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THE MEANING OF LEGISLATION: CONTEXT, PURPOSE AND RESPECT FOR FUNDAMENTAL RIGHTS

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In deciding civil rights and obligations, or criminal liability, the characteristic function of a judge is to identify the issues for trial, find the facts relevant to those issues, and apply the law to the facts as found. One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now to be found in Acts of Parliament rather than judge-made principles of common law (in which I include equity). A federal judge devotes almost the whole of his or her judicial time to the application of an Act of the federal Parliament, whether it be about corporations law, or bankruptcy, or family law, or migration. A commercial case before the Supreme

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Court of Victoria almost inevitably will include a claim, or defence, based upon an allegation of misleading or deceptive conduct in breach of a federal or State Act. Claims for damages for personal injuries are heavily regulated by legislation governing awards of damages, and establishing thresholds below which injuries will not be regarded as sufficiently serious to attract a right to sue. Sentencing is still discretionary, but the judicial discretion is guided by extensive legislative directions (some of which simply apply well-settled common law principles). Over the past 30 years, there has been a surge of legislative activity reaching into areas that once were occupied exclusively by lawyers' law. This has been described as an "orgy" of legislation[1]. The imagery is colourful, if disconcerting. There has been a change in what the public expects of parliaments, and this has raised some unresolved questions about what the public expects of judges.

The system of parliamentary government that we inherited did not involve, either originally or for most of its history, an expectation that Parliament would be a standing law reform agency constantly turning out detailed rules affecting the rights and obligations of citizens. Its origins lay in the occasional need of the King to assemble representatives of his subjects (or representatives of the most important of them) in order to seek their consent to some measure (typically, the imposition of

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[1] Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2004) 35 *Ottawa Law Review* 163, citing Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982) at 1.

taxation) for which such consent was necessary, or at least desirable. Neither the Sovereign nor Parliament was expected to be concerned with constantly changing the common law. Alteration of the ancient laws and customs, rights and privileges of the people was regarded as subversive of good order. Law in general was something that was declared, not freshly made. Changing the law was not seen as an inherently worthy activity, whether it was undertaken by parliaments or judges.

After World War II, the popularity of socialism, and of collectivist ideals, was accompanied by an increase in legislation. The public became more accustomed to detailed statutory regulation of personal and economic activities. In the 1970s, with the popularisation of law reform, it came to be accepted that there was no area of law that might not properly become the object of parliamentary attention. Furthermore, some topics which already had been the subject of legislation became much more intensively regulated. The point can be demonstrated by comparing the size of the *Income Tax Assessment Act* 1936 (Cth) with the present income tax legislation, or that of the Uniform Companies Acts of 1961 with the *Corporations Act* 2001 (Cth).

Making new law in all areas, civil and criminal, is a central part of the work of modern parliaments. Consequently, applying legislation is now the largest part of the work of modern judges.

It would be wrong to assume that judging in such an environment involves no more than diligent search for the relevant legislation, and its mechanical application once found. Much legislation draws upon the common law and is designed to interact with it. Only a very small part of Australian legislation takes the form of codification. Most of it is intended to supplement, or modify, judge-made law, rather than to replace it. Furthermore, legislation often takes its desired effect by conferring broad discretions which require courts to make normative evaluations of conduct, circumstances, and possible consequences. The meaning of the word "policy" is protean, and its unexplained use is often a source of confusion, but in one of its senses judges nowadays are commonly required, by Acts of Parliament, to make what could fairly be described as policy choices about a wide range of matters. They cannot avoid this responsibility when it is conferred by statute. Even a black-letter lawyer is compelled to respond when Parliament legislates in technicolour. Finally, Acts of Parliament often require interpretation. Their meaning is not always self-evident, and in any event the volume and complexity of legislation produces inconsistency and uncertainty. Whether it is described as a science or an art, statutory interpretation is of central importance to the daily work of all judges[2]. The responsibility of discovering, expounding and applying the meaning of legislation is discharged according to legal principles. Observing those principles

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[2] I shall use the words "interpretation" and "construction" interchangeably, as they are in the *Acts Interpretation Act* 1901 (Cth). Any distinction between the two is unimportant for present purposes.

goes to the essence of the role of courts in a liberal democracy, and of the relationship between courts and citizens, whose elected representatives are the authors of the legislation that courts are duty bound to understand and apply.

As Priestley JA, writing extra-judicially[3], pointed out, when a court sets out to discover the meaning of a text it does so for a purpose different from that of a literary critic, or an historian. The court's decision will affect the property, or the civil rights, of parties to litigation and, perhaps, of many other people as well. Courts are constrained by precedent and doctrine, and the nature of their task controls the techniques according to which they act.

Unless the meaning of a legal text of any kind, whether it be a will, a contract, or an Act of Parliament, is self-evident, then the text requires interpretation. A statute is the expression of the will of Parliament. Since Parliament is an institution, the term "will", like "intention", is metaphorical[4], but it reflects the exercise of constitutional authority by a law-giver. The law-giver, in the language of an enactment, expresses its will, and thereby binds those who are subject to its authority, including courts that have the duty of applying the law. The principles that govern

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[3] Priestley, "Judges as Story Tellers", paper delivered at the Law and Literature Association Conference, San Francisco, October 1995.

[4] *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279 per Lord Diplock.

the function of interpretation are derived from the purpose of interpretation. The interpretation of a legal text, including as an Act of Parliament, is a search for meaning. As Lord Steyn pointed out[5]:

> "The starting point must be the text itself. The primacy of the text is the first principle of interpretation."

His Lordship went on to refer to a phenomenon familiar to every judge. Advocates often seem reluctant to go directly to the statute which should be the focal point of their argument. There may be uncertainty, and room for debate, but, once established, it is the meaning of the text that is controlling. The language used by Parliament is the medium through which it expresses its authority, and it is the meaning of what Parliament has said that directs the exercise of judicial power in a given case[6].

By "text" I do not intend to refer to individual words, or phrases, or sentences considered in isolation from their context. Nor do I mean to imply that the way to construe an Act of Parliament is to take the statute in one hand and a dictionary in the other and search for a literal meaning of the words of Parliament. I do not intend to suggest that it is first necessary to show ambiguity before principles of construction come into play. Happily, understanding some texts involves no more than giving

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5 Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2003) 35 *Ottawa Law Review* 163 at 165.

6 *Singh v The Commonwealth* (2004) 222 CLR 322 at 331-337.

clear language its plain meaning. Often, however, there is more to it than that. Even so, interpretation has its own limitations some of which are constitutional. In the paper from which I quoted earlier, Lord Steyn went on to say[7]:

> "The apparent meaning of statutory language is the starting point, but not the end of interpretation. A judge must consider all relevant contextual material in order to decide what different meanings the text is capable of letting in and what is the best interpretation among competing solutions. But the judge's task is interpretation, not interpolation. Interpretation is not infinitely expandable. What falls beyond that range of possible contextual meanings of the text will not be a result attainable by interpretation. There is a Rubicon which judges may not cross: principles of institutional integrity forbid it."

The word interpolate has as its primary meaning to refurbish or to modify. Refurbishment or modification of a text may provide scope for creativity, but where the text is a parliamentary enactment of law the urge to be creative is not what is expected of judges.

The boundary also may be described in terms of the legitimacy. Judicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise, undertaken consistently with principles of law and logic, in discovering the will of Parliament; it is illegitimate when it is an exercise in imposing the will of the judge. The difference is sometimes expressed by referring to a conclusion as judicial legislation; a contradiction in terms reflecting the repugnancy to constitutional

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[7] Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2003) 35 Ottawa Law Review 163 at 166.

principle of judicial departure from the field of interpreting the law and trespass into the field of making the law.

Some of the principles according to which a court looks for the meaning of a statute are themselves contained in legislation, either in the form of a general interpretation Act, or in specific interpretation provisions in a particular statute. General interpretation Acts serve two main purposes. For drafting convenience, they set out certain ground rules such, as a provision that, unless the contrary intention appears, certain words will have a particular meaning or effect. This saves unnecessary repetition and explanation. More significantly for present purposes, such Acts also state general rules to be applied in finding the meaning of statutes. Parliament enacts legislation upon an assumption that the meaning of what it says will be understood in accordance with those general rules. Interpretation Acts set out the working assumptions according to which legislation is framed by Parliament, and applied by the courts[8]. In addition, the courts themselves have developed principles of interpretation, based on logic, common sense and experience. Those principles are known to drafters of legislation. The observance of statutory and judge-made rules of interpretation, as well as being an aid to the discovery of the meaning of a legislative text, is an assurance of the legitimacy of the judicial interpretative function.

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[8] *Attorney-General (Qld) v Australian Industrial Relations Commisson* (2002) 213 CLR 485 at 492-493 [6]-[9].

Against that background, my object is to consider three of the principles that guide judges in interpreting legislative texts.

Context

The meaning of a text is always influenced, and sometimes controlled, by context[9]. The immediate context of a statutory provision may include surrounding provisions or, perhaps, the entire Act. The wider context may include historical circumstances at the time of its enactment, a background of other legislation or judge-made law, the Constitution, and any other matter that could rationally assist understanding of meaning[10].

In the case of some texts, the indispensability of regard to context is obvious. How would it be possible to explain the meaning of the first three of the Ten Commandments to someone who knows nothing of the religious beliefs and practices of the Israelites at the time of Moses? There are some words and concepts that have no meaning, or no single meaning, apart from their context. Resort to a dictionary may disclose a range of possible meanings, but the choice between those possibilities may depend entirely on context. Especially is this so when what is in question is the meaning of a phrase, or a compound expression, made

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[9] *Singh v The Commonwealth* (2004) 222 CLR 322 at 332.

[10] Bennion, *Bennion Statutory Interpretation*, (London: Lexs Nexus 2008) at 588-590, 919; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

up of words which, taken separately, may have a misleading signification. Lord Wilberforce once pointed out that it may come as a surprise to someone who looked up the words "commission" and "agent" in a dictionary to be told that, in England, a "commission agent" was a bookmaker[11]. Evidence of usage in the insurance industry was held admissible in aid of the construction of a statute referring to insurance collectors, it being obvious that the statute was regulating that particular industry and was meant to be understood in the light of its customs and practices[12].

Reference to context, however, is not confined to circumstances where the text would otherwise be unintelligible or at least ambiguous[13]. Utility, not necessity, is the reason for reference to context. The question is whether it can rationally assist understanding, not whether, without regard to context, understanding is impossible.

As to historical context, there are many examples of reliance by the High Court upon the circumstances in which the Australian Constitution was written as an aid to its interpretation[14]. The

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[11] See *XYZ v The Commonwealth* (2006) 227 CLR 532 at 544 fn 49.

[12] *General Accident Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax (NSW)* [1982] 2 NSWLR 52.

[13] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

[14] See *Singh v The Commonwealth* (2004) 222 CLR 322 at 333.

Constitution itself is a paradigm case of an instrument in which particular parts of the text must be understood in the light of the general nature and purpose of the whole document: an instrument of government, expressed in broad and general terms, designed to provide for a future which the framers knew they could not in all respects foresee[15].

The learned author of the standard English text on statutory interpretation[16] deals with context under the rubric of "informed interpretation" and cites a speech of Viscount Simonds in which he spoke of the difficulty of being "invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word."[17]

A recent example of a decision of the High Court using context, in its broadest sense, in aid of statutory interpretation is *R v Lavender*[18], a case concerning the meaning of certain provisions of the *Crimes Act* 1900 (NSW) about unlawful homicide. The question was whether malice is an element of unlawful homicide by involuntary manslaughter. The answer turned upon the meaning of three words in the statutory definition of murder. The Court held that, when the statutory definition

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[15] *Singh v The Commonwealth* (2004) 222 CLR 322 at 334-339.

[16] Bennion, *Bennion on Statutory Interpretation*, 5th ed (London: Lexis Nexus, 2008) at 589.

[17] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461.

[18] (2005) 222 CLR 67.

was considered in the light of the state of the common law, previous legislation, other provisions of the Crimes Act, and the parliamentary history of the Act, the conclusion for which one of the parties contended was irresistible. Counsel acknowledged that some of the information on those matters that was put to the High Court had not been referred to in argument in the court whose decision was under appeal. Information about context made all the difference.

That the history of a legal text, and the circumstances in which it was written, may usefully inform an understanding of the meaning of the text is undeniable. Use of such information is a routine part of legal reasoning. It is a consideration that informs a number of more specific, and well-established rules, such as the rule in Heydon's Case, according to which, to discover "the true intent of the makers of an Act"[19] a court will consider the state of the law before the making of the Act , and the mischief to be remedied. Intention is a concept that is sometimes resisted, because of its association, especially in the field of constitutional law, with the concept of original intent. I have explained elsewhere my views on the relevance, and limitations, of the language of intention in relation to statutory, and constitutional, interpretation, and do not wish to repeat them here. Intention is a slippery concept, but, properly employed, it is valid, and expresses the constitutional place of

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19 (1584) 3 Co Rep 7a; Bennion, *Bennion on Statutory Interpretation*, (London: Lexis Nexus, 2008) at 471.

courts in giving effect to legislative will[20]. The *Acts Interpretation Act* 1901 (Cth) itself makes repeated reference to "intention" in the course of laying down rules of interpretation. How, in the face of the statute, a court could declare intention to be an inadmissible concept is impossible to understand. Fears that the dynamism of the Constitution, essential to its role as an instrument of government, may be stultified and that courts may be tied to the subjective, and often different, understandings of the framers of the Constitution, may account for an occasional lapse into a different error, which is to treat history either as irrelevant to constitutional interpretation, or as a rhetorical weapon, to be employed when it is a support and ignored when it is an embarrassment.

Although the Constitution is not to be treated as an ordinary statute, because of its age and enduring quality it provides some good examples both of the importance of context in interpretation, and of some conceptual problems that need to be faced.

To illustrate these issues, let me begin with an example of context in the narrower sense, that is to say, the instrument of which a disputed text forms part. One of the most difficult problems thrown up by the Constitution is to relate s 122, dealing with territories, to the general

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[20] *Wilson v Anderson* (2002) 213 CLR 401 at 418 [8]. See *R v Secretary of State for the Environment, Transport and the Regions; ex parte Spath Holme* [2001] 2 AC 349 at 396 per Lord Nicholls of Birkenhead.

scheme of the instrument. In 1901, and for most of the 20th century, s 72, in Ch III, provided that the judges of federal courts held office for life. In the exercise of its power over territories, the federal government appointed judges and magistrates. The territories varied in nature, political development, size and remoteness. Were courts that were established pursuant to the power to make laws about territories covered by Ch III? The question was answered in the negative[21]. If it had been otherwise, the surprising consequence would have been that territory magistrates (who in those days were typically public servants) had to be appointed for life[22]. In 1977, s 72 of the Constitution was amended so that, thereafter, federal judges did not have life tenure. In that respect, the context altered. What effect, if any, did that change have on the relationship between s 122 and Ch III? Did the meaning of the Constitution, in that respect, alter as an indirect consequence of the alteration of s 72 that was effected by referendum? Were the voters at the referendum deciding more than they realised? So far as I can recall, none of the material put before electors, either for or against the proposed constitutional change, suggested that it had even a remote connection with the tenure of territory magistrates. The change altered the context. Was the alteration relevant?

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21 *R v Bernasconi* (1915) 19 CLR 629.

22 *Spratt v Hermes* (1965) 114 CLR 226.

It is one thing to say that a statute, and especially a Constitution, is "always speaking". The question is: what is it saying? If, on the true construction of the Constitution before 1977, s 122 related to Ch III in a certain way, did an amendment to one particular provision of Ch III, which removed an inconvenient consequence of the alternative point of view, alter the relationship between Ch III and s 122? The question, of course, is complicated by the accumulation of established authority which, by then, had dealt with various aspects of the relationship. Questions of *stare decisis* intrude, but the effect of a change in context, after enactment, on the meaning of an instrument that is always speaking is of importance. The answer may turn upon the meaning of meaning. I will seek to illustrate this by another constitutional example, this time using context in the wider sense, and again adding the rider that the Constitution is in some respects different from an ordinary Act.

Section 80 refers to trial, on indictment, of federal offences "by jury". In such cases, must jury verdicts be unanimous, or may majority verdicts be permitted by statute? In *Cheatle v The Queen*[23], the High Court held that such verdicts must be unanimous. One of the reasons given for that conclusion was that, in 1901, throughout Australia, unanimity was required for jury verdicts in criminal trials. The Justices who were parties to the unanimous joint reasons were not originalists. They did not equate legal intention with the subjective understandings of

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[23] (1993) 177 CLR 541.

the framers of the Constitution (even assuming a common understanding on the point existed and could be shown). Rather, they considered the historical context and used it to inform their understanding, which was that the expression "trial by jury" had, in 1901, a meaning that excluded majority verdicts. However, at the time of *Cheatle*, change was in the air, and, more recently, has gathered pace. Now, in most parts of Australia, majority verdicts in criminal trials are possible. Again, the effect of precedent cannot be overlooked, but if the issue in *Cheatle* arose afresh (that is, without the benefit of existing authority) tomorrow, what would be the legal significance of the recent changes to which I have referred. Was there, relevantly, a change in context? Did s 80 change its meaning in the concluding years of the 20th century, when trial by jury at criminal trials in the Australian States came to allow for majority verdicts? There is a question of what is meant by meaning. If, at the time the Constitution was enacted, the meaning of trial by jury was sufficiently flexible to accommodate the change in practice that later occurred, one result would follow. But if the idea communicated by the words "trial by jury" was, at least in respect of unanimity, fixed and limited by reference to practice in 1901, there would be a different result. Put another way, there would be an anterior question of construction: how much flexibility do the words "trial by jury", in s 80, allow?

One thing, I suggest, is clear. Judges may not answer that question according to whether they approve, or disapprove, of majority verdicts. I have chosen *Cheatle* as an example because the contextual

change to which I referred is one that some lawyers regard, not as progressive, but as regressive. The case presents them with a nice dilemma. If the Constitution is a living instrument, always speaking, and if the modern understanding of trial by jury encompasses majority verdicts, did s 80 take on a different meaning in the years following *Cheatle*? A negative answer to that question would not depend upon a theory of original intent. It would depend upon the proposition that, having regard to the historical context in which the Constitution was written and enacted, the signification of the words "trial by jury" excluded majority verdicts, and that the words were insufficiently flexible to accommodate later changes in State practice. It could not turn upon a judicial disapproval of majority verdicts, because such disapproval could not form a part of any process of reasoning that would be accepted as legitimate.

Purpose

It is unnecessary to justify purposive construction of legislation. It is mandated by statute. In the case of federal Acts, s 15AA of the *Acts Interpretation Act* 1901 directs that a construction that would promote the purpose or object underlying the Act should be preferred to a construction that would not promote that purpose. State legislation is to similar effect. Section 35(a) of the *Interpretation of Legislation Act* 1984 (Vic) is in the same terms as s 15AA of the federal Act. Section 35 goes on to provide that consideration may be given to any matter or document that is relevant, and then identifies various extrinsic materials in

contemplation. They include reports of proceedings in any House of Parliament. Section 15AB of the federal Act permits the use of such extrinsic materials to confirm that the meaning of a provision is the ordinary meaning, taking account of context and purpose, or to determine meaning in a case of ambiguity or obscurity, or where the ordinary meaning is absurd or unreasonable. It is beyond my present purposes to go into the nuances of difference between the federal and State Acts, or to explore the boundaries of the concept of unreasonableness. The debate that has occurred in the United Kingdom, following *Pepper v Hart*[24], as to the permissibility of the use of a ministerial speech in Parliament, is covered by both statutes. The State Act sets up a test of relevance. If material is relevant to interpretation, then consideration may be given to it. The area for debate will be whether any, and if so what, assistance, is to be gained. If assistance is available, then advantage may be taken of it. The ways in which extrinsic materials of the kind referred to in s 35(b) may rationally assist interpretation, and the dangers to be guarded against in that respect, are issues of importance. It is one thing to say that extrinsic materials of some kind may properly be used as an aid to interpretation; it is another thing to say that a particular piece of information is useful in the resolution of a particular problem. This is a

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24 [1993] AC 593. See, for example, *McDonnell v Congregation of Christian Brothers Trustees* [2004] 1 AC 1101 at 1116-1117 [29], *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at 840 [56] and 863 [139], *R (Jackson) v Attorney General* [2006] 1 AC 262 at 291 [65], *Harding v Wealands* [2007] 2 AC 1 at 9-10 [6]-[10], 16 [37], 29-30 [80]-[82].

context in which the risk of confusing legislative intent with the understanding of an individual is to be kept well in mind.

In *Pepper v Hart*[25], Lord Browne-Wilkinson said:

> "In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words?"

In the speeches of the law lords in that case there are clear statements of the legal and practical reasons, including considerations of parliamentary procedure, that may limit the usefulness of reference to certain kinds of material. There was also a warning to counsel of the additional responsibility, in preparation of argument, that flows from a modification of the earlier exclusionary rule. These days, counsel are expected to have checked extrinsic materials to see whether they contain anything of relevance.

The reference, in the interpretation Acts, to "the purpose or object underlying the Act", in its application to some problems of construction, is deceptively simple. The general purpose or object underlying the Income Tax Assessment Act of the Commonwealth is to raise revenue for the government. Nobody (I trust) would suggest that, in

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[25] [1993] AC 593 at 634-635.

consequence of s 15AA of the Acts Interpretation Act, whenever there is ambiguity in the Act it is to be resolved in favour of the revenue. In truth, the Act is one of the most complex collections of sometimes disparate purposes and objects devised by human ingenuity. To say that its general purpose is to raise revenue is of no rational assistance in solving a problem of interpretation of one of its provisions. Furthermore, the statement is a half-truth. The purpose is not to raise as much revenue as possible, regardless of the consequences. The purpose is to raise revenue according to an intricate pattern of fiscal policy, which is almost constantly changing, and some of whose elements may be inconsistent. The task is to identify the purpose or object of a particular provision, or group of provisions. That may be very difficult. To carry it out may require extensive knowledge of the theory and practice of revenue law, and of many other matters as well.

There was a time, now gone, when courts gave taxing Acts, not a purposive, but a strict and narrow, interpretation. This is a matter to which I will return in dealing with rights-based statutory interpretation, for that approach to taxation law reflected an emphasis on certain rights, now less fashionable. At all events, s 15AA applies to all federal Acts, including taxing Acts. Such Acts, provide a clear example of a wider problem.

In considering "the purpose or object" of a provision, it is important to remember that much legislation is the result of compromise. It has often been pointed out by some judges, and sometimes forgotten by

others, that few Acts of Parliament pursue only a single purpose, or do so at all costs. Parliament is constantly striking a balance between competing considerations of policy. Issues of statutory construction often take the form of disputes as to the balance that has been struck. The question is not so much one of identifying the legislative purpose as of working out how far Parliament has gone in pursuit of that purpose. Where such a doubt exists, it would be illegitimate for a court to act on the basis that Parliament has gone as far as it possibly can, and on that ground to prefer the construction that most advances the general purpose. That may be contrary to an evident parliamentary purpose of compromise.

An example of the problem may be found in a series of recent High Court cases about State legislation regulating the conduct of police in questioning people suspected of crime[26]. Typically, such legislation is the outcome of a parliamentary compromise. If there is a legislative purpose to be identified, it must be identified at a level of particularity that points to the resolution of the specific doubt about meaning that has arisen. It may be of no rational assistance to the resolution of that uncertainty to say that the Act reflects an intention to preserve police powers of questioning while giving a fair measure of protection to the rights of suspected persons. The whole argument is about the extent of

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26 eg *Kelly v The Queen* (2004) 218 CLR 216; *Nicholls v The Queen* (2005) 219 CLR 196; *Carr v Western Australia* (2007) 82 ALJR 1 at 4 [5].

the powers, and of the protection given. Acts of Parliament sometimes have mixed, and even inconsistent, purposes, and even where they have a single or dominant purpose there may be uncertainty about the extent to which it has been pursued. Attribution of legislative purpose may involve judicial over-reach if it ignores such considerations.

A further source of difficulty is that there may be some matters about which Parliament has deliberately refrained from forming or expressing a purpose. Indeed, it may be that which has made possible the compromise achieved by the legislation. Gaps in a legislative scheme may be deliberate. Parliament might have found it expedient to leave it to the courts to fill them in. Or the gaps might be unintentional, because a potential problem has been overlooked, in which case, there may be no discernable purpose that is an aid to construction.

It should be added that, where courts have mistaken legislative purpose, or given a construction that defeats the purpose, it is of course within the power of Parliament to amend the legislation. There may be political realities in the way of that, but the existence of the residual power of Parliament to declare and enact its own purpose, if necessary by way of amendment, reinforces the legitimacy of the judicial process.

Respecting fundamental rights

I was tempted to summarise this third principle of construction as "imputed decency", which is a fair statement of the essence of the

matter, but it is necessary to be more precise. The issue now has a specifically Victorian dimension. I will leave that to one side for the moment.

There is nothing revolutionary about the principle of legality, according to which courts decline to impute to Parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that Parliament has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment. In 1908, in the High Court case of *Potter v Minahan*[27], O'Connor J adopted a passage in the fourth edition of *Maxwell on Statutes* which said that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles ... without expressing its intention with irresistible clearness". The principle was stated clearly by the High Court in 1994 in *Coco v The Queen*[28] and has since been re-asserted in a series of High Court decisions including *Plaintiff S157/2002 v The Commonwealth*[29] and *Al-Kateb v Godwin*[30]. It has been asserted in the House of Lords by, for example, Lord Steyn in *R v*

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[27] (1908) 7 CLR 277 at 304.

[28] (1994) 179 CLR 427.

[29] (2003) 211 CLR 476 at 492 [30]. See also *Baker v Campbell* (1983) 153 CLR 52; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 1968 CLR 501; *Daniels Corporation Ltd v ACCC* (2002) 213 CLR 543.

[30] (2004) 219 CLR 562 at 577 [19].

Secretary of State for the Home Department; Ex parte Pierson[31] and Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[32]. It is the working hypothesis of a liberal democracy[33].

This, however, like all other grounds of judicial action, is subject to considerations of legitimacy. The judiciary should not forget its own history. A century ago, judges enthusiastically construed Acts of Parliament so as to protect and preserve rights. However, they had a rather different set of rights in mind. In 1976, writing extra-judicially, Lord Devlin spoke of judicial opposition to legislative will. He said[34]:

> "In the past, judges have been obstructive. But the source of the obstruction, it is very important to note, has been the refusal of judges to act on the ordinary meaning of words. They looked for the philosophy behind the Act and what they found was a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimise the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry".

Lord Devlin was describing a 19th-century form of judicial protection of rights and freedoms: rights of property, and freedom of

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31 [1998] AC 539 at 587-589.

32 [2000] 2 AC 115 at 131.

33 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [20].

34 Devlin, "Judges and Lawmakers" (1976) 39 *Modern Law Review* 1 at 13-14.

contract. The history of judicial support for those causes has surely not been eradicated from the folk memory of parliamentarians.

One manifestation of this judicial attitude, that survived until relatively recent times, was the approach taken to the interpretation of taxing Acts.

In 1980, in *Federal Commissioner of Taxation v Westraders Pty Ltd*[35], the High Court affirmed a decision of the Federal Court in favour of a taxpayer who used what was described as ingenious use of certain provisions of the *Income Tax Assessment Act* 1936 (Cth) to produce (or manufacture) allowable deductions. Barwick CJ said[36]:

> "It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax."

In its application to taxing Acts, that proposition is no longer accepted and, indeed, would be contrary to s 15AA of the Acts Interpretation Act. Only a year later[37], two other members of the High Court said that, in revenue statutes as in other cases, the courts are concerned "to ascertain the legislative intention from the terms of the

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[35] (1979) 144 CLR 55.

[36] (1979) 144 CLR 55 at 59.

[37] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323 per Mason and Wilson JJ.

instrument viewed as a whole". Barwick CJ explained his approach in terms of principles that he said were "basic to the maintenance of a free society"[38]. Judges who remember their history will understand why their past defences of rights of property and freedom of contract against what they saw as legislative encroachment may have left a legacy of reluctance, in some quarters, to widen their powers.

The legitimacy of judicial interpretation of legislation cannot depend upon enthusiasm, judicial or popular, for a cause. Undoubtedly, the reaction against the past judicial approach to taxing Acts was fuelled by a change in public attitudes towards the social role of taxation, but the battleground was the area of legal principle. Judges were accused of overstepping the bounds of interpretation. When, to use Lord Devlin's expression, they were obstructive, the result was political, and public, questioning of the legitimacy of what they were doing. Effective judicial support for human rights is strengthened by insistence upon such legitimacy, and weakened by disregard for it.

This brings me, in conclusion, to the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), and to its general interpretative provision:

"32 Interpretation

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[38] (1979) 144 CLR 55 at 61.

> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

Similar (although not identical) provisions appear in the *Human Rights Act* 1998 (UK) (s 3) and the *New Zealand Bill of Rights Act* 1900 (NZ) (s 6). The authorities on that legislation were well known to the framers of the Victorian Act[39].

Reference has earlier been made to s 35 of the *Interpretation of Legislation Act* 1984 (Vic) that requires a court to prefer a construction that would promote the purpose or object underlying an Act to a construction that would not promote that purpose or object. The opening words of s 32(1) of the Act of 2006 maintain the importance of legislative purpose. I have earlier mentioned some of the complexities of that concept.

To the extent to which a statutory provision has a discernible purpose that can rationally assist in the resolution of uncertainty about its meaning then a construction in aid of that purpose is to be preferred. The importance of maintaining consistency with that purpose is built into s 32(1). Bearing also in mind the general principle of respect for fundamental rights and freedoms earlier discussed, it will be interesting to see the kinds of case in which courts, in due course, hold that s 32(1)

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[39] eg *R v A (No 2)* [2002] 1 AC 45; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

mandates an abnormal interpretation of legislation. By abnormal, I mean an interpretation that would not be given in the absence of s 32(1). The mandate directs attention to possible interpretations of a statutory provision. The exercise undertaken must conform to the description of interpretation, not interpolation, and the range of possibilities is bounded by the requirement of consistency with purpose. It also will be interesting to see the techniques Parliament will employ (in addition to the obvious, that is, manifesting purpose through the use of clear language) to lay out a purpose. Perhaps the questions that have arisen in the United Kingdom following *Pepper v Hart* will arise in a slightly different context in Victoria. Fortunately, it is not for me to predict, and it will not be for me to influence, the outcome of this new phase of the ongoing collaboration, in the interests of justice, between courts and the Parliament.

The concept of compatibility with human rights will also inspire legal ingenuity. Human rights are not always completely compatible with each other. Free speech and privacy provide a well-known example. If the Parliament legislates to strike a balance between certain competing rights, then judicial alteration of the balance may be beyond what s 32 requires or permits. Additionally, there may be a number of competing constructions of legislation that are all compatible with human rights. Selection (consistently with purpose) between the compatible and the incompatible is one thing, but it does not cover the range of problems of interpretation that can arise.

The direction to courts to interpret statutory provisions in a way that is compatible with human rights is to be understood in the light of the human rights referred to. There is much room for dispute about the content of some of those rights, about the way they intersect, and about the margin of appreciation within which compatibility is to be decided. In giving courts the power, and the responsibility, to make such judgments in the process of interpretation Parliament has changed some of the rules of engagement between the legislative and judicial branches of government. It will take time for the practical effect of the change to become clear. Whether it is marginal or fundamental is something that will be worked out over time. It will not be worked out only by the courts. It will also be influenced by the public and political response to decisions of the courts. The process will be one, not of action, but of interaction.

Last month, the Supreme Court of the United States decided *District of Columbia v Hellier*[40], a case concerning the compatibility of certain gun-control laws with the Second Amendment right to possess firearms. The reasoning of both the majority and the minority on the issue whether the Second Amendment protects an individual right to possess a firearm unconnected with service in the militia provides a good example of the consideration of context, especially historical context, in the process of interpretation. All the members of the Court, and not only those associated with the theory of original intention,

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[40] 554 US (2008).

examined carefully the context in which the Second Amendment came into being. Of particular relevance to my present point, however, is that aspect of the decision that addressed the issue of compatibility. All Justices agreed that, like most rights, the Second Amendment right is not unlimited. It does not confer on everybody a right to keep any kind of weapon for any purpose. That gave rise to what the United States jurisprudence describes as a question of the standard of scrutiny to be applied when testing legislation against constitutional rights. Whether the question is characterised in terms of standard of scrutiny, or proportionality, or a judgment about what is, or could be considered to be, appropriate and adapted, (all expressions that carry their own baggage and need to be applied with discrimination), in the end it comes down to one about the relations between the legislative and judicial arms of government. In a liberal democracy, such a question is fundamentally political. The adoption of a bill or charter of rights and freedoms is based on an acceptance that democracy is more complex more than giving effect to the will of whatever majority enjoys parliamentary power at a given time. Even so, there is a limit to the extent to which democracy can be re-defined. The interaction between the Victorian Parliament and the judiciary sooner or later will test that limit.

Exploring the boundary between interpretation and legislation, in a manner that respects the constitutional and political imperative of judicial legitimacy, is part of the work of modern judges. They may expect that the standard that will be applied to their performance will be one of strict scrutiny.