THE CHANGING APPROACH TO THE INTERPRETATION OF STATUTES

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I am honoured to have been asked to present this paper at a conference to celebrate the career of Sir Ivor Richardson. I take particular pleasure, in that Sir Ivor is graduate of Canterbury, my own University.

I shall speak on statutory interpretation and boldly, probably foolishly, try to chart trends as I see them. I call myself "foolish", because one will never be able to say that all interpreters take the same approach to all statutes. For every trend that one observes, there will be exceptions. Being a pragmatic business, statutory interpretation is not susceptible of a coherent philosophy. But I think the *trends* are there, and I shall try to explain them. Sir Ivor has played a significant part in them. If pursued, they lead to important questions about the intention of Parliament, and the balance between judges and Parliament.

Let me enter one more caveat. I shall be talking about the interpretation of statutes by the *courts*. Almost by definition, these are the difficult cases where there are competing arguments about the proper interpretation. I would like to believe that in many situations, which come before us in our day-to-day business, the meaning of the statute is so clear that there is no room for argument. Perhaps unfashionably, I think words often do convey a perfectly clear and unambiguous meaning. Indeed we could not communicate with each other if it were not so.

But let us turn to the cases that come before the courts. What I might describe as the old style of interpretation persisted to at least the middle of the twentieth century. It was marked by a literalism, which placed great store on the dictionary meanings of words and the rules of grammar. There were many mechanical rules which went by Latin names: *ejusdem generis*, *expressio unius*, etc. New Zealand cases cited much English authority for these rules, and made frequent reference to the standard English works on interpretation such as Maxwell and Craies. Hand in hand with this literalism went a reluctance to go outside the four corners of the Act. Extrinsic evidence was not much relied on, except in

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cases of real uncertainty. Some sorts of extrinsic evidence were precluded altogether: I refer of course, to such things as reports of Parliamentary proceedings. There was, in other words, a view that the intention of Parliament was to be found solely in the words of the Act, and that those words should be allowed to speak for themselves. In 1884 Stephen J said, "The best way of finding out the meaning of a statute is to read it and see what it means".[1] In 1949, a member of the House of Lords agreed with him.[2]

However cutting across this literal approach was another. There was a series of so-called "presumptions" which resulted in many types of Act being narrowly construed. Among them were penal statutes, taxing statutes and statutes affecting property rights. But, this was only part of it. There was, in fact, a long list of fundamental values which the courts were determined to protect: among them the right of access to the courts, the right to legal advice, the sanctity of private property and the maxim that you cannot take advantage of your own fault. The protection of those values at times led the courts to an interpretation that was not "literal" but was strained, even distorted. It was held, for example, that the term "cattle" did not include a bull,[3] and that a rock used to break a window was not an offensive weapon.[4] Most (but not all) of these values were about the protection of the individual, and the Judges were most unwilling to see them abridged by legislation. They construed statutes in a way that did the least possible damage to them. Sometimes they were called principles of legality, and sometimes were said to constitute an "ideal constitution"[5] and a judicial "bill of rights".[6] There was even a view that the common law itself was founded upon such principles, and that wherever possible statutes which intruded upon the common law should be construed in conformity with it. The early writer Dwarris, citing authority, gave this insight into its origins:[7]

> The best interpretation of a statute … is to construe it as near to the rule and reason of the common law as may be, and by the course, which that observes in other cases … When we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law, as the perfection of all reason and the best birthright and noblest inheritance

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1 *Vallance v Falle* (1884) 13 QBD 109, 112 (QB) Stephan J.

2 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 410 (HL) Lord du Parcq.

3 *Ex parte Hill* (1827) 3 C & P 225 (CP).

4 *Smaje v Balmer* [1965] 2 All ER 248 (EWCA).

5 David L Keir and Frederick H Lawson *Cases in Constitutional Law* (4 ed, Oxford University Press, London, 1965) 10.

6 Lord Devlin "Judges as Lawmakers" (1976) 39 MLR 1, 14.

7 Sir Fortunatus Dwarris *A General Treatise on Statutes: Their Rules of Construction, and the Proper boundaries of legis* (2 ed, W Benning, London, 1848) 564.

> of the subject, we cannot be surprised at the great sanction given to this rule of construction, and its careful observance.

As Justice Harlan Stone put it, statute was sometimes treated as "an alien intruder in the house of the common law".[8]

In other words, the judges were gatekeepers for whom interpretation was a lot more than just finding the intention of Parliament via the meaning of the statutory words. This, I am sure, was one reason why Parliamentary debates were excluded from consideration. What was to be found in them was what ministers and members of Parliament thought, rather that the "true" interpretation which was the business of the judges.

Lord Wilberforce said as much as late as 1975:[9]

> It is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved upon the judges from the earliest of times is an essential part of the constitutional process by which subjects are brought under the rule of law – as distinct from the rule of the King or the rule of [P]arliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.

Not only did these features of early interpretation – literalism and the protection of values – run across each other, both of them could lead to the non-attainment of the purpose of the statute. Literalism could result in a myopic attention to words which was blind to the wider purpose; and the value-based approach, concentrating as it did on the rights of the individual, could frustrate the purpose of legislation passed for the wider public good. This was pointed out in an important article in 1963 by the New Zealand Law Draftsman Denzil Ward.[10] He regretted the fact that the purposive approach mandated by section 5(j) of the Acts Interpretation Act 1924 was so often ignored.

Since then, however, there has been an inevitable shift to a purposive approach. These days that has to be so. In a modern State, where legislation is the tool by which government policy is implemented, it is simply not sensible to persist with styles of interpretation that can result in the courts frustrating that policy. Interpretation should facilitate the implementation of policy rather than obstructing it. The State should not always be regarded as the enemy.

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8 Harlan F Stone "The Common Law in the United States" (1936) 50 Harv L Rev 4.

9 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A/G* [1975] AC 591, 629 (HL) Lord Wilberforce.

10 Denzil Ward "A Criticism of the Interpretation of Statutes in New Zealand Courts [1963] NZLJ 293.

This simple imperative, now contained in section 5(1) of the Interpretation Act 1999, is continually followed. It has had a number of consequences.

First, it has weakened some of the old presumptions. Penal Acts are no longer routinely construed narrowly in favour of the individual; neither are tax Acts. Nor is there such a reverence for the common law; if an Act is obviously a reform Act passed to get rid of a tract of common law deemed to be unsatisfactory it will be interpreted to achieve that end. (However, it would be idle to suppose that the relationship between statute and common law is a simple one. Particularly in the case of a statute which amends part of a coherent topic like the law of contract, there is likely to be constant argument as to how much of the common law was meant to go and how much to stay. Familiarity and continuity often favour the staying.)

Secondly, bad drafting is not allowed to frustrate an Act's purpose. An inappropriate use of words by the drafter should not stand in the way of a sensible outcome if the intent underlying those words is nevertheless clear. As Mrs Malaprop and Dr Spooner demonstrate the wrong words can sometimes convey the right meaning.

Thirdly, many cases on interpretation do not just involve deciding what the words of the Act mean; they also involve deciding how they should be *applied* to the facts of the case in question. A large number of cases on interpretation involve a set of facts that the drafter simply did not anticipate, and the question is whether that set of facts is covered by the statutory provision in question. The strongest contribution of the purposive approach has been to allow words to be given strained or unusual meanings so that they can be held to extend to the facts in question when the purpose of the legislation makes that desirable. Such an approach has enabled courts recently to hold that a container of sweets resembling a baby's bottle was a "toy";[11] and that "logs" (of timber) included cut and partly-processed timber.[12] Proponents of a "natural meaning" theory of interpretation may find some difficulty with these cases.

For myself, I do not find a "natural meaning" rule particularly helpful in cases like this. These cases are not about "primary" and "secondary" meaning: they are about the areas of vagueness at the edges of all words. What a purposive approach does is to cope with the difficulty that however careful drafting may be, no drafter can ever foresee and provide exactly for everything that is going to happen in the world of fact. Drafters need a little help from the courts in making sure that the Act works effectively.

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11 *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103, 404 (HC).

12 *Lindsay & Dixon Ltd v Ministry of Forestry* (17 September 1997) High Court, Invercargill, AP 16/97.

Fourthly, and this is really just a concomitant of the third factor, the purposive approach allows statute to keep pace with the times. It allows, for example, elderly statutes referring to "documents" to be applied to computer programmes;[13] and statutes using the word "photograph" to be applied to Internet images.[14] The smooth progression of our law would be impeded if this were not the case. Parliament would have to be constantly amending and updating legislation. There are numerous examples of such "ambulatory" or "updating" interpretation, including a number of very striking cases in the House of Lords.[15]

Hand-in-hand with the purposive approach go two other things. The first is a concentration on the "scheme of the Act". Sir Ivor has emphasised this in many leading judgments. He has described scheme and purpose as "the twin pillars of modern interpretation".[16] I think the term "scheme" is not consistently used by everyone, but at the very least it means that the provision in question must be read in the context of the Act as a whole. Only in that way can the interpreter get inside the mind of the legislator, and fully understand the philosophy and theme of the legislation. It is common nowadays for a judgment to set out in full not just the provision under interpretation but a number of the Act's other provisions. The art of interpretation lies in abandoning one's own prejudices and preconceptions and fully appreciating the direction of the legislature's thinking.

The second concomitant of the modern purposive approach is the increased scrutiny of material extrinsic to the statute, to better understand it.

First, there is what I might describe as contextual material, or, to use a fashionable term, the "factual matrix". It has always been admissible to some extent, but in the past tended to be an adjunct to the "mischief" rule that was only resorted to if literal interpretation produced no clear result.[17] Nowadays it is much more readily admitted.

Of course it can help in understanding a statute to examine the social and economic facts which led to its passing, and the social and economic context in which it must now operate. Sometimes that context is general knowledge. But some statutes are of a more specialist kind where the context in which they must operate requires evidence and

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13 *R v Misic* [2001] 3 NZLR 1 (CA).

14 *R v Fellows* [1997] 2 All ER 548 (HL).

15 See for example *R v Ireland* [1998] AC 147 (HL); *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (HL); *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

16 Rt Hon Sir Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Aust Tax Forum 3.

17 For example, *Johnstone v Police* [1962] NZLR 673, 674 (CA).

explanation to sharpen our understanding. I refer, for example, to the Commerce Act 1986. A proper understanding of the concepts in that Act can only be obtained after the reading of much literature, both national and international. The same is true of the Resource Management Act 1991. You cannot read an Act like that in a vacuum. Sir Ivor has been one Judge who has openly advocated the presentation to the court of contextual material in cases like this.[18]

The desirability of this goes without saying. Better-informed decisions are likely to be more correct decisions. Yet it would be idle to ignore the difficulties. Too much material can confuse, and undesirably lengthen court proceedings. An even greater danger can lie in members of one profession trying to acquire expertise in another. To inform a court properly of the social and economic background to a specialist piece of legislation can require much time, skill and knowledge on the part of the advocate. And there is always the danger that if the advocate is outside his or her own area of expertise the information presented may be partial or even inaccurate. The difficulties of venturing into unfamiliar territory occasionally receive interesting expression in the Privy Council. There have been occasions where their Lordships, rather than entering into a thorough examination of New Zealand history and context, have preferred to decide a case by old-fashioned reliance on the dictionary meaning of the words in the statute itself.[19] There is, I think, simply no answer to this paradox. Contextual material is desirable; to acquire it fully and accurately may be very difficult indeed. Similar difficulties beset the interpretation of contracts in specialist areas such as the construction industry. To become thoroughly acquainted with trade practice and "the matrix of fact" surrounding such contracts is a formidable task.

Secondly, there has been a revolution in the admission of Parliamentary material. Once it was totally excluded. Now it is regularly admitted.

Over the past 15 years or so in New Zealand, and more recently in England, it has become a common occurrence for counsel to cite, and courts to refer to, extracts from Parliamentary debates, explanatory notes to Bills, amendments to Bills, and, more recently, reports of select committees. Most commonly they are used to provide contextual

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18 Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 51-52; *Williams v Attorney-General* [1990] 1 NZLR 646, 681 (CA) Richardson J.

19 For example, *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257, 262 (CA) Richardson J:

> Their Lordships fully recognise the great importance which the Judicial Committee of the Privy Council should always attach to the opinion of Judges exercising jurisdiction in a Commonwealth country in any matter which may reflect their knowledge of local conditions. Yet, when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation.

background and evidence of the genesis of the Bill in question. But sometimes our courts are using them for statements by the policy makers as to the purpose of a piece of legislation and the intent behind it, and sometimes even for evidence of a specific intention about the problem before the court. In the not-so-distant past that would have been regarded as unthinkable.

No doubt time is sometimes wasted by reference to proceedings that turn out to be unhelpful. Indeed a member of the House of Lords has stigmatised the newfound power as an expensive luxury,[20] and there has been a recent attempt by the House of Lords to confine its use.[21] One also has to be alive to the dangers of a Minister, or an official, "planting" statements with the intention that they should influence interpretation. And particular care must be taken to ensure that statements of policy made early in the process remain reliable after amendments to the Bill in select committee or at committee of the whole stage; in the new MMP environment that risk is greater than ever before. However quite often reference to Parliamentary materials does produce something of value. Occasionally judges expressly acknowledge how helpful they have found, say, a statement by a Minister in the House.[22] Overall, the ability to have resort to Hansard has been much more productive than the pessimists predicted.

But it is important not to misconstrue what is going on here. The statements found in these documents are not the word of Parliament. Parliament's authority attaches only to the words of the legislation that it passes. It is therefore not really true to say, as sometimes is said, that one is using these Parliamentary documents as direct evidence of the intention of Parliament. But it is clearly relevant and helpful to know what the proponents of a Bill or clause, normally but not always the government, and those responsible for drafting it, intended to achieve by it. The intentions and purposes of those most directly responsible for the legislation cannot be dismissed as having no value. There is no reason why the courts should not use their statements as a tiebreaker in a case of real ambiguity, or to add persuasive force to an interpretation to which the court is tending for a variety of reasons. (Indeed quite often decisions on statutory interpretation are arrived at by a number of separate arguments using language, scheme, purpose, history and perhaps statements in Hansard.)

However the courts might be said to have the best of both worlds. Since the statements in Hansard are not endorsed by Parliament, they are not binding and therefore do not *have*

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20 Lord Steyn "*Pepper v Hart;* A Re-examination" (2001) 21 Ox J Leg Stud 59.

21 *R v Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL).

22 See for example *De Richaumont Investment Co Ltd v OTW Advertising Ltd* [2001] 2 NZLR 831, 841 (HC) Priestley J; *Everitt v Attorney-General* [2002] 1 NZLR 82, 95 (CA) Richardson P.

to be followed. It is perfectly legitimate for the court to decline to follow what a Minister has said in the House. It has happened. It is open to a court to say that a Minister has misunderstood the law;[23] or that the debates are confused and reveal shifts in stance by the government itself;[24] or (even) that they suggest that members failed to appreciate the significance of what they were about to enact.[25] In other words, statements in these Parliamentary materials can be used in rather the way that judicial dicta and academic commentary have been used over the years: to give weight to a particular argument but to be rejected if felt to be unhelpful. They are used to assist rather than to constrain. In Lord Wilberforce's terms, they do not turn the court into "a reflecting mirror of what some other agency might say". They are an important accessory to the purposive style of interpretation.

It may be useful to stop here and assess the purposive approach. The theory of it is that the judge's job is to interpret the statute in a manner which is true to Parliament's purpose. He or she should exhibit loyalty, even "constructive loyalty",[26] to that purpose. Statutes should be made to work effectively, as Parliament intended them to.

Obviously, this attempt to envelope everything in "Parliamentary purpose" could never have been the whole story. In a difficult case the decision as to whether or not something is within Parliament's purpose must involve a creative decision by the court, and different minds may differ on it. Moreover in a significant number of cases a scrutiny of the scheme of the Act and the available extrinsic evidence will reveal nothing relevant to determining what the "purpose" of a particular section is, so that all one has to work with is the words in which the section is phrased. In such a case a proclaimed search for "purpose" can easily spill over into a search for a result which would simply be sensible,[27] or in the public interest. The *consequences* of the interpretation of the provision become as important as Parliament's (elusive) *purpose* in passing it. Analogy is an important tool as well. If, as in *R v Pratt*,[28] a *car* is a vehicle for the purposes of the crime of conversion, is there any sensible

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23 *R v Bolton* (1986) 79 ALR 225 (HC); *McLennan v Attorney-General* [1999] 2 NZLR 469 (CA). See also *R v Poumako* [2000] 2 NZLR 695, 702 (CA) Richardson P.

24 *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87, 102-103 (CA) Richardson P.

25 *R v Pora* [2001] 2 NZLR 37, 49 (CA) Richardson P.

26 The expression of Sir Robin Cooke (as he then was) "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235.

27 Readers are referred to the beautifully illustrative case (although not so beautiful to cat lovers) *Hamilton City Council v Fairweather* (5 December 2001) High Court, Hamilton AP 61/01: there Baragwanath J justified his decision on the basis of the statutory language, constitutional principle, and "sensible result".

28 *R v Pratt* [1990] 2 NZLR 129 (CA).

reason why a *mechanical roller* commandeered for joyriding should be treated any differently? Of course it is the judge who decides what is sensible, and what will be effective, in such circumstances.

One sees a particularly interesting application of this point in the cases applying old statutes to new circumstances. The purpose of the old Parliament (the statute may be nearly a century old) must today be applied in a society and to a technology which that Parliament could never have foreseen. The task is to make it work sensibly in today's changed circumstances. It is not entirely without meaning in such a case to say that the judge is applying the "intention of Parliament", but that intention is tenuous. It may even be that if that early Parliament had been asked whether its statute would have applied to the circumstances now before the court it would have given an answer different to that arrived at by the judge. For example, it has recently been held in England that the word "family" in elderly tenancy protection legislation includes a de facto partner, including a gay partner;[29] it is virtually certain that the enacting Parliament of 1920 would not have agreed with that. In such a case the Court is making a creative interpretation which best suits the ethics, morals and social circumstances of today: it is applying Parliament's "purpose" only in the most abstract sense.

In Cross's book on *Statutory Interpretation*, it is put that:[30]

> a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force.

Lord Steyn has even said that it is unhelpful in such a case "to inquire into the history of subjective views held by legislators from time to time".[31] On one view, the courts are actually finding that the *meaning* of the statutory language has changed. Not all facets of interpretation can be meaningfully sheeted back to the "intention of Parliament".

So the judges have significant input, even when they are applying the purposive approach. Judges owe a duty to society as well as to Parliament. Ironically, the purposive approach, which was meant to be a tool to ensure loyalty to Parliament's will, is sometimes

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29 *Fitzpatrick v Sterling Housing Associates Ltd* [2001] 1 AC 27 (HL).

30 Sir Rupert Cross *Statutory Interpretation* (3 ed, Butterworths, London, 1995) 51-52. The passage was quoted in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 296 (HL) Lord Steyn.

31 *R v K* [2001] 3 All ER 897, 909 (HL) Lord Steyn.

criticised as giving the courts too much scope to depart from it. There are clear signs that the Parliamentary select committee which considered the recent Interpretation Bill had concerns of that kind.[32]

Having noted that the purposive approach is dominant, I shall now qualify that proposition. For there is another approach to interpretation also, which is different in kind, and which can cut right across the purposive approach. It is, quite simply, interpretation in accordance with the fundamental values of our system. I referred to it earlier. Not only is it still alive; in the last decade it has become even stronger. That is partly the result of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), but there is much more to it than that. The protection of fundamental human rights is high on the international agenda as well. Even before the United Kingdom's adoption of the European Convention on Human Rights there had been an increasing emphasis in the English courts on principles such as freedom of speech. Here, for example, is Lord Hoffmann in 1999:[33]

> But the principle of legality means that [P]arliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words … [I]n the absence of express language or necessary implication to the contrary the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, although acknowledging the sovereignty of [P]arliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

Those are strong words. They advocate an interpretation of legislation in conformity with these fundamental rights. Ambiguities will be construed so as to uphold them, and general words will be read down so as to intrude as little as possible upon them. It may even be that words should be given strained meanings to preserve the integrity of these rights.

Section 6 of the New Zealand Bill of Rights Act should be seen in this context, for it preserves this kind of interpretation. It provides: "If an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights that meaning shall be preferred to any other meaning".

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32 See the Select Committee's commentary at iii: "The main rationale behind clause 5(1) is to ensure that the courts, in accordance with their constitutional role, give effect to the law as expressed by Parliament. A direction to take 'context' into account may lead to a more liberal approach to statutory interpretation that departs from the words of the statute and therefore the purpose of Parliament".

33 *R v Secretary of State for the Home Dept; ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Hoffmann.

While the courts overall have been at pains to emphasise that the meaning adopted must be one which the words can *reasonably* bear, rights-based interpretation has had a significant impact. Ambiguities in our censorship legislation have been resolved in favour of freedom of speech;[34] the powers of the Speaker of Parliament to warn trespassers off Parliament's grounds have been held to be exercisable only after due consideration of the rights of freedom of expression and freedom of assembly in the Bill of Rights Act;[35] and, most significantly, it has been held that rule-making powers in a statute, even through expressed in the most general terms, must be read as excluding the power to make rules which infringe the Bill of Rights Act. [36]

Since the adoption into the United Kingdom of the European Convention on Rights and Freedoms by the Human Rights Act 1998 a similar process can be observed in the English courts, for that Act provides for the construction of United Kingdom statutes in conformity with the Convention "so far as it is possible to do so".[37] It may indeed be, given the pressures of membership of Europe, that rights-conforming interpretation in Britain is more aggressive than it is here.[38]

However, as I have intimated, it would be a mistake to assume that the Bill of Rights Act in New Zealand and the Human Right Act 1998 in the United Kingdom have *created* this approach. There were plenty of examples of it well before either piece of legislation. And the Bill of Rights Act is not exhaustive of the values which will be upheld by the courts: there are fundamental rights (freedom from slavery, privacy, sanctity of property) which exist outside the Act, and important values of our system which are not really rights at all, among them the maxim that one cannot benefit from one's own wrong.

It is, and always has been, artificial to regard this kind of value-influenced interpretation as based on Parliament's *intention*. That is true only to the extent that the values can be excluded by a clear statement of Parliament's *contrary* intention. If there are not sufficiently clear exclusionary words, the values apply in their own right. That is the import of Lord Hoffmann's dictum, and appears also from a statement from Cross recently quoted by Lord Steyn; he said that the law's presumptions of construction[39]

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34 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

35 *Police v Beggs* [1999] 3 NZLR 615 (CA).

36 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

37 See for example *R v Lambert* [2001] 3 All ER 577 (HL); *R v A* [2001] 3 All ER 1 (HL).

38 Compare *R v Lambert*, above with *R v Phillips* [1991] 3 NZLR 175 (CA).

39 Sir Rupert Cross *Statutory Interpretation* (3 ed, Butterworths, London, 1995) 166, quoted in *B (A Minor) v DPP* [2000] 2 AC 428, 470 (HL) Lord Steyn.

> not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate as constitutional principles which are not easily displaced by a statutory text.

That is easy to argue in the case of the rights codified in the Bill of Rights Act, but is equally valid of those that are not. They operate simply because they exist as part of the legal system.

There have been some interesting *dicta* recently that detach these values as used in the process of interpretation from the intention of the Parliament, which passed the legislation in question. In England, Lord Woolf CJ put it this way:[40]

> In the case of legislation predating the 1998 [Human Rights] Act where the legislation would otherwise conflict with the [C]onvention, section 3 requires the court to now interpret legislation in a manner which it would not have done before the 1998 Act came into force. When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in section 3.

His Lordship confined his remarks to legislation earlier than 1998, and in reading those remarks, we must be aware of the lack of an equivalent to the New Zealand Bill of Rights Act section 4 in the English Human Rights Act. But the concept of values bearing on the interpretation of an Act independently of the intention of the Parliament which passed it has implications for any theory of interpretation.

Despite the apparently weaker nature of the New Zealand Bill of Rights Act, there are some *dicta* in our Court of Appeal, which tend in the same direction. I hope it is not unfair of me to use them, for I probably do so a little out of context.

First, in *Ministry of Transport v Noort*,[41] Sir Robin Cooke said he believed section 6 of the Bill of Rights Act, requiring a rights-consistent interpretation, was "perhaps of even greater importance" than the purposive approach in the then section 5(j) of the Acts Interpretation Act 1924. Indeed, rights-based interpretation is not always consistent with the purposive approach. It can *limit* purpose rather than furthering it. It is possible to imagine cases where a different result could be obtained according to which approach is adopted. *R v Salmond*,[42] in 1992, may well have been such a case. The question there was

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40 *Poplar Housing and Regeneration Community Assn Ltd v Donoghue* [2001] 4 All ER 604, 624 (HL) Lord Woolf CJ.

41 *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (CA) Cooke P.

42 *R v Salmond* [1992] 3 NZLR 8, 13 (CA).

whether a compulsory blood test taken in hospital after a car accident could only be used to determine the amount of alcohol in the blood, or whether it could also be used to match stains in the car to see who had been driving at the time. The majority of the Court of Appeal, applying the overriding purpose of the Transport Act 1962 – ie road safety - held that the more extensive interpretation should be preferred. The dissenting judge, Casey J, however, believed that the compulsory taking of blood was such an intrusion on liberty that the section should be narrowly construed. He therefore preferred a limited construction, which allowed the blood to be used to test for alcohol content only. *Choudry v Attorney-General*[43] might also be looked at in this way. The question there was whether SIS officers in exercising an interception warrant had the right to covertly enter a private dwelling house. The High Court held that they did, but the Court of Appeal, relying on the long-standing principle of sanctity of private property, held otherwise.

Secondly, there are dicta suggesting that if an old statute has been interpreted in a particular way over the years (presumably because that interpretation was found to accord with the intention of Parliament) it may have to be revisited after the Bill of Rights Act, and its interpretation changed to conform with that Act.[44] In an interesting elaboration of this view, Tipping J in *Quilter v Attorney-General*,[45] the same-sex marriage case, said that the interpretation of the Marriage Act 1955 might be susceptible of change in the light of the Bill of Rights Act and other marriage legislation passed subsequently to it. He said: "If a shift in the meaning of marriage can be discerned from such material that will support the case for a reinterpretation of the Marriage Act to accord with the shift".[46] The clear implication is that a great deal more is in issue than the intention of the Parliament, which passed the Marriage Act.

Thirdly, in *R v Poumako*,[47] the majority of the Court of Appeal, in discussing section 6 of the Bill of Rights Act and its impact on retrospective penal legislation, said that:[48]

> The meaning to be preferred is that which is consistent (or more consistent) with the rights and freedoms in the Bill of Rights. It is not a matter of what the legislature (or an individual member) might have intended. The direction is that whenever a meaning consistent with the Bill of Rights can be given, it is to be preferred.

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43 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA).

44 For example, *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA).

45 *Quilter v Attorney-General* [1998] 1 NZLR 523, 579 (CA) Tipping J.

46 *Quilter*, above.

47 *R v Poumako* [2000] 2 NZLR 695 (CA).

48 *Poumako*, above, 702.

This is essentially to say it is the intention of the Parliament which passed the Bill of Rights Act which is important, rather than the intention of the Parliament which passed the specific statute under consideration.

Fourthly, there is of course the fascinating and controversial case of *R v Pora*,[49] which takes matters a stage further. Section 4 of the Criminal Justice Act 1985 provides that "notwithstanding anything in any other act" criminal penalties are not to have retrospective effect. In 1999, Parliament added a further section to the same Act providing that new increased penalties for crimes involving home invasion were to be retrospective to crimes committed before the passing of the new section. To resolve this clear conflict between the two sections of the same Act, three members of the seven judge court declined to hold that the last in time prevailed, or to apply the guideline that the specific prevails over the general. It found that section 4 of the Criminal Justice Act 1985 encapsulated a rule of such fundamental importance that the conflict should be resolved in favour of the general principle. It was not sufficiently clear from the 1999 amendment, and the Parliamentary record of its passing, that the legislature intended to override the fundamental principle enshrined in section 4. The 1999 amendment was therefore effectively held to be inapplicable.

This reasoning, if it is to be adopted, could have substantial implications. It could foreshadow the recognition of a hierarchy of legislation with statutes enacting fundamental rights occupying a status above other legislation. It could enable greater consistency of principle than has previously been possible in our rather piecemeal statute book. It could lead to a rethink of the doctrine of implied repeal. It could even raise fundamental questions about the competency of Parliament. But the three other members of the Court who considered the point took a different view, so it is too early to draw any far-reaching conclusions. Moreover the humble section 4 of the New Zealand Bill of Rights Act 1990, which subordinates that Act to *all* inconsistent legislation, past and future,[50] is going to make radical change difficult.

R v Pora aside, what is interesting about some of the modern cases I have referred to is this. Once upon a time, whatever was really going on under the surface, the courts avowedly based their decisions on the "intention of Parliament" or "the meaning of the words Parliament has used". We are now seeing more *explicit* recognition that more is involved in interpreting statutes than just finding Parliament's intention. That has

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49 *R v Pora* [2001] 2 NZLR 37.

50 This polite deference should in theory make the Bill of Rights Act one of the most insignificant statutes on the books. There are very few Acts that are subordinated to *all* others: another example is the New Zealand Walkways Act 1990, s 7. The Bill of Rights Act has risen above this handicap very successfully.

constitutional significance. In acknowledging that values and standards outside the statute are part of the process, there is an acknowledgement that the balance between judges and Parliament is shifting. It is probably too early yet to talk about constraints on Parliament's power, but that could be where the road leads.

The judicial function involves the delicate art of balancing loyalty to Parliamentary purpose with the fundamental values of the legal system as a whole, the needs of society, and, if I may say so, good sense. Judges subject statutes to a form of quality control.

I come now to my final point. Despite all that is going on, judges still cannot *override* statute. They can simply *interpret* liberally or narrowly to achieve a desirable result. Two propositions remain fundamental. The *first* is that Parliament can legislate contrary to even the most fundamental values provided it uses clear enough words – although the more fundamental the value the more difficult it will be to find words which *are* clear enough. In *R v Lord Chancellor; ex parte Witham*, Laws J said he found "great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court … save in a case where that is expressly stated".[51]

The *second* is that nothing authorises a court to depart from the words of the statute and give them a meaning they are totally incapable of bearing: that would be to legislate, not to interpret. It would cause citizens and their legal advisers to lose confidence in even the most straightforward statutory text: issues of reliance and certainty would arise. That, at least, is the theory of it.

That maxim is easy to recite, but much more difficult to apply in practice. It is not possible to draw a bright line between where interpretation ends and judicial legislation begins. There always have been, and always will be, debates over whether a judge in a particular case has gone too far, whether it be through energetic pursuit of purpose or protection of the citizen's rights.

There can be no doubt that "plant" in an industrial statute can include scaffolding: can it include a horse?[52] A live kiwi is undoubtedly "an animal living in a wild state" for the purposes of the Wildlife Act 1953; what about a dead kiwi?[53] A Barbie doll is a "toy" for the purposes of the Fair Trading Act 1984; what about a container for sweets which

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51 *R v Lord Chancellor; ex parte Witham* [1998] QB 575, 586 (EWHC) Laws J.

52 An example given by Lord Wilberforce in *IRC v Scottish and Newcastle Breweries* [1982] 1 WLR 322, 324 (HL) Lord Wilberforce.

53 *Police v Johnson* [1991] 3 NZLR 211 (HC).

resembles a baby's bottle?[54] The answer to each of those questions has been held to be "yes". Where, then, is natural and ordinary meaning?

Examples like these are legion, and one can well argue that any element of surprise in the decisions is outweighed by the countervailing public good. Nor can it really be said that reasonable readers would have been misled, because they would probably have recognised an element of uncertainty about the provision from the outset.

However, take another scenario. It is acknowledged that the purposive approach can enable a court to correct drafting imperfections. Lord Nicholls recently said in the House of Lords, in a passage that is likely to be much quoted: "The court can correct obvious drafting errors … In suitable cases in discharging its interpretive functions the court will add words or omit words or substitute words".[55]

One can fully accept this in the obvious case. Sometimes, even though the drafter has put it badly, one can easily enough discern what is meant; context makes clear the intention which underlay those inappropriate words. There are examples of drafting mistakes in our New Zealand statute books. There are sections in the Hire Purchase Act 1971 which contain obvious errors. In section 10 for example, the word "lender" is clearly meant to be "vendor"; it has survived without amendment for 30 years because it is quite clear what the intention was.

But the problem is to know what qualifies as a "drafting error". A majority of our Court of Appeal has said that that expression is not confined to a single misplaced word. It can sometimes be apparent that a whole section simply fails to capture what was intended. A case in question is *Frucor Beverages Ltd v Rio Beverages Ltd*.[56]

Section 34(1) of the Evidence Amendment Act (No 2) 1980 provides as follows:

> **34. Communication to or by patent attorney, etc –** (1) A registered patent attorney shall not disclose in any proceeding any communication between himself and a client or any other person acting on the client's behalf made for the purpose of obtaining or giving any protected information or advice, except with the consent of the client or, if he is dead, the consent of his personal representative.

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54 *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103, 404 (HC).

55 *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109, 115 (HL) Lord Nicholls. He noted that the court must be sure of the intended purpose, the fact that by inadvertence the draftsmen had failed to give effect to it, and the substance of the provision Parliament would have made if the error had been noticed.

56 *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA).

The question in the case was whether this section conferred a privilege on the client as well as the attorney, so that the client could resist a claim for disclosure of communications between client and attorney. A majority of the Court of Appeal held it did. The narrow literal meaning did not make sense and fell short of conferring the protection the legislature must have intended. The explanatory note to the Bill indicated that there was a wider intention that client-attorney communications be *privileged*. Thomas J, delivering the judgment of himself and Blanchard J, said that it was not possible to point to any particular words in the section that were ambiguous or obscure. But the section as a whole still failed to give effect to what was intended:[57]

> There is something artificial in restricting the purposive approach to cases were the statutory provision contains particular words or phrases which are ambiguous or obscure when, as in this case, Parliament's intention is otherwise ascertainable by reference to the legislative history. No premium should be put on poor drafting, and it cannot be right that, if the draftsperson confines his or her error to a word or phrase, Parliament's intent will prevail as a result of a purposive interpretation but, if the draftsperson's error relates to the format which is adopted, Parliament's intent will be frustrated.

In the majority's view, the section failed to capture what must have been the Parliamentary intent, and should be read in a way which more satisfactorily did capture it.

It is a crude and no doubt unfair commentary on this case to say that the Court placed more weight on the explanatory note than it did on the section itself. Given the fact that the literal interpretation of the section produced a clearly unsatisfactory result, and one which might well have led to a legislative amendment had it been applied, was any damage done by the somewhat herculean interpretation the Court in fact adopted? My own feeling is that while it produced an eminently sensible result in the case itself, it could be dangerous if the case is seen as an invitation to adopt a freer and more liberal approach in other contexts.

Let us take another example of liberal interpretation. The reading down, and straining, of language to accommodate fundamental values is a time-honoured activity. The New Zealand Court of Appeal has said that the application of section 6 of the Bill of Rights Act should not result in a "strained or unnatural meaning".[58] But in the past, value-based interpretation sometimes did exactly that, privative clauses providing perhaps the best example. It is difficult to argue that the codification in the Bill of Rights Act should result in a less vigorous approach. Nor do the English Courts seem to regard themselves as

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57 *Frucor Beverages*, above, 614, Thomas and Blanchard JJ.

58 *R v Phillips* [1991] 3 NZLR 175, 177 (CA) Cooke P.

being so constrained in their use of the similar section 3 of the Human Rights Act 1998.[59] The differences in wording between the United Kingdom section 3 and the New Zealand section 6 would not appear to require a significantly different approach in the two countries, although membership of Europe may create a climate of pressure on the English courts which does not apply here, and the absence in the English Act of any equivalent to the New Zealand section 4 may encourage a view that the English Act can "trump" other legislation.

Sometimes the use of value-based interpretation has led to the imposition of a substantial qualification on statutory words. The case of *Drew v Attorney-General*[60] for example, held that a general rule-making power must be read down so as not to empower the making of rules which infringed important rights of the individual. The words of the relevant section themselves gave no clue to this qualification, and a lay reader of it would not know that the qualification existed. But it is hard indeed to argue that it was wrong, or contrary to principle, to interpret a section in a way which upholds the rule of law. That surely outweighs considerations of accessibility.

More questionable, though, is the use of extrinsic material (such as Parliamentary debates) to read down the words of a statute. The House of Lords has recently held that a statement of purpose found in Hansard cannot be used to limit the exercise of an otherwise general discretion conferred on a Minister by statute.[61] That must be right, because unlike the fundamental values of which I have spoken, Ministers' statements in the House do not have the status of law. Similarly, as I have intimated, I think that the use of explanatory notes to alter or read down the natural meaning of the words of a statute is problematic. That is an important matter, because there is a tendency in modern legislation to have a detailed statement of policy in the explanatory note to the Bill, but a broad and ill-defined set of powers in the Act itself.[62]

It is for the same reasons that one must be careful of the growing use of international conventions to aid in the interpretation of statutes. I have no difficulty if the international context is used to resolve an ambiguity or other real uncertainty. But it is more open to question if it is used to impose a qualification which is not there in the statutory language. I have heard *Sellers v Maritime Safety Inspector*[63] described as such a case.

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59 *R v Lambert* [2001] 3 All ER 577 (HL); *R v A* [2001] 3 All ER 1 (HL).

60 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

61 *R v Secretary of State for the Environment; ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL).

62 An example is the Health and Disability Services (Safety) Act 2001.

63 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 45 (CA).

The relevant section of the Maritime Transport Act 1994 read as follows:

> **21. Pleasure craft departing for overseas –** (1) No master of a pleasure craft shall permit that pleasure craft to depart from any port in New Zealand for any place outside New Zealand unless -
>
> …
>
> (b) The Director is satisfied that the pleasure craft and its safety equipment are adequate for the voyage; and
>
> (c) The Director is satisfied that the pleasure craft is adequately crewed for the voyage.

Relying on an international convention, the Court of Appeal gave the words a more limited meaning. They qualified them in respect of foreign vessels by saying that the Director could only require satisfaction with matters that were within his authority at international law. One can debate the merits of that. There is an argument for saying that given that maritime transport is an international activity the context of the statute is an international one, and that domestic statutes may take on a special connotation when they are read in that wider context. Foreign visitors might indeed so read them. But the matter is not always straightforward. This is one of the intriguing things about statute law. There will always be debate about the line between legislation and interpretation. Different minds can differ on when it is time to say "enough". The boundaries of meaning are not clear-cut. Here is yet another opportunity for judicial creativity.

It is time to finish. I have tried to outline the present shape of statutory interpretation in New Zealand. It is a study of the relationship between judges and Parliament. I have attempted to show that the dominance of the purposive approach, which is about judicial loyalty to Parliament's will, should not be allowed to obscure the fact that judges play a significant and creative role as guardians of the social good and the values of our legal system. There is nothing new in that; but what is new, I think, is the increasing *express* recognition that the intention of Parliament is not all there is to it.