

Statutory Interpretation and Constitutional Legislation

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1. The questions: If there is constitutional legislation, should it be interpreted in a different way from other legislation? What would that mean in practice?

In an earlier article, I argued that, if there is a special category of “constitutional” legislation in the UK, such legislation can be identified only by reference to one’s view of the essential function of a constitution. This, I suggested, is to establish and regulate relations between institutions of the state. I went on to pose, but not answer, a further question. If there is constitutional legislation, should it be interpreted in a special way?¹ This article advances an answer: the techniques of interpretation appropriate for constitutional legislation are essentially the same as those used for any legislation, although the weights given to them may be different when the text and its interpreters have special roles. Anyone who interprets or implements any legislation must ensure that they act in ways which are *legally acceptable* and *practically workable*. That is particularly important when the legislation affects the functions and working of state institutions. Decisions about the meaning and effect of legislation must be in accordance with constitutional principles (unless the legislation is clearly designed to alter them).

Yet constitutional principles are not necessarily consistent with each other, and tensions between them may pull interpreters in different directions. In the UK, for

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example, there are common-law presumptions on one side: that the Queen in Parliament is presumed not to intend to legislate inconsistently with the UK's international legal obligations; that the Queen in Parliament is not to be taken to intend to interfere with individuals' rights and freedoms or impose criminal liability except by clear words; that some rights are fundamental, and assumed to be especially dear to the Queen in Parliament; that the Queen in Parliament is to be assumed to understand and respect the need for a fair adjudicative procedure, and equality of all subjects of the Crown before the law; and so on. By and large, these rebuttable presumptions are liberal in their orientation. On the other side are constitutional ideas which are more paternalistic and authoritarian: the state's top priority is the safety of the population; judges should defer to the judgment of Parliament; judges should not interpret legislation (even criminal legislation) in such a way as to produce a result different from that for which Parliament hoped, regardless of the ordinary meaning of the statute.

We regularly experience the tension between such norms. For example, if the legislature passes first a statute predominantly concerned with the protection of rights, and then one which limits rights to prevent terrorism, the executive is likely to ask courts to interpret the earlier legislation restrictively in the light of the later. If judges regard the earlier legislation as having constitutional status, however, they will interpret the later legislation as not repealing or limiting it unless it does so unambiguously. But how should we interpret the earlier, constitutional legislation? Should we use techniques differently from those we use on "ordinary" legislation? From one perspective, constitutional legislation promulgates law-generating norms in the same way as other legislation. On the other hand, the fact that constitutional legislation deals with the structure of the state, rather than the obligations of its citizens and others, might be thought to make a special interpretative approach necessary. Professor Aharon Barak, formerly President of the Supreme Court of Israel, encapsulates the dilemma when writes, "A constitution is a legal text that grounds a

¹ David Feldman, "The Nature and Significance of 'Constitutional' Legislation" (2013) 129 *L.Q.R.* 343-358.

legal norm. As such, it should be interpreted like any other legal text.”² The general principle, then, is that constitutional legislation is to be interpreted in accordance with the same considerations as other legislation. Nevertheless, its constitutional context may have a significant effect on the result. As the Supreme Court of the United Kingdom wrote in *Imperial Tobacco Ltd v. Lord Advocate*, rules contained in the Scotland Act 1998 “must be interpreted in the same way as any other rules that are found in a UK statute”.³ Lord Hope reaffirmed this, with the agreement of the other Justices of the Supreme Court, in *Attorney General v. National Assembly for Wales Commission* in relation to the Government of Wales Act 2006.⁴

Yet at the same time, as Professor Barak points out:⁵

“...a constitution sits at the top of the normative pyramid. It shapes the character of society and its aspirations throughout history. It establishes a nation’s basic political points of view. It lays the foundation for social values, setting goals, obligations, and trends. It is designed to guide human behaviour over an extended period of time, establishing the framework for enacting legislation⁶ and managing the national government.⁷ It reflects the events of the past, lays a foundation for the present, and shapes the future. It is at once philosophy, politics, sociology, and law. The unique characteristics of a constitution warrant a special approach to its interpretation,⁸ because ‘it is a constitution we are expounding.’”⁹

² Aharon Barak (trans. Sari Bashi), *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), 370.

³ [2012] UKSC 61, [2013] S.C. (UKS.C.), SC, at [14].

⁴ [2012] UKSC 53, [2013] 1 A.C. 792, SC, at [80]. See Stephen J. Dimelow, “The interpretation of ‘constitutional’ legislation” (2013) 129 L.Q.R. 498-513.

⁵ Barak, *loc. cit.*, n. 2 above (references in original).

⁶ *Attorney General (New South Wales) v. Brewery Employees Union of New South Wales (Union Label)* (1908) 6 C.L.R. 469, HC of Australia, at 612 *per* Higgins J.: “it is a constitution, a mechanism under which laws are to be made, not a mere act which declares what the law is to be.”

⁷ Anthony Mason, “Trends in constitutional interpretation” (1995) 18 U.N.S.W.L.J. 237-249 at 238.

⁸ Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* (Cambridge, Mass.: Harvard University Press, 1993) at 1; Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard

Can we explain or reconcile these apparently contradictory intuitions? In the *Imperial Tobacco* case, the Supreme Court attempted to do by pointing out that the rules in the Scotland Act–

“...must, of course, be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable. This is a factor that it is proper to have in mind. But it is not a principle of construction that is peculiar to the 1998 Act. It is a factor that is common to any other statute that has been enacted by the legislature, whether at Westminster or at Holyrood. ... [T]he description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language. ... That purpose provides the context for any discussion about legislative competence.”¹⁰

In *Attorney General v. National Assembly for Wales Commission*, Lord Hope repeated that the description of an Act as a constitutional statute cannot, in itself, be a guide to its interpretation. “The rules which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, *and it is proper to have regard to it if help is needed as to what the words mean.*”¹¹

It is difficult to understand this in the abstract. To build up a sense of what it means in practice, we need to start by seeing whether we can identify how ‘any other statute’ is interpreted, and try, along the way, to make the discussion more concrete. We can start from an uncontroversial proposition. Generally, it is proper to focus first

University Press, 1991), 90.

⁹ *McCulloch v. Maryland*, 17 US 316 (1819) at 407 *per* Marshall C.J.

¹⁰ *Imperial Tobacco Ltd v. Lord Advocate* [2012] UKSC 61, [2013] S.C. (U.K.S.C.) 153, SC, at [14]-[15].

¹¹ [2012] UKSC 53, [2013] 1 A.C. 792, SC, at [80] (emphasis added).

on the words of a provision and require decisions (of all kinds of institutions) to be justifiable by reference to, or at least not inconsistent with, a reasonable reading of the words in their context. Initially, at any rate, only the words carry authority. There are reasons, however, for moving beyond the ordinary or literal meaning of a legal text, and these reasons may be particularly relevant when dealing with constitutional legislation.

As constitutions mature, the meaning or understanding of the text becomes increasingly complex. The words inevitably become overlaid with a mass of other words through the work of glossators, interpreters, legislators, administrators, and adjudicators. By weaving together threads of meaning from different sources, we make constitutional provisions increasingly richly textured. The text remains an important strand, but the time may come when current understanding and implementation of parts of the constitution are hard to explain or justify in terms of the text. The provisions in the Article II of the Constitution of the USA governing the election of the President are a notable example of that kind. The text has been overlaid by conventions generated from contesting the original understanding of the kind of democracy that the USA was to be. In addition, when a particular institution is regarded as having power to determine authoritatively the way in which a text is to be understood and applied, its decisions may drive the effect of the constitution from the ordinary meaning of its text. The Constitution of the USA again offers an example: the jurisprudence of federal courts, especially the Supreme Court, is as important as the text for understanding what the Constitutions “means”. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights (ECHR) is another example.

How, then, can one pin down the elements of constitutional interpretation? This article adopts a two-stage strategy. The first stage is to remind ourselves of the basic saws concerning statutory interpretation. The second is to consider whether different principles or maxims apply to constitutional legislation, whether codified or not. We

might then be able to draw some conclusions about interpreting constitutionally significant legislation of the kind one finds in the UK

2. General approaches to statutory interpretation

“The general approach to statutory interpretation is today not in doubt.”¹² In *R. (Quintaville) v. Secretary of State for Health* Lord Bingham said:¹³

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach...may...(under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

¹² Sir John Dyson, “The shifting sands of statutory interpretation”, accessible at http://www.statutelawsociety.org/__data/assets/pdf_file/0006/93588/Sir_John_Dyson.pdf (last visited 30th December 2013), at 27. See also pp. 2-3, 9.

¹³ [2003] UKHL 13, [2003] 2 A.C. 687, HL, at [8] (*italics added*).

As this passage makes clear, there are different approaches to interpreting statutes. They include “literal (or ordinary, or natural) meaning”, “true meaning”, “legislative intention”, and “mischief” approaches. These are not totally distinct, much less mutually exclusive; they run together, and interpreters either choose between them or (like Lord Bingham) treat intention and mischief as techniques for establishing the “true meaning” of the statutory text. They have significant limitations in practice. For example, there can be no single literal, ordinary, natural or true meaning of a provision if it operates and is expressed in two languages simultaneously. Multilingual instruments are the norm in many legal systems (such as that of Canada) and international treaties (such as the European Convention on Human Rights), in each of which the French and English texts are equally authoritative.¹⁴ There is also the so-called ‘golden rule’: statutes are normally to be given their ordinary, or natural, meaning, but we may depart from that meaning if it would produce an absurd result. The important point about the ‘golden rule’ is that, unlike the true (or natural) meaning, legislative intention and mischief approaches, it explicitly places responsibility on the interpreter to place limits on the acceptable outcomes of applying the legislation to particular sets of facts. It is not self-evident when a result is absurd. Interpreters must make a judgement in the light of their expectations of the legal system (including an interpretative presumption that legislation is not passed to achieve absurd and arbitrary results) and underpinning constitutional principles, bearing in mind the mischief at which the legislation is aimed, but ultimately relying on interpreters to decide when, exceptionally, an outcome is so odd or arbitrary as to be unacceptable in a society governed by the rule of law.

The “legislative intention” approach is conceptually the most difficult. It may refer to an objective, disembodied, imputed intention, that intention which a reasonably well informed person reading the text would imagine that the legislator had. It may alternatively refer to an actual, subjective intention of a real legislator. The latter suffers

¹⁴ I am grateful to Professor John Bell for pointing this out to me.

from problems. The legislator might not have any subjective intention. An autocrat with legislative power can intend his or her legislation to have a particular meaning or effect. A collective, institutional legislator (or “legislature”), by contrast, can have no such subjective intention. A unicameral legislature, such as the New Zealand Parliament, can be imagined as “intending” to pass a Bill; this is implied from its members having collectively followed the procedural rules governing the passing of Bills. Constitutional rules specify a series of actions, the product of which is officially taken to be a piece of legislation. Members and officers of the legislature accept this; it is one of the rules of the game which they play together. (Similarly, legal rules regularly specify how to establish the “will” of other corporate bodies which the law regards as capable of legal agency.) Professor John Gardner distinguishes between natural concerted agency (“teamwork”), such as an orchestra playing together to perform a symphony or a football team playing in a match, and artificial concerted agency, or vicarious agency, which depends on norms which allow certain people to act as representatives of the collectivity.¹⁵ In an orchestra, no one musician’s idea of the desired interpretation of the music is decisive; the interpretation is a result of the combination of individual, creative (or re-creative) performances. By contrast, in a company the law may allow the subjective intention of an officer of the company to be decisive as to the “intention” of the company.

Professor Gardner suggests that a legislature relies on a mixture of natural and artificial concerted agency. We can unpack this a little. In political institutions, where co-operation and unity of purpose are less common than in an orchestral performance or a single football team, the legislative process is more like a competition between at least two teams, working against each other within a framework of accepted rules, and recognizing as valid whatever result flows from playing the game. The teams all intend to produce a result (legislation), although there is no necessary agreement as to what

¹⁵ John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), 62-65.

the legislation means or what effect it is to have. It is only in this very minimal sense, as Professor Joseph Raz shows, that one can accept the outcome of a legislative process as being intended collectively by the legislature: the members of the legislature intend to legislate, but need not have any understanding of the content or import of the legislation they are enacting.¹⁶

It follows that the legislature cannot institutionally have an intention as to what a Bill is to *mean* when it becomes an Act (unless, at any rate, there is convincing evidence that the members of the institution were unanimous as to their reasons for and objectives in adopting the text of the legislation). In normal circumstances, the intention of a legislature is either logically very minimal – to pass a Bill – or empirically obscure, or both.¹⁷ If a legislature is comprised of a multiplicity of institutions, such as the Queen in Parliament in the UK (consisting of the monarch, House of Lords, and House of Commons) or the US Congress (consisting of the House of Representatives and the Senate), the idea that they can have a collective intention in relation to a particular Bill (beyond the intention to pass the Bill) piles absurdity on obscurity.

Dr Richard Ekins, who has done more than most to rescue the idea of legislative intent from its problems, has concluded that the legislative intent “is to change the law in the complex, reasoned way set out in the open proposal for legislative action”.¹⁸ However, even he does not make it clear how this relates to the task of an interpreter of the legislation. He suggests that an interpreter “should aim to understand the legislature’s intended meaning” and also “the reasoned choice that finds expression in this intended meaning”.¹⁹ This is metaphysically comprehensible, but how far is an interpreter to go, beyond reading the statute as a whole, to work out the “intended

¹⁶ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 282-285. Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), 219-221, describes this as interlocking intentions of legislators to be prepared to act jointly to legislate (the “standing intention of the legislature”).

¹⁷ See Max Radin, “Statutory interpretation”, 43 *Harv. L. Rev.* 863-885 (1929).

¹⁸ Ekins, *op. cit.*, 243.

¹⁹ Ekins, *op. cit.*, 247.

meaning”? Ekins’s examples seem to me to show that one can explain earlier interpretative decisions of courts as turning on a search for an intended meaning, but they do not explain how a court approaching a problem without the benefit of already knowing what it will decide would find the intended meaning, beyond advancing a number of techniques or maxims of interpretation which seem only questionably related to legislative intent. Professor Neil Duxbury also advocates courts’ using a notion of legislative intention when interpreting legislation. He argues for the reality of such intention, though accepting that it may be extremely difficult to unearth, because behaving as if there were such an intention provides interpretative discipline and limits the risk that judges will act as unconstrained legislators through uncontrolled interpretation.²⁰ But, as Maksymilian Del Mar observes in a sympathetically critical review of Ekins’s and Duxbury’s books, this does not require (or, one may add, establish) that legislative intent in relation to the meaning of particular pieces of legislation is real; “all it requires is a presupposition or supposition of a legislature acting reasonably to produce a reasonably coherent text”.²¹

Even if, contrary to my view, one were to accept that an institutional legislature can have an intention as to the detailed meaning and effect of its legislation, there are further difficulties for interpreters in using legislative intention as a basis for statutory interpretation. For example, whose intentions and which of their intentions are to count, and how are they to be discovered?²² What wider assumptions should be brought to bear when trying to establish intentions? If a legislature has an intention as to the detailed meaning and effect of legislation, it is fair to assume that the legislation will have been drafted so as to produce that effect, and that the drafters (and legislators) will have done their work in the light of an understanding of the interpretative

²⁰ Neil Duxbury, *Elements of Legislation* (Cambridge: Cambridge University Press, 2013).

²¹ Maksymilian Del Mar, review, [2013] *C.L.J.* 758-764 at 764.

²² Radin, *op. cit.*, 869-872; Ronald Dworkin, *Law’s Empire* (London: Fontana, 1986), 318-327; Raz, *op. cit.*, 282; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 142-146.

conventions which interpreters are likely to apply to the text.²³ These conventions, as Professor Max Radin observed, are developed on the assumption that the purpose of all law is to advance, so far as possible, justice and security. Statutes also form part of a principled, intellectual system of laws which are concerned generally with fairly diffuse notions of justice and which seek to maintain a degree of internal coherence.²⁴ Once interpreters accept that there are times when it is desirable for these general considerations to give legislation more than the narrowest possible meaning, they have to choose between degrees of latitude.²⁵ Professor Gardner has argued that it is possible for a legislature to take account of the various degrees of interpretative latitude which may be available when deciding how narrowly to cast the range of possible cases to which the legislation is applicable or of outcomes which it may produce. If interpreters approach legislation on the assumption that it was intended to be subject to the normal range of possible degrees of inclusiveness unless the legislation itself narrows down that range, the pursuit of legislative intention becomes circular.²⁶

The “purpose” of legislation is also problematic. As Professor Radin showed, the range of purposes which members of a legislature have in relation to legislation, even if they acquiesced in its passing, is great. They are likely to include wanting to be viewed favourably by constituents or by party leaders, wanting to be seen to do something while leaving it to courts to decide how what they are doing should have effect, and wanting to achieve a general aim (such as being tough on crime).²⁷ Legislators will often not think too hard, or at all, about how the legislation they make will affect people in the often very wide variety of circumstances in which it might be invoked. Interpreters who seek the purpose of legislation must therefore choose between possible purposes at different levels of generality and public-spiritedness.

²³ Raz, *op. cit.*, 288; Gardner, *op. cit.*, 44.

²⁴ Radin, *op. cit.*, 876-877; Ronald Dworkin, *op. cit.*, 19-20.

²⁵ Radin, *op. cit.*, 882.

²⁶ Gardner, *op. cit.*, 44.

²⁷ Radin, *op. cit.*, 875-878.

By ‘intention (or purpose) of Parliament’, then, we mean the intention which it seems to us (as interpreters) to be rational to attribute to the institutional legislator in the circumstances. As Lord Carswell said in *R. v. Z (Attorney General for Northern Ireland’s Reference)*:

“If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision.”²⁸

In *R. (M.) v. Hackney L.B.C.*, Toulson L.J., after referring to judicial statements from a number of jurisdictions, concluded:

“As these citations show, there is a tendency for the courts to express their conclusions by reference to the imputed intention of the legislature. This is valuable in so far as it concentrates the mind of the court on the purpose of the particular statutory provision in the wider statutory scheme, although beyond that it can be an oratorical device for clothing the judge’s view of the seriousness of the non-compliance on the particular facts with the mantle of the hypothetical view of the legislature.”²⁹

²⁸ [2005] UKHL 35, [2005] 2 A.C. 645, HL, at [49] (*italics added*). See also *Secretary of State for Defence v. Guardian Newspapers Ltd.* [1985] AC 339, HL, at 362-363 *per* Lord Scarman (dissenting). Cp. Lord Roskill in the latter case at 369: ‘The language of the relevant statute is subject to the ordinary rules of statutory construction, always remembering first that neither additions nor subtractions should be made to the natural meaning of the words used unless they are essential in order to give an intelligible meaning to the statutory language and second that courts should always be slow to cut down as a matter of construction plain words designed to create a privilege or immunity accorded by statute, especially in a case where to put the matter no higher, doubts had long existed as to the extent of any comparable privilege or immunity which was or may have been previously accorded at common law.’

²⁹ *R. (M.) v. Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 W.L.R. 2873, C.A., at [94].

Interpreters seeking a sensible, workable outcome to a dispute that is consistent with a legislative text choose methods of interpretation in the light of constitutional principles, including prohibition of arbitrariness (sometimes called the “principle of legality” or, more descriptively, “quality of law”).³⁰ These constitutional principles are reflected in interpretative presumptions, “which are not easily displaced by a statutory text”.³¹

If the statute is to have legal effects, the purpose attributed to it must fit into the surrounding law and seem reasonable to members of the interpretative community, not (or not only) to the political or legislative community. As Professor Sir John Baker has shown, laws operate primarily in the interpretative community of the legal profession and judiciary. The range of acceptable meanings is shaped by the “common learning” of that community: the largely orally transmitted tradition; values; and system of education. These operate socially, depending more on shared, often unarticulated assumptions than on statutes and case-law.³² The late Professor Brian Simpson made a similar point when describing the common law as a kind of customary law, and criticizing positivists for failing to account for this central characteristic.³³ Working out the meaning of a law is a legal and social process, involving a search for professional consensus. It is not a psychological inquiry into the motivation of politicians.

Nevertheless, this view is contested. Professor Jeffrey Goldsworthy argues that, without some idea of statutory intention, the meaning of a statute becomes merely the conventional, semantic meaning of the words used, without purpose. This, he claims, would reduce statutes to random collections of letters, akin to the product of an infinite

³⁰ See *R. v. Secretary of State for the Home Department, ex parte Pierson* [1008] A.C. 539, 575 per Lord Steyn.

³¹ John Bell and Sir George Engle (eds.), *Cross on Statutory Interpretation* 3rd edn. (London: Butterworths, 1995), 166, quoted with approval by Lord Steyn, n. 30 above at 575.

³² J. H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001).

³³ A. W. B. Simpson, “The common law and legal theory”, in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Oxford: Clarendon Press, 1973), 77-99, especially at 91-99. See also Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford: Oxford University Press, 2001), 68-71.

number of monkeys at keyboards, a result of chance rather than intelligent design.³⁴ As Goldsworthy recognizes, one may accept that some group or groups of people in the legislative process must have an intention or purpose in seeking the enactment of the statute, yet deny that their intention or intentions can be identified with an intention of the legislature as a whole. But he responds that it would be bizarre to treat actual statutes in that way. People interpreting a statute assume that it is trying to achieve something, and that they have to work out what it is. When judges adopt a non-literal meaning in order to give effect to the presumed purpose of the legislation, their conduct is legitimate only if they remain the legislator's "faithful agents" by justifying their conclusion by reference to the assumed intention of the legislator. Without that, he says, judges would effectively enjoy supremacy over statute law.

One can, however, rationally (albeit somewhat artificially) regard the Queen in Parliament as "intending" to pass the Bill into law, yet deny that the Queen in Parliament had a collective intention as to its effect and operation. An Act of Parliament derives its authority from its enactment by the Queen in Parliament, a complex institution of formed of several institutions, but one which can conveniently be imagined as having "intended" to go through the stages of the process that leads to the making of an Act of Parliament. Duly completing that process gives the Act its legal authority. But its meaning is created by human beings—those who read it as much as those who draft it, and more than those who enact it. The legislative process confers legal authority on the text, making it a source of law by reference to which, when it is relevant, people (including but not only judges) must be able to justify their actions and decisions in order to stay within the law. Goldsworthy's argument conflates and confuses the source of a statute's authority and the source of its meaning. It is not necessary to assume that the Queen in Parliament has an intention as to how the text

³⁴ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), ch. 9, at 232-235, 266. At 233 he cites Heidi Hurd, "Sovereignty in silence", 99 *Yale L.J.* 945 (1990), 966, as a scholar who does not shrink from that claim. See also Richard Ekins, "The intention of Parliament" [2010] *P.L.* 709-26.

should be interpreted and given effect in all (or any) circumstances, still less that the legislative process confers binding, legal authority on any of the many discrete and varied meanings of the text (or intentions of the drafters, promoters and supporters and opponents of the Bill). Nor do their intentions or purposes confer legal authority on the resulting Act. Only its emergence from the completed legislative process can do that.

Why, then, do people regularly confuse the source of authority of a piece of legislation with the source of its meaning? It seems that there is a desire, stemming from their adoption of both a particular idea of democracy and a particular view of the place of legislative sovereignty in the constitution, to confer parliamentary legitimacy not only on the legislation but on a particular meaning of the legislation. If a person considers that democracy is a fundamental constitutional principle in one's state, and that democracy requires that laws be made by a body whose members are elected by or accountable to an electorate, it is not surprising that he or she gives considerable weight to the ways in which individual members of a legislature exercise their functions. If in addition the legislature in question is the highest domestic source of law in the state, it is understandable that one would regard law-making by other bodies as having lesser authority. In the UK, where some people are strongly attached to a peculiarly extreme doctrine of parliamentary sovereignty, these considerations might explain their desire to find parliamentary authority for as much of the law as possible. This, however, cannot justify the claim that only the notion of "parliamentary intention" can confer legitimacy on an interpretation of legislation. The authority of a statutory provision stems from its inclusion in a statute which has survived the hurdles of legislative procedure. The authority of a meaning arises from that meaning's adoption by an authoritative interpreter, or, as some would say, an authoritative voice in the relevant interpretative community.

That is a conceptual argument. Even those who do not accept it, and want to find the legislature's "intention", will, however, find the method of statutory drafting in the

United Kingdom calculatedly unhelpful. Statutes usually carry on their faces no indication of the mischief at which they are aimed; they do not tell a story. Looking at the statute as a whole will not always help: many statutes are collections of knee-jerk reactions to a number of different stimuli, and the degree of coherence is further reduced where changes in government policy are given effect by amending earlier legislation drafted to give effect to different policies. This has been a particular problem in the field of criminal law, procedure and sentencing, and is made worse by the maze of commencement orders and transitional provisions which this legislative flood has necessitated.³⁵ Such statutes lose, through these accretions, any coherence of purpose which they might originally have had. To navigate to sensible solutions, bold interpretative steps are needed, using the proviso to the “golden rule”: if the natural or literal meaning of a provision would produce an absurd result, interpreters may depart from it. A purposive approach of some kind may be useful when deciding both whether a result is absurd and what result would be sensible. But the purpose to be sought has to be that of the draftsman (who is assumed to have understood what was being done, but whose true thoughts are unknown) or of a sensible, all-foreseeing legislature, rather than that of the Queen in Parliament, which, even if it is assumed to be capable of reflective thought, can safely be assumed not to have understood the provisions, or not to have foreseen the problem, or both.

When a question of interpretation arises in the course of litigation, it is problematic because the court has to deal with it in order to answer the question, “Who wins?” The problem may take one of several forms. Sometimes, the legislative text (often as amended at least once), on a technical or ordinary reading, simply offers no answer to that question, because it appears meaningless in the context of the facts of the case. Sometimes, the text provides a straightforward answer, but judges consider that it would be absurd or unfair to one party or both parties, or that it would not fit

³⁵ See, e.g. J. R. Spencer, ‘The drafting of criminal legislation: need it be so impenetrable?’ [2008] *C.L.J.* 585-605.

comfortably into the legal framework in which it has to operate. In this situation, they may construct an alternative meaning which achieves what they regard as a fair result. Occasionally, the text provides two possible answers (for example, one giving words their technical meaning and the other their ordinary meaning), and the court has to decide which to choose. For example, in *Edwards v. Attorney General for Canada*³⁶ the Governor General of Canada referred to the Supreme Court of Canada a question as to whether the word “persons” in section 24 of the British North America Act 1867 included women, so that women would be eligible for election to the Canadian Senate. In its general sense, “persons” clearly included women. The Supreme Court advised, however, that it meant “men”, as (according to a majority) it had to be read in the light of the historic common-law disability of women to hold public office. On appeal, the Privy Council reversed the decision, holding that one had to look at the word in the context in which it appeared, namely as part of a constitutional code governing the institutions of Canada, and in that context there was no need, historically or textually, to adopt a presumption against women’s capacity to hold public office or to be eligible for election.

Some cases combine elements of several of those situations, as the following examples show.

In *In re Maryon-Wilson’s Will Trusts*,³⁷ a testator, who died in 1897, had left legacies subject to several life interests in his estate, and required devisees and legatees under his will (rather than his executors) to bear the estate duty “on my death payable on or in respect of any devise legacies or bequests made by me”. At that time, estate duty (which the testator regarded as an “unjust and ruinous” tax, and which he hoped would be abandoned) was levied at the rate of 7½ per cent. The Finance Act 1894, section 9(1), had provided that in such circumstances a rateable part of the estate duty payable in respect of a particular legacy would be a charge on the property used to pay the legacy.

³⁶ [1928] S.C.R. 276; SC of Canada; [1930] A.C. 124, PC.

³⁷ [1968] Ch. 268.

Section 14(1) provided that a person who is authorised or required to pay the estate duty in respect of any property may recover the proper rateable amount of duty “from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary”. When the legacies came to be payable on the death of the second life tenant in 1965, the rate of estate duty had risen to 80 per cent.

The trustees of the residuary estate sought a contribution from the legatees to the estate duty paid on the death of the first and second life tenants. The legatees accepted that section 14(1) required them to contribute to the duty paid on the death of the second life tenant, on which they became entitled in possession to their legacies, at the rate of 80 per cent., reducing their value from £15,000 to £3,000; but they denied that they were liable to contribute to the duty paid on the death of the testator and the first life tenant, which would have reduced the value to £1,476, further benefiting the residuary beneficiaries of an estate which had grown in value since the testator’s death. Ungood-Thomas J. had to decide whether “entitled to any sum charged on such property” meant “entitled at any time in the past or future” or had a more limited meaning. He noted that “entitled” and “sum charged” are terms capable of having wide meanings, referring to contingent future interests, and asked whether the context in which the words were used affect that.³⁸ He noted that even treating “entitled” as meaning “entitled in possession” would not avoid the problem, as a person could become entitled in possession in the future or the past. In order to resolve the dispute, he had to add something to the bare words of the sub-section in order to make sense of it in the context of the case.³⁹ But it had to be done with reference to the statute itself.

“The court will not ascribe to Parliament an unjust intention, but the court cannot override Parliament and its statutes. If the court is to avoid a

³⁸ [1968] Ch. at 281.

³⁹ In argument, W. S. Wigglesworth, counsel for the legatees, said that the main difference between himself and counsel for the residuary beneficiaries was “what had to be put in” to make the sub-section sensible: [1968] Ch. at

statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice.”⁴⁰

He resolved his dilemma by focusing on the opening words of the sub-section, “In the case of property which does not pass to the executor as such...”. They showed, he concluded, that the statute was dealing with property passing on a particular death, and with people who have paid the estate duty due on that death. That person is then entitled to contribution from a person entitled to any sum charged on the property. “...I read ‘property’ as the sum charged on that property, not in the sense of a sum contingently payable and secured by a charge, but in the sense which appears to me to be the more natural and popular sense, of an existing sum actually and presently payable and secured by a charge on the property when it passes on the death; and ‘entitled to any sum’ as meaning entitled in possession to payment of the sum so charged”.⁴¹

When Ungood-Thomas J. referred to “the more natural and popular sense” of the words, it should not be confused with giving them their ordinary or natural meaning. They were technical words with a technical meaning, and his Lordship was trying to find a reading of them which would not almost halve the value of legacies which had already been reduced to one-fifth of the face value of the original bequests, while benefiting the residuary beneficiaries who were already extremely well provided for. A fair result in this case (meaning fair as between the parties) meant limiting as far as possible the unfairness flowing from the testator’s decision to make the legatees contribute to the estate duty, a decision made when the duty was charged at 7½ per cent., and not foreseeing that it would later reach 80 per cent. Where the legislative text

276.

⁴⁰ [1968] Ch. at 282.

⁴¹ [1968] Ch. at 283.

is unhelpful, necessity becomes the mother of interpretative invention, whether or not the outcome is clothed in the language of an assumed parliamentary intention.

For another example of a case of perceived unfairness in the face of taxation, leading to a deep division of opinion among Law Lords as to how to interpret or give effect to the legislation, consider *Luke v. Inland Revenue Commissioners*,⁴² on section 161(1) of the Income Tax Act 1952. This made a company director liable to pay income tax on the value of money spent by the company where it “incurs expense in or in connection with the provision, for any of its directors...of living or other accommodation...or of other benefits or facilities or whatsoever nature...” A majority decided that the words were not wide enough to make the director pay tax on the cost to the company of paying rates, feu duties, insurance, and (according to Lord Reid and Lord Pearce) doing repairs for a house which the company owned and allowed the director to rent from it. Income tax being a tax on income, Lord Reid thought that any extension of the tax to sums which are not in any sense income would need to be expressed in clear statutory terms. The purpose of s. 161(1) seemed on that basis to be to bring within tax provision made by a company for one of its directors which gives the director a financial benefit. But s. 161(1) was “drafted in such a way that if its words are applied literally with their ordinary meanings they would include all the items with which this case is concerned”, whether they conferred a financial benefit on the director or not.⁴³

“To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. ... It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision

⁴² [1963] A.C. 557, HL.

⁴³ [1963] A.C. at 576 *per* Lord Reid.

and will avoid a wholly unreasonable result, that the words of the enactment must prevail.”⁴⁴

Lord Jenkins, dissenting, did not accept that there was any justification for such an interpretation; “the Act does not so provide”. Lord Guest, approaching the legislation on the basis that “if possible, on a fair construction of the section, some mitigation must be found to the extreme results of the contentions for the Revenue. I am, however, compelled, although most unwillingly, to agree that the expenditure charged in this case qualifies for inclusion as a perquisite under section 161(1)”.⁴⁵ Neither was convinced that the “intention of the legislation”, if one existed, could be shown to be different from the effect of the text.

Lest it be objected that both those cases concerned tax legislation, where the purpose of the legislation (beyond raising revenue on a more or less fair basis) is particularly hard to fathom, let us take one more example from the law of mortgages. In *Western Bank Ltd v. Schindler*,⁴⁶ a mortgagor had mortgaged his dwelling house to the bank. The capital was repayable after ten years, and interest was payable monthly in advance. The mortgagor took out an endowment policy, intended to cover the capital, maturing after ten years, and assigned it to the bank. The mortgagor stopped paying the interest and the monthly premiums after three months. The bank applied for possession, without foreclosing on the mortgage. The mortgagor asked the court to exercise discretion under section 36 of the Administration of Justice Act 1970 to delay exercise of the mortgagee’s right to possession. That section provided, so far as relevant, as follows:

“(1) ...the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums

⁴⁴ [1963] A.C. at 577.

⁴⁵ [1963] A.C. at 584 *per* Lord Jenkins and 586 *per* Lord Guest.

⁴⁶ [1968] Ch. 1, CA.

due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

“(2) The court – ... (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may – (i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable. ...”

The problem was that the interest payments and premiums due under the endowment policy were not “sums due under the mortgage”, and the obligations to make those payments were not “obligations arising under or by virtue of the mortgage”. The sums were due, and obligations to pay them arose, under agreements collateral to the mortgage. The mortgagee bank argued that section 36 was therefore inapplicable, and the court had no discretion to delay its taking possession of the house. Buckley L.J. accepted that this was the literal meaning of the section, but thought that it led to a ridiculous result: the court would have discretion to delay a mortgagee’s possession if the mortgagor was in default, but not if the mortgagee was not in default.

“I cannot believe that Parliament can have intended this irrational and unfair result. I must therefore investigate whether the section is capable of some other construction. ... The manifest unfairness, as I think, of such a position seems to me a strong ground for believing that it must have been Parliament’s intention to confer the power, default or no default, notwithstanding the ineptness of the language of the section to achieve this result. The only part of the section which appears to contradict such an intention is the conditional clause. This can only apply when the mortgagor is in arrear with some payment or is otherwise in default. It would be very natural for Parliament to provide that, where the mortgagor is in arrear or otherwise in default, the discretionary power should not be used to prevent

the mortgagee from taking immediate possession unless the court were satisfied that there was a genuine likelihood of the mortgagor being able to put himself right within a reasonable time. On this approach, the conditional clause operates as a restriction on the court's free exercise of discretion."⁴⁷

Scarman L.J. agreed. To avoid absurdity, the court had to choose one of three options: (a) to treat this as a "casus omissus", which only Parliament could fill; (b) to treat the section as excluding entirely the mortgagee's common-law right to possession; (c) to give the court discretion to delay making an order for possession whatever the grounds on which the mortgagee is seeking it. "The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice it to say that before our courts can imply words into a statute the statutory intention must be plain and the insertion not too big, or too much at variance with the language in fact used by the legislature."⁴⁸ The court would strive to avoid option (a), but adopting option (b) would be to legislate. Option (c) would strain the language of the section, but not, he thought, too far when it allowed the court "to give effect to what was plainly the intention of Parliament".⁴⁹

Goff L.J., dissenting on this point, considered that there was no significant difference between option (b), which Scarman L.J. thought would go too far, and option (c), which also abrogated a mortgagee's common-law right to possession, making it depend on a court's exercise of discretion. It was, in his view, not anomalous for section 30 to provide merely that, if a mortgagor is in default, a court would have discretion to allow a reasonable time to make good the default. There was no need to depart from the literal meaning of the section.⁵⁰

⁴⁷ [1968] Ch. at 12-13.

⁴⁸ [1968] Ch. at 18.

⁴⁹ [1968] Ch. at 18-19.

⁵⁰ [1968] Ch. at 25-26.

Three noteworthy points emerge from these cases.⁵¹ First, save on extremely rare occasions when it makes no sense at all, it is not easy to decide whether a statutory text's literal, or ordinary, meaning produces results which are unfair, absurd or unreasonable. Much turns on judges' views of what would be fair, sensible or reasonable. Secondly, whether judges speak of the intention of the legislation, as in *Luke v. Inland Revenue Commissioners*, or the intention of Parliament, as in *Western Bank v. Schindler*, the intention is constructed or imputed by judges, not immanent in the text. The judges admit that, when they speak of finding "the intention of Parliament", they are looking for an interpretation which does as little violence as possible to the statutory language, produces what they regard as a sensible result, and is consistent with their view of the purpose of legislation (often adopted, as in *Luke*, on tenuous grounds, such as the idea that income tax must be presumed to be levied on what can sensibly be regarded as income). Some forms of legislative drafting, especially where an Act has been amended by later Acts or changes introduced over a period have been brought together in a consolidation Act, can make it next to impossible to identify a purpose in a statutory text such as to allow a judge to decide who should win. Where legislation has been amended, Parliamentary intention can hardly provide a guide, even if one believes in that phenomenon, as one would have to decide which Parliament's intention was being sought. Thirdly, to understand fully what judges say about statutory construction, one must read it in the light of the statute which they are examining, and the case which they are deciding. It is tempting to sever statements about a court's role in relation to statutes from their contexts, but that leaves out of account the fact that judges are always decision-makers, and only rarely political or linguistic philosophers. Their discussions of techniques of interpretation tell us as much about their ideas of

⁵¹ And of course, there are many other examples, such as *Maunsell v. Olins* [1975] A.C. 373, HL, where there was a spirited disagreement between Lord Reid, Viscount Dilhorne and Lord Wilberforce on one side, and Lord Diplock and Lord Simon of Glaisdale on the other, as to whether the word "premises" in s. 18(5) of the Rent Act 1968 could apply to an agricultural holding which included dwellings and farm buildings. The issue was whether, on the head tenant of the holding dying and the tenancy being reunited with the freehold, a sub-tenant could continue to occupy a dwelling on the land as a tenant of the freeholder. For Lord Diplock and Lord Simon, the answer was clearly "yes", because "premises" covered land as well as buildings. For the majority, however, their reluctance to face the

fairness in relation to the facts of the case as about the task of making sense of statutes in the abstract. As Professor Gardner wrote, the proper basis for selecting principles of interpretation for a particular case is that one principle or combination of principles leads to an “all-round better judicial decision”.⁵²

It seems, then, that “parliamentary intention”, so far as it is concerned with the meaning, rather than authority, of legislation, must be shorthand for the interpretation of legislation which the judge happens to find most helpful in a particular case. Legal principles and doctrines can be developed in order to give judges the freedom to make those assessments. For example, in administrative law there used to be an orthodox distinction drawn between “directory” and “mandatory” conditions for the exercise of a statutory power. Breaching a mandatory condition made the resulting act invalid, but breach of a directory condition was not fatal to the act. The distinction was similar to that between jurisdictional and non-jurisdictional errors but, as Professor Stephen Bailey has pointed out, it states a conclusion as to the effect of non-compliance rather than criteria for reaching that conclusion.⁵³ It has been said that “in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act”,⁵⁴ and that the effect on the rights of the subject on particular, concrete facts have to be considered, possibly leaving courts with a spectrum of possible outcomes, complete validity and total invalidity being at opposite ends of the spectrum. The modern approach is to look at the purpose of statutory procedures and “whether an intention should be attributed to the legislature that non-compliance with such procedures should render [the process] a nullity, irrespective whether it may have occasioned potential unfairness or prejudice”.⁵⁵ As Professor Bailey puts it, “At one end

consequences let them to complicate the idea of “premises” considerably.

⁵² Gardner, *op. cit.*, n. 13 above, at 44.

⁵³ S. H. Bailey, ‘Grounds for judicial review: due process, natural justice, and fairness’, in David Feldman (ed.), *English Public Law* 2nd edn (Oxford: Oxford University Press, 2009), para. 15.96.

⁵⁴ *Howard v. Boddington* (1877) L.R. 2 P.D. 203 at 210-211 *per* Lord Penzance.

⁵⁵ *Director of Public Prosecutions of the Virgin Islands v. Penn* [2008] UKPC 29 *per* Lord Mance at [18].

of the spectrum, flagrant non-compliance with a fundamental obligation may simply entitle the person affected to ignore the ensuing decision; at the other end, the defect in procedure may be so trivial that the authority can safely proceed. In a great number of cases, possibly the majority, it will be necessary for the matter to be resolved by the courts.”⁵⁶ The focus should be on the consequences of non-compliance, in which regard references to Parliament’s intention can obscure rather than illuminate the issues, as Toulson L.J. pointed out in the passage already noted.⁵⁷

If we discard the idea of parliamentary intention as to the meaning of legislation as more than a metaphor, how do we decide how to interpret legislation? Contrary to the view of Professor Goldsworthy, it does not depend on judicial discretion or randomness. Interpreters make choices in the light of constitutional principles which include that of non-arbitrariness, or as it is sometimes misleadingly called the “principle of legality”.⁵⁸ This is particularly important in relation to constitutional legislation, affecting the structure and working of state institutions.

3. Does constitutional legislation require special techniques of interpretation?

As Professor Barak pointed out in the passage quoted earlier, a constitution “is at once philosophy, politics, sociology, and law”, not to mention history. We must bear that in mind when we interpret it.⁵⁹ Constitutions tell a story about the state, paint a picture of its unity, and try to stimulate loyalty to it. The story and picture appear descriptive, but often present the state as the drafters would like it to be, not as it was and is.

Descriptions are often aspirational prescriptions disguised as (often inaccurate)

⁵⁶ Bailey, *op. cit.*, n. 53 above, at 713, para. 15.101.

⁵⁷ *R. (M.) v. Hackney L.B.C.* [2011] EWCA Civ 4, [2011] 1 W.L.R. 2873, CA, at [94]; text at n. 29 above.

⁵⁸ See Lord Steyn in *Pierson*, cited above, n. 30. I regard the name as misleading because it is both wider and narrower than the true principle of legality, which is that a public official must be able to point to authority in positive law for interfering with a legal right or interest.

⁵⁹ Barak, *loc. cit.*, n. 2 above. See also *R. (Governors of Brynmawr Foundation School) v. Welsh Ministers and Blaenau Gwent County Council* [2011] EWHC 519 (Admin) at [72]-[73] *per* Beatson J.

historical or sociological assertions. It would be dangerous for historians to take them too seriously as factual assertions, but the lasting quality of a constitution depends partly on how consistently citizens and officials view their history and the contemporary state through the prism of the constitution and accept historical distortion and exhortation as deep truth. In this respect, constitutional provisions may be like parables, or morality tales. Ordinary legislation is typically more prosaic and straightforwardly prescriptive, with more concrete and limited objectives, than a constitution.

There is, however, no clear water between them. In Israel, Basic Laws are procedurally and (apart from their name) formally just like ordinary laws passed by the Knesset.⁶⁰ This need not be the case. Some legislation, particularly constitutional legislation, shares some of the broader functions of constitutions. Some constitutions are highly detailed and prescriptive, and lack rhetorical flourish. For example, the Constitution of the Commonwealth of Australia is contained in an Act of the UK Parliament, the Commonwealth of Australia Constitution Act 1900, which has no preamble; the long title is merely “An Act to constitute the Commonwealth of Australia”. The Constitution itself begins prosaically, “The Constitution of the Commonwealth shall be as follows”. This is an example of a constitution which takes its form and tone from the legislative tradition which produced it. Even in more aspirational, codified constitutions particular provisions may be more like legislation than a typical constitution, tightly drafted to reflect a carefully negotiated compromise between political standpoints. The Constitution of the Fifth Republic in France, which opens in an unmistakably rhetorical, idealistic manner, has provisions about the process for enacting the budget which are of very detailed and prosaic. Recognising

⁶⁰ HCJ 4908/10 *Bar-On v. Knesset*, SC of Israel sitting as the High Court of Justice, judgment of April 7, 2011, accessible in Hebrew at <http://elyon1.court.gov.il/files/10/080/049/n08/10049080.n08.htm>. I am grateful to Dr Anat Scolnicov for referring me to this decision.

that, the *Conseil constitutionnel* strictly interprets these provisions, in contrast to its approach to (for example) the application of constitutional rights.⁶¹

Constitutions and constitutional legislation thus both contain different kinds of provisions. Whilst core constitutional rules shape the state institutions, and are paradigms of Hart's secondary rules, not every rule found in a constitutional instrument is of that kind. For example, a description of the national flag (e.g. in the 2008 Constitution of the Maldives) is not a secondary rule, if indeed it can be described as a rule at all. Nor need the provisions be consistent. The contents of a constitutional document represent political choices. A constituent body may decide to include various provisions which are symbolically or rhetorically important or are descriptive of the state or relate to the behaviour or rights of citizens rather than, or as well as, managing the structure and conduct of state institutions.

Sometimes constitutional provisions are simply absent, because drafters failed to negotiate an agreement, so decided to leave an issue for politicians or judges to resolve later. Perhaps the best known example of this is the silence of the Constitution of the USA. as to whether federal courts should have power to ensure that the Congress and the President do not exceed the boundaries of the powers allocated to them by the Constitution. This is rare in ordinary legislation. Even more unusual in ordinary legislation is the phenomenon whereby the way a constitutional text operates changes completely over a period of time, without any change in the text, on account of an overlay of conventions and sub-constitutional legislation. As Dicey observed, this was the fate of the constitutional rules in Article II of the Constitution of the USA concerning the method of electing the President within less than a century of the making of the Constitution.⁶²

⁶¹ I am grateful to Professor John Bell for this point, and to Ms Se-shauna Wheatle for drawing my attention to the support for this approach in *Minister of Home Affairs v. Fisher* [1980] A.C. 319, P.C., at 328-329 *per* Lord Wilberforce and *Boyce v. R.* [2004] UKPC 32, [2005] 1 A.C. 400 at [28]-[29].

⁶² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn (ed. E. C. S. Wade) (London:

Despite differences between constitutions, and between types of provision within each constitution, diverse jurisdictions have shown considerable consistency in their selection of principles to guide the interpretation of constitutional instruments. First, constitutions are to be interpreted with the aid of their preambles, which are usually treated as forming an integral part of them.⁶³ Secondly, a democratic constitution must be interpreted to “foster, develop and enrich”, rather than undermine, democratic institutions.⁶⁴ In particular, interpreters should give scope for a self-governing entity to make its own decisions, including decisions about the terms on which democratic institutions operate, subject to limits imposed by the constitution.⁶⁵ Thirdly, constitutions are not to be interpreted with mechanical literalness. Interpreters must take account of the context, ultimate object, and textual setting of a provision,⁶⁶ bearing in mind that “the question is not what may be supposed to have been intended [by the framers], but what has been said”.⁶⁷ Fourthly, according to at least some judges, constitutions are not to be interpreted as permitting institutions, including legislatures, to act in a way which “offends what I may call the social conscience of a sovereign democratic republic”, because law must be regarded by ordinary people as “reasonable, just and fair”.⁶⁸

Macmillan, 1959), 28-30.

⁶³ See, e.g., *His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala* [1973] Supp. S.C.R. 1, SC of India; *Charan Lal Sahu v. Union of India* [1990] 1 S.C.R. 613, SC of India; *J. M. Puthuparambil v. Kerala Water Authority* A.I.R. 1990 S.C. 228, SC of India; *Popular Democratic Movement v. Electoral Commission* [2011] SCCA 26, C.A. of Seychelles, noted by Justice Fernando, one of the judges in the case, at

<http://www.iconnectblog.com/2012/02/constitutional-jurisprudence-in-paradise-seychelles/>

⁶⁴ See e.g. *Fatehchand Himmatlal v. State of Maharashtra* [1977] 2 S.C.R. 828, SC of India, and (1981) 22 Guj. L.R. 206, SC of India; *Popular Democratic Movement v. Electoral Commission*, n. 63 above, CA of Seychelles.

⁶⁵ *Edwards v. Attorney General for Canada* [1930] A.C. 124, PC, at 136 per Viscount Sankey L.C.

⁶⁶ *Catholic Commission for Justice and Peace v. Attorney General of Zimbabwe* 1993 (4) S.A. 239 at 252 per Gubbay C.J.; *Minister of Home Affairs v. Fisher* [1980] A.C. 319 at pp. 328-329 per Lord Wilberforce; *Dato Menteri Othman bin Baginda v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 Malay. L.J. 29 at 32 per Raja Azlan Shah; *Meerdeka University v. Government of Malaysia* [1981] 2 Malay. L.J. 356 at 386-387 per Abdoolcader J.; Yvonne Tew, *Renegotiating Constitutional Adjudication: A Minimum Core Approach for Malaysia and Singapore*, unpublished PhD thesis, University of Cambridge 2012, 39; Andrew Harding, ‘The Westminster model constitution overseas: transplantation, adaptation and development in Commonwealth states’ (2004) 4 O.U. Cth L.J. 143-166.

⁶⁷ *Edwards v. Attorney General for Canada*, n. 64 above, at 137 per Viscount Sankey L.C.

⁶⁸ *State of West Bengal v. Anwar Ali Sarkar* [1952] S.C.R. 284, SC of India, at 365, 367 per Bose J., and H. H.

Nevertheless, these principles must be qualified by the recognition of differences between constitutions. We must also take account of the difference between different kinds of constitutional provisions. Once we understand that any constitutional document is likely to be an amalgam of different kinds of provisions, we can see why at least some of those provisions might have to be read in a different way from primary rules aimed at citizens. No single interpretative technique is appropriate for all provisions. In addition, we need to recognise that the line between constitutions and constitutional legislation is soft, not hard. Similar techniques may have to be applied to both. A good interpreter will choose a technique suited to the provision and the circumstances of the case, to give the best chance of leading to a decision which is both legally acceptable and practically workable. The choice of interpretative techniques depends partly on factors outside the text.⁶⁹

For example, the natural process of enriching the text in response to disputes may result in there being less and less need to invoke the “ordinary meaning” principle. Again, the “mischief” rule requires us to read the provisions in the light of the problem to which they were a response. Constitutional provisions establishing the state and its main institutions will often not be a response to a particular mischief. A state’s institutional design is more likely to reflect a political theory and idea of good government, as in the USA., or to be a result of gradual accretion, as in the UK, than to be a reaction to an identifiable problem. On the other hand, problems arising in the pre-constitutional period may have directly influenced the choice of political theory, and so have indirectly affected the distribution of responsibilities between institutions, the powers allocated to each institution, their relationships with each other, their powers, and forms of accountability. This was true of West Germany and Japan after World War II, South Africa after apartheid, and Bosnia and Herzegovina after the 1992-95 war.

Maharajadhiraja Mahadav Rao v. Union of India [1971] 3 S.C.R. 9, SC of India; *Popular Democratic Movement v. Electoral Commission*, n. 63 above (Seychelles).

⁶⁹ David Feldman, ‘Factors affecting the choice of techniques of constitutional interpretation’, in Ferndinand Mélin-Sucramanien (ed.), *L’Interprétation Constitutionnelle* (Paris: Les Éditions Dalloz, 2005),

It would be perverse not to consider the social and political evils of Nazism, apartheid, and irredentist “ethnic cleansing” when interpreting such provisions in (respectively) Germany’s *Grundgesetz*, South Africa’s 1996 Constitution, and Bosnia and Herzegovina’s 1995 Constitution. This applies even more strongly to amendments to the constitution: constitutional amendments in the USA. regarding the post-bellum settlement, and conventions in the United Kingdom relating to the introduction of devolution, show that one can sometimes identify recent or current problems as the “mischief” which generates a new constitutional law or understanding.

4. A case study

To illustrate the complexity and indeterminacy of all this, let us examine a case from Northern Ireland of undeniably constitutional significance. *Robinson v. Secretary of State for Northern Ireland*⁷⁰ concerned the Northern Ireland Act 1998, which devolved executive and legislative powers in respect of certain matters in Northern Ireland from Westminster and Whitehall to Belfast. The Act established a directly elected Legislative Assembly and an executive led by a First Minister and Deputy First Minister. Section 16(1) and (8) provided:

(1) Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the deputy First Minister.

...

(8) Where the offices of the First Minister and the deputy First Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with this time.

They had to be elected as joint candidates by a majority of the members of the Legislative Assembly, and that majority had to include majorities of both the designated

pp. 119-138.

⁷⁰ [2002] UKHL 32, [2002] N.I. 390, HL.

Unionist members and the designated Nationalist members voting.⁷¹ Section 32(3) provides, “If the period [of six weeks] ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly.”

In July 2001 the First Minister resigned. After several periods of suspension starting in August 2001, devolved government was restored on 23 September 2001. It then became necessary for the Assembly to elect a new First Minister and Deputy First Minister within six weeks. This proved impossible, because a majority of the designated Unionist members did not support the candidates, Mr David Trimble (Unionist) and Mr Mark Durkan (Nationalist). In November 2001 the Alliance Party, a cross-community party not previously linked to either the Unionist or the Nationalist caucus, agreed to re-designate themselves as Unionists so that their members could help to provide a majority among designated Unionist members. On 6 November, outside the six-week period, Mr Trimble and Mr Durkan were elected. Members of the Alliance Party then disassociated themselves once more from the Unionist caucus. The Secretary of State thereupon exercised his function of setting a date for the election in accordance to his statutory duty by ordering that the next election should take place on the date when it would have been held in any case under section 31(2) of the Act (1st May 2003).

A leading Unionist challenged the validity of this election. He argued that section 16 empowered the Assembly to elect a First Minister and a Deputy First Minister within six weeks of the vacancy, and not otherwise. When six weeks had passed without an election, the Assembly lacked competence to elect them, and the Secretary of State was obligated under section 32(3) to name a date for elections to a new Assembly. The claimant relied on the ordinary meaning of the words of the Act. However, the claim was rejected by Kerr J. (as he then was) at first instance, by a majority of the Court of

⁷¹ Northern Ireland Act 1998, s. 16(1), (3).

Appeal of Northern Ireland, and by a majority of the House of Lords (Lords Bingham, Hoffmann and Millett; Lord Hutton and Lord Hobhouse dissented).

The case turned on the correct approach to interpreting the statute. Literal interpretation played a limited role, partly because it was not clear what the literal meaning was, and partly because any “ordinary” meaning of the provisions led to results which at least some Law Lords found absurd. Lord Bingham said that, as the Act was in effect a constitution for Northern Ireland, it “should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.”⁷² What, then, were those values and purposes?

“The 1998 Act ... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions...If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.”⁷³

Constitutions cannot take account of every eventuality. Often

“matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to

⁷² [2002] UKHL 32, [2002] N.I. 390, HL, at [11].

⁷³ [2002] UKHL at [10].

differing and unpredictable events in a way which the application of strict rules would preclude.”⁷⁴

Knowing that the purpose of the Act as a whole was to achieve peace through power-sharing thus did not resolve the problem of deciding what to do when arrangements for establishing power-sharing broke down. Would the ordinary meaning of the legislation deal with the issue? The Assembly’s duty to elect a First Minister and Deputy First Minister within six weeks seemed mandatory rather than directory.⁷⁵ Yet there was authority for asking two separate questions. First, did the legislature intend the person making the determination to comply with the time provision? All the Law Lords thought it plain that Parliament had intended the Assembly to comply with the time limit. It was obligatory, not discretionary. Secondly, did the legislature intend that failing to meet the deadline would deprive the Assembly of jurisdiction, and render any subsequent election null and void?⁷⁶

These questions required judges to seek out the “intention of the legislature”. But, as noted earlier, that is an artificial construct; the judge has to decide what intention should be imputed to the legislature. This is demonstrably true of sections 16, 31 and 32 of the Northern Ireland Act 1998. The political and legal consequences of the situation facing the House of Lords in *Robinson* had not been thought through in any detail during the legislative process. There had been no time. The Bill implemented the Anglo-Irish Agreement of Good Friday, 1998. Introduced to the Commons on 15 July, it went through all its Commons stages by 31 July. Second Reading in the Lords was on 5 October, after the summer recess. There was a five-day Committee Stage and a three-day Report Stage, most of which were occupied with Government amendments,

⁷⁴ [2002] UKHL at [12].

⁷⁵ [2002] UKHL at [78] *per* Lord Millett: “This is the effect of the word ‘shall’: see *R. v. Secretary of State for the Home Department, ex parte Jeyanthan* [2000] 1 W.L.R. 354, 358 *per* Lord Woolf: ‘the requirement is never intended to be optional if a word such as “shall” or “must” is used.’”

⁷⁶ *Wang v. Commissioners of Inland Revenue* [1994] 1 W.L.R. 1286, 1296; [1995] 1 All E.R. 367, 377, PC, *per* Lord Slynn of Hadley. See also *London & Clydeside Estates v. Aberdeen District Council* [1980] 1 W.L.R. 182, H.L., at 189-190 *per* Lord Hailsham L.C.

necessitated by the fact that the Bill had been drafted in a hurry and new problems were constantly being spotted. Its Third Reading in the Lords was on 17 November; the Commons accepted Lords' amendments on 18 November; royal assent followed on 19 November, immediately before Parliament was prorogued at the end of its 1997-98 session. Furthermore, debate in both Houses was characterised by disagreement between political sceptics and optimists over the peace process, concern about the rushed legislative procedure, and frustration that so many of the Bill's details could not be amended because of the need to give effect to the Good Friday agreement. The process did not allow careful scrutiny of the Bill's technical details, let alone any attempt to anticipate and cater for all political contingencies that might arise under the new power-sharing agreement. As a result, parliamentarians had no opportunity to turn their minds to the issue in *Robinson*. Had they done so, it is impossible to say what consensus, if any, would have emerged.⁷⁷ Their Lordships in *Robinson* were, therefore, seeking a legislative intention which was imaginary rather than real, constructive rather than actual, objective rather than subjective.

Lord Bingham thought that it would have been surprising had Parliament intended that after the end of the six weeks the Assembly would have no power to act, and the Secretary of State would immediately have to start the process of dissolving the assembly and setting a date for a new election. First, "...in the context of section 16(1), ... little more than seven weeks would have elapsed since the last poll (section 31(4)) and there could be no assurance that a further poll would procure a different result". Secondly, it "would have precluded the possibility of negotiation and compromise to find a political solution to an essentially political problem, contrary (as I would suggest) to British political tradition". Thirdly, it "would have deprived the Secretary of State,

⁷⁷ See now Northern Ireland Act 1998, ss. 16A, 16B and 16C (substituted for s. 16 by the Northern Ireland (St. Andrews Agreement) Act 2006, s. 8(1)), and ss. 31 and 32 (as amended by the 2006 Act).

acting as the non-partisan guardian of this constitutional settlement, of any opportunity to wait, even briefly, for a solution to the problem to emerge”.⁷⁸

Indeed, the Act had not expressly required the Secretary of State to start to dissolve the assembly after six weeks, nor had it imposed an absolute limit on the period during which the Assembly could make an election. Lord Hoffmann noted that even the Assembly’s power to elect a First and a Deputy First Minister within six weeks was not expressly set out in the Act. Instead, it fell to be implied, because section 16(1) and (8) had clearly been drafted on the assumption that the Assembly would have that power. “So there is no reason why it should not continue for as long as the Assembly remains in being and there is a vacancy.”⁷⁹

From a purposive viewpoint, Lord Hoffmann pointed out that to treat the six-week period as allowing no leeway would have contradicted the most basic purpose of the Belfast Agreement –

“namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for political judgment in dealing with the deadlocks and crises which were bound to occur.... The long title of the Act is ‘to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland ...’. According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the

⁷⁸ [2002] UKHL 32, [2002] N.I. 390, HL, at [14].

⁷⁹ [2002] UKHL at [24] *per* Lord Hoffmann.

Convention and the Federalist Papers are the background to construing the Constitution of the United States.”⁸⁰

For the majority, then, what might be thought of as a literal, or ordinary meaning, interpretation would have produced a result which, in the context of the Belfast Agreement, would have been absurd. Lord Hutton (a former Lord Chief Justice of Northern Ireland), with whom Lord Hobhouse of Woodborough agreed, dissented. Lord Hutton took a more literal approach than the majority, but still relied on what he judged to be absurdity of consequences:

“Where a statute gives power to a statutory body to perform a certain act within a specified period the normal rule is that the body has no power to perform that act outside the period, and I see nothing in the provisions of the Act pointing to a different conclusion....

“...if the respondents’ argument be correct it would result in unusual consequences which were never intended by Parliament. If the Assembly does not elect a First Minister and deputy First Minister within the six weeks’ period and the Secretary of State then proposes a date for the poll and an Order in Council fixes that date, on the respondents’ argument the Assembly could elect a First Minister and deputy First Minister the day before its dissolution. I do not think that Parliament intended the Assembly to have such a power....

“What has happened in this case, where the Secretary of State has fixed the date as being the date when a poll would have taken place under section 31 on the normal expiration of the life of the Assembly, appears to be a procedure which is contrived and artificial, particularly as the side note to section 32 refers to ‘Extraordinary elections’ but the Secretary of State has proposed the date on which an ordinary election

⁸⁰ [2002] UKHL at [30], [33] *per* Lord Hoffmann.

for the Assembly would take place under section 31. Moreover on the respondents' argument if the Assembly failed under section 16(1) to elect a First Minister and deputy First Minister within six weeks of its first meeting, the Secretary of State would be entitled in some circumstances to propose a date more than three years beyond the expiration of the six weeks' period. I do not think that Parliament intended that section 32(3) could operate in that way and that the Secretary of State should have such a power."⁸¹

This shows that neither a search for the ordinary meaning of the provisions nor inquiring into legislative intention can produce a definitive answer in hard cases. The meaning of even apparently simple provisions can lead to irreconcilable differences.⁸² Legislative intention in relation to an unforeseen problem is, and should be, merely a veneer of constitutional theory applied over a search for a sensible, workable result in today's circumstances. It can be an area of profound disagreement among judges, rather than an area of consensus among legislators. Both majority and dissenting Law Lords in *Robinson* thought that they correctly understood what Parliament must have, or could not have, intended.

Deciding when to employ the proviso to the "golden rule", displacing the ordinary meaning of a provision, is equally problematical. In order to decide whether provisions produce absurd or arbitrary results, bringing the principle of legality into play, one has to consider the social and political context in which they were enacted. It may also depend on whether one is prepared to move from an ordinary meaning whenever it seems ill-suited to achieving the imputed purpose, or only when no reasonable justification can be found for the outcome if one applies the ordinary meaning. In *Robinson*, Lord Hoffmann adopted the first approach, and Lord Hutton the

⁸¹ [2002] UKHL at [54], [58], [59] *per* Lord Hutton.

⁸² See also Lord Dyson's discussion of *R. (Electoral Commission) v. City of Westminster Magistrates' Court* [2010] UKSC40, [2011] 1 A.C. 496, SC, in 'The shifting sands of statutory interpretation', n. 12 above, at 19 *et seq.*

second. Both justified their arguments by reference to different conceptions of the proper, constitutional role of courts when interpreting constitutional provisions, and each generated results that adherents of the other approach regarded as absurd or arbitrary.

5. Conclusion

The implication of this is that the search for purpose in constitutional provisions has to take account of purpose at a high level of generality (as Lord Bingham said, bringing peace to Northern Ireland through political power-sharing) as well as, or in preference to, concrete purposes of particular provisions. It cannot be an inquiry into the actual thoughts, expectations or purposes of legislators, and the search for a literal or ordinary meaning of the text cannot ignore the context of the legislation, including the needs and expectations of those who have to make the system work. Language used by the drafters of legislation in the past and attempts to identify their historical purposes should not be allowed to preclude a sensible outcome to today's problems. This, however, is not restricted to constitutional legislation. It applies to all legislation, and still more important when the legislation has constitutional status; issues are likely to be of greater national significance, and it is likely to be more difficult to achieve consensus on how new legislation is to be framed than it is to construct a parliamentary majority for amending ordinary legislation. The "golden rule" is particularly important in relation to legislation with constitutional significance, but is applicable generally to allow courts to produce sensible results when applying any legislation.
