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JUDICIAL SOVEREIGNTY AND THE HUMAN RIGHTS ACT 1998

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SECTION 3(1) of the Human Rights Act 1998 (''the Act'') requires courts to ''read and give effect'' to primary and subordinate legislation so as to be ''compatible with Convention rights'', ''so far as it is possible to do so''. This begs the question—when is it impossible to interpret statutes in a manner compatible with Convention rights? More importantly, who is in charge of setting the boundary, Parliament or the courts? The ''deeply mysterious''[1] wording of section 3(1) does not clearly delineate the power of the court. The largely inconsistent ministerial statements in Hansard appear to be equally incapable of providing a clear Parliament-defined boundary to the judiciary's power.[2] However, Parliament has not left the meaning of section 3(1) of the Act completely in the hands of the court. The legislative history of the Act does rule out some possible interpretations of ''so far as possible''. In addition, a clear boundary is provided by Parliament, made available to the court through *Pepper* v. *Hart*. Section 3(1) reaches a limit when protecting Convention rights requires implied repeal. Yet, when we investigate this boundary more thoroughly, we discover that it is so malleable as to amount to no limit at all. Control over the extent to which Convention rights are protected through statutory interpretation rests firmly in the hands of the judiciary. Although *Pepper* v. *Hart* prohibits the use of implied repeal, courts can use principles of interpretation to achieve the same effect in practice as if section 3(1) of the Act impliedly

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[1] G. Marshall, ''Interpreting interpretation in the Human Rights Bill'' [1998] Public Law 167, 167.

[2] F.A.R. Bennion, ''What interpretation is 'possible' under section 3(1) Human Rights Act 1998?'' [2000] Public Law 77, 88.

repealed earlier statutes that are incompatible with Convention rights.

Since *Pepper* v. *Hart*, courts can refer to clear statements of the Minister promoting the Bill in the hope of transforming a vague statutory provision into a clear and precise account of the will of Parliament. When introducing the Act in its second reading before the House of Lords, Lord Irvine L-C, who introduced the Bill to the House of Lords, stated that section 3(1) ensures that "if it is possible to interpret a statute in two ways—one compatible with the Convention and one not—the courts will choose the interpretation which is compatible ... however, the Bill does not allow the courts to set aside or ignore Acts of Parliament".[3]

At Committee Stage in the House of Commons, the Secretary of State for the Home Department, Jack Straw M.P., stated that

> ... we want the courts to strive to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that legislation is incompatible with them ... I will say that it is not our intention that the courts in applying section 3 should contort the meaning of words to produce implausible or incredible meanings.[4]

Thus, for Lord Irvine, section 3(1) of the Act reaches a limit when it is not possible to interpret a statute in two ways, one of which is compatible with Convention rights. For Jack Straw M.P., section 3(1) of the Act reaches a limit when statutory words have to be contorted if they are to be made compatible with Convention rights.

There are three possible limits that can be placed upon the powers of the court. First, it could be impossible to interpret statutes in a manner compatible with Convention rights where the statutory language is not unclear or ambiguous. Second, courts could interpret statutes in a Convention-compatible manner, even if the wording was not unclear and ambiguous, by reading down statutory language. However, a Convention-compatible interpretation would be impossible if it required the court to read words in to statutes. Third, courts would be able to interpret statutes in line with Convention rights by reading down words and reading in words, but they would be prevented from giving a Convention-compatible interpretation of a statute if to do so required the courts to use the doctrine of implied repeal. The first two limits, although possible interpretations of Lord Irvine and Jack Straw M.P., are ruled out by the legislative history of the Act.

[3] Hansard H.L. Deb. vol. 582, col. 1230 (3 November 1997).
[4] Hansard H.C. Deb. vol. 313, cols. 421–422 (3 June 1998).

The third is expressly supported by *Pepper* v. *Hart*, but provides no Parliamentary limit upon the power of the court.

A. Absence of Ambiguity

Before the enactment of the Act, courts could only interpret statutes in a manner compatible with Convention rights where the wording of the statute was unclear or ambiguous.[5] If statutory words were clearly contrary to Convention rights, the statute could not be interpreted in a manner compatible with the Convention. In addition, it was impossible to interpret a statute in a manner compatible with Convention rights, if to do so would require a strained meaning of the statutory wording. If this is the correct interpretation of "so far as possible", then the Act achieves nothing more than to place the courts under an obligation where previously courts had a discretionary power.

The recourse to Parliamentary material permitted by *Pepper* v. *Hart* does appear to support such an interpretation of "so far as possible". Lord Irvine states that section 3(1) of the Act applies where it is possible to interpret a statute in two ways.[6] It is arguably only possible to interpret a statute in two ways when it is ambiguous. Jack Straw M.P. states that Convention-compatible interpretations are impossible where it requires the wording of the statute to be contorted.[7] To interpret an unambiguous non-Convention compatible provision of statute in a manner compatible with Convention rights would arguably contort the statute's meaning. It would go beyond the plain meaning of the statutory wording.

However, to interpret Lord Irvine's and Jack Straw M.P.'s statements in this restrictive manner conflicts with the Government's White Paper, "Rights Brought Home: The Human Rights Bill", which states that section 3(1) "goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in the legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention, that it is impossible to do so."[8] This clearly endorses the ability of the courts to give a strained meaning to legislation and to interpret it in a manner compatible with Convention rights, even when it is not ambiguous. In addition, to interpret section 3(1) as only allowing courts to interpret

[5] *Brind* v. *Secretary of State for the Home Department* [1991] 1 All E.R. 720.
[6] See p. 54 above.
[7] See p. 54 above.
[8] Cm. 3782, paragraph 2.7.

ambiguous legislation in a manner that is compatible with Convention rights contradicts extra-Parliamentary statements made by Lord Irvine. In the Tom Sargant Memorial lecture, delivered on 16 December 1997, Lord Irvine endorsed the approach of the White Paper, making it clear that "[i]t will not be necessary to find an ambiguity. On the contrary the Courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."[9]

This section of the Tom Sargant Memorial lecture was quoted by Lord Lester in debates in the House of Lords.[10] It was neither questioned nor queried by Lord Irvine. Consequently, although the White Paper and the Tom Sargant Memorial lecture do not themselves form part of the Parliamentary material that *Pepper* v. *Hart* permits the court to refer to, these extra parliamentary materials make it difficult to interpret Lord Irvine's parliamentary statements to support ambiguity as the limit of possibility. When Lord Irvine was referring to situations in which it was possible to have more than one meaning of a statutory provision, he must have meant situations in which it was possible to interpret a statute in line with Convention rights, even if to do so would require a strained meaning of that statutory provision. In addition, Jack Straw M.P.'s statements must be interpreted to mean that contorting words is not the same as straining the meaning of the words.[11]

B. Reading In

A further interpretation of the limits of "possibility" that is indirectly ruled out by the legislative history of the Act, is that proposed by Edwards. He suggests that it is possible to "read down" statutes, but not possible to "read in" to statutes in order to make them compatible with Convention rights.[12] Statutes are "read down", when broad provisions of statutes are interpreted narrowly, in order to make them compatible with Convention rights. For example, if a statute provided that a Minister may regulate the number of party political broadcasts to be made by

[9] This paper is available on the internet at http://www.lcd.gov.uk/humanrights/speeches/speechfr.htm.

[10] Hansard H.L. Deb. vol. 584, col. 1291 (19 January 1998).

[11] G. Marshall recognises the difficulty of recognising that section 3(1) HRA is not limited to ambiguous statutes, yet at the same time it is difficult to assess what other limit can be drawn when courts are required to "read" legislation in a manner that is compatible with Convention rights. He reconciles this problem, by referring to the ability of the courts to "give effect" to Convention rights. See G. Marshall, "Two kinds of compatibility: more about section 3 of the Human Rights Act 1998" [1999] Public Law 377.

[12] R.A. Edwards, "Reading down legislation under the Human Rights Act 1998" (2000) 20 Legal Studies 353.

certain political parties during the run-up to an election, the provisions would be "read down" to ensure that the Minister did not have statutory authority to limit party political broadcasts in a manner that would be contrary to the Convention right of freedom of expression. "Reading in" to a statute occurs when the judiciary read words into legislation that is narrower than the Convention right, in order to ensure that the statute is compatible with Convention rights. For example, if a statute allowed individuals access to information held about them on Governmental databases, whereas the Convention right to privacy required the information to be sent to individuals free of charge upon request, words would be read into the statute requiring the Government to send the relevant information to individuals free of charge upon request. Edwards argues that "reading in" would not be permitted by section 3(1) of the Act, by referring to similar legislative provisions in other Commonwealth jurisdictions. Where other Commonwealth jurisdictions permit courts to read words into statutes, this is justified by a statutory requirement placed upon the court to ensure an adequate remedy for protected human rights.[13] There is no such provision in the Act.[14]

It is possible to find support for Edwards' interpretation in the parliamentary statements of Lord Irvine and Jack Straw M.P. It is arguably impossible to have two interpretations of a statute, where one interpretation requires words to be read into the statute, thus going beyond the limit proposed by Lord Irvine.[15] To read words into the statute would arguably "contort" its meaning, transgressing the boundary proposed by Jack Straw M.P.[16] However, such interpretations are inconsistent with the words of Lord Irvine in his Tom Sargant Memorial Lecture. Lord Irvine expressly refers to techniques of European Community law that can be used by the courts when applying section 3(1) of the Act, including "reading in words which are not there".[17] Once more, this was cited by Lord Lester in parliamentary debates and was neither challenged nor questioned by Lord Irvine.[18] Given this indirect parliamentary endorsement of the Tom Sargant Memorial Lecture by Lord Irvine, it is difficult to interpret Lord Irvine's parliamentary statements as supporting Edwards' interpretation of

[13] *Ibid.*, at pp. 366–368.
[14] Article 13 E.C.H.R. provides that all those whose Convention rights are violated "shall have an effective remedy before a national authority". The Human Rights Act 1998, s 1(1)(a) expressly excludes Article 13 E.C.H.R. from incorporation into English law.
[15] See p. 54 above.
[16] See p. 54 above.
[17] http://www.lcd.gov.uk/humanrights/speeches/speechfr.htm.
[18] Hansard H.L. Deb. vol. 584, col. 1292 (19 January 1998).

section 3(1) of the Act. Edwards' limit cannot stand in the face of the full legislative history of the Act.

C. Implied Repeal

The third proposed limit is implied repeal. It is not possible to read a statute in a manner compatible with Convention rights where to do so would require the statute to be repealed by implication. In contrast to the limit of absence of ambiguity and reading in, the limit of implied repeal is directly supported by Parliamentary material permitted by *Pepper* v. *Hart*. It is clear from parliamentary statements made by Lord Irvine during the passing of the Human Rights Bill that section 3(1) does not impliedly repeal earlier statutes whose content is contrary to Convention rights. The House of Lords discussed implied repeal and section 3 of the Act on two separate occasions, following proposed amendments by Lord Simon of Glaisdale to allow section 3(1) to impliedly repeal earlier statutes whose content was incompatible with Convention rights.[19] On each occasion, Lord Irvine rejected the amendment, and indicated clearly that section 3(1) of the Act did not impliedly repeal provisions of earlier statutes that were incompatible with Convention rights.[20] Lord Irvine's rejection of implied repeal provides a clear delineation of "possible" for the purposes of section 3(1) of the Act in theory. But it provides no clear limitation upon the courts' power in practice. This is because the limit of implied repeal provides no restraint upon the courts' powers. Indeed, the limit is so malleable, that courts could use principles of interpretation to achieve the same effect in practice as implied repeal.

The limit of implied repeal places no restraint upon the powers of the court, as there is no clear distinction between situations in which courts can interpret a statute in a manner compatible with Convention rights, and situations in which courts would be required to apply the doctrine of implied repeal. The doctrine of implied repeal stems from *Deans and Chapter Ely* v. *Bliss*.[21] Lord Langdale M.R. described the application of the doctrine of implied repeal as follows, "... if two inconsistent Acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way".[22] Thus, if a statute is deemed to be inconsistent with Convention rights, it is not possible to interpret the statute in a manner compatible with Convention rights. The only option left to

[19] Hansard H.L. Deb. vol. 583, cols. 518–519 (18 November 1997) and Hansard H.L. Deb. vol. 584, col. 1290 (19 January 1998).
[20] Hansard H.L. Deb. vol. 583, col. 522 (18 November 1997).
[21] (1842) 5 Beavan 574; 49 E.R. 700.
[22] (1842) 5 Beavan 574, 583; 49 E.R. 700, 704.

the court is to declare the statute incompatible with Convention rights, under section 4 of the Act. However, if a statute is deemed to be consistent with Convention rights, it can be interpreted in a manner compatible with Convention rights. An example of two inconsistent statutes is set out in *Ely* v. *Bliss*. An Act of 1832 required a 60 year period of exemption to defeat a claim for tithes. An Act of 1833 required only a 20 year period of exemption. The two statutes were inconsistent and the doctrine of implied repeal applied, the later statute impliedly repealing the earlier statute. A further example of two inconsistent statutes is where one statute required compensation for land that was acquired compulsorily should be the "value of the land at the time the valuation is made of the land clear of buildings and available for development" and a second required compensation of the "amount a willing seller might be expected to realise in the open market".[23]

The limitation of implied repeal provides no clear judicial guidance, aside from the two blatant examples given above. It merely begs the question—when is a statute inconsistent with a Convention right? This is because the doctrine of implied repeal only applies when interpretation runs out. It tells us nothing about how far courts are able to go when interpreting statutes in a manner compatible with Convention rights before hitting the wall of implied repeal.

Not only does implied repeal provide no restraint upon the powers of the judiciary, but also interpretation can be applied so broadly by the courts that it could achieve the same outcome as implied repeal. This is because, in practice, there are no situations in which a statute passed prior to the Human Rights Act 1998 cannot be interpreted in a manner compatible with Convention rights. This broad appliance of interpretation is based upon a combination of arguments made by Lord Lester, the principle of legality and implied repeal.[24] Lord Lester's arguments and the principle of legality reduce the range of circumstances in which a statute passed prior to the Human Rights Act 1998 will be deemed to be incompatible with Convention rights to such a small extent, that, in practice, implied repeal is never needed to protect Convention rights. The doctrine of implied repeal itself removes a final barrier, ensuring that statutes can be interpreted in a manner compatible with Convention rights even if an earlier statute requires that its provisions cannot be interpreted in a manner compatible with Convention rights.

[23] *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 K.B. 733; *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590.
[24] Hansard H.L. Deb. vol. 584, col. 1292 (19 January 1998).

Lord Lester bases his claim upon three separate arguments: the principle of constitutionality, the principle of indirect effect and an analysis of the approach of the New Zealand Courts. All three arguments give rise to a purposive approach, similar to the developmental method, as described by F.A.R. Bennion.[25] All three argue that the limit of interpretation is reached when courts are required to distort the wording of a statute, or where a Convention-compatible interpretation is contrary to the express will of Parliament. The principle of constitutionality requires courts to give a generous interpretation to constitutional documents designed to protect human rights.[26] It enables courts to interpret statutes in a manner compatible with human rights, even to the extent of reading words in to a statute,[27] but reaches a limit where such an interpretation would "contradict words actually set out in the law itself"[28] or "defeat Parliament's intention by depriving the law of all legal effect".[29] The principle of indirect effect requires English courts to interpret national law in line with the words, aims and purposes of European Community law "so far as possible".[30] This includes the ability to read words in to a statute.[31] Indirect effect reaches a limit in English courts, where an interpretation would "distort the meaning" of the statute.[32] Case law in New Zealand also requires a purposive interpretation of legislation to bring it into line with human rights provisions. It reaches a limit where there is clear Parliamentary intent to legislate contrary to human rights.[33]

The principles cited by Lord Lester provide two limitations: courts cannot interpret statutes in a manner that is contrary to the express will of Parliament and courts cannot distort the meaning of the statutory words. In order for the intention of Parliament to defeat a compatible interpretation, Parliament's intention in that statute must have been to achieve an effect that is specifically contrary to a Convention right. This is unlikely in practice for two reasons. First, courts are reluctant to ascribe to Parliament an intention to legislate contrary to Convention rights.[34] Second, courts have great flexibility in defining the scope of Convention rights. Articles 8 to 11 of the Convention for the Protection of

[25] F.A.R. Bennion, "What interpretation is 'possible' under section 3(1) Human Rights Act 1998?" [2000] Public Law 77, 80–82.
[26] *Minister for Home Affairs* v. *Fisher* [1980] A.C. 319.
[27] *A-G of the Gambia* v. *Momodou Jobe* [1984] A.C. 689, 702.
[28] [1984] A.C. 689, 702.
[29] [1984] A.C. 689, 702.
[30] C-106/89 *Marleasing* [1990] E.C.R. I-4135 and C-456/98 *Centrosteel* [2000] 3 C.M.L.R. 711.
[31] *Litster* v. *Forth Dry Dock* [1984] A.C. 689.
[32] *Webb* v. *Emo Air Cargo (U.K.) Ltd.* [1993] 1 W.L.R. 49, 59 (Lord Keith).
[33] *Minister of Transport* v. *Noort* [1992] 3 N.Z.L.R. 260.
[34] *Brind* v. *Secretary of State for the Home Department* [1991] 1 All E.R. 720.

Human Rights and Fundamental Freedoms (E.C.H.R.) do not protect rights absolutely, but require a balance to be drawn between different rights and interests. Courts have a degree of flexibility in drawing this balance. Even when Convention rights are absolutely protected—e.g. article 3 E.C.H.R., which prevents torture—courts still have a large degree of flexibility when determining the scope of Convention rights. This flexibility remains, despite the requirement in section 2 of the Act that courts have regard to decisions of the European Court of Human Rights when determining the scope of Convention rights. First, section 2 only requires national courts to have regard to the decisions of the European Court of Human Rights. It does not require the decisions of the European Court of Human Rights to operate as binding precedent. Second, the European Court of Human Rights has developed the margin of appreciation, allowing signatory States a degree of flexibility when determining the scope of Convention rights. Various interpretations of the scope of a right may fall within the margin of appreciation. It is thus difficult to imagine situations in which statutes passed before the Human Rights Act 1998 would be specifically contrary to Convention rights. The courts' ability to read down and read words in to a statute, combined with the flexibility in defining the scope of Convention rights also makes it difficult to imagine circumstances in which a Convention-compatible interpretation would distort the meaning of the words of the statute. The limit would only appear to be reached, if the court was required to insert the word "not" in front of a statutory provision.

The principle of legality narrows down even further the range of situations in which a court would find it impossible to interpret a statute in a manner compatible with Convention rights. This is particularly true of the formulation of the principle of legality provided by Lord Hoffmann in *R.* v. *Secretary of State for the Home Department ex parte Simms (Simms)*, that "Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[35]

In *Simms*, journalists who wished to visit prisoners brought a case for judicial review with regard to the prison rules regulating their visits. According to rule 37:

[35] [2000] 2 A.C. 115, 131.

> Visits to inmates by journalists or authors in their professional capacity should in general not be allowed and the governor has authority to refuse them without reference to headquarters. If a journalist or author who is a friend or relative wishes to visit an inmate in this capacity and not for professional purposes, the governor should inform the intending visitor that before the visit can take place he or she will be required to give a written undertaking that any material obtained at the interview will not be used for professional purposes and in particular for publication by the intending visitor or anyone else.

Rule 37A provided that journalists who were given permission by the governor to visit an inmate also had to give a similar undertaking that any material obtained at the interview would not be used for professional purposes except as permitted by the governor. The journalists argued that this was contrary to their right to freedom of expression. In particular, it rendered it difficult, if not impossible, for journalists to bring potential miscarriages of justice to the attention of the public. Their Lordships interpreted the Prison Rules in a manner compatible with Convention rights, by reading in an exception to Rule 37A, to allow journalists to use material gained from prisoners in a professional capacity, where this was to expose miscarriages of justice. This illustrates not only the ability to read words in to legislative provisions, but also the flexibility of the court to determine the precise scope of Convention rights—here the right to freedom of expression was interpreted to include the right for journalists to have access to prisoners to expose miscarriages of justice.

Moreover, Lord Hoffmann's principle of legality could expand the range of interpretation even further than its application in *Simms*. The principle of legality states that broad or general words cannot limit Convention rights. Even if the prison rules had expressly stated that journalists could never use material gained from interviewing prisoners in a professional capacity, this broad prohibition could have been interpreted in a manner compatible with the Convention right to freedom of expression. An exception could be read in to the prohibition to allow journalists to exercise their right to freedom of expression, by rewording the rule to read that journalists could not use material gained from prisoners in a professional capacity, unless it was to expose a miscarriage of justice. It would appear, therefore, that even if the courts were required to insert the word "not" in front of a statutory provision, this would be possible, if the courts were narrowing down a broad prohibition. It is only where statute expressly prohibits a specific interpretation of a Convention right that courts would find it

impossible to interpret that statute in a manner compatible with Convention rights. Given the degree of flexibility granted to the courts when determining the scope of Convention rights, it would be rare indeed to find such a provision in a statute passed prior to the Act.

The principles of constitutionality, indirect effect and legality, and the case law of New Zealand narrows down considerably the range of circumstances in which a statute passed prior to the Act would be incompatible with Convention rights. This means that, in practice, the barrier of implied repeal would hardly ever restrain the courts. One potential barrier, however, still remains. This arises where a statute passed before the Act expressly states that it must not be interpreted in a manner compatible with Convention rights, or where the statute expressly requires its provisions to be interpreted in a manner compatible with other principles that themselves conflict with Convention rights. However, paradoxically, this barrier is removed by the doctrine of implied repeal itself. This can best be illustrated by means of an example.

Let us suppose the existence of fictitious Statute A, passed prior to the coming in to force of the Human Rights Act 1998, section 1 of which states that "the provisions of Statute A must not be interpreted in a manner compatible with Convention rights". The provisions of Statute A are inconsistent with section 3(1) of the Human Rights Act 1998, which requires statutes to be interpreted in a manner compatible with Convention rights "so far as possible". It would appear that it is impossible to interpret the provisions of Statute A in a manner compatible with Convention rights, as to do so is prevented by section 1 of Statute A, which expressly requires this not to take place. However, it is open for the court to argue that the doctrine of implied repeal is itself a principle of interpretation. The doctrine of implied repeal applies where there is a conflict between the principle of interpretation provided for in an earlier statute and that provided for in section 3(1) of the Human Rights Act 1998. The principle of interpretation provided for in section 3(1) of the Act impliedly repeals the principle of interpretation in the earlier Statute A. Consequently, it would not distort the meaning of the words of statute A to interpret its provisions in a manner compatible with Convention rights. The words that would prevent such an interpretation, namely section 1 of Statute A, are impliedly repealed by section 3(1) of the Human Rights Act 1998.

It is perfectly consistent with the legislative history of the Act for courts to use the principles of constitutionality, indirect effect, legality and implied repeal in the above manner. The doctrines of

constitutionality and indirect effect and the application of cases from New Zealand are endorsed by the legislative history of the Act and fall indirectly within the range of Parliamentary material courts may refer to using *Pepper* v. *Hart*. Lord Irvine cites these specifically in his Tom Sargant Memorial Lecture. Lord Lester quoted from the Tom Sargant Memorial Lecture in his speech to the House of Lords. Lord Irvine was present at this debate and had ample opportunity to respond to Lord Lester's argument. He did not. Although the principle of legality is not specifically endorsed by the legislative history of the Act, it is not ruled out. Lord Irvine is not averse to section 3(1) incorporating the principle of legality, and cites the principle with approval in extra-judicial writing, which can be used to clarify the meaning of his parliamentary statements, to which reference is permitted by *Pepper* v. *Hart*.[36] Finally, Lord Irvine does not reject the application of implied repeal, he merely explains that section 3(1) of the Act will not impliedly repeal statutes whose content is incompatible with Convention rights.[37] There is nothing to stop section 3(1) of the Act impliedly repealing an earlier principle of interpretation of a specific statute that is incompatible with Convention rights. The Act does not expressly exclude the operation of the doctrine of implied repeal. Moreover, Lord Lester stated in the House of Lords that the doctrine of implied repeal can be used as a principle of interpretation within section 3(1) of the Act.[38] Again, if Lord Irvine was not happy with this interpretation of section 3(1) of the Act, he was free to dispute this in debates in the House of Lords. Far from doing so, Lord Irvine expressly thanked Lord Lester for his clarification of the operation of section 3(1).[39] There is nothing in the parliamentary history of the Act preventing courts from applying "so far as possible" so broadly, that, in practice, it is never impossible to interpret an earlier statute in a manner compatible with Convention rights. The barrier of implied repeal is never reached. Interpretation can achieve the same effect in practice as implied repeal.

D. Conclusion

Section 3(1) appears to limit the powers of the court, allowing them to interpret statutes in a manner compatible with Convention rights

[36] A.A.M. Irvine, "Activism and Restraint: Human Rights and the Interpretative Process" (1999) 10 King's College Journal 177; the Paul Sighart Memorial Lecture, delivered on 20 April 1999. A copy of this speech can be found at http://www.lcd.gov.uk/humanrights/speeches/speechfr.htm.

[37] With the possible exception of article 10 E.C.H.R. See *Douglas* v. *Hello! Ltd* [2001] Q.B. 967, 1003 (Sedley LJ) and *Venables* v. *News Group Newspapers* [2001] Fam. 430.

[38] Hansard H.L. Deb. vol. 583, col. 520 (18 November 1997).

[39] Hansard H.L. Deb. vol. 583, col. 521 (18 November 1997).

only when it is possible to do so. However, in practice, Parliament has given the judiciary carte blanche to determine when it is impossible to interpret statutes in a manner compatible with Convention rights. The express words of section 3(1) are so vague that they do not provide a clear outline of the limits of possibility. Parliament's implied intention, discovered through reference to Parliamentary materials permitted by *Pepper* v. *Hart*, does rule out two possible interpretations of so far as possible. Courts can clearly go beyond the limit of lack of ambiguity and reading in. Parliamentary material falling within the ambit of *Pepper* v. *Hart* also establishes a further Parliamentary-imposed limit, implied repeal. However, the limit of implied repeal does not curb the power of the judiciary. It merely replaces impossibility with incompatibility, a boundary completely at the hands of the judiciary. There is nothing in *Pepper* v. *Hart* to prevent the judiciary from allowing section 3(1) of the Act to have the same effect in practice as if it impliedly repealed the provisions of all statutes contrary to Convention rights, thus removing the need to cross the implied repeal barrier to protect Convention rights. The legislative history of the Human Rights Act 1998 provides further evidence of the limitations of *Pepper* v. *Hart*. Ministerial statements are rarely clear enough to limit the power of courts to interpret the meaning of statutes. Moreover, it raises issues as to the reality of parliamentary supremacy, particularly when delineating the respective roles of the judiciary and the legislature. How can the judiciary respect Parliament's intention with regard to its role under section 3(1) of the Act, if Parliament has made its intentions so unclear as to place the court fully in charge of delineating its own power? Parliamentary sovereignty has given way to judicial sovereignty.