The Principle of Legality

Extract from *HM Treasury v Ahmed & Ors* [2010] UKSC 2

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LORD PHILLIPS

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The principle of legality

111. The appellants have put this principle at the forefront of their argument on the interpretation of the 1946 Act. Under this principle the court must, where possible, interpret a statute in such a way as to avoid encroachment on fundamental rights, sometimes described as constitutional rights. Lord Hope at paragraph 46 has cited the passages in the speech of Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 in which he described this principle. Equally pertinent is the oft cited passage in the speech of Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 at p 131:

> *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*

112. Lord Hoffmann went on to say that the principle of legality applied as much to subordinate legislation as to Acts of Parliament. Lord Hoffmann made it plain that the principle of legality was one that applied to the interpretation of general or ambiguous words in the absence of express language or necessary implication to the contrary. At the time of his judgment the Human Rights Act had not yet come into effect and Lord Hoffmann commented that the principle of legality had been expressly enacted as a rule of construction in section 3 of the Act. I believe that the House of Lords has extended the reach of section 3 of the HRA beyond that of the principle of legality.

113. Section 3(1) 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 the Convention rights."*

114. The Convention rights are defined in section 1 to mean the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the Convention, articles 1 to 3 of the First Protocol and article 1 of the Thirteenth Protocol.

115. The effect of section 3 has been the subject of extensive academic discussion – see the literature referred to in footnote 27 to paragraph 4.08 in the Second Edition (2009) of The Law of Human Rights by Clayton and Tomlinson. It has also been the subject of judicial consideration on a number of occasions in the House of Lords. It is not necessary to refer in detail to this body of authority. It suffices to note that it accords to section 3 a role of constitutional significance. By enacting section 3, Parliament has been held to direct the courts to interpret legislation in a way which is compatible with Convention rights, even

where such interpretation involves departing from the "unambiguous meaning the legislation would otherwise bear", or the "legislative intention of Parliament" – see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at paragraph 30 per Lord Nicholls and *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264 at paragraph 24 per Lord Bingham. Such an interpretation must, however, be one that is "possible" having regard to the underlying thrust or intention of the legislation.

116. *Bennion on Statutory Interpretation*, 5th ed (2008), at section 270, p.823, comments that the term "principle of legality" is likely to lead to confusion but goes on to suggest that the "so-called principle of legality" was widened by a majority of the House of Lords in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604 so as to contradict what Lord Bingham (who dissented) called "a clear and unambiguous legislative provision" (para 20), the provision in question being contained in delegated legislation.

117. The other members of the House did not, however, purport to depart from wording that was clear and unambiguous – see Lord Steyn at para 31, Lord Hoffmann at para 37, Lord Millett at para 43 and Lord Scott at para 58. I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention. To this extent its reach is less than that of section 3 of the HRA.

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138. It may be argued that it is "expedient" to throw the net wide in order to ensure that the criminals are caught within it, even if this is at the expense of enmeshing those who are not. But I would not give "expedient", as used in the 1946 Act, so extravagant a scope. Whether in so deciding I am applying the principle of legality, or a simple rule of construction that confines general words within reasonable limits where fundamental rights are in play, matters not. Bennion would probably say that they are one and the same – see p 823.