READING DOWN

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"A STATUTE MUST BE construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[1] British lawyers would call this an instance of a court urging that a statute be *read down*. Or rather, that's what they would call it nowadays. Only at the close of the twentieth century did this expression enter their lexicon. Before then, the lawyer who read down was doing the same thing as anyone else who read down: skimming a text or scrutinizing a list.

"Reading down" entered British legal vocabulary after the enactment of the Human Rights Act 1998. Section 3 of that Act stipulates that national legislation must, "so far as it is possible to do so, . . . be read and given effect in a way which is compatible with" upholding the rights and freedoms enumerated in the first section of the European Convention on Human Rights (ECHR). In September 2000, one of the main British law journals carried an article proclaiming that section 3 required judges "to adopt the technique of reading down."[2] Once the Human Rights Act came into force the following month, lawyers and judges quickly got into the habit of referring to section 3 of the Act as having established an interpretive obligation which could be met by reading down statutory language.[3] A concept un-

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[1] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

[2] Richard A. Edwards, *Reading Down Legislation under the Human Rights Act*, 20 Legal Studies 353, 356 (2000). Other notable essays which preceded the enactment of the statute and which speculated on the implications of section 3 made no mention of this technique.

[3] See, e.g., R. v. A. (No. 2) [2001] UKHL 25 at para. 110 (Lord Hope); R. v. Lambert [2001] UKHL 37 at para. 81 (Lord Hope); R. (Kariharan) v. Secretary of State for the

familiar to British lawyers in 1997 became, over the next decade, their go-to mantra when specifying what a court had to do when negotiating domestic statutes apparently at odds with the ECHR. Human rights cases, textbooks, and scholarship in the first decade of the twenty-first century provide ample evidence of British lawyers invoking "reading down" with remarkable casualness, as if nobody could possibly be unaware of what the term meant. But what *did* it mean? A court which strikes a statute down is invalidating it – everybody knows that (even in places which eschew *Marbury v. Madison*-style judicial review). But what is a court doing when it reads a statute down?

Look to the legislative history – read up on reading down – and you find, in the parliamentary debates on the Human Rights Bill, very little in the way of an answer to this question. Once the Bill is enacted, the human rights lawyer Anthony Lester remarked during its passage through the House of Lords, "there will be a new approach to statutory interpretation", whereby both "reading in safeguards to save [a] statute" and "reading down – reading narrowly restrictions upon human rights" – will be options at a judge's disposal.[4] The British courts had in fact long endorsed the proposition that "words can be read into a statute"[5] – or, indeed, out of one – if the statute couldn't otherwise be saved from the absurdity of its being enforced to deny a right which the legislature, in enacting the statute, had patently wanted to protect. The courts had also long accepted that a statute might be interpreted narrowly so as to stop it intruding where the legislature would have considered it unwelcome.[6] But they were not accustomed to describing a statute subjected to a narrowing interpretation as having been read down.

Home Department [2002] EWCA Civ 1102 at para. 47 (Arden LJ); R. (Rusbridger) v. A-G [2003] UKHL 38 at para. 40 (Lord Scott); Richard Clayton, *The Limits of What's 'Possible': Statutory Construction Under the Human Rights Act*, European Human Rights L. Rev. 559, 562-3 [2002]; Richard Ekins, *A Critique of Radical Approaches to Rights Consistent Statutory Interpretation*, European Human Rights L. Rev. 641, 645-6 [2003]; Aileen Kavanagh, *The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998*, 24 Oxford J. Legal Studies 259, 283 (2004).

[4] *Hansard* vol. 584, col. 1292 (House of Lords' debates), 19 January 1998 (Lord Lester).

[5] Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry [1974] 1 WLR 505, 524.

[6] See JOHN BELL & GEORGE ENGLE, CROSS ON STATUTORY INTERPRETATION 172-5 (3rd ed., Butterworths, 2005).

It was otherwise in various commonwealth jurisdictions. "[R]eading down meanings of [statutory] words with loose lexical amplitude", the Supreme Court of India observed in 1980, "is permissible as part of the judicial process."[7] Both in Australia and in New Zealand, lawyers had been referring to strict statutory construction as "reading down" since the middle of the twentieth century.[8] By the 1970s, Canadian lawyers had got in on the act – though in their hands "reading down" meant subjecting a statute to a narrow interpretation so as to preserve its constitutionality.[9] The term was employed similarly in South Africa, where the interpretation clause in the 1994 interim constitution contained what became known as a "reading down provision."[10] In New Zealand, "reading down" acquired a similar (albeit non-constitutional) connotation after the enactment of section 6 of the New Zealand Bill of Rights Act 1990.[11]

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[7] Maharao Sahib Shri Bhim Singhji v. Union of India, AIR 1981 SC 234 at para. 17 (judgment handed down 13 November 1980).

[8] See, e.g., Carter v. Potato Marketing Board (1951) 84 CLR 460 at 463, 475; Clarke v. Kerr (1955) 94 CLR 489, 494; Campbell v. Russell [1962] New Zealand L.R. 407, 426 (judgment handed down 14 December 1961). Before the enactment of the Human Rights Act, British judges who sat on the Judicial Committee of the Privy Council would occasionally consider Australian attorneys' submissions on the feasibility or otherwise of reading down a rule relevant to the case at hand (see Hughes & Vale Proprietary v. State of New South Wales [1955] AC 241 at 257, 279; Perpetual Trustee Co. v. Pacific Coal Co. [1956] AC 165, 177). But it is not obvious that they would have been exposed to this term (used as a legal term) in any context other than appeals to the Privy Council.

[9] See Carol Rogerson, *The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreadth and Vagueness*, in CHARTER LITIGATION 233, 247-50 (ed. R.J. Sharpe, Butterworths, 1986).

[10] See, e.g., LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 120-21 (1994); also S. v. Bhulwana; S. v. Gwadiso 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), paras 26 & 28. (§ 35(2) of the interim constitution (suspended February 1997) provided that "[n]o law which limits any of the rights entrenched . . . shall be constitutionally invalid . . . provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.").

[11] See Michael Taggart, *Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990*, Public Law 266, 284 [1998]; Paul Rishworth, *The Potential of the Bill of Rights*, New Zealand L.J. 68, 69-70 [1990]; also Simpson v. A-G (Baigent's Case) [1994] 3 New Zealand L.R. 667, 690-1. The New Zealand Bill of Rights Act has, as its

The Canadian story provides an interesting preface to the British one. In Canada, reading down was originally just shorthand for a canon of construction used in federalism cases: the canon that wherever possible, statutory language should be interpreted so as to keep it within the scope of the enacting legislature's constitutional powers.[12] But gradually – and particularly after the introduction of the Charter of Rights and Freedoms – Canada's courts started to think of reading down as a doctrine which accommodated interpolation as well as interpretation. In *Re Edmonton Journal* (1983), for example, a statute providing that "the trial of children shall take place without publicity"[13] was read down by Alberta's Court of Queen's Bench so that the rule became: "the trial of children *may* take place without publicity." By "reading the mandatory word 'shall' as a permissive 'may'", Dea J observed, "a blanket requirement of *in camera* hearings is avoided. . . . [T]he judicial discretion implicit in the section so 'read down' confirms the proper social purpose of the Act to protect children."[14] Another Alberta judge performed the same maneuver just one month later, claiming to read down "shall exclude from the room"[15] by turning it into "may exclude from the room."[16] It was not a maneuver that met with universal approval. "[W]e are not entitled to rewrite the statute under attack when considering the applicability of the provisions of the Charter", McKay J remarked in the Supreme Court of British Columbia in 1983. "I am unable to agree that what the learned judge did [in *Re Edmonton Journal*] was to 'read down'. . . . It appears to me that he, in effect, legislated a rather major change."[17]

British judges may have come late to reading down but, once they started using the concept, they quickly blurred the line separating reading

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name implies, statutory rather than constitutional status. Section 6 of the Act provides that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[12] See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 15.7 (5th ed., 2007).

[13] Juvenile Delinquents Act, R.S.C. 1970, s 12(1).

[14] Re Edmonton Journal and A-G Alta. (1983) 146 DLR (3d) 673, 683.

[15] Child Welfare Act, R.S.A. 1980, s 12(3).

[16] Re L. (E.L.) (1983) 65 AR 363 (Fitch J, Alta. Prov. Ct.).

[17] Canadian Newspapers Co. v. Canada (1983) 1 DLR (4th) 133, 142.

down and reading in. "[T]o 'read down'" a statute "so as to include additional words . . . would . . . not be an exercise in interpretation" but rather "a legislative exercise of amendment", Lord Hobhouse stated in *Bellinger v. Bellinger* (2003).[18] But the following year, in *Ghaidan v. Godin-Mendoza*, Lord Steyn pushed back against the "refrain that a judicial reading down, or reading in, under section 3 [of the Human Rights Act] would flout the will of Parliament as expressed in the statute under examination."[19] In *Ghaidan*, the statute under examination accorded a person living with a tenant "as his or her wife or husband"[20] the right to succeed the tenancy on the tenant's death. The statute didn't confer this right to surviving partners in same-sex relationships, which meant that the statute was incompatible with the ECHR's anti-discrimination provision (Article 14) as read in conjunction with its respect-for-home provision (Article 8). So the House of Lords extended the right to same-sex partners, thereby rendering the impugned statute Convention-compliant, by reading "as his or her wife or husband" as "as if they were his wife or husband." Reading down and reading in were being treated as all of a piece; both were deemed "possible" under section 3 of the Human Rights Act. It would be an exaggeration to say that the two concepts have been routinely conflated ever since. But it is surprising, all the same, to find British lawyers – including some very eminent British lawyers – fairly regularly referring to reading down as if it could entail reading in.[21]

How, and indeed why, did the House of Lords end up where it did? Let us begin with how. Judges should never insert words into a statute so as to flout the will of Parliament – so as to make the statute mean something that Parliament would never have wanted it to mean. But – this was

[18] Bellinger v. Bellinger [2003] UKHL 21 at para. 78.

[19] Ghaidan v. Godin-Mendoza [2004] UKHL 30 at para. 40.

[20] Rent Act 1977, sched. 1, para. 2(2).

[21] See, e.g., I v. Dunn [2012] HJCAC 108 at paras 22, 41, and 56; also Baroness Hale, *The Protection of Human Rights in the United Kingdom* [2013] Oxford Univ. Comparative L. Forum, at ouclf.iuscomp.org/ (the journal is unpaginated: the quoted text contains n. 51) ("In Secretary of State for the Home Department v. MB [2007] UKHL 46 . . . we held (by a majority) that [section 3 of The Prevention of Terrorism Act 2005] had to be read down to prevent [the obstruction of the right to a fair hearing], by inserting the words 'except where to do so would be incompatible with the right of the controlled person to a fair trial'").

the majority's position in *Ghaidan* – it *is* legitimate for judges to modify a statute's language (thereby making it compatible with the ECHR) so long as the modification doesn't fly in the face of the statute itself. Courts are entitled to amend statutory language for the purpose of fulfilling their duty under section 3, in other words, so long as they are convinced that the amendments they make would not have met with the disapproval – even though they never had the approval – of the enacting legislature. Since these are amendments made by judges when they apply – or rather, when they purport to apply – the statute to the facts of a case, the new statutory language can't be found in the text of the statute itself; to find the new language, you have to look to the law reports.[22] Imagine what Antonin Scalia might have said.

The more interesting question is why. "The [Human Rights] Bill is based on a number of important principles", the Lord Chancellor observed at its final reading in the House of Lords, one of which is that "[t]he sovereignty of Parliament should not be disturbed."[23] If a court, in trying to fulfil its duty under section 3 of the Human Rights Act, finds it impossible to read a statute in such a way as to make it compatible with the ECHR, "it may" – this is section 4(2) of the Act – "make a declaration of that in-

[22] In 2008, section 19 of the Asylum and Immigration (Treatment of Immigrants) Act 2004, which requires that "a party subject to immigration control" wishing to "marry in the United Kingdom" obtain "the written permission of the Secretary of State", was read – substantially rewritten – by the House of Lords to say that there can be no valid marriage unless the party "has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under Article 12 of the European Convention [which provides that '[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right']". The law lord who proposed this reading described it as a "correction". See R. (Baiai) v. Secretary of State for the Home Department [2008] UKHL 53 at para. 32 (Lord Bingham). Even a prominent defender of the Human Rights Act couldn't help but raise his eyebrows at this: although Parliament repealed section 19 three years after the ruling, Conor Gearty observes, "during that whole intervening period no lawyer would have had a clue about what the law required by looking only at how it appeared in the statute books." CONOR GEARTY, ON FANTASY ISLAND: BRITAIN, EUROPE, AND HUMAN RIGHTS 94 (2016).

[23] *Hansard* vol. 585, col. 839 (House of Lords' debates), 5 February 1998 (Lord Irvine, LC).

compatibility." This isn't a binding declaration. Parliament is under no duty to enact remedying legislation in response to a finding of incompatibility, and, in the case at hand, the court issuing the declaration will still have to apply the reprobate statute on its plain meaning. This means that judges can end up awarding booby prizes, with complainants getting the good news that the law which they challenged is indeed incompatible with their rights under the ECHR – something which might prompt Parliament to enact remedying legislation at a later date – but also the bad news that their victory is Pyrrhic, because the court still has to apply that law to their case.

One obvious drawback to the declaration of incompatibility is that prospective litigants have little or no incentive to challenge statutes if a successful challenge won't be to their benefit. Another is that it in effect encourages judges to read down – or read words into – a statute so as to save it.[24] The House of Lords, had it issued a declaration of incompatibility in *Ghaidan*, would have had to interpret "as his or her wife or husband" on its plain meaning and, applying the statutory provision, would have had no choice but to rule that Juan Godin-Mendoza wasn't a tenant; before Parliament could introduce legislation extending tenancy survivorship rights to same-sex partners (presuming it had wanted to do such a thing), he would have been evicted. A court is likely to try very hard indeed to read down a statute so that it becomes Convention-compatible if the alternative is telling aggrieved parties that their rights have indeed been infringed but that they can have no remedy for the infringement.

The United Kingdom's vote to leave the European Union – the biggest political shake-up for quite some time, till Americans decided to trump it with a vote of their own – is a matter entirely separate from its commitment to the ECHR.[25] The nation's Conservative government is clear, nevertheless, that it wants to repeal the Human Rights Act (which replicates ECHR rights in domestic law) and replace it with a British Bill of Rights. Should this come to pass, reading down is unlikely to exit the stage along with the Act that marked its entrance. The British courts, in upholding the

[24] See R. v. A. (No. 2), supra n. 3 at para. 44 (Lord Steyn) ("A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so").

[25] Its commitment to the ECHR has to do with its membership in the Council of Europe rather than its membership in the European Union.

Bill of Rights, would have to rule on challenges to statutory provisions alleged to contravene articles in the Bill. Although some would see this as Britain's opportunity to embrace something akin to full-on judicial review,[26] the reality is that the general quality and robustness of the British legislative process is such that no government, let alone the current one, would want to remove Parliament's sovereignty. But the courts, though unable to strike statutes down, presumably would still be able to declare statutes incompatible – not with the ECHR any longer, but with the domestic Bill of Rights. And since these declarations would still be booby prizes, judges would very likely be disinclined to award them – and instead resort to legerdemain in the quest to "read down" statutory language.

[26] See, e.g., Tom Hickman, *Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model*, New Zealand L. Rev. 35 [2015].