The role of purpose in legislative interpretation: inescapable but problematic necessity

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Introduction: philosophy/background

Statutes are expressed in words. Courts interpret and apply statutes according to their proper meaning. But 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 of composite sentences. Words have shades of meaning, which becomes determinate when used in specific contexts for specific purposes.

There are therefore philosophical reasons why the meaning of words involves recourse to the purposes of the person who uses them.[2]

Modern statutory interpretation implicitly draws on insights derived from the later work of Ludwig Wittgenstein[3] about how language works and how meaning is conveyed. Words do not have a simple correspondence with objects in the world or concepts. Language is autonomous, in the sense that it is detached from the world. Sense or meaning is given by the use to which it is put by the person using it.[4] 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. How is the agent using the words, as a tool to convey the meaning he or she wishes? As Adam Kramer says in relation to contractual interpretation, "meaning is discovered by the recognition of the fact that the communicator intended it to be discovered".[5]

The jurisprudential tradition associated with H.L.A. Hart emphasises the relative indeterminacy of language and hence of the law, which depends on language.[6] Natural

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[1] I am grateful to my Judicial Assistant, Alex Hughes, for his assistance with research for this presentation.

[2] For the first part of this paper, I draw on P Sales 'Contractual Interpretation: Antinomies and Boundaries' in E Peel and R Probert (eds) *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (2023), as the issues arising in relation to interpretation of contracts are similar.

[3] In particular, in L Wittgenstein, *Philosophical Investigations*, tr GEM Anscombe (3rd ed, 1968), and writers drawing on his work. See also HP Grice, *Studies in the Way of Words* (1989).

[4] 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').

[5] A Kramer, "Common Sense Principles of Contract Interpretation (and how we've been using them all along)" (2003) 23 OJLS 173, 175.

[6] See H.L.A. Hart, *The Concept of Law* (3rd ed, 2012), ch VII, 'Formalism and Rule-Scepticism'.

languages like English are "irreducibly open-textured".[7] As a result, law and legal rules also have an open texture.[8] We do not live in a world suitable for "mechanical" jurisprudence, in which no choice has to be made to determine the meaning of a text or utterance which is to be given normative effect across time: "human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim".[9]

New and unanticipated cases arise which call for the judge to supply a specific degree of determinacy in the language and the aim of the rule, when applying it to decide the case at hand in accordance with it. "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".[10] For these purposes, where the enforcement of the rule, such as in a statute, depends on the decision of a judge, what "best satisfies us" is what best satisfies the judge.[11] But at the same time, the linguistic formulation of the rule, since it appeals to general standards of language in relation to which there is *some* (and often a considerable) degree of settled meaning, albeit it might become questionable in marginal cases, does provide substantial guidance independent of the judgment of a judicial official.

It is not feasible to expect that words can be used with total clarity as regards their application in all future circumstances. But this feature of language does not mean that the careful use of language serves no purpose. On the contrary, language may be used in a way which clearly and adequately does serve the primary objects which legislators have in mind when they choose it. The indeterminacy in marginal, unanticipated cases does not constitute ignorance about its meaning. It is just that, as regards those cases, "We do not know the boundaries because none have been drawn … we can draw a boundary – for a special purpose. Does it take that to make the concept usable? Not at all! (Except for that special purpose.)"[12]

In the statutory legal context, the special purpose is the application of a legal rule in a situation which was not immediately and clearly in the contemplation of the legislature when it framed the rule, but where it is accepted that the rule has to be interpreted both to see whether it has any application at all and, if it does, to work out what it must be taken to mean. Legislators will frame the statute by focusing on what is most directly important to them and their choice of language will be directed to that. But since the language is used to create a legal regime which endures across time and which necessarily has wider implications and constitutes more of a general legal framework than the legislators could readily construct in detail, which covers more cases than they had directly to mind, the legal solution to a dispute has to be capable of dealing with the marginal cases which are within the ambit of the general framework of the statute but are not its primary focus. The courts have to do this by

[7] Ibid, 128.
[8] Ibid, 124-136.
[9] Ibid, 128.
[10] Ibid, 129.
[11] Ibid, 135.
[12] Wittgenstein, *Philosophical Investigations*, para 69.

constructing meaning, by drawing inferences about what the legislature as a collective agent[13] is likely to have intended, which really means would reasonably have intended, had it concentrated more directly on the situation which has now occurred and given rise to the dispute.

The potential extent of legitimate disagreement about linguistic meaning is reduced further by the specification of an accepted methodology for how to address the resolution of the cases of uncertainty at the margins of linguistic meaning. However, such 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.

Arguments about statutory interpretation often resolve into contests between apparent natural meaning of a text according to grammatical rules (but assessed in the light of a very thin notion of context) and meaning (ie natural meaning) assessed in the light of the purpose of the statute, which is a thicker and more dense specification of the context in which the language has been used. Ordinary grammatical sense tends to be overinclusive in relation to the aims of the legislature. This feature of interpretation is particularly strong in relation to statements of law, because they have authoritative effect across time and situations potentially far removed from those to which the legislature directed its attention and there is no simple mechanism for recourse back to it for clarification as new circumstances arise. Courts have 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 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[14] expresses this idea:

> "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 or 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."[15]

According to Foster J, a law must "be interpreted reasonably, in the light of its evident purpose".[16]

Since interpretation is inevitably teleological to some degree, so that the specification of the purpose for which language is being used affects meaning, it becomes important to work out what the purpose is. That may be more difficult the more the inference of meaning has to be drawn in circumstances which are remote from the use of the language being interpreted. But

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[13] See P Sales, 'In Defence of Legislative Intention' (2019) 48 Australian Bar Review 6; Richard Ekins, *The Nature of Legislative Intent* (2012).
[14] (1949) 62 Harv L Rev 616
[15] Ibid, 625-626. Also see Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022), 74-75, citing F Schauer, *Playing by the Rules* (1991).
[16] Ibid, 624.

it is not as though no context at all can be discerned, and it may nonetheless appear that ordinary grammatical meaning could well be overinclusive of the situations which the legislature intended to catch by its enactment. However, the role which identification of purpose plays in the interpretive exercise places a large premium on that concept and on the methodology by which the relevant purpose can be inferred.

Also, since courts are not themselves legislators and are required to operate within the bounds of their legitimate authority, they need to be able give an account of the process by which they identify the purpose of the legislature which is objectively justified as legitimate and within the scope of that authority. 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.

As Eskridge points out:[17]

> "Although one advantage of grounding statutory interpretation on legislative purpose is that general purpose is more easily determinable than specific intent, a corresponding disadvantage is that purpose is *too* easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations. Purposive statutory interpretation, therefore, might be even less determinate than more traditional approaches."

He identifies a main line of attack against a strongly purposive approach to statutory interpretation: because purpose is fictional (ie something ascribed to the legislature rather than explicitly declared by it) interpretation becomes judicial law-making and judicial lawmaking is questionable for reasons of democratic theory and institutional competence, and on grounds of unjustified elitism.

If the purpose for which a statute is promulgated affects its meaning, it may be critical in the inquiry as to meaning to identify what that purpose is. However, this process of identification poses a series of problems, since the legislature does not generally state the purpose for which it is enacting a statutory provision. Identification of purpose arises as a second order inquiry, at a higher level of generality than identification of the words used in the statute and their ordinary grammatical meaning. In the interests of legal objectivity and predictability, and maintenance of the legitimacy of the courts' own role as interpreters rather than law-makers, it is important for the courts to adopt a reasonably settled and coherent methodology for the identification of legislative purpose.

The juristic nature of the exercise of interpretation of a statute draws judges and litigants into an exploration of the context in which words are written with a view to creating a statutory rule. Statutes are to be interpreted in an objective, rather than subjective way (ie by reference to the subjective understanding and intentions of individual members of the legislature, which are unlikely to correspond and are not an object of investigation). An objective interpretation

[17] W. Eskridge, "*The Case of the Speluncian Explorers*: Twentieth-Century Statutory Interpretation in a Nutshell" (1993) 61 George Washington Law Review 1731,

is also called for because statutes are addressed to third parties who are bound by them and have to be able to understand them in order to know what their legal obligations are.

It follows from the objective approach to statutory interpretation, which is normatively justified for these reasons, that both the user of the words and the recipient of them are constructs rather than real people. Since interpretation is an exercise in construction of meaning in the context of the statute, rather than a function of evidence about the particular subjective psychological state of legislators or individual citizens, some understanding of the context is in fact critical for the interpretive exercise.

Where the language used in a statute is clear in its grammatical sense as to the result for a particular case, and there is no contextual ground for concern that that sense may be overinclusive in relation to the legislature's aim such as to require deeper investigation on that point, the court can confidently proceed on the basis that this represents the true objective meaning chosen by the legislature. Such an approach provides a good discipline for the legislature to think carefully about what is important from its perspective and to specify this clearly. The better and more precise the drafting, the less there is for the courts to do in making sense of it and the more the norm-specifying space is truly filled by the legislature itself, with less scope for imaginative contribution from the court.[18]

On the other hand, 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. Then, the inference to be drawn as to its intention is more debateable and obscure. One may be dealing with a situation to which it had given no thought at all or which was left to one side as too difficult in the parliamentary processes and negotiations aimed at securing majority support to bring a law into existence, perhaps in the hope it would never arise. Interpretation then shades into construction. This involves a process of imagining how a legislature placed as this one was would have wished the statutory rule to be articulated and applied in this new situation.

The court is then effectively obliged to proceed by reference to what a *reasonable* legislature (on notice that its legislation will bind, and will fall to be interpreted by, reasonable citizens) would have wished to do if it had notice of the problem, and to call on a wider range of aids to interpretation which offer clues to answering that question. It is still possible to locate this constructed meaning within a framework of inference as to the legislature's intention, inferred in appropriate cases from these wider background factors. In a well-known formulation, Henry Hart and Albert Sacks[19] said judges should presume legislators are "reasonable men pursuing reasonable purposes reasonably".

There is a spectrum of circumstances in which purpose may potentially have a greater or lesser role in deriving meaning from a statutory text, rather than a clear dividing line as to when it is relevant and when it is not. It always has *some* relevance, but may be simple to understand from the text as used in the immediate context of the statute itself. Difficult questions arise, though, when trying to decide whether there is sufficient doubt about the apparent meaning given at that stage of the inquiry as to justify inquiring further and more

[18] P Sales, "The Contribution of Legislative Drafting to the Rule of Law" [2018] CLJ 630, 632.
[19] Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), 1124-1125.

deeply in order to specify the purpose more precisely; and where that is done, in trying to determine the extent to which any purpose so identified may impact upon and change that apparent meaning. There is no simple test to resolve these issues.

In constructing a model of the legislature on the lines proposed by Hart and Sacks, there is scope for a judge to inject an element of his or her own values and predispositions as normative content to fill out the idea of the reasonable author. What a judge thinks a reasonable person would do is likely to reflect to some degree the judge's own values and expectations. However, the principle of a statute as a matter of legislative choice by a democratic legislature requires that the inquiry should be framed as one into the presumed intention of the legislature as agent. It is relatively simple to posit the legislature as a single unified person exercising its own agency, and to look for clues in the properly available evidence as to how that person would have been likely to have intended to resolve the particular case. But to proceed in this way requires careful attention to be given to what counts as the properly available evidence.

The available clues are the language chosen by the legislature, the internal scheme of the statute and the background context in which the statute was made (in so far as that casts light on the purposes the legislature was trying to achieve when it made it). There is no simple metric or stated rule which can govern where the balance is struck between linguistic meaning and internal and external context. These are incommensurable ingredients, all of which are relevant for a legal solution. Certainty and predictability therefore require a high degree of regularity of approach among legal practitioners. To a significant degree, this depends upon the strength of the legal culture as well as upon statements of the methodology to be used.[20]

Judicial sensitivity to these features of law and language: the UK experience

For judges it is a commonplace that in carrying out the task of statutory interpretation the court is "seeking the meaning of the words which Parliament has used": *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189, para 72 (Lord Neuberger). In *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591, 613 Lord Reid said

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

But this distinction between "meaning" and the "true meaning of what they said" is problematic. The contrast is really between the subjective intentions of individual legislators and the objective intention of the collective legislature, as the agent employing the words it has chosen. The purpose of the legislature is relevant. At p 614 Lord Reid said:

> "It has always been said to be important to consider the "mischief" B which the Act was apparently intended to remedy. The word "mischief" is traditional. I would

[20] See eg Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) pp. 185-86, 202, 213-16.

> expand it in this way. In addition to reading the Act you look at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it, and you consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act."

As was pointed out by the UK Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. An example given was *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, where Lord Bingham said (para 8):

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

The House of Lords in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, at 396-398 (Lord Nicholls), and the Supreme Court in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023} AC 255, paras 29-31 (Lord Hodge), have placed emphasis on the importance of interpreting statutory words in their context. In the latter case the Court stated (paras 29-30):

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament had chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.
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> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision."

A hierarchy of indicators of purpose proceeding from the statutory text falling to be interpreted itself and broadening out through other features of the statute, and treating external aids as of second order importance seems broadly justified, in that the legislature will have focused very directly on the wording and structure of the statute. But sometimes the purpose for which legislative intervention was required may be the very prominent focus for

the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place. In such circumstances, where there is a doubt regarding the specific meaning of the words used which has to be resolved, it is difficult to see why the text should count for more than external indicators of the legislature's purpose. So again there is no simple test which orders the priority and weight to be given to these different factors.

The features of language and law described above find expression in the cases. Exactly where within the open-textured range of meaning of a word or sentence the precise meaning is intended to be fixed is governed to a large extent by an understanding of the purpose for which the word or sentence is being used. As explained by H.L.A. Hart, however, that purpose may itself require to be elaborated by the person applying the rule which contains that language.

The courts recognise that words are not regarded as having simple, fixed meanings like building blocks. As Lord Mance put it:[21]

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. … 'the notion of words having a natural meaning' is not always very helpful …, and certainly not as a starting point, before identifying the legislative purpose and scheme. …"

Similarly, Lord Nicholls, discussing the meaning of the words 'occupier' and 'occupation' as used in a statute, said:[22]

> "… the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words 'occupied', and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used. …
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> In many factual situations questions of occupation will attract the same answer, whatever the context … the answer in situations which are not so clear cut is affected by the purpose for which the concept of occupation is being used. In such situations the purpose for which the distinction between occupation and non-occupation is being drawn, and the consequences flowing from the presence or absence of occupation, will throw light on what sort of activities are or are not to be regarded as occupation in the particular context."

A further issue related to the purpose served by legislation arises in the UK, because of the application of an external human rights normative template to evaluate the compatibility of domestic legislation with the Convention rights in the European Convention on Human Rights, pursuant to the Human Rights Act 1998. A typical inquiry is whether legislation is a proportionate response to a legitimate aim, which places analytical pressure on the

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[21] *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25; [2011] 1 WLR 1546, [10].
[22] *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] AC 329, 334-335.

identification of the relevant aim. I do not expand upon this aspect of legislative purpose in this paper.

However, it is a principle of statutory interpretation that the 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. See *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, para 43:

> "The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See now *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result". I would add that 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 position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity. …"

The purpose ascribed to Parliament may be relevant to determination of whether a particular result on a particular interpretation of the legislation is to be taken to be absurd, so as to attract the operation of this principle, or not.

The purpose to be ascribed to the legislature is especially important in the context of discretionary powers conferred on public authorities, in view of the doctrine that such powers must be exercised for proper purposes, determined as a matter of statutory interpretation: *Padfield v Minister for Agriculture, Fisheries and Food*[23] and *Spath Holme*.

Four problems

Four problems arise in relation to identification of legislative purpose in the context of statutory interpretation: (i) what evidence as to purpose is properly admissible? (ii) to what

[23] [1968] AC 997.

extent can courts inject normative content by an assumption that Parliament has legislated to accommodate particular background constitutional or human rights objectives ("the principle of legality")? (iii) how should the courts react where there are multiple (and potentially conflicting) purposes? (iv) what should courts do where there is a compromise involving a deliberate obfuscation, limitation or non-implementation of conflicting purposes?

Problem (1): what evidence is admissible?

As noted above, there is evidence of purpose which is internal to the statute itself: (a) the language of the particular section to be construed; (b) its place in the scheme of the particular part of the statute in which it appears; and (c) its place in the scheme of the statute as a whole.

In *Spath Holme* Lord Nicholls said (pp 397-8):

> "Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, "the mischief and defect for which the common law did not provide": *Heydon's Case* (1584) 3 Co Rep 7a, 7b. f Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool. This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned.
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> …
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> That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the

words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations."

There may also be evidence of purpose which is extrinsic to the statute: (a) background reports, white papers and Law Commission reports which operate as the spur for the particular legislative activity (see, in particular, *Black-Clawson*); (b) statements made in Parliament by the promoter of a Bill; (c) Explanatory Notes published in relation to the Bill.

It was only in *Pepper v Hart* [1993] AC 593 that the House of Lords accepted that statements in Parliament could be treated as admissible evidence of Parliament's intention. 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 are themselves clear (as it was put in *Spath Holme*, p 391, the statements must themselves be 'clear and unequivocal'; and these criteria must be strictly applied - p 392).

The relevance of explanatory notes has been addressed in several cases. In *PACCAR* the legislature created a problem by adopting concepts which were the subject of specific definitions in one statutory context as the building block concepts in a different statutory context. It was common ground that the definitions used were so specific that the inference was that Parliament intended them to have the meaning they had in the earlier legislation. After referring to authority I said (para 41): "The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it", and continued (para 42):

> "It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."

Problem (2): to what extent can courts inject normative content by an assumption that Parliament has legislated to accommodate particular background constitutional or human rights objectives ("the principle of legality")?

What lawyers in the UK call "the principle of legality" is an approach to legislative interpretation which proceeds from an underlying assumption that Parliament intends by its legislation to further certain general social objectives: "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."[24] In *Black-Clawson* Lord Wilberforce explained:[25]

> "The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated, so often indeed as to have become an incantation. If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs"). As Bell and Engle explain in Cross on *Statutory Interpretation*, "[Statutes] are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules. … Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament."[26]

The principle of legality is concerned to ensure that legislation that overrides fundamental common law principles or rights can clearly be appreciated as such at the time of its passage, so that Parliament's intention to achieve that result is properly established.[27] A paradigm example is the presumption against retrospective effect of laws, in particular in relation to imposition of criminal liability. "The role for the principle of legality is … not so much to inject normative content into legislative texts purely on the authority of the judges, but to exercise a checking or editorial function to see that the legislature and the executive, which has the prime role in promoting legislation …, have sufficiently held in mind the longer term principles, rights and freedoms which support the moral claims of democratic rule, when legislating to adopt a particular statutory text".[28]

With due adjustment for the UK's local constitutional traditions and principles, this style of reasoning as regards the interpretation of legislative intention can be located in what Adrian Vermeule calls common good constitutionalism in the mode of the classical legal tradition.[29]

This calls for the union of well-ordered reason, directed to certain objectives, with public authority: 'law is ordered to the common good … it is law's nature to be so ordered … and … the positive law based on the will of the civil lawmaker, while worthy of great respect in its

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[24] P Sales, "Legislative Intention, Interpretation, and the Principle of Legality" (2019) 40 Statute Law Review 53, 62; and see P Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598. See, eg, *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 573G-575D (Lord Browne-Wilkinson), 587C-590A (Lord Steyn). See also *Maxwell on the Interpretation of Statutes*, 12th ed. by P. St. J. Langan, pp. 251ff ("Statutes Encroaching on Rights or Imposing Burdens").
[25] [1975] AC 591, 629-630.
[26] Cross, *Statutory Interpretation* (3rd ed.) ch. 7, "Presumptions", at p. 165.
[27] See *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131E-G (Lord Hoffmann).
[28] P Sales, "Legislative Intention, Interpretation, and the Principle of Legality" (2019) 40 Statute Law Review 53, 62.
[29] Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022).

sphere, is contained within a larger objective order of legal principles and can only be interpreted in accordance with those principles'.[30] As Vermeule explains, the specific expectations embodied in a legal text provide no theoretical criterion for resolving new cases over time that differ from the paradigm case, in terms of identifying which features of the expected application of the statute are legally relevant: 'The moment that one begins to generalize, one needs a theory, and that theory will inevitably be normative, a theory about the *point* of creating the category in the first place'.[31] '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'.[32]

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. Again, there is no simple test which determines which form of evidence should predominate as guidance as to meaning. Judgment is called for to assess the relative weight of text, explanatory materials and background constitutional principles.

In *Spath Holme* the exercise of an open-ended statutory power enabling a Minister to make an order restricting rents chargeable for residential property was challenged by property owners, who argued that it could only be exercised for the purpose of countering inflation and not (as it had been) for the purpose of achieving greater fairness between landlords and tenants. The argument succeeded in the Court of Appeal but failed in the House of Lords. In support of their argument the property owners sought to rely on a presumption that Parliament does not legislate to take away property rights without compensation. However, in the House of Lords this was treated as a factor which was outweighed by other circumstantial evidence regarding the context in which the relevant legislation had been enacted. Lord Nicholls also pointed out (p 399) that a *Pepper v Hart* statement in Parliament might conflict with background constitutional principles, the respective weights of which would have to be assessed.

Problem (3): how should the courts react where there are multiple (and potentially conflicting) purposes?

In *Spath Holme* it was common ground that the ambit of the statutory power was limited to the purposes for which it was granted.[33] So how should those purposes be identified? Were

[30] Ibid, 2. In this regard Vermeule aligns himself with Ronald Dworkin's theory of interpretation.
[31] Ibid, 96. See generally ch 3, "Originalism as Illusion". Cf the doctrine of a statute as "always speaking" to cover new situations identified as falling within the policy of the law as originally enacted, as explained in *Quintavalle*.
[32] Ibid, 111.
[33] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030.

they limited to combating inflation, or could the provision be used to protect tenants against high rent rises?

The wide language used in the provision was not ambiguous or obscure, and did not lead to absurdity,[34] but still the House of Lords was left with a concern that to give the text its wide grammatical meaning would be excessive. So it went back to predecessor legislation to see if that legislation as properly construed indicated any narrowing of meaning. Taking account of a range of indications – the predecessor legislation was not specifically directed to inflation, by contrast with other legislation enacted shortly before it; the statutory power was not limited in time or subject to any sunset provision; one would have expected Parliament to make more specific reference to a counter-inflationary purpose if such a limitation was intended - it was concluded that it did not.[35]

The House of Lords relied on the speech of Lord Simon of Glaisdale and Lord Diplock in *Maunsell v Olins* [1975] AC 373, 393, in which they warned against a simplistic approach to construction based on an assumption that the drafter has sought to remedy one mischief only (or, in other words, that a statutory provision has only one statutory objective):

> "For a court of construction to constrain statutory language which has a primary natural meaning appropriate in its context so as to give it an artificial meaning which is appropriate only to remedy the mischief which is conceived to have occasioned the statutory provision is to proceed unsupported by principle, inconsonant with authority and oblivious of the actual practice of parliamentary draftsmen. Once a mischief has been drawn to the attention of the draftsman he will consider whether any concomitant mischiefs should be dealt with as a necessary corollary."

In general terms one can say that legal reasoning is a form of practical reasoning in which reasons for action are evaluated. 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. So it is by no means unusual that courts have to consider cases in which specification of purposes by a court involves identifying conflicts between those purposes, so 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.

Examples may be given in which the courts recognise the existence and relevance of competing purposes.

In *Gray's Timber Products Ltd v Revenue and Customs Commissioners* [2010] UKSC 4 Lord Walker said (paras 4-7) that the provisions of Part 7 of the Income Tax (Earnings and Pensions) Act 2003 reflected three different, and to some extent conflicting, legislative purposes: to encourage employees to own shares in the company for which they work; to charge tax on some chargeable event instead of, or in addition to, a charge on the employee's

[34] See eg [2001] AC at 398 (Lord Bingham).
[35] Ibid, 390 (Lord Bingham).

original acquisition of rights; and to counteract artificial tax avoidance. However, he did not address how to deal with or reconcile these conflicting purposes.

In *Medical Board of Australia v Kemp* (2018) 56 VR 51 the Victoria Court of Appeal observed that there may be circumstances where a statute or a particular provision may have multiple or competing purposes. The case concerned the extent to which medical confidence could be overridden in order to obtain evidence for use in civil proceedings. The relevant interests (purposes) were summarised at para 108:

> "Section 28(2) operates at the intersection of various interests but in a specific context. First, there is the interest of the patient in protecting medical confidence. Second, there are the interests of the parties to the suit, action or proceeding who will be denied access to the material that, it must be assumed, would otherwise be obtainable and probative of some issue in dispute. Third, there is the public interest that the administration of justice shall not be frustrated by the withholding of documents or evidence which must be produced if justice is to be done."

At para 116 the Court observed: "Having identified the various interests in play, it is apparent from its terms that s 28(2) does not operate to favour only a single interest." In such cases, the Court considered that the interpretive task involves assessing how the statute or provision balances those purposes which are relevant to that task. So at para 126-127 it held:

> "there is a balance between competing private interests in the context of the broader public interest in ensuring that the court has access to all relevant material. However, the essential balance that is struck is between competing private interests. Section 28(2) is intended to provide a rule of evidence or procedure that is limited in scope and mediates between those competing private interests.
>
> … in contrast to criminal proceedings where the interests of the public are thought to outweigh considerations of medical confidence, the State 'refuses to be a participant in the breach of a personal trust' 'where individual rights only are in controversy'."

A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd [2024] UKSC 27 concerned the effect of non-compliance with a statutory procedural rule in terms of the validity of a process for the transfer of management rights in respect of a building subject to residential leases which followed from the invocation of the statutory procedure. The statute did not specify the consequences of non-compliance. In the judgment, Lord Briggs and I said:

> "57. … the appropriate starting point for analysis is the guidance given in *Soneji*. The case concerned the making of confiscation orders in the Crown Court pursuant to the proceeds of crime legislation against defendants who had been convicted and sentenced in criminal proceedings, in circumstances where the stipulated statutory time limit for making such orders of six months after date of conviction had been exceeded. The Court of Appeal ([2003] EWCA Crim 1765; [2004] 1 Cr App R (S) 219) allowed an appeal against the making of the orders. The House of Lords ([2006] 1 AC 340) allowed the Crown's appeal and upheld the orders notwithstanding the breach of the statutory procedural requirement.

58. As Lord Steyn held in his speech (with the substance of which the other members of the Appellate Committee agreed) the correct approach to a failure to comply with a provision prescribing the doing of some act before a power was exercised was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. In summary, the court's power to postpone the making of a confiscation order was to make the sentencing process rather than the confiscation procedure as effective as possible; the judge's failure to adhere to the statutory requirements for making a confiscation order had caused no prejudice to the defendants in respect of their sentences and any other prejudice to them caused by the delay was outweighed by the public interest in not allowing convicted offenders to escape conviction for bona fide errors in the judicial process; and that accordingly that failure would not have been intended by Parliament to invalidate the confiscation proceedings, so the orders should stand. …

61. The point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement. We therefore consider that in the present statutory context *Osman v Natt* needs to be considered and applied with some caution, particularly in its suggestion that cases where it becomes necessary to infer the intended consequences of non-compliance can for that purpose be divided into distinct and watertight categories and its apparent suggestion (para 31) that in the second category the possibility of a middle position as identified in *Soneji* between outright validity or outright invalidity is excluded. Instead, it is appropriate to go back to the basic principled approach as explained in *Soneji*, as applied in light of the particular statutory context and the specific facts of the case.

62. This does not mean that application of procedural rules in every statutory context turns on detailed examination of the consequences arising from the particular facts of the case, nor that a test of substantial compliance is properly to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule may indicate that Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which follows. An example would be the notice requirements for extending business tenancies under the Landlord and Tenant Act 1954, where failure to serve a notice in proper time means that the tenant loses their right to extend. The procedural rules there apply in a context where there is an established bilateral relationship between landlord and tenant, where the tenant is in a position to know clearly what it has to do and where both parties need to know clearly what property rights they have and may dispose of in the market. …

68. In our view the correct approach in a case where there is no express statement of the consequences of non-compliance with a statutory requirement is first to look

carefully at the whole of the structure within which the requirement arises and ask what consequence of non-compliance best fits the structure as a whole. …"

Problem (4): what should courts do where there is a compromise involving a deliberate obfuscation or non-implementation of conflicting purposes, or simply opacity in terms of identifying the purpose of a statutory provision?

In certain situations, evidence regarding the purpose pursued by the legislature may be lacking or obscure. Ekins and Goldsworthy observe:[36]

> "Although we maintain that legislatures frequently do have relevant intentions, they may not have an intention with respect to every interpretive dispute that arises. In addition, in some cases objective evidence of their intentions may be unavailable or inconclusive: as Kirby J once said: 'A "purposive" approach founders in the shallows of a multitude of obscure, uncertain and even apparently conflicting purposes' (*Avel Pty Ltd* v. *A-G for NSW* (1987) 11 NSWLR 126, 127). Consequently, legislation may remain stubbornly ambiguous, vague or otherwise insufficiently determinate to resolve an interpretive dispute, after all admissible evidence of legislative intent has been examined. Judges who find themselves in this predicament tend to be reluctant to acknowledge that they have no alternative but to act creatively, and choose which way of resolving the indeterminacy would be preferable, all things considered, including the purpose of the legislation, justice and the public interest. Rather than admitting that they are forced to embroider the statute, they tend to attribute their own handiwork to legislative intention. This does involve attributing a fictional intention to Parliament."

Elsewhere, I have written:

> "[W]hat might appear as unprincipled compromise in legislative drafting may reflect a deeper principle, the desirability of seeking compromise as a way of balancing competing views in a viable modus vivdendi, which seeks to optimize the practical realization of competing values".[37]

Where the evidence regarding purpose, and hence the legislature's true intention, is thin the courts do not abandon the search but have to do the best they can to reconstruct it, bearing in mind that the legislative text might simply have been a compromise. More exiguous indicators assume more importance, as they did in *Spath Holme*. The courts also tend to be driven back to the simple grammatical meaning of the text, because there is an absence of evidence of more specific purpose to qualify or limit this (as again occurred in *Spath Holme*).

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[36] R Ekins and J Goldsworthy 'The Reality and Indispensability of Legislative Intentions' (2014) 36 Sydney Law Rev 39, 61

[37] P Sales, "Legislative Intention, Interpretation, and the Principle of Legality" (2019) 40 Statute Law Review 53, 61. For modus vivendi as a principle of liberalism, see J Gray, *Two Faces of Liberalism* (2000).

They also tend to be driven back to reliance on general indicators of meaning, under the principle of legality.

If a legislative text is regarded as a form of compromise, a court may recognise that the legislature enacted it with several purposes in view, but which are not clearly ranked. This makes the situation into a variant of that addressed under Problem (3). The court then has to infer how the identified purposes are to be balanced. Its reasoning then approximates to the reasoning typical in cases involving the common law and identification of rights arising under that law, in which different and competing interests have to be brought into account.[38]

An example where the evidence of legislative purpose was diffuse is *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, concerning the Hunting Act 2004 to restrict fox-hunting. There were strong views on each side of the debate and a free vote in Parliament. In the context of assessing the compatibility of the Act with EU law and the European Convention on Human Rights, the House of Lords held that the objective of the Act was to prevent or reduce unnecessary suffering to wild animals on the basis that causing such suffering for sport was unethical. Lord Bingham referred (para 40) to the judgment of the Divisional Court which had said:

> "We discern from evidence admissible on the [relevant] principles … that the legislative aim of the Hunting Act is a composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped. The evidential derivation for this legitimate aim comprises the terms of the legislation and the admissible contextual background. This background includes the Burns Report, the Portcullis House hearings, the ministerial basis for and the terms of the original Michael Bill, the obvious inference that the majority of the House of Commons considered the original Michael Bill inadequate, and the well-known opposing points of view in the prolonged and much publicised hunting controversy."

Lord Bingham continued:

> "Plainly, as I think, the Divisional Court was entitled to have regard to the materials listed, … and its approach was not challenged, save (by the Attorney General) to suggest that it could have taken account of other parliamentary materials. I consider that the courts below accurately expressed the rationale of the Act. The appellants did not accept this. They pointed out, correctly, that this rationale was nowhere expressed in the Act, that this did not reflect the Government's intention in introducing the Bill and that virtually no parliamentary statement expressed the rationale in this way. But, as the Divisional Court recorded in para 12 of its judgment, endorsed by the Court of Appeal in para 6, the Labour Party in 1997 had advocated new measures to promote animal welfare, including a free vote in Parliament on whether hunting with hounds should be banned. So concern for animal welfare was the mainspring of the legislation. It was originally proposed by the government, in the Michael Bill, to achieve that end by prohibiting deer hunting and hare coursing but permitting fox, hare and mink hunting

[38] See also, P Sales, "Modern Statutory Interpretation" (2017) 38 Statute Law Review 125.

> subject to regulation according to the principles of utility and least suffering already noted. But the latter proposal, although enjoying a measure of support in the House of Lords, was plainly unacceptable to a majority in the House of Commons, who did not feel that it went far enough. Why not? I do not think the appellants proffered any answer to this question. The only answer can, I think, be that it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) by way of sport."

Presidential Insurance Company Ltd v Resha St Hill [2012] UKPC 33 is a case in which context did not offer meaningful information about purpose. The Privy Council found (para 28) there was a "lack of any obvious explanation" for the amendment to section 4(7) of the Trinidad and Tobago Motor Vehicle Insurance (Third Party Risks) Act. There was "no real assistance" to be derived from *Hansard* and the work of the Law Commission. In such circumstances, the Privy Council found that the natural meaning of the provision was "clear" and "must prevail": paras 32-33; that is, it found no good reason to depart from the ordinary grammatical meaning it had identified.

Mitchell v Bailey [2008] FCA 426 is another example in which the text and context did not provide meaningful clues about the purpose of a statutory provision. The court therefore adopted a similar approach to the Privy Council in *Resha St Hill*. Tracey J (para 31) held: "In the absence of any clear identification of the legislative purpose intended to be served by the words appearing in parenthesis in s 360(1)(iii), the case would seem to be one in which it is necessary to focus on, and give effect to, the literal words chosen by the legislature."

Monis v The Queen [2013] HCA 4 is an example where, in the absence of specific evidence about the purpose of a statutory provision, the court had recourse to the principle of legality. At para 20, French CJ said:

> "It is sufficient to observe that a relevant statutory purpose of s 471.12 is the prevention of offensive uses of postal and similar services. That purpose does not aid in the construction of s 471.12 as it is a purpose derived from the text itself. It can only be given content by the construction of the section applying other criteria. Criteria relevant in this case are that the provision attaches a criminal sanction to an offensive use of postal or similar services and that such uses may include the content of a communication thereby affecting freedom of expression. The criminal sanction and the application of the principle of legality both indicate a requirement for a high threshold to be surmounted before the content of a communication made using a postal or similar service can be characterised as 'offensive'. A useful definition of any larger statutory purpose based upon common attributes of or significance to be attached to 'postal or similar services' is elusive."