Phillips of Worth Matravers MR said-

> 'The Court of Appeal is a creature of statute and has no jurisdiction other than that accorded by statute or that which is ancillary to such jurisdiction by reason of implication – see ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528.'

[23] *Appeal from appeal decision* As to restrictions on appealing from an appeal decision see ***Uphill v BRB Residuary) Ltd*** [2005] EWCA Civ 60, [2005] 3 All ER 264.

[24] In footnote 9 on page 114 insert at end: See further ***Cetelem SA v Roust Holdings Ltd*** [2005] EWCA Civ 618, [2005] 4 All ER 52, at [23], [28], Code p 36.

Judicial review (Code s 24)

[25] *Nature of jurisdiction* (p 121) In ***R (on the application of The Noble Organisation Ltd) v Thanet District Council (Rosefarm Estates PLC and Rank Group PLC interested parties)*** [2005] EWCA Civ 782, at [68], the Court of Appeal expressed dissatisfaction 'at the way the availability of the remedy of judicial review can be exploited – some

might say abused – as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments . . . This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest . . . However seemingly complicated the issues are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.'

[26] *Public law* (pp 119-120) For the case where pursuit of a private remedy instead of judicial review may be an abuse of process see *Phonographic Performance Ltd v Department of Trade and Industry and another* [2004] EWHC 1795 (Ch), [2005] 1 All ER 369.

Dynamic processing (doctrine of precedent) (Code s 26)

[27] *Sub-rules* (p 133) After Example 26.2 insert the following-

> *Example 26.2A* In *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134, [2005] 3 All ER 135, the Court of Appeal held that the rule in *The Sardinia Sulcis* (laid down in *The Sardinia Sulcis and Al Tawwab* 1 [1991] 1 Lloyd's Rep 201) should not continue to apply now that it was CPR 19.5 that implemented the Limitation Act 1980 s 35. Jacob LJ said at [37], [40], [42]-
>
> 'Citation of old authorities under different rules simply obscures the debate. *The Sardinia Sulcis* should be allowed to sink back to the ocean bottom . . . The jurisdiction is for putting things right . . . There is no prejudice to the defendants. They are deprived of an unmeritorious defence arising solely from a blunder by the other side – and that does not count as prejudice.'

[28] *Prospective overruling* No court, not even the House of Lords, has power to overrule a decision with effect only for future cases: *Re Spectrum Plus Ltd, National Westminster Bank plc v Re Spectrum Plus Ltd and others* [2005] UKHL 41, [2005] 4 All ER 209. Such a profound constitutional change would require legislation.

Definition of an Act (Code s 27)

[29] A draft Bill (see 2005 Supplement p S14) was referred to for interpretation of an Act in *Ward v Metropolitan Police Commissioner and another* [2005] UKHL 32, [2005] 3 All ER 1013, at [27].

Official published editions of Acts (Code s 46)

[30] *Statutory Publications Office (SPO)* The Statute Law Database (SLD) is currently under development by the Statutory Publications Office (SPO). When complete, SLD will be published as the official revised version of the UK statute book. The SPO have commissioned a new electronic system for the maintenance of SLD. The new SLD will be made available to government users through the Government Secure Intranet (GSI) following a pilot exercise during the course of 2005. Once the GSI service has been successfully launched, it is planned to release a version of SLD to the general public. This is currently scheduled for Spring 2006.

[31] In the meantime, Acts from 1988 onwards can be viewed on the website of the Office of Public Sector Information at http://www.opsi.gov.uk. Earlier Acts are not available in electronic form because they were printed in the traditional way. This is ironical in view of the fact that Acts were being officially drafted electronically (by the present author) as early as 1975: see F A R Bennion, 'A Computer Experiment in Legislative Drafting', *Computers and Law*, November 1975, http://www.francisbennion.com/pdfs/fb/1975/1975-004-computers-and-drafting.pdf.

Challenge to validity of an Act (Code s 47)

[32] On p 190, before paragraph beginning *Evidence that amendments not agreed*, insert-

> As to a case where the Lords did not pass a Bill subsequently enacted under the Parliament Act 1911 (see Code ss 43, 44) see ***R (on the application of Jackson and others) v Attorney General*** [2005] UKHL 56, [2005] 4 All ER 1253, where the validity of the Parliament Act 1949 was upheld.

Nature of delegated legislation (Code s 50)

[33] On p 197, before paragraph beginning *Reasons for delegation*, insert-

> Where an Act remodels the primary legislative procedure, as the Parliament Act 1911 did in reducing the power of the House of Lords to reject or delay public Bills (see Code ss 43, 44), the product of the remodelled process is primary rather than delegated legislation: ***R (on the application of Jackson and others) v Attorney General*** [2005] UKHL 56, [2005] 4 All ER 1253. In that case the House of Lords (see eg [91]-[93]) upheld the decision of the Divisional Court in ***R (on the application of Jackson and others) v Attorney General*** [2005] EWHC 94 (Admin), [2005] All ER (D) 285, where Maurice Kay LJ said at [23]: '. . . the language of "redefinition" or "remodelling" (the latter being the word used by Francis Bennion in his helpful article 'Is the New Hunting Act Valid?' *Justice of the Peace*, 27 November 2004, 928) is more appropriate than that of "delegation"'.

Meaning of 'commencement' (Code s 71)

[34] In footnote 4 on page 231 at end add: Followed in ***North British Housing Association Ltd v Matthews and other appeals; London and Quadrant Housing Trust v Morgan*** [2004] EWCA Civ 1736, [2005] 2 All ER 667: see Example 319.6A.

Textual amendment (Code s 78)

[35] On p 241, at end of paragraph before Example 78.6, delete the passage inserted on p S16 of 2005 Supplement and insert-

> (The foregoing has been judicially approved: see ***Brown and another v Bennett and others*** [2002] 2 All ER 273, at [40]-[42]; ***Medcalf v Mardell and others*** [2002] UKHL 27, [2002] 3 All ER 721, at [20].)

Presumption against retrospective operation (Code s 97)

[36] On p 266, after footnote reference 9, insert-

> There is of course no room for the presumption where the enactment is expressly stated to be retrospective.
>
> > *Example* 97.00 The Nationality, Immigration and Asylum Act 2002 s 67(3) says that the section 'shall be treated as always having had effect' (see Example 316.9).

Basic rule as to extent of an Act (Code s 102)

[37] It is the constitutional practice to frame a provision which limits the extent of an Act to a part only of the territories which are within the jurisdiction of Parliament in a way which does not truncate a discrete portion of those territories, as for example by stating that it extends to England only or to Wales only (England and Wales being still regarded, despite the limited devolution effected by the Government of Wales Act 1998, as a single constitutional unit).

> *Example 102.2* The Age-Related Payments Act 2004 s 10 says-
>
> This Act shall extend only to-
> (a) England and Wales, and
> (b) Scotland.

[38] Here it should be noted that there is a difference between extent and effect. An Act may extend to say England and Wales in the sense of forming part of the law of England and Wales even though its effect is felt only in Wales, or even in a part only of Wales (for example an Act dealing solely with the Millennium Stadium in Cardiff).

[39] (For the suggestion that recent changes mean that Wales should now be treated as a separate territory for purposes of extent see Timothy H Jones and Jane M Williams, 'Wales as a Jurisdiction' [2004] PL 78; Timothy H Jones, John H Turnbull and Jane M Williams, 'The Law of Wales or The Law of England and Wales?' [2005 26 Stat LR 135.)

Presumption of United Kingdom extent (Code s 106)

[40] This section of the Code was accepted by the Court of Appeal in *R (on the application of B and others) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, at [68], and applied by Stanley Burnton J in *R (on the application of Carson) v Secretary of State for Work and Pensions (Commonwealth of Australia interested party)* [2002] EWHC 978 (Admin), at [19], where he said-

> 'Parliament is presumed to intend an Act to extend to each territory of the United Kingdom, but not to any territory outside the United Kingdom: see *Bennion*, S*tatutory Interpretation*, [4th] edition, at section 106, page [282]. The comity of nations is doubtless one basis for this presumption: one state should not be taken to interfere with the sovereignty of another state by enacting legislation extending to its territory. Another is practicality: most legislation cannot practically be applied to those present in another state.

General principles as to application (Code s 128)

[41] This section of the Code was accepted by the Court of Appeal in *R (on the application of B and others) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, at [68].

Deemed location of an artificial person (Code s 135)

[42] *Piercing the corporate veil* In footnote 8 on p 332 at end insert: See further *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391, at [45]-[48].

Applying the enactment to the facts (Code s 136)

[43] *Recusal by judge* (p 335) As to recusal by a judge see *Phillips and others v Symes and others* [2004] EWHC 2330 (Ch), [205] 4 All ER519, at [41]-[51].

Opposing constructions of an enactment (Code s 149)

[44] *The adversarial system* (pp 371-372) At end of passage inserted at p 371 by 2005 Supplement p S20 insert-

> In *R (on the application of H) v Secretary of State for Health* [2004] EWCA Civ 1609, [2005] 3 All ER 468, at [27], Buxton LJ rebuked counsel for saying she was 'neutral' on which of two possible courses the court should take. The court may raise a point of its own motion (see eg *R (on the application of Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114, at [10]).

When implications are legitimate (Code s 174)

[45] *Implied ancillary powers* (pp 429-430) On page 429, in footnote 5, at end insert-

> This passage of the Code was upheld in *Ward v Metropolitan Police Commissioner and another* [2005] UKHL 32, [2005] 3 All ER 1013, at [23].

[46] On p 430, after Example 174.4 insert-

Example 174.5 Without specific statutory power, a local authority can set up an inquiry for any purpose connected with its functions: see *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 962, at [110].

[47] On page 430, in footnote 1, at end insert: This decision was followed in *Ward v Metropolitan Police Commissioner and another* [2005] UKHL 32, [2005] 3 All ER 1013, at [23].

[48] On page 430, in footnote 7, insert after the reference to *Symphony Group plc v Hodgson* a reference to *Phillips and others v Symes and others* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519.

Interstitial articulation by the court (Code s 179)

[49] *Example 179.7* (p 438) Renumber Example 179.7 added by 2005 Supplement p S23 as Example 179.6A and insert the following-

Example 179.6B Dyson LJ held that the reference in CPR 52.13(2)(a) to 'an important point of principle or practice' should be treated as if the words 'that has not yet been established' were included at the end (see *Uphill v BRB Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264, at [18]).

Example 179.6C Lightman J held that the statement in CPR 1.3 that the parties are required to help the court further the objective of dealing with cases justly should be treated as if the words 'That must include assisting the court to further the objective by co-operating with each other' were included at the end (see *Hertsmere Primary Care Trust and others v Administrators of Balasubramanium's Estate and another* [2005] EWHC 320 (Ch), [2005] 3 All ER 274, at [11]).

The plain meaning rule (Code s 195)

[50] *Composite formula* After the passage with this heading in 2005 Supplement p S24 insert-

In *Morgans v Alpha Plus Security Ltd* [2005] 4 All ER 655, at [22.3], Burton J said leaving it to the good sense of the employment tribunal when deciding on the amount of compensation under the Employment Rights Act 1996 s 123 to determine when and whether and to what extent to disregard receipts by the claimant would be 'to legitimise the palm tree justice which Brooks LJ and Lord Steyn deprecated in *Dunnachie's* case (see [2004] 3 All ER 1011 at [26])'.

Statutory definitions (Code s 199)

[51] *Potency of the term defined* (pp 480-482). On p 480, before Example 199.2. insert-

Thus in *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47, [2005] 4 All ER 107, at [18], Lord Hoffmann said-

'. . . a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean.'

The Interpretation Act 1978 (Code s 200)

[52] *The term 'person'* (pp 492-493) In footnote 1 on page 492 at end insert: See further *Huntingdon Life Sciences Group plc and another v Cass and others* [2005] EWHC 2233 (QB), [2005] 4 All ER 899.

The 'context' of an enactment (Code s 202)

[53] On page 503, at end of text, insert-

Example 202.2 In *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47, [2005] 4 All ER 107, the House of Lords construed the Finance Act 1989 s 43(11)(a) by reference to a later enactment. The favoured construction would give rise to an anomaly unfair to the taxpayer. Lord Hoffmann said at [20]-

> 'But precisely that result has been achieved by s 143 and Sch 24 to the Finance Act 2003, which replaced s 43(11)(a) . . . The anomaly and unfairness has therefore not troubled a more recent Parliament and may not have troubled the Parliament of 1989.'

The pre-Act law (Code s 210)

[54] In footnote 1 on page 513 add a reference to *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304.

Codifying Acts (Code s 212)

[55] *Correction of error* On page 519 the words ending '. . . consistent with the Act' following the indicator for footnote 5 should be moved to the end of the footnote.

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

[56] In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304, at [15], Mummery LJ said of the Limitation Act 1980 s 24(1)-

> 'In interpreting s 24(1) the court *is not entitled to take into account [the recommendations of the Law Reform Committee] acted on by Parliament in the subsequent legislation*, but it is entitled to have regard to the statements contained in the report of the mischief aimed at and of the state of the law as it was then understood to be by the Committee . . .' (emphasis added).

[57] It is submitted that, in the light of dicta cited in the Comment to Code s 216, the italicised words are not good law; and that it is open to the court in such a case to have regard to all statements made in the report, giving each the weight to which it is entitled according to the fact of the matter.

Use of explanatory memoranda (Code s 219)

[58] *Textual memoranda* (p 544)

An alternative to the distribution of an individual textual memorandum to MPs or peers considering a Bill which makes extensive textual amendments to an Act is the current practice of making such a memorandum available in the Library of the House. (See eg Lords Hansard, 11 October 2005, col 167 (Racial and Religious Hatred Bill).)

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

[59] *Contrary to principle* (pp 546-547) The growing judicial disillusionment with the rule in *Pepper v Hart* is reflected in Lord Hoffmann's comment in *R (on the application of Quintavalle) v Secretary of State for Health* [2005] UKHL 28, [2005] 2 All ER 555, at [34], following citation of Hansard by opposing counsel as authority for rival contentions, that '[as] is almost invariably the case when such statements are tendered under the rule . . . I found neither of any assistance'.

[60] *Article 9 of Bill of Rights* (pp 567-569) For the effect of article 9 of the Bill of Rights 1689 in protecting Members of Parliament from defamation proceedings see *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273.

Nature of legal policy (Code s 263)

[61] *Obedience to Parliament* (p 668) After Example 263.7B insert-

> The parliamentary authorisation of conditional fee agreements (CFAs) was a

departure from traditional legal policy. In *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, at [54], Lord Carswell said-

> 'It has to be said that there are many who regard the imbalance in the system adopted in England and Wales as most unjust. The regimen of CFAs and the imposition of these charges upon the losing party is, however, legislative policy which the courts must accept . . .'

[62] The same applies to the confiscation of property acquired by criminal means.

> *Example 263.7C* In *R v Soneji and another* [2005] UKHL 49, [2005] 4 All ER 321, at [2], Lord Steyn said: 'Parliament has firmly adopted the policy that in the fight against serious crime, apart from ordinary sentences, a high priority must be given by the courts to the making of confiscation orders against defendants convicted of serious offences.'

[63] This sort of guidance by Parliament has been called a 'legislative steer': see *Re Peters* [1998] 3 All ER 46 at 51, [1988] QB 871 at 879; *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391, at [20], [43].

[64] *Categories of legal policy: Morality* (pp 666-667) It is because the final arbiter of legal policy in criminal matters should be the humble juror that the judge is not allowed to instruct the jury to return a guilty verdict: *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782.

Law should be just (Code s 265)

[65] *Fairness* (pp 680-681) After Example 265.5 on p 681 insert-

> In dealing with any matter involving the Crown 'the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state': *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391, at [56].

Law should be certain and predictable (Code s 266)

[66] *Legal certainty* (p 683) The purpose of the Arbitration Act 1996 was to reduce drastically judicial intervention in the arbitration process and promote one-stop adjudication: *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43, [2005] 3 All ER 789, at [26], [33].

Principle against penalisation under a doubtful law (Code s 271)

[67] *General* (p 705) In *R v Z* [2005] UKHL 35, [2005] 3 All ER 95, at [16], Lord Bingham of Cornhill referred to

> '. . . the important principle of legal policy, exemplified by *Tuck & Sons v Priester* (1887) 19 QBD 629, that *a person should not be penalised except under clear law*, should not (as it is sometimes said) be put in peril on an ambiguity: see *Bennion on Statutory Interpretation* (4th edn, 2002) p 705.' (Emphasis added; the italicised words repeat the formulation in Code s 271).

[68] The finding of the House of Lords in this case that the Real IRA was a proscribed organization was contrary to the view of the present author as expressed in 'Is the Real IRA a Proscribed Organisation?' 168 JP (19 June 2004) 472 and 'The IRA is Proscribed After All' 168 JP (4 September 2004) 694.

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

[69] *Right of litigious control* (pp 730-732) After second complete paragraph on p 731 insert-

> The court will construe narrowly any enactment which appears to restrict the rights of parties and legal advisers in relation to litigation. See eg *Bowman v Fels*

[2005] EWCA Civ 226, [2005] 4 All ER 609 (construction of Proceeds of Crime Act 2002 s 328). For such an enactment see Courts and Legal Services Act 1990 s 28 (rights to conduct litigation).

[70] *Neutral citation of judgments* (p 732) From 14 January 2002 the practice of neutral citation of judgments was extended to all judgments given by judges in the High Court in London: see *Practice Direction* [2002] 1 All ER 351, para 1. 'Although the judges cannot dictate the form in which law publishers reproduce the judgments of the court, this form of citation contains the official number given to each judgment which they hope will be reproduced wherever the judgment is republished, in addition to the reference given in any particular series of reports: see ibid, para 6.

Presumption favouring consequential construction (Code s 286)

[71] After fifth line on p 747 insert-

Example 286.0 In *9 Cornwell Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2005] 4 All ER 1207 the Court of Appeal considered the *Cadogan v Morris* principle, where the consequences of specifying an artificial price in a statutory notice are considered to be so adverse as to invalidate the notice.

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

[72] In footnote 3 on p 763, at end insert: See further *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 962, at [85], [86].

[73] *Changes in the mischief* (pp 767-768) In Example 288.3A (inserted by the 2005 Supplement p S36) the reference to 'the same genus of facts' echoes the dictum of Lord Wilberforce in *Royal College of Nursing of the UK v Dept of Health and Social Security* [1981] 1 All ER 545 at 564-565, [1981] AC 800 at 822 that when a new state of affairs bearing on the policy of an Act comes into existence it may be held within the Act if it falls within 'the same genus of facts as those to which the expressed policy has been formulated'. On this see *R (on the application of Quintavalle) v Secretary of State for Health* [2005] UKHL 28, [2005] 2 All ER 555, at [30].

[74] *Changes in relevant law* (pp 768-771) In footnote 5 on p 768, at end insert: See further *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 962, at [85], [86].

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

[75] At end of Comment on p 830 insert-

In *Shanning International Ltd and others v Rasheed Bank and others* [2001] UKHL 31; [2001] 1 WLR 1462, Lord Steyn said at [24]-

'There is an illuminating discussion in *Cross, Statutory Interpretation*, 3rd ed. pp 105-112 of the correct approach to the construction of instruments of the European Community . . . The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by *Cross* (at p 107):

> "You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."

Cross points out that of the four methods of interpretation - literal, historical, schematic and teleological - the first is the least important and the last the most important. *Cross* makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with *Bennion, Statutory Interpretation*, [4th] ed, s 311, *Cross* states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, Cross points out that a purposive construction may yield either an expansive or restrictive interpretation.'

Presumption that 'absurd' result not intended (Code s 312)

[76] The fact that 'absurdity' can still be given its ordinary narrow meaning of contrary to reason is illustrated by *R v Connor, R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925, at [25], where Lord Steyn said of the Contempt of Court Act 1981 s 8(1) 'the notion that the Court of Appeal could be in contempt *of itself* if it exercised the jurisdiction to hear evidence about what happened in the jury room is an absurdity' (emphasis by Lord Steyn). See further *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1, at [25].

[77] *Strained construction* The court will apply a strained construction to avoid any form of absurdity. Thus in *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2004] EWHC 2019 (Admin), [2005] 2 All ER 181, Stanley Burnton J said at [25] of a proffered construction of the Extradition Act 2003 s 65: 'This result is so absurd that we would strain not to interpret the 2003 Act as producing it'. He added at [31]-

> 'Regrettably, ss 64 and 65 of the 2003 Act have not been drafted with the need to deal with trans-frontier offences taken expressly or clearly into account. We have reached our conclusion because of the need to arrive at a workable interpretation . . .'

[78] See further as to strained construction in relation to 'absurdity' Code pp 833-834.

Avoiding an unworkable or impracticable result (Code s 313)

[79] Insert the following after Example 313.00 (added by 2005 Supplement, p S38)-

> *Example 313.000* In *Re Loftus (deceased), Green and others v Gaul and others* [2005] EWHC 406 (Ch), [2005] 2 All ER 700, it was held that for the purposes of the Limitation Act 1980 s 22(a) time did not run (as might have been plausible) from the completion of an administration because that reading would have meant that in some cases the limitation period would never begin, rendering the Act unworkable.

Avoiding an inconvenient result (Code s 314)

[80] *Unnecessary technicality* (p 840) In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129, at [49], Baroness Hale of Richmond said that, in the case of a complex statutory system, 'if the specialist judiciary who do understand the system and the people it serves have established consistent principles, the generalist courts should respect those principles unless they can clearly be shown to be wrong in law'.

Avoiding an anomalous or illogical result (Code s 315)

[81] *Where anomaly intended* (pp 854-855) On the reasons for having statutes of limitation see further *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304, at [30], [31].

[82] In footnote 4 on p 854 at end insert: For an example of an intended anomaly see Example 202.2.

Avoiding a futile or pointless result (Code s 316)

[83] *Literal meaning too strong* (p 861) After Example 316.8 insert-

> *Example 316.9* In *R (on the application of Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114, the House of Lords held that the Nationality, Immigration and Asylum Act 2002 s 67 was an unnecessary enactment since what it purported to provide had always been the law.

Presumption that evasion of Act not allowed (Code s 319)

[84] *Fraud on an Act* (pp 868-870) Insert the following on page 870 before Example 319.7-

> *Example 319.6A* An adjournment of legal proceedings whose sole purpose is to await a future event which will defeat a claim is improper: *North British Housing Association Ltd v Matthews and other appeals; London and Quadrant Housing Trust v Morgan* [2004] EWCA Civ 1736, [2005] 2 All ER 667, at [35] (adjournment would have defeated policy of Housing Act 1988 and the right it conferred on a landlord).

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

[85] *Introductory* (p 887) The common law can be used to supplement deficiencies in an Act. Thus in *Government of Germany v Kleindschmidt and another* [2005] EWHC (Admin), [2005] 3 All ER 759, at [54], Sedley LJ said of the Extradition Act 2003-

> 'Since, remarkably, no provision is made in or under the Act for ensuring that defendants receive necessary documents in good time, the justice of the common law (as Byles J once called it) will supplement Parliament's prescription . . .'

[86] *Vacant provisions* (p 892) Where an Act contains what may be called a vacant provision, that is one unfurnished with details of the kind which must obviously be taken to be implied, the court will assume that the legislator intended it to draw on relevant ancillary rules for this purpose.

> *Example 327.8C* The Insolvency Act s 375(1) says that every court having jurisdiction for certain purposes may review, rescind or vary any order made by it in the exercise of that jurisdiction. This is a vacant provision because obviously all kinds of details need to be filled in by the courts as circumstances require. In *Papanicola (a trustee in bankruptcy for Mak) v Humphreys and others* [2005] EWHC 335 (Ch), [2005] 2 All ER 418, at [25], Laddie J drew up six infilling propositions derived from existing legal principles. He added a seventh by saying, at [37], 'the philosophy underlying CPR 39.3(3)-(5) applies'.

Presumed application of constitutional law rules (Code s 328)

[87] At beginning of third line on p 900 insert side heading *Civil and criminal law contrasted.*

[88] In footnote 3 on page 900 insert at end: See further *A-G v Able* [1984] 1 All ER 277 at 283-284, [1984] QB 795; *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609, at [18].

Law regulating decision making (Code s 329)

[89] *Proportionality* (p 904) (1) After indicator for footnote 5 insert: The doctrine of proportionality also applies in other areas of law. (2) After indicator for footnote 6 insert: It applies to charges of professional misconduct (see *Giele v General Medical Council* [2005] EWHC 2143 (Admin), [2005] 4 All ER 1241, at [17]).

[90] *Procedural propriety* (pp 904-908) After line 3 on p 907 insert-

The outcome afforded by public law to a frustrated legitimate expectation may be to set aside the procedural consequences normally applicable in the situation.

Example 329.0 The applicant for judicial review had ticked the wrong box when filling in a form for renewal of an exemption from payment of the London congestion charge. When he explained this to an official of the relevant authority, Transport for London, he was told that the penalties laid down would not apply. Nevertheless he continued to be served with penalty notices and finally his car was impounded. Collins J in the Administrative Court held despite the formal statutory provisions the penalties were not to be levied and the car must be returned. He said-

'There was, if one puts it in public law terms, a legitimate expectation created by the misinformation given to Mr Dolatabadi, coupled with the failure to respond properly to the letters he had written . . . He clearly acted to his detriment in the result.' (*R (on the application of Bijan Dolatabadi) v Transport for London* [2005] EWHC 1942 (Admin) at [25].)

Presumed application of rules of tort law (Code s 333)

[91] After Example 333.2 on p 920 insert-

There is a 'long-standing and clear presumption that Parliament does not intend to authorise tortious conduct except by express provision': *R (on the application of W) v Metropolitan Police Commissioner and another (Secretary of State for the Home Department, interested party)* [2005] EWHC 1586 (Admin), [2005] 3 All ER 749, *per* Brooke LJ at [33] (alleged power of police to remove child under Anti-social Behaviour Act 2003 s 30(6) where child not offending). The court cited *Morris v Beardmore* [1980] 2 All ER 753, [1981] AC 446: see Code p 966.

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

[92] *Right to silence* (pp 926-928) In footnote 8 on p 927 (as amended in 2005 Supplement p S41) at end insert: *R v Becouarn* [2005] UKHL 55, [2005] 4 All ER 673.

Presumed application of rules of evidence (Code s 335)

[93] *Hearsay* In footnote 1 on p 933 at end insert: As to hearsay evidence see *Moat Housing Group South Ltd v Harris and another* [2005] EWCA 287, [2005] 4 All ER 1051, at [131]-[135].

[94] *Expert evidence* (pp 934-935) As to the duties of an expert witness see *Phillips and others v Symes and others* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519.

Reliance on illegality: *allegans suam turpitudinem non est audiendus* (Code s 340)

[95] On p 953, before side heading *Construction in bonam partem*, insert-

Effect on interpretation Where an enactment specifies a state of affairs it may be necessary to determine whether it applies if there is an element of illegality.

Example 340.6 The Domicile and Matrimonial Proceedings Act 1973 s 5(2) referred to a person's domicile or habitual residence in England and Wales. The question arose whether this applied where the person's presence in England and Wales was unlawful: *Mark v Mark* [2005] UKHL 42, [2005] 3 All ER 912.

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

[96] *Duress* (p 974) (1) In footnote 4 on p 974 at end insert: But see *R (on the application of H) v Secretary of State for Health* [2005] UKHL Civ 1609, [2005] 4 All ER 1311, at

[5]; (2) For the reference given for ***R v Hasan*** at p S44 of the 2005 Supplement substitute [2005] UKHL 22, [2005] 4 All ER 685.

Judge in own cause (Code s 348)

[97] *Application to non-judicial decisions* (pp 978-979) The principle discussed in this section also applies where under statute a person such as a guardian ad litem, litigation friend or personal adviser is appointed to represent or assist someone involved in a statutory procedure.

> *Example 348.3* A personal adviser S, a member of the local authority's own staff, was appointed for J by a local authority under the Children Act 1989 s 23D, added by the Children (Leaving Care) Act 2000 s 3. In ***R (on the application of J) v Caerphilly County Borough Council*** [2005] EWHC 586 (Admin) at [27], [30] Munby J held-
>
> > '. . . there is nothing either in the general law or in the relevant legislation which makes it either unlawful or necessarily undesirable to appoint as the personal adviser of a child in care an officer or employee of the local authority which is the child's statutory parent. On the other hand, if such a person is appointed, it is important that both he or she and the local authority should recognise that the personal adviser is indeed acting in that role and not in some other, let alone conflicting, role. That, unfortunately, seems not to have been appreciated in the present case . . . It is not part of the personal adviser's functions to undertake the statutory assessment or the preparation of the pathway plan, nor should he do so. The Regulations, in my judgment, show that it is not permissible for him to do so. It is in any event undesirable that he should do so. Part of the personal adviser's role is, in a sense, to be the advocate or representative of the child in the course of the child's dealings with the local authority. As the *Children Leaving Care Act Guidance* puts it, the personal adviser plays a 'negotiating role on behalf of the child'. He is, in a sense, a 'go-between' between the child and the local authority. His vital role and function are apt to be compromised if he is, at one and the same time, both the author of the local authority's pathway plan and the person charged with important duties owed to the child in respect of its preparation and implementation.'

Agency (Code s 351)

[98] In footnote 4 on page 986 at end insert: As to service by the internet see ***Smith v Tyne and Wear Autistic Society*** [2005] 4 All ER 1336. As to service by fax see ***Woodward v Abbey National plc, JP Garrett Electrical Ltd v Cotton*** [2005] 4 All ER 1346.

Volenti principle (Code s 353)

[99] *Criminal breach* (p 988) It is not contrary to public policy to treat consent to injury as exculpatory where the consent is deemed to have been given by the victim having agreed to take part in an innocent event, such as a sporting fixture, where personal injury is likely to occur. Consent will not however be so deemed to have been given if the injury is disproportionate: see ***R v Barnes*** [2004] EWCA Crim 3246, [2005] 2 All ER 113, (conviction of footballer of breach of Offences against the Person Act 1861 s 20 quashed). Lord Woolf LCJ said at [11]-

> 'The advantage of identifying that the defence is based upon public policy is that it renders it unnecessary to find a separate jurisprudential basis for application of the defence in the various different factual contexts in which an offence could be committed. For example, it explains why boxing, despite the fact that participants intend to hurt each other, is ordinarily considered a lawful sport, whereas prize-fighting is not. It also means that changing public attitudes can affect the activities which are classed as unlawful, as the judgment in ***R v Dica*** demonstrates.'

[100] Lord Woolf LCJ had said at [10]-

'*R v Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593, considers the position where, as a result of having sexual intercourse with two women, a male defendant who is HIV positive infects them so that they both are subsequently diagnosed as being HIV positive. This court held that the man would be guilty of an offence contrary to s 20 of the 1861 Act if, being aware of his condition, he had sexual intercourse with them without disclosing his condition. On the other hand this court considered that he would have a defence if he had made the women aware of his condition, but with this knowledge they were still prepared to accept the risks involved . . .'

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

[101] *Every word to be given meaning* (pp 993-994) In the addition made by the 2005 Supplement p S46 to footnote 9 on p 993, at end insert-

To the like effect was the ruling by the Administrative Court that 'grossly' in the Communications Act 2003 s 127(1)(a) required 'some added value' to be given: see *Director of Public Prosecutions v Collins* [2005] EWHC 1308 (Admin), [2005] 3 All ER 326, at [5]. See further *R v J* [2004] UKHL 42, [2005] 1 All ER 1, at [20], [47] and Example 319.7A.

Homonyms (Code s 373)

[102] In footnote 9 on page 1042, at end insert: See also *9 Cornwell Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2005] 4 All ER 1207 ('proposed purchase price').

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

[103] On p 1052, in footnote 2, for 'See' substitute-

In *R (on the application of Keating and others) v Cardiff Local Health Board (Secretary of State for Health, intervening)* [2005] EWCA Civ 847, [2005] 3 All ER 1000, at [42], Brooke LJ said that 'facilities' is 'a chameleon-like word' which 'takes its colour from its context'. See further

***Ejusdem generis* principle: description of** (Code s 379)

[104] In p 1055 insert after Example 379.1-

Example 379.1A In *R (on the application of the Lord Chancellor) v Chief Land Registrar (Barking and Dagenham London Borough Council, interested party)* [2005] EWHC 1706 (Admin), [2005] 4 All ER 643, at [23], Stanley Burnton J said: 'The context I am considering is the transfer of "property, rights or liabilities", and in this context it would be anomalous to construe "property" as meaning something physical, when there is a clear non-physical genus'.

***Reddendo singula singulis* principle** (Code s 388)

[105] Lord Thring said (*Practical Legislation* (London, John Murray, 1902, p 52)-

'However great his difficulty, the draftsman must exclude any necessity for the adoption of the rule of *reddendo singula singulis*, or reading the sentences distributively; a rule which, like other rules of construction, has arisen from the obligation imposed on the courts of attaching an intelligible meaning to confused and unintelligible sentences.'

Interpretation of Community law (Code s 410)

[106] *Subsections (4) and (5)* (pp 1104-1105) The like interpretative rules as are applicable at common law (see Code Parts XI-XV) are presumed to apply to Community law unless the contrary is shown, eg the commensense construction rule (see Code s 197)

has been so applied: see *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, [2005] 3 All ER 497, at [41].

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

[107] In footnote 6 on p 1115 at end insert: 'See also *White v White and another* [2001] UKHL 9, [2001] 2 All ER 43, where Lord Cooke of Thorndon, at [31], commended the treatment in this Comment.'

UPDATING OF PART XXX OF MAIN WORK AS CONTAINED IN SUPPLEMENT

Introduction (pp S53-S56)

[108] On p S54, insert the following after second paragraph (beginning 'Unfortunately . . .')-

> Problems caused by the complexities introduced into British law by the Human Rights Act 1998 are illustrated by ***R (on the application of SB) v Governors of Denbigh High School*** [2005] EWCA Civ 199, [2005] 2 All ER 396. In the Court of Appeal a Muslim schoolgirl won the right to wear the jilbab, which conceals the shape of the wearer's arms and legs, even though it infringed the school's policy regarding uniforms. The Court of Appeal found for the pupil because, although the school might have succeeded if they had dealt with the matter as the law required, they approached the relevant issues from the wrong direction (see [88]).
>
> The school's Complaints Committee complained in their turn that they did not have the legal knowledge needed to interpret the complex legislation governing the matter ([58]). Brooke LJ said 'one is bound to sympathise with the teachers and governors of this school when they have to try and understand quite complex and novel considerations of human rights law in the absence of authoritative written guidance' ([82]). Mummery LJ said-
>
> > 'I agree with Brooke LJ on the need for teachers and governors to be given authoritative written guidance on the handling of human rights issues in schools. There are many issues that members of the staff, parents and pupils could raise under [the HRA] in respect of most of the articles in the Convention. Head teachers and governors of all kinds of schools need help to cope with this additional burden. They need to be made aware of the impact of [the HRA] on schools. They need clear, constructive and practical advice on how to anticipate and prepare for problems, how to spot them as and when they arise and how to deal with them properly. It would be a great pity if, through lack of expert guidance, schools were to find themselves frequently in court having to use valuable time and resources . . .([89])'
>
> This is tantamount to saying that every school needs its own legal adviser – or indeed its own legal department. It is a remarkable reflection on the state of our law.

[109] For footnote 9 on p S54 substitute: *Leeds City Council v Price and others* [2005] EWCA Civ 289, [2005] 3 All ER 573.

Nature of the Convention rights (Code s 419)

[110] *Art 1 of Convention* (p S57) Art 1 of the Convention requires the contracting states to secure to everyone 'within their jurisdiction' the rights and freedoms defined in Arts 2-18. The jurisdiction is essentially territorial; but exceptionally extends to outposts of a contracting state's authority abroad such as embassies, consulates and prisons. The jurisdiction does not apply to the total territory of another state which is not itself a

party to the Convention, even if that territory is in the effective control of the first state. See *R (on the application of Al Skeini and others) v Secretary of State for Defence and the Redress Trust* [2004] EWHC 2911 (Admin), where it was held at [293] that the rules given in Code ss 106 and 128 did not prevent a finding of British jurisdiction in the case of a British prison in Iraq.

[111] *Origins of Convention* (p S58) In *R (on the application of W) v Metropolitan Police Commissioner and another (Secretary of State for the Home Department, interested party)* [2005] EWHC 1586 (Admin), [2005] 3 All ER 749, at [21], Brooke LJ said: 'It is often forgotten . . . that English common lawyers contributed to the drafting of the Convention, and the resolution of points of statutory interpretation . . . can very often be achieved without any need to refer to Strasbourg law at all.'

Compatible construction rule (Code s 421)

[112] *Subsection (1): Rule of construction* (p S61) The Human Rights Act s 3(1) does not apply where a person has been deprived of a Convention right (eg through negligence) where the enactment is Convention compliant if operated correctly: *R (on the application of Nunn) v First Secretary of State (Leeds City Council and another, interested parties)* [2005] EWCA Civ 101, [2005] 2 All ER 987 (applicant deprived through failure of planning authority to observe time limit). For another example see *R (on the application of H) v Secretary of State for Health* [2005] UKHL Civ 1609, [2005] 4 All ER 1311.

[113] *Implied exceptions* Where a rule is laid down by statute, section 3(1) empowers the court to infer that an exception to the rule is implied where this is needed for compliance: *R (on the application of Hammond) v Secretary of State for the Home Department* [2004] EWHC 2753 (Admin), [2005] 4 All ER 1127 (Criminal Justice Act 2003 Sch 22 para 11: implied exception for oral hearings).

Illegality of incompatible acts and omissions of public authorities (Code s 432)

[114] *Vertical and horizontal effect* (p S78) A 'victim' who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by the Human Rights Act 1998 (the HRA) s 6(1) may bring legal proceedings against the authority, including judicial review(see Code s 434). However this does not apply where the act in question is one by a court or tribunal. Here the HRA remedy must be sought through the exercise of the normal rights of appeal or judicial review etc (see Code s 435). This remedy against public authorities is referred to as the 'vertical' or direct effect of the HRA. This contrasts with a 'horizontal' or indirect effect under which remedies could also be sought against private persons. In the debates on the Human Rights Bill Lord Wilberforce said it was perfectly clear that the Bill was aimed entirely at public authorities and not at private individuals (HL Deb. 24 November 1997, col. 781). However it can be argued that since HRA s 6(3)(a) expressly makes courts and tribunals 'public authorities' (see Code s 462) they are bound to apply the HRA in all types of legal proceeding before them. On horizontal effect see further *Douglas and others v Hello Ltd (No 2)* [2005] EWCA Civ 596, [2005] 4 All ER128, at [50].

Remedies for incompatible acts and omissions: damages (Code s 438)

[115] After reference to Law Commission report insert: See further *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240.

Article 3 of Convention (prohibition of torture) (Code s 441)

[116] *Destitution* (p S81) As to the duty of the state under Art 3 in relation to asylum seekers see *R (on the application of Limbuela) v Secretary of State for the Home Department), R (on the application of Tesema) v Secretary of State for the Home Department), R (on*

the application of Adam) v Secretary of State for the Home Department, [2004] EWCA Civ 540, [2005] 3 All ER 29.

[117] *Soering principle* The *Soering* principle, named after *Soering v United Kingdom* (1989) 11 EHRR 439, lays down that Art 3 implies an obligation on the part of a contracting state not to expel from its territory a person who will face a real risk of being subjected in the receiving country to treatment which is contrary to Art 3 even though the receiving country is outside its jurisdiction: see *R (on the application of B and others v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344; *R (on the application of Bagdanavicius and another v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 4 All ER 263.

[118] *Medical etc conditions* Art 3 does not imply an obligation on the part of a contracting state not to expel from its territory persons who need 'medical, social and other forms of assistance': *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 4 all ER 1017, at [15].

Article 5 of Convention (right to liberty and security) (Code s 443)

[119] *Art 5(4)* On the difference of wording between Art 5(3) ('shall be brought promptly before a judge . . .' and Art 5(4) ('shall be entitled to take proceedings') see *R (on the application of H) v Secretary of State for Health* [2005] UKHL Civ 1609, [2005] 4 All ER 1311.

Article 6 of Convention (right to a fair trial) (Code s 444)

[120] *Damages for breach of Art 6* See Code s 438 and *R (on the application off Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240.

[121] *Art 6(1)(a)* (p S85) The requirement of a fair hearing is 'a basic principle of the common law': *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885, at [70]. 'It is well known that among the rights implied into Art 6(1) is a right against self-incrimination': Ibid at [49]. It is for the national court to lay down rules as to the admissibility of evidence: Ibid at [20].

[122] *'In the determination of his civil rights'* Art 6 is concerned to protect procedural rather than substantive rights, so is not engaged in relation to rights to child maintenance secured by the Child Support Act 1991: *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905.

[123] *'Criminal charge'* (p S86) As to a warning under the Crime and Disorder Act 1998 ss 65 and 66 regarding a putative offence see *R (on the application of R) v Durham Constabulary and another* [2005] UKHL 21, [2005] 2 All ER 369.

[124] *'Independent and impartial tribunal established by law'* (p S86) A jury is not a separate tribunal from the trial court: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885, at [19].

[125] An example of an official of the body whose decision is in issue (2005 Supplement p S86) is, in relation to a prisoner, a prison governor or other such official: see *R (on the application off Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240, at [1].

[126] As to a judge de facto (2005 Supplement, p S86) see further *Baldock v Webster and others* [2005] EWCA Civ 1869, [2005] 3 All ER 655.

[127] *Art 6(3)(c)* (p S87) As to the immunity of advocates see *Phillips and others v Symes and others* [2004] EWHC 2330 (Ch), [205] 4 All ER519, at [75]-[86].

Article 8 of Convention (right to respect for private and family life) (Code s 446)

[128] *Relation to Art 10* There is a reference, in footnote 2 on p S90, to *Jameel and another v Wall Street Journal Europe SPRL* [2003] EWHC 2945 (QB), [2004] 2 All ER 92.

This decision was approved in *Jameel and another v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, [2005] 4 All ER 356.

Article 10 of Convention (freedom of expression) (Code s 448)

[129] On p S93, at end of material dealing with Code s 448, insert-

Disclosure of information received in confidence See *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1 (disclosure by member of jury).

Conditional fee agreements (CFAs) These are exempted by Art 10(2): see *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, at [28].

Article 14 of Convention (prohibition of discrimination) (Code s 451)

[130] In *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 3 All ER 169, it was held that the Anti-terrorism, Crime and Security Act 2001 s 23, in providing for the detention of suspected international terrorists who were not United Kingdom nationals but not for detention of those who were such nationals, unlawfully discriminated in breach of Art 14 against the enjoyment of liberty under Art 5.

[131] In *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2005] 4 All ER 545 the House of Lords criticised the four questions framed by Lord Woolf (see p S94) as to the application of Art 14. In that case it was held that Art 14 is not infringed by legislation which gives smaller social security benefits to people who live outside the United Kingdom since the purpose of such benefits, including retirement pensions, is to provide a basic standard of living for its inhabitants. It was also held that Art 14 is not infringed by legislation which gives smaller social security benefits to young people since their expenses are smaller.

Defined terms (Code s 462)

[132] *'The Convention'* (p S102) In *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 3 All ER 169, it was held that the Anti-terrorism, Crime and Security Act 2001 s 23, being discriminatory, could not strictly be required by Art 15 of the Convention and so was disproportionate.

[133] *'Public authority'* (p S104) A jury is not a separate public authority: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885, at [19].