

2

Domestic Sources of Law: parliamentary material

By the end of this chapter you will be able to:

- Understand the primary sources of domestic law.
- Differentiate between primary and secondary sources of law.
- Differentiate between primary and secondary legislation.
- Identify, and use, the different approaches to statutory interpretation.

Introduction

You are studying the law but how do you know what the law is? Where do you find law? The skill of being able to find law and the knowledge of knowing how to interpret law are two of the most important abilities of any lawyer. Indeed it is possible to go so far as to say that these are the two most important abilities of a lawyer and of a law student. If you are able to find and interpret law then you can apply those skills to any law—it does not matter whether you have studied the subject or not because all law has the same basic components in it.

Sources of law are an important (and arguably *the* most important) part of legal study since a proper grounding in the subject will allow you to access any substantive legal issue. The next two chapters will introduce you to this knowledge but reference should also be made to Legal Skills texts that will help you put this knowledge into practice. This chapter examines parliamentary material, that is to say laws passed by the Houses of Parliament, and Chapter 3 examines material produced by the courts through cases.

2.1 Domestic law

This chapter discusses the sources of domestic law and we need to be clear at the very beginning of this chapter what that means.

2.1.1 International relations

As has already been noted the United Kingdom consists of four countries (England, Scotland, Northern Ireland, and Wales) and there are three legal systems (England and Wales,¹ Scotland, and Northern Ireland) each of which approaches its sources of law in similar (although not exactly the same) ways. However, the United Kingdom is also a signatory to a number of treaties, most notably the *European Convention on Human Rights* (ECHR) and the *Treaty of Rome* which led to the UK joining what was the European Economic Community (EEC) and is now the European Union (EU).

The ECHR is directly relevant because the *Human Rights Act 1998* created a situation where it was deemed that all public bodies would abide by the Convention and provided authorities to the domestic courts to hear challenges to any breach. This chapter will look at how the *Human Rights Act 1998* has altered the way courts approach domestic legislation but will not discuss the sources of the jurisprudence surrounding the ECHR as this will be discussed in Chapter 4 (International Sources of Law). The individual rights established within the ECHR will be examined in Chapter 5 as will some of the effects of the *Human Rights Act 1998*.

The relationship that the United Kingdom has with the EU is more complicated and this too will be examined in Chapter 4. Some EU law becomes directly part of UK domestic law without any domestic proceedings occurring but this is because Parliament has provided for this (see the *European Communities Act 1972*) and if it wished to do so it could legislate to prevent this from happening. Accordingly, in this chapter the interface with EU law will not be considered because apart from those situations where a measure is directly applicable into domestic law, any changes are brought about in the same way. Chapter 4 will examine how EU law is created, how decisions are reached as to whether it is directly applicable to individual states, and how that law is implemented.

2.1.2 Constitution

This text is not a textbook on the constitution of the United Kingdom and those of you who are studying law as an undergraduate programme will almost certainly study the constitution of the United Kingdom in a specific module, sometimes called *Constitutional Law* and sometimes known as *Public Law*. However, it is necessary to summarize some aspects of the constitutional law so as to understand the sources of domestic law.

Every country must have a constitution which can be defined as a series of legal and non-legal rules that define how a country is governed (Barendt (1998) 2). However, the

1. Although it will be remembered from Chapter 1 that Wales is starting to develop its own system of laws.

term ‘constitution’ in many countries means a document that enshrines the fundamental rules of governance. Perhaps the most obvious example of this is the Constitution of the United States of America which quite clearly sets out the machinery of governance, expressly creating three instruments of state: the executive (President of the United States of America), the legislature (Congress), and the judiciary (Supreme Court of the United States of America). The American Constitution is not static in that it can be changed (and indeed there are currently twenty-seven amendments, the last having been passed in 1992).²

Most constitutions will enshrine the laws in their constitution, ie they will require a special resolution to amend the instrument. Most democracies will normally operate on a simple majority system to pass legislation but constitutions will require a higher standard to ensure that the constitution, which will normally also prescribe the rights and freedoms of citizens, cannot be abused by rogue governments. In the United States of America any amendment to the Constitution requires Congress to pass an amendment by a two-thirds majority *and* for three-quarters of the individual state legislatures to pass the amendment.

2.1.2.1 Does the United Kingdom have a constitution?

The United Kingdom does not have a written constitution:

There is no document in the United Kingdom equivalent, say, to the United States Constitution...Nor, for that matter, is there a set of statutes clearly indicated by their titles as ‘Constitutional’ or ‘Basic’ laws. (Barendt (1998), 26)

However, this is no longer strictly true as the *Constitutional Reform Act 2005* obviously contains the word ‘constitutional’ in it, but the basic point remains intact; within the United Kingdom the legislature rarely expressly refers to pieces of legislation as constituting part of a formal constitution. That is not to say that measures do not exist because quite apart from the 2005 Act, the *Acts of Union 1707* and *1801* which created the United Kingdom (see 1.1.1) must be considered constitutional as must the *European Communities Act 1972* and the *Human Rights Act 1998*. However, the presumption is that so-called ‘constitutional’ pieces of legislation are no different from any other piece of legislation and could be amended or repealed by a simple majority.

2.1.3 Primary and secondary sources

When locating law it is important to draw a distinction between primary and secondary sources of law. Primary sources of law are authoritative sources of law, ie they are statements of what the law is. Secondary sources of law are not authoritative and are interpretations of the law. Whilst you will use secondary sources quite frequently through your law studies you should not misunderstand their place and should cite primary sources where possible (see Diagram 2.1).

Diagram 2.1 demonstrates that within each division of sources there are different subcategories and this chapter will discuss which sources should be cited when.

2. Which protects the ‘compensation’ (salary) of senators and congressmen.

Primary	Secondary
Acts of Parliament	Books of authority
Statutory Instruments	Peer-refereed articles in law journals
Orders in Council	Leading textbooks in the field
Decisions of superior courts	Non-refereed articles in key law journals

Diagram 2.1 Primary and secondary sources

2.1.3.1 Primary sources

It was discussed earlier that there is no enshrined specific constitutional law and thus primary sources of law can be separated into two general parts. The first is legislation, ie measures that come from the legislature (Parliament) and this is known as ‘statutory law’, and the second is from the decisions of courts and this is known as the ‘common law’. The interaction between these forms of law will be discussed in this chapter but theoretically statutory law is supreme. The United Kingdom is a monarchy. The formal Head of State is the Queen (which can be contrasted with the President of the United States of America or the President of France) but at the same time we are a democracy and the head of the executive is the prime minister.³ Sovereign power in the United Kingdom resides in the Queen in Parliament. This means that all legislation requires the approval of the monarch (see ‘Royal Assent’) but that subject to this Parliament may pass such laws as it wishes. There are different types of democracies but the UK version of parliamentary democracy means that rather than citizens taking votes on issues (known as referendums) the convention is that we elect Members of Parliament who have the right to pass laws subject to their being voted out of office at the next election.

As the Queen in Parliament is supreme then this means that where a statute conflicts with a decision of the court, the statute (legislation) should prevail but whether this happens in practice will be discussed later. However, there are examples of situations where Parliament has passed legislation with the specific intention of overturning a decision of the courts⁴ and the courts have had to accept that version of the law.

3. Although interestingly there is no *legal* rule that states that the prime minister is the head of the executive and until comparatively recently, the office did not even necessarily legally exist as it was not mentioned in statutes. It is a *convention* that the prime minister is the head of the executive and this demonstrates the importance of conventions (unwritten rules of custom and practice).

4. For example the *Sexual Offences Act 2003* states that the test for whether an offender believed a rape complainant was consenting is an objective test whereas the courts had traditionally said that it was a subjective test.

2.1.3.2 Secondary sources

It can be seen from Diagram 2.1 that secondary sources are, in essence, academic material, although other material (for example, government policy papers etc) may also come within this band. The use of the material will be discussed later but it should be noted at the outset that whilst you may use secondary sources frequently in your studies (either to find primary sources or to complete an essay) they will very rarely be mentioned in court. That said, the courts do appear to be citing academic material more than they ever did and at one point authors would only be cited when they were dead and could not change their mind! Perhaps the growth in academic writings over recent years has led judges to consider that it can be useful to see how others have interpreted the law. However, caution should always be used when citing contemporary academic sources.

2.2 Statutory law

The first source to discuss is statutory law, that being law passed by Parliament. It was noted earlier that statutory law is a primary source of law but to confuse matters statutory law itself is divided into primary legislation and secondary legislation with primary legislation itself being divided into two! Diagram 2.2 may assist.

Diagram 2.2 shows that primary legislation is that which is known as an Act of Parliament and that these may exist as either a Public or Private Act. Whilst all forms of parliamentary legislation are statutory, an Act of Parliament is often referred to as a 'statute'. The statutes that you will encounter most of the time are known as Public Acts and these are measures that apply to all of society. Private Acts are those that are limited to a particular company or organization that requires powers beyond those prescribed by the normal law. They tended to be used for the creation of docks, transport links, or other major building programmes.

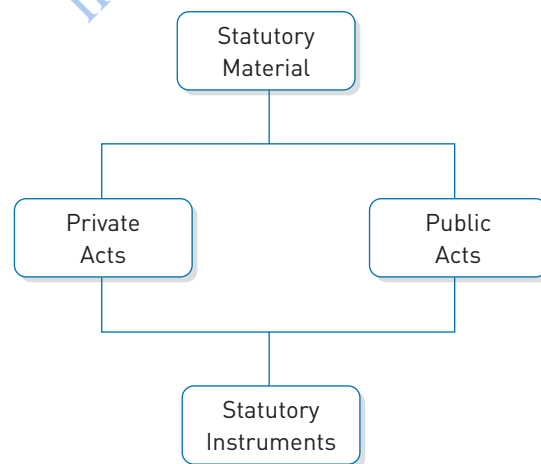


Diagram 2.2 Legislation

➔ PRIVATE ACT

The University of Wales, Cardiff Act 2004 is a private (sometimes referred to as 'local') Act. Its purpose was to merge the University of Wales Medical School with the University of Wales, Cardiff. Universities can be divided into two groups: those that existed before 1992 and those that gained university status after 1992. The former were generally established by Royal Charter whereas the latter acquired their authority from the Further and Higher Education Act 1992 and articles of governance approved by the Privy Council. Universities are independent bodies but are limited to the powers set out in either the Royal Charter or the 1992 legislation. In 2004 it was decided that the University of Wales Medical School would be incorporated into the larger University of Wales, Cardiff but neither institution had the power to do this as their status was regulated as already described. They petitioned Parliament and the University of Wales, Cardiff Act 2004 gave the institutions the power to merge and become a single unit.

The Act thus provided one institution a power that it did not previously have and doing so did not involve it granting any wider power to either that institution or any other institution, the essence of a private Act.

➔ PUBLIC ACT

The Education Act 2005 is a public Act. Its purpose is to reform the way in which failing schools are identified and required to reform. The Act is of general importance as it applies not to a specific school or authority but to all schools in England.⁵ It creates an Inspectorate for Schools in England and provides specific powers and duties for that body.

As the Act provides a general power that applies beyond a single company or authority it is a Public Act and applies as a general law of the land subject to the limitations contained within its drafting.

Secondary legislation is slightly easier to define although it is normally referred to as *statutory instruments*. An Act of Parliament will generally provide the general scope of a law and its powers but it will commonly leave some consequential matters out. Such matters could include when a piece of legislation comes into effect (a majority of Acts of Parliament do not come into effect immediately so that preparations can be made for any requisite training or public awareness campaigns) or the precise application of a law (eg what grade a person must be to exercise a power).

The balance between what goes in primary and secondary legislation is a delicate one. Parliament only has a finite amount of time to debate legislation and so if every detail of a law was placed in primary legislation then any changes (eg an organization changes its name) would require another piece of primary legislation to permit this. This would quickly lead to a situation where Parliament would have no time to discuss any other legislation. However, if too much is placed into secondary legislation then Parliament as a whole could lose control of how the law is being implemented because it is far easier for secondary legislation to be passed (see the following section). To put this all into context if we look at the figures for 2012, Parliament passed twenty-three Public Acts of Parliament while 3,253 pieces of secondary legislation were passed. It

⁵ The *Education Act 2005* is also unusual in that it provides a general application for just England rather than England and Wales because education is a devolved matter for Wales (see 1.1.2).

is inconceivable that each piece of secondary legislation could have been passed in the same way as primary legislation.

SECONDARY LEGISLATION

Part II of the *Regulation of Investigatory Powers Act 2000* permits certain public bodies the right to undertake covert surveillance. The Act does not say who these public authorities are or who within the organization may authorize surveillance to be carried out. These details are provided for in the *Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010, SI 2010/521*. The order lists each organization that may undertake surveillance (eg the police, local authorities, etc) and who within each organization may authorize its use (eg police inspector, director of housing, etc). The advantage of this is that where a new public agency requires the right to conduct surveillance Parliament need only pass a new statutory instrument rather than amend the 2000 Act.

The manner in which legislation is passed, reviewed, and treated depends on whether it is primary or secondary legislation, as will be seen.

2.2.1 Primary legislation

The most important type of legislation is primary legislation. Although noting the existence of Private Acts of Parliament earlier, the remainder of this chapter will focus on Public Acts of Parliament as these are the more important and also the pieces of legislation that you are more likely to encounter.

It was noted that the Queen in Parliament is the sovereign body in this country and in practice this means Parliament through its Acts of Parliament. There are (theoretically) no limits to the power of Parliament and it could legislate to do anything it wishes.



Example Smoking in Paris

A common example that is used when discussing the supreme nature of Parliament is that of smoking on the streets of Paris. If Parliament wished to do so it could pass a law that states it is illegal to smoke on the streets of Paris. Could this be enforced? Possibly not but it does not matter because whether a law can be enforced is not relevant to its validity. A statute banning smoking in Paris would be valid and assuming that evidence existed to show that D had smoked in Paris then if D ever set foot in the United Kingdom he could be arrested, tried, and convicted.

The fact that Parliament can legislate for anything has not been compromised by the constitutional changes that have taken place in recent years. It was noted in Chapter 1 that Scotland, Northern Ireland, and (to a much more limited extent) Wales have devolved authority whereby they can create their own law. However, Parliament could as easily choose to withdraw this power and centralize all legislation again. It was noted at the beginning of this chapter that no legislation is enshrined into law (2.1.2) and, accordingly, an Act of Parliament could repeal the devolution legislation. Even without

doing this, however, we can see that the UK Parliament remains supreme because the legislation expressly states that the devolution legislation does not preclude the UK Parliament from legislating over devolved areas (see, for example, s 28(7) *Scotland Act 1998*).

The *Human Rights Act 1998* (HRA 1998) is also compatible with this convention that Parliament can legislate to do anything. Whilst there is a presumption that all legislation will be compatible with the ECHR the statute expressly preserves the power of Parliament to legislate in a way that is *not* compliant with the ECHR (see s 19(2) HRA 1998). This also serves as an example of the second principal convention that exists on the sovereignty of Parliament which is that Parliament cannot bind its successors. In other words, the current Parliament in any current session may not pass a law that is not subject to repeal. This convention is also likely to ensure that Parliament cannot enshrine legislation as although this would not prevent Parliament from repealing it (enshrining legislation merely raises the threshold for repeal) the setting of a threshold would restrict the competency of Parliament and accordingly all statutes have (theoretically) the same status as each other.

2.2.1.1 Process of creating an Act

We now know what an Act of Parliament is but how is it established? Reference should be made to your constitutional-law/public-law texts which will describe this process in more detail, but it is necessary at least to summarize the parliamentary process in order to understand the impact of statutes.

The general process can be represented in diagrammatic form as shown in Diagram 2.3.

For the purposes of Diagram 2.3 a Bill has been introduced into the House of Commons but a Bill can begin its parliamentary life in either House. Whilst a Bill is progressing through Parliament it is easy to identify where it originated as the letters '[HL]' are appended to those Bills that start in the House of Lords. Where this happens the boxes in Diagram 2.3 listed 'House of Commons' and 'House of Lords' would simply be switched. Each substantive stage will be detailed in brief.

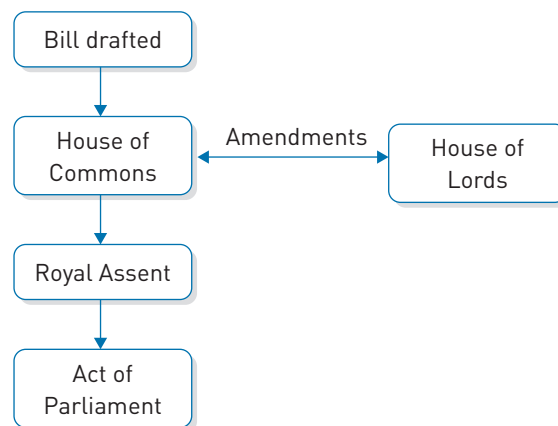


Diagram 2.3 The parliamentary process

House of Commons

Regardless of whether the House receives the Bill first or second the same format is always adopted.

Table 2.1 The legislative stages

First Reading	Title of the Bill is read out and the Bill is printed.
Second Reading	Debate on the general principles of the Bill. Vote taken on whether to proceed.
Committee Stage	Passes to a Committee of the House. ⁶
Report Stage	Amended Bill is reprinted and voted on.
Third Reading	Final amendments and vote. Passed to House of Lords if relevant.

The matter will only not return to the House of Lords if either the Parliament Act is used (see 2.2.1.2) or the two Houses have agreed the content of the Bill following the process described.

House of Lords

The process adopted in the House of Lords is virtually identical but the committee is normally a committee of the whole House and the rules relating to the choice and content of the amendments is not as regulated as it is in the House of Commons. The other significant difference is that by convention a Finance Bill is never defeated in the House and a government Bill that was included in an election manifesto is never defeated at second reading (although it may be later on).

Consideration of amendments

In many cases it is likely that the second House to consider the Bill will produce a slightly different Bill than that which was handed to them not least because members of the second House have had the opportunity to table amendments. Assuming that this happens then the matter returns to the originating House (so in our example the House of Commons) where that House must consider the amendments. If they do not agree to them (and therefore make further amendments themselves) then the matter returns to the other House and the process is repeated in a 'ping-pong' fashion until one of three things happens:

- the two Houses agree the content of the Bill
- the Houses cannot agree and parliamentary time runs out in which case the Bill is normally lost⁷
- the Parliament Act is invoked (see 2.2.1.2).

⁶ Where this is a constitutional Bill or part of the Finance Bill ('the budget') then it would normally be a committee of the whole House, otherwise it is more likely that an ad hoc committee of up to 50 MPs is established according to party strength.

⁷ However, since 1998 the House of Commons can, in certain circumstances, agree that a government Bill can be held over to the next session (see House of Commons Factsheet L1: *Parliamentary Stages of a Government Bill*, 6–7).

Royal Assent

Assuming that the two Houses manage to agree the content of the Bill then the Bill is sent to the Queen for Royal Assent. The date on which the Royal Assent is given is also marked on the Act and it becomes itself part of the Act (see 'Date of assent'). The constitutional position of Royal Assent is often debated but it is usually accepted that the sovereign no longer has power to decline assent (see, for example, Barendt (1998) 41).

2.2.1.2 Parliament Act

The normal process by which an Act will be established is as discussed above but an important exception to this is when the Parliament Act is invoked. In fact there are two Parliament Acts, the first is the *Parliament Act 1911* and the second is the *Parliament Act 1949* which amended the 1911 Act. The 1911 Act was created to solve an impasse between the House of Commons and House of Lords whereby government business was being rejected by the upper House. The prime minister of the day, Herbert Asquith, sought to introduce legislation that would limit the right of the House of Lords to reject the wishes of the (democratically elected) House of Commons. If the legislation was not passed then Asquith had gained the support of the king to create sufficient new peers to ensure that the government would have a majority in the upper House, which would have been disastrous in terms of the authority and efficiency of the upper House. With that threat the House of Lords passed the 1911 Act.

The main provisions of the 1911 Act are to be found in ss 1 and 2 of the Act. Section 1 states that the House of Lords may only delay a money Bill for one month and that after this has elapsed the Bill may receive Royal Assent without the authority of the House of Lords. Whether a Bill is a 'money Bill' will depend on whether the Speaker of the House of Commons certifies it as such under s 1(2). The certificate of the Speaker cannot be subject to review by any court of law (s 4). This severely restricts the powers of the upper House and was imposed because one of the Bills that was rejected in Asquith's Parliament was the Finance Bill (the government budget).

The second, and more important, part of the 1911 Act is provided for in s 2. This also limits the time in which the upper House can delay a Bill. When it was originally enacted the Bill had to be rejected on the third occasion before s 2 could be used (ie the Bill had failed to gain parliamentary support in at least two successive parliamentary sessions (years)) and the rejection had to be for virtually identical Bills (subject to amendments to reflect the passage of time). If the criterion was met—and the Speaker certified the criterion as being met (s 2(4) with s 4 applying to deny the opportunity to review this certificate)—then after its rejection for the third time the Bill could receive Royal Assent without the House of Lords approving it. The only exceptions to this were money bills (covered by s 1) and any provision that purported to lengthen the duration of Parliament.⁸

The *Parliament Act 1911* has only been used seven times, twice in 1914⁹ and four times in the last twenty-five years,¹⁰ but its most controversial use was when it was used

8. Ensuring that a rogue government could not legislate to continue in power where it had a majority but knew it was unlikely to be re-elected.

9. To legislate for the disestablishment of the Church of Wales (*Welsh Church Act 1914*) and once to legislate for home rule in Ireland (*Home Rule Act 1914*) although this Act was never implemented.

10. To legislate for war crimes (*War Crimes Act 1991*), European parliamentary elections (*European Parliamentary Elections Act 1999*), to legalize certain homosexual acts and to reduce the age of consent for sexual activity (*Sexual Offences (Amendment) Act 2000*), and to ban hunting (*Hunting Act 2004*).

to pass the *Parliament Act 1949* which amended the 1911 Act itself. The principal purpose of the 1949 Act was to reduce the threshold in s 2 to one year, meaning that a Bill must merely fail after it has been entered in two consecutive Parliaments and would be passed after the second, rather than third, defeat.

One important point to note about the *Parliament Act 1911* is that it applies only to legislation introduced to the House of Commons. If a Bill introduced into the House of Lords is amended by the House of Commons and the Lords refuse to accede to these amendments over two consecutive years then the Act cannot be invoked (see Barnett (2011) 444).

Validity of the Parliament Act 1949

There has for a number of years been a debate over the validity of the *Parliament Act 1949*. The sole purpose of this Act was to amend the 1911 Act and two criticisms have been made of the 1949 Act. The first, as Loveland (2009) notes, is that some consider it unconstitutional because the 1911 Act was not designed to limit further the power of the upper House (Loveland (2009) 165) but from a legal standpoint this argument carries little weight due to the competency of Parliament to legislate in any manner. The second argument is that legislation under the 1911 Act is not primary legislation per se but delegated legislation (the delegation being the 1911 Act permitting law to be made in a way contrary to the usual parliamentary process) and that delegated legislation cannot be used to alter primary legislation without express permission to do so.

The debate about the validity of the Act had been played out in the pages of academic books and journals but in 2005 it became a real proposition when it formed the basis of a case before the courts. The *Hunting Act 2004* was arguably one of the most controversial statutes in recent years and it banned certain types of hunting with live animals. The debate in Parliament was acrimonious and the House of Lords refused to pass the legislation. The government used the Parliament Act to force the provision through but the *Countryside Alliance*, an organization created to lobby against the Act, sought to challenge the ruling.

The challenge was rejected by the High Court and the matter proceeded to the Court of Appeal (*R (Jackson and others) v Attorney-General* [2005] QB 579) who needed to consider the status of the 1949 Act. The court agreed that legislation under the 1911 Act was delegated legislation rather than true primary legislation. The court argued that this conclusion was inevitable because delegated means the authority arises from another piece of legislation and this is what happens when the Parliament Act is invoked. The Bill which is to become an Act can only do so because of the authority vested in the 1911 Act. If the 1911 Act was repealed then a Bill rejected by the House of Lords could not become an Act of Parliament (pp 589–593). However, the court also rejected the suggestion that because it was delegated legislation it was somehow not as effective as an Act of Parliament and held that the legitimacy of an Act passed under the Parliament Act was present. In terms of the 1949 Act the court held that although the 1911 Act could not be used to bring further significant constitutional change (as it did not expressly so provide) the 1949 Act could not be so categorized. The court also made the important point that the amended Act had

been used three times already without challenge and that the sovereign, Parliament, and the courts had acted on that Act implicitly acquiescing to the validity of the Act (pp 606–607). This perhaps marks the ultimate conclusion of the courts: if the 1949 Act had been deemed invalid it would have caused numerous difficulties in its exercise in the past twenty years and that alone was cause for the courts to be slow to question its validity.

The matter inevitably proceeded to the House of Lords ([2005] 3 WLR 733) where their Lordships upheld the decision of the Court of Appeal by dismissing the appeal but reversed the Court of Appeal on several aspects of its judgment, most notably over whether legislation passed under the Parliament Acts is delegated legislation. Lord Bingham, who gave the leading speech in the case, stated that the 1911 Act makes clear that the legislation should be an ‘Act of Parliament’ and Parliament did not at that time envisage any different status (p 744). This, it was submitted, is a crucial point. Constitutionally there has never been any distinction drawn between the status of Acts of Parliament as distinct from legislation in general. Acts of Parliament have always been considered to be not only primary sources of law but also primary legislation—and accordingly although the courts can interpret the provisions (see 2.3) they cannot rule them illegal. The submissions of the appellants would have created a situation where a distinction was drawn between Acts of Parliament, which could have undermined the supremacy of Parliament.

Lord Bingham went further and argued that the case being litigated came extremely close to disrupting the separation of powers, with his Lordship noting that the courts have consistently stated that they do not have the power to look at the validity of an Act of Parliament but must merely interpret and implement its provisions (p 746). This was not a view shared by all the Law Lords sitting on the case and Lord Nicholls, for example, argued that it is not a case of looking at the validity of a properly passed Act but questioning whether the Act was properly passed (p 754). This is probably an important distinction to be drawn as who else could decide this point? The balance of powers in the state does not provide Parliament with any power to adjudicate on individual cases but instead leaves that to the judiciary. Whilst Parliament can overrule a decision of the courts by legislating to overrule the principle this will ordinarily have no impact on the specific case being litigated. The only way that the validity of the Parliament Act process could be raised is through the courts and for this reason a relaxation of the traditional rules would appear appropriate.

Importantly, the decision in *Jackson* leaves open some questions on the limits of parliamentary accountability to the judiciary, with Cooke (a former Lord of Appeal in Ordinary) suggesting that some judges were prepared to hold that there are certain measures (eg the abolition of judicial review or a similar restriction of judicial access) that could not be passed under the Act (see Cooke (2006) 226). However, it is quite clear from the unanimous decision of the House that legislation passed under the Parliament Acts is not delegated but has exactly the same status as legislation that is passed in the usual way. It is, of course, open to Parliament to repeal the Parliament Acts but unless the repealing Act expressly stated that it was to operate retrospectively the decision of the House of Lords in this case demonstrates that all Acts passed under those instruments are as valid as any other statute.

? QUESTION FOR REFLECTION

Lord Cooke suggests that the *Parliament Act 1949* cannot be used to amend the *Parliament Act 1911* in such a way as to remove the safeguards against a money bill or the extension of Parliament. Consider the case of *Jackson* (see 'Validity of the Parliament Act 1949'), in particular the speech of Lord Bingham. Do you think Lord Cooke is right? If so, does that mean there are no safeguards to prevent a rogue government indefinitely extending the lifetime of Parliament?

🎧 LISTEN TO THE PODCAST

For guidance on how to answer this question and a discussion of the main issues, listen to the author's podcast on the Online Resource Centre:

www.oxfordtextbooks.co.uk/orc/gillespie_els4e/

2.2.2 Content of a statute

Having now discussed what legislation is, what does one look like and what are its contents. If we take, as an example, the *Constitutional Reform Act 2005* (CRA 2005) which we have already used it can be seen that the beginning of the Statute will look similar to Diagram 2.4.

The relevant aspects to discuss are:

1. Short title
2. Royal Coat of Arms
3. Chapter number
4. Long title
5. Date of Royal Assent
6. Enacting formula
7. Part number and heading
8. Marginal note
9. Section

Short title

Most statutes will be referred to by their short title, ie in the example earlier the statute will normally be called the *Constitutional Reform Act 2005*. This short title is always displayed at the beginning of the Act but the authority to use a short title must be expressly provided within the statute itself and it will normally come towards the end of the statute. For this statute, s 149 CRA 2005 says: 'This Act may be cited as the Constitutional Reform Act 2005.'

Ordinarily the short title of an Act is uncontroversial but occasionally its use can be misunderstood. Perhaps a classic example of this was in 2008 during the midst of the global financial crisis. An Icelandic bank called *Landsbanki Islands hf* was in financial difficulties and after it went into liquidation the Chancellor of the Exchequer used powers given to him under the *Anti-Terrorism, Crime and Security Act 2001* to seize control

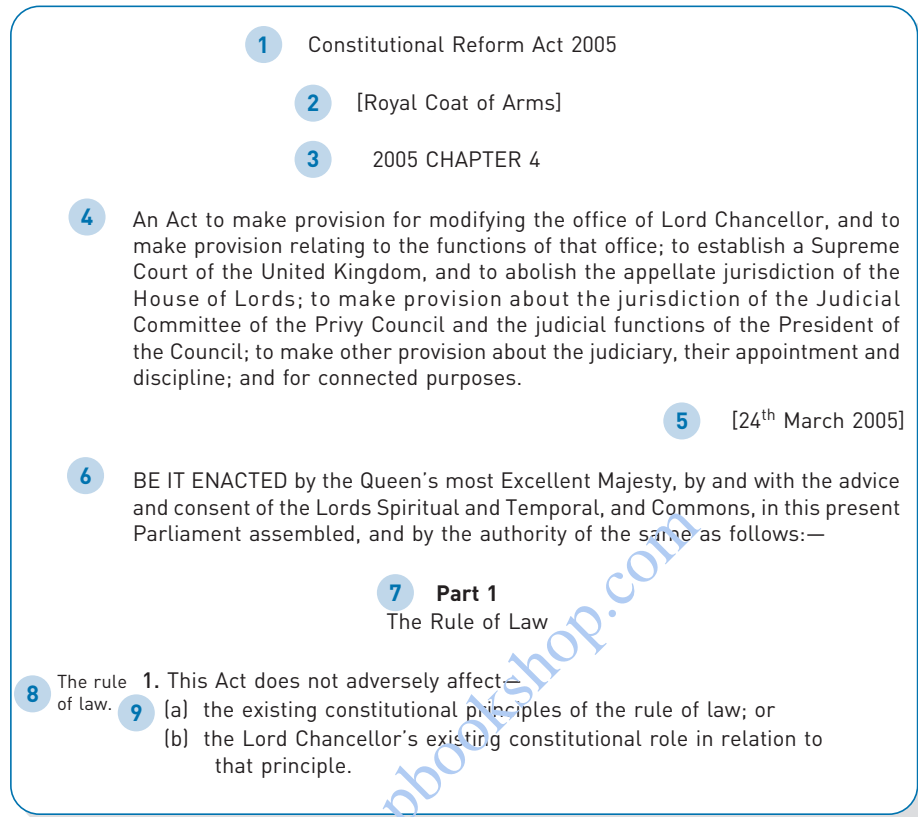


Diagram 2.4 An example of a statute

of the bank's British assets. This led to the Icelandic government and many global media outlets stating that the British government had used its anti-terrorist legislation against Iceland, the inference being that Iceland was being compared to terrorists. However, the relevant provisions used by the Chancellor were not in the Anti-Terrorism parts of the Act, they were in later sections of the Act. It is easy to see how this could be misrepresented, however, given the short title of the Act. It is perhaps a warning of the political difficulties in putting too much disparate legislation in an Act of Parliament, and also of the requirement to choose short titles with care!

Royal Coat of Arms

An Act of Parliament is made under the authority of the Queen in Parliament because the United Kingdom is a constitutional monarchy. Accordingly when any legislation is passed the Royal Coat of Arms is affixed to the statute to act as a seal for the legislation.

Chapter number

The second official way in which a statute should be cited is in respect of its chapter number. Each Act that is passed by both Houses of Parliament and which receives Royal Assent is assigned a sequential number to identify what order the legislation was passed in any parliamentary session. Modern statutes are governed by the *Parliament*

Numbering and Citation Act 1962 which provides that the chapter number is assigned by reference to the calendar year. The first statute to be given Royal Assent after 31 December is given the chapter number 1, and each successive piece of legislation is given a sequential number (s 1). Accordingly in the earlier example, the *Constitutional Reform Act 2005* was the fourth Act to be given Royal Assent in the calendar year 2005.

Prior to the 1962 Act the position was significantly more complicated. Statutes were assigned a chapter number according to the regnal year in which the parliamentary session was begun. The regnal year was the year of the reign of the current monarch. The regnal year starts on the accession to the throne (eg Queen Elizabeth II acceded to the throne on 6 February 1952)¹¹ and continues until the day before the anniversary of accession (eg the first regnal year of Queen Elizabeth II was 6 February 1952 to 5 February 1953; on 6 February 1953 Her Majesty's second regnal year began). This inevitably meant that there may be an overlap between the regnal years and the parliamentary sessions which typically begin in October or November of each year with the Queen's Speech. The system was extremely confusing because of this overlap and, for example, the twenty-third Act that was passed in the parliamentary session which began in 1961 and lasted to 1962 would be referred to as *10&11 Eliz.2 c.23* which is translated to mean the 23rd Act in the 10th and 11th years of the reign of the Monarch Elizabeth II. This meant that one would need to know the year of accession for all the monarchs in order to identify what year the Act was! Even today in law libraries you will normally find a list of monarchs and their regnal years in order to facilitate paper-based searching of these Acts.¹² Thankfully the 1962 Act simplified this process and most electronic legislative search engines (eg *Westlaw*, *LexisNexis*, etc) use the calendar rather than regnal year for ease of reference.

It has been argued that the only significance of the chapter number is that it allows the courts to identify in which order Parliament is deemed to have acted (Bennion (1990) 128). If, for example, in the extremely unlikely event that two pieces of legislation are given Royal Assent on the same day but appear to contradict each other, the chapter number identifies which is the later Act and would, therefore, be deemed to have implicitly repealed the earlier legislation.¹³

Long title

Although each Act is given a short title by which it will ordinarily be known, there is also a 'long title' to the Act which serves a description of the purposes of the Act. Bennion also notes that procedurally it is important because when a Bill is being debated in the House of Commons (see 2.2.1.1) an amendment can only be tabled to the Act if it is within the scope of the legislation and the long title broadly governs the scope of legislation (Bennion (1990) 42). Bennion also notes that it should be an aid to construction and this will be considered later (see 2.3.5.1).

11. Note it is the date of the *accession* (ie assumption) of the throne and not the date of the *coronation*. A monarchy is never without a sovereign and thus as soon as a monarch dies the heir presumptive becomes monarch with this assumption being *confirmed* by coronation but the rule starts at the time of accession. The coronation of Queen Elizabeth II was not until 1953 but she was Queen from 1952.

12. A list can also be found on the Online Resource Centre that accompanies this book.

13. For more on implicit repeal see Loveland (2009) 33–34. The issue is not necessarily academic discussion. In *R v Richards* [2007] 1 WLR 847 the President of the Queen's Bench Division held the fact that two pieces of legislation were enacted on the same day was evidence that they did not contradict (and thus implicitly repeal) each other (at 853).

Date of Royal Assent

It was discussed earlier that Royal Assent is the final part of the process required to enact legislation (see 2.2.1.1) and the date on which assent is given is placed on the Act and on all copies of the Act. The sovereign no longer signs each Act and the process is now regulated, in part, by the *Royal Assent Act 1967*, s 1(1)(b) of which permits the Speaker of the House of Commons and the Lord Speaker of the House of Lords to notify their House that Royal Assent has been granted.

Enacting formula

The enacting formula is just a formal wording that demonstrates that the legislation passed the relevant legislative processes. The formula identified in the earlier example is the usual one but where the Parliament Act has been invoked (see 2.2.1.2) the formula changes to:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Commons, in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows—

Obviously it is necessary for this formula to be used as the usual one refers to the advice and consent of the Lords which, of course, did not occur if the Parliament Acts needed to be invoked.

Part number and heading

The organization of statutory material is important since, especially with long pieces of legislation, it ensures that there is a consistency of approach and permits provisions to be grouped together for interpretation. Where an Act is long it is not uncommon for the Act to be split into Parts. The *Constitutional Reform Act 2005* is divided into seven Parts each dealing with a discrete set of provisions in a broad area. Each Part is usually accompanied by a heading, or more properly referred to as a 'note' and these have the same status as marginal notes (see 'Marginal note').

Where an Act is particularly long or complicated it is possible to further divide the Parts into chapters. For example the *Constitutional Reform Act 2005* divides Part 4 (judicial appointments and discipline) into four chapters. In this context it is important to note that 'chapter' merely means a subdivision of a Part and is not the same as a chapter number.

Marginal note

Each section within a statute (see 'Section') is accompanied by a marginal note, which is sometimes also referred to as a side note. In effect it has the appearance of a heading and on electronic versions of statutes it appears alongside the section number with the appearance of a heading; eg s 1, as noted earlier, is presented in electronic versions as:

1. The Rule of Law

This Act does not adversely affect—

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

However it is referred to as a marginal note because, as was seen in Diagram 2.4, in printed form the notes appear in the margins alongside text. A debate appears to exist

as to whether marginal notes are part of the Act or whether they are annotations. This will be discussed in more detail later as it is relevant only to the interpretation of a statute (see 2.3.5.1).

Section

Each provision within a statute is known as a section. Each section will ordinarily deal with only one topic but it may not be possible to deal with a single topic with only one level of heading within the provision. Accordingly, it is possible to subdivide a section. Four levels are recognized.

Table 2.2 Dividing sections

Level	Name	Appearance
1	Section	1
2	Subsection	(1)
3	Paragraph	(a)
4	Subparagraph	(i)



Example Section 9 *Constitutional Reform Act 2005*

Section 9 states:

- (1) The President of the Family Division is Head of Family Justice.
- (2) The Lord Chief Justice may appoint a person to be Deputy Head of Family Justice.
- (3) The Lord Chief Justice must not appoint a person under subsection (2) unless these conditions are met—
 - (a) the Lord Chief Justice has consulted the Lord Chancellor;
 - (b) the person to be appointed is an ordinary judge of the Court of Appeal.
- (4) A person appointed as Deputy Head of Family Justice holds that office in accordance with the terms of his appointment.

It can be seen that s 9 is broken into four subsections each of which deals with a discrete aspect of the section's provision. Subsection (3) has to be subdivided itself in order to provide for discrete conditions and this division consists of two paragraphs. If either paragraph needed to be divided then this division would be known as subparagraphs and would be represented as (i), (ii), etc.

It is important to note that each level has a distinct appearance. If I wanted to refer to the second paragraph of subsection 3 I would do so by writing s 9(3)(b). Not using the brackets could cause confusion as s 9 3 b might be taken to mean either section 93 or a new section that follows s 93.¹⁴

The provisions themselves are at the heart of the statute and it is these that the courts need to interpret when adjudicating on cases brought before them.

¹⁴ A further explanation of the appearance of provisions is given on the Online Resource Centre accompanying this book.

2.3 Statutory interpretation

Having now seen a statutory provision it can be seen that the language used is somewhat formal. Section 25 CRA 2005 was relatively easy to understand but some statutory provisions are less than clear and consist of highly technical language. Sometimes because of the complexity of a statute it is not immediately clear what the section provides; in other situations it may not be immediately clear who is within the provisions. One of the principal jobs for courts is to interpret statutory material (both primary and secondary legislation)¹⁵ and apply their interpretation to the facts at hand.

It has been suggested that since 2001 there have been two principal means of interpreting a statute: the purposive approach and the interpretative approach (Marshall (2003) 236). Marshall argues that the former is the traditional manner in which legislation is construed and the latter arises from s 3 *Human Rights Act 1998* which provides that a court must, so far as possible, interpret a statute to comply with the ECHR. Whether the distinction is as profound as Marshall argues is perhaps more debatable and Bennion, writing a decade earlier, argued that there is no distinction between construction and interpretation (Bennion (1990) 84) but s 3 undoubtedly introduces a new aspect of statutory interpretation and its importance cannot be denied.

Statutory interpretation is unique to common-law-based jurisdictions (Bennion (1990) 83). The principal comparator to the common-law-based system is continental Europe where civil law is primary and where the courts feel they have no need to construe a statute because the texts are more often considered to be more flexible and more akin to 'living instruments' with the judges having final say over what the law should mean in a particular case (Bennion (1990) 83). Common-law countries, however, now prefer to state that the legislature creates the law and the courts merely apply the law which, of course, means that the will of Parliament must be identified. This requires a system of rules known as statutory interpretation to assist the judiciary.

Given that the common-law countries seek to separate the powers between the instruments of law (with Parliament creating the law, the executive implementing the law and the judiciary applying the law) it is perhaps not unsurprising that tension exists between the instruments. Whilst each would appear to have a distinct role, there is undoubtedly overlap and tension. For example, much of the law that is passed by Parliament comes from the executive but neither branch can by itself apply the law. The judiciary considers itself to be the custodian of rights in the country and does not act in a way that is necessarily popular but in a way that it sees as just. In recent years the tension between the executive and the judiciary has become increasingly fraught, especially in the fields of criminal justice and asylum issues. It is perhaps not surprising that these are the areas of increased tension as they are also the most politically active areas of law with the impression that the electorate is most concerned with these matters. In the early 1990s when John Major was the prime minister and Michael Howard was the Home Secretary this tension began to become somewhat noticeable but in the early 2000s the

¹⁵ The remainder of this section will discuss how to interpret statutes as this will be the most usual practice. However, the same rules and procedures govern interpreting statutory instruments too.

battle recommenced when David Blunkett was appointed Home Secretary (see Stevens (2002) 129–136). The tension arises from the way that judges interpret statutes but is this a deliberate attempt by the judiciary to thwart the will of the elected body or is it something else?

PARLIAMENTARY SOVEREIGNTY: 'GINGER HAIR' TEST

Earlier in this chapter the concept of parliamentary sovereignty was discussed and the ambit of Parliament was discussed in connection with the 'smoking on the streets of Paris' example (see 2.2.1). If Parliament can do what it wishes then does this mean there are no balances and that a corrupt Parliament could use its powers to act in an improper way? Those who argue that the courts are either supreme or, at the very least, a safeguard to an overzealous legislature and executive sometimes point to the 'ginger hair' example.

The essence of this example is that Parliament passes a law that states anyone with ginger hair is to be arrested and sent to gaol. Theoretically Parliament could enact such a law but it is an unjust law and one that is a direct affront to human rights and the right to liberty. Given that the courts will be the ultimate arbitrators of this law it is argued that they could interpret the law so as to make it impossible to implement. For example, if a judge was called upon to rule whether someone had ginger hair, she could adjudicate that the person in fact had red hair or a dark copper colour hair. In this way the courts could act as a 'brake' to Parliament's desire to infringe human rights by ensuring that the law was interpreted in such a way that no injustice is done.

Before the 'interpretative' rule arose the courts stated that they would interpret legislation in accordance with one of three rules:

- literal rule
- golden rule
- mischief rule.

By examining these rules we can begin to understand how the courts interpret statutes and where tensions between the executive and legislature begin to be introduced. However, the notion of these rules is controversial with Bennion, arguably one of the leading authorities on parliamentary drafting and interpretation, suggesting that it is erroneous to argue that there are only three rules governing interpretation (Bennion (1990) 104–105). This is an important point and is undoubtedly true. There is also the difficulty of using the term 'rules' since the courts themselves do not consider themselves bound by them, they are conventions rather than strict rules, and some refer to them as 'canons of interpretation'. However the three following principles are the most commonly referred to.

2.3.1 **Literal rule**

The literal rule is considered to be the 'normal' rule and it complies with the traditional view of the courts that their role is not to make or subvert the law but rather to apply the law created by Parliament. The essence of the literal rule is that the courts simply look at the words and apply them as they are written with the suggestion that Parliament must have known what they meant.



Example Literal rule

Parliament (hypothetically) creates a law that states:

- (1) A person aged 18 must pay the sum of £150 to the government.
- (2) On receipt of the £150 the government shall grant to the person a certificate.
- (3) No person shall be entitled to drink an alcoholic beverage in a public house without a certificate.

There are a number of parts of this law that may need to be interpreted, including 'aged 18', 'on receipt', 'alcoholic beverage', and 'public house'. The literal approach would simply look towards the ordinary meaning of these words. Accordingly in subsection (1) it is likely that the courts would hold that a person could not pay £150 until the eighteenth anniversary of their birth, but that they had until the day before their nineteenth anniversary of their birth to pay the £150. A literal interpretation would not suggest that the sum must be paid on the person's eighteenth birthday because it does not literally say that. A literal interpretation of subsection (2) would mean that as soon as the money has been received by the government they should issue a certificate and so, for example, an executive decision taken by the Home Secretary not to issue any certificates until two months after receipt in order to enable people to attend alcohol education programmes could be ruled illegal as it contravened a literal interpretation of the Act. A literal interpretation of subsection (3) would mean that a person could not drink any alcoholic drink in a public house regardless of whether they bought it or indeed knew whether it was alcoholic.

Where the literal interpretation can begin to come unstuck, however, is when grammar is introduced, not least because grammatical rules and styles change over the years (see Bennion (1990) 130). Some have argued that grammar should be ignored but that would be a false premise as punctuation must have been used for a reason. One commentator has suggested that where there are conflicting grammatical meanings the courts must decide between them by looking at the possibilities and the section as a whole (Bennion (1990) 96–97) but to remember above all that the purpose of statutory interpretation is to adopt a legal meaning and not necessarily a grammatical meaning (p 88).

In deciding the literal meaning of the word the judge will sometimes refer to their own interpretation of the meaning, usually arguing that it is so well known that people know what it means. Alternatively the judge will make reference to a dictionary, usually the *Oxford English Dictionary*, and suggest that this amounts to the literal meaning. The literal rule can sometimes appear harsh with one leading commentator citing the example of *Diane Blood* who was denied the right to conceive by artificial insemination using her late husband's sperm which had been harvested whilst he was in a coma (Darbyshire (2001) 27).¹⁶ The relevant Act (*Human Fertilisation and Embryology Act 1990*) required the consent of the donor before artificial insemination could be undertaken and this was not, of course, possible in these circumstances. Although the courts were deeply sympathetic to the predicament faced by Mrs Blood they were forced to rule that the literal language employed by statute was obvious and they were bound to follow the wording of the Act.

16. *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 WLR 807.

2.3.2 Golden rule

Whilst the literal rule will normally be applied there are occasions when its use could actually defeat the intention of Parliament rather than apply it. On those occasions the courts will not feel constrained to obey the literal rule but will follow what is known as the ‘golden rule’.

It has been suggested that this rule should be used when Parliament intended its provision to have a wider definition and not one restricted to the literal meaning of its words (Bennion (1990) 105) and this is corroborated by other commentators who note that the rule is traditionally employed when it is decided that a literal interpretation would not give rise to the will of Parliament (Manchester et al (2000) 41) although they then argue that it is commonly applied when it is thought that the literal rule would lead to an absurdity (p 42). An absurdity may arise of course not just because of the intentions of Parliament but because of poor drafting but this need not contradict Bennion’s belief because the key to the ruling is that Parliament’s intention is to be discovered and applied notwithstanding the drafting of the words.

It is important to note that the courts cannot just cast off the literal rule for the golden rule when it so wishes. The clear presumption is that it must follow the literal rule unless not to do so would contravene the intentions of Parliament (with it being implicit that Parliament will not normally wish to legislate in such a way to create an absurd situation). In the preceding section it was noted that the courts had sympathy with Mrs Blood who wished to conceive using her dead husband’s harvested sperm. Given that the courts and indeed the parties directly related to the litigation morally supported her¹⁷ it may be thought that the courts would reject the literal rule but there were no grounds to do so: there was no uncertainty in the legislation nor was there any absurdity created. It was undoubtedly Parliament’s intention that the consent of both parties was required but they probably did not contemplate this situation. The failure of Parliament to contemplate a situation is not a reason to depart from the literal rule and all a court can do in these circumstances is bring the matter to the attention of Parliament and suggest that it passes new legislation.



Example Golden Rule

Section 57 Offences Against the Person Act 1861 defines bigamy as:

Whosoever, being married, shall marry another person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty [of an offence].

It is not possible to use the literal rule here since the application of that rule would defeat the intention of Parliament. Section 57 says it is illegal to marry another person but as a matter of civil law a second marriage under such circumstances would not be legally valid so the person has not, by law, married. Also, the statute says during the life of the ‘former’ husband

¹⁷ The hospital that in effect refused to undertake the procedure did not do so because it objected in principle to the idea but rather because it believed it had no statutory right to do it and was obliged to reject the approach. This is a common feature in medical cases where there is no ‘dispute’ as such but doubt exists about the legality of a situation.

or wife. The purpose of bigamy is to deal with situations where they are still married so 'former' would not apply. If they were the former husband or wife then it would not be bigamy.

The courts, to overcome this obstacle, have used the golden rule so as to construe bigamy as when somebody purports to marry someone else (ie go through a marriage ceremony) whilst already legally married.

QUESTION FOR REFLECTION

The Online Resource Centre accompanying this book has a summary of the Diane Blood litigation. Read this. Do you think that the courts were unduly harsh here? Nobody doubts that the golden rule could have been used to create an exemption where a partner is dead but the question is whether the rule could be used. Instead of looking at absurdity in *the law* (ie on the face of the legislation) could the absurdity not be *in fact* (ie in this case, the fact that it was impossible to gain consent from a dead person)?

LISTEN TO THE PODCAST

For guidance on how to answer this question and a discussion of the main issues, listen to the author's podcast on the Online Resource Centre:

www.oxfordtextbooks.co.uk/orc/gillespie_els4e/

2.3.3 Mischief rule

The third rule that is most commonly employed by the courts is the mischief rule. This rule differs from the previous two rules in that the importance of the words is less important than the underlying reason why Parliament legislated (Manchester et al (2000) 42). Bennion argues that the rule is historic as it dates back to the time when statutory law did not have a pre-eminent position—ie common law was the more usual and statutory law was only passed when the common law did not cover an issue (Bennion (1990) 161) or, presumably, Parliament wished to remedy what it saw as a 'defect' in the law.

Bennion also argues that allied to the mischief rule is the purposive rule which is when Parliament has legislated to remedy a defect in a previous statute that has been identified (Bennion (1990) 163). The purposive approach takes as its starting point that Parliament intended to remedy the previous defect and accordingly the courts should construe the amending legislation in such a way as to ensure that it recognizes the intention of Parliament was to correct the error.

The mischief rule is sometimes used when a statute is in force for many years. Some statutes will remain current law for many years, and will be in continuous use. A good example of this is the *Offences Against the Person Act 1861* which is probably one of the most commonly used statutes in the criminal law. However, a statute will invariably use words that were appropriate at the time and may no longer necessarily be correct in contemporary society. The mischief rule permits a court to depart from the literal meaning of a word used at that time and apply the intention of Parliament—to legislate for a particular mischief—in such a way that it can be applied to modern society.



Example Obscenity

An example of the use of the mischief rule can be seen from the case of *R v Stamford* [1972] 2 QB 391 where the appellant had been convicted of sending postal packets containing indecent or obscene material. The relevant statute creating the offence, the *Post Office Act 1953*, did not provide any definition of 'indecent' or 'obscene' and this could be contrasted with the *Obscene Publications Act 1959*, which did. The Court of Appeal was called upon to consider whether it was possible to call expert evidence on what amounted to 'indecent' or 'obscene' material if someone was charged under the 1953 Act. Counsel submitted that they should be able to because expert evidence was permitted under the 1959 Act. In rejecting the submission the court looked to the mischief behind the 1953 and 1959 Acts and decided that the statutes were intended to deal with different mischiefs (see pp 396–397 per Ashworth J) with the 1953 Act being intended to prevent the misuse of the postal service and the 1959 Act being intended to regulate, inter alia, the publication of obscene material. The court argued that this meant that the test of obscenity under the 1953 Act would be purely objective as it matters not what the addressee thinks of the material as the postal service has been misused irrespective of the intentions of both parties. This could be contrasted with the 1959 Act where it was thought that the views of the likely audience at the publication would be relevant.

It can be seen that the court believed that in order to understand Parliament's intention it was not enough to look literally at the wording of the Act but rather to focus on the mischief and conclude as to Parliament's intention.

2.3.4 The Human Rights Act 1998

Whatever the status of the traditional 'rules' of statutory interpretation, the process of statutory interpretation was altered by the *Human Rights Act 1998*. The Act was one of the first major pieces of constitutional legislation enacted by the Labour administration elected in 1997. The Act itself will be the subject of discussion in Chapter 5 where reference will be made to s 3 which empowers the court to interpret legislation 'so far as it is possible to do so' in a way compatible with the ECHR (discussed at 5.2.3.1). It will be seen in Chapter 5 that s 3 is a very flexible power and one that allows the courts to go far beyond what the traditional rules of statutory interpretation permit. However the power is just that, one of interpretation, and if it is not possible to interpret the law then the courts must not produce a strained interpretation but instead declare that it is not possible to construe in a compatible way (s 4 HRA 1998 discussed at 5.2.4.2).

2.3.5 Aids to interpretation

Although it has been noted that subject to the qualification put forward by Bennion it can be said that there are rules governing statutory interpretation, it should also be noted that the courts have a number of tools at their disposal to assist them in their interpretation of statutory material. These aids can normally be classified into one of two categories.

2.3.5.1 Intrinsic aids

Intrinsic aids are those contained within the statutory instrument itself. Quite what can be considered to be 'part of a statute' is open to debate. The contents of a statute were

Intrinsic aids

Looking at the content of the statutory material to assist in the interpretation of a provision

Extrinsic aids

Looking at material outside the Act but within the contemplation of the legislature

Diagram 2.5 Intrinsic and extrinsic aids

discussed earlier and the individual components of legislation may become relevant in deciding how to construe a statute.

A number of issues arise as to what is within the statute however. The two principal issues are the wording of the provisions and the explanatory features of the Act.

Wording of the statute

The first issue to examine is the wording of the Act. An important canon of interpretation is that the Act should be read as a whole (Bennion (1990) 187) which gives rise to three examples, all of which are known by a Latin term notwithstanding the fact that we are trying to remove Latin from the legal language! The common rules are:

- *noscitur a sociis*
- *ejusdem generis*
- *expressio unius exclusio alterius*.

Noscitur a sociis

The first rule is that a statutory provision should be read in conjunction with its neighbouring provisions. Certainly this canon has been employed by the courts on a number of occasions and is a logical step. Given that even the most disparate of Acts will normally be divided into Parts, the neighbouring provisions should assist in ascertaining either the meaning of a word or the mischief behind the Act.

This rule can, in effect, be divided into two aspects. The first of these looks at similar words. A word should have the same meaning throughout an Act (Bennion (1990) 188) although it should be noted that this is only a presumption and accordingly if Parliament expressly wishes to act differently it may do so. A good example of this can be found in the *Sexual Offences Act 2003* where 'sexual' is defined within s 78 but the Act expressly states that a different meaning of the word shall be employed for s 71.

The second aspect to this rule is its logical conclusion: that different words in a statute should normally bear different meanings (Bennion (1990) 189). Whilst this would appear to be obvious it is not necessarily so and indeed this construction has caused difficulties before.

→ COMPLICITY

The Accessories and Abettors Act 1861 is a good illustration of how different words should have different meanings. The provision makes it clear that a person can become an accomplice to the principal offender by acting in one of four ways:

1. aiding
2. abetting

3. counselling
4. procuring.

At first sight it is unclear what the difference is between 'aiding' and 'abetting' or 'abetting' and 'counselling' or even 'counselling' and 'procuring'. Certainly common usage will frequently refer to someone as 'aiding and abetting' and the thesaurus provides 'aid' as the first alternative to 'abet'. In *Attorney-General's Reference (No 1 of 1975)* [1975] 2 All ER 684 the Court of Appeal held, however, that each had a different meaning because if it were otherwise then Parliament would not have listed these four separate ways of acting.

This canon can still be controversial however and there is sometimes a debate in the courts as to whether different words must necessarily mean anything. A good example of this is the words 'cause' and 'inflict' within the *Offences Against the Person Act 1861*. At first sight they appear to be two different words but they appear in two related sections of the Act (ss 18 and 20 which relate to grievous bodily harm). The difference between the words exercised the courts for many years and in *R v Ireland; R v Burstow* [1998] AC 147 the House of Lords held that for practical purposes there is no longer a distinction between 'cause' and 'inflict' (see p 160 per Lord Steyn and in particular p 164 per Lord Hope of Craighead).

Ejusdem generis

This second rule is similar to the first but relates to similar words rather than identical or contrasting words. The expression can be translated into English as 'of the same kind or nature' and it demonstrates the purpose of this rule. The basic principle of the rule is that where words of general meaning are to be found in a provision following words with a specific meaning then the general words are to be read narrowly as though they were linked to the specific words (see Bennion (1990) 196). In other words the general words are considered to be a continuation of any list of words preceding them.

The rule is subject to some restrictions. The first is that all the words must constitute a genus (or 'set' of words) and this genus should be narrower than the literal interpretation of the provision (Bennion (1990) 197). Bennion provides the following example:

The *Customs Consolidation Act 1876*, s 43 reads: 'The importation of arms, ammunition, gunpowder or any other goods may be prohibited.' (p 197)

There is no doubt that the words 'or any other goods' are general words and their literal interpretation would encompass virtually any form of trade. However, the *ejusdem generis* rule would seek to limit the meaning of those general words to a context related to the preceding words, ie the 'any other goods' must be comparable to ammunition, eg gelignite (a high explosive) may come within this provision. Bennion continues by arguing that the 'genus' must also be restricted narrowly:

The string specified as 'boots, shoes, stockings and other articles' would import the genus 'footwear' rather than the wider category of 'wearing apparel'.

Clearly this is a useful and sensible approach to adopt and does ensure that a provision is no wider than it needs to be.

Expressio unius exclusio alterius

This final rule is related to the *ejusdem generis* rule in that it concerns lists of words but where the rule differs is that the *expressio* rule operates on the premise that in the absence of any general words a list will be exhaustive and accordingly any term

not listed within the list will be deemed not to be included within the provision. This principle can be identified from its English translation, 'to list one thing is to exclude another'.

The rule arguably goes further by limiting general words. Bennion's argument is that if a specific word is used to limit a general word (cf the *ejusdem generis* rule where a general word was used to *extend* or *complement* the specific words) then the specific word is taken to mean that it excludes other words that come within that general class (Bennion (1990) 202). He provides the following example:

The *Immigration Act 1973*, s 2(3) states that for the purposes of s 2(1) of the Act the word 'parent' includes the *mother* of an illegitimate child. The class to which this extension relates is the *parents* of an illegitimate child. (p 202)

The logical conclusion of this rule is that the father of an illegitimate child would not be within s 2(1) because the use of the word 'mother' as an express inclusion must be to limit the meaning of the general word 'parent' and accordingly 'father' which is obviously within the general term has been implicitly excluded.

Explanatory issues

Although it will be noted later (see 'Explanatory notes') that some explanatory material is outside of the Act, the statute itself will contain some provisions that explain the significance of the detailed provisions. The two most important features are marginal notes and the long title.

Marginal notes

It was noted that sections will normally be accompanied by something called a 'marginal note' or 'side note'. These are, in effect, descriptions of the section but are they part of the statute and capable of being used as an intrinsic aid? Some commentators argue that the answer is 'no' and they do not form part of the Act and accordingly cannot be used as an intrinsic aid (Manchester et al (2000) 46). However, others disagree and argue that they *are* part of the statute albeit they usually provide only an indication of the provision rather than a necessarily accurate description of the provision (Bennion (1990) 128). It is submitted that there is no reason why a court could not take account of the marginal note of a provision although caution should be shown because the notes are not debated within Parliament but are placed on the Act by the draftsman (p 127). Accordingly, not only is it not necessarily an accurate description of the provision it is the draftsman's deduction of the meaning of the provision.



Case box *R v Tivnan*

In *R v Tivnan* [1999] 1 Cr App R(S) 92 the Court of Appeal demonstrated that it does occasionally use marginal notes in order to assist in understanding the intentions of Parliament. The appellant had been convicted of drug dealing and a confiscation order had been made against his assets. He claimed that as it could not be proven his assets had been obtained through the proceeds of drug dealing the confiscation order should be quashed. The Court of Appeal considered Parliament's intention was to deprive drug dealers of assets equal to the proceeds obtained by drug dealing not necessarily just those assets that were purchased directly from the proceedings. The Court made express reference to the marginal note in seeking the intent (see p 97).

Long title

The long title of the Act may provide assistance in the construction of a provision. It will be remembered that the long title is part of the preamble to the Act which sets out the purpose of the Act. As the long title is part of, if not the official title, for the Act it would appear appropriate that it should be considered.



Example Animal cruelty

The Protection of Animals (Amendment) Act 2000 permits a court to make an order, upon the application of a prosecutor, for an order for the care, disposal, or slaughter of animals that have been kept cruelly. In *Cornwall County Council v Baker* [2003] 1 WLR 1813 the Divisional Court was asked to rule on the meaning of 'animals in question'. The Council had prosecuted the respondent for cruelty to seven farm animals. It also sought an order under the 2000 Act relating to other animals at the farm which were not subject to the prosecution. The magistrates' court refused to make an order in respect of the other animals contending that the 2000 Act applied only to animals subject to proceedings under the 1911 Act. The Divisional Court upheld this ruling on appeal and referred to the long title to demonstrate its purpose (see pp 1819–1820 per Toulson J).

2.3.5.2 Extrinsic aids

In certain circumstances it may be possible to look outside of the Act for assistance in construing a statutory provision and this is known as using extrinsic aids. There are a number of extrinsic aids that the courts will consider but rules do sometimes exist as to when courts may look outside of the Act for assistance. Broadly speaking, the following aids will be examined:

- explanatory notes accompanying an Act
- parliamentary material
- other statutory provisions
- academic writing
- pre-parliamentary material.

Explanatory notes

Since 1999 all government Bills introduced into Parliament are accompanied by explanatory notes and upon Royal Assent these notes are amended to reflect the agreed wording of the Act (see Munday (2005) 340–341). The notes do not form part of the Act and are indeed created by the government department sponsoring the Bill (see *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956 at pp 2958–2960 per Lord Steyn) so they have not been approved within Parliament because whilst they may be the subject of discussion during the progress of the Bill there is no mechanism for the notes to be amended by Parliament. Further, parliamentary draftsmen have argued that 'explanatory notes are informal in style, are there to improve clarity for the reader, and to this end may be highly discursive' (Munday (2005) 341). Clearly, it is contemplated that the reader of a piece of legislation will refer to the notes but does a 'reader' include members of the judiciary? Also, given that the notes are written by draftsmen and not members of the legislature, they arguably suffer from the same problem as marginal notes (discussed earlier).

The courts readily refer to explanatory notes (Munday (2005) 341–342) but some question whether they go too far and accord them a ‘quasi-legislative’ status that it was never intended for them to have. To support this argument reference is made to the comments of Lord Bingham in *Attorney-General’s Reference (No 5 of 2002)* [2005] 1 AC 167 where his Lordship argued that the explanatory notes ‘strongly supported’ his conclusion as to the meaning of the provisions. Given that they are a creature of the executive rather than the legislature it is somewhat surprising that the notes are so readily referred to, especially in light of the rule governing the use of parliamentary material (see 2.3.5.3). However, Lord Steyn in *Westminster City Council v National Asylum Support Service* argued that they were akin to pre-parliamentary material but arguably of more assistance than, for example, White or Green Papers since they reflect the initial wording of the provisions (p 2960). One concern is that ready use of these notes by the courts could encourage sloppy draftsmanship (on the basis that so long as the notes explain the provision it need not matter whether the provision is tightly defined) (Munday (2005) 347). The fact that the notes are created by the executive rather than the legislature also creates the possibility that recourse to the notes could give rise to a confusion as to whether a provision reflects the intentions of Parliament or the government with the two not necessarily coinciding. Notwithstanding these points, however, the use of the notes has become an accepted part of statutory construction although recent decisions of the House of Lords would appear to suggest that a fundamental review of their use (akin to that undertaken in *Pepper v Hart* [1993] AC 593; see 2.3.5.3) may soon occur (see Munday (2005) 346–349 and 352–354 for a discussion of these issues).

Parliamentary material

Parliament is a formal body and is a body of record, ie a number of documents exist governing its proceedings and one possible extrinsic aid may be to use these documents. However, this is one of the more controversial uses of an extrinsic aid and for this reason, and to demonstrate the importance of the general rule, the use of such material is considered in its own section later (see 2.3.5.3).

Other statutory provisions

Whilst some statutes will act as amending or consolidating instruments for existing legislation, a significant amount of legislation is ‘new’ in that it creates stand-alone laws and procedures. It may be thought therefore that there is little use in examining other pieces of legislation but it is not unusual for similar words to be found in other statutes. Where the mischief is similar between the Acts then comparing or contrasting statutory words could prove useful in helping construct the meaning of the provision under scrutiny.



Case box *R v Dooley*

In *R v Dooley* [2005] EWCA Crim 3093 the Court of Appeal needed to consider the meaning of the words ‘with a view to’ which appeared in s 1(1)(c) Protection of Children Act 1978. The Act did not define these words but it is a not uncommon phrase to be found within legislation and the court examined how it had been construed in other legislation, including ss 1(2), 20, and 21 *Theft Act 1968* and the *Obscene Publications Act 1964*. The Court then argued that applying the same interpretation to the 1978 Act would be logical and it can be seen, therefore, that the other legislation acted as an extrinsic aid.

Perhaps the most common alternative statute to examine is that of the *Interpretation Act 1978* which, as its short title suggests, was designed to provide assistance in the interpretation of statutes. The 1978 Act is merely the latest reincarnation of the Interpretation Act and it is unlikely to be the last. The Act itself provides a series of common words and the presumption is that if one of these words is used in a statutory provision then it is deemed to have that meaning unless Parliament intended differently, this intention normally being evidenced expressly. Perhaps the most important interpretative presumptions in the Act are contained within s 6:

In any Act, unless the contrary intention appears—

- (a) words importing the masculine gender include the feminine;
- (b) words importing the feminine gender include the masculine;
- (c) words in the singular include the plural and words in the plural include the singular.

The use of such presumptions is important because otherwise an Act of Parliament could become cluttered and unreadable when a simple provision refers constantly to 'he or she', 'him or her', 'that or those', etc. Where the context clearly means the masculine or feminine gender then obviously the interpretation is so construed as the 1978 Act creates presumptions rather than mandatory rules.

Academic writing

It is often said that the English courts have been somewhat sceptical about the use of academic writings but this is not necessarily the case. Perhaps the most basic example of the use of books as an extrinsic aid is that of the dictionary; it was noted earlier that the usual rule in statutory interpretation is to use the literal meaning of the word and a dictionary is not infrequently consulted to achieve that aim. A dictionary cannot be anything other than an external aid.

The use of academic writing through texts and journals has been slowly developing but was used in even the nineteenth century. However its use has arguably been growing not least because there is a greater respect between 'academic' and 'practising' lawyers.¹⁸

The appellate courts are now increasingly turning to the use of academic sources of writing and indeed a failure to do so has led to criticism about the courts taking an unduly lenient approach to construction (see, for example, the commentary by Professor Andrew Ashworth on the Privy Council decision of *Attorney-General for Jersey v Holley* [2005] 2 AC 580 at [2005] Crim LR 966 at 970). That is not to say that academic sources will be automatically consulted and certainly where textbooks are concerned it is not unusual for only the most authoritative to be cited, but where a narrow point of law arises where there has been little case law or what case law there is has been debated amongst eminent academics then the citation of academic writings can be of assistance to the judges although, of course, they are not bound by them.

¹⁸ Indeed this 'glasnost' has led to a debate as to whether academics could be appointed direct to the bench (see Chapter 7). Arguably the most famous 'academic' lawyer was Professor Brenda Hoggett QC who moved from academia to the Law Commission. She was then appointed to the High Court bench as Hale J before being promoted to the Court of Appeal and then appointed the first female Law Lord in 2004. However, this cannot be said to be a 'pure' academic appointment as she was appointed from the Law Commission rather than from the academe.

→ ACADEMIC WRITING

BOOKS

In *R v Dooley* discussed in the previous case study the Court of Appeal did not just use alternative statutes as an aid but also made reference to Smith and Hogan's Criminal Law, undoubtedly the leading criminal law textbook. The arguments made in the text by its editor and author, Professor David Ormerod, were cited by the Court as being of assistance (para 14).

ARTICLES

In *R (Purdy) v DPP* [2010] 1 AC 345 the House of Lords became aware of an article by Professor Michael Hirst (at 359). Not only did Lord Philips refer to it extensively in his speech but the House also required counsel to supply written submissions on whether they believed the points contained within it were correct.

Pre-parliamentary sources

Legislation does not 'just happen' especially when a Bill is introduced by the government. There will normally be a significant number of documents that were produced and published prior to the Bill being introduced. When the Bill arises out of government policy it is quite likely that a series of official 'papers' may have been published, with a *White Paper* being a statement of the policy with a broad indication as to how the government intends to legislate to tackle the mischief, and a *Green Paper* being a discussion paper issued by the government for assistance in structuring the way in which the mischief should be tackled. The government may also have asked the Law Commission to examine a particular issue and if so the Law Commission will almost certainly have produced a consultation paper and a report to Parliament.¹⁹ In exceptional circumstances where issues of importance need to be examined it is possible that a Royal Commission will be established which will issue a report to Parliament.

Outside of the executive-controlled bodies Parliament itself may have created documents that are relevant to the provision. Both Houses of Parliament create *select committees* that investigate areas of interest to Parliament. Some of these committees are standing committees in that they remain in existence at all times (eg Home Affairs Select Committee, Defence Select Committee) and others will be created for a specific purpose. Committees will produce reports that are publicly available and sometimes these reports will call for legislation to be introduced which the executive may heed.

The use of such material is accepted by the courts but the degree to which it will be useful is perhaps more open to question since it may not reflect the proceedings in Parliament. That said the material will allow the provision to be placed into context and this could assist in its interpretation.

→ MODEL CODES

Pre-parliamentary material need not necessarily be accepted, or even debated, by Parliament for it to be used in the construction of a statute. Perhaps the best example of this is *R v G and R* [2004] 1 AC 1034 which is an important criminal law case where the House of Lords used its right to depart from its own decisions (see 3.4.3) to overrule *R v Caldwell* [1982] AC 341 which

¹⁹. Although the executive will refer a matter to the Law Commission the report will always be to Parliament.

it stated was a 'mistake' even though it had been used for over ten years. Lord Bingham, who gave the leading speech in the House, used the model penal code to construe the meaning of the word 'reckless'. The model penal code was created by the Law Commission and was designed as an exercise to demonstrate how the criminal law could be codified. Parliament has not yet decided that the criminal law should be codified, and indeed the Law Commission has now dropped the proposals believing they are unlikely to ever be implemented, so the proposals have not been debated by Parliament but this does not stop Lord Bingham from using it as a source of identifying the meaning of 'reckless' (pp 1046 and 1054).

2.3.5.3 The rule in *Pepper v Hart*

It has been seen that a basic distinction can be drawn between the legislature and judiciary in that Parliament enacts the law but the courts interpret it. How a court interprets legislation has been discussed and the ability to use extrinsic aids to assist in interpretation has also been identified as a source of help for the judiciary. A logical supposition that could be drawn is that an easy way of interpreting the law would be to examine what was said in Parliament when passing the provision. Debates and written answers in both Houses of Parliament are reported in a series known as *Hansard* and it is published daily both on the Internet and in hard copy.

Where the courts wish to analyse what Parliament's intention is then it may appear sensible to examine *Hansard* to provide clues as to the meaning of the legislation. However, the traditional rule was that it was not permissible to look at parliamentary proceedings to assist in interpretation; in part this was because it was thought that it would lead to unnecessary expense and delays (see *Beswick v Beswick* [1968] AC 58) but it was also because it was thought that it might be a challenge to parliamentary supremacy in that it was thought that the law was that which was passed by Parliament not that which was discussed, ie the wording of Bills change and only the final Act is law and looking at the proceedings may lead to the suggestion that the courts were questioning or impeaching the process of Parliament contrary to Article 9 of the *Bill of Rights 1689*.

However, in the landmark case of *Pepper v Hart* [1993] AC 593 the House of Lords, exercising its power to reverse previous decisions of the House (see *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 and see 3.4.3), decided to relax this rule and introduced rules governing when recourse to *Hansard* would be permitted for statutory interpretation. The rule permitted courts to make reference to ministerial statements or the promoter of a Bill so long as three rules were met:

1. The legislation in question was ambiguous, obscure, or led to absurdity.
2. The material relied on consisted of statements by a minister (or the promoter of a Bill).
3. The statements relied on were clear.

It was never thought that this would lead to *Hansard* being referred to frequently, in part because it could be considered an abrogation of the duty of a court to invoke the rule. The clear presumption is that the courts will interpret the law according to the words used (see 2.3.1) and accordingly only where this is not possible will it be possible to consider using the rule. Lord Browne-Wilkinson, who gave the leading speech in the case, stated: 'In many...cases reference to Parliamentary material will not throw any light on the matter' (p 634). This is partly because many provisions of a Bill are not

subject to detailed comment or consideration and in part because where the language is obtuse it is unlikely that any ministerial statement will be particularly clear either. Kavanagh (2005b) argues that restricting an analysis of *Hansard* to the comments of ministers inevitably misrepresents the position and confuses the distinction between the legislature (Parliament) and the executive (government) (p 106). She argues that Parliament passes legislation even if the majority of legislation is sponsored by the executive as the largest parliamentary party. It does not follow automatically that the language of the legislation will necessarily reflect the executive's desire and most Bills will be full of amendments, and it is always open to Parliament to enforce its powers and pass a Bill different to that required by the executive.



Example Parliament v Executive

A good example of where Parliament and the executive may depart is over terrorism legislation. The executive has an interest in obtaining wider powers to deal with terrorists because of the threat that they pose to society at large. Terrorism differs from traditional crimes in the way that it is carried out and most developed countries will have special rules for dealing with terrorism. However, powers can be abused as easily as used and the legislature is therefore careful to ensure that there is a check on any increase in the power of the executive, and indeed this is its very purpose.

In 2005 the Terrorism Bill was being discussed and the government wished to extend the time a terrorist suspect could be held by the police without charge from fourteen days to ninety days. Parliament did not agree and it eventually defeated the government clause proposing this measure, accepting a reduced increase to twenty-eight days. The case for the government was put forward by the Home Secretary and he outlined the reasons why the powers were necessary. If there was any legislative uncertainty as to the meaning of cl 23 of the Bill would recourse to *Pepper v Hart* help? Probably not because the rule permits only statements by ministers to be cited and yet in this case the House of Commons rejected these arguments and put forward its own viewpoint.

The debate on powers may help clarify any uncertainty and the comments of the back-benchers as to why they would not support ninety days would certainly help a court understand the intention of Parliament in this provision but the rule, as drafted, would be of no assistance—the courts would have to ignore parliamentary debates and reach their own conclusions.

Kavanagh, citing Corry, argues that a further difficulty with the rule is that Parliament is not a bipartisan place. A minister making a statement to either House will not be giving a fully independent rationale comment but will be making the point to support his, and the government's position (Kavanagh (2005b) 108). Whilst it is true to state that the rules of Parliament make clear that a minister may not mislead either House²⁰ this is a far step from an independent comment and Kavanagh argues this can be contrasted with a witness who gives testimony in court under oath (Kavanagh (2005b) 108). Of course others will be sceptical as to whether a witness necessarily gives independent and unbalanced evidence in court but the political nature of Parliament inevitably means that the ministers' statements will be geared towards their desire.

20. See McKay (2004) 439 ('Erskine May').

However the threat to *Pepper v Hart* appears to have retreated for some time as the House of Lords showed no desire to widen the scope of its enquiry into parliamentary legislation. Kavanagh notes that when the Court of Appeal sought to widen the scope of the rule in *Wilson v Secretary of State for Trade and Industry* [2003] 3 WLR 568 the Speaker of the House of Commons and Clerk to the Houses of Parliament sought the right to make representations to the House as to the application of the rule (Kavanagh (2005b) 112). Their fear was that a wider treatment of parliamentary legislation could lead to the courts scrutinizing the proceedings of Parliament, something that they are expressly not permitted to do (see Article 9 of the *Bill of Rights 1689*).²¹ In *Wilson* the House did not simply prevent the rule in *Pepper v Hart* from being widened but it actually constrained its use by noting that the statement of a minister will not necessarily reflect the intention of Parliament as a whole. The House also stated that it was important to emphasize that any statement was not *law* but an aid to deciding *what* the law was. Accordingly, any statement permitted under the rule of *Pepper v Hart* was simply a tool to help the court decide what the law should be and not a definitive statement of the law. This latter point is to be welcomed and whilst Kavanagh argues that it is a restriction (p 115) some doubt must exist as to this because it is difficult to believe that Lord Browne-Wilkinson, when formulating the rule, ever intended that a ministerial statement should ever bind a court when deciding the meaning of the law.

So what is the status of *Pepper v Hart*? Kavanagh argues that it has been significantly reduced but in *Jackson v Attorney-General* [2005] UKHL 56 Lord Nicholls of Birkenhead appeared to disagree:

In some quarters the *Pepper v Hart* principle is currently under something of a judicial cloud. In part this is due to judicial experience that references to *Hansard* seldom assist... It would be unfortunate if *Pepper v Hart* were now to be sidelined. The *Pepper v Hart* ruling is sound in principle, removing as it did a self-created judicial anomaly. (para 65)

His Lordship argues that the rule continues to be important even if his enthusiasm is tempered by the reminder that the rule is perhaps not as useful as some suggest. Yet Lord Steyn, in the same case, suggests that it may not be as important:

If it were necessary to do so, I would be inclined to hold that the time has come to rule... that *Pepper v Hart* should be confined to the situation which was before the House in *Pepper v Hart*. That would leave unaffected the use of *Hansard* material to identify the mischief at which the legislation was directed and its objective setting. But trying to discover the intentions of the Government from Ministerial statements in Parliament is unacceptable. (para 97)

Although the ruling in *Pepper v Hart* was about ascertaining the intentions of Parliament and not the government, the difference between what Parliament intends and what the government intends arguably goes to the heart of some of the difficulties that have been raised about this rule. Lord Walker of Gestingthorpe appears to summarize the crux of this area when his Lordship noted that there was a disagreement as to the application of the *Pepper v Hart* principle in the House although his Lordship argued that this need not be resolved in that case (para 141) and this is probably true

21. For more on this see Lord McKay's speech in *Pepper v Hart* [1993] AC 593 at 614–616 and Lord Browne-Wilkinson at 621–629, 638–640.

with the statements of the other Lords concerning its application being *obiter dicta*. *Jackson* is the latest decision of the House to examine this rule and it would appear to demonstrate that the rule remains controversial and one that is not simply understood or applied.

2.3.6 Presumptions

Alongside the rules governing interpretation and the aids used by the courts to identify the correct meaning of words are presumptions that operate in respect of the construction of statutory material. The key presumptions that will be discussed here are:

- against altering the common law
- Crown not bound by Act
- *mens rea* required for criminal offences
- against retrospective approach
- presumption in favour of the defendant.

2.3.6.1 Common law

It has already been noted that until comparatively recently the vast majority of law was judge-made rather than statutory, with Parliament initially simply amending or correcting defects within the common law (see 2.3.3). However, as one would expect, Parliament began to take control of the law and now it is often contended that judges no longer have any right to make law (although as will be seen in the next chapter this is contentious). Notwithstanding this however, there remains a presumption that a statute will not alter the common law unless it was the intention of Parliament to do so. The rationale behind the presumption is that Parliament must know the law before it enacts legislation and accordingly unless it identifies a defect in that law then it is presumed not to be interfering with its course. In *Deeble v Robinson* [1954] 1 QB 77 the Court of Appeal held that only plain words would suffice to interfere with common-law rights (p 81) which is taken to mean that the intention of Parliament to interfere with the common-law power should be obvious.

DOLI INCAPAX

Whilst the intention to interfere with the common law need not be express it is not uncommon for Parliament, when wishing to end a common-law rule, to use express blunt terms to do so. A good example of this can be found in the *Crime and Disorder Act 1998* where s 34 ended the common-law rule of *doli incapax* (where a child between the ages of ten and fourteen was presumed not to be capable of committing a criminal offence unless evidence was adduced to demonstrate they knew it was legally or morally wrong). Section 34 states:

The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished

which would seem to leave little room for doubt but see *R v JTB* [2009] 1 AC 1310 where the House of Lords had to rule on whether the presumption or the substantive doctrine had been abolished. The House ruled that despite the literal phrasing, the substantive defence and not just its presumption, was removed by the CDA 1998.

It has been argued that the presumption is extremely controversial (Bailey et al (2002) 459) and given that Parliament is supreme and can legislate against any matter it does appear strange that there should continue to be a presumption that judge-made law will not normally be affected.

2.3.6.2 Crown not bound by the statute

As the United Kingdom is a constitutional monarchy its Head of State is actually the sovereign, currently Her Majesty The Queen Elizabeth II.²² The term ‘the Crown’ however is normally used to denote the machinery of the state through the executive (ie government). Since rules are considered to be binding principles handed down from a *ruler* to *subject* the principle has always been that the Crown would not be bound by any law. Note, however, that this does not mean (with the exception of the sovereign) that anyone is personally immune from laws as it is the state rather than an individual who is not subject to laws. The presumption against the Crown not being bound by a statute arises from this doctrine with the principle being that as the Crown is the ruler (the state) it should not be bound unless it expressly says so.

An Act of Parliament will now normally state whether it is bound and it has been considered more appropriate for the Act to state expressly whether it is so bound rather than leave it implied which ensures that the courts must construe the appropriate status.

2.3.6.3 *Mens rea*

Many of the important presumptions relate to the criminal law where certainty is to be expected since transgression of the criminal law could lead to the loss of liberty for the transgressor. One of the most important presumptions is that *mens rea* should be implied into statutes unless it was Parliament’s intention for there to be none. It is not possible in this text to provide a precise definition of *mens rea* and you should cross-reference to your set text for *Criminal Law* for a fuller definition but suffice it to say that most crimes require two elements; the *actus reus* (the ‘conduct’ part of a crime) and the *mens rea* (the ‘mental requirement’ for a crime). It will often be said that *mens rea* can be approximated to ‘guilty mind’.

THEFT

Theft is defined under s 1 Theft Act 1968 thus: ‘[a] person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it’. The *actus reus* of this crime is appropriating property belonging to another. The *mens rea* of the crime is doing so dishonestly and with the intention of permanently depriving the other of the property.

Not every statute will, however, necessarily easily identify a mental requirement and it may appear therefore that only the *actus reus* is required for liability to arise.

²² Although in Scotland she is technically the first Queen Elizabeth as the Queen Elizabeth who ruled between 1558 and 1603 was Queen of England but not Queen of Scotland.



Case box *Sweet v Parsley*

The leading case that discusses the absence of *mens rea* is *Sweet v Parsley* [1970] AC 132. The appellant was the tenant of a farm but sublet rooms to other people. At the time of the offence the appellant did not live at the farm. The police found some cannabis resin at the farm and she was charged with the offence of, inter alia, being concerned with the management of premises used for the purpose of smoking cannabis or cannabis resin (s 5(b) *Dangerous Drugs Act 1965*). On the face of the section there was no requirement for *mens rea* and she was convicted by the court as she was concerned with the management of premises—as she was the landlady—at which drugs were found. The House of Lords quashed the conviction and stated that unless Parliament indicated otherwise, *mens rea* should be an essential requirement for any crime. They implied the requirement for knowledge into the criteria.

It is important to note that this is simply a presumption and it can, therefore, be rebutted if it was Parliament's intention to do so. In *B v DPP* [2000] 2 AC 428 and *CPS v K* [2002] 1 AC 462 the House of Lords examined sexual offences against children. Their Lordships argued that indecency with a child and indecent assault (both now repealed) were not crimes of strict liability but they did accept that s 5 *Sexual Offences Act 1956* (now repealed), which created the offence of unlawful sexual intercourse with a girl under thirteen, was intended to be a crime of strict liability. They reached this conclusion by noting that comparable offences within the same legislation did expressly consider mental requirements and accordingly its absence in s 5 must have been deliberate (see [2002] 1 AC 462 at 469–471 per Lord Bingham).

2.3.6.4 Acting retrospectively

The law normally works prospectively—that is to say a law will only change the way we regulate conduct that arises *after* an instrument becomes law. Attempting to regulate conduct that has occurred in the past is known as acting retrospectively and there is a strong presumption that Parliament does not intend to act in this way. Bennion argues that this rule is a matter of fairness since if a person is deemed to know the law (and that well-known saying ‘ignorance is no defence to the law’ does have a foundation of truth within it) then they should be able to trust the law and act in accordance with their knowledge (Bennion (1990) 151). If a law were retrospective then it would mean that even if a person knew the law and acted in the way that he knew was lawful, he could later be liable under the law as a result of the retrospective law making his actions culpable.

Where the statute relates to the criminal law then the position becomes more complicated because Article 7 of the ECHR prohibits, inter alia, retrospective crimes and punishment. Accordingly, any statute that purports to do this would be subject not only to the common-law presumption but also to s 3(1) *Human Rights Act 1998* as it would prima facie breach Article 7.

That said it should be emphasized that this is a presumption and Parliament, because it is supreme, can act in a way that is retrospective. Perhaps the most obvious example of this is the *War Damage Act 1965* which was enacted specifically to overturn a decision of the House of Lords in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75. This

Act did not just statutorily overrule the decision but was expressly retrospective and ensured that the appellants did not receive that which the House of Lords had held was due to them.

Parliament can expressly choose to act retrospectively and certain retrospective acts will not be considered to harm the principle, most notably purely administrative or procedural changes (Bennion (1990) 152). It is not uncommon for procedural rules to change and these can come into effect in respect of conduct that occurs prior to the change becoming effective. Non-punitive regulatory conduct can also come within this rule.

➔ SEXUAL OFFENDING

Section 28 *Criminal Justice and Court Services Act 2000* permits certain courts the power to ban relevant offenders (those convicted of prescribed offences and who have been sentenced beyond a set threshold) from working with children. Whilst this ban is not punitive by itself, breach of the section is a criminal offence (s 35). The Act was silent as to whether a person who was convicted after the date in which the provision came into force but for conduct which occurred prior to that date could be banned. In *R v Field* [2003] 2 Cr App R 3 the appellant contended he could not as this would mean the provision was retrospective in that at the time of his conduct he would not be statutorily banned from working with children. The Court of Appeal rejected this argument and said that it was purely procedural and in any event it was not retrospective by including behaviour that occurred before the provision came into force so long as it did not include cases that were tried before the relevant date.

This can be contrasted with s 106(4) *Sexual Offences Act 2003* which governs Sexual Offence Prevention Orders, a civil order similar to an injunction that can prohibit a convicted sex offender from doing anything listed on the order (see ss 104–108). One of the grounds for making an order is if the chief constable of an area believes that the defendant has acted in a way that makes it necessary for an order to be made to protect the public (s 104(4)–(5)). Section 106(4) expressly states: ‘Acts, behaviour, convictions and findings include those occurring before the commencement of this [Act].’

Applying the logic of *Field* this was probably not necessary but Parliament, applying the usual custom, decided to make it clear that there was a degree of retrospectivity in this provision.

2.3.6.5 Presumption in favour of the defence

In the English Legal System—like most developed legal systems—there is, in criminal matters, a presumption of innocence which means that it is not for a defendant to prove that he is innocent but rather for the state to prove that he is guilty. Where the state is not able to demonstrate guilt then the defendant is entitled to an acquittal even if the evidence demonstrates that it is more likely than not that the defendant committed the crime.

The presumption of innocence is taken further and justifies the presumption in favour of the defence. According to this presumption if there are two possible constructions of a statutory provision and one is broadly favourable to the defendant and the other is broadly favourable to the prosecution then this rule states that the construction that favours the defence should be used unless Parliament intends the opposite.

Summary

In this chapter we have examined the basic concept of domestic sources of law. We have identified that there are two sources of law (primary sources and secondary sources). In particular we have noted that:

- *Primary sources* are considered to be those 'authoritative' sources that are produced by the legal process itself. *Secondary sources* are sources that are produced by others and are, in essence, a commentary on the law.
- Primary sources of law include statutory material and this itself is divided into two types of material: *primary legislation* (Acts of Parliament) and *secondary legislation* (Statutory Instruments, Orders in Council, etc).
- Statutes are Acts of Parliament and are either *Public Acts* (Acts that are of general application) or *Private Acts* (which are limited to a certain body).
- An Act will normally have to pass both the House of Commons and House of Lords and then receive Royal Assent before it becomes an Act of Parliament. However, subject to limited exceptions, it is possible to use the Parliament Acts, which will allow the House of Commons to override the House of Lords and enact legislation that has passed only one House.
- A statute will ordinarily be broken down into Parts and Chapters but the most important division is in its clauses known as sections. Sections can also be broken down into sub-sections, paragraphs, and subparagraphs.
- The courts are called upon to interpret legislation and they do this normally by using the *literal* rule where they simply look at the wording of the legislation. Where this leads to an absurdity they can look at either the *golden* or *mischief* rules which allows them to consider what Parliament intended.
- *The Human Rights Act 1998* allows greater interpretation and expressly allows courts to decide whether legislation is compatible with the *European Convention on Human Rights*.

End-of-chapter questions

1. Should the Parliament Acts be used in politically controversial pieces of legislation? The House of Lords is the second chamber of the legislature and thus should it not have the right to block controversial legislation? By allowing the House of Commons to bypass this block does this not mean there is no protection against, for example, a state seeking to diminish human rights?
2. The Supreme Court of the United States of America is allowed to 'strike down' legislation that is incompatible with their Constitution. Should the Supreme Court of the UK be allowed to 'strike down' legislation that is incompatible with the ECHR?
3. If the intention of Parliament is important in the construction of legislation why shouldn't the courts be allowed to use parliamentary material whenever they wish and in whatever form?
4. Reread the section on the use of explanatory notes ('Explanatory notes' p 45) and also read Munday (2005) 346–349, 352–354 and Kavanagh (2005b) 105–108. Is it right that the courts look to statements produced by the government rather than Parliament as a

whole when examining parliamentary material? It is used to gauge Parliament's intent and this need not be the government's intent. Should the rule be relaxed?



Further reading

Kavanagh A (2005) 'Unlocking the Human Rights Act: The radical approach to section 3(1) revisited' 3 *European Human Rights Law Review* 259–275.

This is another authoritative article from this commentator where it is suggested that the courts have been reluctant to make the full use of their powers of interpretation.

Kavanagh A (2005) 'Pepper v Hart and matters of constitutional principle' 121 *Law Quarterly Review* 98–122.

This is an interesting article that examines the modern application of the rule in *Pepper v Hart*.

Marshall G (2003) 'The lynchpin of parliamentary intention: Lost, stolen or strained' *Public Law* 236–248.

This is an article that examines the place of parliamentary intention in the construction of statutes.

Munday R (2005) 'Bad character rules and riddles: Explanatory notes and the true meanings of s 103(1) Criminal Justice Act 2003' *Criminal Law Review* 337–354.

This is a short but extremely useful and interesting article on the legal status of explanatory notes.



For multiple choice questions, updates to this chapter and links to useful websites, please visit the Online Resource Centre at:

www.oxfordtextbooks.co.uk/orc/gilespie_els4e/