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STATUTORY CONSTRUCTION AND BIBLICAL HERMENEUTICS- LAW IN THE SERVICE OF THE GOSPEL?

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Some time ago I spent a couple of years teaching an introductory course on law at the University of Newcastle while pastoring a university-related independent evangelical church.¹ While the two sides of my life didn't often formally intersect, from time to time, while teaching engineers or prospective safety officers about the principles of interpreting statutes, I was struck by the connections between the process of statutory interpretation as practiced by courts, and the task of interpreting the Bible. This paper was first started at that time, with the aim, in a very preliminary way, of teasing out some of these connections, and in order to suggest that a legal background may provide some very useful tools for properly handling the word of God.

I have updated the paper slightly since I first presented it to a group of Christian lawyers. Presenting at a multi-disciplinary conference always raises the issue of who the audience will be! In putting this version of the paper together I have assumed that most of those to whom I speak will not be lawyers, and so the angle of the paper is, for the benefit of those with a general interest in the Bible, to demonstrate some of the techniques and principles used by lawyers and judges in coming to grips with authoritative texts which need to be applied in new circumstances. I hope that perhaps one side benefit is to further demolish the school which says "it's all a matter of interpretation!", as if that means no more may be said on some matter! "Interpretation" is not something only done in pulpits and pastoral studies, it is a craft practiced in the courts of law every day, and the principles used can be agreed upon, and usually produce workable and practical results.

The Nature of the Two Tasks

The tasks of statutory and Biblical interpretation are obviously comparable. In each case the interpreter (the court or the preacher) is seeking to draw from a pre-existing text, which is assumed to be authoritative, the meaning of that text, and then to apply that text to a modern situation.² As E D Hirsch comments, hermeneutics traditionally

was confined almost exclusively to two domains where correct interpretation was a matter of life and death (or Heaven and Hell)- the study of scripture and the study of law.³

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¹ Then called "Newcastle Unichurch", now (I am still an active member, though no longer one of the pastors) Hunter Bible Church- see <http://hunterbiblechurch.org/>.

² See Samuel J Levine, "Unenumerated constitutional rights and unenumerated biblical obligations: a preliminary study in comparative hermeneutics" *Constitutional Commentary* (Fall 1998) 511-522, who comments in relation to the United States Constitution: "like the Constitution, the Bible functions as an authoritative legal text that must be interpreted in order to serve as the foundation for a living community" (at 511). Levine's Jewish background leads him to place more emphasis than I would on the Bible as a purely "legal" text, but his comment is accurate in terms of principles of interpretation/

³ *The Aims of Interpretation* (Chicago: Uni of Chicago Press, 1972) 19-20, quoted in the preface to Sanford Levinson & Steven Mailloux (eds) *Interpreting law and literature : a hermeneutic reader* (Evanston, IL : Northwestern University Press, 1988). That is not to say, of course, that in all respects the techniques of

Stone also comments about the similarities between theological and legal hermeneutics:

[T]he institutionalised authority of certain texts such as the Bible and the Constitution; the never-ending disputes between liberals and conservatives about the authority of the text's original meaning in relation to the authority of ongoing community meaning; and the felt political or religious obligations of the judge, legal scholar, priest, minister, theologian and biblical scholar to heed the authoritative texts while responding to the pressing needs of the community moment.⁴

In both cases the human author of the text is usually not immediately present to be questioned as to the meaning. We who regularly seek to interpret the Bible take a great deal of comfort from the fact that Jesus promised that the Holy Spirit would be present with his disciples (eg John 16:13), and we pray that God's Spirit will open up our minds to understand the word of which He is the ultimate Author. But the Spirit, while He may occasionally give direct insight, generally seems to work through the skills and diligence of the interpreter in reading his words as what in fact they are: words, intended to be interpreted as all words are.

The modern emphasis in Biblical criticism has been to seek to understand the Bible as a piece of literature- which is thoroughly to be applauded, because this is what it is. It is a book in which we hear the very voice of God; but it is a book, a collection of literary works, not a "code-book" to only be read by those with the hidden key, or a series of nice sayings upon which the preacher's thoughts for the day can be strung up.

In the case of statutory material, of course, the draftsman or individual legislators may in fact still be alive and theoretically available for consultation; but the courts have often said that it is not the individual intentions of those persons which it must consider. The process which the draftsmen and the legislators have been involved in, culminates in the moment of Royal Assent to a particular text, which is then, as it were, "released into the world" to take its place in the body of other binding statutory material. From that point on the subjective meaning that a Principal Legal Officer in the Office of Parliamentary Counsel thought that she gave to a word or phrase, or what the Member for the Black Stump thought he was voting for (if indeed he thought other than what his Whip told him), are irrelevant.

The courts in recent years have acknowledged that in many ways "Parliament's intention" is a legal fiction. So McHugh and Gummow JJ in *Byrne and Frew v Australian Airlines Ltd* (1995) 131 ALR 422 comment:

In Australia, the proposition that the courts give effect to "the intention of the legislature" tends to disguise the compromises between contradictory positions which may be involved in obtaining the passage of legislation, particularly through a bicameral and federal legislature. To plumb the intent of the particular body which enacted the law in question may be an illusory quest... The task of the court... is to give effect to the will of the legislature but as it has been expressed in the law and by ascertaining the meaning of the terms of the law. [at 131 ALR 456-7]

interpretation are identical. For an interesting and carefully nuanced discussion of the difference between modern legal interpretation and the way that the Biblical narrative communicates, see B S Jackson, "Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence" (2000) 13/4 *International Journal for the Semiotics of Law* 433-457. For a fascinating comparison of Jewish and modern Protestant views of the Bible and its relation to law, see Chaim Saiman, "Jesus' Legal Theory- A Rabbinic Interpretation" (2007-2008) 23 *Journal of Law and Religion* 97.

⁴ Jerry H Stone, "Christian Praxis as Reflective Action", in G Leyh (ed) *Legal Hermeneutics: History, Theory and Practice* (Berkeley: Uni of California Press, 1992) 103-126, 104.

But in the end the courts are obliged to treat a statute *as if* it had one author who was consistent in what he or she said and the way that language was used.⁵

For the evangelical preacher, of course, the Bible does *in truth* have a single ultimate Author, in the sense that everything that is said in the Bible is said because God purposed that it be said, and comes with his authority.⁶ But this does not relieve the exegete from being aware of the fact that God's "concurvive" authorship of Scripture (to use a phrase employed by B B Warfield) involved Him allowing complete freedom to the many individual human writers, while retaining at the same time complete control over the content of their writings.

To slightly anticipate a point to be explored later- what this does mean is that the unity of authorship of the Bible, while it implies a unity of *theme* and a lack of ultimate contradiction, does not necessarily imply a unity of *form of expression* or vocabulary. So to require that the same Greek or Hebrew word must mean precisely the same thing in different books of the Bible is to misunderstand the nature of divine authorship. It seems quite likely, to take a well-known example, that when Paul and James use the word πιστις, *pistis* "faith", in Rom 3:28⁷ and James 2:17⁸, the word actually has a different meaning in each author's mind (as shown by the context of each usage.) But when the whole discourse of each letter is examined they will be found to making the same assertions of truth.

In this area, then, other analogies between the techniques of the law and those of Biblical interpretation can be found in the process of judicial reasoning used in the consideration of previous decisions of other judges- doctrines which go under the heading of the doctrine of precedent and *stare decisis*. But that will have to be the subject of another paper! For current purposes I want to simply introduce some of the ways that principles that judges use to interpret statutes can illuminate (and confirm) principles of good Biblical hermeneutics.

General Principles of Statutory Interpretation

We should start by being clear on the modern approach of courts to statutory interpretation.

The basic and overriding objective which the courts seek to achieve can be stated very simply. Justice Kirby, when he was on the Supreme Court of NSW, put it this way with characteristic lucidity:

the duty of the court is to give effect to the will of Parliament as expressed in the language by which that will is stated.⁹

This brings out two important points. The first is that the court is seeking the *intention*, or will, of Parliament. Parliament is the supreme law-maker, and the court's role is give effect to the law Parliament intended to make.

⁵ See the comment by Prof Dworkin, that judges should "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author- the community personified-expressing a coherent conception of justice and fairness"- in *Law's Empire* (1986) at 225, as quoted in J C Fromer, "Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation" (2002) 115 *Harvard Law Review* 1456. Fromer's note is an interesting example of an attempt to apply traditional Jewish exegetical techniques to the task of dealing with ambiguities in American statutes.

⁶ It will become apparent that this is the stance of the author. But it is hoped that even those who are not necessarily committed to the truth of the Bible may find it helpful to consider what interpretive stance should be adopted if that truthfulness were assumed!

⁷ "For we maintain that a man is justified by faith apart from observing the law." (NIV, as are subsequent scripture quotations.)

⁸ "In the same way, faith by itself, if it is not accompanied by action, is dead."

⁹ *DPP v Logan Park Investments Pty Ltd* (1995) 132 ALR 449, at 455.

The second point is equally important, though: that in seeking the will of Parliament, the main and overriding instrument that must be used is the *language* that Parliament actually put into the statute. While these days a court is allowed to refer to Parliamentary debates and Law Reform reports in determining Parliament's intention, these things cannot overrule the words that Parliament uses. As Kirby J went on to say in the *Logan Park* case:

the ultimate duty of a court is one of fidelity to the language which Parliament has actually used...Ministerial speeches and explanatory memoranda cannot substitute for the language of Parliament which is expressed in its statutes.¹⁰

To put it another way, even if by some magical process it was possible to finally and completely determine that the subjective intention of every member of Parliament at a particular time was "A", if the words that Parliament has used amount to "B", and cannot by any normal use of language mean "A", then the courts must read it as "B".

Biblical Implications

The distinction between intention and the language it is expressed in, is, I think, suggestive of a helpful corrective to some forms of Biblical interpretation. While our primary focus in reading a passage is the intention of the author of that passage, we are only at liberty to seek that intention through the language they have used.

To take one example from a few years ago- the general approach of Dr Barbara Thiering in some of her books was to suggest that somehow she had privileged access to the mind of the authors of the New Testament.¹¹ Her books implied that by going outside the Biblical material to Jewish midrash and the Dead Sea Scrolls, she was able to "crack the code". On top of all the other problems this approach has, there is this: to any literate person reading the New Testament in its first century Graeco-Roman context, the language makes perfect sense without such decoding!¹² Dr Thiering's method assumed that the private intention of the authors was to do one thing ("A"), while it seemed to any casual reader of the material to be something else ("B"). The corrective principle from statutory interpretation reminds us that when documents are issued in public, which make sense when read according to ordinary conventions of language, we have no warrant for "going behind" the document to seek another meaning.¹³

The Traditional "Rules" for Statutory Interpretation

Within the broad parameters noted above, the courts over a period of time developed a number of guidelines to assist in the process of determining Parliament's intention as evidenced in the terms of the statute. They are sometimes referred to as "rules" of statutory interpretation, and this is the way I will refer to them; but it should be clear that since

¹⁰ 132 ALR at 457.

¹¹ For example, *Jesus the Man* (Doubleday, 1992).

¹² In more recent years, of course, a large part of the attraction of Dan Brown's *Da Vinci Code* was that it promised to reveal secrets hidden within the text of the Bible and other texts that had been misunderstood by those reading only the "surface" meaning.

¹³ A similar approach is taken by the courts in interpretation of private contracts, applying what is often called the "parol evidence" rule precluding the acceptance of secondary conversations between the parties to a written contract which would fundamentally alter the meaning of the written text. See the comments of Kirby P (again when in the NSW Supreme Court) in *B & B Constructions (Aust) Pty Ltd v Brian C Cheeseman & Assoc Pty Ltd* (1994) 35 NSWLR 227 noting the connections between the parol evidence rule and principles of statutory interpretation. For recent affirmation of the "parol evidence rule" by the High Court of Australia see *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471.

application of the different principles may give rise to differing results, they are better seen as “guidelines”. None of them are finally definitive; today each of them is simply viewed as one approach to the ultimate task of finding Parliament’s intention. I will mention some of them briefly, with some suggestions as to their application in Biblical interpretation.

(a) The Literal Rule

We start with the “literal rule”.

The classic formulation of the rule in Australia is that of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, at 161-2:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

The emphasis of the “literal rule”, then, is just to look at the “ordinary and natural sense” of the words. If the meaning of the provision is clear, that meaning must be the one adopted, even if the result seems to be “improbable”. This final part of the statement expresses an attitude that says- we will do what Parliament tells us, even if we don’t agree with it, because Parliament has the authority to make this decision.

Examples of the application of the literal rule, in the sense of simply following the ordinary meaning of the words, are probably to be found in courts all over Australia every day, simply because in general legislation meets the expectations of Parliament and the courts. There are some cases where the rule creates problems, however, because the particular legislation operates in unexpected ways. In such cases, where it seems that Parliament has simply made a mistake, or failed to anticipate a possible outcome, then the courts face the dilemma of either following the statute literally, or attempting to reach a result which arguably Parliament “really” intended.

This tension faced by the courts over the years has led to a more “nuanced” view of the rule. In Australia this is seen as starting with the case of *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 319-23. Mason and Wilson JJ referred to the paragraph quoted above from the *Engineers' case* and then said:

It would have been better had Higgins J omitted the last clause of the last sentence from the passage which we have quoted. The last clause may be taken to suggest that the operation of a statute is not relevant to the ascertainment of its meaning and this is certainly not now the case, if it ever was. Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural or ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.

In other words, the literal approach is not to be followed today where it would lead to an inconvenient or absurd result, if there is an alternative construction of the words which is “reasonably open”. The court will pay attention to the *effect* of its interpretation. If that interpretation would clearly undermine the policy of the legislation as a whole, then the court will try to find another possible interpretation.

Biblical Implications

It is illuminating to consider how these principles may apply to Biblical interpretation. The initial stress in the “literal rule” is a sound corrective to occasional tendencies to allegorising and “spiritualising” the Bible. Particularly in wrestling with the Old Testament preachers have sometimes presented passages as if they were “really” about something other than the subject of the text. A sound Biblical theology, exemplified in such helpful works as those of Graeme Goldsworthy’s *Gospel and Kingdom*,¹⁴ or the books of Dr William Dumbrell (eg *The Faith of Israel*),¹⁵ is essential in understanding the Old Testament and how the move to the New Testament is legitimately made. It starts with taking seriously the text of the Old Testament as it stands, with all its apparent problems and difficulties, and working hard to trace how each text fits within the overall development of the Bible’s themes.

The firm insistence of the older version of the literal rule, that when we have determined the meaning of the text we must submit ourselves to it, even if it seems contrary to our natural inclinations, seems a very salutary corrective to the type of Biblical scholarship which is prepared to jettison those parts of the Bible which do not conform to modern world-views. In the days of old-fashioned liberalism it was those bits of the Bible that clearly taught that miracles had happened which were under threat; in more recent years, of course, parts of the Bible’s teaching on relationships between men and women, and sexual morality, are in danger of being ignored.

What of the more recent judicial trend to depart from the literal meaning in light of the overall purpose of the statute? This too can be a helpful perspective if appropriated carefully. I take it that it ought not to authorise simply re-writing the text to fit our current views. But if viewed (as the above quote stresses) as making sure that our reading of the text is faithful to the text viewed *as a whole*, then it is helpful.

So if someone today were to argue that I ought not to eat certain foods because they were prohibited in the Old Testament, then I would argue that while a narrowly “literal” reading of a text such as Lev 11:7 would require me to forgo the delights of bacon and egg McMuffins, the whole context of Scripture (including passages such as Mark 7:19 and Rom 14:4-7) tells me that food laws of that sort are no longer applicable to God’s people. In this case applying the “literal” rule woodenly would distort the overall meaning of the Bible.

(b) The “Mischief” Rule

The broadest approach adopted by common law courts used to be what was called the “mischief” rule. The rule (and its unusual name) came from a case known as *Heydon’s case* (1584) 3 CoRep 7a; 76 ER 637. In its original form the rule requires the court to consider the state of the common law before the passing of the statute; the “mischief” or problem intended to be remedied by the statute; and to interpret the statute to give effect to Parliament’s intention to resolve the problem. The rule assumed that statutes generally were mainly passed to remedy some problem in the common law. If the statute was ambiguous in some way then the court was entitled to look at the problem to be remedied, and to interpret the legislation accordingly.

In general we may say that in the modern approach the “mischief” rule has been absorbed into the “purpose” rule, which we will consider next.

¹⁴ Now available as part of *The Goldsworthy Trilogy* (Paternoster, 2000).

¹⁵ Now in a 2nd ed, Baker, 2002.

Biblical Implications

However, the old rule may still have some benefit in Biblical interpretation. When reading a passage in the Bible, it is always helpful, insofar as it is possible to do so without undue speculation, to ask: what is the “mischief” that the writer is seeking to deal with?

To come back to the question of “faith” and “works” in Romans, much helpful modern work on the interpretation of Romans has proceeded from the insight that the mischief which Paul is addressing may well be a 1st century issue of the “ethnic boundary” between God’s people and the rest of the world. He writes to people who are tempted to see membership of the Jewish community, and its boundary markers of circumcision and food laws, as what distinguishes God’s people. He writes to argue, at least in part, that all along the “true Israel” has not been defined ethnically but by the issue of faith, and he argues from the example of Abraham.

When it is seen that this is the “mischief” Paul is addressing, there are good reasons to be careful that we do not approach Romans as if it were written by Martin Luther attacking “righteousness” in the medieval church. In fact many of Luther’s insights were perfectly valid, but a careful reading of the text needs to work from what Paul was actually saying in his context, and so to how these things apply, not only in Luther’s day, but also in our time.

(c) The “Purposive” Approach

The modern approach to statutory construction, then, is best summed up in the “purposive” approach.

(1) At common law

This was so even before the statutory developments to which we will turn in a moment, having been developed by the courts.

This approach requires the court to consider the purpose of the legislation generally, rather than simply the “mischief” created by the common law. In addition, it seems clear that the passages quoted from the *Cooper Brookes* case already would imply that the court does not have to find some “ambiguity” or “uncertainty” before turning to the purpose; it can look at the purpose of the Act (at least where that purpose appears from within the Act itself) from the outset.

(2) Statutory rules

The question whether this is or is not the proper modern approach at common law is really an academic one now, because there is now a statutory rule governing the issue in both the Commonwealth and State area. We may take as the primary example s 15AA(1) of the *Acts Interpretation Act 1901* (Cth), which provides:

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.

An almost identical provision applies to NSW legislation: see s 33, *Interpretation Act 1987* (NSW). Both the statutory regime and the current trend in interpretation were referred to by Mr Justice McHugh, when a member of the NSW Court of Appeal, in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, at 421-424:

A purposive and not a literal approach is the method of statutory construction which now prevails ... In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the

grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The *Acts Interpretation Act* 1901 (Cth), s.15AA, and the *Interpretation Act* 1987 (NSW), s.33, both require this approach to statutory construction.

Biblical Implications

How does this approach help us in understanding the Bible? It seems to me that this is actually a key insight into hermeneutics- the business of moving from the text to today. Our reading of the Bible must be one which allows the more important and clear parts of Scripture to guide us in reading the more difficult bits. Goldsworthy, in *Gospel and Kingdom*, for example, using the overarching ideas of “God’s people in God’s place under God’s rule” to trace themes from Genesis to Revelation. The Bible is not simply a disparate collection of 66 books randomly thrown together by the winds of history; it has a consistent plot, a central theme, a unifying story. Paul tells us in 1 Cor 1:20 that it is in Jesus that all God’s promises find their “Yes”! God has a plan for the world: a plan which is centred on the crucified, risen and reigning figure of Jesus the Messiah-

A plan for the fullness of time, to gather up all things in him, things in heaven and things on earth.
(Eph 1:10)

So that in the end when we read any passage of the Bible, we have not fully understood it until we have seen it in the context of the revelation of Jesus Christ, and his death, resurrection, ascension and future coming. That, I submit, is a “purposive” reading of Scripture which will be incredibly fruitful.

Principles Relating to Context

There are many other technical rules of statutory interpretation, of course. We don’t have time to examine them in detail, or look at examples of all of them. But the one thing I want to stress is that they all are rules which require the court to look at the words of a section or sub-section *in context*.

That is just a general rule of language that we all apply when reading anything: to read it in context. I tell my law students what I first read in a book about exegesis of the Bible: that a text, without a context, is a pretext. The context of a provision in a statute is first the part of the statute it is in; next the statute as a whole; and going further out, other statutes on similar topics, the previous common law, and the constitutional basis.

Keeping these things in mind- that the basic rule is to read a provision in context- let me just mention some of the rules that courts use to remind them about context.

(a) Definitions of Words

One of the most helpful parts of a statute in determining the meaning of a word can be the “definitions section”. Almost every Act of any length contains a section defining certain key words. In most Acts these sections are near the beginning, often in section 3 or 4. (There are some exceptions in legislation from the 1990’s when for some reason it became trendy to put definitions in a “Dictionary” at the end – see eg the *Local Government Act* 1993 (NSW), and the *Native Title Act* 1993 (Cth).)

These interpretations will be applied whenever the word appears in the Act, unless it is clear that some other meaning is required.

In addition to the definitions in a specific Act, each jurisdiction in Australia has an *Interpretation Act* which provides definitions which cover all other Acts. If a word is not defined in another part of the Act, or in another Act, then the court will usually take the ordinary everyday meaning of the word. But if the word has acquired a technical meaning in

a particular area, that meaning may be applied. A technical legal meaning might be applied if an Act was altering an area of common law, for example. In *Van Der Feltz v City of Stirling* [2009] WASC 142 (22 May 2009) Murphy J commented:

90 The general rule is that words used in a statute must be taken to have been used in their ordinary meaning. If it is contended that the word has some commercial or other special meaning, there must be evidence as to that, and then it is for the court to determine whether the legislature has used the word in its ordinary signification, or in the special sense: *Markell v Wollaston* [1906] HCA 91; (1906) 4 CLR 141, 150. The technical meaning of a word is a question of fact, although whether the legislature intended to use the technical meaning is a question of law: *Collector of Customs v Pozzolanac Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280, 287.

Biblical Implications

In the Biblical context, within one document and sometimes within one “corpus” of documents (such as, for example, the books 1 Samuel – 2 Kings, which seem to be clearly intended to stand together; or Luke’s 2-volume work, or even Paul’s letters) it may be useful from time to time to refer back, if a word is in doubt, to see if the writer has “defined” it in some way. Of course there is always a danger in the process, because one writer may often use the same word in different senses in different documents, and in different parts of the same document, where context makes his meaning clear. Indeed, there is a warning about this danger in the definitions provisions of most legislation, which usually start with the important caveat that the defined meaning will only apply “unless the context otherwise requires”!¹⁶

The mention of the common law principle that sometimes words may be treated as “technical terms”, however, is a good reminder that context includes the past use of the word in previous Biblical material. References to “propitiation” and the like require some understanding of the Old Testament sacrificial system.

(b) The “Latin maxims”

Various Latin sayings are used by courts from time to time. (The only reason they remain in Latin seems to be the well-known proclivity of professionals to persist with jargon to make them sound better-educated than their clients! But since lawyers still use them I will mention some of them briefly.) All, in the end, are merely specific examples of the need to look at context.

- *“noscitur a sociis”*

This simply requires the court to consider the context of words. In particular this rule is usually cited when there is a general word used which could mean a number of things. The word is said to take its “colour” from the surrounding context. Thus in a prohibition on bookmaking in any “house, office, room or place”, the High Court held that “place” did not extend to a public road (*Prior v Sherwood* (1906) 3 CLR 1054). In *R v Ann Harris* (1836) 173 ER 198 a provision which made it a crime to “stab, cut or wound” somebody was held not to include “bite”, and the accused who had bitten off another lady’s nose was set free!

- *“ejusdem generis”*

This is a more specific rule. It means “of a like nature” or “genus”. Where a list of items is given in a statute, followed by a general word, then the general word will usually be

¹⁶ There is excellent material on the dangers of “word studies” which fail to take note of context in D A Carson, *Exegetical Fallacies* (2nd ed; Grand Rapids: Baker, 1996) and in some more detail the careful work in P Cotterell & M Turner, *Linguistics and Biblical Interpretation* (London: SPCK, 1989) ch 4.

held to fall into the same “genus” or category as the specific words (assuming the specific items can be given some category.) A statute referring to “horses, cows, goats and other animals” might be thought reasonably not to cover tigers and lions.

In *Hughes v Winter* [1955] SASR 238 the defendant Winter was charged that contrary to the by-laws of the Adelaide City Corporation he had attracted together a number of persons and obstructed traffic. Evidence was that he had done this by getting an employee to dress up in a gorilla suit and walk around on the steps of his theatre.

The provision which he was supposed to have breached was :

No person shall by speaking, shouting, singing, playing upon, operating or sounding any musical or noisy instrument or doing anything whatsoever attract together a number of persons in any street or so as to obstruct traffic.

In fact it was found that the gorilla had made no noise, simply jumped up and down on the theatre steps. Was the action prohibited under the words “doing anything whatsoever”? The Supreme Court of South Australia got itself into statutory interpretation textbooks forever by applying the rule *ejusdem generis*, and finding that the defendant was not guilty because the “genus” established by the earlier part of the section was “noise makers”.

•*expressio unius est exclusio alterius*

Where one thing is spelled out, this excludes others by implication. In one case, where a Commission of Inquiry was given specific powers to make certain reports, it was held that this implied that the Commission could not make a general report about someone's criminal liability: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

Biblical Implications

Without looking at all of these, this last may have some interesting implications. If certain obligations are spelled out in Scripture, then we ought not to come along and add others of our own devising on people's consciences! This of course was what Jesus indicated in Mark 7:9-13 that the Pharisees had done- by adding their tradition to the word of God, they had in effect “nullified” the word of God. Paul also attacks those who through legalism would seek to burden believers by adding to the gospel of “faith in Jesus”, requirements about food, drink and festivals (Col 2:16-23).

Presumptions

There are in addition to the above rules, a number of “presumptions” which the courts use in interpretation- in effect, “starting points” which will not usually be departed from unless the legislation is very clear. These include such important presumptions those which usually prohibit retrospective operation of legislation, or interference with fundamental rights such as liberty or the right to hold property. Of course, in our legal system where Parliament, at least when acting constitutionally, is supreme, then Parliament may choose to contradict those presumptions- but the courts require them to do so with clarity and very explicitly.¹⁷

¹⁷ For discussion of presumptions, and Parliament's power to over-ride them, see eg *DPP v Logan Park Investments Pty Ltd* (1995) 132 ALR 449, *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7.

Biblical Implications

The details of the common law presumptions are not very helpful for Biblical interpretation, but the general idea of “starting points” is useful. We all make presumptions when we read a document- and some of the most important are views that we have on the reliability and consistency of the author.

The Reformers developed a set of presumptions which I would argue have been shown to stand the test of time in Biblical interpretation. One of them is this: that in general we will presume that the Bible, as the word of God, will be internally self-consistent. Of course this is not a presumption we could *start* with if we were attempting to prove the reliability of the Scriptures. But it seems to me that if we have been convinced (as I would argue we ought to be) of the reliability of Jesus Christ, and if he testifies (as he does) to the truthfulness of the Old Testament and the fact that he will empower his apostles to write truth, then we can trust the Bible.¹⁸

As such, this becomes a useful exegetical principle. When I come up against a “hard passage”, where something is said that seems to contradict some other part of the Bible, old-fashioned liberalism would say, “too bad for the Bible”. But if I start with a presumption of the Bible’s truthfulness, then I say – “perhaps my understanding of this passage, or the others, isn’t right”. I am then pushed to keep on looking, to dig around, and see how the passage works. Nine times out of ten it is the passages which look hard which prove to be the most fruitful when I have persisted with them.

Use of “Extrinsic Material”

Finally in this very brief overview of legal interpretative issues, one of the issues that has concerned commentators for a long time is whether a court can refer to matters outside the Act itself, such as the Reports of Law Reform bodies, or debates in Parliament, to determine the intention of the Parliament.

The older approach was to say that such materials were *not* to be admitted. One argument was that it would prolong trials greatly if all this extra material was open to be admitted. Another was that individual speeches in Parliament may not represent the will of the whole Parliament.

While a certain increased willingness to consider outside material was developing in the courts, the real innovation came with statutory change. In 1984 s 15AB was inserted into the *Acts Interpretation Act 1901* (Cth). This section (like other State provisions, such as s 34 of the *Interpretation Act 1987* (NSW)), allows extrinsic material to be used in clearly defined circumstances:

- to confirm the ordinary meaning of the Act;
- where the Act is ambiguous;
- where the ordinary meaning leads to a “manifestly absurd or unreasonable” result.

These circumstances, however, must be clearly present before the Court is authorized to refer to the material. The High Court in *Re Australian Federation of Construction Contractors; ex parte Billing* (1986) 68 ALR 416, for example, refused to allow extrinsic material where there was no ambiguity in the statute.

Still, the provision has added a valuable tool to the court's resources for interpretation. In particular the Minister's Second Reading Speech, where the overall policy of a Bill is set out, has proved useful in interpretation. In *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623, for example, the Court relied extensively on both the Parliamentary

¹⁸ The best book I have read on the reliability of the Bible is still John Wenham’s classic *Christ and the Bible* (Baker, 1994) where he explores Jesus’ words about scripture.

memorandum and the Law Reform Commission Report which lay behind the provision being interpreted.

The High Court issued a warning in *Re Bolton; ex parte Bean* (1987) 162 CLR 514 however that even if these materials are used, what the court must give effect to are the words used by the Act itself, and not what it seems the Minister thought the words meant! There was a recent extensive discussion of these issue by the NSW Court of Appeal in *Harrison v Melhem* [2008] NSWCA 67, where Spigelman CJ commented at [12] that

12 ... Statements of intention as to the meaning of words by ministers in a Second Reading Speech, let alone other statements in parliamentary speeches are virtually never useful. Relevantly, in my opinion, they are rarely, if ever, “capable of assisting in the ascertainment of the meaning of the provisions” within s 34(1) of the *Interpretation Act* 1987. I only refrain from using the word “never” to allow for a truly exceptional case, which I am not at present able to envisage.

Biblical Implications

In Biblical studies the use of “extraneous material” to illuminate the meaning of the Bible has been common, and often been helpful. So research into the background of the Biblical text by comparing Genesis 1-2 with other Ancient Near Eastern texts describing the creation of the world has led to some interesting insights, as has New Testament research into Paul’s letters by examining the form and style of other 1st century letters. These matters can help us get a feel for how the literature of the Bible works, the conventions of various genres, the formal features used to convey meaning.

But it is perhaps worth reflecting how this material can occasionally be misused, and to understand why the older legal rules were doubtful about the use such material in statutory interpretation. The fact is that a document which is intended for future long-term use will usually have sufficient “obvious” cues about its meaning for most of the important elements to be read off internally. Otherwise we will return to seeing it as a “coded” work which can only be read by experts. One of the fascinating things about both the Old and New Testaments is that the more “poetic” or “general works” (prophecies, epistles) are deliberately situated in an overall corpus which contains historical narrative, which itself provides the context for the general works. The so-called “Deuteronomic History” from Genesis to 2 Kings, for example, gives a wealth of historical information which allows a setting to be seen for pretty well all the prophecies, from Isaiah to Malachi, and indeed for most of the “wisdom” and poetic literature (see the ascription of the wisdom books to Solomon, or many of the Psalms to David). The letters of Paul and others in the New Testament are given an historical framework in many cases by the chronology of events in Acts. So in many cases the older legal scepticism about the need for “extraneous” material, may prove a useful corrective to the more modern tendency of Biblical criticism to pin down precise, but speculative, scenarios to explain (or explain away) some of the teaching of the Bible.

Overall Hermeneutics: Moving from Ancient Text to Modern Life

To conclude, what do the courts have to say about the process involved in moving from understanding the legal text, to implementing it in a particular situation? For much modern legislation, enacted within the space of a few years prior to the particular case, there may not be many problems. But in Australia, as in the United States, there is one statute which is old, but crucial- the Constitution. And moving from the text of the Constitution to the modern world raises a number of important issues which I only have time to touch on briefly here.

In the United States there is a long history of active debate over how much freedom the courts, and in particular the Supreme Court, should have to “update” the provisions of the Constitution.¹⁹

The High Court of Australia has also wrestled with these issues over a number of years. With his usual clarity Justice Kirby described some of the questions and answers in the following passage from *Kartinyeri v The Commonwealth* [1998] HCA 22, and since his Honour puts it better than I can I hope an extended quotation will be excused:

[132] For the moment, it is sufficient to note the following general rules [sc, of Constitutional interpretation]:

1. The duty of the Court is to the Constitution. Neither the Court, nor individual Justices, are authorised to alter the essential meaning of that document. The Court itself is created by the Constitution which is expressed in a form the text of which cannot be altered except with the authority of the electors qualified to vote. It is the text (with its words and structure) which is the law to which the Court owes obedience. In the Constitutional Court of South Africa, Kentridge AJ has recently described the judicial task of interpretation of a written constitution:

"[I]t cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean ... If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

This emphasis upon the text of the document is beneficial. It tames the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a particular case. The text is the law. It may be elaborated by the most ample construction, as is appropriate to a grant of legislative power in a relatively inflexible fundamental law intended to provide indefinitely the legal foundation for the government of the Australian people. But judicial interpretation of the Constitution risks the loss of legitimacy if it shifts its ultimate focus of attention away from the text and structure of the document.

2. Assertions that the meaning given to words in the Australian Constitution cannot be altered from that which those words bore when they were settled a hundred years ago have given rise to confusing (and possibly inaccurate) claims that the "connotation" of a word in the constitutional text remains the same whereas its "denotation" may expand over time. Attempts of this kind to offer linguistic explanations of the judicial function in giving meaning to the language of the Constitution may be less convincing than a candid acknowledgment that, sometimes, words themselves acquire new meaning from new circumstances. The very application of broad language to changing facts demands a measure of accommodation. Moreover, new, and completely unpredictable matters may arise which, when measured against the text, are held to fall within a given head of power. Each generation reads the Constitution in the light of accumulated experience. Each finds in the sparse words ideas and applications that earlier generations would not have imagined simply because circumstances, experience and common knowledge did not then require it. Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate. Add to these considerations the special ambiguity of the English language, in which the document is written, occasioned by its unique fusion of Germanic and Latin sources, and it should not be surprising that constitutional interpretation in Australia, over time, has involved changes in the understanding and exposition of the words used. Constitutional interpretation is no mechanical task. The Constitution is no ordinary statute. {footnotes omitted}

¹⁹ For a recent review of the debate over “originalism” in the interpretation of the US Constitution, see J Greene, “Selling Originalism” (2009) 97/3 *Georgetown Law Journal* 657-721.

Biblical Implications

Perhaps one may be forgiven for adding- nor is the Bible an ordinary book! His Honour's helpful reminder is that both sides of the coin must be carefully considered. We have a written Bible which we have no authority to change or tamper with (see the stern warning in Rev 22:18-19). But we speak to a society which has changed since the original writing of the Bible. As we wrestle with applying the word of God to today's world, we must make the effort to show people how it speaks to those changing circumstances.

Unlike the Constitution, however, foundational document as it is for the legal system, those of us who expound the word of God can do so with the confidence that the Author of the document we interpret is the Creator of the universe who has not changed (Heb 13:8- "Jesus Christ is the same yesterday and today and forever"), and who speaks to us today through his written word. May God through his Holy Spirit and the gifts he has given us assist us to interpret and explain his word clearly.

I trust that this very abbreviated overview of the way the courts approach the task of interpreting statutes, may have given you some worthwhile ideas for this task. At the very least I think it is clear that the task of interpretation is something that is common to courts and pastors alike, and something that can be tested and approved.

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