Keynote address to the biennial conference of the Commonwealth Association of Legislative Counsel 2008

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The impact of judicial interpretation on legislative drafting*

The Rt. Hon. Lady Justice Mary Arden DBE†

Introduction

I am greatly honoured to be asked to give this keynote address to this biennial conference of the Commonwealth Association of Legislative Counsel. I consider it to be very important in a modern democracy that laws should be drafted in conformity with the rule of law. Indeed, the rule of law may cease to exist if laws are not properly drafted. Hence I attach great importance to the work of legislative drafters.

So far as the title to this talk is concerned, I suggested to your chairman that he should choose the title and so the title you have is the title he chose. This particular title has given me considerable insight into what interests you, assuming the chairman has correctly understood what you would like me to talk about. It seems to me that you are interested in a form of reverse engineering. That is the process which occurs when you take a car or a dishwasher to pieces to see how the final product is made up, and how it works. So, too, you, through your chairman, have expressed an interest in judicial interpretation and want me to take that apart so that you can see what impact it has on the work which you do when you are drafting statutes.

I should say straight away that judges approach the task of interpreting statutes in a variety of ways. There is no single technique which they use or manual which they have. However, there are a number of basic themes. What I propose to do is to identify some of those themes and then hopefully to draw some points together about the sort of things which I at least find helpful or unhelpful.

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† Member of the Court of Appeal of England and Wales.

The general approach to statutory interpretation

Statutes are the means by which the legislature imposes its will on the citizen. Statutory interpretation therefore has constitutional implications. Statute law is increasingly important in the United Kingdom because of the sheer volume of statute law enacted each year by Parliament and also by the devolved Parliaments of the United Kingdom, that is the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly. Some legislation is enacted to fulfil international obligations, such as the obligation to implement Community instruments that consist of legislative measures of various kinds adopted by the European Community and requiring implementation in the member states.

Statutory interpretation is the prerogative of the courts, including tribunals, and the courts alone. We do not, for instance, have a principle such as exists in the United States of America whereby, in a case involving a challenge to executive action carried out on the basis of the Executive's view as to the meaning of an ambiguous statute, the court does not ask whether the interpretation is correct, but simply whether the administrative agency's interpretation is a permissible one. In most countries, statutory interpretation is the prerogative of the courts, but there are some jurisdictions, notably Hong Kong, where the final say is given to the legislative body. Thus, even where the Court of Final Appeal of Hong Kong has given a judgment on the meaning of the Basic Law the Standing Committee of the National People's Congress in Beijing can state its view as to the meaning of the Basic Law, and that view is binding. Happily, that has only happened on rare occasions.

The doctrine of precedent applies to decisions interpreting statutes and accordingly the decisions of the higher courts bind the lower courts within the same jurisdiction. There are three separate jurisdictions in the United Kingdom. The Court of Appeal and lower courts in England and Wales would, in the absence of some compelling reason, follow decisions of the Inner House of the Court of Session in Scotland and of the Court of Appeal of Northern Ireland if the statute is one that applies throughout the United Kingdom.

In the United Kingdom, highly trained legislative drafters draft statutes and stylistically legislation tends to be detailed. Nevertheless, there are many problems of statutory interpretation. This is inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation that might arise. Sometimes legislation is passed in a hurry or an amendment is inserted at a late stage that has not been fully considered.

The principles of statutory interpretation are not codified. They are governed by the common law and are therefore capable of endogenous development by the courts to meet new technical problems or social needs. Since the principles of interpretation are governed by the common law, it might be thought that statutes mean what judges say they mean, rather than what Parliament may have intended. But that is not theoretically so: in general, the court's function is to ascertain the intention of Parliament and that is done from the language that Parliament has used. Thus we can say that the basic model for statutory interpretation is an "Agency Model". The essential feature of this model is that the judge sets out to interpret what is written in front of him, rather than to think about constitutional issues. In doing this he is fulfilling as faithfully as he can the will of the democratically elected Parliament.

It follows naturally from this that judges cannot rewrite statutes. Moreover, they must always act within judicial constraints. But, in practice, there are situations where it is not

clear what Parliament would have intended if it had thought about the situation that has emerged and presents itself in the case before the court. Parliament may have intended one thing but the language which it has used may not bear that meaning. The court has to find the meaning of the statute from the language used and the indications given in the statute read as a whole. This means that it is possible that its interpretation will turn out not to have been what Parliament intended.

In principle, the same method applies to all kinds of legislation, whatever the subject matter. In determining the intention of Parliament from the language used, the main rules which the court applies are that the statute must be read as a whole and that all the words must be given a meaning. There are other rules such as the limited class, or "eiusdem generis", rule. Under this rule, where there are a number of specific terms followed by a general word, the general word is to be interpreted as limited to the same class of thing as the earlier specific terms. Since the role of the courts is to interpret legislation, and not to rewrite it, the courts cannot cure a gap in a legislative scheme. However, by careful interpretation they may be able to prevent the gap from arising in the first place.

After a statute is passed, changes often occur, for example, changes in social conditions or technological developments. Exceptionally, a statute is limited to a state of affairs existing at a particular point in time, but more generally it is silent about its effect in changed circumstances. As already explained, the courts cannot fill gaps in legislation, and so they have to determine whether the existing statute applies to the changed state of affairs. The legislation may express a clear purpose that can only be fulfilled if it is applied to the new state of affairs. The House of Lords held that this was the case where the statute provided for a process of statutory licensing for in vitro fertilisation of human embryos and a new method of creating embryos outside the human body was discovered (*R (Quintavalle) v Health Secretary* [2003] 2 AC 687). In other cases, it may be that the legislation refers to a concept, which is sufficiently wide to embrace changes in circumstances. This is the case, for instance, where companies legislation requires company accounts to show "a true and fair view". The content of the concept of a true and fair view may change over the course of time but the concept itself is unaltered.

In some jurisdictions, the courts, when interpreting a statute, can take into account what was said in Parliament when the Bill was considered. In England and Wales, the use of legislative history as an aid to the interpretation of the statute was not permitted prior to 1993. It can now be used as an aid to interpretation if the statute is ambiguous and if a government minister, or other promoter of the Bill, made a statement in Parliament dealing clearly with the point of dispute (*Pepper v Hart* [1993] AC 593). But this is a very limited exception to the general rule excluding legislative history. The court cannot, for example, use legislative history to show that a particular change in the law was considered and rejected in the course of pre-legislative scrutiny.

Statutes are enacted on the basis that principles of the general law apply unless Parliament has excluded them expressly or by implication. The principles in question may be principles of public law or of private law. An example of this is where statute creates a public body and gives it powers. It will be presumed by the courts that the public body will, in the exercise of its powers, be subject to the supervisory jurisdiction of the courts on the principles of administrative law developed by the courts. These general principles of law do not need to be set out in the statute and in general it is better not to set them out. If they are

set out, that may throw doubt on their application in statutes where they are not set out. Moreover, developments in the case law may not apply. If the principles go beyond the principles permitted by the courts, a citizen may unintentionally obtain additional remedies over and above those to which the citizen would be entitled in similar situations under public law.

The most important of the general principles of law is undoubtedly the rule of law itself. The rule of law has never been comprehensively defined. For that reason, when the office of Lord Chancellor was reformed in the United Kingdom by the *Constitutional Reform Act 2005*, it was thought desirable to state that the reforms to his office did not affect his function to uphold the rule of law. Accordingly, s 1 of that Act provides:

"This Act does not adversely affect—

- the existing constitutional principle of the rule of law, or
- the Lord Chancellor's existing constitutional role in relation to that principle."

The rule of law is absolutely fundamental. It is like a tree which is perpetually developing and has many branches. The fundamental principle of the rule of law is that there is a state of affairs in which law rules and in which people are equally subjected to the law. The branches of the rule of law include—

- access to justice,
- the principle of limited government,
- the principle of separation of powers,
- the principle that the law must achieve a certain quality, and
- the principle that the law must guarantee certain basic rights.

As to the principle of limited government, Lord Phillips, Lord Chief Justice of England and Wales, in his keynote address to the 2007 Commonwealth Law Conference went so far as to say that the rule of law would not fully prevail unless judges could review the legitimacy of executive action.

The Senior Law Lord of the United Kingdom, Lord Bingham of Cornhill, recently gave an important lecture in which he set out a number of the features of the rule of law. This lecture is now published in the Cambridge Law Journal ([2007] CLJ 67), and it is well worth reading in full. He said that the core of the existing principle of the rule of law is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. He said that it was important to understand the implications of the rule of law, and he conveniently broke these down into eight sub rules, which he did not intend to be exclusive. Those sub rules were that:

- the law must be accessible and, so far as possible, intelligible, clear and practicable;
- questions of legal right and liability should ordinarily be resolved by the application of the law, not by the exercise of discretion;

- the laws of the land should apply equally to all save to the extent that objective differences justified differentiation;
- the law must afford adequate protection of fundamental human rights;
- means must be provided for resolving without prohibitive cost or inordinate delay bona fide disputes which the courts themselves are able to resolve;
- ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers;
- adjudicative procedures provided by the state should be fair, and
- the existing principle of the rule of law requires compliance by the state with its obligations in international law.

Stephen Laws, the distinguished First Parliamentary Counsel of the United Kingdom, recently reminded me about the work of the great Professor Lon Fuller. In his book, *The Morality of Law*, Professor Fuller identified eight elements of law as necessary for a society aspiring to institute the rule of law.

The eight elements stated by Professor Fuller were:

- Laws must exist and be obeyed by all, including government officials.
- Laws must be published.
- Laws must be prospective in nature, so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
- Laws should be written with reasonable clarity to avoid unfair enforcement.
- Laws must avoid contradictions.
- Laws must not command the impossible.
- Law must stay constant throughout time to allow the formalisation of the rules; however, the law must allow the timely revision when the underlying social and political circumstances have changed.
- Official action should be consistent with the declared rule.

Many of these elements can be applied directly to statute law, for instance, the elements that the law must be prospective in nature and that they must avoid contradictions and not command the impossible.

Professor Fuller wrote that an attempt to create a legal system might miscarry in at least one of eight ways. He concluded that a total failure in any one of the eight ways that he identified would result in something that could not properly be called a legal system at all "except perhaps in the Pickwickian sense in which a void contact can still to be said to be one kind of contract."

The principle of the rule of law is one of the general principles of law against which legislation is drafted. The rule of law is very relevant to the task of legislative counsel and I

would suggest that legislative counsel would do well to have principles identified by Lord Bingham and Professor Fuller well in mind. I am indebted to Stephen Laws for pointing out to me the relevance of the principles identified by Professor Fuller to the work of Parliamentary Counsel.

I would indeed seek to go further than this. Legislative counsel seem to me to be the gatekeeper in many situations. They have, of course, to act on the instructions of the promoters of the legislation and to draft the legislation as they are instructed but they are also able to advise and should do so where it seems that legislative proposals would offend against general principles of law, including the rule of law itself. It is one of the advantages of having an independent profession of legislative drafters that they should exercise independent judgment on a matter as important as the rule of law. It is an important constitutional safeguard for the citizen. Unlike the courts, drafters will see all or nearly all of the legislation placed before Parliament.

Professor Fuller's rules may have practical implications for the work of the courts as well. I would like to give the example of a case in which I sat called *Re FP (Iran*) *v SSHD* [2007] EWCA Civ13. This case concerned the power of the Lord Chancellor to make rules for asylum appeals. The statutory power, provided that, in making these rules, the Lord Chancellor should "aim to secure… that the rules are designed to ensure the proceedings before the tribunal are handled as fairly, quickly and efficiently as possible….". The power also enabled the Lord Chancellor to make a rule requiring a tribunal to hear an appeal in the absence of the parties.

The Lord Chancellor made a rule requiring the tribunal to hear an appeal in the absence of a party or his representative if it was satisfied that the party or his representative had been given notice of the date, time and place of the hearing and had given no satisfactory explanation for his absence. This rule was in contrast to the rule which applies to normal civil proceedings. This enables the court to proceed to a trial in the absence of a party, but provides that the party may apply for the judgment to be set aside. The court may grant that application if the applicant acted promptly, has a good reason for not attending the trial and has a real prospect of success. There was no equivalent in the asylum rules. I held that the relevant rules gave the party or his representative the right to give a satisfactory explanation for his absence. If, however, the reason for his absence was that he was not aware of the notice of hearing, he would be unable to give any explanation for his absence and thus could never satisfy that part of the rule, even though the rule had purported to give them that opportunity. In the cases before us, the parties had failed to appear because they had changed their addresses and asked their solicitors to give notice of change of address to the tribunal which those solicitors had failed to do. The rule appeared to apply when the party had not become aware of notice of hearing. The rule purported to give the party the right to put forward an explanation for that failure and to show that there was a satisfactory explanation. A party might be able to give a satisfactory explanation for his absence, for example, where he had had an accident and been in hospital when the notice was sent and had not seen it until too late.

The Secretary of State argued that the applicants' remedy was to apply for judicial review of the tribunal's decision. However, judicial review is not available where there is a mistake of fact which is the responsibility of the applicant or his legal representatives or if the mistake of fact was contentious. Yet a party might be able to give a satisfactory explanation for his

absence, such as where he had had an accident and been in hospital when the notice was sent and had not seen it until too late.

In the circumstances, the relevant rule removed the right of a party to provide a satisfactory explanation for his absence by providing that the tribunal must proceed in his absence even if he did not know he had to put forward such an explanation. I held that the situation in which a party was given a right and it was then taken away before he had a chance to exercise it did not fulfil the basic requirements of the rule of law as identified by Professor Fuller. The rule was accordingly held to be *ultra vires* to the Lord Chancellor's rule-making power. The Lord Chancellor accepted this decision and altered the rules.

I now turn to the relationship between statutes and obligations in international law. International treaties are not enforceable in our domestic law unless they are approved by Parliament. But, where an international treaty is adopted into English law, an important statutory presumption arises, which is the springboard for a more dynamic approach to statutory interpretation than the Agency Model, which I have hitherto discussed. It is presumed by the courts that, where Parliament has made an international treaty part of our domestic law, then, when it enacts subsequent legislation, it intends that legislation to comply with its international obligations. This is a very important presumption in relation to Community law, and I take it that this presumption may also be relevant when courts are considering the obligations of their Parliaments to fulfil obligations of international organisations such as the South African Development Community, and the East African Community, the Common Market of Eastern and South Africa, the Caribbean Community and Common Market.

Dynamic approach applying to the interpretation of Convention rights

In my speech to the CALC conference in London in 2005 (which has now been published in *The Loophole*), I explained how a dynamic approach applied to the interpretation of legislation when a question arises as to whether the legislation complied with human rights. The legislative framework is contained in the Human Rights Act 1998. This imposes a specific mandatory obligation on the courts to interpret legislation in conformity with the rights guaranteed by the European Convention on Human Rights, to which I will refer simply as the Convention. This approach is built on the presumption that domestic law must be interpreted in accordance with international treaty obligations adopted by Parliament.

Accordingly, s 3(1) of the Human Rights Act 1998 provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

I explained in my keynote address in 2005 how the English courts had been given powers to make declarations of incompatibility in respect of legislation that could not be interpreted so as to be compatible with Convention rights. But any such declaration does not affect the result in the particular proceedings or constitute any precedent on which other parties can rely. It simply acts as a signal to Parliament and also to the government that it should consider introducing some measure to amend the enactment in question. The scheme of the *Human Rights Act 1998* was intended to preserve Parliamentary sovereignty in that regard.

What does this mean in practice? Significantly, in relation to interpretation of legislation under the *Human Rights Act 1998* we move from an Agency Model to the "Dynamic Model". The judge is not simply looking at the wording and trying to apply it. He is looking at the wording critically and considering whether it complies with the Convention. This approach works on the basis that Parliament intended that statutes should have the effect of operating in conformity with human rights unless the contrary conclusion could not be achieved by interpretation. But, in truth, it is no longer a matter of looking at Parliamentary intention. This is highlighted by the fact that the new approach applies to legislation whenever passed. The court is acting as the guardian of human rights and constitutional rights. Its role is a dynamic one, and hence I call the model in this context the Dynamic Model.

Just how dynamic is this model? After a little trial and error on the part of the House of Lords, if I may respectfully say so, there was an important case called *Ghaidan v Godin Mendoza* [2004] 2 AC 557. This case concerned the question whether statutory rights of succession in respect of a tenancy were transmitted to a person who lived with a deceased original tenant of the same sex. The relevant condition in the statute was that the person should have lived with the deceased original tenant "as his or her wife or husband". If the legislation did not benefit same sex couples, it would discriminate against them in violation of article 14 of the Convention read with article 8 of the Convention. The House of Lords held that the statute in question applied to the survivor of a same-sex relationship as much as it did to a surviving spouse. The court gave important guidance as to the limits of section3 of the Human Rights Act 1998. I will merely refer to the speech of Lord Nicholls.

Lord Nicholls held that the effect of section 3 was that the court might be required to depart from the unambiguous meaning of the statute. The question of difficulty was how far the court should go. He held that the answer to this question did not depend upon the actual wording used by Parliament. He continued:

> "32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention- compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables the language to be interpreted restrictively or expansively, but section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention compliant. In other words, the intention of parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

Parliament, however, cannot have intended that in the discharge of this extended interpretative function the court should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of

making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

As I said in my keynote address, *Ghaidan* is a powerful statement of the courts' preparedness to interpret legislation so that it is compatible with human rights. It is very far from being aimed at the interpretation of the legislation as a reflection of what Parliament must have intended. Francis Bennion says that the *Human Rights Act 1998* has revolutionised our constitution. He is right in that. It also revolutionised interpretation in relation to legislation where there is a challenge on human rights grounds. In other respects, statutory interpretation is not affected, but human rights challenges are significant, and so the exception made by the *Human Rights Act* is a significant one.

Where a question arises as to compatibility with the Convention, therefore, the courts do not have to seek the intention of Parliament in the particular text. The courts must adopt what is sometimes called a "strained construction" in order to achieve compatibility with the Convention. I do not consider that future generations will necessarily regard this sort of interpretation as "strained". Rather they will see it as an illustration of a more dynamic approach or the Dynamic Model. The court in this context is no longer an agent simply for the purpose of ascertaining Parliamentary intention. The court has an independent role as guardian of the rule of law and human rights.

When there is an issue as to compatibility with the Convention, the question may arise whether the legislative act is necessary in a democratic society or serves a legitimate aim. Article 8 of the Convention, for instance, provides that there can be interference by public authorities with the private or family life of an individual if that is necessary in a democratic society, proportionate and in accordance with the law. The same pattern appears in many Commonwealth constitutions.

In respect of these questions, the Judiciary is required to decide some novel and profound questions of moral and political significance. The decisions of the higher courts may have substantial and social implications. What is there to assist them? In the United States, there are two schools of thought. Some believe that judges should apply the view of the constitution which would have been adopted by those who ratified the constitution in the eighteenth century. But why are the views of the original founders of the Constitution superior? Their view of, say, equality may be quite different from our own. The opposing point of view is that the judges should reach their own decision as of the date of their decision on what the Constitution requires. Questions of interpretation can only be decided in the context and culture in which they arise. On the other hand, this approach is open to the objection that it can confer too much power on the judges. People who favour this approach sometimes go further and say that because Parliament is so busy and unable to deal with matters of detailed law reform, it should be for the judges to update laws when they need to be updated. But this too runs into the objection that it confers much too much power on judges. It is not always possible for the judges to act in accordance with public opinion, because public opinion may not exist or it may be misinformed.

The American debate does not apply as such in our jurisdiction. But we still have to ask ourselves where we should seek to find the answers to the difficult questions posed by the qualified Convention rights. Is public opinion relevant? It may be divided or not fully informed. It can be said that even recognition of relative institutional competence – that is, a

decision that the Executive or Parliament are better able to form a view on a particular matter – constitutes a form of moral or political judgment by judges that in that situation the courts should exercise restraint. The question has to be asked whether there is ultimately anything, apart from sound moral and political reasoning, to assist the judges on questions such as those arising on the application of qualified rights?

What do I find useful in legislative drafting?

I would like to start by saying that there is something which I definitely do not find helpful, and that is the tendency of some drafters to see how many ideas and concepts they can pack into a single clause. This can lead to great loss of clarity. It is sometimes not clear, for instance, whether conditions that are stated as to be necessary are in fact necessary and exclusive or only necessary but not exclusive. To take an example, a statute may provide that before A can happen, B is necessary and that B is not necessary unless either C or D is present. Can the court say that even if C or D is present, the condition that B is necessary is not satisfied because the further provision that B is not necessary unless C or D is present is a threshold condition and not an exhaustive statement of what necessity is? In these situations, logical purity has been given greater priority than transparency and clarity. If judges find this sort of clause difficult, one must think what the position is for members of the public or lawyers in the profession. Of course, some statutes have to be addressed to a specialist audience. However, they can still be clearly expressed in regard to matters that were clearly anticipated.

In the ultimate analysis, it seems to me that the greatest merit in legislation is its ability to withstand logical analysis. Does it apply with equal logic when situations are put which are extreme? If it cannot withstand this kind of rational analysis, the courts will have great difficulty in interpreting them.

For my own part, I like explanatory notes in general. They can provide an overview and explanation outside the statute. I would accept, however, that in general statutes should contain only operative material. It is an important tool of statutory interpretation that each word should be given meaning and this may not be possible if mere narrative is included.

I would be happy to see some narrative in legislation provided that it is clear that it is simply an aid to interpretation and not to be followed slavishly, or used to restrict the court from adopting the appropriate interpretation. So, in a suitable context, it can be useful to give examples in a statute provided it is clear that there are not restrictive and also provided that they are used sparingly.

On some occasions, there is scope for blue sky thinking by Parliamentary counsel. This was the position in the statement of directors' duties in our new *Companies Act 2006*. This was the largest statute ever passed by the United Kingdom Parliament. It has over 1300 sections (and a mere 16 schedules). It also holds the record for the number of government amendments introduced in the passage of the bill. There were over 400 government amendments taken at the report stage.

The statutory statement of directors' duties largely reflects the previous case law on fiduciary duties but also contains some remarkably ambitious provisions. The provisions codify the duty of directors to act in the best interests of the company, to use their powers for the proper purposes, not to make secret profits and their common law duty to exercise care and skill.

The present law on secret profits is codified. This has to be flexible. Suppose a director is engaged in a building company and he is asked to leave. Suppose that before he leaves he is approached by one of the company's principal clients and asked if he would take over their business in a new company. If the director takes this course, would he be misappropriating corporate opportunity? This depends on an evaluation of all the circumstances, such as the circumstances in which the opportunity arose and the relationship of the client's business to the company's line of business, or whether he took the initiative or was approached and so on. The case law has become relatively inaccessible but the empirical evidence showed that directors wanted it to be codified. But the statute could only provide a snapshot of a living body of law at a particular point in time and for that reason Parliamentary counsel drafted the following for the assistance of the court on interpretation:

> (3) The general duties are based on certain common law and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles and, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

Most of these provisions come into force on 1 October of this year and it will be interesting to see how they are used by the courts. But they are an example of blue sky thinking by legislative counsel, who had to find a solution appropriate for the particular context.

Another example would be the *Water Resources Act* of South Africa. That contains narrative about such matters as the need to redress imbalances under the apartheid regime in the allocation of water resources.

Recapitulation

The principal approach used by the courts in England and Wales is one where the judge seeks to find the intention of Parliament as expressed in the language Parliament has used. I have called this the Agency Model. Here a judge applies important presumptions, including the presumption that Parliament intended to fulfil its international obligations adopted into English domestic law. But this is model is not the complete picture. The Agency Model is based on the notion of Parliamentary sovereignty rather than, to quote the American Declaration of Independence of 1776, the notion that all men are "endowed by their Creator with certain inalienable Rights". So too the Agency Model is inconsistent with the direction in the *Human Rights Act 1998* that judges should interpret legislation, whenever passed, so far as possible in conformity with Convention rights. I have suggested that future generations will not regard this as a "strained interpretation", as it is sometimes described. They will recognize that the basis in this context is that the judge is no longer an agent of ascertaining Parliamentary intention and that his function is as guardian of constitutional norms, including human rights. This model I have therefore called the Dynamic Model.
