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INTERPRETING LEGISLATION: TEXT, CONTEXT AND PURPOSE

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Because so much of the work of modern courts consists of applying, and where necessary interpreting, Acts of Parliament, there has recently been a revival of interest on the part of Australian Law Schools in the theory and practice of legal interpretation. I suspect this topic had been ignored because in the past it was often presented as a series of formulae, usually expressed in Latin, offering judges a handy selection of justifications for a conclusion that had already been reached intuitively. It was not regarded as of sufficient intellectual content to warrant the attention of law teachers. Two factors have changed. First, in recent years in all common law jurisdictions there has been a surge in legislative activity, and Parliaments now concern themselves with a host of issues previously left to the common law. Secondly, it is now recognized that the way in which courts interact with legislatures - the rules of engagement between them - is an important question of public policy. The legal principles by which courts interpret legislation are an aspect of the legitimacy of the judicial function. The exposition of those principles, of their theoretical foundation, is now recognized as a subject of interest and importance.

The move away from statutory interpretation as the selection and application of one of a series of maxims, beginning with Lord Wensleydale's Golden Rule, and proceeding through a series of possible refinements, is reflected in a 2008 judgment of the High Court of Australia in *Gideon v. NSW Crime Commission*¹ where this was said:

"The question of construction of para.(b) of s.7(1) is not resolved by the application of any particular maxim or canon of statutory construction selected from among those which may jostle for acceptance. The preferable starting point appears from what was said by Dixon J in *Cody v. J H Nelson Pty Ltd* [in 1947]:

'In the modern search for a real intention covering each particular situation litigated, however much help and guidance may be obtained from the principles and rules of construction, their controlling force in determining the conclusion is likely to be confined to cases where the real meaning is undiscoverable or where the court of construction, sceptical of the foresight of the draftsman or of his appreciation of the situation presented, is better content to supply the meaning by a legal presumption than subjectively'".

These days, the use of Latin maxims is taken to indicate ideological unsoundness, although I have not yet heard an elegant alternative to *prima facie*. Expressions such as *eiusdem generis* and *noscitur a sociis* can be dealt with quite adequately, and without creating offence to progressive souls, under the rubric of context.

¹ (2008) 236 CLR 120 at 140.

The mention of Sir Owen Dixon, a legal figure who would now be described as an Australian icon, and of context reminds me to make one thing clear. What I am about to say concerns the judicial interpretation of statutes against an Australian background, which includes a written Constitution that was in many respects based on the United States model, and that reflects a rather strict separation of powers. Sir Owen Dixon was very keen on that separation, and his opinions have now entered into important features of our governmental structures. The function of interpreting statutes may bear a different aspect in other constitutional contexts, but I am speaking from an Australian perspective. How well these ideas and understandings travel is a matter for my audience to judge.

The concept of interpretation itself expresses a condition of the legitimacy of what judges are doing. To interpret a legal text, whether it be a will, or a contract, or a statute or regulation, is to expound the meaning of the text. Legal interpretation takes place because a text creates legal rights or obligations, and a court is required to resolve a dispute about those rights or obligations. If the meaning of the text is not self-evident, the resolution of the dispute will require a court to make a decision about what the text means. Such a decision is made as part of an exercise of the judicial power to declare the rights of the parties to the dispute. The judicial power is not the source of the rights. The judicial role is to identify and declare the rights, and to do so in a way that is consistent with, and respects, their source. If the legal text in question is a will, the expressed intention of the testator is the source of the rights of inheritance created by the will. If the legal text is a contract, the expressed agreement of the parties is the source of their rights and obligations. If the legal text is a statute, the language of the statute is an expression of constitutionally authorized legislative power, and it is the

expressed will or intention of the body with legislative power that is the source of the rights or obligations declared and enforced by a court.

Because a legislative body is an institution, words like "will" or "intention" are metaphorical², but they are apt to express the constitutional relationship between legislative and judicial power³. The danger is that their objectivity will be overlooked. Interpreting a contract is a task for a lawyer, not a psychiatrist. The law gives people, within limits, the freedom to contract, but they are bound by the words they have used to express their agreement, not by the thoughts that passed through their heads. The meaning the law gives to those words is the meaning that would be given to them by a reasonable person in the position and circumstances of the parties. The common law of contract has a strongly commercial flavour. In commerce it is ordinarily just that people are bound by what they say, rather than by what they meant to say. Furthermore, commercial contracts often come into the hands of, and affect the rights of, people other than the original parties. This is a reason for the objectivity of the law's idea of meaning. The institutional process that results in legislation is normally more complex than the process the results in a contract, and there is even less reason to identify the meaning of legislation with the mental state of some individual involved in the process. But even in the case of some contracts, the drafting process may be complex.

Depending upon the circumstances, to say of a text that it is open to interpretation may imply that the author, deliberately or inadvertently, has invited creativity on the part of the reader. In a literary or artistic context, this

² *Fothergill v. Monarch Airlines Ltd* [1981] AC 251 at 279 per Lord Diplock.

³ *Singh v. The Commonwealth* (2004) 222 CLR 332 at 331-337.

may be exactly what was intended. In a constitutional context, where legislative power is vested in one body, and judicial power in another, what is expected of interpretation is not creativity but fidelity to the legal source of the rights or obligations in question.

Priestley JA, then of the New South Wales Court of Appeal, writing extra-judicially said⁴:

“ Courts have to decide the meaning of texts in a way that will affect the property or civil rights of the parties before the court directly, and which may have an effect on the property or civil rights of many parties not before the court ...

Courts, unlike literary critics, are not usually in a position to start afresh, even if so disposed, every time the meaning of a particular text is being considered. No doubt every successive reader of both a literary and a legal text will come to it with a somewhat different perception of its possible meaning than anyone had before; the literary interpreter can take advantage of the fact that the meaning of a text can be approached as never closed; the legal interpreter is constrained when ... an authoritative meaning for legal purposes has previously been seen in the text.”

This does not mean the exercise of legal interpretation is mechanical. Far from it. There may be many reasons why legislation is open to interpretation. A common reason is that the legislature has not addressed the particular issue that has arisen, perhaps because it was not foreseen,

⁴ Priestley, “Judges as Story Tellers”, paper delivered at the Law and Literature Association Conference, San Francisco, October 1995.

perhaps because political considerations made it inexpedient to deal with the point, or perhaps because it was thought prudent not to attempt to deal with all possible contingencies without knowing exactly how they may arise. Another reason is simply the imperfection of language as an instrument of communication. Another is human fallibility. A good deal of interpretation consists in filling in gaps, which often exists because there was no intention bearing directly on the problem that has arisen. But there is a difference between judicial interpretation and delegated legislation.

Whatever the occasion of the need for interpretation, the essential thing is that what the court is doing, and appears to be doing, is elucidating the meaning of the statutory text, in accordance with established legal principle.

As Lord Steyn has said:

"The starting point must be the text itself. The primacy of the text is the first principle of interpretation".⁵

The established legal principles according to which the exercise proceeds are, or may be taken to be, known to the legislature itself. They are the ground rules. Legislative drafters know them. In Australia, some of them are stated in Interpretation Acts. Some are like boilerplate provisions in contracts; they are stated in the interests of clarity or economy of expression and are usually said to apply unless a contrary intention appears. Whether they are found in an Interpretation Act or in common law principles, following

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

the rules protects courts from the charge that they have crossed the boundary between legitimate interpretation and illegitimate interpolation.

Even a rule of interpretation that is statute-based may be expressed in terms that confer on courts a role that is far from mechanical.

Section 19 of the Interpretation and General Clauses Ordinance of Hong Kong provides:

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

As Bokhary PJ pointed out in *Medical Council of Hong Kong v. Chow Siu Shek*⁶ reasonable people differ about what is "fair, large and liberal". He said the section deals with what is to be done rather than how to do it, and quoted with approval the statement in *Bennion on Statutory Interpretation*⁷ that:

"... the basic rule of statutory interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors involved."

The two most important such factors are context and purpose.

⁶ (2000) 3 HKCFAR 144 at 153.

⁷ 3rd ed (1997) at 424.

Before turning to these, I should mention a particular problem of text-based interpretation which has been considered both in Hong Kong and Australia, that is, a case where the text contains an evident error. This problem may arise with any legal text. In a contract, for example, it may appear that the parties have, as the Americans say, mis-spoken. Although courts are naturally cautious in correcting errors as a matter of construction rather than by way of formal rectification, there is ample power to do so⁸. In *Chan Pun Chung v. HKSAR*⁹ the Hong Kong Court of Final Appeal considered the legitimate interpretative role of the courts in plain cases of drafting mistakes. The same subject was considered, to the same effect, by the High Court of Australia in *Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation*¹⁰.

The label of strict constructionist, or whatever is its opposite, is usually applied with the intellectual rigour of a cheer or a hiss. With statutes, as with contracts, the degree of latitude that is appropriate in examining a text varies with the circumstances. In some circumstances, it is reasonable to hold people strictly to what they have said. In some circumstances, it is not. Courts construe penal statutes strictly, because it is reasonable to expect clarity in imposing criminal responsibility. Courts may construe legislation creating social benefits generously. Similarly, the approach a court takes to the interpretation of a contract between two banks may be different to its approach to the interpretation of a contract between two people of limited resources and skill acting without legal advice. It is not a question of the judge's disposition; it is a question of what is reasonable.

⁸ *Fitzgerald v. Masters* (1956) 95 CLR 420.

⁹ (2000) 3 HKCFAR 392.

¹⁰ (1980) 147 CLR 297.

By "text", I do not mean to recommend concentration on single words, or phrases, or even sentences. We are all familiar with examples of the misunderstanding that can result from that kind of literalism. Text and context are normally inseparable. Where there is a dispute about the meaning of a word, or a phrase, or a clause, or a section, then context, which throws light on the meaning, may be the immediate context of a section or a group of sections, or the wider context of the whole statute, or a pattern of cognate legislation, or the social and political setting of which the legislation is part, or the legal or historical background to it. Context should be understood in its widest sense, as embracing anything that could rationally assist understanding of meaning¹¹.

The meaning of a text is always influenced, and sometimes controlled, by context¹². A moment's reflection will show how much we depend on context, in ordinary communication, to convey or understand meaning. It is not only where a text is otherwise unintelligible or ambiguous that we rely on context¹³. We always interpret language in its context. Whether in the understanding of legal texts, or in everyday communication, it is an error to look at a word or phrase isolated from context, on the basis that we need resort to context only if there is then a doubt. All language is expressed, and is intended to be understood, in context. Many years ago, I argued a case in New South Wales, that went to the Privy Council,

¹¹ *Bennion on Statutory Interpretation* (London: Lexis Nexis 2008) at 588-590, 919; *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

¹² *Singh v. The Commonwealth* (2004) 222 CLR 322 at 332.

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

concerning the meaning of legislation about "insurance collectors"¹⁴. That did not mean people who collect insurance. There was, in the past, a certain kind of insurance, sold mainly to people in modest circumstances, who paid premiums in small weekly installments, collected, usually on Saturday mornings, by agents of the insurers. With that contextual information the meaning of the expression was plain. Without it, the phrase would have meant something quite different. The Privy Council held that evidence of usage in the insurance industry was admissible to explain the context. This is what the leading English text calls "informed interpretation"¹⁵.

The immediate, or statutory, context of the provision that is being construed, which is the starting point of the process of construction, may show some apparent inconsistency. In that event, the duty of the court is to attempt to alleviate any conflict "by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions".

In *Medical Council of Hong Kong v. Chow Siu Shek*¹⁶ the Hong Kong Court of Final Appeal, in dealing with a question about the meaning of the Medical Registration Ordinance, looked at cognate legislation, including the Dentists Registration Ordinance and the Legal Practitioners Ordinance.

In *Town Planning Board v. Society for the Protection of the Harbour*

¹⁴ *General Accident Fire and Life Assurance Corporation Ltd v. Commissioner of Pay-Roll Tax* (NSW) [1982] 2 NSWLR 52.

¹⁵ *Bennion on Statutory Interpretation*, 5th ed (London: Lexis Nexis, 2008) at 589.

¹⁶ (2000) 3 HKCFR 144.

*Ltd*¹⁷, the issue concerned the weight to be given to a presumption against reclamation in the harbour stipulated by an environmental ordinance. An English lawyer expert in town planning had given a certain opinion, with which the Hong Kong Court of Final Appeal disagreed. Li CJ examined not only the historical background of the Ordinance but also the environmental and heritage considerations that lay behind it. It is common legal experience that the weight of a presumption may vary according to the circumstances. Here was a clear example of context, in its widest sense, contributing to the meaning of statutory language.

For Australian lawyers, the most familiar example of context influencing interpretation is our Constitution. It is a principle of interpretation of an Act of Parliament that it will be construed so as to conform to the constitutional grant of legislative power pursuant to which it was enacted. The Australian Constitution took legal effect as an Act of the United Kingdom Parliament, but, like the Canadian Constitution, it has since been repatriated. It never was an ordinary statute. It is an instrument of government, largely framed in the colonies. It was intended to be difficult to amend, and history has shown how effectively that intention was fulfilled. Its provisions were intended by the framers to have effect in a future they could not foresee, and those provisions were drafted on broad and general lines. In many respects, its nature and its history are essential aids to an understanding of its meaning.

We are all familiar with the way in which the Supreme Court of the United States has regard to historical context to resolve disputes about the

¹⁷ (2004) 7 HKCFAR 1.

meaning of the United States Constitution¹⁸. How could a lawyer understand Magna Carta without knowledge of the historical context in which it was written? The influence of context on the meaning of a legal text is inescapable.

A particular issue that may be viewed as one of context is whether and in what circumstances a statute is to be construed so as to accord with Australia's international obligations. In Australia, treaties are made by the Executive Government and do not have the force of law unless and until they are made the subject of legislation. Treaties often give their parties some room for choice as to how they will be implemented. If a statute is enacted pursuant to a treaty obligation, then plainly it ought to be read so as to conform to the obligation. What if the sequence is reversed? Could a statute change its meaning because of a later treaty entered into by the Executive Government, without parliamentary intervention? This seems difficult to reconcile with constitutional theory.

In the *Acts Interpretation Act 1901* (Cth), which is the federal interpretation Act in Australia, and in corresponding State interpretation Acts, the two factors that are repeatedly stressed are context and purpose.

There is nothing new about the general idea of giving statutes a purposive construction. In 1584, in *Heydon's Case*¹⁹ it was ruled that in order to discover the true intent of the makers of an Act a court will consider the state of the law before the making of the Act and the mischief to be remedied.

¹⁸ eg. *District of Columbia v. Hellier* 554 US (2008).

¹⁹ (1854) 3 Co. Rep 7a.

That rule was formulated at a time when Parliament's main function was not considered to be constantly making new laws. In those days, the laws were seen as the embodiment of ancient customs, rights and privileges, and changing the law was treated with some suspicion. The main function of Parliaments was to enable the King to consult representatives of the people, or at least some of the people, for purposes such as raising revenue. If Parliament decided to change the law, there was usually a well-understood reason, and that was taken into account in understanding what Parliament enacted.

Nowadays in many common law countries Parliaments regard changing the law as their main reason for existence. Parliaments regard themselves as standing law reform agencies. There is no lawyers' law any longer.

Purposive construction now has a wider meaning, and is given more general emphasis. Section 19 of the Hong Kong Interpretation Ordinance mandates an interpretation that will best ensure the attainment of the object of the ordinance according to its true intent, meaning and spirit. Section 15AA of the Australian Acts Interpretation Act provides that:

"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 will not promote that purpose or object".

It is worth mentioning that provisions like this have a negative as well as a positive aspect. They are aimed at counteracting the obstructive literalism that sometimes used to prevail. Even if, on occasion, it may be

hard to work out exactly what these interpretative stipulations are directing courts to do, it is fairly clear what they are telling courts not to do. Warning signs may be useful even when they do not say exactly how care is to be taken. There is a deceptive simplicity about the reference to "the purpose or object underlying [an] Act". Much legislation is the product of compromise. Legislatures rarely pursue a single purpose at all costs. Many problems of interpretation involve deciding the balance that the legislature has struck. In such a case, identification of a general purpose or object may be of little assistance. A good example of this that arose in the High Court of Australia was a series of cases about police interrogation of persons suspected of crime²⁰. It was well known, and evident from the parliamentary history, that the legislation was the outcome of a compromise between what might be called civil liberties groups pressing for limitation of police powers and for appropriate respect for the rights of persons suspected or accused of crime and law and order interests anxious to maintain police powers to the extent consistent with such rights. Drawing a line between those competing pressures can be difficult, and the question was where Parliament had drawn the line. It was very difficult to describe a purpose or object of the legislation that did not beg the question. The text itself was the best and safest guide to the answer.

Even if there is a relatively clear and uncomplicated purpose or object, it is necessary to identify it at a level of specificity that will assist to solve the question of interpretation that has arisen. Even so, where a purpose or object can be seen, and can be related to the question of an interpretation in such a way that assists the solution, then the court is directed

²⁰ eg. *Kelly v. The Queen* (2004) 218 CLR 216.

to take advantage of that assistance.

In Australia, the use of extrinsic materials, such as reports of law reform agencies, explanatory memoranda, and Ministerial speeches is covered by legislation. Section 15AB of the Acts Interpretation Act 1901 (Cth), which has its State counterparts, deals with material not forming part of an Act that is capable of assisting in the ascertainment of the meaning of a provision of the Act. A decision whether material satisfies that description, that is, whether it is capable of assisting, may itself require some care. Reference was earlier made to the parliamentary process. Since the object of interpretation is to give meaning to the legislative text, knowledge of what some individual involved in the parliamentary process thought or said it meant may not be helpful.

Perhaps this is a way of looking at the *Pepper v. Hart*²¹ issue. The revenue authorities were urging the court to construe tax legislation in a manner contrary to an answer given by the Minister in Parliament as to the intended reach of the legislation. The House of Lords said the meaning of the text was unclear and the Minister's response could be used to clarify it. Lord Brown-Wilkinson said²²:

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

²¹ [1993] AC 593.

²² [1993] AC 593 at 634-635.

Reservations were later expressed, notably by Lord Steyn²³. His Lordship pointed out that what a Minister says may not be a safe guide to what Parliament intends. There is danger of ministerial speeches being "loaded" with the executive government's preferred construction of a text in circumstances where it may not be safe to attribute that to Parliament. No doubt an understanding of constitutional principle and an appreciation of the realities of the parliamentary process will guide a court in deciding whether the statutory pre-condition to the use of extrinsic material is satisfied, that is, whether the material is capable of assisting in the ascertainment of the meaning of the legislative text. But if that precondition is satisfied then it is difficult to see why it cannot be used.

Last year, in *HKSAR v. Cheung Kwun Yin*²⁴, the Hong Kong Court of Final Appeal used official government statements to identify the purpose of a statutory provision in aid of construction, but left open the question of the direct application of *Pepper v. Hart* in Hong Kong. Li CJ pointed out the three conditions imposed by the House of Lords: (a) The legislation is ambiguous or obscure or leads to an absurdity; (b) The material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) The statements relied upon are clear.

It is interesting to compare those conditions with the Australian legislation. I have already pointed out that built into s.15AB is the condition

²³ See *McDonnell v. Congregation of Christian Brothers Trustees* [2004] 1 AC 1101 at 1116-1117, *Wilson v. First County Trust Ltd (No.2)* [2004] 1 AC 816 at 840.

²⁴ [2009] 6 HKC 22.

that the material is capable of assisting. The section states the use that can be made of it:

- "(a) to confirm that the meaning of the provision is 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; or
- (b) to determine the meaning of the provision when;
 - (i) the provision is ambiguous or obscure; or
 - (ii) 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 leads to a result that is manifestly absurd or unreasonable."

Upon analysis, those provisions are fairly close to the *Pepper v. Hart* conditions.

Reference to s.15AB of the Australian Act enables me to end where I began. The section concludes by requiring courts, when deciding the use of extrinsic material, to take into account "the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account [context and purpose]".

This is not merely a restatement of the basic principle of interpretation; it is an affirmation of an aspect of the rule of law.