= Section 3 of the Human Rights Act 1998 =

Section 3 of the Human Rights Act 1998 is a provision of the Human Rights Act 1998 that enables the Act to take effect in the United Kingdom . The section requires courts to interpret both primary and subordinate legislation so that their provisions are compatible with the articles of the European Convention of Human Rights , which are also part of the Human Rights Act 1998 . This interpretation goes far beyond normal statutory interpretation , and includes past and future legislation , therefore preventing the Human Rights act from being impliedly repealed by subsequent contradictory legislation .

Courts have applied section 3 of the Act through three forms of interpretation : " reading in " ? inserting words where there are none in a statute ; " reading out " where words are omitted from a statute ; and " reading down " where a particular meaning is chosen to be in compliance . They do not interpret statutes to conflict with legislative intent , and courts have been reluctant in particular to " read out " provisions for this reason . If it is not possible to so interpret , they may issue a declaration of incompatibility under section 4 .

The relationship between sections 3 and 4 and parliamentary sovereignty has been commented on most extensively . The most common criticism has been of the implied limitations on legislative supremacy . Opponents of this criticism has questioned both its factual accuracy and its suggestion that the weakening of parliamentary sovereignty should be avoided . They instead cite morality and constitutionalism as among positive features of this change . The limits of courts ' powers have also been queried . The retroactivity of law making is one criticism related to the rule of law , although the advancement of human rights is seen as a positive feature also associated with the rule of law . Whilst the scope of section 3 has been criticised for being vague and there have been warnings of to the imposition of the judiciary on parliament 's domain , these have also been challenged .

= = Context = =

Human rights are rights taken to be universal , of considerable importance , and relate to the individual and not collectively ; among other things , they can grant freedoms , claims , immunities and powers . The European Convention on Human Rights was drawn up in the wake of the Second World War to uphold such rights . The United Kingdom ratified the European Convention on Human Rights in 1951 , and accepted the right of individual petition to the European Court of Human Rights , Strasbourg , in 1966 . The Human Rights Act 1998 made most Convention rights directly enforceable in a British court for the first time . Excluded are Articles 1 and 13 , which the government argued were fulfilled by the Act itself , and therefore were not relevant to rights enforced under it . The Human Rights Act has had a considerable effect on British law , and remains an Act of " fundamental constitutional importance " .

= = Provisions = =

Section 3 (1) states that " 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 . " Accordingly , a court must read any statute passed by parliament so as to uphold Convention rights , where this is possible . It is possibly the section of the act with the widest scope . The Human Rights Act therefore built upon a small number of previously recognised absolute freedoms which could only be expressly subjugated to another aim . This is different from other systems , such as the New Zealand Bill of Rights , that require an interpretation to be " reasonable " . As happened in R (Anderson) v Home Secretary , the alternative where such interpretation is not possible the alternative is a declaration of incompatibility under Section 4 . Lord Hoffmann in a case , R (Simms) v Home Secretary , which bridged the introduction of the Human Rights Act , said :

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 .

" Read and give effect " requires the interpretation " where possible " of legislation ? where there is an interpretation open to the court that is consistent with Convention rights , it must be chosen over those that do not . Following the introduction of the Human Rights Act , there was some disagreement between judges as to how far this provision went . Lord Steyn , in R v A , has said " the interpretative obligation under section 3 of the 1998 Act is a strong one . It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings . " He further noted that it may be necessary under section 3 to " adopt an interpretation which linguistically may appear strained " and that a declaration of incomparability was a " measure of last resort " . However , In re S established that there may be cases where interpretation can go to far ; that the court can assume an administrative power it would not ordinarily have , with practical consequences that it is not best placed to consider : " a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment . " Given that the precise wording of a statute could be altered under the section , the " thrust " was important ; going against the " thrust " required legislative power that the courts did not have . Although other sources could be used (see , for example , Pepper v Hart) , the wording of a statute must be considered the primary intent of parliament . The decision in Ghaidan v Godin @-@ Mendoza appears to have achieved some settling of the approach taken in extreme cases .

Section 3 (2) (a) extends the scope of section 3 to past and future Acts of Parliament in addition to present legislation . It therefore contradicts the usual policy of implied repeal ? whereby any inconsistency between statutes are resolved in favour of the later statute . The Human Rights Act must therefore be explicitly (or " expressly ") repealed by an Act of Parliament deliberately doing so , not merely be introducing contradictory legislation . The act therefore carries an additional normative force and has been considered constitutional in character as a result . It is widely recognised that parliament may never directly contradict convention rights , or at least do so very rarely . Sections 3 (2) (b) and 3 (2) (c) confirm the validity of all legislation , whether or not it has been interpreted under Section 3 . Section 3 can therefore be said to protect primary legislation which is incompatible , and any secondary legislation made under such primary legislation .

= = Interpretation = =

Three types of judicial interpretation are commonly identified in the context of section 3 : " reading in " , " reading out " and " reading down " . " Reading in " refers to adding in words that are not present in the statute so as to ensure compliance with Convention rights , and " reading out " removing words in a statute to do so . These processes had already been implemented with reference to the implementation of European legislation , so as to ensure compliance of domestic law with European law . Although accepted with secondary legislation , they remain controversial with primary legislation , since parliament would have included or omitted such words if it had had such an intent ; reading in or out words would therefore conflict with parliamentary intention . Courts have , however , accepted these powers , and during the passing of the Human Rights Act , it was agreed that the courts would have such a power .

In R v A , extra provisions were read into a statute to ensure compliance , since the statute itself had the legitimate aim of protecting potential rape victims ; it was merely , in the words of Lord Steyn , that " the methods adopted amounted to legislative overkill " . In Poplar Housing v Donaghue , the

Court of Appeal rejected the possibility of reading in a provision , because it would have altered the method of remedying the problem to that laid down by Parliament , amounting to starting afresh on how best to approach the issue . Courts have been far more reluctant to read out wording for fear of going against parliamentary intention , but it remains a possibility .

" Reading down " involves choosing an interpretation that is compatible , where more than one is strictly possible . For example , placing a persuasive burden of proof on a defendant raising a defence ? that he need persuade the jury that it is the case , was judged to be incompatible with Article 6 (2) of the Convention , which related to the presumption of innocence , which had long been a part of English law in R v Lambert . The court read down the burden of proof as merely one of an evidential burden ? meaning the defendant merely had to raise some evidence to support the defence , which it believed did not conflict with Article 6 (2) . However , in Sheldrake v DPP , the court instead requiring a persuasive burden , because it believed in the context of the motoring offence in the case , this was not disproportionate and did not conflict with Article 6 (2) .

= = Academic commentary = =

Before the Human Rights Act was brought before parliament , the government 's whitepaper considered that it was necessary to prevent courts from setting aside legislation on the basis of incompatibility (reflecting a strong need to respect parliamentary sovereignty) . However , the effect on parliamentary sovereignty has been criticised despite the safeguards put in place . Section 3 has been defended , however , by reference to the enhanced morality and constitutionalism of the new system , prompted by an " incoming tide " of human rights . Aileen Kavanagh considers the choice of a court in cases not a question of parliamentary sovereignty , but a complex question of how far the judiciary can perform a legislative function in that area . She considers the political and legislative pressure on government after section 3 or 4 overwhelming to the extent that the concept of parliamentary sovereignty should be " eliminated " . However , other writers have stressed the important of the formal right to ignore either decision . The result of this debate has been to label section 3 either a " radical tool " to implement human rights , or a " signficiant limitation " of Parliament 's will .

Geoffrey Marshall has characterised section 3 as a " deeply mysterious provision " in several respects , including judging how strong a provision it is ? an issue since dealt with by the courts ? but has also noted a disparity between what the Act might be expected to do and what it does . He argues that a litigant would hope that courts would strive to uphold his rights under the Convention , accepting a derivation from them only rarely ; instead section 3 requires courts to find compatibility with the Convention where possible ? in other words , to strive to find that the Convention does not impact the claimant . Alison L. Young has examined the upper boundaries to courts ' powers of interpretation . She puts forward three possible limits : firstly , where the text of a statute is not ambiguous ; secondly , where reading in words is inappropriate ; and , thirdly , where any interpretation is restricted to cases where it does not involve implied repeal . Young dismisses the first two as incompatible with the legislative history (and , in at least the first case , judicial history) and believes the third to present no rigid limit on courts ' powers at all . The decision of Pepper v Hart provides a method for the legislative history of a bill to play a role in its interpretation .

Philip Sales and Richard Ekins are among those that believe that section 3 has not displaced the purpose of interpretation ? to discern parliamentary intention . In their eyes , section 3 is about " how interpreters are to infer that intention " . They also criticise the " judicial lawmaking " because it applies to the case in hand , concluding that this breaks the non @-@ retroactivity commonly considered part of the rule of law , although it is sometimes necessary . They also note that rules made by courts are not transparent , because their new interpretation under section 3 differs from their ordinary meaning ? after all , section 3 must go beyond standard interpretation . This leaves citizens uncertain of what the law is . Sales and Ekins also suggest that while applying section 3 to post @-@ Human Rights Act legislation might be merely using a presumption that the legislature intended to follow it , applying it to pre @-@ Human Rights Act legislation cannot possibly base itself on such an inference . Section 3 , though , still allows them to do so .

Another view is that Section 3 provides a much strengthened basis for the sort of " weak review " ? the scope of which carefully determined between courts on one hand and parliament on the other ? in a statutory form . There have been at least three criticisms put forward : firstly that the impossibility of implied repeal goes against some formulations of parliamentary sovereignty that require that no parliament can bind a future parliament . Secondly , whether section 3 interpretations follow parliamentary intent is questionable ; thirdly , if it does allow interpretations contrary to intent , section 3 may render section 4 necessary . However , judicial powers are probably not unconstrained . The analysis of what the courts can and cannot do would also provide the answer the third criticism , depending on the viewpoint . Whilst the scope of section 3 has been criticised for being vague , and leading therefore more easily to the imposition of the judiciary on the legal domain of parliament , this viewpoint is controversial : they do not seem to have yet so encroached and there are rules emerging about the application of section 3 .