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Interpreting Treaties, Statutes and Contracts

KJ Keith

May 2009

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TABLE OF CONTENTS

PREFACE.....	v
I INTRODUCTION.....	1
II WHAT IS INTERPRETATION?.....	3
III THREE CASES ON STATUTES AND TREATIES ABOUT EMPLOYMENT	6
IV AND CASES ON CONTRACTS	15
V CODIFICATION OF RULES OF INTERPRETATION	19
VI ... OF TREATIES	21
VII ... OF STATUTES	28
VIII THE PLACE OF LEGISLATURES AND DEMOCRATIC PRINCIPLE IN THE INTERPRETIVE PROCESS.....	31
IX THREE QUESTIONS ABOUT CODIFICATIONS.....	34
A IS USE OF THE PURPOSE SUBJECT TO A PREREQUISITE?	34
B HOW, IF AT ALL, SHOULD THE CONTEXT BE REFERRED TO?.....	35
C WHAT REFERENCE, IF ANY, SHOULD BE MADE TO EXTRINSIC MATERIAL?.....	37
X THE USE AND IMPACT OF AUTHORITATIVE DIRECTIVES AND GUIDES	40
XI FOUR MORE CASES: ACCESS TO THE COURTS, CITIZENSHIP, LIBERTY AND TORTURE.....	49
XII SOME CONCLUDING THOUGHTS.....	54

PREFACE

This essay arises out of my teaching, law reform work and judging. My teaching began with legal system where interpretation was mainly about statutes; international law where, with treaties serving many functions, including those of contracts, legislation and constitutions, as AD McNair had notably demonstrated in 1930,¹ I began to see the overlaps between different categories of legal instruments); constitutional law with questions of how to interpret constitutions which were appearing throughout the Commonwealth, constitutional statutes, such as bills of rights, and public order statutes being invoked against protesters; and administrative law where RB Cooke as recently as 1957 had, memorably (for me at least), said that the whole of judicial review could be seen as an appendix to the law of statutory interpretation.² My law reform work began in earnest in the United Nations Secretariat in New York as the Vienna Convention on the Law of Treaties was being prepared and other work on treaties was under way, and later, in Wellington, included the work which led to the report of the Law Commission on a new Interpretation Act. The Law Commission also gave major attention to the format of the statute book and styles of drafting and its recommendations were carried through into practice by the excellent work of the Parliamentary Counsel Office. Overlapping both categories of work was judging which 25 years ago began with the interpretation of the Constitutions of Western Samoa, the Cook Islands and Niue and later the Constitution of Fiji, followed by international arbitrations interpreting treaties. For more than ten years now my full time task, judging, has often involved finding the meaning of contracts, statutes, constitutions and treaties.

I am very grateful to the Law Faculty at the University of Cambridge, to Herbert Smith under whose fellowship I spent a most pleasant few weeks in the faculty in 2004 and did some of the research reflected in this paper and to James Crawford who facilitated that. I am grateful to James Brudney, John McGrath, Janet McLean, Robyn Briese, Jonas Beaudry, Fedelma Smith and Kate Cronin-Furman for comments on earlier drafts and for comments by members of the law faculty at the University of Otago, especially Richard Sutton, at a staff seminar.

1 Arnold D McNair "The Functions and Differing Legal Character of Treaties" (1930) 11 BYIL 100.

2 RB Cooke "The Rights of Citizens" in RS Milne (ed) *Bureaucracy in New Zealand* (New Zealand Institute of Public Administration, Wellington, 1957) 84, 96.

Because this is an essay and because of its wide scope, I do not explore many details, for instance the variations in directions in interpretation statutes, and I make only limited references to secondary sources.

I INTRODUCTION

Courts and tribunals, lawyers in private and public practice and legal scholars have long been engaged in the process of interpreting treaties, constitutions, statutes, contracts and other legal instruments. With legislative bodies, they have also long been in the business of proposing and adopting rules or principles of, and approaches to, interpretation.

This paper considers parts of those two enterprises. First, how do interpreters go about their task? What matters do they consider and what weight do they give to them? What, for instance, is the balance between text, purpose and context and broader principles of the constitution including democracy? What matters *should* they consider and what weight *should* they give to them?

Secondly, do formally adopted codifications or statements of the processes, principles and rules assist the processes of interpretation? Are they appropriate? They may be made by constitution makers, legislatures or diplomatic conferences. Judges and scholars, collectively as well as individually, also prepare such statements.

A third matter addresses the question whether interpreters and codifiers concerned with one type of legal document can usefully draw on the experience of interpreting other types. Experience in one area *may* be illuminating in others, even as we remember Paul Freund's warning that we must be careful not to interpret a constitution as a last will and testament lest indeed it become one.³ It is not surprising that it is judges who in recent

3 Paul A Freund "Supreme Court of the United States" 29 Can Bar Rev 1080, 1086 (reprinted in Paul A Freund *The Supreme Court of the United States* (World Publishing Company, Cleveland, 1961) 11, 19). The warning was quoted by Dickson J in the first case decided by the Supreme Court of Canada on the Canadian Charter of Rights and Freedoms: *Hunter v Southam* [1984] 2 SCR 641, 649. Freund continues that, in their most enduring and memorable work, the justices have been guided by the basic canon of Marshall calculated to turn the mind away from canons (*McCulloch v Maryland* (1819) 17 US 316, 415 Marshall CJ): "This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Dickson J went on to quote the "living tree" approach to interpretation of Lord Sankey LC in *Edwards v Attorney General of Canada* [1930] AC 124, 136 (PC) (rather than the "watertight compartments" metaphor of Lord Atkin in *Attorney-General for Canada v Attorney-General for Ottawa* [1937] AC 326, 354 (PC)), the Wilberforce (or Stanley de Smith) warning against "tabulated legalism" in *Ministry of Home Affairs v Fisher* [1980] AC 319 (PC), 328 and *McCulloch v Maryland*, *ibid*, 415.

years have looked across different types of legal documents for it is they who day to day struggle to find meaning across the range.⁴

Some have long questioned the enterprise of finding or using principles, rules or approaches to interpretation, or even indeed their existence:⁵

"When I use a word" Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

Sixty years later, the great American scholar Karl Llewellyn assembled what he referred to as a "technical framework" for manoeuvre, consisting of pairs of "opposing canons" under the headings "Thrust but Parry" and "Thrust and Counterthrust".⁶ And in 1992 the noted American legal lexicographer, David Mellinkoff, defined "rules of interpretation" as:⁷

... the usual reference to a loose assortment of ways to discover the sense, if any, in a piece of legal writing. The label *rule* gives an aura of general standard to what are usually very personal conclusions of interpretation.

But against the doubters and deniers are the efforts over the centuries to state and apply rules or principles or approaches for finding the meaning of legal texts. In a broader sense those efforts must reflect the commitment of those undertaking those tasks to the integrity of the legal process and indeed the very existence of law as an autonomous discipline.

4 See Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney LR 5, Michael Kirby "Towards a Grand Theory of Interpretation — the case of Statutes and Contract" (2003) 24 Statute LR 95 and notably Aharon Barak *Purposive Interpretation in Law* (Princeton University Press, Princeton, 2005). Some judges have long seen their tasks in finding meaning of one category of legal texts as applicable to another. See for example Eyre CJ in *Marryat v Wilson* (1799) Bosan & Puller 430, 439; 126 ER 993 (CP, Eyre CJ) ("we are to construe this treaty as we would construe any other instrument public or private") cited as "strong authority" in an arbitration, *Van Bokkelen* (1888) Moore Int Arbitrations II 1813, 1840; for a modern equation of the interpretation of statutes and treaties see *Thomson v Thomson* [1994] 3 SCR 551, 577-578.

5 Lewis Carroll *Through the Looking Glass* (1887) ch 6, quoted by Lord Atkin in his dissent in *Liversidge v Anderson* [1942] AC 206, 245 (HL). Note, however, that Humpty Dumpty added that "When I make a word do a lot of work like that, I always pay it extra."

6 Karl Llewellyn "Remarks on the Theory of Appellate Decisions and the Rules and Canons about how Statutes are to be Construed" (1950) 3 Vand L Rev 395 reproduced with additions as Appendix C to his *The Common Law Tradition* (Little Brown and Company, Boston, 1960).

7 *Mellinkoff's Dictionary of American Legal Usage* (West Publishing, St Paul, Minn 1992) 578.

II WHAT IS INTERPRETATION?

What is an interpreter of legal texts doing? What does the construction of legal documents call for? "Interpret" comes from the Latin *interpretari* – explain, expand or translate; and "construe" is often defined as "interpret". Those definitions suggest that finding the meaning of the text is of the essence.

Oliver Wendell Holmes emphasised that critical point and others, a century ago, in a paper which still rings true and from which I quote at some length:⁸

It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other It is not true that in practice . . . a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usage of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you are still doing the same thing.

How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. . . .

Different rules conceivably might be laid down for the construction of different kinds of writing. In the case of a statute, to turn from contracts to the opposite extreme, it would be possible to say that as we are dealing with the commands of the sovereign the only thing to do is to find out what the sovereign wants. If supreme power resided in the person of a despot who would cut off your hand or your head if you went wrong, probably one would take every available means to find out what was wanted. Yet in fact we do not deal

8 Oliver Wendell Holmes "The Theory of Legal Interpretation" (1899) 12 Harvard L Rev 417.

differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means. ...

So in the case of a will. It is true that the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.

Holmes makes six points, among others. First is the emphasis on the text; Holmes rejects the idea that the interpreter is finding the intention of the contracting parties, the legislature or the testator: "We do not inquire what the legislature meant; we ask only what the statute means".⁹ Second, in the finding of the meaning of the particular text, attention is to be given to other matters, including the rest of the instrument and "the circumstances" in which the words in question were used. A third feature is that Holmes does not contemplate the interpreter following a particular sequence in the inquiry into meaning, nor require that certain prerequisites such as ambiguity or absurdity must be satisfied before the inquiry extends beyond the text. Nor does he give any indication of the relative weight to be given to matters beyond the text. Next, while the interpreter may adopt essentially the same approach to different categories of instruments – a contract, a statute, a will – Holmes accepts that different rules and approaches apply. Finally, as he makes express at the end of the paper, for practical purposes, theory generally turns out to be the most important thing in the end.

In terms of classical authority, the theoretical choice is between *voluntas* and *verba*, between will (or intention) and text (or meaning), between the subjective and the objective.¹⁰

Voluntas, will, and the subjective take us back to the first point drawn from the Holmes essay. Does the intention of the constitution-maker, legislator, parties ... have any role in interpretation? Many accounts of interpretation put it at the centre of the whole enterprise.¹¹ So too do very many judgments interpreting statutes in common law jurisdictions.¹²

9 See also Holmes in his great "Path of the Law" (1897) 10 Harv L Rev 457, 463 (parties may be bound by a contract to things which neither of them intended).

10 See Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, Oxford, 1990).

11 For example the essays by Chief Justice Spigelman and Justice Mason in Tom Gotsis (ed) *Statutory Interpretation – Principles and Pragmatism for a New Age* (Judicial Commission of NSW, Sydney, 2007) [*Statutory Interpretation*], Jim Evans *Statutory Interpretation: Problems of*

But strong authority and practice alike reject it or do not find it useful. To anticipate some of that material, recent authoritative guides to and directions on interpretation such as the Vienna Convention on the Law of Treaties, and Australian and New Zealand interpretation statutes do not refer to intention or intent. Leading judges such as Justice OW Holmes, Lord Reid, Lord Steyn and Justice Michael Kirby expressly reject the concept, as do scholars such as Sir Rupert Cross and Professor John Burrows.¹³ Justice Kirby's position is particularly striking since as recently as 2003 after three decades of judging this very scholarly and reflective judge declared that he "now" does not use the expression "intention of Parliament"; it is potentially misleading.¹⁴ In terms of principle, omitting to refer to intention emphasises the text formulated by those who have the authority to state the law or the rights and obligations. It is that text to which the court is to give meaning. Removing intention from the process avoids what will often in fact be a fiction ("whimsical nonsense", according to Gareth Evans QC, an Australian Attorney-General of the 1980s). The matter may be one that could not have conceivably been within the contemplation of those preparing the text or, if it was, they may have disagreed expressly or silently on it. Emphasizing the text along with purpose and context facilitates, as is often appropriate, the application of the text to changing facts and contexts.¹⁵ Next, that approach emphasises the objective rather than the subjective. Further, if the interpreter does address the purpose of the text, also referring to intention may add nothing to the inquiry and may simply cause confusion. We shall see that arguments such as these have recurred when legislative directions are prepared. I might add that, for essentially those reasons, I have not found it useful as a judge or arbitrator to refer to intention.

On the other hand, many civilian codes, building on article 1156 of the Napoleonic Code, begin with the proposition that, in interpreting contracts, the shared intention of the

Communication (Oxford University Press, Oxford, 1988) and the many authorities they cite and Sir Christopher Staughton "How do the courts interpret commercial contracts?" [1999] Camb LJ 303.

- 12 See for example a judgment of the Privy Council on appeal from New Zealand seeking not just the intention of Parliament, but its "true intention": *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145, para 9 (PC).
- 13 See the references in KJ Keith "Sources of Law, especially in statutory interpretation" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 86-87 and Steyn, above n 4 and Kirby, above n 4.
- 14 Kirby, above n 4, 98.
- 15 For example Interpretation Act 1999, s 6 and *R v Ireland* [1998] AC 145, 158 (HL).

parties must be sought, rather than stopping at the literal sense of the terms. By contrast, recent codes on the interpretation of statutes and treaties emphasise the finding of the meaning of the text, by reference to its context and its purpose, and make no reference at all to intention. So article 31(1) of the Vienna Convention on the Law of Treaties 1969, in stating the general rule for interpreting treaties, provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Three decades later the New Zealand Parliament similarly stated the first principle for "ascertaining the meaning of legislation" as follows:¹⁶

The meaning of an enactment must be ascertained from its text and in the light of its purpose.

Such codifications or statements of the law of interpretation present a range of choices – intention or meaning; the text of the provision being interpreted; the purpose and context; the balance between them; and permissive or prohibitive rules relating to material extrinsic to the text, especially the drafting history and subsequent practice. Such choices are also made in particular cases when a court resolves disputes about interpretation.

In an outstanding paper 60 years ago on interpreting, or as he put it, reading statutes Justice Felix Frankfurter went to the work of three great masters of the law – Holmes, Brandeis and Cardozo.¹⁷ Instead, I begin with three cases. The cases highlight different approaches to finding meaning. They also provide a basis for speculating whether a formal guide or directions on interpretation would have assist the interpreters: in none of the cases did such a guide exist.

III THREE CASES ON STATUTES AND TREATIES ABOUT EMPLOYMENT

The United States Congress in 1885 made it unlawful for any person:¹⁸

16 Interpretation Act 1999 s 5(1); the absence of a reference to "context" is considered later.

17 Felix Frankfurter "Some reflections on the reading of statutes" (1947) 47 Colum L Rev 527, 530. One of his students said that Professor Frankfurter had three rules for interpreting statutes: (1) read the statute; (2) read the statute; and (3) read the statute! Henry J Friendly *Benchmarks* (University of Chicago Press, Chicago, 1967) 196, 202.

18 Act of February 26 1885, 23 Stat 332, c 164.

... in any manner whatsoever to prepay the transportation, or in any way assist or encourage the importation or migration of any alien ... into the United States ... under contract or agreement, parole or special, express or implied, made previous to the importation or migration of such alien, ... to perform labour or service of any kind in the United States ...

Two years later the Church of the Holy Trinity in New York City made a contract with E Walpole Warren, an alien residing in England, to remove to New York and enter its service as rector and pastor. The Circuit Court held that the Church was in breach of the statute and the Church appealed to the Supreme Court. The appeal succeeded because, according to the Court, the prohibition applied to the work of manual labourers, as distinguished from that of professional men.¹⁹

The Court had to concede at the outset that the act of the Church was within the letter of the section: "Not only are the general words 'labour' and 'service' both used, but also, as if w ere to guard against any narrow interpretation and emphasize the breadth of meaning, to them it added 'of any kind'."²⁰ Further, another section, by specifically excepting from the bar the employment of professional actors, artists, lecturers, singers, domestic servants and others, strengthened the idea that every other kind of labour and service was intended to be reached by the prohibition.

How then did the appeal succeed? The Court said:²¹

[We] cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule [extensive authority being cited] that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.

Taken together, the title of the Act, the historical context in which it was enacted and particular aspects of the legislative history led the Court to the conclusion that "the intent of Congress was simply to stay the influx of ... cheap unskilled labour" – and not "labour or service of any kind", to return to the words of the Congressional prohibition.

The Court was not done. It also invoked the wider historical context:²²

19 *Church of the Holy Trinity v United States* (1892) 143 US 457.

20 *Ibid*, 458 Brewer J.

21 *Ibid*, 459 Brewer J.

22 *Ibid*, 465 Brewer J.

But beyond all these matters no purpose of action against religion can be imputed to any legislation, State or National, because this is a religious people. This is historically true.

The "historical truth" begins with Columbus, continues through Raleigh and Royal Charters to the new colonies and the Mayflower Compact and much else, including the Declaration of Independence, state constitutions, oaths of office and the Sabbath laws. The Court concluded:²³

It is the duty of the Courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislation, and therefore cannot be within the statute.

In the next case, by contrast, the Court adheres much more closely to the words of the legislative instrument. That choice of starting point is important for the result. Even more important is the Court's narrowness of approach — an approach in sharp contrast to that of the Holy Trinity Court. That combination resulted in the initial broad (or ordinary or natural) meaning of the particular words in issue being sustained.

In November 1919 the International Labour Conference in a Convention concerning the employment of women during the night stated in Article 3 this prohibition:

Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.

Exceptions were allowed in specified circumstances such as force majeure and for reasons of seasonable demand or climate.

Did the prohibition cover "women who hold positions of supervision or management and are not ordinarily engaged in manual work"? If it did, to take one example, female engineers would be debarred from holding certain posts in electrical power undertakings which operated day and night.

23 Ibid, 472 Brewer J. Justice Antonin Scalia in his *A Matter of Interpretation* (Princeton University Press, Princeton 1997) 22 sees this triumph of supposed "legislative intent" over the text of the law as a handy cover for the triumph of judicial intent and as not compatible with democratic theory. He continues by quoting a rebuke by Justice Holmes to counsel rejecting a reference to intention, quoted approvingly by Justice Frankfurter in his 1947 article (Frankfurter, above n 17, 538), and the sentence from the 1899 article, set out above, about asking "only" what the statute means, quoted with approval by Justice Jackson in *Schwegmann Bros v Calvert Distillers Corp* (1951) 341 US 384, 397.

Members of the International Labour Organization (ILO) disagreed on the answer to that question as did the members of the Permanent Court of International Justice to whom the question was referred.²⁴ By six votes to five they answered affirmatively, holding that the Convention did apply to women in supervisory and management work; it was not limited to manual workers. The Court issued a single reasoned opinion, four of the dissenting judges limited themselves to a brief declaration while the other dissenter, Judge Anzilotti, set out his reasons in some detail. The matters covered by the Court and by Judge Anzilotti differ significantly, as does the emphasis they give to matters which they do both cover.

The opinion of the Court begins by setting out the terms of Article 3. It repeats the question before it and immediately says that:²⁵

The wording of Article 3, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in industrial establishments of women without distinction of age. Taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court. If, therefore, Article 3 ... is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words.

Right at the outset Judge Anzilotti rejects that single minded focus on Article 3 (which he does not even set out), with its alleged "natural sense" and clear meaning, on the basis that it alone does not lead inexorably to a result:²⁶

I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto.

The Court, by contrast, does not ever address the object and purpose of the Convention. Its search for a valid ground for departing from "the natural sense of the words" of article 3 begins with other provisions of the Convention itself: its title, its preamble (both referring to "women") and other provisions of the Convention. They

24 *Interpretation of the Convention of 1919 concerning employment of women during the night* (Advisory Opinion) [1932] PCIJ (Series A/B No 50) [*Employment of Women During the Night*].

25 *Ibid*, 373.

26 *Ibid*, 383.

provide no ground for moving from the terms of Article 3 "which are in themselves clear and free from ambiguity".²⁷

Next, the Court asked, does the Constitution of the ILO set out in Part XIII of the Treaty of Versailles provide a ground for restricting the meaning? Should Article 3 be interpreted as applying only to manual workers on the ground that the improvement of the lot of the manual worker was the principal object of that Part? Not as a matter of validity of the Convention (that could not be contended), but rather as a matter of interpretation in the sense that, unless a contrary intention is made manifest, Article 3 would be limited to manual workers. That argument, says the Court, would not be sound. While its reasons begin with the presumptive argument, they slide, it might be thought impermissibly, into an absolute argument about the outer limits of the competence of the ILO:²⁸

To justify the adoption of a rule for the interpretation of Labour conventions to the effect that words describing general categories of human beings such as "persons" or "women" must *prima facie* be regarded as referring only to manual workers, *it would be necessary to show that it was only with manual workers that the Labour Organization was intended to concern itself.*

The relevant provisions of the Constitution are also, says the Court, broad – *travailleurs*, workers, *travailleurs salariés*, wage earners – as compared with *ouvriers* or labourers and accordingly do "not support the view that it is workers doing manual work – to the exclusion of other categories of workers – with whom the ILO was to concern itself". Again, it may be noticed that the Court is concerned with the absolute issue of the extent of the power of the ILO rather than with a presumptive approach to the interpretation of a convention adopted within those powers.

While Judge Anzilotti accepts that the ILO may concern itself with all categories of workers, Part XIII for him is essentially concerned with the claims of the working class which are closely bound up with the conditions of manual work in modern industrial organisations. The regulation of the conditions of manual workers (*ouvriers*) is the essential and normal task of the Organisation. The Preamble, with its references to "labour conditions involving such injustice, hardship and privation ... as to produce unrest so great that the peace and harmony of the world are imperilled",²⁹ supports that, as do the

27 Ibid, 373.

28 Ibid, 375 (emphasis added).

29 An unspoken matter in all this is the very recent Russian revolution and other serious social unrest in Europe and beyond. The Court does not mention this feature of the preamble.

operative provisions. That analysis leads him to the natural inference that any convention concluded under Part XIII is to be regarded as relating to manual labour and not to labour in general. A more general intention is conceivable, but cannot be presumed: it must be proved. That presumption is of course directly opposite to that adopted by the Court.

The Court next rejected an argument based on the alleged linkage of the new Convention to that adopted in Bern in 1906, which was expressly limited to women engaged in manual work. That linkage was the reason for the declaration by the four dissidents.

The suggestion that very few women held positions of supervision or management in industrial undertakings in 1919 and that the application to them of the Convention was never considered also carried no weight with the Court. The mere fact that certain situations which the terms of the Convention were wide enough to cover were not thought of did not justify interpreting the general provisions otherwise than in accordance with their terms.

Nor did the preparatory work displace the natural meaning. The Court's examination of the preparatory work was not intended to derogate "in any way from the rule which [the Court] has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."³⁰

In any event the preparatory work "confirms the conclusion reached on a study of the text of the Convention that there is no good reason for the interpreting of Article 3 otherwise than in accordance with the natural meaning of the words".³¹ Further:³²

If in the Eight Hour Day Convention, after a prohibition applicable to "persons", it was necessary to make an exception in respect of persons holding positions of supervision or management, it was equally necessary to make a corresponding exception in respect of women in the Convention on Night Work of Women, if it was intended that women holding positions of supervision or management should be excluded from the operation of the convention.

While Judge Anzilotti shares in part the Court's caution about referring to the preparatory work, like the Court, he sees it as helping his argument for the opposite conclusion:³³

30 *Employment of Women During the Night*, above n 24, 378.

31 *Ibid.*, 380.

32 *Ibid.*, 381.

If however any doubt were possible, it would be necessary to refer to the preparatory work, which, in such case, would be adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text.

Now the preparatory work shows most convincingly that the intention of the Washington Conference was to maintain – whilst for technical reasons adopting a new convention — the main lines of the Berne Convention ... And since the Berne Convention ... refers only to women manual workers, it follows that the intention of the Conference was to regulate the night employment of women manual workers. Thus the preparatory work would, if need be, confirm the interpretation which, in my view, naturally flows from the text of the Convention.

In the result, the Court did not depart from its initial literal and broad interpretation of "employed".³⁴ It refused to imply an exception or reservation into the Convention. In response, the International Labour Conference made that exception express, by adopting a revised Convention excluding from its coverage women "holding responsible positions of management ... not ordinarily engaged in manual work."

In the third case, by contrast, (apparently) broad words, "any seaman", were read down by reference to the context and particularly the international context. A Danish seaman, while temporarily in New York, joined the crew of a ship of Danish flag and registry, owned by a Danish citizen, under articles which provided that the rights of crew members would be governed by Danish law. He was negligently injured on the ship in the course of employment while it was in Havana harbour. He sued in the District Court for the Southern District of New York under the Jones Act:³⁵

Any seaman who shall suffer personal injury in the course of his employment may ... maintain an action for damages at law

33 Ibid, 388-389.

34 See also the argument of counsel for the United Kingdom that "It has never been more essential than it is today that international engagements should be faithfully and strictly carried out, and it is one of the functions of this great Court to further that object." *Employment of Women During the Night* (Pleadings, Oral Statements and, and Decisions) [1932] PCIJ (Series C, No 60) 236-237. He had earlier referred to the French law on interpretation, citing Dalloz and article 1156 of the Napoleonic Code (234-235).

35 Merchant Marine Act 1920 (also known as Jones Act), s 33.

The lower courts upheld his claim. The Supreme Court reversed.³⁶ In reaching that conclusion and finding that Danish law applied, the Court, having acknowledged that the plaintiff was literally within the scope of the provision, said these words were not written on a clean slate. The Jones Act, one of a long series of enactments regarding shipping, was enacted with regard to a seasoned body of maritime law. Like many other enactments it was in general terms, leaving their application to be determined from context and circumstances.³⁷

By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. ...

This doctrine of construction is in accord with the long-headed admonition of Mr. Chief Justice Marshall that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains" *The Charming Betsy*, 2 Cranch 64, 118.

The history of the legislation also supported the limited reading, as did the role of the "Law of the Flag".³⁸

Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag.

These three cases help highlight the elements considered by the interpreters and the choices they exercise:

- (a) the "ordinary" meaning or "natural sense" of the words of the particular provision, emphasised by the PCIJ and recognised by the *Holy Trinity* and Jones Act courts, but with sharply contrasting willingness to move from that meaning by reference to one or more of intention, purpose, history, immediate context and wider context (including principle);
- (b) the role of intention, emphasised in *Holy Trinity* and by Judge Anzilotti, but having a lesser role for the PCIJ and no part in the Jones Act case;
- (c) the significance of purpose (*Holy Trinity* and Judge Anzilotti), or failing to mention it (the PCIJ and the Jones Act court);

36 *Lauritzen v Larsen* (1953) 345 US 571.

37 *Ibid*, 577-578 Jackson J.

38 *Ibid*, 584.

- (d) the role of the immediate context, including other provisions of the same instrument (the PCIJ and *Holy Trinity*, but with different weight being given to them) and of a slightly wider context (as with the ILO Constitution used in conflicting ways by the PCIJ and Judge Anzilotti);
- (e) the role of the much wider context and relevant (legal) principle, given great weight by the *Holy Trinity* court and the Jones Act Court;
- (f) the role of legislative history which was significant for the *Holy Trinity* Court but in conflicting ways for the PCIJ and Judge Anzilotti.

The Holmes proposition that theory is in practice generally the most important thing also gains support from these cases. An emphasis on the intention of the legislature makes reference to the drafting history easier (as in *Holy Trinity*), while not adverting to it may facilitate reference to wider legal principle which, as in the the Jones Act case, may well not have been in the mind of the legislators. An emphasis on intention, as opposed to the meaning of the text in context, also faces the problem that the issue in question may not even have been in the contemplation of the parties (as recognised by the PCIJ) or that it might have been, but they did not disclose their different intents or, if they did, they did not resolve them.

The choices help highlight the commonly stated proposition that interpretation is as much an art as it is a science, but also raise the question whether statutory and other guides and directives would help introduce more science. Would authoritative directions or guides have reduced the leeway for choice in the three cases? It might be said that established, clear guides or principles of interpretation relating to maritime statutes and international law, even if established by courts and not by legislatures, were available to, and were in fact used by, the Jones Act court. But cases from other jurisdictions, considered later, suggest the possible value of a statutory guide or direction on international law – and the lower courts in that case did decide the other way.

A direction emphasising the meaning of the text and its purpose, as opposed to the intention of the drafters, strongly supported, as it was, by the historical and religious context, might have produced a different result in *Holy Trinity*; so too might a provision like those in the Vienna Convention and the Australian reforms considered later, limiting the use of the legislative history. And the PCIJ might have come to the opposite conclusion if required to interpret the convention in the light of its purpose as opposed to its depending on the ordinary meaning of just one word. Counsel's argument may also have been more structured. This speculation relates to just those three cases. I later

address cases where legislative or treaty directions were available. But before I do that I consider an area of interpretation where common law courts, unlike those in many civil law jurisdictions, do not have general legislative directions or guides.

IV AND CASES ON CONTRACTS ...

Scholarly commentary suggests that the courts in the United Kingdom and New Zealand in recent years have significantly changed their approaches to the interpretation of contracts in the direction of wider use of material beyond the text of the contract.³⁹ With a limited qualification, I need not go back further than Lord Wilberforce's statement in *Prenn v Simmonds* in 1971. The agreement in question, he said, "must be placed in its context":⁴⁰

The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ... enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

He gave reasons for rejecting the negotiating history – essentially because of its lack of value – but accepted:⁴¹

... that previous documents may be looked at to explain the aims of the parties. ... the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. ... And if it can be shown that one interpretation completely frustrates that object ... that may be a strong argument for an alternative interpretation. ... But beyond that it may be difficult to go; it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention; the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get 'agreement' and in the hope that disputes will not arise. The only course then can be to

39 For example John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4 ed, LexisNexis, Wellington, 2009) 238-246; Don Holborow "Contract Interpretation" [2000] NZLJ 374 and [2004] NZLJ 272 and DW McLauchlan "Contract Interpretation: A return to judicial conservatism?" (2004) 10 NZBLQ 66.

40 *Prenn v Simmonds* [1971] 3 All ER 237, 239-240 (HL) Lord Wilberforce; see also Burrows, Finn and Todd, *ibid*, 328-332.

41 *Ibid*, 240 Lord Wilberforce.

try to ascertain the 'natural' meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective—even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised.

Lord Wilberforce depended heavily on a judgment of Cardozo J in the New York Court of Appeals which ruled that taking the proper legal or primary or strict reading of the contract then in issue "is to make the whole transaction futile".⁴² Citing Wigmore and Stephen on Evidence, Cardozo J held that "to take the secondary or loose meaning is to give [the transaction] efficiency and purpose. In such a situation, [its] genesis and aim may rightly guide our choice."⁴³

These passages have much in common with the Holmes essay. While it is the case that Lord Wilberforce, unlike Cardozo J, does mention "common intention" he recognises that it may not exist on the point in issue and that interpretation is in any event distinct from it: the language of the agreement must be seen along with the relevant circumstances and the object appearing from those circumstances. That process is an overall one which does not give any priority to internal linguistic considerations and does not, for instance, require a finding of ambiguity before the context and object are made part of the process.

Sharply contrasting "well settled" approaches are however also to be found, for instance as recently as 1996 in *Melanesian Mission*, a Privy Council case on appeal from New Zealand.⁴⁴ The approach in that case is seen by one commentator as presenting a "strict" approach limiting the use of "extrinsic material", and setting a rigid course for interpretation by requiring in particular a finding of ambiguity before that material can be used. The emphasis on intention, on the ordinary or clear meaning of the words, and on ambiguity as a precondition to other means of assisting interpretation also indicates a sharply different position from that taken by Lord Wilberforce.

42 *Utica City National Bank v Gunn* (1918) 222 NY 204, 208; 118 NE 607, 608 (NYCA) Cardozo J.

43 *Ibid.*

44 *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391, 394-395 (PC).

In just the following year, 1997, a further and major judicial step was taken by Lord Hoffmann speaking for four of the five Law Lords sitting in *Investors Compensation Scheme Ltd v West Bromwich Building Society*. He did not think that:⁴⁵

the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded.

He summarised the principles "by which contractual documents are nowadays construed" as follows:⁴⁶

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. ...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible

45 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (HL) Lord Hoffmann. For a vigorous criticism of the widening of the "matrix" see Staughton, above n 11, 306-308.

46 *Ibid.*, 912-913.

meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

...

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

This statement is of interest for at least three reasons. First, as a matter of legal method, it is interesting to see a senior judge, apparently for the first time at least in recent years in his jurisdiction, spelling out the "principles" in such a lengthy and detailed way and recognising that a "fundamental change" had been effected by judicial decision. Secondly, "intention" plays no real part; the emphasis is on the meaning conveyed to a reasonable person with the relevant background; and, when it does appear in paragraph 5, it is "business commonsense" rather than the parties' intention that prevails. Thirdly, the statement appears to be on all fours with the Holmes' approach which may perhaps be summarised in a single sentence: the meaning of a document is to be found by reading it in context, a context which may, with the text, indicate the object or purpose. Both reject any reference to a party's unilateral declaration of its subjective intent.

A further point about the Hoffmann statement is that since 1997 senior New Zealand courts have routinely adopted it. While some have suggested that the difference between *Melanesian Mission* and *Investors Compensation* is only one of emphasis, two careful commentators agree that the principles stated in the two cases may not be reconciled; they go on however to disagree on which is to be supported. To use their adjectives, the academic prefers the more "liberal" Hoffmann approach, the practitioner the more "conservative" *Melanesian Mission* approach.⁴⁷ For the practitioner the wider approach "ignores the realities of business and the need for contract law to operate as a tool to enable the efficient conduct of business, meeting the reasonable expectations of honest business people".⁴⁸ Using the factual matrix undermines "the whole basis of

47 McLauchlan, above n 39, and Holborow, above n 39.

48 Don Holborow "Contract Interpretation" [2004] NZLJ 272, 273.

transacting".⁴⁹ Impaired reliance on the agreed words by the parties and interested third parties, the added uncertainty and the extra costs in advising and litigating, especially years after the event, are further disadvantages. We shall see similar criticisms of the use of extrinsic material in the interpretation of statutes and treaties.

That extrinsic material may also include the subsequent conduct of the parties, as article 31(3)(b) of the Vienna Convention contemplates, and as supported, obiter by four members of the New Zealand Supreme Court in a recent contract case.⁵⁰ Whatever the merits of that approach, that case highlights, as Jack Hodder points out,⁵¹ the question whether a major change in the law should be effected in the course of commercial litigation between just two parties without the participation and consultation to be found in more deliberate law reform processes to which I now turn.

V CODIFICATION OF RULES OF INTERPRETATION

As already indicated, many law-makers have from time to time attempted to give directions or guidance to the interpreters of treaties, statutes and contracts. That the official directions or guides are not essential is clearly demonstrated by gaps in their coverage. Many common law jurisdictions have directions for legislation but not for contracts. Many civil law codes provide rules for the interpretation of contracts but not for statutes. And gaps may appear over time in jurisdictions which have had directions or guides for legislation, abandoned them and reinstated them. A fourth variation may be seen in the greater detail included in some directions or guides, particularly in respect of the use of preparatory work. Given this array of differences, do the directions or guides nevertheless have value? Do they help the process of finding meaning in a principled manner?

Doubters are not difficult to find. The authors of a major study of comparative law say this:⁵²

The draftsmen of the European codes had widely different views of the value of prescribing rules of construction [of contracts]. The *Romanistic* civil codes in particular contain a great

49 Ibid, 274.

50 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2008] 1 NZLR 277 (NZSC).

51 Jack Hodder "Commentary: The Supreme Court – A Brief Introduction to a Long Conversation" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 347.

52 K Zweigert and H Kotz (translated by Tony Weir) *An Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 401.

many canons of construction ... all of very dubious merit. It is not really for the legislator to instruct the judge in what is practically reasonable to control his application of the law by technical rules which are virtually empty of content. ... It can safely be left to judges and scholars to develop proper rules of construction.

Judge Aharon Barak in his recent major study declares that experience teaches that such statutes have little impact on the way judges actually interpret texts in most cases because the guidelines are too general to be practically useful. Only in exceptional cases, for instance to resolve a deep divide over the use of legislative history, should they be used.⁵³ Some may see a contradiction in the Judge then proceeding, as scholar, to provide a (valuable) guide of his own. In 1966 Lord Wilberforce in a debate in the House of Lords, as the law commissions were being set up in the United Kingdom, similarly:⁵⁴

doubted whether statutory interpretation is a genuine subject for the Law Commission at all. I suspect it is what is nowadays popularly called a non-subject. I do not think that law reform can really grapple with it. It is a matter for educating the judges and practitioners and hoping that the work is better done.

A related issue about the utility of the civil code provisions is raised by consistent French and Italian jurisprudence to the effect that their canons of construction, though enacted in legislated codes, are properly not rules of law at all, but only advisory to the discretion of the Court without an imperative character; accordingly the failure to observe article 1156 of the Napoleonic Code did not provide an opportunity for cassation.⁵⁵ That aspect of the code provisions highlights what appears to be a critical question relevant to codification provisions: if they are not binding what value do they have? But in this area is there such a clear division between binding and non binding rules? Lord Reid in 1975 declared that rules of statutory interpretation are not rules in the ordinary sense of having some binding force. "They are our servants, not our masters."⁵⁶ The different impacts of directions in different common law jurisdictions also suggest that much depends on the legal profession's attitude to statutes, informed or not by their education, and more fundamentally to democratic and other constitutional principles.

53 Barak, above n 4, 50.

54 Lord Wilberforce (1966) 277 HLD col 1294. Compare his use, 15 years later, of a codification in a treaty case; see text at n 125.

55 Charles Fairman "Interpretation of Treaties" (1935) 20 Grotius Soc Tr 123, 129-130.

56 *Mansell v Olins* [1975] AC 373, 382 (HL); compare E K Braybooke "Are rules of precedent rules of law?" (1953) 1 VUCLR 7.

In this context I should recall the caution expressed earlier and captured by Paul Freund comparing constitutions and wills.⁵⁷ Democratic and constitutional principles and the related values may have very limited or no application to legal instruments of a private law character, particularly contracts.

VI ... OF TREATIES

Light is thrown on these questions by the debates leading to the codification of the law of treaty interpretation which began in the 1950s in the Institut de Droit International, continued in 1964-1966 in the International Law Commission and concluded in 1968-69 at the Diplomatic Conference with the successful adoption of articles on interpretation in the Vienna Convention on the Law of Treaties. Those debates, elaborations and adoption of the text are by no means the end of the process for we now have almost three decades of experience of the operation of those provisions, some considered later.

Professor Hersch Lauterpacht, as rapporteur in the Institut, emphasised at the outset what he saw as the central role of the intention of the parties. In his first draft of the resolution designed to be adopted by the Institut, he began with the proposition that the search for the intention of the parties is the principal object of interpretation.⁵⁸ That emphasis on intention is hardly surprising, given that the word was frequently found in discussions of, and decisions on, the interpretation of treaties, and also in respect of the interpretation of many other legal documents, notably in the continental civil codes. Strong challenges to the emphasis and proposition nevertheless emerged at once. Sir Eric Beckett, Legal Adviser in the British Foreign Office, considered the frequent references to the intention of the parties as clichés tending to obscure rather than to illuminate the real task of the tribunal. There is a complete unreality, he said, in seeking the supposed intention where the issue was never thought of at all (recall the Court in the *Employment of Women at Night* case)⁵⁹ or where it was thought of and the parties had divergent intentions and deliberately refrained from raising the matter (think of Lord Wilberforce in *Prenn v Simmonds*).⁶⁰ "In fact the task of the court is to interpret the treaty and not to ascertain the intention of the parties."⁶¹ Following further criticism of the references to intention, Lauterpacht in his 1953 text reduced intention to a lesser role and in 1956 the

57 See text at n 3.

58 (1952) 44(1) *Annuaire de l'Institut de Droit International* 222.

59 *Employment of Women During the Night*, above n 24.

60 *Prenn v Simmonds*, above n 40.

61 (1950) 43(1) *Annuaire de l'Institut de Droit International* 435, 438-439.

Institut adopted a text, on the basis of a draft prepared by Sir Gerald Fitzmaurice, which made no reference to intention at all.⁶²

It was not until 1964, more than ten years after it began to consider the law of treaties and only two years before it completed its text, that the International Law Commission was presented with draft articles on the interpretation of treaties. The draft articles, prepared by Sir Humphrey Waldock as its fourth and final special rapporteur on the law of treaties,⁶³ stated general rules of interpretation, listed further matters relevant to interpretation (including the context and the drafting history), provided for the effective interpretation of the terms and addressed the effect on interpretation of a later customary rule, agreement and practice. He began by mentioning that the utility and even the existence of rules governing the interpretation of treaties had been questioned, quoting the Harvard Law School Research on International Law:⁶⁴

The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty In most instances interpretation involves *giving* a meaning to a text – not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve. This is obviously a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolutely and universal

62 (1954) 45(1) *Annuaire de l'Institut de Droit International* 225; (1956) 46 *Annuaire de l'Institut de Droit International* 317-320 and 364-365.

63 *Yearbook of the International Law Commission* (vol II, United Nations, New York, 1964) 52-62, draft articles 70-73.

64 Harvard Law School "Research in International Law" Part III Draft Convention on the Law of Treaties, with Comment (1935) 29 *AJIL* 653, 939 Notwithstanding those hesitations, the research did include a valuable provision on interpretation in its draft convention: article 19(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.

While others, Sir Humphrey continued, may have had reservations about the obligatory character of certain of the so called canons of interpretation, they showed less hesitation in recognising the existence of some ground rules. They included Sir Gerald Fitzmaurice, the previous special rapporteur in the ILC, and the Institut. By their actions over the next two years, Sir Humphrey and the Commission also put themselves in that group. A related decision, first taken in 1961, was to prepare draft articles intended to serve as the basis for a convention, in contrast to the approach of Sir Gerald who proposed an expository code. The Commission stated these reasons:⁶⁵

First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.

In 1965 and 1966 the Commission confirmed that decision, for the same reasons, and accordingly recommended that the General Assembly should convene an international conference to conclude a convention on the law of treaties,⁶⁶ as indeed the Assembly did, with the Convention being adopted in 1969.

On the substance, the Commission considered the balance between: (1) the text as the authentic expression of the intention of the parties, (2) the intentions of the parties as a subjective element distinct from the text, and (3) the object and purposes of the treaty. The majority of modern writers, said the rapporteur and the Commission agreed, emphasised the primacy of the text, while at the same time giving a certain place to the

65 *Yearbook of the International Law Commission* (vol II, United Nations, New York, 1962) 160, para 17.

66 *Yearbook of the International Law Commission* (vol II, United Nations, New York, 1966) 176, paras 25-26.

other two matters.⁶⁷ That element had to feature strongly in the draft articles. But what of all the principles and maxims of interpretation which feature so richly in international practice? Recourse to those was not automatic or obligatory. "The interpretation of documents is to some extent an art, not an exact science."⁶⁸

The Commission decided to confine itself to isolating and codifying the comparatively few general principles which appeared to it to constitute general rules for the interpretation of treaties. It gave these "cogent reasons" for undertaking the task:⁶⁹

First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to the divergent opinions concerning methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles adopted by the Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties. In addition the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

It followed from this general and limited approach that the Commission did not distinguish between lawmaking and other treaties, nor did it consider that the principle of effectiveness should get an express reference, as the special rapporteur had initially proposed. It gave these reasons for emphasising the text:⁷⁰

The article ... is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this – the textual – approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of

67 *Yearbook of the International Law Commission* (vol II, United Nations, New York, 1964) 54, paras 4 and 56, para 13; and 201-202 para 9; *Yearbook of the International Law Commission* (vol II, United Nations, New York, 1966) 220, para 11.

68 *Yearbook of the International Law Commission* (1966), above n 66, 218, para 4.

69 *Ibid*, 218, para 5.

70 *Ibid*, 220, para 11.

the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law.

Contemporary assessments of the draft articles were sharply conflicting. I mention two. In his *General Course on Principles of International Law* given at the Hague Academy in 1967, Professor RY Jennings of the University of Cambridge emphasised that the ILC attempted to state only the basic general principles and that quite shortly; the principles were "isolated" (the Commission's word) from other principles, rules, techniques or maxims which perhaps were being seen as non-obligatory, as principles of logic and good sense; and the width of choice involved in the provisions on preparatory work would mean that it could always be invoked (involving extra cost to no likely advantage). He earlier echoed and added to the words of the Commission when he said:⁷¹

[T]he rules and principles [of interpretation] are elusive in the extreme. Certainly the interpretation of treaties is an art rather than a science; though it is part of the art that it should have an appearance of a science.

By contrast, from the other side of the Atlantic, came a violent assault from the pen and later the voice of Professor (and US delegation member) Myres S McDougal and also from the United States government. The complaint, as the government formulated it in late 1967, was that the draft articles laid down "overly rigid and unreasonably restricted requirements".⁷² The ordinary meaning rule should not be accorded primacy and it should not be the centre point. The limited role of context and object and purpose and the subordinate position of the preparatory work in the circumstances of the treaty's conclusion were also deprecated. There should be free access to all pertinent material. There should be no fixed hierarchy. In the same year Professor McDougal published an article and, with colleagues, a book attacking the draft. The article began in this way:⁷³

71 Professor RY Jennings *General Course on Principles of International Law* (1967) 121 *Recueil des Cours* 323, 547-522 and 544.

72 United Nations Resolution 2287 (XXII) (6 December 1967), reproduced in United States: Comments of the Government of the United States on the Draft Articles on the Law of Treaties Drawn up by the International Law Commission (1968) 62 *AJIL* 567, 569-570.

73 Myres S McDougal "The International Law Commission's draft articles upon interpretation: textuality *redivivus*" (1967) 61 *AJIL* 992; see also McDougal, Harold D Laswell and James C Miller *The Interpretation of Agreements and World Public Order; Principles of Content and Procedure* (Yale University Press, New Haven, 1967). Fitzmaurice in a vigorous review of the

The great defect, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistence upon an impossible, conformity imposing textuality.

In April the following year he addressed the Vienna Conference on the Law of Treaties in support of the United States amendment which would have collapsed the two draft articles into one and required "interpretation in good faith to determine the meaning to be given to its terms in the light of all relevant factors, including in particular" followed by a list, on an equal footing, of the matters included in the ILC draft.⁷⁴ The rigidities and restrictions in that draft had never been international law, could not successfully be made international law for the future and should not be, even if the conference possessed the omnipotence to do that.⁷⁵ The diplomatic conference overwhelmingly rejected that

1967 book concluded that "aiming at order and liberty, its concepts, by their very breadth, open the door to anarchy and abuse": G Fitzmaurice "*Vae Victis* or Woe to the Negotiators! Your Treaty or Our 'Interpretation' of it?" (1971) 65 AJIL 358, 373 (quoting Virgil "the easy descent into Avernus"). (Compare the opposition by the US (and many others) to a draft article about modification of a treaty by subsequent practice, the only ILC proposal which did not survive, and Richard D Kearney and Robert E Dalton "The Treaty on Treaties" (1970) AJIL 495, 525.)

74 Vienna Conference on the Law of Treaties (1968) 62 AJIL 1021.

75 Compare the more sober assessment by Richard D Kearney and Robert E Dalton (of the Office of the Legal Advisor, Department of State but writing in their personal capacity), above n 73, 518-520:

The adoption by the conference of two articles which the United States viewed as somewhat archaic and unduly rigid does not seriously weaken the value of the convention. It seems unlikely that foreign offices will cease to take into consideration the preparatory work and the circumstances of the conclusion of treaties when faced with problems of treaty interpretation, or that international tribunals will be less disposed to consult Article 32 sources in determining questions of treaty interpretation.

In 1965 the American Law Institute completed its *Restatement (Second), Foreign Relations Law of the United States* (St Paul, Minnesota, 1965). Its texts on interpretation (sections 146-148) were less structured than those of the International Law Commission (ILC), providing for instance that while the ordinary meaning of the words of an agreement must always be considered as a factor in interpretation, there was no established priority as between the other listed factors (including the negotiating history and subsequent practice) or factors not listed. For a valuable comparison see Shabtai Rosenne (a member of the ILC at the time) "Interpretation of Treaties in the Restatement and the International Law Commission Draft Articles: A comparison" (1966) 5 Colum J Tr L 205; see especially 221-223. When the American Law Institute revisited the matter in the 1980s it moved much closer to the Vienna Convention text with the 1980 draft essentially following the Vienna text (*Tentative Draft No 1*, 1 April 1980, 145-149) p 28; but the final version omitted its structural provisions and much of its detail (American Law Institute *Restatement of the Law (Third) The Foreign Relations Law of the United States* (vol I, St Paul, Minnesota, 1987) 144-148, 196-202 (section 325)).

proposal⁷⁶ and adopted Articles 31 and 32 which are identical to those proposed by the Commission:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable

The structure of the provisions is important. The "general rule" (the singular being deliberately chosen) is followed by a provision about recourse to "supplementary means" but only to confirm meaning or if ambiguity or unreasonableness is established, that is, if the drafting history and other matters are to be invoked to produce a change in the ordinary meaning determined in context by reference to purpose. Such structuring and

76 For a valuable insider's account see I M Sinclair "Vienna Conference on the Law of Treaties" (1970) 19 ICLQ 47, 60-66.

conditioning was to appear in Australian legislation which was directly influenced by the Vienna provisions.

VII ... OF STATUTES

The question has similarly been asked whether rules or principles for the interpretation of statutes should be stated by Parliament. A sharp divide is to be found in the answers given in common law jurisdictions. That divide highlights choices both about legal method and about the roles of the judge, supported by the scholarly and wider professional community, and of the legislature in stating such rules or principles; and about substance, especially the relationship between statutes and the common law.

The whole story remains to be told and I am selective. The United Kingdom Parliament in 1850 enacted its first generally applicable Interpretation Act (Lord Brougham's Act) dealing with recurring issues such as dates, distances, singular and plural and gender. In terms of the second and third of the three purposes stated in the most recent New Zealand Interpretation Act the rules had the purpose of shortening statutes and promoting consistency in their language and form.⁷⁷

But from the mid 19th century, other interpretation statutes in the common law world were more ambitious and also addressed the first of the three purposes declared by the New Zealand Parliament in 1999 – to state principles and rules for the interpretation of legislation. The first New Zealand Interpretation Ordinance, prepared in 1851 by the Attorney-General William Swainson, the year after Lord Brougham's Act, added two provisions to that technical set:⁷⁸

- s3 That the language of every Ordinance shall be construed according to its plain purport, and where it is doubtful according to the purpose thereof.
- s4 That whenever the doing of any act is prohibited by any Ordinance, the prohibition shall be taken to extend to the causing such act to be done, unless there be something in the subject, or the words of the Ordinance repugnant thereto.

Many such purposive provisions were also beginning to be enacted in North American jurisdictions, with several in the United States substantially to this effect:⁷⁹

77 Interpretation Act 1999, s 2 (b) and (c).

78 Interpretation Ordinance 1851.

79 Iowa Code, title 1, ch 4-2. For valuable discussions and collections of the provisions see Livingston Hall "Strict or Liberal Construction of Penal Statutes" (1935) 48 Harv L Rev 748, who traces general provisions in the United States back to 1838 for penal laws (*ibid*, 735-755;

Common law rule of construction.

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.

One of the Canadian provisions, an Upper Canada provision of 1849, was introduced into the New Zealand statute book in 1888 where it remained, essentially unchanged, until 1999:⁸⁰

5 General Rules of Construction

- (j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

The 1999 provision quoted earlier was based on a text prepared by the Law Commission. As will appear, democratic principle was central to its recommendation that a purposive provision be maintained. (That principle might also have supported a text emphasising the intention of Parliament.) While most Canadian jurisdictions had such provisions and a number of Australian jurisdictions had recently followed suit, no such provision has ever been included in the equivalent British or United States federal statutes. The law commissions in the United Kingdom in 1969, between the two sessions of the Vienna Conference on the Law of Treaties, proposed a purposive provision and also, to return to the Jones Act case, a provision about international obligations:⁸¹

see also *ibid*, Appendix 771-774); Jefferson B Fordham and Russell Leach "Interpretation of Statutes in Derogation of the Common Law" (1950) *Vand L Rev* 438, 448-453; Charles A Beckham "The Judicial Avoidance of Liberal Statutory Construction": Is Article 10, Section 8 Lost and Forgotten?" (1978) 10 *St Mary's LJ* 163; and especially Alan R Romero "Interpretive Directions in Statutes" (1994) 31 *Harv J on Legis* 211.

- 80 The provision quoted above is the Acts Interpretation Act 1924, s 5(j); for the immediate background to the Canadian provision see Eric Tucker "The Gospel of Statutory Rules requiring liberal interpretation according to St Peter's" (1985) 35 *UTLJ* 113, 125-127.
- 81 The Law Commission and the Scottish Law Commission *The Interpretation of Statutes* (1969 LawCom No 21 and Scott-Law Com No 11) 51. Lord Scarman, who chaired the Law Commission in 1969 in a lecture given in Melbourne in September 1980 (Lord Scarman "Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century -

2. The following shall be included among the principles to be applied in the interpretation of Acts, namely –
 - (a) that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not; and
 - (b) that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not.

One feature of the wording of these principles is that they would not have required any preliminary finding of ambiguity or absurdity.⁸² Another feature is that the two principles might have tugged in opposite directions. The legislative purpose may, for instance, be to confer extensive powers of search and seizure while the right to be protected against unreasonable search and seizure is stated in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.⁸³ An important feature of the second is that the principle it states would apply to all international obligations of the United Kingdom — whether treaty based or not and whether the legislation in issue was enacted to give effect to the particular treaty or indeed whether the obligation even existed at the time the legislation was enacted.

Although not enacted in Britain, the commissions' purposive proposal plainly had real influence in Australia at the federal level and in several states. The 1981 federal provision is as follows:⁸⁴

Happy Marriage or Irretrievable Breakdown?" (1980) 7 Monash UL Rev 1, 6) said this: "In London no one would dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse". The *Fothergill* case, below n 125, in which Lord Scarman and his colleagues adopted a purposive approach had been argued and decided earlier in the year. In the following year, 1981, he unsuccessfully promoted an Interpretation of Legislation Bill incorporating the United Kingdom Commissions' proposals: Lord Scarman "Current Topics Statutory guidelines for interpreting Commonwealth statutes" (1981) 55 ALJ 711. The Wilberforce position (above n 40) may be seen as prevailing.

82 Compare, on the first, the original 1851 New Zealand direction, and, on the second, the decision of the House of Lords in *R v Secretary of State for Home Department; ex parte Brind* [1991] 1 AC 696 (HL).

83 Since 2 October 2000 the second direction is to be found in the Human Rights Act 1998, s 3(1) but only in respect of the European Convention and not in respect of the full range of international law binding on the United Kingdom, as proposed by the Law Commissions.

84 Acts Interpretation Act 1901, s 15AA.

Regard to be had to purpose or object of Act

- (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The decisions of many North American legislatures as well as those in South Australia and New Zealand, from the mid nineteenth century onwards, to require interpreters to give effect to legislative purpose is to be put against the negative view of legislation held and applied by many common lawyers, including influential judges, through at least much of the nineteenth century and well into the twentieth.

VIII THE PLACE OF LEGISLATURES AND DEMOCRATIC PRINCIPLE IN THE INTERPRETIVE PROCESS

For Roscoe Pound writing in 1908 "not the least notable characteristics of American law today are the output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers".⁸⁵ The courts, he thought, might deal with a legislative innovation in one of four ways:⁸⁶

- (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.
- (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject.
- (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.
- (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.

The fourth, he said, represents common law orthodoxy, but probably the third "represents more nearly the attitude to which we are tending".⁸⁷ The first and second

85 Roscoe Pound "Common Law and Legislation" (1908) 21 Harv L Rev 383.

86 Ibid, 385.

87 Ibid.

"doubtless" appear "absurd" to the common law lawyer. Some contemporaries, at least from the other side of the Atlantic may have doubted his assessment of the "tendency" towards the third. Twenty years earlier Sir Frederick Pollock had said this of judicial attitudes, an assessment endorsed by Harold Laski 50 years later in 1932:⁸⁸

There is a whole science of interpretation better known to judges and parliamentary draftsmen than to most members of the legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.

In 1938, John Willis writing in the *Canadian Bar Review* also expressed strong concern about judicial thwarting of parliamentary purpose.⁸⁹ While his statement of three judicial "rules" of interpretation has been very influential, his statement of concern has been largely ignored.

Sir David Keir and F H Lawson in their *Cases on Constitutional Law*, which was widely used in a number of Commonwealth law schools from the late 1920s well into the 1960s, spoke of the judges seeming to:⁹⁰

... have in their minds an ideal constitution comprising those fundamental rules of common law which are essential to the liberties of the subject and the proper government of the country. The rules cannot be repealed but by direct and unequivocal enactment.

They instanced the right to compensation for property taken, the reading of permissive powers to leave so far as possible private rights intact, the strict construction of legislation limiting personal freedom, the right of access to the courts, the strict construction of penal and tax statutes and the presumption against retrospective effect.⁹¹

88 Sir Frederick Pollock "Some Defects of Our Commercial Law" in *Essays on Jurisprudence and Ethics* (MacMillan and Co, London, 1882) ch III, 85, 90-94. Harold Laski, responding to that negative attitude to legislation, especially in the realm of major social experiments, proposed in his note to the *Report of the (Donoughmore) Committee on Ministers' Powers* (1932 Cmd 4060) 135-137 that judges should use the explanatory memoranda which were increasingly provided to members of Parliament.

89 John Willis "Statutory Interpretation in a Nutshell" (1938) 16 *Can Bar Rev* 1.

90 DL Keir and FN Lawson *Cases on Constitutional Law* (1 ed, Clarendon Press, Oxford, 1928) 3. See also DL Keir and FN Lawson *Cases on Constitutional Law* (5 ed, Clarendon Press, Oxford, 1967).

91 For example see Keir and Lawson, *ibid*, (1 ed) 3; and (5 ed) 11-13.

The North American provisions mentioned earlier by their very terms are expressly directed against that common law attitude: they abolished the common law rule that statutes in derogation of the common law (as by their very nature many are) are to be strictly construed. They were and are striking in their directness.

What is even more striking is their apparently very limited impact on the practice of the law and on related commentary. For instance the famous Llewellyn article about thrust and counter thrust in American statutory interpretation cites only cases or secondary sources and not one of those many state statutes of long standing;⁹² that is also true of the Statutes title in *American Jurisprudence* 2d volume 73. Similarly John Willis' 1938 article does not refer to any of the many long established (but generally ignored) Canadian federal and provincial directions — an omission which is all the more surprising since he was a statutes man and strongly opposed to what he saw as judicial overreaching and implementation of a judicially created "ideal Bill of Rights".⁹³

Certainly the New Zealand Law Commission, in recommending that a purposive provision be retained in the proposed new Interpretation Act, emphasised the democratic imperative. An immediate factor was the potentially conflicting role of the Bill of Rights which had been enacted only three months earlier; that was also of course a measure that had democratic legitimacy.⁹⁴

At bottom the matter is constitutional. Parliament, composed of the representatives of the people, has enacted the legislation in issue. It has done this usually on the proposal, and always with the agreement, of Cabinet which in turn has the confidence of the House of Representatives established by the electorate. Parliament has very large powers to make law. Democratic principle argues that its will is to be given effect to. The courts are not to stand in the way of that will. On the other side and in potential conflict with democratic principle, are enduring principles (or at least so they appear to the courts) which are not to be ignored unless Parliament has made itself very clear. The ideal constitution, the implicit Bill of Rights, can of course be made explicit, either in an entrenched form limiting the ordinary

92 Llewellyn, above n 6.

93 See for example Michael Taggart "Prolegomenon to an intellectual history of administrative law in the Twentieth Century: the case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223.

94 New Zealand Law Commission *A New Interpretation Act to Avoid "Prolivity and Tautology"* (NZLC R17, Wellington, 1990) paras 52 and 59 [*A New Interpretation Act*], For section 5(j) reference, see above n 80.

lawmaking power of Parliament or in an interpretative, presumptive form as in the recently enacted New Zealand Bill of Rights Act 1990. ...

The central argument for the s 5(j) type of direction is the democratic one already indicated. The courts are to give effect to the law enacted by Parliament. True, it is for the courts to determine the meaning of the words that Parliament writes. That is their constitutional role. Are directions or guides of the s 5(j) type needed or helpful in that context? Does experience show that they can in some situations provide a useful reminder of the need of the interpreter to pursue the purpose of the law maker? That reminder can emphasise for the interpreter the relevant statements of the law maker's purpose and meaning. Even if the proposition is well understood there is value in its declaratory statement. The law is more accessible. It can help rebut the unthinking use of presumptions which might be used to defeat parliamentary purpose. It can help emphasise the central position of statutes in our legal system; they are not merely a gloss on the common law. The direction can enhance the likelihood of an interpretation consistent with democratic theory. That is one important reason for the Commission's proposal that a variant of s 5(j) be continued.

Canadian legislatures too have generally maintained a s5(j) equivalent. Apart from South Australia, which in earlier years had a provision like the Canadian and New Zealand ones, it is only in recent times that Australian jurisdictions have considered the matter, with several adopting purposive directions. Those who decide to prepare such provisions have a number of choices.

IX THREE QUESTIONS ABOUT CODIFICATIONS

I consider three of these choices:

- whether the purposive direction is subject to a precondition such as ambiguity;
- the role of context; and
- the role of material extrinsic to the statute.

Since the provisions have in common an emphasis on purpose, along with the text and context, I do not further consider the inclusion of a reference to purpose. I do however come back to it and its relationship to the other elements involved in interpretation when considering further cases.

A Is Use of the Purpose Subject to a Prerequisite?

The 1851 New Zealand interpretation ordinance, it will be recalled, was in two parts. It required construction of the language of every ordinance according to its plain purport and where it is doubtful according to its purpose. The apparent condition of doubt did not

however appear, at least expressly, in the 1888 adoption of the provisions from Upper Canada. It also does not appear, again at least expressly, in many other of the statutory directions and guides. That is also the case with article 31 of the Vienna Convention which states a "single rule" (the ILC's expression) encompassing the text, purpose and context. When it comes to extrinsic materials, by contrast, the Convention, like the Australian provisions modelled on it, does state preconditions of uncertainty or unreasonableness or limits the purpose of the reference to a confirming role.

Such conditions raise the same question as the purposive or liberal directions themselves: what attitudes will a court take to them? It may say in respect of the direction that the "clear intentment" of the statute must prevail or that the provision must be "fairly construed",⁹⁵ and, in the case of the prerequisite for using the extrinsic material, it may effectively ignore it. While I consider that specific situation later, along with the issue presented by the New Zealand language of 1851, any such statement of a condition raises a basic issue about the very business of reading, of finding meaning. Is it as sequential as those provisions and judgments suggest? Is it possible, to be more specific, to determine the meaning of the language without considering its purpose or context? Recall Judge Anzilotti's position in the ILO case. Or consider this question decided by the High Court of Australia: is Scottish Gaelic a "European language"?⁹⁶ The simple answer, uninformed by purpose or context is yes, but the High Court answered no. The phrase was used in an immigration statute which permitted an official to administer a dictation test to a prospective entrant. Egon Kisch, a radical political figure of the 1930s, was refused entry for not being able to do a test in Scottish Gaelic. The High Court ruled that the expression was to be read in context and with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve. So read, "the compound expression" conveyed that "a test is provided ... depending upon a proper familiarity with some form of speech which in some politically organised European country is regarded as the common means of communication."⁹⁷

B How, if At All, Should the Context Be Referred to?

One respect in which the proposal of the New Zealand Law Commission and the example provided by the Vienna Convention were not adopted in the New Zealand

95 See for example the cases discussed by Fordham and Leach, above n 79, Romero, above n 79, 451-453, and Tucker, above n 80.

96 *R v Wilson; ex parte Kisch* (1934) 52 CLR 234, 244.

97 *Ibid.*

Interpretation Act is in the omission of any reference to the context of the measure. The explanatory note to the Bill gave two "principal reasons" for the omission:⁹⁸

First, the term "context" is imprecise. Second, the discussion of the concept in the Law Commission's report (para 71 and 72) suggests a meaning that might well go beyond the approach of the Courts currently in interpreting legislation.

In the cited paragraphs, the Law Commission referred to the context as the rest of the enactment, the particular area of law from which the legislation arises, and the wider social and political context out of which the legislation arises.⁹⁹ The Commission also referred to an even wider context that might be used not to expand but to restrain the apparent meaning of legislation. It instanced New Zealand's extensive network of treaty obligations:¹⁰⁰

In many cases the treaty will be part of the particular context out of which the legislation arises. Indeed the legislation will sometimes refer to it and will have as a purpose, whether stated or not, the giving of effect to the treaty. But in other cases the legislation will not be designed to give effect to the treaty obligations; rather the treaty might provide a basis for reading the legislation narrowly and contrary to the apparent purposive meaning. In that way the treaty contributes to the wider public policy against which legislation is to be read That is to say, the word "context", in the above draft, when broadly read, may include within itself the tension between the [broad] approaches of giving effect to the values underlying the particular statute and giving effect to the values of the wider society.

While the Bill was still before Parliament John Burrows, the leading New Zealand commentator on statutory interpretation, suggested that the omission would make no difference in practice, a prediction which has been borne out by judicial practice and decisions.¹⁰¹

98 Interpretation Bill 1997, no 90-1 (explanatory note).

99 New Zealand Law Commission, above n 94, para 72.

100 Ibid.

101 John Burrows *Statute Law in New Zealand* (2 ed, Butterworths, Wellington, 1999) and see eg *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] 3 NZLR 767, para 22 (NZSC), the authorities cited there and Cathy Nijman "Ascertaining the meaning of Legislation — A Question of Context" (2007) 38 VUWLR 629. See Lord McNair's very apt use of Father Brown in *The Law of Treaties* (Clarendon, Oxford, 1961) 368, quoting GK Chesterton's *The Invisible Man*:

C What Reference, if Any, Should Be Made to Extrinsic Material?

Some jurisdictions have included in their interpretation statutes provisions about the use of extrinsic material, including law reform reports and parliamentary proceedings. Others have not. The Australian provisions closely track articles 31 and 32 of the Vienna Convention on the Law of Treaties,¹⁰² provisions which were also weighed but not adopted in the New Zealand reform process. The Federal Acts Interpretation Act section 15AB, headed use of extrinsic material in the interpretation of an Act, has three subsections. The first states that material not forming part of the Act which is capable of assisting in the ascertainment of the meaning of the provision may be considered to confirm that the meaning of the provision is the ordinary meaning; or to determine the meaning of the provision when either the provision is ambiguous or obscure or the ordinary meaning is manifestly absurd or unreasonable.

That power is subject to subsection (3) which requires that regard be had to:

- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
- (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

Have you ever noticed this — that people never answer what you say? They answer what you mean — or what they think you mean. Suppose one lady says to another in a country house, "Is anybody staying with you?" the lady doesn't answer "Yes; the butler, the three footmen, the parlour-maid, and so on," though the parlour-maid may be in the room, or the butler behind her chair. She says: "There is *nobody* staying with us," meaning nobody of the sort you mean. But suppose a doctor enquiring into an epidemic asks, "Who is staying in the house?" then the lady will remember the butler, the parlour-maid, and the rest. All language is used like that; you never get a question answered literally, even when you get it answered truly. When those four quite honest men said that no man had gone into the Mansions, they did not really mean that *no man* had gone into them. They meant no man whom they could suspect of being your man. A man did go into the house, and did come out of it, but they never noticed him. [The "invisible man" was the postman.]

102 A tracking which is to be attributed to the role of Patrick Brazil who led the Australian delegation to the Vienna Conference and was Secretary of the Commonwealth Attorney-General's Department at the time of the reforms to the interpretation legislation. See Patrick Brazil "Some Reflections on the Vienna Convention on the Law of Treaties" (1975) 6 Fed L Rev 223, 234-239, and Patrick Brazil "Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: with a Postscript on Simpler Drafting" (1988) 62 ALJ 503.

Subsection (2) provides a lengthy non exhaustive list of the materials that *may* (the discretion is emphasised again) be considered under subs (1). The discretion also appears from the contents of the list. It includes relevant reports laid before Parliament before the legislation was enacted, any treaty referred to in the Act, the Minister's second reading speech and relevant materials in the Parliamentary debates. Many instances can be found of the use of material falling outside the limits included in the first and second of those items and the fourth item includes the third.

Those variations in respect of material extrinsic to the text present at least four questions for the codifier:

- (a) Should the codifier address the issue? The alternative is to leave the matter for the courts and the scholarly community.
- (b) If the codifier is to address the issue, should the provision prohibit the use of the material or some of it or allow its use?
- (c) If it allows use, should it be mandatory or permissive?
- (d) If use is to be allowed, should the provision identify the prerequisites to and the purposes of the use?

The ILC and the Vienna Conference, UNCITRAL and the Conference which adopted the Convention on the International Sale of Goods, UNIDROIT, and a number of Australian jurisdictions (essentially following the Vienna model) and some American states have answered the first question yes; on the second, they allow the use of certain material; on the third they are permissive; and on the fourth they state prerequisites to, and purposes for, the use of the material along the lines of article 32 of the Vienna Convention.

The British law commissions would have allowed a reference to a limited range of material, but would have prohibited reference to parliamentary material. The New Zealand Law Commission, by contrast to both approaches, did not think that legislation was necessary: the courts were already making use of parliamentary material, an action which the Commission supported, and the provisions regulating use did not appear to help. The courts should be left to develop the rules and practices about relevance and significance. Accordingly the Commission did not:¹⁰³

103 New Zealand Law Commission *A New Interpretation Act*, above n 94, para 126.

... propose the enactment of legislation regulating the use of parliamentary material. That was also the strong view of most of those who expressed views to us on this issue. We conclude with two cautionary remarks. We repeat that the user of the statute book should in general be able to place heavy reliance on it. Extended references to material beyond its text should not be common. The obverse of this point is the need to make statute law more accessible through drafting and related changes. The second caution is that experience shows that in many cases relevant parliamentary material does not exist, and we certainly do not wish to be seen as encouraging the presentation to the courts of unhelpful information. ... But practice in many jurisdictions shows that the parliamentary record will sometimes be useful.

A further step was taken in 1992 by the House of Lords in its judicial capacity – no legislation having been enacted in response to the British law commissions' 1969 recommendations which would have prohibited access to Parliamentary records. It decided to relax the exclusionary rule and allow consultation of Hansard as an aid to the interpretation of legislation in certain circumstances and for certain purposes – an approach not unlike that adopted in the Vienna Convention and the Australian statutes.¹⁰⁴ Successful counsel opposed the arguments made by the British Commissions, preferring the arguments made by the New Zealand Law Commission and the account of the developments New Zealand provided by John Burrows.¹⁰⁵ British courts have continued to refine the circumstances in which and the purposes for which they will use the material. The refining appears to be in the direction of making less use of the legislative history than the New Zealand courts do. Some judges have indeed begun to question the 1992 decision.¹⁰⁶

104 *Pepper v Hart* [1993] AC 593 (HL). A proposal to that effect had been made by members of the Donoughmore Committee 60 years earlier, above n 88.

105 *Ibid*, 599-601; for generous acknowledgements of the borrowing see Lord Lester "*Pepper v Hart* Revisited" (1994) 15 *Statute L Rev* 10 and Anthony Lester "English Judges as Law Makers" [1993] *PL* 269, 275.

106 Compare for example Johan Steyn, above n 4, 16, with Lord Cooke "The Road Ahead for the Common Law" (2004) 53 *ICLQ* 273, 282-284, referring to the different approaches in *R v Secretary of State for the Environment ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL). An American commentator has provided a most valuable overview, James Brudney "Below the Surface: comparing legislative history usage by the House of Lords and the Supreme Court" (2007) 85 *Washington ULR* 1, 17-28 and 54-71.

X ***THE USE AND IMPACT OF AUTHORITATIVE DIRECTIVES AND GUIDES***

I have already referred to accounts which indicate that the North American legislative directives and guides have no or, at best, only limited effect. That is so notwithstanding the fact that they are to be found in the large majority of North American jurisdictions and have been for well over a century. The more recent Australian provisions appear to have had a somewhat more prominent, but still limited, role. One recent piece of evidence of their role, or its lack, appears from an interesting publication of the New South Wales Judicial Commission, *Statutory Interpretation – Principles and Pragmatism for a New Age*,¹⁰⁷ which is also relevant to the North American provisions.

Not one of the three Australian judges who discuss statutory interpretation mentions the statutory directions. The Australian academic contributor records a comment made soon after the federal purposive provision was enacted that there had been a noticeable lack of enthusiasm for the new provision, particularly among many members of the judiciary, and notes that in the first few years the provision was infrequently applied or even referred to, although reference to the purposes of legislation had increased.¹⁰⁸ He then states that although the interpretive provisions, state as well as federal, were introduced to override certain common law principles they did not completely sweep them aside. The academic next highlights a 1997 judgment of the High Court setting out two propositions which have been followed on "numerous occasions":¹⁰⁹

... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy.

That paragraph was preceded by a sentence to the effect that:¹¹⁰

107 Gotsis (ed) *Statutory Interpretation*, above n 11.

108 RS Geddes "Purpose and Context in Statutory Interpretation" in Gotsis (ed) *Statutory Interpretation*, *ibid*, 127, 130.

109 *CIC Insurance v Bankstown Football Club Inc* (1997) 187 CLR 384, 408 Brennan CJ, Dawson, Toohey and Gummow JJ.

110 *Ibid*.

It is well settled that at common law, apart from any reliance on s 15AB, ... the Court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure.

Of the three authorities the Court cites in support of that statement of the common law, only one refers to a report, while the second refers to law officers' opinions and a ministerial statement in Parliament and the third to a ministerial statement in Parliament. The judgment does not mention section 15AA of the Interpretation Act. The accounts may not however give full weight to the role in practice of the legislative guides.¹¹¹

The United States essayist, a noted writer on the interpretation of statutes, or at least of federal statutes, makes no reference at all to the many American state statutes, limiting himself, so far as directives are concerned, to a theoretical comparison of the Australian federal legislation of the 1980s with the Harvard (Hart-Sacks) legal process school.¹¹²

The Canadian commentator does refer to the federal purposive directive (not the provincial ones) but only in a limited way.¹¹³ She quotes a passage by a leading commentator, Elmer Dreidger, who, building on John Willis' 1938 essay, integrated Willis' three rules into "the modern principle":¹¹⁴

Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court of Canada in 1988 "formally adopted" that paragraph.¹¹⁵ A supporting footnote, after listing eight Supreme Court decisions, finally notes that in the

111 See for example the leading text, DC Pearce and RS Geddes *Statutory Interpretation in Australia* (6 ed, LexisNexis, Chatswood (NSW), 2006) 30-37. It is striking that, in one of his final cases, Justice Kirby, the senior member of a unanimous bench, in writing separately to recognise the central importance of contextual and purposive interpretation, cited leading cases but made no reference at all to the relevant Interpretation Act provisions: *Minister Administering the Crown Lands Act v NSW Aboriginal Lands Board* [2008] HCA 48.

112 Philip P Frickey "Structuring Purposive Statutory Interpretation" in Gotsis (ed) *Statutory Interpretation*, above n 11, 159.

113 Ruth Sullivan "Statutory Interpretation in Canada" in Gotsis (ed) *Statutory Interpretation*, *ibid*, 105.

114 E A Dreidger *Construction of Statutes* (2 ed, Butterworths, Toronto, 1983) 81

115 *Rizzo v Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27, cited in Sullivan in Gotsis (ed) "Statutory Interpretation in Canada" *Statutory Interpretation*, above n 113, 105.

federal legislative context, the Court's preferred approach is buttressed by section 12 of the Interpretation Act 1985.¹¹⁶

In sharp contrast to that neglect or relative neglect in North America and perhaps in Australia is the role of the Vienna Convention provisions over nearly three decades and of the New Zealand provisions over a longer period. I consider some of that experience.

New Zealand judicial attitudes to appear to have been on the whole significantly different from those found elsewhere in the common law world, especially in North America. The Chief Justice has recently said:¹¹⁷

In New Zealand, Judges have always been deferential to legislative authority. We have had a cooperative approach to statutes, free of the suspicion which has been a feature of other jurisdictions. There never has been a time in New Zealand when the Judges have sought to frustrate legislative policies or shown the hostility to legislative reforms shown by the English Judges or American Judges where those reforms were thought to undermine the property interests or to extract property by way of taxes. Those were indeed "activist" Judges. In New Zealand, Judges have had no difficulty in accepting that statutes and common law operate within a single legal system and that the Judge must ensure that they work without friction.

Section 5(1) and especially its predecessors have had a major if fluctuating role in that cooperative process, even if at times they have been neglected. Others, notably John Burrows, have carefully and extensively documented that role.¹¹⁸ Accordingly, I am able

116 See also the cautious assessment of Pierre Côté *The Interpretation of Legislation in Canada* (Éditions Y. Blais (Quebec), 1984) 299-300. In her text book Ruth Sullivan, the Canadian contributor to the NSW book, takes almost a constitutional position: the courts have a special expertise in interpretation; for this reason legislatures are reluctant to tell judges how to do the work of interpretation; and when they do their instructions are sometimes ignored. For the most part, she says, the rules of statutory interpretation are found in case law. She also puts the finding of legislative intent at the centre of the process. See Ruth Sullivan *Statutory Interpretation* (2 ed, Irwin Law, Toronto, 2007) 31-32. On Canada see also the valuable contribution of Randal Graham *Statutory Interpretation: Theory and Practice* (E Montgomery Publications, Toronto, 2001).

117 Sian Elias "The Next Revisit: Judicial Independence Seven Years On" (2004) 10 Cant LR 217, 226; see also her "Interweavers: Contribution of the New Zealand Judiciary to New Zealand Law in Sir Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission* (LexisNexis NZ, Wellington, 2007) 55, 66-67 ["Interweavers"].

118 See especially JF Burrows *Statute Law in New Zealand* (4 ed LexisNexis NZ, Wellington, 2009) [Burrows *Statute Law*] and his series of articles including (1969) 3 NZULR 253. See also the papers by DAS Ward "The Law Draftsman, Trends in the Interpretation of Statutes" (1957) 2 VUWLR 155 and DAS Ward "A Criticism of the Interpretation of Statutes in the New Zealand

to focus on some of the criticism of the process. In 1905 the Chief Justice of the day, Sir Robert Stout, in the pages of the *Law Quarterly Review*, asked what for him was a rhetorical question: Is the Privy Council a legislative body?¹¹⁹ His criticism, which is to be read with his ideas about ending appeals to London,¹²⁰ was in large part directed at a Privy Council decision interpreting liquor licensing legislation enacted over the previous two decades. In the Chief Justice's view, the Privy Council had gone beyond all rules which had been laid down for the interpretation of statutes and misapprehended the scope and intention of the New Zealand Acts. In the particular decision (allowing an appeal by licensees) the Privy Council had cited the earlier equivalent of s 5(1), as did the Chief Justice, but he said their Lordships had misunderstood the intention of the legislation. The purposive direction did not, in his view, help them: the object of the statute as determined from its real and inner meaning was to increase rather than enlarge the power of the people to control the granting of new licences, a power which, the Chief Justice thought, the Law Lords had thwarted.

In the 1920s and 1930s in important cases about the extent of executive regulatory powers, the courts can be found using the language of s 5(j) without expressly citing it,¹²¹ although, at the same time judges refused to apply it in some areas, protecting private property for instance, or to tax and penal statutes, adhering to the common law

Courts" [1963] NZLJ 293 (a paper to the New Zealand Law Conference). John McGrath discusses those papers and the developments over the next 40 years in valuable papers, John McGrath "Reading Legislation and Ivor Richardson" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) (also 33 VUWLR 1017) and John McGrath "Purpose, Hansard, Rights and Language" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis NZ, Wellington, 2004) 227. From that latter volume see also the sharply contrasting and challenging papers by an academic and judge, Jim Evans "Reading Down Statutes", *ibid*, 123 and Susan Glazebrook "Filling in Gaps", *ibid*, 153, touched on in the foreword. The two Ward papers were very influential, as best I can judge, in their impact on law teaching and argument in court. Note as well the comment by HRC Wild QC, then the Solicitor General, at the Law Conference, that s 5(j) was more often invoked than the law reports indicated.

119 Sir Robert Stout "Is the Privy Council a Legislative Body?" (1905) 21 LQR 9.

120 For example Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3.

121 For example *New Zealand Meat Producers Board v Attorney General* [1927] NZLR 851 (SC) Ostley J for the Court, 859 and *Kerridge v Girling Butcher* [1933] NZLR 646, 686 (CA) Smith J.

presumptions that such statutes are to be strictly construed.¹²² But as John Burrows reports, the purposive approach is now the accepted method.¹²³

I need not add to the extensive commentary on the role of articles 31 and 32 of the Vienna Convention in international litigation.¹²⁴ Rather, I give some attention to their role in national courts.

Many courts in many jurisdictions in hundreds of cases have now used those interpretation provisions. In many of those cases the Vienna Convention was not applicable as treaty law because it had not come into force, or because it had not come into force for the States in question, or because of its non retrospective application. In those cases the judges expressly or impliedly accepted that the provisions reflected customary international law. What does this jurisprudence say about the value in principle and in practice of such directives and guides and about the elements relevant to interpretation and the weight to be given to them?

Some of the questions arose as early as 1980 in an English case, *Fothergill v Monarch Airlines*,¹²⁵ arising out of a loss of luggage which Mr Fothergill, on return from a holiday in Italy, suffered in 1975, five years before the Vienna Convention came into force. The Warsaw Convention on Carriage by Air of 1929 required him to complain within seven days of "the damage": he gave timely notice that his suitcase was badly torn but not that some of his clothes were missing. Was that loss "damage"? Yes, said the House of Lords. Mr Fothergill had accordingly failed to give the required notice and his claim in respect of the clothes failed.

The primary reason for the conclusion was that, as a matter of purposive interpretation (enabling the airline to take timely action), the word "damage" or "avarie" (since the French text was to prevail in the event of inconsistency) was to extend to the loss in issue.¹²⁶ That was so although the loss which Mr Fothergill suffered does not fall within

122 For example Burrows *Statute Law in New Zealand*, above n 118, 204-205. See also the current Chief Justice's comment on matrimonial property cases, Elias "Interweavers", above n 117, 72.

123 Burrows *Statute Law in New Zealand*, above n 118, 205-206, quoting two successive Presidents of the Court of Appeal, Sir Robin Cooke and Sir Ivor Richardson.

124 For a very recent valuable study emphasizing international decisions see Richard K Gardiner *Treaty Interpretation* (Oxford University Press, Oxford, 2008).

125 *Fothergill v Monarch Airlines* [1981] AC 251 (HL).

126 *Ibid.*, 272-273 Lord Wilberforce; 279-280 Lord Diplock; 287 Lord Fraser, agreeing with Lord Wilberforce; and 289-290 Lord Scarman.

ordinary meanings of "damage". The emphasis placed on the purposive approach matched the text proposed by the British law commissions ten years earlier, and adopted by Australian legislatures, if not by the United Kingdom parliament.

The Law Lords also addressed the correct approach to the interpretation of treaties implemented by legislation and in particular whether the treaty's drafting history could be considered. According to the defendant airline, the drafting history, including a statement made, as it happened, by Mr R O Wilberforce QC of the United Kingdom delegation at the 1955 Conference which amended the original 1929 Convention, helped its case. On the other side the plaintiff reminded the House of the existing bar on the use of legislative history, recently endorsed by the British law commissions.¹²⁷

Lord Wilberforce noted the very limited English authority on the use of travaux préparatoires, and the more extensive practice of international courts and tribunals, a practice "cautiously endorsed" by article 32 of the Vienna Convention. The interest in uniform application of the Warsaw Convention meant that the judges ought to have regard to the general practice of the courts of other states party to the Convention. That led him to the conclusion that:¹²⁸

[I]t would be proper for us, in the same interest, to recognise that there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention.

Lord Wilberforce's use of article 32 may be put in the balance against his rejection in 1966 of a possible codification of the rules of interpretation – "a non-subject" he thought then. Lord Diplock recalled that international courts and tribunals do refer to travaux préparatoires as an aid to interpretation of treaties and this practice had been confirmed by the Vienna Convention. While the Convention applies only to treaties concluded after it came into force and thus does not apply to the Warsaw Convention and Protocol of 1955, what it says in articles 31 and 32 did no more than codify already existing public international law. Further:¹²⁹

127 Ibid, 267, see Christopher Staughton QC for the plaintiff accepting Article 32, but no more. As it happens, 20 years on, speaking in his personal capacity, in a lecture on approaches to contract interpretation he took a consistent, cautious position: Staughton, above n 11.

128 *Fothergill v Monarch Airlines*, above n 125 (HL), 278.

129 Ibid, 283.

[I]n exercising its interpretative function of ascertaining what it was that the delegates to an international conference agreed upon by their majority vote in favour of the text of an international convention where that text itself is ambiguous or obscure, an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of the Vienna Convention on the Law of Treaties (Cmnd. 4140), I think an English court might well be under a constitutional obligation to do so. By ratifying that convention, Her Majesty's Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.

How is that "constitutional" obligation to be squared with the constitutional position of treaties in English law? There was of course no doubt that the United Kingdom as a State party was under an *international* obligation to give effect to the Convention.¹³⁰

Lord Scarman, agreeing with Lord Wilberforce, and also not referring to their earlier disagreement on the value of the codification of rules of interpretation, added comments about the correct approach of British Courts to the interpretation of treaties because of the growing importance of the task:¹³¹

[T]o do [this job] successfully, they will have to achieve an approach which is broadly in line with the practice of public international law. Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention ...

He then referred (as had Lord Diplock) to often quoted passages from judgments of Lord Macmillan in 1932 and Lord Wilberforce in 1977:¹³²

The international currency of the convention must be respected, as also its international purpose. The convention should be construed "on broad principles of general acceptance."

130 See the sharply different position of Lord Fraser who called for legislation to give effect to the Vienna Convention, legislation which has never been enacted.

131 *Fothergill v Monarch Airlines*, above n 125, 290.

132 See also Lord Roskill, noting the gradual evolution of the policy of the courts towards legislation implementing treaties over the previous sixty years or so.

Over the subsequent twenty or more years courts in Australia,¹³³ Scotland,¹³⁴ the United States,¹³⁵ and others in dealing with Warsaw convention cases have consistently used the Vienna Convention in resolving interpretation disputes. Among many other treaties in relation to which it is invoked are those regulating tax, road transport, shipping and other maritime matters, child abduction and other private law matters,¹³⁶ diplomatic relations, the environment, anti-discrimination, human rights, extradition, world trade, immigration and refugees.¹³⁷

In refugee cases, one issue is the use of subsequent practice. The New Zealand Court of Appeal distinguishes between guidelines issued by the United Nations High Commissioner for Refugees and resolutions of the Executive Committee (made up of States parties) with the latter being regarded as being the most valuable guide among the available international materials for discovering the meaning of the Convention.¹³⁸ In interpreting legislation to implement a customs valuation convention that Court has similarly:¹³⁹

... bearing in mind the purpose of the convention and the particular role of the Harmonized System Committee [set up under the Convention to issue opinions and generally to prepare

133 For example *Qantas Ltd v Povey* [2003] VSCA 227, affirmed *Povey v Qantas* (2005) 216 ALR 427 (HCA).

134 For example *King v Bristow Helicopters Ltd* [2000] Scot CS 195, para 8; the Lord President addressed the issues of ambulatory readings (para 12), purposive construction (para 15), *travaux préparatoires*. (para 34-44), subsequent history (para 45-54); see also Lord Cameron paras 10(4), (5) and (6); Lord Reed paras 18-21, 46-49 and 59-66.

135 For example *Day v Trans World Airlines* (1975) 528 F 2d 31 (US CA 2d Cir). See also the division of opinion in *Olympic Airways v Husain* (2004) 540 US 644 on the value of consistent interpretation of courts in different States parties to the Warsaw Convention; on that matter see also for example *King v Bristow Helicopters Ltd*, above n 134.

136 For example Jürgen Basedow "Uniform Private Law Conventions and the Law of Treaties" (2006) 11 Uniform L Rev 731, 741-745.

137 For a list of United States cases see Evan Criddle "The Vienna Convention on the Law of Treaties in US Treaty Interpretation" (2004) 44 Va J Int Law 43, 1 n72 and Gardiner, above n 124, 134-138.

138 *Attorney-General v RCNZ Inc* [2003] 2 NZLR 577 (CA), paras 110-111.

139 *New Zealand Customs Service v Rakaia Engineering* [2002] 3 NZLR 24, para 34 (CA) Keith J for the Court, referring to *Dellabarca v Christie* [1999] 2 NZLR 548, 551 (CA) Keith J for the Court, which also emphasised the value of aiming at uniform interpretation, in that case of the Hague Convention on International Child Abduction, by reference to relevant international commentaries.

advice on the interpretation of the Convention to secure uniformity in the system's interpretation and application], stress[ed] the importance of the uniform interpretation of the tariff terms if possible in accordance with the committee's opinion.

Those cases recognise, as Lord McNair did over seventy years ago, that different categories of treaties with different functions may attract different methods of interpretation, a matter recognised in varying degrees by the Vienna Convention.¹⁴⁰ We here have a reminder, within a single legal category, of the Freund caution.

Those cases, like others, also indicate that the concern expressed in the mid-1960s that the structure of Articles 31 and 32 would severely and, on one view of it, wrongly restrain the use of the drafting history has not been born out in practice. The parties will, when it helps their argument, bring the history to the attention of the court in question. In the absence of an absolute prohibitory rule such as that that used to exist for parliamentary history in the United Kingdom there is no practical way of stopping that happening. That is especially the case given that the material can be used to *confirm* the meaning reached by other means. To go back to the debates of 40 years ago, the excessive rigidity which McDougal feared has not really appeared, while the central role of the text, read with the purpose and in context, has been consolidated by constant reference to, and use of, the Vienna articles.

A final reflection on decisions of national courts in common law jurisdictions is that they may suggest a narrowing, if not the disappearance, of the differences between approaches to the interpretation of statutes and treaties, a possibility which the British law commissions anticipated 40 years ago. In Australia that may in significant part be a result of legislation influenced by the Vienna Convention. In the United Kingdom the adopting of purposive approaches to interpretation and the removal of the bar on using legislative history in interpreting statutes were important steps in that direction. Recent New Zealand cases help make the point for that jurisdiction:¹⁴¹

[T]he differences suggested thirty or more years ago between the interpretation of domestic legislation and the interpretation of treaties might not now be seen in such sharp terms. Whether that is so or not, the approach to the interpretation of treaties now stated in the

140 McNair "The Functions and Differing Legal Character of Treaties" above n 1; see Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, arts 3, 5, 20(2) and (3), 40, 41, 55, 56, 58, 60(1), (2) and (5), and 62(2)(a).

141 *Edwards v United States of America* [2002] 3 NZLR 222, paras 25-26 (CA) Keith J for the Court. See also the decisions of *Marryat v Wilson*, above n 4, *Van Bokkelen*, above n 4, and *Thomson v Thomson*, above n 4.

Vienna Convention on the Law of Treaties and generally considered to be declaratory of customary international law ... appears to be broadly to the same effect.

XI FOUR MORE CASES: ACCESS TO THE COURTS, CITIZENSHIP, LIBERTY AND TORTURE

The four cases now reviewed demonstrate the choices of interpretative principles and approaches which continue to be made in hard cases and the actual or possible role of interpretive directives or guides in channelling those choices. With the earlier discussion, they help provide a basis for some concluding comments.

In the first, the House of Lords held in 1969 that it could review a determination of the Foreign Compensation Commission although Parliament appeared to have flatly prohibited that: "the determination by the commission ... shall not be called in question in any court".¹⁴² There was no legislative direction or guide to the interpreter but, as the Law Lords saw it, there was a strong judicial one: the courts had long been hostile to and read down legislative provisions purporting to oust their jurisdiction or depriving them of it. (The very adjectives applied by courts to such provisions – "ouster" and "privative" – demonstrate their attitude.) That restrictive approach to the apparent, plain meaning of the provision had the support of the constitutional principle of the right to access of the Court, a right which may be traced back in English law to Magna Carta and which by the late 1960s also had growing support in international law. But against that approach are not only the strong, apparently plain words but even more the particular context. The long established opposition to "privative" clauses by the judges and others had been accepted in 1959 by Parliament which on the recommendation of the Franks Committee had repealed all such clauses with only two exceptions, one apparently designed to protect the determinations of the Commission. Reasons for that exception may have included the advantages of giving early finality to the decisions of a Commission, composed of senior experienced barristers, dividing up on a proportional basis a limited compensation fund among a number of qualified applicants and allowing its expeditious distribution. Whatever the reasons and their strengths, the significant thing for the moment is that that aspect of the context of the provision and its possible purpose were scarcely mentioned in the litigation and not at all in the House of Lords' judgments.¹⁴³ The judges' view of the "ideal constitution" swept all before it including the apparently plain words. Would

¹⁴² *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

¹⁴³ See Templeman QC for the Commission in the Court of Appeal in *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, 869 and Sellers LJ 884.

consideration of the apparent purpose, the legislative history and the immediate context have led to a different result?¹⁴⁴ Would provisions like the Australian ones have helped?

By contrast, in the second case about citizenship, the Privy Council in 1982 did see itself as required by the words of a 1928 New Zealand statute to hold that persons born in Western Samoa after the date of that enactment and before 1948, when the first general New Zealand Citizenship Act was passed, were natural born British subjects in terms of New Zealand law and became New Zealand citizens from 1948 when that status was first established. The purposive directive, then found in section 5(j) of the Acts Interpretation Act 1924,¹⁴⁵ appears to have played no role, although the purpose of the 1928 Act could be readily determined from resolutions of the Council of the League of Nations relating to mandated territories under the League of Nations (which is what Western Samoa was in 1928), from resolutions of (British) Imperial Conferences, and from imperial legislation: they all provided for the *voluntary* naturalisation of inhabitants of mandated territories; there was to be no automatic acquisition (or imposition) of the nationality of the administering power. By contrast, the Court of Appeal in its judgment, which the Privy Council overruled, began with that wider background: the legislation, it said, could not be sensibly considered without a reference to that general background. Another part of the context, not considered in Downing Street at the heart of what was once the Empire, were the limits on the powers of the New Zealand legislature in the 1920s particularly in respect of the conferral of British nationality.

The different choice of starting point in this case was critical to the outcome. Important too was the basis for using the resolutions of the Council of the League. While the Privy Council could find no ambiguity or lack of clarity in the legislation, the Court of Appeal stated that "in the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not legal, obligations in this sphere".¹⁴⁶

144 New Zealand Law Commission *Legislation and its Interpretation* (NZLC PP8, Wellington, 1998) 16-18; compare Lord Cooke *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997) 63-80). See now *Seal v Chief Constable of South Wales Police* [2007] 1 WLR 1910 (HL).

145 See above n 80.

146 *Lesa v Attorney-General* [1982] 1 NZLR 165 (PC) Lord Diplock; see also Sir Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 6 Waikato LR 1, 28-31.

In the third case,¹⁴⁷ the members of the High Court of Australia, drawing on the provisions of the federal Interpretation Act about purposive interpretation and the use of drafting history, were divided over the weight to be given to the wording and structure of the legislation, the historical background, the area of law in issue, Hansard and constitutional principle. An enlisted member of the United States Marine Corps, while a patient in the US Naval Hospital in 1970 in Da Nang, Vietnam, deserted or illegally absented himself and travelled to Australia, where he became a permanent resident and lived until 1986, when he was arrested at the request of the US military authorities. They claimed to be acting under the powers conferred by the Defence (Visiting Forces) Act 1963 (Cth) in respect of "a deserter or an absentee without leave from [the] forces" making the request.

The majority of the High Court held that the power applied only to persons who had deserted from a visiting force present in Australia by arrangement with the Minister of Defence. The dissent read the provision more broadly, applying it to deserters and absentees from the forces of any country within the scope of the Act (as the United States was) whether they came from a visiting force or not. That reading was supported by the wording and structure of the legislation, its historical background, the law of visiting forces and Hansard. In respect of the last, according to the dissent, "any doubt about the matter ... is put to rest by reference to the second-reading speeches in the Parliament when the 1963 legislation was introduced".¹⁴⁸ The Ministerial speeches, by the then Attorney-General and Foreign Minister (and later Chief Justice), Sir Garfield Barwick, could not have been clearer and supported the wider reading of the power favoured by the United States and the dissenter. However, for three of the majority the Minister's "unambiguous" statement:¹⁴⁹

...while deserving serious consideration, cannot be determinative: it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive on the liberty of the individual.

The answer to the question, they said at the outset, "is to be found in the proper construction of the provisions of the Act rather than by reference to the undisputed values securing the liberty of the individual that for centuries have illuminated the common

147 *Re Bolton, ex parte Beane* (1987) 162 CLR 514.

148 *Ibid*, 537 Toohey J.

149 *Ibid*, 518 Mason CJ, Wilson and Dawson JJ.

law".¹⁵⁰ That passage appears to be directed at a broader approach stated by another member of the majority in his first paragraph:¹⁵¹

Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force. This is such a case and the common law of habeas corpus and the *Habeas Corpus Act 1679* (31 Car II) as extended by the *Habeas Corpus Act 1816* are such laws.

Later he said that "[t]he law of this country is very jealous of any infringement of personal liberty ... and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right".¹⁵²

In the fourth and final case, the House of Lords was ruling on a challenge to a decision not to hold an inquiry into the alleged killings of Iraqi citizens and maltreatment of one of them in Basra by members of the British armed forces. On the one side the Minister of Defence placed heavy reliance on what he referred to as "a general and well established principle of statutory construction" that "unless the contrary intention appears Parliament is taken to intend an Act [in this case the Human Rights Act 1998] to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom".¹⁵³ On the other side, supporting the claimants' case, was the proposition that "absent some clear indication to the contrary, domestic legislation is to be taken to have been intended to cohere with the State's international obligations".¹⁵⁴ Neither approach had a legislative base of the kind that could have been provided by the 1969 proposals of the law commissions. For the majority, the second approach (or something like it) was preferred and the legislation was held to apply to one claim although it was based on acts

150 Ibid.

151 Ibid, 520 Brennan J.

152 Ibid, 523 Brennan J.

153 Francis A R Bennion *Statutory Interpretation: a Code* (4 ed, Butterworths, London, 2002) 282, as cited in *Al-Skeini v Secretary of State for Defence* [2008] 1 AC 153 (HL) para 11 Lord Bingham.

154 *Al-Skeini v Secretary of State for Defence* [2006] 3 WLR 508 (CA) para 186 Sedley LJ, as cited in *Al-Skeini v Secretary of State for Defence*, above n 153, para 12 Lord Bingham.

occurring outside the United Kingdom.¹⁵⁵ For the dissent, the former, territorial presumption prevailed.¹⁵⁶

The case is of interest not only because of the conflicting choices made between the two presumptions or approaches, but also because of the contrasting judicial formulations of the presumption about international obligations. The dissent, disagreeing with the majority's formulation just quoted, preferred a lengthy "classic [judicial] exposition of the presumption",¹⁵⁷ given 40 years earlier by Diplock LJ.¹⁵⁸ That exposition:

- appears to be limited to the interpretation of legislation designed to give effect to the treaty obligations invoked and accordingly does not cover obligations which arise subsequently to the legislation or which by no stretch of the imagination would have been in the mind of those preparing the legislation or which are found in customary international law;
- requires ambiguity or a lack of clarity in the legislation if the treaty is to be relevant; and
- depends on Parliament's intention.

This statement is significantly narrower than those made by the other members of the Court of Appeal in that earlier case. Lord Denning MR, for instance, stated simply that "we ought always to interpret our statutes so as to be in conformity with international law".¹⁵⁹ It is also narrower in each of the three respects noted above than the principle proposed two years later by the British Law Commissions, a proposal which was the result of a more rigorous process, involving a wide range of inputs, consultation, drafting and redrafting, as well as a potential parliamentary stage. A single legislative statement should also have the advantage of occupying the field and replacing the conflicting judicial statements made over the years.

155 *Al-Skeini v Secretary of State for Defence*, above n 153, paras 42 and 56 Lord Rodger; para 88 Baroness Hale; para 96 Lord Carswell; paras 139 and 141 Lord Brown.

156 *Ibid*, para 26 Lord Bingham.

157 *Ibid*, para 12 Lord Bingham.

158 *Salomon v Commissioner of Customs and Excise* [1967] 2 QB 116, 143-144 (CA) QB, Diplock LJ. Compare the position he took on the Vienna Convention about 15 years later in the *Fothergill* case, above n 125.

159 *Ibid*, 141 Denning LJ.

Again both the advantages and the limits of authoritative directives or guides are demonstrated by these cases. A greater emphasis on the particular purpose and the immediate context of the no questioning provision in *Anisminic* might well have led to a different result, in support of the words of the provision. In the citizenship case, had the Privy Council begun with the purpose, the context and the principle of consistency with Britain's and New Zealand's international obligations, the apparent "plain" meaning may well not have prevailed. The international obligations proposal of the British Law Commissions in 1969 would have facilitated more straightforward decision making in the Basra case. But the Australian visiting forces case shows that even when guides exist and are used reasonable differences can occur.¹⁶⁰

XII SOME CONCLUDING THOUGHTS

Courts and codifiers (public and private) involved in the interpretation of a range of legal texts including treaties, constitutions, legislation and contracts in a number of national and international jurisdictions appear to be adopting similar principles and approaches. The common positions tend to emphasise the finding of meaning on the basis of the text in issue read in context and in the light of its purpose.¹⁶¹ The balance between text and purpose varies, especially from one category and function to another. A further variable is that the context may be immediate to the particular text or distinct from it, and the balance between different contexts, the text and the purpose will also vary. I would also recall the Freund warning as illustrated by the basic differences between a contract which provides for private ordering often over a short period and a statute with a public role and usually a longer life. That very difference appears *within* the category of treaties.

Codifications may assist in terms of principle, the striking of those balances and the process of interpretation. On the first, many guides, properly in my view, emphasize both the text actually adopted by those responsible for making the law and creating the relevant rights and obligations and the purpose of the text. In relation to the products of a legislature, that emphasis conforms with democratic principle. In relation to contracts and treaties, the emphasis conforms with the authority of those who have completed the texts and committed themselves and those they represent to the rights, obligations and rules

¹⁶⁰ For another example of reasonable difference see the divided judgments in the Supreme Court of Canada in *Pushpanathan v Canada* [1998] 1 SCR 982, discussed in KJ Keith "Administrative Law Developments in New Zealand as Seen Through Immigration Law" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law* (University of Toronto Press, Toronto, 2006) 125, 150-151.

¹⁶¹ See especially Barak, above n 4.

which the texts state. But, to quote Frankfurter again, while interpreters are confined by the text they are not confined to it. One aspect of the width of the inquiry is suggested by the common, and again in my view correct, and indeed often inescapable, reference to context. The context, particularly the more immediate one, may support the purposive reading of the text while the broader context may limit or even challenge it. A codified directive or guide may also assist the process of interpretation, by stating, for instance, that the legislative history may or may not be considered, and, if it may be, in what circumstances and for what purpose.

The structuring of the interpretation provisions included in the Vienna Convention, the Australian provisions and some North American ones present the question – raised by the United States in Vienna in 1968 – of the limits of codification in this area. Those provisions and their structuring suggest a sequential process, with ambiguity or absurdity as a prerequisite to the use of extrinsic material. That sequence matches the way many judgments appear on the printed page, a sequence which is dictated by the very business of saying or writing words, sentences and paragraphs, one after the other, to explain the reasoning. As suggested earlier, the real process of thought may however be multi-layered rather than sequential. An interpreter considering all the material which may be relevant – and much extrinsic material may in practice be put before the judges before any alleged prerequisite is satisfied – may come to an overall conclusion about the meaning of the text. The interpreter may never come to any conclusions about ambiguity or absurdity of the claimed "plain" meaning. The use of such an overall approach may also be suggested by the choice of starting point in the judgment as written, a critical matter in cases such as the Samoan citizenship case. Max Huber's *encerclement concentrique* does not answer the question whether interpretation should begin at the centre or the perimeter.

While the codes may and do in practice increase the science of the process of interpretation, many cases, including some reviewed in this paper, show that in hard cases the art, even if reduced somewhat, will remain.

Experience in a number of jurisdictions shows that whether codes do play a real role depends very much on professional education, culture and practice. So far as statutory interpretation codes are concerned, what is the general professional attitude to legislation? How is it taught in the law schools? How are cases argued in court? More fundamentally what is the attitude of the legal profession, including the judges, to the democratic and legislative processes and to the legitimacy of the varying roles and responsibilities of those engaged in the legal process as law makers and interpreters? In the case of New Zealand, are the size of the population, the universality of the suffrage over much of its history since British settlement, and the relative ease of popular access to the political and

legislative process significant factors? And, moving from Wellington to the Hague, what is the significance for the judges interpreting treaties of the fact that they are addressing the text agreed by the representatives of sovereign states and giving meaning to that text? The judges, I might add, are frequently reminded of articles 31 and 32 of the Vienna Convention.

The value of the codes, given their emphasis on purpose, also depends on the ability of judges, assisted by counsel, to discover the purpose (or purposes if more than one). The immediate context and the legislative history may help with that process of discovery. Of major and critical importance is the systematic and structured drafting of legislation, including the preparation of purpose statements where they do give real help to the understanding of the text. The one sentence I give to excellence in the preparation of legislation and other legal texts in this paper is in inverse proportion to its importance.¹⁶²

162 George Tanner QC and his colleagues in the New Zealand Parliamentary Counsel office have made major improvements assisted by Law Commission studies and reports; see for example George Tanner QC "Confronting the Process of Statute-Making" in Bigwood, above n 118, 49, with among other things a fine tribute to Dr Bill Sewell, *ibid*, 67.