Sir Christopher Staughton Memorial Lecture 2022

Statutory Interpretation in the Courts Today

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1. Introduction

As Professor Guido Calabresi, the famous American academic and judge, wrote in 1982, we are 'in the age of statutes'.[1] In a similar vein, Professor Grant Gilmore graphically described the past century and more as involving 'an orgy of statute-making'.[2] And in the words of my former Oxford colleague Professor Robert Stevens, 'Judge made rules are … doomed to die … Eventually legislation will cover all, as far as the eye can see.'[3]

So it is indisputable that statutes are swallowing up our common law. Yet oddly, in UK law schools, the study of statutes as a coherent whole is sadly neglected. A survey carried out in 2011 for the Statute Law Society by Professor Stefan Voganauer revealed that in fewer than one in five UK law schools was there a dedicated course or teaching unit on legislation; and over half of such courses were for first years.[4] Clearly particular statutes or statutory provisions within a particular area of substantive law (e.g. contract law or tort law or employment law or company law) are studied, albeit generally without much enthusiasm compared to the common law, but statute law as a coherent whole tends to be treated only at a basic introductory level in, for example, first year English Legal System or Legal Skills courses. Even where statute law as a whole is taken more seriously, this is often either at a theoretical level in jurisprudence courses or as a relatively small part of the constitutional law syllabus. As Lord Steyn has said, '[T]he academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law of our time.'[5]

Of course, in common law systems, our basic law is judge-made. Conceptually, statutes are seen as supplementing or removing the common law, but it is the common law that provides the residual gapless law where there is no statute. Therefore, whatever the factual takeover of the common law by statute, and hence the factual dominance of statutes, in a conceptual sense, our common law

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[1] *A Common Law for the Age of Statutes* (1982) at 181.

[2] *The Ages of American Law* (1977) at 95.

[3] 'Private Law and Statute' at 1 (paper given at conference on *Private Law in the 21st Century*, Brisbane, 2015).

[4] *Teaching Legislation in UK Law Schools: Summary of Survey Results* (2011) (carried out for the Statute Law Society by Professor Stefan Voganauer) showed that in only 19% of UK law schools (who responded to the survey, there being a response rate of 47.04%) was there a dedicated course or teaching unit on legislation; and 56% of such courses were for first years.

[5] 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 Sydney Law Review 5.

remains the primary source of law. This contrasts with civilian systems where a statutory code is seen as providing the basic gapless law.

However, the relative neglect of the study of statutes in a common law system is only partly to be attributed to the conceptual centrality of the common law. It is also because, at least on the face of it, cases are so much more interesting and entertaining than statutes. As lawyers in the common law tradition, we are never happier than when we have cases to learn from. Case law is fun because we have a real-life situation at the forefront of attention. Thinking just about contract and tort, we have a skiing holiday that does not live up to expectations, a tragedy at bluebell time in Kent, a nephew who ignores the agreement made with his now deceased uncle, balls being hit into a garden from the village cricket field, a swimming pool that is not built to the correct depth, and a promise made in a pub after several drinks to pay someone £15M if shares in a company reach a certain price. The range of human life in the law reports is boundless. With statutes, in contrast, we have abstract rules with no real-life facts to help and this makes their study and understanding dry and difficult.

In this lecture, I want to try to bring alive what is probably the most important topic in the study of statutes, namely the law on statutory interpretation. How do the courts in the modern era decide what a particular statutory provision means?

It is crucial to realise just how important, in the practice of law, statutory interpretation has become. As Justice Kirby formerly of the High Court of Australia has said, '[T]he construction of statutes is now, probably, the single most important aspect of legal and judicial work … This is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing.'[6]

In line with this, I can confirm that, since I started on the Supreme Court in June 2020, over two thirds of the cases that I have sat on in the Supreme Court have involved some issue of legislative interpretation. In many of the cases I have been in on the Supreme Court, the decision has turned almost entirely on statutory interpretation. This was the position in, for example, *TW Logistics Ltd v Essex County Council*,[7] a wonderful case on the law on town and village greens, which involved interpreting provisions in the Inclosure Act 1857, the Commons Act 1876, and the Commons Act 2006. *Rittson-Thomas v Oxfordshire CC,*[8] a case on statutory trusts for schools, also turned almost entirely on statutory interpretation, in this case ss 2 and 14 of the School Sites Act 1841; and the same was also true in *Kostal UK Ltd v Dunkley*[9]*,* concerned with offers being made directly to trade union members, undermining collective bargaining, which turned on the correct interpretation of s 145B and 145D of the Trade Union and Labour Relations (Consolidation) Act 1992. In other cases I have been involved in on the Supreme Court, statutory interpretation has been the backdrop to, or an additional point to, the application of the common law, as in *Tinkler v HMRC*[10] which concerned estoppel by convention in relation to dealings between HMRC and a taxpayer.

There are three preliminary points I would like to make about statutory interpretation.

[6] The Hon Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2002) Statute LR 95, 96-7.
[7] [2021] UKSC 4, [2021] 2 WLR 383.
[8] [2021] UKSC 13, [2021] 2 WLR 993.
[9] [2021] UKSC 47, [2021] 3 WLR 697.
[10] [2021] UKSC 39, [2021] 3 WLR 697.

The first is that, although I shall be focussing what I want to say on statutes – that is, primary legislation, Acts of Parliament – the same approach to interpretation applies in relation to secondary or delegated legislation contained in statutory instruments or orders in council. Put another way, there is no difference in approach between statutory interpretation and, more widely, legislative interpretation.

Secondly, for reasons of time, I am dealing only with what one might term ordinary statutory interpretation and am putting to one side special rules of interpretation that apply under the Human Rights Act 1998 and in interpreting EU law. I am not therefore dealing with so-called conforming interpretation under section 3 of the Human Rights Act 1998 or the similar idea referred to as the '*Marleasing* principle' in relation to EU law. I am also putting to one side the very similar 'principle of legality' under which the courts will be reluctant to find that, subject to this being expressly provided for or being a matter of necessary implication, a statute has taken away a person's fundamental or constitutional common law right.

Thirdly, although it has been suggested, for example by Lord Hoffmann, that the same basic approach applies to the interpretation of all legal documents, whether they be statutes, contracts, articles of association or wills, I regard that, with respect, as unhelpful. Of course, all questions of interpretation of written words, including the interpretation of a novel or a play, share some similarities. But there are distinct features of the interpretation of statutes that differ from, for example, the interpretation of contracts and I think it is incorrect to think that they can simply be assimilated.

2. Three recent cases

I want to bring home to you the fascinating range of issues that can arise under the umbrella of statutory interpretation by looking at three relatively recent cases that have come before the courts that were concerned with statutory interpretation. The first two reached the Supreme Court, although before I joined the Court, and the third was in the Court of Appeal.

In *R (Black) v Sec of State for Justice*[11] the question was whether the smoking ban in public places in Part 1 of the Health Act 2006 applied to prisons run by the state. A prisoner with health issues related to breathing had complained that prisoners and prison staff were smoking in general areas of the prison and that he was being affected by the secondary smoke. The prisoner brought judicial review proceedings against the prison governor. It was held by the Supreme Court that the smoking ban did not apply to state prisons. This was so despite the following four factors: (i) prisons fell within the definition in the Act of public places; (ii) there was nothing in the Act which expressly exempted prisons; (iii) the public health purpose of the Act would be served by applying the ban to prisons; and (iv) it was not in dispute that privately-run prisons did fall within the Act. Despite those factors, the controversial reasoning of the Supreme Court in holding unanimously that the Act did not apply to state prisons was that the courts should continue to apply the long-standing rule that the Crown (that is, the State) is not bound by any statute unless there are clear words in the statute which, expressly or by necessary implication, bind the Crown; and it was held that there were here no such clear words.

[11] [2017] UKSC 81, [2018] AC 215.

My second case is *R (Belhaj) v DPP*[12] in which the applicants argued that the British Secret Intelligence Service had been assisting the USA in the illegal rendition of the applicants from Thailand to Libya, where they were imprisoned and tortured. The applicants were challenging the decision of the DPP not to prosecute Sir Mark Allen, who was said to be a senior British officer of the British Secret Intelligence Service allegedly involved with the rendition. The DPP argued, inter alia, that, for reasons of national security, the judicial review of the DPP's decision must use a so-called 'closed material hearing'. The relevant statutory provision on closed material hearings, s 6 of the Justice and Security Act 2013, exempts 'proceedings in a criminal cause or matter', i.e. one cannot use a closed material hearing in proceedings in a criminal cause or matter. So the question, which was entirely one of statutory interpretation, was whether the judicial review proceedings against the DPP for failure to prosecute were 'proceedings in a criminal cause or matter.' It was held by the Supreme Court by a bare majority, 3-2, that the judicial review proceedings were here so closely related to a criminal trial that they were covered by the words 'proceedings in a criminal cause or matter' so that a closed material hearing could not be used. The case was subsequently settled but, had it gone ahead, the decision of the Supreme Court meant that normal procedures would have had to be used, including those involving what is termed 'public interest immunity'.

My third example is *R (CXF) v Central Bedfordshire Council.*[13] Here the applicant was a patient detained in a mental hospital. Each day he left the hospital to go on a bus trip accompanied for six out of the seven days by members of the hospital staff. On the seventh day, his mother made a round trip of 120 miles to accompany him on his bus trip. She sought reimbursement of her travel expenses for that round trip. There was a statutory provision, s 117 of the Mental Health Act 1983, providing for costs incurred in supporting mental patients where the relevant person was providing 'after-care services' in a situation where the mental patient had been detained in a mental hospital but had then 'ceased to be detained … and left hospital'. The mother argued that her son fell within this provision because when he went out with her weekly on the bus trip, he had ceased to be detained and she was providing 'after-care services'. Again this was a pure question of statutory interpretation. The Court of Appeal held, and I think this was relatively straightforward, that the words 'ceased to be detained … and left hospital' were referring to the son's continuing situation – and here he continued to be detained in hospital – and were not referring to mere temporary trips out from the hospital.

Those are just three recent examples of cases turning on statutory interpretation. The important point is that those examples are the tip of the iceberg. Many students simply do not realise – and as a student I certainly did not realise – that, each year, there are scores of interesting cases coming before the appellate courts, not least the Supreme Court, which turn on statutory interpretation.

3. The modern approach

What then is the present English law on how one interprets a statute?

It is now clear from several cases in the House of Lords or Supreme Court that the modern approach to statutory interpretation is contextual and purposive – one seeks to arrive at the best interpretation of the words in the light of their context and the purpose of the statutory provision. In so far as one

[12] [2018] UKSC 33, [2019] AC 593.
[13] [2018] EWCA Civ 2852, [2019] 1 WLR 1862.

ever did, one no longer gives words their literal or dictionary meaning in so far as the context and purpose of the statute indicate that that is not the best interpretation of what Parliament has enacted.

A leading case laying this down is *R (Quintavalle) v Secretary of State for Health*.[14] In Lord Bingham's words in that case:

'The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'[15]

In the same case, Lord Steyn very clearly emphasised that a purposive, rather than a literal approach, was now to be taken:

'The pendulum has swung towards purposive methods of construction. This change … has been accelerated by European ideas… [N]owadays the shift towards purposive interpretation is not in doubt.'

More recently, Lord Reed and Hodge, giving the leading judgment in *Test Claimants in the FII Group Litigation v HMRC* said:

'It is the duty of the court, in accordance with ordinary principles of statutory interpretation, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it.'[16]

Again, in *Kostal UK Ltd v Dunkley,*[17] Lady Arden and I in our concurring judgment said:

'The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose… In carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant consultation papers, and, within the parameters set by *Pepper v Hart* …, at ministerial statements reported in *Hansard*.'

In February 2022, there was an important restatement of the relevant principles of statutory interpretation by the Supreme Court in the case, in which I was not sitting, of *R (on the application of O) v Sec of State for the Home Department*.[18] The decision was that it was within a Minister's powers, under section 1(4) of the British Nationality Act 1981, to charge £1012 for a child's right to be registered as a British citizen. This was so despite many young applicants being unable to afford that fee. Lord Hodge, giving the leading judgment, said at para 51:

[14] [2003] UKHL 13, [2003] 2 AC 687, [8]. In Australia, a purposive approach is laid down in statutes. So, eg, s 15AA of the (Commonwealth) Acts Interpretation Act 1901 (as amended) reads: 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act … is to be preferred to each other interpretation.'
[15] [2003] UKHL 13, [2003] 2 AC 687, at [8].
[16] [2020] UKSC 47, [2020] 3 WLR 1369 at [155]. See also [157], [179], [217]. See also *Rittson-Thomas v Oxfordshire County Council* [2021] UKSC 13, [2021] 2 WLR 993, at [33]-[34].
[17] [2021] UKSC 39, [2021] 3 WLR 697, at [109].
[18] [2022] UKSC 3, [2022] 2 WLR 343.

"The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination. It is not a matter for judges for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level [at] which it has been set."

In other words, the role of the judges is to interpret what Parliament has laid down and it is irrelevant whether the judges agree or disagree with the policy of the Act. As regards the approach to statutory interpretation, Lord Hodge clarified that statutory interpretation is concerned to identify the meaning of the words used by Parliament and that, in ascertaining that meaning, the context and purpose are important. Although he described them as playing a secondary role – which Lady Arden in her concurring judgment cast some doubt on – Lord Hodge accepted that explanatory notes, Law Commission reports and Government White Papers may be helpful. Lord Hodge also confirmed that statements reported in *Hansard* may exceptionally be relied on provided the three conditions laid down in *Pepper v Hart*[19] are satisfied. Those three conditions are (i) that the legislative provision must be ambiguous, obscure or lead to absurdity; (ii) that the relevant statement is of a Minister or other promoter of the Bill; and (iii) that the statement made in Parliament is clear and unequivocal. On the facts, it was held that a Ministerial statement could not be relied on in this case because the first condition in *Pepper v Hart* had not been satisfied, i.e. the legislative provision was not ambiguous, unclear or leading to absurdity.

Sometimes students are taught that there are three rules of statutory interpretation which the courts can choose between. The literal rule, the golden rule and the mischief rule. I think that is very misleading because there is only one correct modern approach – that one must ascertain the meaning of the words in the light of their context and the purpose of the provision – and none of those three rules quite captures that approach, albeit that the mischief rule perhaps comes the closest.

4. Always speaking

A further feature of the modern contextual and purposive approach to statutory interpretation that has been focused on in a number of recent cases is the "always speaking" idea. This idea means that, while the purpose of a statute must have some consistency over time, a statute may apply to circumstances which could not possibly have been foreseen at the time the statute was passed. I will mention here three relevant cases from the last five years.

First is *Owens v Owens,*[20] a divorce case. The Supreme Court, upholding the Court of Appeal, decided that, although the marriage had broken down irretrievably, a divorce should not be granted to the wife because she had failed to prove that her husband's behaviour was such that she could not reasonably be expected to live with him. Therefore, none of the grounds for divorce in s 1 of the Matrimonial Causes Act 1973 (re-enacting ss 1-2 of the Divorce Reform Act 1969) had been established. Particularly helpful on the 'always speaking' doctrine was Sir James Munby P's judgment in the Court of Appeal. He said that because an Act is 'always speaking', one needed to construe it 'taking into account changes in our understanding of the natural world, technological changes,

[19] [1993] AC 593.
[20] [2018] UKSC 41, [2018] AC 899.

changes in social standards and, of particular importance here, changes in social attitudes.'[21] He explained that, in the family law context, what is covered by, for example, a 'child's welfare' (originally used in s 1 of the Guardianship of Infants Act 1925, now s 1 of the Children Act 1989) was to be judged by the standards of 2017, not those of 1925. It followed that the objective test in this case ('cannot reasonably be expected to live with [him]') should be judged by the standards of 2017, not those of 1969. The relevant standards were not those 'of the man or woman on the Routemaster clutching their paper bus ticket … in … 1969 … but the man or woman on the Boris Bus with their Oyster Card in 2017.'[22] Yet even applying the standards of 2017, when a wife might be reasonably expected to be less tolerant than in 1969, she had failed to make out her case.

My second case is *TW Logistics v Essex CC*[23] in which Lord Sales and I gave the judgment of the Supreme Court, with which Lady Black, Lady Arden and Lord Stephens agreed. The underlying question was whether an area of land had been validly registered as a town or village green. The unusual feature of the facts was that the area of land in question was very different from the archetypal village green with its area of grass where local inhabitants can walk and play. Rather the land in question here was an area of concrete of some 200 square metres on, or close to, the water's edge in the working port of Mistley across which port vehicles, including heavy goods vehicles, were commonly driven. The central question was whether the registration of that area of concrete as a town or village green would have the consequence that the landowner's pre-existing commercial activities, in working the port, would be criminalised under two Victorian statutes: s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876. The Supreme Court decided that they would not be so criminalised, and Lord Sales and I said the following in relation to the "always speaking" idea:[24]

'As with almost all statutes, one should regard the Victorian statutes as "always speaking" …. This means that the correct approach is to interpret the words of the Victorian statutes in the light of modern conditions rather than conditions that prevailed in Victorian times. Modern conditions include the introduction in 1965, as confirmed by the enactment of section 15 of the Commons Act 2006, of a process by which registration of land as a [town and village green] creates rights for members of the public to use it as such and the availability of a statutory right to seek registration of forms of land which … could not plausibly have been contemplated as being a TVG when the Victorian statutes were enacted.'

My third case on the 'always speaking' idea takes me back to my beloved territory of restitution and a case on limitation periods for the restitution of tax paid, heard before I joined the court, but laid down after I joined. The case is *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369. The underlying tax issues are complex but can be simplified by saying that various companies had been required, by domestic legislation, to pay advance corporation tax, contrary to EU law. Those companies, the claimants, sought restitution of the tax paid that was legally not owed. Under the Limitation Act 1980, the normal limitation period for restitution

[21] [2017] EWCA Civ 182, [2017] 4 WLR 74, at [38]. Sir James Munby also cited *Birmingham City Council v Oakley* [2001] 1 AC 617, 631 per Lord Hoffmann.
[22] Ibid at [40].
[23] [2021] UKSC 4, [2021] 2 WLR 383.
[24] Ibid at [73].

of money paid is 6 years from the date of payment. But the claimants had been paying this tax for decades before they brought their actions for restitution.

What the claimants therefore sought to do was to rely on the mistake exception to the running of time first laid down in 1939 and re-enacted in s 32(1)(c) of the Limitation Act 1980 that "where the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the … mistake … or could with reasonable diligence have discovered it." So the claimants based their claim on the payments having been made by mistake of law and argued that they could rely on section 32(1)(c) to recover payments made more than six years before the actions were brought.

It is important background to appreciate that it was only in 1999 in *Kleinwort Benson v Lincoln CC* that the House of Lords, led by the great Lord Goff, had decided that there could be restitution for payments made by mistakes of law as well as fact.

Applying the "always speaking" doctrine, the majority of the Supreme Court in this *FII* case stressed that it did not matter that, at the time the 1939 and 1980 Limitation Acts were passed, the state of the law was such that only mistakes of fact triggered restitution. The state of the law had since moved on and the best interpretation of the Act should apply the purpose of the provision to the present, not the past, state of the law, and the purpose was to postpone the running of time for any cause of action based on mistake. The claims for mistake of law, giving recovery of all payments made within six years of when the mistake could with reasonable diligence have been discovered, were therefore allowed.

5. Parliamentary intention?

Finally, I want to touch on a debate that is ongoing as to whether it is helpful to regard statutory interpretation as, at root, being concerned to effect the intention of Parliament.

There is no doubt that it has historically been very common, and remains so, to refer to statutory interpretation as being concerned to effect the intention of Parliament. Whether applying the old literal or the modern contextual and purposive approach, the cases are full of references to this being the ultimate aim of statutory interpretation and most of us will have used this language at some stage. Although some of my colleagues on the Supreme Court disagree with me on this (see, e.g., Lord Sales who has written an article to the contrary,[25]) I am somewhat sceptical about the reliance by the courts on Parliamentary intention. I have three main reasons for scepticism.

First, philosophically, there is some difficulty in talking about intention at all where one cannot identify particular individuals whose intention should count. In the philosophy of language, one hears talk of speaker intent or author intent but who is the speaker or author in relation to Parliament and statutes? As Lord Nicholls indicated in *R v Sec of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*, one cannot be referring to the subjective intention of any individual. In his

[25] 'In Defence of Legislative Intention' (2019) 48 Australian Bar Review 6. At one point, Lord Sales appears to accept that legislative intention is a fiction but treats it as a sensible, and probably inevitable, fiction. With respect, all fictions (if they are really fictions) are best regarded as unhelpful in that they obscure clear and transparent reasoning. I note also that Lord Sales treats the 'purpose' of the statute as also being a fiction and meaning much the same as legislative intention. With respect, the two are distinct, as made clear once one sees that the purpose of a statute is the same as the 'policy' of the statute. In any event, if they are one and the same, there appears to be nothing to be gained by referring to them both.

words, "It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions.'[26]

To give you a personal example: when I was at the Law Commission, and immediately after I left the Law Commission, I had a lot to do with what is now the Contracts (Rights of Third Parties) Act 1999. And indeed, I drafted the explanatory notes that went with the Bill, even though formally they were put out as the work of the relevant Department. In relation to some of those provisions, especially on arbitration, I spent many hours with the drafters working out how we could achieve what we wanted. I doubt whether any Minister or MP precisely understood the significance of some of those provisions. So when we talk about Parliament's intention in relation to the 1999 Act (not least the provisions on arbitration), whose intention are we talking about? It cannot be my or the drafters' intentions because we are not members of Parliament.

Having said that, I accept that legislation is what has been termed a speech act and that human beings obviously lie behind that speech act. In line with this, I think the best account of Parliament's intention, if that phrase is to be retained, is that given by Dr Richard Ekins in his 2012 book *The Nature of Legislative Intent*. He argues that 'group theory' explains what is meant by Parliamentary intention. According to this view, it is perfectly natural to recognise the intentions of a group as a rational agent (so, to take a simple example, we say 'the intention of the team is to play attacking football'); and that this does not involve aggregating the intentions of individuals or picking out the intentions of certain leading individuals. The Legislature is a complex group and what is meant by legislative intention is that Parliament as a group acts with a rational plan, with linked procedures, to change the law in some way.

But while I can accept that notion of group intention, the problem with it is that it operates at such a high level of generality that it offers no practical assistance at all to the courts in answering the questions of statutory interpretation that come before it. It amounts to the banal proposition that Parliament's intention has been to pass the Act in question so that it is a valid law that must be applied and interpreted by the courts. But it provides no assistance in how the courts should ascertain the best interpretation of the statute where, precisely because the matter is being fought out in court, this is not straightforward.

Another way of expressing this is that once one is focusing on the words, the context and the purpose of the legislative provision, the intention of Parliament is an unnecessary and unhelpful concept. It is a fifth wheel on the coach.

Ultimately therefore my first objection to the reference to Parliamentary intention is that, even if one can identify what is here meant by intention, it is unhelpful because it offers no real practical assistance in the exercise of interpretation.

Secondly, reference to Parliamentary intention is not merely unhelpful but tends to obscure the true reasoning being adopted. In other words, without great care, it can become an obstruction to transparent reasoning. Put another way still, Parliamentary intention is often used as if it were a

[26] [2001] 2 AC 349, 397.

reason for a particular interpretation whereas it is in fact being used as a conclusion for reasoning that is otherwise left unarticulated.

So many times since I have been on the Supreme Court I have heard counsel in their submissions say that Parliament must have intended this or Parliament cannot have intended that, as if they were reasons themselves for adopting a particular interpretation. But the actual reason needs to be carefully focussed on. It may be, for example, that one interpretation rather than another leads to unreasonable or absurd consequences. But that is the good reason for adopting a particular interpretation and nothing is being added by saying that Parliament cannot have intended those consequences.

Thirdly, although not impossible, it is difficult to reconcile reliance on Parliamentary intention with the "always speaking" doctrine. As we have seen, that doctrine requires the judges to apply the best interpretation of the legal rule laid down by the statute in the light of developments since the Act was passed. This task of deciding on the best interpretation of a statute with the benefit of hindsight falls to the judges and it is, in this sense, somewhat analogous to their role in interpreting a common law precedent although the words of a statute impose important constraints on statutory interpretation that do not apply to common law precedents. A serious objection to any reference to legislative intent is that, at least at first sight, it appears to advocate an approach which favours the law's ossification by inappropriately freezing the law in the past.

For these three reasons, I regard Justice Kirby, the Australian judge, as having been on the correct lines when he wrote in 2002, "It is unfortunately still common to see reference … to the intention of Parliament. I never use that expression now. It is potentially misleading." Certainly since joining the Supreme Court I have tried to avoid placing any reliance on the language of Parliamentary intention.

Of course, one can readily understand why it is that the courts have found it convenient to rely on the idea that they are merely giving effect to Parliamentary intention. Just like the old fiction that the judges found and did not make the common law, articulating a decision as effecting Parliamentary intention helps to divert attention away from scrutinising the role of the unelected judges. However, in an age of rational transparency the correct strategy should not be to shy away from the truth but to make clear that, while in interpreting legislation, the judges exercise the power to decide what a statute means, that power is very different from that exercised by the Legislature. Whether their role is interpreting statutes or developing the common law, the judges are clearly not free, as a legislator would be, simply to impose anew their own preferred policies. On the contrary, the statutory interpretative exercise is precisely constrained by the words, context and purpose of the statute. The judges must apply the statute, through interpretation of it, whether they like the policy or not. And, in the UK's system of Parliamentary sovereignty there is an ultimate check on judicial power because Parliament can always pass new or amending legislation overriding what the courts have decided. True it is that reference to Parliamentary intention immediately points to Parliamentary sovereignty: but the very fact that the courts are interpreting, and not making statutes ought to make the respective roles of courts and Parliament sufficiently clear without reliance on a potentially misleading concept.

6. Conclusion

What I have tried to do in this lecture is to bring alive the issue of statutory interpretation which dominates so much judicial time and energy and yet has often been relatively neglected in our law schools. I hope I may have convinced the students here that, throughout your legal studies, thinking more deeply about statutory interpretation is not only of great importance but also of great interest.