

In Defence of Legislative Intention

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Denning Society Lecture

18 November 2019

(A version of this lecture is published in (2019) 48 Australian Bar Review 6)

The concept of legislative intention appears to be under pressure from a number of directions. In his Hamlyn Lectures, Professor Andrew Burrows argues that the concept is devoid of proper content and unhelpful.¹ In a lecture to the Statute Law Society in 2017, Sir John Laws argued that we should abandon the concept and instead work with the idea of statutory purpose as something inherent in and to be discerned from the statute itself. In the US, John Manning argues that the Courts should engage in legislative interpretation “without the pretense of legislative intent”.² And in Australia, Justice Kenneth Hayne has argued extra-judicially that the concept of legislative intention is unhelpful.³ The Australian High Court has said that legislative intention is a fiction which serves no useful purpose.⁴

It is pointed out that statutes are passed by multi-member legislative bodies, and the intentions those members have when passing legislation are likely to be various and do not correspond with each other. So, reference to the actual intentions of the relevant human agents is not available to resolve issues of interpretation of statutes. Moreover, in

¹ A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (2018).

² J. Manning, “Without the Pretense of Legislative Intent” (2017) 130 Harv. L. Rev. 2397.

³ K. Hayne, “Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?” (2013) 13 OUCJLJ 271.

⁴ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also eg *Zheng v Cai* (2009) 239 CLR 446, [28]; *Dickson v The Queen* (2010) 241 CLR 491, [32].

construing a statute the courts do not in fact try to identify the subjective intentions of individual legislators as a guide to interpretation. The courts do not issue writs for disclosure of the personal diaries of legislators to inform the interpretative process.

In this lecture I want to do four things. I will argue that the concept of legislative intention is intellectually viable and that the courts' practice of referring to legislative intention as a guide to interpretation of statutes is defensible. Secondly, I will suggest that it is constitutionally important that the courts *should* interpret legislation with reference to legislative intention. Thirdly, I will try to explain what that means in practice. And fourthly, I will try to explain how the constitutionally important guide to construction of legislation, the principle of legality, can be understood as a doctrine integrated into the concept of legislative intention.

I am setting out to defend what I understand to be the orthodox and long-established position in English law. In 1877, Lord Blackburn said in the *River Wear Commissioners* case⁵ that the principles applicable to construing a statute were the same as those for construing other instruments in writing:

“In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the

⁵ *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763-764.

meaning of words varies according to the circumstances with respect to which they were used.

...

The office of the Judges is not to legislate, but to declare the expressed intention of the Legislature.”

In the *Black-Clawson* case in 1975⁶ 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.”

However, this was a statement directed, entirely rightly, at focusing primarily on the text legislated by Parliament when looking to see how it changed the law by that text. It was not a statement intended to discredit the notion of identifying the intention of Parliament as inferred from that text as adopted in the circumstances in which Parliament legislated.

Later in his speech, in addressing the meaning to be attached to the words used in the provision in question, Lord Reid reasoned that no good draftsman would “have employed such an obscure expression if the intention had been to deal with the defendant’s judgments”.⁷

⁶ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at 613.

⁷ At 617.

Lord Reid was simply following in construing the statute what he described as “The general rule in construing any document”, which was “that one should put oneself ‘in the shoes’ of the maker or makers and take into account relevant facts known to them when the document was made”.⁸ It is difficult to discern any difference between Lord Reid’s approach and that of Lord Blackburn a century before.

The conclusion of the House of Lords, adopting this approach, was that the courts should refer to the report of a law reform commission, which had been before Parliament when it legislated, as an aid to construction of the statute.

The speeches of the other Law Lords in *Black-Clawson* adopted essentially the same approach. Viscount Dilhorne said:

“The task confronting a court when construing a statute is to determine what was Parliament's intention. In a perfect world the language employed in the Act would not be capable of more than one interpretation but due in part to the lack of precision of the English language, often more than one interpretation is possible. Then, to enable Parliament's intention to be determined, as I understand the position, one may have regard to what was the law at the time of the enactment and to what was the mischief at which it was directed.”⁹

Lord Simon of Glaisdale said:

⁸ At 613-614.

⁹ At 622.

“Courts of construction interpret statutes with a view to ascertaining the intention of Parliament expressed therein. But, as in interpretation of all written material, what is to be ascertained is the meaning of what Parliament has said and not what Parliament meant to say.”¹⁰

He also cited Lord Blackburn’s statement to which I have referred.¹¹

The courts have for a very, very long time adopted the practice of looking for guidance for the interpretation of statutes, especially when their application to particular facts is unclear or they are ambiguous, to materials from which inferences can be drawn about the likely intention of the enacting Parliament. That is a practice about which judges should be relaxed. There is nothing incoherent in it. It does not need to be reformed. On the contrary, there are strong constitutional reasons why it should be followed.

Legislative intention

Judges and philosophy are not always happy bedfellows. There is a bit of a danger in examining the notion of legislative intention that half-understood references to philosophy take judges rather far from practical decision-making, which is what they are trained in and what I think they do best. I actually give the historically endorsed judicial practice which I have referred to considerable weight in its own right. But fear not - I will line up my philosophers in a moment for good measure!

¹⁰ At 625.

¹¹ At 627.

There is also a danger, going down the philosophy route, of thinking that there can only be one conception of statutory interpretation or indeed only one conception of legislative intention. However, there are a number of possible approaches. I try to bring this out in my next section on the constitutional significance of focusing on legislative intention. There are choices of approach which have to be made, and they should be governed by constitutional considerations. Statutory interpretation is, indeed, constitutional law in its practical application.

It is not necessarily the case that English, Australian, American and, say, German statutory interpretation should be the same. Indeed, it is clear that, for example, German practices of interpretation are different in certain ways. However, English and Australian law are close cousins and the constitutional environment is similar, so I think that there are strong reasons why English and Australian approaches to interpretation should be the same.

Before parading my philosophers, I want to try to put in my own words why it seems to me that the concept of legislative intention is a legitimate one for the courts to use.¹²

It is true that the intention of the legislature is in certain senses a fiction. The legislature is not a human person, so one has to treat it as a fictional person. But this is not an impediment to the use of the notion of legislative intention.

Also, one is not concerned with the actual, subjective intentions of individual legislators, i.e. what they meant or hoped to achieve by voting to adopt a particular legislative

¹² The following is drawn from P. Sales, “Legislative Intention, Interpretation and the Principle of Legality” (2019) 40 Statute Law Review 53.

provision. Their actual intentions do not govern the meaning of what is jointly agreed as a text, after using defined procedures to produce one authoritative statement of law from many, often conflicting, views, purposes and priorities. So, again, and as an aspect of the first point, one has to treat the legislature as a fictional person. But this also does not disqualify the notion of legislative intention from having a role in working out the meaning of a statute.

The basic issue revolves around deriving a singular view of public policy, as ultimately expressed in an act of legislation, from a plurality of human beings. The legislature is a fictional person; but then so also is the *demos* in democracy a fictional person. In reality, there is a mass of individuals with conflicting desires, emotions and purposes. The issue in each case is how to produce a coherent unity from a plurality, and the use of a legal fiction is a sensible, and probably inevitable, way of doing that. In each case the fiction gives normative coherence which is essential to promote constitutional values.

Democratic will, though a fiction from a certain factual perspective, is still real in a normative and conceptual sense. One can track it through processes of crystallisation deriving from formation of public opinion (another fiction, based on a sense of aggregation of different views), through more procedural filters of parliamentary deliberation, to the production of a single binding statement of policy in legal form. Democracy is rule of the *demos*/people, which expresses its collective will through these processes.

Legislation is a deliberate collective act by a legislature authorised to issue new law, chosen and voted upon by individual parliamentarians in light of their views about what

the public in fact want or what parliamentarians take to be their collective interests. The legislative will is the will of the people, in refined and concretised form.

The legislature clearly does exercise agency. It acts deliberately and on the basis of reasons to change the law in specific ways and to further specific objectives. I suggest that the notion of legislative intention is the concept which is appropriate to capture this constitutional and indeed factual reality. It is not incoherent or indefensible. It is constitutionally and logically necessary. It simply reflects the agency which the legislature undoubtedly exercises.

The legislature exercises agency and uses language on a collective, co-operative basis. The co-operation is founded on use of language and the mutual reliance of parliamentarians that the texts on which they vote can and will be read in ways which they understand will give effect to those objectives.

Fair notice to parliamentarians of the meaning of such texts, relying on generally accepted rules of grammar and meaning, as located in the specific legislative context, promotes equality of voice and vote when they act together and is a necessary foundation for the coherent expression of collective agency.

This perspective, internal to the legislature, is not always brought out clearly in commentaries. An objective approach to identifying legislative intention and the meaning of statutes is necessary, both as the foundation for the coherent exercise of legislative will by parliamentarians in the first place and for rule of law reasons. These relate to the virtues of predictability of application of laws for those subject to them and giving fair notice of the legal requirements being imposed upon them.

The changes to the law which the legislature intends should have effect – that is to say, legislative intention with respect to making changes to the law - is expressed through the medium of language. But language only has sense in a context.

I agree with Richard Ekins when he writes: “[T]he legal meaning of a statutory text is the meaning one infers the legislature intended to convey in uttering the semantic content of the text in the particular context of the enactment”; this “involves and informs inference about the reasoned choice or choices that explain the enactment”; and “the meaning of the statutory text is to be found by reasoning about what meaning was likely intended by the legislature that actually enacted that text”.¹³

When the words used do not convey a sense which is clear so far as concerns their application to the case in hand, legislative intent in a wider sense provides a second order resource to establish whether the words apply. Other criteria could be used; but in a democracy, particularly one operating in our legal and constitutional tradition, there are strong reasons why the criterion of inference regarding legislative intention should be used.

Joseph Raz puts it this way:¹⁴

“To give a person or an institution law-making powers is to entrust them with the power to make law by acts intended to make law, or at least undertaken in the

¹³ R. Ekins, “Statutes, Intentions and the Legislature: A Reply to Justice Hayne” (2014) 14 *OUCLJ* 3, 6.

¹⁴ J Raz, “Intention in Interpretation” in *The Autonomy of Law: Essays on Legal Positivism* (1996), 258.

knowledge that they make law. It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.”

Raz considers that a joint intention of legislators can be identified. He therefore takes issue with two other prominent philosophers, Ronald Dworkin and Jeremy Waldron, who rely upon the multi-member nature of legislatures to contend that there is no such thing as legislative intention.¹⁵

John Gardner makes similar points to Raz.¹⁶ Legislated law is intentionally made. Parliament does intend to change the law. All parliamentarians who participate in legislative activity, including those on the losing side of any vote, intend to participate in doing that. As Gardner puts it: “An agent acts intentionally inasmuch as it does what it does for (what it takes to be) reasons”.¹⁷

Clearly, reasons are given for and against changing the law. That is indeed the purpose of legislative debate, and behind that it is the purpose of wider public debate about policy and law, and ultimately may be the purpose of holding a general election in which the public will can be tested.

Legislation is the act of one agent, and that agent may be an institution such as Parliament. Gardner draws an analogy with an orchestra or a sports team. In an orchestra, members achieve co-ordination by following the conductor, with each playing

¹⁵ Ibid., 264-5. Cf R. Dworkin, *Law's Empire* (1986), 336; J. Waldron *Law and Disagreement* (1999), 43.

¹⁶ J. Gardner, “Some Types of Law”, ch 2 in D. Edlin (ed), *Common Law Theory* (2007).

¹⁷ Ibid., 57.

his own instrument; but only the orchestra, concertedly, plays the symphony. A sports team, as a team entity, puts into effect its plan for a match. Concerted agency is not completely fictitious, says Gardner. Members of a legislature do complete much of their work as a team. In any event, he says, there is nothing wrong with a legal fiction of concerted agency, for there are artificial concerted agents, and many are creatures of the law. He writes:

“It does not follow from the fact that they are creatures of the law that they do not exist or that they are not agents. On the contrary, it follows from the fact that they can perform actions with legal effect, such as legislating, that they do exist and that they are agents.”¹⁸

Richard Ekins, in his book *The Nature of Legislative Intent*,¹⁹ takes a similar line. And writing with Jeffrey Goldsworthy, he has criticised the challenge posed by some members of the Australian High Court to the traditional principle that the primary object of statutory interpretation is to ascertain the legislature’s intention, in an essay entitled “The Reality and Indispensability of Legislative Intentions”.²⁰

I would join these writers in contending that the notion of legislative intention cannot be discounted as unsustainable for philosophical reasons.

In this section of my lecture I simply wish to contend that the notion of legislative intention is a coherent one which is legitimately available for use by the courts. In old

¹⁸ Ibid., 59-60.

¹⁹ R. Ekins, *The Nature of Legislative Intent* (2012).

²⁰ (2014) 36 Sydney Law Review 39.

times it was more usual to find that the legislator could be a single individual, such as a king. But parliamentary institutions in modern times are set up with working procedures specifically designed to enable a multitude of parliamentarians to deliberate together regarding the reasons for and against changing the law, so as to be able to agree *that* the law should be changed and *how* it should be changed by adoption of a legislative text. Majority voting is a procedure a group uses together to settle on what *its* action, that is to say, as a collectivity, should be.

The constitutional importance of legislative intention

Statutory interpretation is central to legal practice and the work of the courts. A lot of the time, the courts just get on with it according to practices with which they are familiar and it causes very little difficulty. However, problems naturally arise when the statutory language falls to be applied to a case not clearly and directly addressed by the provision in issue.

It is particularly in such cases that the intellectual framework within which statutory interpretation takes place assumes particular importance. That framework will identify both the precise nature of the question to be asked in establishing what meaning to give to the statutory provision in issue and also the criteria and relevant evidence appropriate for answering that question.

Statutory interpretation is a reflection of, and implies, a constitutional background. It is not a uniform, single, rationally mandated operation.²¹

A statute contains a communication, typically in the form of instructions, from an authoritative source – the legislature – backed up by the coercive power of the state. This feature means that it is not purely the will of the legislature which is relevant to the interpretation of statutes. Other rule of law values are relevant as well.

Laws should be made and interpreted in such a way that citizens can understand their content and predict how they will be applied when they act. Accordingly, statutory interpretation always involves something of a balance between underlying values which may be in tension with each other; and something of a balance between the perspective of the communicator and that of the reader.²²

Lord Simon put it well in the *Black Clawson* case, where he said:

“... interpretation cannot be concerned wholly with what the promulgator of a written instrument meant by it: interpretation must also be frequently concerned with the reasonable expectation of those who may be affected thereby. This is most clearly to be seen in the interpretation of a contract: it has long been accepted that the concern of the court is not so much with the subject-matter of consent between the parties (which may, indeed, exceptionally, be entirely absent)

²¹ For some accounts which explain the various options, see eg Aharon Barak, *Purposive Interpretation in Law* (2005), ch 1; D. Neil MacCormick and Robert S Summers, *Interpreting Statutes: A Comparative Study* (1991); K Greenawalt, ‘Are Mental States Relevant for Statutory and Constitutional Interpretation?’ (2000) 85 Cornell LR 1609.

²² See eg Greenawalt (n. 21).

as with the reasonable expectation of the promisee. So, too, in statutory construction, the court is not solely concerned with what the citizens, through their parliamentary representatives, meant to say; it is also concerned with the reasonable expectation of those citizens who are affected by the statute, and whose understanding of the meaning of what was said is therefore relevant. The sovereignty of Parliament runs in tandem with the rule of objective law.”²³

Another significant feature of the background is that statutes have to be applied to cases which fall within their scope, on their proper construction. Courts do not have the option of saying, ‘Well, we just don’t know what the legislature meant, so we will do nothing’. And, of course, unlike in an ordinary conversation, the legislature is not immediately on hand to be asked what it meant if there is doubt about the application of its statements to a specific case. This creates a particular pressure, in the context of the operation of a legal system, for meaning to be identified for statutory provisions even where there is doubt about what it is.

A third feature of the background against which statutory interpretation takes place is the balance of authority and expertise between the person doing the communicating, the legislator, and the persons applying the legislation, the courts.²⁴ An aspect of this is the extent to which access to the legislator may be readily available if problems come to the surface when a statute is being applied. If it is going to be difficult to revert to the legislator for the law to be changed, the courts are operating more on their own and may have greater responsibility (and hence authority) to interpret imaginatively and

²³ [1975] AC 591, 645.

²⁴ Greenawalt (n. 21), 1624-1625.

ambitiously to deal with the problem they have identified, which the legislature did not anticipate.²⁵

There are various different ways in which one might frame the approach which a court should adopt when trying to give meaning to a statutory provision. The choice to be made should be informed by constitutional considerations about the relative authority and respective roles of legislature and courts. The choice made will also reflexively carry implications about those matters: we may discover things about our constitutional arrangements by examining the mundane practices of the courts in undertaking statutory interpretation.

For present purposes, to make my point, I mention five possibilities of different questions which a court might ask itself in order to determine the meaning of a statutory provision where the language used by Parliament is not clear in its application to the case at hand and the court finds itself in HLA Hart's penumbra of meaning²⁶ (there are others):

1. Since Parliament has not stated its meaning clearly in the particular context, the conclusion could be that it has in effect delegated the decision to be made about whether to apply the rule or not to the court – so the court can do what it thinks is best as a matter of policy.²⁷
2. Or instead, the court might decide by looking to see what interpretation would produce the best 'fit' with other laws in the vicinity and general legal principles as

²⁵ P. Sales, "Law, Democracy and the Absent Legislator" in E. Fisher and A. Young (eds) eds), *The Foundations and Future of Public Law* (2019) (forthcoming).

²⁶ H.L.A. Hart, *The Concept of Law* (3rd ed., 2012), ch. 7.

²⁷ D. Payne, "The Intention of the Legislature in the Interpretation of Statutes" (1956) 9 *Current Legal Problems* 96

they stand now. This might be how Dworkin's Judge Hercules would be expected to proceed.²⁸ As we will see, German law adopts this approach.

3. Or instead, the court might decide by looking to see what interpretation would produce the best 'fit' with other laws in the vicinity and general legal principles as they stood at the time the Act was promulgated.
4. Or instead, the court might decide by looking to infer what the legislating Parliament would have decided had it addressed itself directly to the issue at hand. This is the approach for traditional statutory interpretation and the approach which I seek to defend. It emerges very clearly from the speeches in the *Black Clawson* case, in particular that of Lord Simon: he emphasised that the proper approach was to look at matters as they would have appeared to the Parliament which enacted the relevant legislation, and not anachronistically by reference to how matters stood at the time the court looked at the case.²⁹
5. Or instead, the court might decide by inferring what the current Parliament would decide now if it addressed itself directly to the issue at hand.

In relation to all these options, various further choices have to be made as to how wide the reference may be to other background materials in order to answer the question posed. It is not necessarily the case that one should look at the legislative history in Parliament, as the House of Lords chose to do under certain conditions in *Pepper v Hart*.³⁰ Constitutional values are relevant in making these choices as well.

²⁸ R. Dworkin, *Law's Empire* (1986).

²⁹ [1975] AC 591, 643-644.

³⁰ [1996] AC 593.

As Lord Diplock put it in *Fothergill v Monarch Airlines*:³¹

“... the need for legal certainty demands that the rules by which a citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible ...”

German jurists distinguish between different types of purposive or teleological interpretation.³² On the one hand, there is the subjective-teleological approach, which focuses on the intention of the legislator at the time it passed the law in question. On the other, there is the objective-teleological approach, which decides on the meaning to be given to the statutory rule by investigating the reasonable goals or social functions of the norm, or as it is put, “the sense and purpose of the statute”.

German courts use the objective-teleological approach in cases of doubt,³³ even though it is controversial: “Its critics argue it gives too much freedom to the interpreter to read his own beliefs about right and reason into the norm”.³⁴ The courts’ expansive interpretive approach is underpinned by the role given to the courts under the German constitution and is socially accepted.³⁵

³¹ [1981] AC 251, 279-280. Also *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), [13]; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 614A (Lord Reid), 638D-H (Lord Diplock) and 645C-H (Lord Simon of Glaisdale).

³² See e.g. ch. 4 by Robert Alexy and Karl Dreier in D. Neil MacCormick and Robert S Summers, *Interpreting Statutes: A Comparative Study* (1991).

³³ *Ibid.*, 93-94; the courts’ expansive role is subject to criticism in Germany on democratic grounds.

³⁴ *Ibid.*, 88-89.

³⁵ *Ibid.*, 107.

As Alexy and Dreier explain,

“According to the subjective theory, the aim of interpretation consists in finding out the historical legislator’s actual intention. According to the objective theory, the aim is to find the law’s reasonable meaning. It is a controversial matter which aim is preferable and how the relationship between the two aims is to be determined ... The answer depends, on the one hand, on legal-philosophical and constitutional considerations and, on the other hand, the extent to which one may talk about something like the historical legislator’s intention and the law’s reasonable purpose. The subjective theory involves giving priority to semiotic and genetic arguments, that is, to the wording of the statute and the intention of the historical legislator. The objective theory opens up the possibility of giving priority to objective-teleological arguments and to other arguments based on rationality in general’.³⁶

In passing, I note that these jurists have no intellectual difficulty in speaking about the legislator’s intention.

The roots of the difference go back very far, reflecting the long parliamentary tradition in the United Kingdom. Franz Neumann, writing in the 1930s, observed that in the British doctrine of the Rule of Law associated with Dicey “the centre of gravity lies in the determination of the content of the laws by Parliament”, while the German theory of the Rechtsstaat as developed in the nineteenth century “is uninterested in the genesis of the

³⁶ Ibid., 93

law, and is immediately concerned with the interpretation of a positive law, somehow and somewhere arisen”.

As he said, “The German theory is liberal-constitutional; the English, democratic-constitutional.”³⁷ This reflects the comparatively weak experience of Germany of parliamentary democracy in a unified state in the nineteenth century, as a result of the conditions there – unification only occurred in 1871 and German legal culture relied much more on academic writing and the influence of jurists.

The difference can be illustrated by the different approaches adopted to interpretation of old statutes. On the German approach, where a statute is old it becomes more legitimate for the courts to interpret it with freedom, because the immediate authority of the legislature has become attenuated by the passage of time: Alexy and Dreier explain: “the older a statute, the weaker the binding force of its wording and of the actual will of the historical legislator”.³⁸

This is very different from the English approach, which treats statutes as “always speaking”, in the sense that the courts will seek to identify how they should apply in light of the enacting Parliament’s intentions. Lord Wilberforce put it this way in the leading judgment:³⁹

³⁷ F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society*, [1935-], Berg, Leamington Spa 1986, 185.

³⁸ MacCormick and Summers, (n. 32), 107. Barak (n. 21) adopts a similar approach, see 191-192.

³⁹ *Royal College of Nursing v DHSS* [1981] AC 800, 822.

"In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed."

For judges operating in the English tradition, to deny that there is such a thing as legislative intention is in danger of being undemocratic.⁴⁰ It also potentially opens the door too wide for judicial law-making, by removing the focus from where it should be, on the will of Parliament (i.e. parliamentary intention), reflecting the will of the people. If that is not taken as the object of inquiry where disputed issues of statutory interpretation arise, the exercise of interpretation becomes unmoored and the way appears clear for the

⁴⁰ Here I draw again on Sales, "Legislative Intention" (n. 12).

courts to import normative content of which they approve, even if it is not plausible to think that the legislating Parliament would have accepted it.

Sometimes a move is made to replace legislative intention with the purpose of a statute. In my opinion, this move fails to sidestep the issue of legislative intention. To refer to a purpose of a document is to refer to the purpose of the human agents who brought it into existence. Documents do not have agency and do not have purposes of their own. So, the concept of legislative purpose is a fiction in the same way as legislative intention is a fiction - and indeed means much the same thing.

A practical approach to legislative intention

Where the language used in a statute is clear as to the result for a particular case, the court can confidently proceed on the basis that this represents the intention of Parliament for that case. Good legislative drafting is important. As I put it in an article on the contribution of legislative drafting to the rule of law, “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 Parliament.”⁴¹

On the other hand, where the statute is not clear, the courts have to move to identify legislative intention at a higher level of abstraction, as a second order concept and employing a wider range of materials. At such points, one tends to move beyond anything resembling the actual intentions of legislators framed in the light of

⁴¹ P. Sales, “The Contribution of Legislative Drafting to the Rule of Law” [2018] CLJ 630, 632.

circumstances which they had in mind when they chose to act to promulgate the rule in question, and who had not thought of the problem at all.

Interpretation then shades into construction. This involves a process of imagining how legislators placed as these ones were would have wished the rule to be articulated and applied in this new situation.

Here, the court is right to proceed by reference to what a *reasonable* legislator would have wished to do, if he or she had notice of the problem; and to call on a wider range of aids to interpretation which offer clues to answering that question (e.g. the highly refined presumption that the legislator would not have wished to place the UK in breach of its obligations under international law).

It is still possible to locate this constructed meaning within a framework of inference as to the intention of the legislature as a collective body, operating as a constitutional subject in its own right, the intention of which may be inferred in appropriate cases from these wider background factors. The legislature endures as an institution over the *longue durée* and its statutes affect the standing of the polity in multifarious ways in respect of which it is meaningful to ascribe intention to the legislature as a complex collective entity.

In a well-known formulation, Henry Hart & Albert Sachs⁴² said judges should presume legislators are "reasonable men pursuing reasonable purposes reasonably".

⁴² 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.

In earlier times, Francis Bacon said something similar:

“By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided”; lawmakers cannot anticipate every case in express terms, so a court should “suppose the law-maker present and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given”.⁴³

Richard Posner posits an analogy with a military order given to a junior officer, who has to follow it on the field of battle without any scope for referring back to the commander when it becomes unclear how it is intended he should proceed in circumstances which have arisen. He advocates a similar solution:⁴⁴

“the judge should give the text the meaning that its author would have wanted it to be given, had he or she thought about the matter – in other words, the intent of the reasonable author”.

The idea of the reasonable author obviously gives a court scope to inject normative content.⁴⁵ What a judge thinks a reasonable person would do is likely to reflect to some degree the judge’s own values and expectations.

⁴³ Quoted in *Riggs v Palmer* 22 NE 188, 189 (1889).

⁴⁴ R. Posner, *The Problems of Jurisprudence* (1990), 273.

⁴⁵ See Greenawalt, (n. 21).

However, democratic principle requires that the inquiry should be framed as one into the presumed intention of the legislature. It is relatively simple to posit the legislature as a unified person exercising its own agency, and to look for clues in the properly available evidence as to how it would have been likely to have intended to resolve the particular case.

The principle of legality and legislative intention

The principle of legality is the rather strange name given to a technique of statutory interpretation whereby the meaning of a statutory text is modified or bent to take account of other values arising externally to the text itself. A prime example is the way in which general words in a statute will not be taken to abrogate fundamental human rights.⁴⁶ But there are other examples by reference to other constitutional values and principles.⁴⁷ It is a technique of interpretation with a long history in Australia, which was rediscovered rather more recently in the UK in the late 1990s. We seem to have forgotten about it in the way Australian judges never did.

How should one conceptualise this technique? This is a significant question, because the conceptualisation which is applied to it will guide when and to what extent it may be used to change – some might say, pejoratively, distort – the meaning otherwise to be given to a statutory provision.

⁴⁶ *R v Secretary of State for the Home Dept, ex p. Simms* [2000] 2 AC 115.

⁴⁷ See P. Sales “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 LQR 598.

Given the fundamental importance of the democratic principle in our constitutions, I suggest that it is highly desirable to locate the principle of legality within the concept of the intention of the legislature. Otherwise, the courts risk undermining the legitimacy of their decisions in the eyes of the public. I also suggest that it is perfectly possible to produce an account and a methodology which satisfy this requirement.

I have already highlighted how statutory interpretation involves a balance between the authority of Parliament and the expertise of the courts, with the courts' role becoming greater the less specifically Parliament has expressed itself on the matter at hand in the text it has adopted in a statute. There is a legitimate role for courts to be the guardians of long wave constitutional principles, which moderate the short-wave excitability of ordinary democratic politics.

It has been a longstanding critique of democracy that public opinion is too changeable and incoherent to provide a basis for sound rule. James Bohman, in his book *Public Deliberation: Pluralism, Complexity and Democracy*, points to Hegel and Walter Lippmann as prime exemplars of this view.⁴⁸

The political theorist Nadia Urbinati argues⁴⁹ that democracy should be conceived as a diarchy of will and opinion, that is to say a balance between the right to vote and procedures to make authoritative decisions, on the one hand, and the extra-institutional domain of political opinions on the other. These influence each other without merging.

⁴⁸ J. Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (1996), Conclusion.

⁴⁹ Nadia Urbinati, *Democracy Disfigured: Opinion, Truth and the People* (2014), 2.

Representative procedures provide a slowing and smoothing effect which preserves the gap between them and stops political will from being consumed by fast changing opinion.

I would like to suggest that one could conceive of democracy more as a triarchy of will, opinion and constitutional reason. The courts act as guardians of long-term constitutional principles which promote stability and allow for the formation of a public will which is coherent and capable of being implemented in an effective way. The principles of constitutional reason allow present and future legislators to know where they stand, so that they can act coherently together.⁵⁰ The courts, by promoting constitutional principles, can bring about what Michael Stolleis, describing the effect of the German constitutional court, calls “deceleration” and “calm”.⁵¹ The courts make a contribution to smoothing out the excitability of democratic opinion in parallel with the forms of representative government.

The principle of legality is a technique by which the courts are in a position, in an acceptable way, to inject constitutional reason into the democratic mix. It is a technique which legitimises this role in democratic terms. It allows courts to perform three functions:

- (1) By protecting human rights the courts promote the scope for citizens to participate in democratic engagement and to influence the institutions which represent them;

⁵⁰ P. Sales, “Legalism in Constitutional Law: Judging in a Democracy” [2018] Public Law 687.

⁵¹ Michael Stolleis (trans. Thomas Dunlap), *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century* (2017), 131.

- (2) They promote the long-term stability and coherence of democratic will, which is subject to formation under conditions set by constitutional principles underwritten by the courts; and
- (3) They achieve the practical reconciliation of rule of law values and democratic will.

If the principle of legality is not constrained by legislative intention, then it is unclear what does limit the courts in moulding or distorting the meaning of a legislative text. An appeal to constitutional principle on its own is not sufficient, because the notion of legislative intent is at the heart of a democratic constitution.

The principle of legality can and should be viewed as an aspect of legislative intention. That is because it is legitimate and plausible to regard the context in which Parliament legislates as including 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.

From the intra-legislature perspective, the constitutional presumptions referred to by the principle of legality assist the efficiency of legislative deliberation, since parliamentarians can take them as read without having to introduce them into every debate on every Bill.

From the extra-legislative perspective, the subjects of law can rely upon the presumption that certain longstanding, well-recognised and important constitutional principles should be taken as read, unless the contrary is clearly indicated in the legislation in question. This includes not just certain human rights or civil liberties, such as the right not to be tortured or the rights to free speech and freedom of association, but also the right to be

treated fairly by public officials before the exercise of public powers which affect an individual.

The role for the principle of legality is then 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 (but is also naturally primarily focused on achieving pragmatic instrumental goals, in the name of effective administration), 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.

On this model, the principle of legality is properly to be viewed as an aspect of legislative intent. It becomes highly relevant to ask whether any supposed fundamental “right”, which is to be capable of modifying the meaning of legislation, can plausibly be taken to have had such a level of acceptance among parliamentarians (and as may be evidenced by acceptance by other key constitutional actors, such as senior civil servants) as to form part of the legislative context in which they meant to act.

One then needs to look for evidence of such rights and principles in constitutional tradition and in political practice and self-understanding, rather than simply asking whether a group of judges think them a good idea.⁵² The use of such evidential criteria ensures that Parliament, when it legislates, has fair notice of the way in which the courts may be expected to read the texts it creates; and hence can formulate them to take account of this and so be enabled to exercise legislative agency effectively.

⁵² P. Sales, “Rights and Fundamental Rights in English Law” [2016] CLJ 86.

Making the operation of the principle of legality depend upon such evidential criteria imposes an objective discipline on the courts. At the same time, this also allows them to legitimate their interventions in injecting meaning into legislative texts by reference to legislative intention and the democratic will, properly understood.

The doctrine then becomes a practical way of reconciling the two distinct traditions which lie at the heart of the modern constitutional democratic state: the democratic tradition, based on the will of the people; and the liberal, human rights and rule of law tradition, based on the protection of individual rights.

The doctrine can also be integrated with forms of interpretation based on certain other rebuttable constitutional presumptions, such as that statutes are presumed not to bind the Crown;⁵³ with the modern purposive approach to interpretation of criminal statutes;⁵⁴ and with the modern, strongly purposive approach to anti-avoidance interpretation of taxation statutes whereby intermediate steps in an avoidance scheme which have no commercial purpose are liable to be ignored for the purposes of application of the statute.⁵⁵

Thank you.

⁵³ See P. Sales, “A Comparison” (n. 47).

⁵⁴ A. Ashworth, “Interpreting Criminal Statutes: A Crisis of Legality?” (1991) 107 LQR 419.

⁵⁵ See *UBS AG v HMRC* [2016] UKSC 13; [2016] 1 WLR 1005, [61]ff. From the point of view of the taxpayer, this is almost the principle of legality in reverse.