

What is the purpose in the purposive interpretation of statutes?

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Introduction

It is a commonplace statement in the recent case-law of the House of Lords and the Supreme Court that the courts adopt a purposive approach to the interpretation of statutes.¹ My lecture this evening will explore what this means. In particular, if courts are going to refer to the purpose of a statute to inform the meaning to be given to its provisions, exactly what role does purpose play in the analysis? How should the courts go about identifying what it is? And what weight should the courts give to it when balancing it against other indications of the meaning of a statutory provision, such as the ordinary grammatical meaning of the words used in the provision? I will suggest that the answers to these questions require consideration of how language works – of the philosophy of language, if you like – and also of the constitutional position of Parliament and of the role that law plays in society. These three elements have to be brought into relationship with each other.

1. How language works: the philosophy of language

To understand how we discern the meaning of a statutory provision, it is first important to understand how we derive meaning from words. Words are not simple building blocks constituted of fixed and unalterable datums of meaning which are put together like Lego bricks to reveal clear and perspicuous meaning in composite sentences. They have shades of meaning, which becomes determinate when used in specific contexts for specific purposes. The philosophy of language provides reasons why the meaning of words involves reference to the purpose of the person who uses them.

* I am grateful to my Judicial Assistant, Shannon McKeown-Gilmore, for her excellent assistance in the preparation of this lecture.

¹ See eg *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [41].

Modern statutory interpretation implicitly draws on insights derived from the later work of Ludwig Wittgenstein about how language works and how meaning is conveyed.² Words do not have a simple correspondence with objects in the world or with concepts. Language is autonomous, in the sense that it is detached from the world and sense or meaning is given by the use to which it is put by the person using it.³ This view of language necessarily involves greater recourse to context in order to explain how the words in which a statute has been expressed are being used, and with what object.

The indeterminacy of language also underpins influential jurisprudential theories, including that developed by H.L.A. Hart.⁴ Natural languages like English are ‘irreducibly open-textured’.⁵ As a result, law and legal rules also inevitably have an open texture.⁶ New and unanticipated cases arise which call for the judge to supply a specific degree of determinacy in the language used in a statutory provision, having regard to the aim of the rule, when applying it to decide the case at hand in accordance with it.

It is against this background that the case for purposive interpretation is to be made out. Arguments about statutory interpretation often diverge into two factions. The first, which may be called ‘textualist’ or ‘literalist’, discerns the apparent natural meaning of a text according to grammatical rules, but in the light of a very thin notion of context. The second, purposive interpretation, assesses meaning in the light of the purpose of the statute, which provides a richer and more detailed account of the context in which the language has been used.

Historically, the approach to statutory interpretation in English law was markedly literalist. The literalist approach to statutory interpretation rose to prominence over the course of the nineteenth century. The classic statement of the rule comes from the *Sussex Peerages Case* of 1844, where Lord Chief Justice Tindal said: ‘If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the

² In particular, in L Wittgenstein, *Philosophical Investigations*, tr GEM Anscombe (3rd ed, 1968), and writers drawing on his work.

³ See the account in GP Baker and PMS Hacker, *Wittgenstein: Understanding and Meaning* (1980), in particular ch VIII (‘A word has a meaning only in the context of a sentence’), ch XI (‘Vagueness and determinacy of sense’), ch XVI (‘Understanding and Ability’), ch XVII (‘Meaning and Understanding’).

⁴ H.L.A. Hart, *The Concept of Law* (3rd ed, 2012), ch VII, ‘Formalism and Rule-Scepticism’.

⁵ *Ibid*, 128.

⁶ *Ibid*, 124-136.

intention of the lawgiver’⁷ However, during the second half of the twentieth century, the courts increasingly moved towards a more purposive approach to statutory interpretation.

In 1975 Lord Diplock remarked in *Carter v Bradbeer* that ‘[i]f one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.’⁸ The best explanation for this shift, I think, is that the courts have come to adopt an approach which reflects more accurately the connection between language and purpose, implicitly drawing on insights derived from Wittgenstein. This was to adopt a more realistic approach to how people in fact understand language in real life. In this way, the courts conceived of themselves as recognising more clearly the constitutional role of Parliament in legislating for a state which respects the rule of law and for the citizens in such a state who are subject to the law it lays down. The impulses to respect for democratic reasons the choices made by Parliament and to take account of the position of the citizen subject to the law run together, since citizens will understand statutes as instances of the ordinary use of language directed at them by Parliament.

2. Purposive interpretation and those participating in the legal enterprise

Statutory interpretation must involve engagement with the three distinct perspectives of those participating in the enterprise of making law and giving it effect: the judge, the drafter and the person subject to the statute.⁹ First, in relation to the judge, the preliminary question to answer is how a judge decides upon their approach to interpretation. Why should a judge prefer one approach over another?

Both approaches, textualist and purposive, are rooted in the same motivation – that they should produce an interpretation which is loyal to the legislative choice made by Parliament and which is comprehensible to those subject to the law. Statute is the output of an elected legislature and it is authoritative because of its democratic foundation. Judges do not have a democratic mandate: their interpretations of statute draw on the authority of Parliament and should properly reflect that authority. The judges declare a meaning which they discover in the text,

⁷ *Sussex Peerages Case* (1844) 11 Cl & Fin 85; 8 ER 1034, 1057.

⁸ *Carter v Bradbeer* [1975] 1 WLR 1204, 1206–1207.

⁹ K Rundle, *Reclaiming the Jurisprudence of Lon L Fuller* (2012), 85.

read in its context, which in principle is the meaning the statute has always had. The debate then diverges over what sources are relevant for determining such meaning.

Some commentators maintain that the concept of legislative intent is an unhelpful fiction,¹⁰ however, my view is that it is real and is the proper focus for inquiry when interpreting statute.¹¹ Legislative intention is a concept directly drawn from the fact that the legislature has authority to make and change the law and is taken to do so for good reasons. The legislature exercises agency, forming and acting on intentions to change the law for those reasons and to convey some particular meaning to the subjects of the law.¹² Even though the legislature is itself comprised of individuals each with their own subjective state of mind, it is valuable, in fact it is necessary, for the interpretive process to ask what meaning Parliament as a collective institution intended to convey by using the language it chose in enacting a statute.

As Stanley Fish puts it:

‘If interpretation is to be rational and not arbitrary there must be something to be interpreted, something prior to the interpreter’s efforts, something the interpreter is trying to get right, something in relation to which an interpretation can be rejected’.¹³

As he argues, there are only two possibilities: the text and the intention of the author. ‘But the text isn’t really a possibility because a text doesn’t become a text – the vehicle of a message – until the assumption of purposive design, or intention, is in place’; ‘take that assumption away and the text dissolves into a mass of shapes [or letters] ... that mean nothing and, because they mean nothing, can be made to mean anything.’ So, he says, in the final analysis, the only possible constraint against practically untrammelled discretion for judges in deciding what a legislative text means ‘is the intention of the author’.¹⁴ Interpretation is the ‘empirical labor of trying to figure out what some purposive agent – his, her, theirs or its identity is also an empirical matter – meant by these signs’.¹⁵

Therefore, the exercise for the courts is to interpret legislation to arrive at what the legislature ‘really’ meant. On this view, but on the critical assumption that the courts are able accurately to identify the general purpose of the legislature in enacting the legislation, purposive

¹⁰ E.g., A Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (2018).

¹¹ P Sales, *Constitutional Agency* (2026), 61.

¹² Ibid.

¹³ S. Fish. ‘Intention is all there is’ (2008) 29 *Cardozo Law Review* 1109, 1114.

¹⁴ Ibid. 1115.

¹⁵ Ibid. 1116.

interpretation best reflects fidelity to enacted law, with the courts as faithful agents of the legislature.

The opinion of Foster J in Lon Fuller's Case of the Speluncean Explorers thought experiment expresses this idea:¹⁶

'No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when ... her master tells her to 'drop everything and come running' he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely, we have the right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.'¹⁷

If the interpretive process is inevitably teleological to some degree, it becomes important to identify what the purpose is. It is also true that judges may have to construct purpose, by drawing inferences about what it is likely to have been, rather than simply 'discover' it in some uncomplicated way. A statutory rule has normative force across time and may have to be applied in cases which were not in fact envisaged by the legislator, and judicial methodology has to take account of this.

H.L.A. Hart explains this in *The Concept of Law*: 'When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing issues in the way that best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word'.¹⁸

The process of interpretation inevitably gives a degree of decision-making power to the judges to identify and give effect to the public policy which appears to be promoted by a statute, and the more the approach adopted is purposive in character the greater the responsibility cast on the judges to construct the meaning to be given to it. This poses problems, because there are no clearly settled criteria to identify such higher order purposes which exist apart from the simple words used by the legislature, and identification of relevant purposes may be highly contestable. I will return to the importance of methodology later in this lecture.

¹⁶ Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 Harv L Rev 616.

¹⁷ Ibid, 625-626. Also see A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022), 74-75, citing F Schauer, *Playing by the Rules* (1991).

¹⁸ Hart (n 4), 128.

The second of the participants in the legal enterprise – the first actor in time - is the person who enacts the statute, Parliament, whom I will call the drafter. Whilst it is not feasible to expect that words can be used with total clarity as regards their application in all future circumstances, the careful use of language in the formulation of rules is nonetheless very valuable. But there will always be indeterminacy in borderline, unanticipated cases. In a statute, language is used to create a legal regime which endures over time and which necessarily has wider implications and is more general than the legislators could readily construct in detail. Also, since statutes are instruments intended to last over time, there may be societal changes unanticipated by the drafter which may result in perceived ambiguity of meaning.

Each participant's perspective informs the actions of the others. A statute has two relevant audiences: the judge who will interpret its meaning and the subjects whose actions and conduct will be guided by it. Parliament should and does consider both audiences when choosing the formulation of rules in the legislation which it passes. The corollary is that Parliament will consider the interpretive approach taken by judges as part of its style of legislative drafting, a phenomenon explained by Lord Diplock in *Fothergill v Monarch Airlines*.¹⁹ The traditional non-purposive, narrowly semantic approach to interpretation can cause courts to give legislation a meaning which they know defeats Parliament's apparent purpose, simply because the statutory wording does not technically achieve that purpose. He illustrated this point by quoting Lord Simonds as an example of overt textualism, a style of interpretation which Lord Diplock was at pains to criticise:

‘It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose.’²⁰

The obvious and immediate effect of non-purposive interpretation is that it can stifle a proper understanding of legislative intent. However, for Lord Diplock, failure to have recourse to purpose when interpreting statutes has the further consequence of restraining legislative drafting in unhelpful ways. He observed that parliamentary counsel anticipated this ‘narrowly semantic approach to statutory construction’,²¹ and statutes became excessively detailed and technical. Rather than stating broad principles and leaving courts to apply them purposively to

¹⁹ [1981] AC 251.

²⁰ Ibid; *Inland Revenue Commissioners v. Ayrshire Employers Mutual Insurance Association Ltd.* [1946] 1 All E.R. 637, 641.

²¹ Ibid, 280.

particular circumstances, drafters attempted to spell out every foreseeable situation expressly. This style of drafting often makes statutes more opaque and harder to understand. One can lose sight of the wood for the trees. Therefore, purposive interpretation is also valuable because it enables the legislature and the courts to work in conjunction: Parliament can rely on judges to give effect to legislative purpose in a sensible way, which in turn encourages a more principled and less prescriptive approach to legislative drafting.

Judges are the secondary audience of any statute. The primary audience is the subjects of the law, and they also must be able to determine its meaning. Statute cannot be interpreted in a vacuum without the consideration of what the reasonable audience would understand the law to mean. To grasp why law can lay claim to society's support, one must understand its purpose, on the part of all its participants.²² Lord Simon in the *Black-Clawson* case said:

‘Interpretation cannot be concerned wholly with what the promulgator of a written instrument meant by it: interpretation must also be frequently concerned with the reasonable expectation of those who may be affected thereby... in statutory construction, the court is not solely concerned with what the citizens, through their parliamentary representatives, meant to say; it is also concerned with the reasonable expectation of those citizens who are affected by the statute, and whose understanding of the meaning of what was said is therefore relevant. The sovereignty of Parliament runs in tandem with the rule of objective law.’²³

In fact, it is because one infers that Parliament is concerned to take account of the perspective of law's subjects that textualism, in the sense of grounding the interpretation of statutes in the ordinary meaning of words as a starting point, has its foundation. Legislation ought to speak in a language that its target audience understands, which means that it is a fair inference that Parliament states the law using standard public conventions and evidence of meaning drawn from standard dictionaries in the ordinary case. As Fish says, ‘Because legislation is intended to send a message that tells citizens which behaviors are lawful, interpreters of legislation begin with the assumption that the meanings being employed are the standard ones known to most citizens.’²⁴

²² Rundle (n 9), 65.

²³ *Black-Clawson International Ltd. Appellants v Papierwerke Waldhof-Aschaffenburg A.G. Respondents*, [1975] A.C. 591, 645.

²⁴ Fish (n 13), 1127-1128.

But there may be other sources of evidence which cast light on what Parliament truly meant and which a subject of the law would also take into account to understand what it has said. It is likely the subject will understand the law in light of its perceived purpose. So the perspective of the person subject to the law is by no means an argument against purposivism in interpretation. Rather, it is the opposite. Also, following standard usages might still leave a high degree of doubt regarding the intended meaning in relation to the particular case in issue, including if it suggests a result which is absurd, having regard to the nature of Parliament as legislator and the nature of the problem it was seeking to address.

On Lon Fuller's account, law has an inherent purpose as morally worthwhile social ordering. It is an ethical enterprise.²⁵ If subjects of the law are faithful to the law because they consider it to have such a moral purpose, then judges should also consider law to have such a purpose and should interpret it in that light. Thus, when interpreting statutes judges seek to align the discernible intention of Parliament with how subjects are liable to receive and understand the law. As Fuller argues, to understand law, it must be analysed taking account of the perspective of the legal subject and how the law seeks to exercise legal authority over her.²⁶ For Fuller, law, properly understood, relates to and respects human agency. Law should be evaluated to include the position of those subjects who are obliged to live under it.²⁷ A person subject to the law expects to read a statute on the basis that it forms a coherent whole. This is why judges should similarly adopt the perspective of the subject in statutory interpretation, asking how the legislation would reasonably be understood by those who must follow it. Approaching a statute with its purpose in mind is likely to help the interpreter understand it as a coherent body of rules, rather than a random collection of norms which do not fit together.

3. The constitutional position of courts and purposive interpretation

A court applying a statute is applying law which binds it as much as it binds the subjects of the law. How does one identify the specific content of the binding norm contained in a statute and applied to a specific set of facts? If a court cannot say that it is interpreting and applying 'law', as something reasonably objective and separate from the political or policy opinions of the judge, it will delegitimise its activity and itself. Accordingly, the perennial concern for courts

²⁵ Rundle (n 9), 66.

²⁶ Ibid, 75.

²⁷ Ibid.

in relation to statutory interpretation is to explain how it is applying objective law as laid down by Parliament, rather than exercising a discretion of their own.

I think that Stanley Fish is right to say that the proper approach for a court to adopt is to focus on identifying the intention of the legislature as the guiding principle. It is that search for meaning, understood in that way, which constrains the court. To like effect, Richard Ekins argues that legislative intention is not a further source of evidence about the meaning of an enactment. Instead, it is the object of interpretation, the identification of which settles the meaning of the enactment.²⁸

It is a key feature of purposive interpretation that the court's conception of the purpose of a legislative provision may play a role, sometimes a major role, in working out what the legislation means. It can therefore be objected that purposive interpretation is vulnerable to the charge that it may be difficult for the courts accurately to identify the purpose or purposes of the legislature in enacting the legislation and that this tends to introduce instability into the interpretive exercise and serves as a cloak for smuggling in judicial discretion. Proponents of the textualist approach, for example US Supreme Court Justice Antonin Scalia, criticise purposive interpretation as providing a wide-reaching basis for the judicial re-writing of legislation.²⁹ Scalia wrote that a purposive approach 'frees the judge from interpretive scruples' and that 'its most destructive (and most alluring feature)' is its 'manipulability'.³⁰

But this objection is overstated. As Fish points out, an excessively textualist approach suffers from the same problem. Far from involving judicial over-reach as its critics worry, a purposive approach emerged in order to give *better* effect to Parliament's intention in legislating and to accord proper recognition to Parliament's central role in the political and legal system. It is likely to be the case that a blend of textual analysis in the light of purpose will allow the best inference to be drawn as to the intention of Parliament, as expressed objectively in the legislation it has passed. It is a clear understanding that the intention of Parliament is the object of inquiry when interpreting legislation which provides the true and principled discipline for the courts and the justification for their role.

²⁸ R. Ekins, 'Statutes, Intentions and the Legislature: A reply to Justice Hayne' (2014) 14 Oxford University Commonwealth Law Journal 3.

²⁹ For example, Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012); John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 Columbia Law Review 1; John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 Columbia Law Review 70.

³⁰ Scalia and Garner (n 29), 18.

However, in the interests of legal objectivity and predictability, and to demonstrate that the courts act as interpreters rather than lawmakers, it is important that they should seek to adopt a reasonably settled and coherent methodology for the identification of legislative purpose.

Recent cases in the Supreme Court illustrate the interaction between the constitutional context of a statute, the words used in a provision and its purpose. The language, context and purpose of a statute all have to be taken into account. For example, in the *Akbars Restaurant* case earlier this year,³¹ the question was whether a civil penalty notice issued under section 15 of the Immigration, Asylum and Nationality Act 2006 to a person said to be employing an illegal migrant had to specify which of three mutually exclusive grounds formed the basis of the penalty, or whether it was sufficient that the notice indicated that *any* of those grounds might apply. In the judgment, I emphasised that statutory interpretation requires a provision to be read in its context and in light of its purpose, but that a conception of the purpose has to be anchored to the language Parliament chose. A generalised conception of the statute's objective - in this case, to discourage illegal employment - could not be used to gloss the words of the particular provision.

Three points were important. First, the provision had to be read in the context that the regime was penal in nature. In determining the statement required by the statute, it is expected that clear reasons should be given to explain why the state is exercising its penal power. Secondly, 'determination of the purpose of a statutory provision has to be linked to the language Parliament has chosen to use.'³² Any purpose which the courts impute to Parliament must align clearly with the language of the provision itself. Thirdly, in this case the relevant purpose was to inform an employer in receipt of a penalty notice why it was being imposed and, in consequence, to enable them to be able to make an informed decision whether to appeal on that point.³³ Accordingly, the conception of purpose was guided by consideration of how the statutory rules would be read from the perspective of a person subject to the law. Purpose was identified not at the high level of the statute's general objective of discouraging illegal employment, but by considering the function performed by the particular provision within the statutory scheme. The case illustrates how the courts should use constitutional context and a reasonably precise conception of purpose to help determine meaning, whilst keeping within the confines of statutory language.

³¹ *Akbars Restaurant (Middlesbrough) Ltd v Secretary of State for the Home Department* [2026] UKSC 26

³² *Ibid*, [47].

³³ *Ibid*, [51].

4. Methodology

The potential extent of legitimate disagreement about linguistic meaning is reduced by the specification of an accepted methodology as to how to address the resolution of the cases of uncertainty at the margins of linguistic meaning. The legislature does not generally state the purpose for which it is enacting a statutory provision. This methodology should include objective criteria by reference to which judges can justify their identification and use of constitutional rights and principles. A defined and defensible legal methodology to statutory interpretation will protect against accusations that courts use interpretation to impose their own idiosyncratic values into the law. In the longer term, this risks diminishing public confidence in the courts, which would itself undermine rule of law values. Whilst a methodology cannot wholly eliminate the uncertainty which might arise and in the ultimate analysis difficult cases can only be resolved by an exercise of judgment, it remains constitutionally imperative that judges are clear on their reasoning and methodology in difficult cases so as not to undermine the legitimacy of their judgment.

The first point to note about methodology is that statutory interpretation is an objective exercise. It is not concerned with the subjective intentions or understandings of individual legislators, which are unlikely to coincide and are not themselves the object of the inquiry. Instead, it is concerned with the meaning objectively conveyed by the statutory language read in the light of the context and purpose of the provision. This is because the legislating agent is Parliament itself, as a collective body or artificial person. This approach is reinforced by the perspective of those subject to the law, who need to be able to understand the law promulgated by Parliament in order to ascertain their legal rights and obligations.

Some idea of the purpose for which Parliament is using the specific language in a statute is inescapable at a very basic level, because the notion of words having a ‘natural meaning’ is not always very helpful. When open-textured expressions are used which have a range of meanings, the purpose for which Parliament is legislating is a starting point in fixing the point within that range which it intends should apply. ‘The purpose and scheme of an Act ... provide the basic frame of orientation for the use of the language employed in it’.³⁴ When Parliament uses the word ‘instrument’, does it mean a physical object like a knife or a financial instrument?

³⁴ *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [41].

The purpose for which it is legislating will often straightforwardly answer that point. Indeed, it is so straightforward that we understand the use of language in this way that most of the time we are hardly conscious of resorting to purpose in this way.

In the interpretive process, where the grammatical meaning of the language is clear in its application to a particular case and there is no contextual concern that such a result is overinclusive in relation to the legislature's aim, then the court may proceed confidently to the conclusion that this is the true objective meaning. This modern approach to purposive interpretation properly focuses on the particular words used by Parliament as a primary reference point.

Where the statutory language is not clear, the courts have to move to identify the legislature's intention as to meaning at a higher level of abstraction, employing a wider range of materials. What this means for formulating a methodology is that uncertainty in the statutory language is a precondition for placing distinct weight on context and purpose, bearing in mind they will already have played an important role in providing orientation regarding how Parliament intended to use the language in a provision.³⁵ Courts take a pragmatic approach to narrowing the scope for interpretive arguments. For example, under the rule in *Pepper v Hart*³⁶ statements in Parliament about the meaning of a legislative provision are only admissible if the provision is ambiguous, if the statement is by the promoter of the Bill and if it is clear to definitively resolve the doubt which has arisen. The test operates to narrow the availability of the admission of Hansard. Certain other external aids to interpretation are also only admissible if the provision is ambiguous.

On the other hand, under the interpretive approach called the principle of legality, linguistic ambiguity is not a precondition. The meaning of a provision drafted in general terms may be affected by a presumption that, absent clear indications to the contrary, it is not read as overriding relevant constitutional rights and principles. But for this method of interpretation to be justified and legitimate, the content of those rights and principles has to be clearly identified in a way which meant that Parliament was on notice of them.³⁷

Aharon Barak, in his book on purposive interpretation in law, argues that once language and purpose have been exhausted to discern the authoritative meaning of a statute without success,

³⁵ *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [41].

³⁶ [1993] AC 593.

³⁷ P Sales, 'Rights and Fundamental Rights in English Law' [2016] CLJ 86.

then judges will exercise discretion to come to a final answer.³⁸ His theory is that discretion is a ‘critical component of every system of interpretation’ and it is ‘a myth’ to think a system of interpretation can function without it.³⁹ However, he emphasises that discretion should be limited in scope: it is a necessary but not sufficient condition for any system of interpretation.⁴⁰

However, in my view reference to judicial ‘discretion’ is a misnomer. The idea of discretion means that a judge has the ‘freedom to choose between multiple legal solutions’.⁴¹ But when determining the meaning of a statute, focusing on the intention of Parliament as the object of the interpretive inquiry means judges do not have freedom of that kind. If a simple reading of the words does not yield a clear result, judges may have to refer to higher-order reasons for guidance. But there will always be *an* external indicator which will provide an answer.

Stanley Fish responds to Barak’s theory of interpretation by noting that ‘Interpreters are not choosing the conclusions they come to, and they are certainly not doing so freely. Rather they are being persuaded to them. That is, in the course of sifting and assessing evidence they become convinced that this rather than that is the case.’⁴² I think he is correct in the idea that there will always be an external frame of reference to provide relevant evidence for that inquiry which will lead a judge to a particular interpretation. Disagreement between judges is not indicative of the existence of discretion but rather that interpreters can and will disagree about what is and is not an applicable reason in the interpretive process and about how different factors should be weighed up.⁴³

Of course, the possibility of disagreement means there may be a degree of uncertainty about a statute’s meaning from the perspective of the subject of the law. This is an inevitable feature of statutes given, first, that they are expressed in language and language is inherently capable of conveying shades of meaning, and second, that they extend across society and through time, and so cannot anticipate and provide in terms for every situation they will encounter.

At the highest level of abstraction, it may be relevant to have regard to the nature of the person who is communicating in order to draw inferences about what they intended to say. If I know my elderly great-uncle is a racist, that may inform how I understand what he says. So

³⁸ A Barak, *Purposive Interpretation in Law* (2005, Princeton University Press), 207.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Barak (n 38), 208.

⁴² Ibid.

⁴³ Ibid.

sometimes it may be important to have regard to the nature of Parliament in order to understand its legislation.

Adrian Vermeule, in his book *Common Good Constitutionalism*, makes a similar point.⁴⁴ Judges resort to higher order reasons to determine meaning: ‘law is ordered to the common good ... the positive law based on the will of the civil lawmaker, while worthy of great respect in its sphere, is contained within a larger objective order of legal principles and can only be interpreted in accordance with those principles.’⁴⁵ Vermeule writes in the natural law tradition. He says ‘Those who apply the law must inevitably, in some domain of cases, have recourse to general background principles of law and to the natural law in order to decide how texts should best be read.’⁴⁶

But although in a very general sense one would say that Parliament legislates for the common good, drawing inferences about the type of speaker Parliament is does not commit one to this natural law approach. On the contrary, in modern Britain Parliament is a body which is oriented towards legislating for a pluralist and tolerant society which is characterised as a liberal constitutional democracy subject to the rule of law.⁴⁷ As Judith Shklar points out in her book *Legalism*, natural law approaches are typically too prescriptive and potentially authoritarian for such a society.⁴⁸

A practical example of how courts draw inferences based on their understanding of the sort of legislative agent Parliament is can be taken from the judgment of the Supreme Court in the *PACCAR* case. Courts will infer that Parliament did not intend to legislate to create absurd results. This is a function of the approach that Parliament is presumed to be a reasonable agent that legislates in a coherent and sensible way. But as was pointed out in the judgment,

‘the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional

⁴⁴ A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See eg *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, [26]-[28].

⁴⁸ J. Shklar, *Legalism: Law, Morals and Political Trials* (1964; 1986), 63-110 (‘the whole aim of natural law as a political ideology is to overcome diversity. It is fundamentally an ideology of agreement’: 63). See also the discussion in E Hall, *Power and Powerlessness: The Liberalism of Fear in the Twenty-first Century* (2025), 45, arguing that natural lawyers assume an objective understanding of the public good which escapes the normal conflicts of pluralistic society, but there is no rational consensus on what it is.

position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity. ...'⁴⁹

Another inference drawn by the courts about the nature of Parliament and the purposes it pursues is inherent in the assumption that Parliament intends by its legislation to respect established common law and constitutional rights and principles and to further certain general social objectives as encapsulated in the principle of legality. The principle of legality proceeds on the footing that there is 'a principled presumptive commitment by the legislators to certain basic principles which can be viewed as underpinning a liberal democracy committed to the rule of law.'⁵⁰

5. Problems inherent in purposive interpretation

As I have explained, a purposive approach to interpreting language is inherent in the practice of communication by words. Reference to the purpose of legislation resolves what would otherwise be puzzles. But there are areas in which a purposive approach to the interpretation of statutes also gives rise to problems of its own. The concept of the purpose of legislation may have tensions inherent in it. Where these arise, it is desirable for courts to try to develop an accepted and predictable methodology to resolve them, insofar as that is possible. I will mention four issues.

(a) How to identify purpose and what evidence is admissible in this process

The first issue concerns the material a court can consider when determining its purpose. There will of course be recourse to the 'internal' evidence provided by the statute itself: the language of the particular section to be construed; its place in the scheme of the particular part of the statute in which it appears; and its place in the scheme of the statute as a whole. From the context in which Parliament legislated, courts will have some idea at a very basic level of the aim of the statute or the 'mischief' it was intended to address. When appropriate, the courts may find there is also value in 'extrinsic' evidence. For example, courts look at background reports, white papers and Law Commission reports which operate as the spur for the particular

⁴⁹ *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [43].

⁵⁰ P Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 Statute Law Review 53, 61.

legislative activity, especially if such reports were in front of Parliament when the legislation was passed.

Perhaps the most contentious of external aids to interpretation are statements recorded in Hansard made in debates during a Bill's passage through Parliament. Historically, these statements were subject to a strong exclusionary rule. It was only in *Pepper v Hart* in 1993 that the House of Lords accepted that statements in Parliament could be treated as admissible evidence of Parliament's intention.⁵¹ Three conditions were laid down: (a) the legislation is ambiguous or obscure or leads to an absurdity; (b) the material relied upon consists of statements by a minister or promoter of the Bill; (c) the statements relied upon clearly show the meaning. These criteria are policed strictly.

Explanatory notes in relation to statutes are another source of evidence. They are produced by civil servants rather than by Parliament itself, and they cannot all be regarded as having received Parliament's endorsement. An important distinction should be drawn between two categories.⁵² First, explanatory notes produced while a Bill is before Parliament may be presumed to have been available to, and taken into account by, Parliament in legislating.⁵³ Secondly, under current practice, the sponsoring department issues a further set of explanatory notes once the Bill has received Royal Assent. These stand on a different footing because Parliament has not seen them and cannot be said to have legislated on the basis of them. To the extent that they are different from the explanatory notes available to Parliament itself, they are admissible on the separate basis that they constitute a relevant form of *contemporanea expositio* (exposition of contemporary understanding) regarding the meaning of the Act, albeit they are generally produced by quite junior civil servants who were not themselves involved in its drafting. The interpretive weight of this second category is slight. There is also a risk of blurring constitutional lines if the later explanatory notes are relied upon given that they originate with the executive.⁵⁴

For explanatory notes, as with Hansard, they are only taken to assist with interpretation if they are clear on the very point on which the statute is ambiguous.

⁵¹ [1993] AC 593.

⁵² *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [42].

⁵³ *Ibid.*

⁵⁴ D Bailey, 'Use of Explanatory Notes in Statutory Interpretation' [2026] Public Law 15, 20.

(b) Multiple purposes pursued by a statute

Secondly, it is well-recognised in case-law that statutes can and do have multiple purposes. How should the courts respond when there is more than one purpose of a provision, especially if they potentially conflict? Aharon Barak argues that interpreters should prefer or favour purpose at a low level of abstraction.⁵⁵ However, when the reliability of information about various subjective purposes varies, interpreters should prefer the purpose about which the most credible information exists.⁵⁶ But I question whether such a mechanistic approach is feasible.

When multiple purposes are identified, a court may simply have to balance them against each other to arrive at a persuasive interpretation of the text. Courts engage in a form of practical reasoning in which the reasons for legislative action by a body of the character of Parliament are evaluated and weighed against each other. In practical reasoning ends and means interact. It is inherent in deciding whether to pursue some goal that one has to take account of available means and the costs associated with them.

It has been observed that:

‘no legislation pursues its purposes at all costs. Deciding that competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.’⁵⁷

Accordingly, it is by no means unusual that courts have to consider cases in which specification of purposes by the court involves identifying conflicts between those purposes. This means that purpose-based reasoning poses its own problems of interpretation at the same time as it might potentially provide resources to assist in resolving problems of interpretation of a specific statutory text. The methodology which is employed bears a strong resemblance to common law reasoning in other areas of the law, when a court is trying to identify and distil a principle of the common law. In both cases, a court weighs all relevant reasons which bear on the specification of the norm to be applied.

⁵⁵ Barak (n 38).

⁵⁶ Ibid.

⁵⁷ *Rodriguez v United States* (1987) 480 US 522, 525–526 (emphasis in original); *Akbars Restaurant* [2026] UKSC 26, [49].

(c) To what extent does the concept of purpose act as a conduit for normative content?

The third issue is the extent to which a court may seek to inject normative content into the concept of purpose. As already mentioned, the principle of legality operates as a background assumption about the characteristics of the Parliament which is producing the legislation being interpreted. Parliament intends by its legislation to respect certain existing rights and principles and to further certain general social objectives as part of the legislative package. A paradigm example is the presumption against retrospective effect of laws, in particular in relation to imposition of criminal liability. However, Parliament is sovereign and so where clear and unequivocal wording is used, the principle does not override Parliament's legislative choice.

Where there is scope for it to apply, the principle of legality thus functions as a third order form of purposive reasoning, sitting behind the text of the statute itself and the specific types of evidence of statutory purpose, but capable of providing guidance in relation to the meaning of both of those. By keeping the operation of the principle of legality within narrow bounds, the courts make it clear that they will protect the general constitutional principle of democratic choice and that the principle of legality operates only through limited presumptive constitutional constraints.⁵⁸ This is another example of how modern statutory interpretation has developed greater affinity with the common law method - taking account of a range of values in order to distil a precise norm to apply in a given situation - albeit constrained in important ways by the statutory text.⁵⁹

(d) Retained EU law and 'assimilated law'

Finally, I will mention the complexity of purposive interpretation where the overarching constitutional architecture has changed, as it has with Brexit. Interpretation of EU law and retained EU law (now called assimilated law) remains an important task for the courts. This is legislation produced originally by the EU's legislative organs. It is well-established that a purposive approach to interpretation applies. But how should the courts identify the relevant purposes now that the UK has left the EU and no longer shares all of its objectives? The UK no longer shares the EU's Treaty objectives and UK courts no longer make references to the CJEU for it to rule. Not only will judges in the UK have to identify the purpose or purposes pursued by retained EU law, but they will have to distinguish those which remain relevant in

⁵⁸ P Sales, *Constitutional Agency* (n 11).

⁵⁹ P Sales, *Modern Statutory Interpretation* (2017) 38 Statute Law Review 125.

the post-Brexit period such that they guide the interpretive process from those which are now no longer applicable.

Some of the ‘meta-purposes’ of the EU legal order (such as the spirit of the treaties, the mandatory effectiveness of EU law and the principle of ever closer union) do not retain their normative weight in the post-Brexit domestic legal order.⁶⁰ When interpreting retained EU law, the domestic courts should not automatically assume that the retained version of EU law as applicable in the UK inherits all the purposes tied to European integration. But purposes reflecting broader shared aims - consumer, worker and environmental protections, data protection, and fundamental rights - are more likely to remain relevant. Since purpose is capable of playing an important role in interpretation, as I have tried to explain this evening, these differences may be significant.

Conclusion

Ultimately, purposive reasoning is an inevitable feature of statutory interpretation. Given the nature of language, statutory meaning cannot always be determined without reference to the purpose for which the legislation was enacted. Where ambiguity arises, courts should therefore engage openly and rationally with an analysis of the statutory purpose. Once the relevant purpose or purposes have been identified, they must be weighed alongside other constitutional principles in determining the meaning of the provision. This exercise may involve balancing considerations that are not readily commensurable, inevitably leaving scope for a degree of judicial disagreement. In the end, as in so many areas of law, an exercise of judgment is called for, guided by a settled methodology. In this respect, statutory interpretation may operate more like common law reasoning than is sometimes acknowledged. Transparency in the judicial methodology for identifying and applying purpose reinforces confidence that judges are interpreting rather than legislating and demonstrates that purposive interpretation of statutes remains anchored in its constitutional justification: giving faithful effect to the intention of Parliament.

⁶⁰ P Sales, ‘Retained EU Law: Purposive Interpretation when the Constitutional Architecture Changes’ (2024) 49 European Law Review 3.