

2004

Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspective

Ian McLeod

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Ian McLeod, *Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspective*, 29 *Brook. J. Int'l L.* (2004).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol29/iss3/5>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

LITERAL AND PURPOSIVE TECHNIQUES OF LEGISLATIVE INTERPRETATION: SOME EUROPEAN COMMUNITY AND ENGLISH COMMON LAW PERSPECTIVES

*Ian McLeod**

I. INTRODUCTION: A TALE OF TWO TRADITIONS

The United Kingdom's entry¹ into the European Economic Community (as it then was)² involved an intimate intermingling of two of the world's great legal traditions: the English legal system's common law tradition³ and the Community legal system's civil law (or Roman law based) tradition. Among the more obvious differences between the two traditions are the English doctrines of the *legislative supremacy of Parliament* and *binding precedent*, neither of which has any counterpart within the civil law tradition. Although the doctrinal constraints within which the English legal system functions have not, in practice, generally inhibited judicial creativity to any substantial extent, the United Kingdom's entry into the Community did at least raise the perception of one particular area of difficulty, namely the difference between the English technique of *literalism* in the process of legislative interpretation and the civil law technique of *purposive* (or *teleological*, to use the civil law's own terminology) interpretation.

* LLB, BA, BPhil, Solicitor of the Supreme Court, England and Wales; Head of Division of Law, London Metropolitan University (UK). This article is based on a paper given on September 19, 2003 at Brooklyn Law School as a contribution to a Symposium on the theme of Creating and Interpreting Law in a Multi-Lingual Environment.

1. Entry became effective on January 1, 1973.

2. In practice, the European Economic Community ("EEC") came to be known simply as the European Community ("EC"), but this usage was not formalized until the Treaty of Maastricht (Treaty on European Union, or "TEU"). The phrase *Community law* is to be preferred to the more commonly encountered *Union law* because the Community is still an essentially legal entity while the Union is a political entity.

3. The phrase *English legal system* is used here with its conventional meaning to describe the legal system of England and Wales.

Article I. Lord Denning MR⁴ gave voice to this perception when, having compared the detailed drafting of English legislation with the open-textured drafting of the Community Treaty, he said:

Beyond doubt the English courts must follow the same principles [of interpretation] as the European court. Otherwise there would be differences between the [member states]. That would never do. All the courts of all [the member states] should interpret the [Treaty] in the same way.⁵

The discussion contained within this Article will show that this perception of the extent of the distinction between English and Community techniques of interpretation was (at least in relation to the contemporary English practice of legislative interpretation) a significant overstatement,⁶ before proceeding to compare the English version of purposivism with that employed by the European Court of Justice.⁷

II. LITERAL AND PURPOSIVE INTERPRETATION IN ENGLISH LAW

There can be no doubt that, in the Nineteenth Century, the English courts were strongly inclined towards a literal approach to legislative interpretation. For example, in the *Sussex Peerage Case*,⁸ Lord Tindal CJ said:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound

4. The Master of the Rolls is the most senior judge of the Court of Appeal (Civil Division). The Court of Appeal ranks between the High Court and the House of Lords. In the overall order of judicial precedence, the Master of the Rolls ranks immediately below the Lord Chief Justice, who presides over the Court of Appeal (Criminal Division), and is the most senior member of the judiciary.

5. See *HP Bulmer Ltd. v. J Bollinger SA* [1974] 3 W.L.R. 202, 226 (Eng.). The same point was made by the European Court of Justice in *Amministrazione della Finanze del Stato v. Simmenthal SpA* ("Rules of Community law must be fully and uniformly applied in all the Member States"). *Amministrazione della Finanze del Stato v. Simmenthal SpA* (case 106/77) [1978] ECR 629, 643.

6. This statement proves true at least in relation to the contemporary English practice of legislative interpretation.

7. In the interest of textual simplicity, the phrase "European Court of Justice" is used throughout this article to include the "Court of First Instance."

8. The *Sussex Peerage Case*, 8 Eng. Rep. 1034, 1057 (H.L. 1844).

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1111

those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver.⁹

Admittedly, it is possible, though not usual, to read this comment as being an affirmation of literalism as purposivism. However, no such equivocation is possible in relation to Lord Esher MR's comment in *R v. Judge of the City of London Court*:¹⁰ "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."¹¹

The operation of this type of simple literalism may be illustrated by the case of *Whiteley v. Chappell*,¹² which arose from the statutory offence of impersonating "any person entitled to vote" at an election.¹³ The defendant impersonated someone whose name was on the register of electors but who had died between the date on which the register had been compiled and the date of the election.¹⁴ Although he was convicted at first instance, his appeal was allowed on the ground that dead men are not, in the words of the statute, "entitled to vote."¹⁵

However, when viewed in its proper historical perspective, the nineteenth century flourishing of literalism may be seen as a temporary aberration.¹⁶ More particularly, in an earlier age, when statutes were a relatively minor source of law, the English courts adopted an unashamedly purposive approach to leg-

9. See *id.* at 1057. See also *In Re Bernard Boaver* [1915] 1 K.B. 21, 27.

10. *Queen v. Judge of the City of London Court* [1892] 1 Q.B. 273.

11. *Id.* at 290.

12. *Whiteley v. Chappell* 4 Q.B. 147 (1868).

13. See *Personation at Election of Guardians of the Poor*, 14 & 15 Vict., ch. 105 §3 (1852) (Eng.). See also *Whiteley*, 4 Q.B. at 147.

14. *Whiteley*, 4 Q.B. at 147.

15. *Id.*

16. The reasons for this aberration are beyond the scope of this Article, but they may be summarized thus. The combination of the traditional doctrine of the legislative supremacy of Parliament and the progressive extension of the franchise from the Great Reform Act of 1832 onward, seems to have created a mindset on the part of judges that their role was to do what they were told by the supreme and, by the standards of the time, increasingly democratically validated Parliament. Additionally, the background of revolutionary activity in continental Europe (especially from 1789 to 1848) can hardly have left the judges in any doubt as to the potential consequences of failing to take account of the popular will.

islative interpretation, as the classic statement in *Heydon's Case*¹⁷ shows:

For the sure and true interpretation of all statutes...four things are to be discerned and considered:

1st What was the Common Law before the making of the Act?

2nd What was the mischief and defect for which the Common Law did not provide?

3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?

4th The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress continuance of the mischief...according to the true intent of the makers of the Act.¹⁸

In due course, however, for the reasons outlined above,¹⁹ this approach gave way to literalism, only to re-appear under the name of purposivism, in the twentieth century.

More particularly, the ascendancy of purposivism may be associated with the period immediately after the Second World War, when a great deal of social legislation was enacted.²⁰ It may be tentatively suggested that many judges in that context, steeped in the democratic tradition, would naturally feel an obligation to promote the objects of the legislation where it was possible to do so. However, whatever the reasons for the transition from literalism to purposivism may have been, that there was such a transition is abundantly clear. In the words of Lord Diplock, "If one looks back to the actual decisions of this House...over the last thirty years one cannot fail to be struck by

17. *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584).

18. *Id.* at 638. It is submitted that the use of the word *mischief* rather than *purpose* is immaterial.

19. See *supra* text accompanying notes 9–16.

20. See, for example, statutes as diverse as the National Health Service Act 1946 and the National Parks and Access to the Countryside Act 1949. National Health Service Act, 1946, 9 & 10 Geo. 6, ch. 81, National Parks and Access to the Countryside Act, 1949, 12, 13 & 14 Geo. 6, ch. 97. For the scope of the former, see *infra* text accompanying note 75. The scope of the latter is reasonably self-evident.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1113

the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.”²¹

One reason for the resurgence of purposivism appears to be the simple, if somewhat belated, realization that the idea of literal meaning is (or is likely to be) an illusion, as illustrated by the case of *Bourne v. Norwich Crematorium Ltd.*²² The case required the court to decide whether a crematorium company’s expenditure on a furnace chamber and chimney tower qualified for a tax allowance.²³ The answer to this question depended on whether the work was within the definition of “an industrial building or structure,” which, in turn, depended on whether the chamber and chimney were used “for a trade which consists in the manufacture of goods or materials or the subjection of goods or material to any process.”²⁴ Stamp J’s intuitive response to this question was forthright:

I would say at once that my mind recoils as much from the description of the bodies of the dead as “goods or materials” as it does from the idea that what is done in a crematorium can be described as “the subjection of” the human corpse to a “process.” Nevertheless, the taxpayer so contends and I must examine that contention.²⁵

Given the judge’s starting point, it is not altogether surprising that the taxpayer lost. For the present purposes, however, the most important element of this decision lies in the following statement of principle:

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language. That one must construe a word or phrase in a section of an Act of Parliament with all the assistance one

21. *Carter v. Bradbeer* [1975] 1 W.L.R. 1204, 1208. The transition was, of course, gradual.

22. *Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd.* [1967] 1 W.L.R. 691, 695.

23. *Id.*

24. *Id.*

25. *Id.*

can from decided cases and, if you will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one would not think it can possibly bear.²⁶

Other reasons for the resurgence of purposivism may include an increased awareness that it contributes to, rather than detracts from, the effectiveness of statutory law.²⁷ The following cases provide useful examples of the power of purposivism in achieving results which could never flow from the application of strict literalism. Moreover, some of them show that the power of purposivism may extend even to cases where its application will undermine English law's traditional tendency to err on the side of favouring the defence in criminal cases; and, perhaps even more startlingly, may defeat property rights expressly conferred by statute.

*Smith v. Hughes*²⁸ arose from Section 1 of the Street Offences Act 1959, under which it was an offence "to solicit in a street ... for the purpose of prostitution."²⁹ It fell to the High Court to decide whether this provision applied where the prostitutes were soliciting either from behind windows or on balconies overlooking the street, while the men who were being solicited were in the street. Since the prostitutes themselves were plainly not in the street, it was at least arguable that they should be acquitted.³⁰ However, the court rejected this view, with Lord Parker CJ saying, "Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common pros-

26. *Id.* at 696.

27. For example, see the comments of Lord Steyn, which are quoted below in the context of interpreting legislation in the light of subsequent scientific change in *R (on the Application of Quintavalle) v. Human Fertilization and Embryology Authority*. *R (on the Application of Quintavalle) v. Human Fertilization and Embryology Authority* [2002] 1 F.C.R. 664.

28. *Smith v. Hughes*, [1960] 1 W.L.R.. 830; *see also* Street Offences Act, 1959, 7 & 8 Eliz. 2, c. 57, § 1(1), (Eng.).

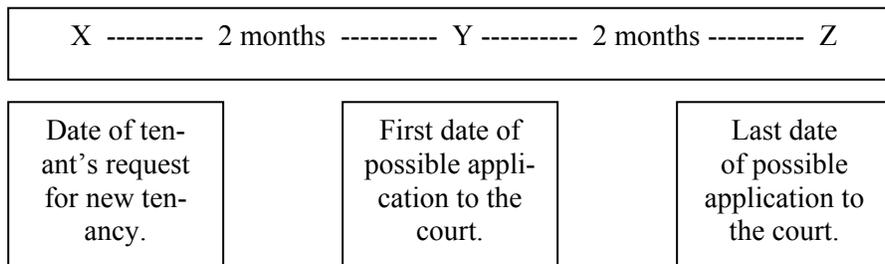
29. Street Offences Act, § 1(1).

30. On the basis that, as they were not in the street, it followed that they could not be convicted of conduct (in this case soliciting) in the street. *Hughes*, 1 W.L.R..at 830.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1115

titutes ... For my part, I am content to base my decision on that ground and that ground alone.”³¹

Other cases may not be characterized by the same level of public awareness of the legislative purpose, but this need not inhibit the courts from identifying and applying a putative purpose. For example, in *Kammins Ballrooms Co. Ltd. v. Zenith Investments Ltd.*,³² under Part II of the Landlord and Tenant Act 1954, tenants of premises used for business purposes who wished to have their expiring tenancies renewed were required to ask their landlords to grant them new ones.³³ If a landlord refused to grant a new tenancy, the tenant then had a statutory right to apply to the court, which could order the landlord to grant a new tenancy.³⁴ The case required the House of Lords to consider the meaning and application of Section 29(3) of the Act, which provided that, “no application ... shall be entertained unless it is made not less than two nor more than four months after...the making of the tenant’s request for a new tenancy.”³⁵ This may be represented thus:



31. *Id.* at 832. Lord Parker's confidence that everyone knew the purpose of the Act stemmed from the fact that it owed its genesis to the report of the Committee on Homosexual Offences and Prostitution, chaired by Sir John Wolfenden. The Wolfenden Report, as it was generally known, had given rise to extensive public debate. Committee on Homosexual Offences and Prostitution, *The Wolfenden Report* cmt. 247 (1957).

32. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, [1970] 3 W.L.R.. 287.

33. *Id.* Landlord and Tenant Act, 1954, 2 & 3 Eliz. 2, c. 56, § 26, (Eng.).

34. *Id.* at § 24.

35. *Id.* at § 29(3).

In this case, the tenant's application to the court was plainly outside the statutory period.³⁶ Nevertheless, the House of Lords held that the statutory provision did not necessarily invalidate the application,³⁷ although Lord Diplock did acknowledge that:

[S]emantics and the rules of syntax alone could never justify the conclusion that the words "No application...shall be entertained *unless*" meant that some applications should be entertained notwithstanding that neither of the conditions which follow the word "unless" was fulfilled.³⁸

The key to Lord Diplock's reasoning lies in his decision that of the purposes of the Landlord and Tenant Act is to encourage landlords and tenants to proceed by agreement wherever possible, together with his view that the time limit in question as purely procedural.³⁹ On this basis, it followed that landlords should be entitled to waive compliance with the time limit if they so wished. Therefore, in a case where the application to the court is made out of time, the first question for the court is whether the landlord has, in fact, waived the right to rely on observance of the time limits.⁴⁰

As we have seen,⁴¹ purposivism may even prevail over the criminal law's traditional bias in favour of the defence. The case of *R. v. Pigg*⁴² concerned the validity of a rape conviction, where the verdict had been by a majority.⁴³ Section 17(3) of the Juries Act, 1974⁴⁴ provided that a majority verdict could not be accepted unless "the foreman of the jury has stated in open

36. In fact, it was made approximately half way through the initial two month period. The reason for error appears to have been the tenant's solicitor's ignorance of the statutory time-scale. *Kammings Ballrooms*, 3 W.L.R.. at 287.

37. *Id.*

38. *Id.*

39. *Id.*

40. On the facts of the case, the landlord had not waived his right to rely on the statutory time limits, but this does not invalidate Lord Diplock's approach to the interpretation of the provision. *Id.* at 299-300.

41. *Smith*, [1960] 1 W.L.R. at 830.

42. *R. v. Pigg*, [1982] 1 W.L.R.. 6 (Eng.).

43. *Id.*

44. After centuries during which a conviction could flow only from a unanimous verdict, the possibility of conviction by a majority verdict (of either ten or eleven where there were twelve jurors, or nine where there were ten) had been introduced by the Criminal Justice Act 1967. *Id.*

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1117

court the number of jurors who respectively agreed to and dissented from the verdict.”⁴⁵ In this case, when the foreman indicated that ten jurors had agreed to convict, the clerk of the court replied “ten agreed to two of you,” to which the foreman made no response.⁴⁶ Although the foreman’s failure to say how many jurors had disagreed was a clear contravention of the plain words of the statute, Lord Brandon declined to treat this failure as being fatal to the resulting conviction:

If the foreman of the jury states no more than that the number agreeing to the verdict is ten, it is nevertheless a necessary and inevitable inference, obvious to any ordinary person, that the number dissenting from the verdict is two. True it is that the foreman of the jury has not said so in terms as the 1974 Act, interpreted literally, requires. In my opinion, however, it is the substance of the requirement...which has to be complied with, and the precise form of words by which such compliance is achieved, so long as the effect is clear, is not material.⁴⁷

The purposive approach, even when it is not expressly labelled as such, may even override property rights which have been conferred by statute, as illustrated by *Re Sigsworth*.⁴⁸ The key provision was Section 46 of the Administration of Estates Act, 1925, which laid down, in absolute and unqualified terms, the order of inheritance in cases where people had died without making their wills.⁴⁹ On the facts of the case, the effect of the provision would have been that a murderer would have inherited the estate of his victim.⁵⁰ Clauson J, in the High Court, disappplied the provision, on the basis that, by parity of reasoning, the case was governed by the “well-settled principle that public policy precludes a sane murderer from taking a benefit under a victim’s will.”⁵¹ In other words, “the principle...must be

45. Juries Act, 1974, c. 23, § 17(3), (Eng.).

46. *Pigg*, [1982] 1 W.L.R.. at 6.

47. *Id.* at 12.

48. *In re Sigsworth*, [1935] 1 Ch. 98.; Administration of Estates Act, 1925, c. 23, § 46 (Eng.).

49. *In re Sigsworth*, [1935] 1 Ch. at 98.

50. *Id.*

51. *Id.* The principle, which in relation to testate succession is, of course, the basis of the decision in *Riggs v. Palmer*, is simply one application of a the more general principle that there is a presumption that Parliament did not intend to all people to gain advantages from their own wrongdoing. *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). For another example of this pre-

so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it.”⁵²

Finally, the courts may use the purposive approach to deal with problems which arise from social and scientific changes. Two cases — one dealing with social change and one with scientific change — will suffice as examples.

In *Fitzpatrick v. Sterling Housing Association Ltd.*,⁵³ the House of Lords held that, for the purposes of Schedule I to the Housing Act, 1977, where a tenant of a dwelling died, leaving a same-sex partner with whom he had lived and who wished to remain in the dwelling, the survivor was a member of the deceased tenant’s family living with him at the time of his death.⁵⁴ The practical consequence of this provision was that the survivor was entitled to inherit both the tenancy and security of tenure.⁵⁵ As Lord Nicholls put it, when discussing the meaning of the word *family* for the purposes of the statute:

In the present case Parliament used an ordinary word of flexible meaning and left it undefined. The underlying legislative purpose was to provide a secure home for those who share their lives together with the original tenant in the manner which characterizes a family unit. This purpose would be at risk of being stultified if the courts could not have regard to changes in the way people live together and changes in the perception of relationships.⁵⁶

In the context of scientific developments, the decision in *R (on the Application of Quintavalle) v. Human Fertilisation and Embryology Authority*⁵⁷ is instructive. The Human Fertilisation and Embryology Act, 1990 regulated the creation and use of

sumption in operation, see *Re X (A Minor) (Adoption Details: Disclosure)*, [1994] 3 W.L.R. 327, discussed in IAN MCLEOD, *LEGAL METHOD* 310–11 (4th ed., 2002).

52. *In re Sigsworth*, [1935] 1. Ch. 89.

53. *Fitzpatrick v. Sterling Housing Ass’n Ltd.*, [1999] 4 All E.R. 705 (H.L. 1999).

54. *Id.* at 717; Rent Act, 1977, ch. 42 (Eng.).

55. Rent Act, sch. 1, para. 3.

56. *Fitzpatrick*, 4 All E.R. at 722.

57. *Regina (on the application of Quintavalle) v. Human Fertilisation and Embryology Authority*, [2003] 2 All E.R. 105.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1119

human embryos outside the body.⁵⁸ At the time of enactment, fertilisation provided the only means of creating a human embryo.⁵⁹ Subsequently, scientists developed the technique of cloning by a process known as *cell nuclear replacement* (“CNR”).⁶⁰ The issue in the case was whether the scheme contained in the Act applied to embryos created by CNR.⁶¹ Holding that there was a plain Parliamentary intention that the Act should apply to all embryos created outside the human body, irrespective of the means of their genesis, Lord Steyn observed:

In order to give effect to a plain Parliamentary purpose, a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament.⁶²

58. See *Regina (on the application of Quintavalle) v. Secretary of State for Health*, [2003] 2 All E.R. 113, 116.

59. Accordingly, the word “embryo” was defined for the purposes of the Act, and “except where otherwise stated” in terms of fertilization. See *Human Fertilisation and Embryology Act, 1990*, c. 37, § 1(1) (Eng.).

60. See *id.*

CNR is a process by which the nucleus, which is a diploid, from one cell is transplanted into an unfertilized egg, from which...the nucleus has been removed. The [replacement] nucleus is derived from either an embryonic or a foetal or an adult cell. The cell is then treated to encourage it to grow and divide, forming first a two-cell structure and then developing in a similar way to an ordinary embryo.

CNR is a form of cloning. Clones are organisms that are genetically identical to each other. When CNR is used, if the embryo develops into an live individual, that individual is genetically identical to the nucleus transplanted into the egg. There are other methods of cloning, for example, embryo splitting, which may occur naturally or be encouraged. Identical twins are a result of embryo splitting.

The famous Dolly the sheep was produced by CNR. Live young have been since produced by CNR in some other mammals. It has not yet been attempted in humans.

Id.

61. *Id.* at 115.

62. *Regina v. Human Fertilisation and Embryology Auth.*, [2002] 2 All E.R. 625, 722.

In this case, therefore, from the point of view of the protection afforded to it by the statute, an embryo is an embryo irrespective of its genesis. It follows that the courts should not deny some embryos the benefit of this statutory protection simply because of advances in medical technology occurring after the statute was enacted.

Although the cases discussed above provide clear examples of the modern English practice of purposivism, they generally provide little guidance as to how the legislative purpose is to be identified.⁶³

III. IDENTIFYING LEGISLATIVE PURPOSES IN ENGLISH LAW

Having established that purposivism is the predominant technique of legislative interpretation in English law, the next task is to ascertain the means by which the legislative purpose is to be identified. In common with all other legal systems which have emerged and evolved over time, English law contains no single identifiable statement of its own purposes. Furthermore, one consequence of the informality of the British Constitution is that there is similarly no simple and straightforward statement of its fundamental, underpinning values.⁶⁴ Nevertheless, few would seek to deny that, generally speaking, the British Constitution accords high priority to a variety of basic values, with obvious examples being the presumptive protection of the subject's right of access to justice (an important aspect of which is that the jurisdiction of the courts can be ousted only by clear words to that effect), and the presumption against gaining advantage from wrongdoing.⁶⁵ Two examples

63. With the exception *Hughes*, [1960] 1 W.L.R. at 830.

64. Perhaps to some extent making a virtue out of necessity, English common lawyers often emphasize the pragmatism of the common law. *See, e.g.*, *R. v. Higher Education Funding Council ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651. No doubt the common law will develop, as the common law does, case by case. It is not entirely satisfactory that this should be so, not least because experience suggests that in the absence of a prior principle irreconcilable or inconsistent decisions will emerge. But from the tenor of the decisions principles will come, and if the common law's pragmatism has a virtue, it is that these principles are likely to be robust. *Id.* at 666 (Sedley J.).

65. Values such as these are, of course, common to the Western liberal tradition as a whole, and no claim is being advanced here that they are uniquely characteristic of the English legal system.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1121

(one in relation to each of these values) will suffice for illustrative purposes.

First, in *Anisminic v. Foreign Compensation Commission*,⁶⁶ the House of Lords held that a statutory provision that determinations of the Foreign Compensation Commission⁶⁷ “shall not be called into question in any court of law”⁶⁸ did not preclude the court from considering a claim that an apparent determination was *ultra vires* and void as a matter of law (and, therefore, could not be accurately described as being a determination at all).⁶⁹ In other words, if the legislative purpose includes removing the subject’s right of access to the courts in order to challenge the legality of a public body’s decision-making processes, Parliament must make that purpose abundantly plain, because the courts will be unwilling to presume such a purpose on any other basis.

Secondly, it is worth recalling *In Re Sigsworth*,⁷⁰ where the court relied on the fundamental principle of the common law which prevents gaining advantage from wrongdoing, in order to avoid a result which could not have been within the scope of the legislative intention.⁷¹

Quite apart from relying on the application of basic principles such as those exemplified by the *Anisminic* and *Sigsworth* cases, the English courts may have recourse to a number of aids when seeking to identify legislative intention. Some of these aids are internal to the text in question, while others are external. Taking internal aids first, there is always the possibility that a statute will contain an express purpose section. In prac-

66. *Anisminic v. Foreign Compensation Commission*, [1969] 1 All E.R. 208.

67. The Foreign Compensation Commission was established by the Foreign Compensation Act 1950 to handle claims for compensation made by British subjects against foreign governments. Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12, § 4(4) (Eng.). The scheme was that a foreign government which was liable to compensate British subjects would make a lump sum payment to the British government, on whose behalf the Foreign Compensation Commission would entertain claims and decide which were valid and which were invalid, before proceeding to quantify compensation in respect of those which were valid. The present case arose out of compensation due in consequence of the Egyptian nationalisation of the Suez canal.

68. Foreign Compensation Act, § 4(4).

69. *Anisminic*, 1 All E.R. at 221.

70. *In re Sigsworth*, [1935] 1 Ch. at 98.

71. *Id.* at 89.

tice these are very rare, but the Children Act, 1989 and the Arbitration Act, 1996 provide two relatively recent examples of provisions which furnish at least some guidance as to how problems of interpretation should be approached.⁷²

More useful in practice, because they are universally present, are the long titles of statutes, which may provide "the plainest of all guides to the general objectives of a statute," and short titles, although it must be remembered that, in the nature of short titles, "accuracy may have been sacrificed to brevity."⁷³ Reference may also be made to marginal notes. The classic

72. §1 of the Children Act 1989 is as follows:

1. Welfare of the Child

(1) When a court determines any question with respect to -

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.¹

Children Act, 1989, c. 41, §1 (Eng.). §1 of the Arbitration Act 1996 is as follows:

1. General Principles

The provisions of this Part of this Act are founded on the following principles, and shall be construed accordingly -

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Arbitration Act, 1996, c. 23, § 1 (Eng.)

73. Scrutton LJ, *In re Boaler*, 1 K.B. at 21. For an example of a short title and a long title (reversing the order in which they appear in the text to this note), see the National Health Service Act 1946 which is an Act to provide for the establishment of a comprehensive health service for England and Wales and for purposes connected herewith. *Boaler*, [1915] 1 K.B. 21 (Scrutton, LJ); National Health Services Act, 1946, 9 & 10 Geo. 6, c. 81 (Eng.).

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1123

example is *Stephens v. Cuckfield Rural District Council*,⁷⁴ where the council served a notice requiring a landowner to tidy up a site which was seriously injurious to the amenity of the district.⁷⁵ The statutory power⁷⁶ was exercisable only in respect of “a garden, vacant site or other open space.”⁷⁷ The question for the court was whether the power was exercisable in respect of a car-breaker’s yard.⁷⁸ While the site was clearly an “open space” (in the sense that it was uncovered), the court nevertheless decided that the statutory power was not exercisable. One thread in the reasoning leading to this conclusion was that the marginal note to the section referred to “power to require proper maintenance of waste land etc,” and it was clear beyond doubt that the site in question did not fall within this category.⁷⁹ Referring to the marginal note and its relevance to the process of interpretation, Upjohn LJ said, “While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.”⁸⁰

Going beyond the confines of the statute itself, material may be conveniently divided into three categories (namely, pre-Parliamentary, Parliamentary and post-Parliamentary) in order to assess the extent to which material within each category may be used in order to identify the legislative purpose. Pre-Parliamentary, such as reports of official committees and Royal Commissions, are generally accepted as being relevant when seeking to establish the purpose — but not the meaning — of ensuing legislation.⁸¹ Parliamentary materials⁸² may normally

74. *Stephens v. Cuckfield Rural District Council*, [1960] 2 Q.B. 373.

75. *Id.* at 376.

76. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51, § 33 (1).

77. *See Cuckfield Rural District Council*, [1960] 2 Q.B. at 373. *See also* Town and Country Planning Act § 33.

78. *Cuckfield Rural District Council*, [1960] 2 Q.B. at 374.

79. *Id.* at 378–79.

80. *Id.*

81. *R. v. Allen*, [1985] 2 All E.R. 641. For an example of the use of pre-Parliamentary materials in order to identify the legislative purpose, see *Hughes*, 2 All E.R. at 859 (relying on the *Wolfenden Report*).

82. In practice, the phrase *Parliamentary materials* almost invariably means the official record of Parliamentary business (including verbatim re-

be used for the purposes of statutory interpretation in only very limited circumstances, namely

where (a) 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.⁸³

Taking these elements in turn, there will be many cases in which the requirement of *ambiguity* or *obscurity* either indubitably exists or, at least, can be made to appear to exist by a skilled advocate. Having thus established a very broad criterion, the House immediately proceeded to limit the scope of the new doctrine by restricting the use of Parliamentary materials to statements made by whoever introduced the Bill which became the Act which falls to be interpreted.⁸⁴ The third requirement (namely, that the statements should be clear) may seem sensible enough, but once again, the ingenuity of the advocate may well be enough to introduce sufficient doubt to exclude reliance on any particular statement.

In addition to the general rule expressed above, there is one further rule of much more limited scope: when interpreting legislation which has been passed to implement a Community law obligation, reference may be made to Parliamentary materials in order to identify the extent of that obligation.⁸⁵ The most obvious example of this would be where legislation is enacted to implement a Directive,⁸⁶ but the principle applies equally to all forms of Community legislation.⁸⁷

ports of debates in both the House of Commons and the House of Lords) which are published in *Hansard*.

83. See *Pepper v. Hart*, [1993] 1 All ER 42, 69 (Lord Browne-Wilkinson, concurring with five of the other six Law Lords; Lord Mackay LC, dissenting).

84. In practice, almost all Bills are government Bills and, therefore, the person to whose statements the court may refer will almost invariably be a government minister.

85. *Pickstone v. Freemans PLC* [1988] 3 C.M.L.R. 221, 238–44 (Lord Oliver's opinion).

86. Directives require member states to achieve defined objectives while leaving it to each member state to identify and adopt whatever mechanism it considers to be appropriate to achieve the objective in question, within the context of its own legal system. See Treaty Establishing the European Eco-

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1125

Having discussed the origin, evolution, nature and power of purposivism in the English common law, it is now appropriate to turn to its position in European Community law.

IV. LITERAL AND PURPOSIVE INTERPRETATION IN EUROPEAN COMMUNITY LAW

The idea of literalism has never been central to the civil law⁸⁸ tradition in which Community law is rooted. Moreover, and perhaps more importantly, literalism is intrinsically unlikely to play a significant part in a multi-lingual system in which all languages (nine, in the case of the Community) are equally authentic. Overall, therefore, it is hardly surprising that, as the following discussion will show, the European Court of Justice attaches much greater importance to factors such as the overall legislative scheme and its purposes than it does to the idea of the literal meaning of the words used to convey that scheme and those purposes.

In *Wendelboe v. LJ Music*,⁸⁹ the European Court of Justice had to interpret Article 3(1) of the Transfer of Undertakings Directive, which the Court abbreviated as, “[T]he transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing at the date of a transfer...shall, by reason of such transfer, be transferred to the transferee.”⁹⁰ The question was whether it was the *contract of employment* or the *obligations* which had to be existing at the date of the transfer. In the English and Danish versions of the text, either conclusion was possible, but the Dutch, French, German, Greek and Italian versions were open to only one literal interpretation, namely that it was the contract of employment (or employment relationship) which had to be in existence at the date of the transfer. In other words, having read all the official language versions, it was impossible to conclude that there was a single, literal meaning.

conomic Community, Mar. 25, 1957, Art. 249, 298 U.N.T.S. 36 (i.e. Treaty of Rome 1957).

87. For example, in *Pickstone*, the English legislation had been triggered by a regulation. See *Pickstone*, [1988] 2 All E.R. at 803.

88. Using the term “civil law” to mean “Roman law based.”

89. *Wendelboe v. L.J. Music* APS, [1985] E.C.R. 457 (Eng.).

90. *Id.* at 466.

Although the version contained in the majority languages prevailed in this case, there is no principle which requires that this shall be so in all cases. For example, in *Elefanten Schuh v. Jacqmain*,⁹¹ the European Court of Justice had to interpret Article 18 of the European Community Convention on Jurisdiction and the Enforcement of Judgments 1968.⁹² The problem arose from a discrepancy between the French and Irish texts on the one hand and the English, Danish, Dutch, German and Italian texts on the other.⁹³ More particularly, the English text representing the majority, provided that “a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered *solely* to contest the jurisdiction.”⁹⁴ Assuming that the word “solely” means something, the effect of this version is that defendants who wish to contest *both* the jurisdiction of the court *and* (if they lose the jurisdiction argument) the merits of the case, must be taken as having submitted to the jurisdiction of the court.⁹⁵ The European Court of Justice upheld the French and Irish versions (neither of which contained anything equivalent to the word “solely”) on the basis that these were “more in keeping with the objectives and spirit of the Convention” than were the alternative language versions.⁹⁶

Of course, the lack of status which Community law accords to the literal technique leaves open the question of which other technique (*or techniques*) should be adopted. There is no universally agreed terminology for describing those techniques, but the two concepts which are involved are sometimes labelled *contextual* or *schematic and teleological*.⁹⁷ Advocate-General May-

91. *Elefanten Schuh v. Jacqmain*, [1981] E.C.R. 1671 (Eng.).

92. The European Community Convention on Jurisdiction and the Enforcement of Judgments 1968 is commonly known as the Brussels Convention.

93. *Jacqmain*, [1981] E.C.R. at 1671.

94. *Id.* (citing Article 18 of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 36).

95. *Id.*

96. *Id.* at 1685.

97. Rules of Interpretation of ECC Laws [1989] STAT LR 163, 168–73 (where Millett uses “schematic” and “teleological”). See generally STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW (3d ed. 1999) (where the authors use “contextual” and “schematic”).

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1127

ras brought the whole topic into sharp focus when he said that the principal aim of the court was to identify the *clear* meaning:

[T]his Court may not substitute its discretion for that of the Community legislature; when the meaning of the legislation is clear it has to be applied with that meaning, even if the solution prescribed may be thought to be unsatisfactory. That is not to say, however, that the literal construction of a provision must always be accepted. If such construction were to lead to a nonsensical result in regard to a situation which the Court believed the provision was intended to cover, certain doubts might properly be entertained in regard to it. In other words, the clear meaning and the literal meaning are not synonymous. *There have been many cases in which the Court has rejected a literal interpretation in favour of another which it found more compatible with the objective and the whole scheme of the legislation in question.*⁹⁸

As Advocate-General Mayras acknowledged, *both* the objective (or purpose) *and* the scheme of the legislation have to be considered.⁹⁹ In practice, these two factors are commonly so closely inter-twined or overlapping as to amount to one single, contextual factor.¹⁰⁰

One of the earliest and most important examples of *schematic* (or *teleological*) interpretation may be found in *van Gend en Loos v. Nederlandse Administratie der Belastingen*,¹⁰¹ where a Dutch company was aggrieved by a contravention of Article 12 (now Article 25) of the Community Treaty, which prohibits member states from “introducing between themselves any new

98. *Fellinger v. Bundesanstalt für Arbeit*, [1980] 1 E.C.R. 535, 550 (emphasis added).

99. *Id.* at 550.

100. Indeed, it is difficult to see any point in making the distinction in the first place, since at least part of the purpose of any piece of Community legislation must be to advance either the scheme of Community law as a whole or some identifiable part thereof. It is difficult, therefore, to disagree with Lord Mackenzie Stuart, the United Kingdom’s first judge in the European Court of Justice, who once commented that he wished to add nothing to the discussion of the nature of the interpretations “except a note of scepticism and the suggestion there are dangers in over-analysis.” See LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* 72 (1977). For further comment on identifying the legislative purpose of Community legislation, see Case 26/62, *Van gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

101. *Van gend en Loos*, 1963 E.C.R. at 1.

customs duties...."¹⁰² For the present purposes, the question was whether the company could enforce the article against the Dutch customs authorities in the Dutch courts.¹⁰³ The European Court of Justice said:

The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between the member states and their subjects

...

It follows...that, according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.¹⁰⁴

In other words, the whole scheme, and therefore an identifiable purpose, of Community law contributed to the requirement of an affirmative answer to the question raised by the company; and this answer was also supported by the wording of the relevant article.

However, in some cases the other factors may well operate to negative the literal meaning. For example, in *Commission v. Netherlands*,¹⁰⁵ the issue was whether butter which was being stored in Dutch customs warehouses (and which formed part of the Community's so-called butter mountain) could lawfully be re-packed into smaller quantities.¹⁰⁶ In response to the Dutch argument that this was a well-established national practice, the European Court of Justice said:

The...argument which seeks to establish that the contested packing is one of the forms of handling specified in article 1(1) of Directive 71/235, inasmuch as it was traditionally authorized in Netherlands customs warehouses, cannot be accepted. Although the inventory of national practices was carried out at an early stage in the preparatory work for the Directive, its purpose was not to maintain them but, on the contrary, to harmonize them.

....

102. *Id.* at 4.

103. *Id.* at 3.

104. *Id.* at 12.

105. *Commission v. Kingdom of the Netherlands*, [1983] 1 E.C.R. 1195.

106. *Id.* at 1196.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1129

In the Court's opinion, the question whether or not the contested packing comes within the scope of the customs warehousing procedure laid down by Directive 71/235 cannot be decided by reference to the [text]; instead, the operation must be considered *in the light of the objective of the customs warehousing procedure*.¹⁰⁷

Between the extremes of confirming and negating the literal meaning, there lies the possibility of using the schematic technique to fill in the gaps, a classic example of which is *Commission v. United Kingdom*.¹⁰⁸ The United Kingdom had introduced the Road Vehicles Lighting Regulations, 1984.¹⁰⁹ These Regulations required motor vehicles to be fitted with a dim-dip device, which would produce an intensity of beam below that of ordinary dipped headlamps whenever a vehicle's ignition was switched on.¹¹⁰ The Commission claimed that these Regulations infringed Council Directive 76/756/EEC on the approximation of the laws of the member states relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers.¹¹¹ The United Kingdom responded that the Directive was non-exhaustive and merely prohibited refusal of type-approval for vehicles on grounds relating to the lighting and light-signalling devices listed in an Annex to the Directive.¹¹² Since dim-dip devices were not within the scope of the Annex, the United Kingdom argued that it followed that there was no infringement of the Directive.¹¹³ The European Court of Justice, however, took the view that the purpose of the Directive was to promote freedom of trade in motor vehicles across the Community, and that unique requirements of the type imposed by the United Kingdom in this case were incompatible with that purpose.¹¹⁴

It is clear from the foregoing discussion that Community Law acknowledges literal meaning as only one element in the matrix

107. *Id.* at 1205 (emphasis added).

108. *Commission v. United Kingdom of Great Britain and Northern Ireland*, [1988] 7 E.C.R. 3921.

109. Road Vehicles Lighting Regulations, S.I. 812 (1984).

110. *Commission v. United Kingdom*, 7 E.C.R. at 3932.

111. *Id.* at 3924–25.

112. *Id.* at 3926.

113. *Id.*

114. *Id.* at 3935.

of considerations by reference to which the legal meaning of a legislative instrument is to be identified, with the purpose of the legislative scheme being a further (and, in practice, more important) element within that matrix. What must now be considered is how legislative purposes are to be identified within Community Law.

V. IDENTIFYING LEGISLATIVE PURPOSES IN COMMUNITY LAW

The discussion of interpretation in the European Court has been able to proceed thus far on the basis of Community law as an all-embracing term, with legislative interpretation being given a correspondingly all-embracing meaning. However, when proceeding to discuss the identification of legislative purposes it is necessary, for some purposes, to distinguish between Community treaties and Community legislation, according to which usage *legislation* has the narrower meaning of *regulations, directives and decisions*.¹¹⁵

Proceeding to the substance of the discussion, it is useful to emphasize the contrast between the synthetic (or constructed) nature of the Community's legal system and the natural (or spontaneous) character of domestic legal systems. One important aspect of this is that the whole Community, including its legal system, is based on expressly articulated objectives (or purposes).¹¹⁶ For example, and to begin at the beginning, the preamble to the Community Treaty identifies a number of social and economic ideals as the foundation for achieving "an ever closer union among the peoples of Europe."¹¹⁷

In addition to these general statements of the purposes of the system of Community law as a whole, individual pieces of legislation (that is to say, regulations, directives and decisions) will each have their own purposes. The general proposition is, unsurprisingly, that Community legislation should be interpreted, so far as possible, in ways which make it consistent with the

115. See Lord Slynn of Hadley, *Looking at European Community Texts*, STAT. L.R. 12, 13 (1993).

116. As has already been noted *supra* Part II, second paragraph, this is in marked contrast to domestic legal systems. See accompanying text and *supra* note 16.

117. Consolidated Version Of The Treaty Establishing The European Community, Dec. 24, 2002, O.J. (C 324) 33, 39 (2002). Article 2 of the Treaty sets out the task of the Community in broadly similar terms. *Id.* at 40.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1131

Treaties and the general principles of Community law.¹¹⁸ More specifically, the operative part of each piece of Community legislation will be preceded by *citations* and *recitals*.

Citations consist of a number of short paragraphs, each of which begins with the words “having regard to.”¹¹⁹ Citations will typically identify the relevant treaty article(s) and any relevant proposals, opinions and consultations in which the legislation in question purports to locate its legal base. Clearly, therefore, while citations are important in those cases where an issue arises as to the legitimacy or illegitimacy of legislation, they also serve the purpose of identifying the legislative purpose as an aid to interpretation, which is a skill much more commonly required in legal practice.

Recitals consist of a number of paragraphs that are generally rather longer than those constituting citations, each of which begins with the word “whereas.”¹²⁰ Recitals set out the reasons underlying the legislation and may, therefore, be very helpful in identifying the legislative purpose(s).

Going outside the text of the treaties, the *travaux préparatoires* may be used for the purposes of interpretation, provided it is remembered that “any argument... which is not based on the Treaty itself cannot be decisive.”¹²¹ However, such aids, and therefore their limited assistance, will not always be available. In such cases, “in the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is.”¹²²

Travaux préparatoires are also relevant to the interpretation of Community legislation. For example, in *Stauder v. City of Ulm*,¹²³ the Court noted that a recital to a decision showed an intention to adopt an amendment to the decision which had been proposed when an earlier draft was being considered.¹²⁴

118. Klensch v. Secrétaire d'Etat à l'Agriculture et à la Viticulture, [1986] 10 E.C.R. 3477; Rauh v. Hauptzollamt Nürnberg-Fürth, [1991] 3 E.C.R. 1647.

119. See, e.g., Commission Regulation 282/2004, 2004 J.O. (L 49) 11; Commission Regulation 283/2004, 2004 J.O. (L 49) 25.

120. *Id.*

121. Case 362, Commission v. Luxembourg and Belgium, 1964 E.C.R. 625 (opinion of A-G Roemer).

122. Simon v. Court of Justice, 1961 E.C.R. 115.

123. *Stauder v. City of Ulm*, Sozialamt, Case 29/69, [1969] E.C.R. 419.

124. See *supra* text accompanying note 4.

Similarly, the Court of Justice has held that letters sent by the High Authority of the European Coal and Steel Community to the addressee of a decision, were available as aids to the interpretation of the decision itself.¹²⁵ On the other hand, “[s]ubsequent statements originating from officials of the High Authority cannot have any influence on the interpretation of decisions made by the latter, at least when such interpretation, irrespective of the statements made, leads to a logical result.”¹²⁶

The cases identified and discussed above lead to the conclusion that Community law contains a more developed body of authority as to the identification of legislative purposes than does English common law. Perhaps, however, this is less than altogether surprising, bearing in mind the teleological tradition of interpretation in which Community law is rooted.

VI. THE USE OF COMMUNITY TECHNIQUES OF INTERPRETATION IN ENGLISH COURTS

As we have seen, at an early stage in the United Kingdom's membership of the Community Lord Denning MR accepted the need for English courts to employ the Community law method when interpreting Community legislation.¹²⁷ The point was further emphasized in *Henn & Darby v. Director of Public Prosecutions*,¹²⁸ where the issue was whether an English prohibition on the importation of obscene articles¹²⁹ was contrary to Article 30 of the Treaty of Rome, 1957 which prohibited quantitative restrictions on imports from between member state.¹³⁰ Responding to a preliminary reference from the House of Lords, the European Court of Justice said it was well established in Community law, that a total prohibition is a quantitative restriction for the present purposes. When the case returned to the House of Lords, Lord Diplock said:

In the Court of Appeal considerable doubt was expressed by that court as to whether an absolute prohibition on the import

125. *Societa Industriale Acciaiere San Michele v. High Authority of the European Coal and Steel Community*, [1964] C.M.L.R. 146 (1964).

126. *Lemmerz-Werke GmbH v. High Authority*, [1964] C.M.L.R. 384.

127. See *supra* note 4 and accompanying text.

128. *Henn & Darby v. Director of Public Prosecutions*, [1981] A.C. 850.

129. See Customs Consolidations Act, 1876, c. 36, § 42 (Eng.).

130. Treaty of Rome, 1957, c. 2, art. 30.

2004] *LITERAL AND PURPOSIVE TECHNIQUES* 1133

of a particular description of goods could amount to a quantitative restriction or a measure having equivalent effect, so as to fall within the ambit of art. 30 at all. That such doubt should be expressed shows the danger of an English court applying English canons of statutory construction to the interpretation of the Treaty or, for that matter, of Regulations or Directives.¹³¹

From the Community perspective, the requirement of the adoption of shared techniques is not only a means of maximising the coherence of Community law as a whole,¹³² but is also an aspect of the doctrine which received one formulation in *von Colson v. Land Nordrhein-Westfalen*,¹³³ before being re-enforced in *Marleasing SA v. La Comercial Internacional de Alimentación SA*.¹³⁴ In *von Colson* the European Court of Justice said:

In applying the national law *and in particular the provision of a national law specifically introduced in order to implement [a Directive]*, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in [the Treaty].¹³⁵

Although this statement emphasizes the position in relation to provisions specifically introduced to implement Community obligations, when read as a whole it is reasonably clear that it is intended to apply equally to all national provisions. Any doubt in this respect was laid to rest in *Marleasing*, which obliges national courts to interpret national law in accordance with Community law wherever this is possible, *even if no national legislation has been enacted specifically to comply with Community law*.¹³⁶ This includes the situation in which the relevant national law consists of *prior* legislation, which plainly cannot have been enacted to comply with a provision of Community law which did not exist at the time of its enactment.

131. See *Henn & Darby*, [1981] A.C. at 904.

132. See *Simmenthal SpA*, [1978] E.C.R. 629, 643.

133. Case 14/83, *Colson v. Land Nordrhein-Westfalen*, [1984] E.C.R. 1891, 2 C.M.L.R. 430 (1984).

134. Case C-106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1990 E.C.R. I-4135, [1992] 1 C.M.L.R. 305 (1992).

135. *Id.* at 430 (emphasis added).

136. *Marleasing*, [1992] 1 C.M.L.R. 305, 307.

VII. CONCLUSION

Both the English common law and Community law approach the task of legislative interpretation in a purposive, or teleological, way. However, there is a significant difference between the two systems, in that lawyers operating within the Community legal system may refer to explicitly articulated statements of legislative purpose. By way of contrast, while the English legal system provides some aids to identifying legislative purposes, those purposes are almost always less explicitly identified. It follows both that the identification of legislative purposes is more difficult in English than in Community law, and that it is more difficult to be confident of the accuracy of any identification which is made.

Finally, and at the risk of stating the obvious, it may be worth commenting that, as the quantity of litigation coming before the Court of Justice demonstrates, the ability to identify legislative purposes both more simply and more accurately than is usually possible in the English legal system, does not necessarily guarantee that disputes will be resolved without recourse to the courts.