Modern Statutory Interpretation

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Most of the law which the courts are called on to apply is statutory. Yet statutory interpretation languishes as a subject of study. For the most part, law students are expected to pick it up by a sort of process of osmosis. It's more fun and engaging to study cases, as vignettes of real life. So the common law and common law method wins out.

However, in many ways modern statutory interpretation has become closer to common law method. By common law method I mean the familiar process of extrapolation of underlying principles and values from disparate sources, with a view to identifying the particular rule to apply to the case in hand. In the last 40 years or so, the courts have used this sort of method in their approach to statutory interpretation both more widely and with increasing depth of effect. The words of a statute are taken as the starting point for analysis, rather than the start and finish. In some respects, they are not even the starting point, because the court goes through a process of orientation by reference to the context and subject matter of the statute to set a framework within which the words are to be read. Nonetheless, for the courts the words continue to be of critical importance. The final outcome has to be compatible with the language used and it controls the exercise of interpretation, even if often only in a relatively loose sense. How should one understand this process?

To speak of a modern approach to statutory interpretation involves some sense of mutation over time. Why use the word "modern" if the approach is timeless and unvarying? In fact, standards and styles of statutory interpretation clearly do change over time. Neil Duxbury in his book *Elements of Legislation*[1] provides a helpful guide here. What he brings out is the way in which the courts' attitude to interpretation of legislation varies with conceptions of the relative constitutional roles of judges and the legislature. This in turn reflects shifts in judicial understanding of the political principles which underlie the UK's constitutional arrangements.

Statutory interpretation is embedded in constitutional law, and constitutional law has undergone a process of change in the last 40 years or so. Whereas Laws J (as he then was) could write in an important judgment of 1998 that "the common law does not generally speak in the language of constitutional rights"[2], we now regularly use the concept of fundamental common law rights[3] and even the idea of common law constitutionalism, whatever that may mean for different writers.

In medieval times, statutes were treated as being in effect part of the common law. They were like judgments of a high court, to be woven into the

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[1] N. Duxbury, *Elements of Legislation* (2013).

[2] *R v Lord Chancellor, ex p. Witham* [1998] QB 575, 581.

[3] See e.g. *Kennedy v The Charity Commission* [2014] UKSC 20.

fabric of the common law as a whole. They could be used, like case law, as a foundation for analogical reasoning.

A decisive change occurred in Tudor times. Henry VIII and Thomas Cromwell used Parliament and legislation to give legitimacy to the Henrician break from Rome. As Chris Thornhill writes, during the English Reformation "the principle of rule by the king-in-parliament became a key legitimating device of royal government".[4] Elizabeth I, although technically an illegitimate child, was acknowledged as Henry's heir because of Henrician legislation. All this in turn meant that Parliament's own authority was enhanced, with the effect that the courts began to treat the will of Parliament as expressed in the words it used in statutes as having special force. As Alan Cromartie explains, "One sign that people were impressed by parliamentary power was that they placed increasing stress on parliament's historical intentions."[5]

Samuel Thorne highlighted the change by reference to a text by Thomas Egerton in the Elizabethan period: *A discourse upon the exposicion and understandinge of statutes*.[6] Egerton went on, as Lord Ellesmere, to be a leading judge under James I. According to Thorne, this was the first of a new genre to consider statutory interpretation as a distinct topic. It was written at the beginning of the move to focus on the will of Parliament as the legislature, involving stricter adherence to the words of a statute as a binding statement of the law and greater reluctance to engage in judicial legislation to fill in the gaps.

This positivist approach to statutory interpretation was powerfully reinforced in the course of the nineteenth century. Three factors were particularly significant. First, growing adherence to a concept of parliamentary sovereignty and supremacy, culminating in the decisive theoretical exposition by Dicey. Secondly, the growing force of democratic ideology, linked to the expansion of the franchise. Thirdly, a loss of confidence on the part of the judiciary in the face of greater parliamentary expertise and access to sources of information regarding social problems. This last is dated by Duxbury to the early part of the nineteenth century. As Parliament became more active after 1832 and made use of research into social problems, the judges felt less well informed than Parliament and so were reluctant to develop the law by reference to policy, so that the common law was seen as subordinate to statute.[7] The positivism of the English law approach to statutory interpretation reflected an acceptance of the desirability and legitimacy of political controls through Parliament over political power and a faith in customary conventions as stabilisers for the exercise of that power: the political constitution.

The growth of the administrative state in the late nineteenth and early twentieth centuries reflected and reinforced this positivist trend. Parliament and the agencies it created to address social problems understood them better than the courts. The decisions to be made about how to tackle them involved major

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[4] Chris Thornhill, *A Sociology of Constitutions* (2011), p. 97; Also see Duxbury, note 1 above, p. 24.

[5] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (2006), pp. 102-103.

[6] SE Thorne (ed), *A discourse upon the exposicion and understandinge of statutes* (1942).

[7] Duxbury, note 1 above, pp. 33-34.

questions of resource allocation which was the domain of Parliament, not the courts. The agencies were expert bodies tasked with their functions by Parliament, the ultimate law-giver, and the courts were reluctant to intervene in their decisions.

Despite this, it is worth recalling that in Dicey's scheme the courts were posited as a source of anti-majoritarian rule of law values to be injected into the law via presumptions to be used in statutory interpretation. Dicey himself referred to resources inherent in the approach of the domestic courts arising from their power to interpret legislation which might limit the "substitution of the despotism of Parliament for the prerogative of the Crown." For example, there has always been a strong presumption against interpreting statutes to have retrospective effect. However, this feature was not emphasised under the Diceyan model or in judicial practice.[8]

But gradually faith in the political constitution came under pressure. Particularly in relation to the question of Home Rule for Ireland, Dicey became disillusioned with modern parliamentary politics based on political parties and the whip, as a departure from a liberal nineteenth century conception of parliament as a debating chamber to arrive at collective ideas of the good for society. Ironically for the high priest of parliamentary democracy, his solution was to press for a more plebiscitary version of democracy, using referendums;[9] although this did not attract significant support. Lord Hewart CJ published his *The New Despotism* in 1929. Legal thinkers associated with the Conservative Party pressed for greater control over state agencies through background legal constraints imposed by the courts taking a more active role.[10] The soft controls of constitutional conventions came to be perceived as ineffective against a background of the breakdown of customary approaches to doing politics.[11] Instead, calls were made for a break with the positivism of English public law, based pre-eminently in the prevalent approach to statutory interpretation, and for an approach with far greater explicit acknowledgement within the law itself, via the principles of statutory interpretation, of a set of basic constitutional values which should be respected.[12]

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[8] "Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments … the supremacy of the law of the land calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality", A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (E.C.S. Wade, 1959), 413-414.
[9] R. Weill, "Dicey was not Diceyan" [2003] CLJ 474.
[10] J. Jacob, *The Republican Crown: Lawyers and the Making of the State in the Twentieth Century* (1996).
[11] See N. Johnson, *In Search of the Constitution* (Oxford 1977).
[12] For a prominent early example, see Johnson, note 11 above.

In the 1960s the famous cases of *Ridge v Baldwin*,[13] *Padfield*[14] and *Anisminic*[15] reinvigorated English public law. They did so by the courts gradually moving away from a more pronounced adherence to the bald meaning given by the language used in statutes so as to inject other values, by reference to general background understandings and presumptions of natural justice and fairness (*Ridge*), a more flexible form of interpretation having regard to the general purpose of the statute rather than the simple language of a particular provision (*Padfield*) and emphasis on the rule of law and a particularly strong presumption regarding access to the courts (*Anisminic*). It should be noted that these developments had already begun and received strong impetus from the House of Lords well before there was any question of heightened purposive interpretation deriving from the model of the ECJ's approach to interpretation of Community legislation and the strong requirement of sympathetic interpretation of domestic legislation in light of Community law[16] and from the requirement to produce rights-compliant interpretations of legislation under section 3 of the Human Rights Act 1998. Community law and the Human Rights Act can be seen in this context as part of a continuous development in line with movements in the domestic approach to statutory interpretation, endorsed and given impetus by Parliament itself, as well as involving an element of rupture as compared with those movements, by virtue of the greatly strengthened interpretive obligations they imposed.

Statutes are legal instructions transmitted into an existing, highly developed framework of legal values and expectations. The existing law, modes of reasoning and established localised value systems provide the interpretive context in which a statute is read. Upon receipt of a statutory text, lawyers and the judiciary seek to knit it into the fabric of the law. The statute may represent a radical departure from what has gone before, in which case the existing law still provides the context for assessing how radical Parliament intended the change to be. On the other hand, the values inherent in the existing law – as recognised by judges and lawyers - may be assessed to be so strong as to exert a gravitational force on the text, pulling its meaning in their direction. Nils Jansen, in his book *The Making of Legal Authority*, shows how the reception of texts within an existing legal culture may have profound effects on their meaning and authority within a legal system.[17] The English courts' approach to interpreting the Land Registration Acts governing the system for registration of title to land, particularly with respect to registration of title which is acquired fraudulently, provides a practical illustration within our system. Arguably, the interpretation of the Acts so as to protect the innocent landowner victim in this type of case undermines the apparent legislative intention that the land register should be a

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[13] [1964] AC 40.
[14] [1968] AC 997.
[15] [1969] 2 AC 147.
[16] Under the *Marleasing* principle [1990] ECR I-4135; *Litster v Forth Dry Dock & Engineering* [1990] 1 AC 546.
[17] Nils Jansen, *The Making of Legal Authority* (2010), esp. at pp. 45-49; and see P. Sales, "Judges and Legislature: Values into Law" [2012] CLJ 287.

definitive source of good title for third party purchasers.[18] Again, the Human Rights Act can operate to enhance this effect still further, as for example in the well-known rape-shield case of *R v A (No. 2)*, in which the House of Lords relied on section 3 to re-write the extent of protection in the witness-box for a rape complainant so as to accord with judicial notions of fair trial rights.[19]

With a re-balancing of statutory interpretation in favour of accommodating purpose and background understandings as against text, the arguments for recourse to interpretive aids outside the statute became correspondingly stronger. The courts now accept that reference to law commission and governmental reports which provide guidance regarding purpose is legitimate;[20] as is reference to statements in Parliament by promoters of bills, subject to restrictive limitations.[21]

Interposed between *Anisminic* and the HRA were a series of important cases in the late 1990s which made explicit reference to domestic constitutional rights or principles, very much on the model advocated by Johnson in 1977: *Witham*;[22] *R v Secretary of State for the Home Department, ex p. Pierson*;[23] and *R v Secretary of State for the Home Department, ex p. Simms*.[24] In *Simms* Lord Hoffmann famously stated the position thus:

> "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."

So both for legislative interpretive purposes and for the purposes of application of general public law standards, there was a new emphasis on the articulation, application and enforcement of legal constitutional norms, even if in each context they only create presumptive effects which can be overridden - in

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[18] For discussion, see Amy Goymour, "Mistaken Registrations of Land: Exploding the Myth of 'Title by Registration'" [2013] CLJ 617.
[19] [2001] UKHL 25; [2002] 1 AC 45.
[20] *Black-Clawson International* [1975] AC 591.
[21] *Pepper v Hart* [1993] AC 593; *R v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 WLR 15, HL
[22] [1998] QB 575.
[23] [1998] AC 539.
[24] [2000] 2 AC 115, 131-132.

the case of statutory interpretation, by sufficiently clear indication of parliamentary intention in the statute in question; in the case of public law, by a sufficiently strong countervailing public interest which makes the defeat of the right proportionate and lawful. What under the Diceyan scheme might have been merely unenforceable constitutional conventions encapsulating the morality of the political process have in effect been distilled into rules of law with presumptive effects which are enforced by the courts.[25]

The courts thus have wide powers to adjust the meaning of statutes to reflect and embody values which the judges regard as important, but also which they think that Parliament should be taken to have thought were important, without needing to say so.[26] This makes the texture of argument about statutory interpretation much more open and uncertain than a strict focus on grammatical meaning would allow. With reference to a wider range of sources now permitted and required - unspoken constitutional understandings and principles; inferences as to the purpose of the legislation; background reports and statements in Parliament – it is harder to be sure, in advance of litigation and a ruling by the courts, what legislation actually means.

It is impossible to specify in abstract terms what weight each of these ingredients should be given, both in relation to the text and as between themselves. They each reflect different values which have varying and different force depending on the particular context. The text of the statute stands in the middle of a force-field, subject to forces coming from different directions pressing on or bending its meaning. The courts therefore have to make sensitive evaluative judgments balancing the different elements and assessing their respective weights in light of broad background understandings in relation to the proper respective constitutional roles of Parliament and the courts. They aim to produce a statutory meaning which reflects the reasonable expectations of citizens and, in particular, the lawyers who advise them, who are inculcated in the relevant legal culture and trained in the way in which courts derive legal meaning from legislation. I have described this as a sort of vector analysis, in which different considerations or vectors are brought into a relationship to produce a final composite, the resultant vector identified as the substantive norm to apply to the case in hand.[27] The common legal culture and training of judges and lawyers promotes rule of law values, in the form of reasonable predictability and stability of statutory meaning across courts and for citizens

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[25] P. Sales, "Rights and Fundamental Rights in English Law" [2016] CLJ 86.

[26] A prominent recent example is the courts' approach to interpretation of tax legislation, incorporating the *Ramsay* doctrine into the process of statutory interpretation, so that there is now in effect a presumption that charging provisions in tax statutes are applicable in relation to transactions undertaken for genuine commercial reasons, and cannot be avoided by imposition of artificial elements in a chain of transactions: *UBS AG v Deutsche Bank* [2016] UKSC 13, para. [64] (Lord Reed). Further examples, reading statutory provisions as impliedly subject to the illegality principle, are *R (Best) v Chief Land Registrar* [2015] EWCA 17 and *R (Hysaj) v Secretary of State for the Home Department* [2015] EWCA 1195;

[27] P. Sales, "Partnership and Challenge: the Courts' Role in Managing the Integration of Rights and Democracy" [2016] *Public Law* 456, 457.

and their legal advisers.[28]

Duxbury observes that the open-textured nature of statutory interpretation under section 3 of the Human Rights Act means that the distinction between legislation and judge-made law is less straightforward than it was. He points to a resemblance with modes of interpretive reasoning in the sixteenth and seventeenth centuries, to produce where possible statutory meanings judged to be consonant with judge-based conceptions of reason and justice,[29] provided that such proposed meanings do not go against "the grain of the legislation".[30]

Both sides of the equation – what counts as the grain of the legislation? what counts as justice and reason, or qualifies as a constitutional right or principle? – require the courts to make evaluative assessments. This is a process similar to application of the common law method, with the text of the statute and the grain of the legislation fulfilling a constraining role similar to the words used in recognised canonical case-law authorities and identified underlying common law principle.[31] The more the courts are given latitude to identify and formulate for themselves the different elements to be brought into account, and to make an evaluative judgment in weighing them up, the more their reasoning comes to resemble their approach to articulating and developing the common law. Similarly, the more statutory meaning becomes open to influence by interpretive aids and values taken from outside the text of the legislation, the more important becomes the partnership between judges and lawyers in participating in a common culture which both promotes predictability and stability of the meaning to be derived from statute and allows scope for evaluation and criticism by the legal profession and legal academia and hence a form of discipline for judges in performing the task of interpretation. This again highlights a degree of convergence with common law styles of reasoning, objectivity and discipline.[32]

But the courts are operating in a very different constitutional environment from that of the sixteenth and seventeenth centuries. There is now an obligation on the courts to play their part, alongside other constitutional actors such as Parliament and the executive government, to respect and accommodate two main imperatives or constitutional traditions of the modern

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[28] See Sales, "Judges and Legislature", note 17 above.

[29] Duxbury, note 1 above, pp. 234-240.

[30] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[31] P. Sales and R. Ekins, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 LQR 217; Sir Jack Beatson, "Common Law, Statute Law and Constitutional Law" (2006) 27 Stat LR 1, 13.

[32] See e.g. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960), esp. pp. 185-186; cf A.W.B. Simpson, "The Common Law and Legal Theory", in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973), p. 94 ("… the common law … consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession …").

age – democracy and human rights.[33] As the unelected branch, the courts have to be sensitive to the limits on their constitutional role as against that of Parliament.

In order to legitimise the courts' modern approach to statutory interpretation, they have to be able to specify objective criteria by reference to which they can justify their identification and use of constitutional rights and principles.[34] The courts need to have strategies in place and a defined and defensible legal methodology to protect against the accusation that they are illegitimately imposing their own idiosyncratic values in the interpretation of legislation, completely removed from any real democratic endorsement. If they cannot do this, then in the medium to long term they will diminish public respect for their neutrality as impartial appliers of the law, which would itself undermine rule of law values.

The modern approach to statutory interpretation involves a partnership between courts and legislature, with the courts' side of the partnership more prominent than it was in the twentieth century. But we have not broken free from democratic principle; on the contrary, democratic ideology has grown in strength as well in a parallel development. The democratic principle remains fundamental to our constitution and the courts have to recognise this. For this reason, I suggest that it is important for courts seeking to use constitutional rights and principles to inform statutory interpretation always to have this in mind: "The question is not simply what do we (the courts) think is a basic right, but is it also plausible that Parliament should be taken to think so?"[35] In addressing this question, the courts have to orientate themselves by reference to broad background constitutional ideas. As Lord Steyn said in *Anufrijeva*, Parliament is taken to legislative for a liberal democracy in a constitutional state which observes the rule of law.[36] But plainly these very broad concepts are at a level of generality which means they operate only as rather loose constraints. They leave a lot of work to be done by the courts in giving meaning to statutory provisions at the level of particularity required by the detailed process of interpretation, in order to produce a determinate legal outcome in a case.

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[33] See Sales, "Partnership and Challenge", note 27 above.

[34] For my suggestions regarding how they might do this, see Sales, "Rights and Fundamental Rights", note 25 above.

[35] Sales, "Rights and Fundamental Rights", note 25 above; Sales, "Partnership and Challenge", note 27 above, p. 465; also *Electrolux Home Products* (2004) 221 CLR 309, 329 per Gleeson CJ.

[36] *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604, [28]-[31].