Chapter Fourteen

Statutory Interpretation and Legislative Intentions

Questions of statutory interpretation turn on the relationships between courts and legislatures[1] and between government and citizens. Basic questions in this area include: Should judges fill in gaps in legislation? And, in applying rules, what importance should be given to the intentions of the rule-makers and what importance to the reasonable expectations of the public? These and similar controversies are basically political questions, which may be informed by different theories about institutional competence and institutional behaviour, but it is unlikely that many such questions will be resolved by reference to abstract statements about the nature of law or about the nature of language. This observation may seem obvious, but it is surprising how often it is ignored in the writings of legal theorists.[2] **14–01**

Given that issues of statutory interpretation are primarily matters of convention to be decided within each legal system, there is not much that can or should be said at the level of general jurisprudential theory. However, there are a few claims that have been made by legal theorists that are worth noting, as well as some clarifications of terms and concepts that may facilitate discussion in this area.

LEGISLATIVE INTENTION

As a number of commentators have pointed out, there are many subtleties, complications and paradoxes involved when discussing legislative intentions.[3] Some derive from the fact that "intentions" in the context of **14–02**

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[1] One needs to keep in mind that there is no necessary reason that rules be made and applied by separate institutions, though there are many practical advantages to this separation.

[2] See Brian H. Bix, "Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?", 16 *Ratio Juris* 281 (2003).

[3] See, e.g. Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986), pp. 313–354; see also Jeremy Waldron, *Law and Disagreement* (Oxford University

a group promulgating a rule simply cannot refer to the same things as the identical concept ("intention") means when referring to one individual conversing with another. To the extent that individual, conversational intention is partly a matter of what the speaker was actually thinking when she spoke, there is no readily available analogue in context of a group. (Does a group have thoughts and intentions separate from those of its individual members? And if we are to focus on the individual members, how are we to "sum up" those thoughts and intentions when they are conflicting?) Additionally, legislation usually involves an expectation that the rule promulgated will be used as guidance for the indefinite future by persons not known to the legislators—a purpose or set of expectations far different from what one finds most of the time in individual conversations. Legislation is also more likely to involve a variety of different types of intentions: for example, intentions about what a text means, intentions regarding how the text should be interpreted, and intentions regarding how it should be applied.[4] The authors of a standard requiring "reasonable" behaviour could believe that a particular type of action would be "unreasonable" under the standard, but might at the same time believe that judgments of reasonableness should be made by judges according to contemporary standards at the time of judging.

The question then is: what follows from the fact that there are these differences between legislation and individual communication? A variety of responses have been offered: for example, that legislative intentions should only be legally relevant under certain conditions (generally conditions that make those intentions seem more similar to intentions in a conversational context, e.g. when all the legislators shared the same intention and when that intention was relatively recent[5]); that legislative intention and legislative history should play no role in the interpretation of statutes[6]; and that legislative intention is best understood as having nothing to do with intention, but is just a shorthand for saying that certain types of facts should be taken into account when constructing the best interpretation of a statute.[7]

Press, Oxford, 1999), pp. 129–146. I discussed some of these issues in Brian H. Bix, "Questions in Legal Interpretation", in Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995), pp. 137–154, at pp. 142–146.

[4] See Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992), pp. 165–172; Larry Alexander, "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions", in Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995), pp. 357–404.

[5] See Marmor, *Interpretation and Legal Theory*, pp. 155–184.

[6] See, e.g. Antonin Scalia, *A Matter of Interpretation* (Amy Gutmann ed., Princeton University Press, Princeton, 1997), pp. 16–37; Jeremy Waldron, "Legislators Intentions and Unintentional Legislation", in Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995), pp. 329–356.

[7] See Dworkin, *Law's Empire*, pp. 313–354.

"PLAIN MEANING"

The English courts say that they are trying to discover Parliament's intention regarding a statute, but until 1993[8] neither the judges nor the lawyers appearing before them were allowed even to refer to the record of Parliamentary debates. The focus instead was (and largely still is) on the "literal" or "plain" meaning of the statute. Lord Reid explained: "We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."[9] Though perhaps not optimally phrased, Lord Reid's point seems clear enough. Yet the eminent commentator Sir Rupert Cross took issue with Lord Reid: "This is not one of Lord Reid's most helpful remarks because if the true meaning of what someone says is not what he intended to say, it is difficult to know what it is."[10] 14–03

Sir Rupert seemed to have overlooked the obvious and familiar distinction between the meaning we wish to get across and the meaning our words in fact convey to the reader or listener,[11] a distinction justified by the frequency of misstatements, misunderstandings, cultural differences between speaker and listener, differing assumptions and expectations, and so on. At the least, Sir Rupert was asking a great deal of the phrase "the true meaning".

In *Davis v Johnson* (discussed in the previous chapter), Lord Justice Cumming-Bruce in the Court of Appeal supported emphatically the traditional approach to interpreting statutes by stating: "An Act means what the words and phrases selected by the parliamentary draftsmen actually mean, and not what individual members of the two Houses of Parliament may think they mean."[12]

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[8] See *Pepper v Hart* [1993] A.C. 593 (allowing reference to Parliamentary debates (*Hansard*) to aid the interpretation of statutes in certain limited circumstances). The decision to allow reference to statements made in Parliament for the purpose of interpreting statutes remains controversial, and some judges and commentators have argued for a return to a more restrictive rule. See Lord Steyn, "*Pepper v Hart*: A Re-examination", 21 *Oxford Journal of Legal Studies* 59 (2001); Stefan Vogenauer, "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn", 25 *Oxford Journal of Legal Studies* 629 (2005).

[9] *Black-Clauson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All E.R. 810 at 814. For comparable language from the United States Supreme Court, see *Schwegmann Bros. v Calvert Distillers Corp.*, 341 U.S. 384 at 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means").

[10] Rupert Cross, *Statutory Interpretation* (Butterworths, London, 1976), pp. 39–40. (The quotation is not repeated in the third edition of that text, which came out in 1995.)

[11] A distinction which sometimes goes under the label of "speaker meaning" versus "linguistic meaning". See, e.g. Robert Audi ed., *The Cambridge Dictionary of Philosophy* (2nd ed., Cambridge University Press, Cambridge, 1999), p. 869 (entry on "speech act theory").

[12] *Davis v Johnson* [1979] A.C. 316.

Lord Justice Cumming-Bruce wanted to distinguish what individual legislators *thought about* a text from what the text *actually means*; but actual meanings do not announce themselves for all to hear. To be slightly cynical about matters: in actual practice, the choice becomes one between what the legislators thought the text means (as best this can be cobbled together from the legislative history) and what the judges think the text means. This is not to say that there are not good reasons for preferring the latter to the former, only that the judges are fooling themselves if they think that their access to meaning is different from and better than that of other people—as though one group had direct access to meanings, while other groups could only offer *interpretations* of meanings, interpretations which were particularly vulnerable to mistake.

It seems relatively clear what Lord Justice Cumming-Bruce was getting at: he believed that a statute should be interpreted according to the plain or conventional meaning of its text; when there is a conflict, the conventional meaning of the text should take precedence over any more idiosyncratic meaning that the legislators might have attached to the text. There are, however, two unspoken assumptions in the argument. The first is that there is a conventional meaning to be found. One could argue regarding particular texts in particular circumstances (and some might offer a similar argument regarding all language all of the time) that no consensus or near-consensus in meaning exists; all there is (or all that is accessible to us) are the different readings of different groups.[13] The second assumption is that the judge will be able to interpret the text in line with its conventional meaning: one could argue (especially in England, where the judiciary has been, at least until recently, relatively homogenous in its background and personal characteristics and far from representative of the general population[14]), that judges are at least as likely to succumb to idiosyncratic interpretations as are legislators.

The American approach to statutory interpretation has, at least in the last century,[15] been far more receptive than the English courts (before *Pepper v Hart*) to arguments based on legislative history. However, there has been a push, supported by Supreme Court Justice Antonin Scalia,[16] to interpret statutes strictly in line with the literal meaning of their texts:

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[13] Claims along those lines, if perhaps not quite as radical, have been made by theorists identified with critical legal studies (Ch. 19) and postmodernism (Ch. 22).

[14] See John Griffith, *The Politics of the Judiciary* (Fontana, London, 1985).

[15] In the United States, judicial use of legislative history in interpreting statutes only became common in the early decades of the 20th century, growing with frequency throughout that century. See, e.g. Scalia, *A Matter of Interpretation*, pp. 30–31. There is evidence that the criticism, by Justice Scalia and others, of the judicial use of legislative history has led to a decline in that practice among American judges.

[16] See Scalia, *A Matter of Interpretation*. For a thoughtful critique of Scalia's position, see William N. Eskridge, Jr., "Textualism, The Unknown Ideal?", 96 *Michigan Law Review* 1509 (1998).

with no reference to legislative history and, here apparently going even further than the traditional English approach,[17] no exceptions for when a literal interpretation leads to an absurd result.[18] The opposition to using legislative history, and indeed to most other common law methods of determining legislative intentions, is presented with a strong "rule of law" justification:

"[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . It is the law that governs, not the intent of the lawgiver."[19]

The basic claim is that people should only be bound by publicly promulgated rules, and legislative history is often not easily accessible (even putting aside the arguments that such history is often written by (non-elected) staff members, and it is usually not expressly assented to by anything like a majority of the legislators).[20]

The opposing position is that the basic institutional structure of the United States and Great Britain has a legislative body which has the authority to make decisions for the country, decisions which are to be carried out by other officials, including judges. Thus, it is important for the courts to figure out what the lawmakers intended—to be "faithful agents."[21] In this sort of debate, the "rule of law" values will frequently conflict with the "authority" values—a troubling conflict, as both values are likely central to evaluating the legitimacy of governmental action.

Barbara Baum Levenbook has offered an approach that tries to take elements from both approaches, arguing that statutes should be

[17] For the "Golden Rule", allowing that where the ordinary meaning of statutory language would "produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification", a different reading of the language can and should be made, see, e.g. *River Wear Commissioners v Adamson* (1877) 2 App. Cas. 743 at 764–765 (per Lord Blackburn).

[18] Eskridge certainly assumes that there is no "absurdity" exception in Scalia's textualism: see Eskridge, "Textualism, the Unknown Ideal?", p. 1549, and there is support in the strong language Scalia uses in *A Matter of Interpretation*, though I have been unable to find a place where the "absurdity" exception is expressly rejected.

[19] Scalia, *A Matter of Interpretation*, p. 17.

[20] See Scalia, *A Matter of Interpretation*, pp. 16–18, 23–25. Other arguments offered for a "plain meaning" approach to statutory interpretation that would exclude recourse to legislative history include: that it saves time and expense (of attorneys and judges); it arguably constrains "wilful" judges, who use, or would be tempted to use, (ambiguous) legislative history to achieve the results they prefer; and that it would force legislatures to be more careful in their drafting. See Scalia, *A Matter of Interpretation*, pp. 9–14, 16–37; Eskridge, "Textualism, The Unknown Ideal?", pp. 1511–1515, 1540–1542.

[21] See, e.g. Eskridge, "Textualism, The Unknown Ideal?", pp. 1548–1551; Richard A. Posner, *Law and Literature* (Harvard University Press, Cambridge, Mass., 1988), pp. 209–268 (a revised edition of this book appeared in 1998, and a 3rd edition in 2009; in those later editions some of the relevant discussion was excised or modified).

interpreted according to applications that would be "socially salient" given the context of the enactment.[22] This approach avoids focusing too closely on what was in the minds of the law-makers (a matter to which most citizens would not have easy access), while authorising outcomes that are likely close to what the law-makers in fact intended.

Whatever the approach to statutory interpretation adopted by a judiciary (and other officials with the duty to implement legislation) within a legal system, it is important that the rules of interpretation be relatively predictable, stable and determinate.[23] This allows for more effective legislative drafting. For example, if the legislature knows that committee reports will be taken into account in interpreting a statute, then important clarifying information will likely be placed in such reports. On the other hand, if interpretation will be based only on "plain meaning", then little attention will be paid to committee reports, and more attention will likely be given to a clearer and/or more detailed statutory text. Certainly, it would be inviting miscommunication and misinterpretation for statutes enacted under one set of interpretive conventions to be subject to a different set of conventions.[24]

Finally, one might note a possible sceptical view: that judges' choosing one approach to (statutory) interpretation rather than another may have little or no effect on the result those judges reach (but perhaps will only lead to different rationalisations of results reached for other reasons—perhaps reasons of prior political or moral inclination). At least one empirical study seems to offer support for this sceptical view.[25]

Suggested Further Reading

14–04 Rupert Cross; John Bell and George Engle, *Statutory Interpretation* (3rd ed., LexisNexis, London, 1995).

Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986), Ch. 9 ("Statutes").

Richard Ekins, "Interpretive Choice in Statutory Interpretation", 59 *American Journal of Jurisprudence* 1 (2014).

—, *The Nature of Legislative Intent* (Oxford University Press, Oxford, 2012).

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22 Barbara Baum Levenbook, "How a Statute Applies", 12 *Legal Theory* 71 (2006).

23 Whether the canons of interpretation within a legal system actually bind judges and/or make decisions more predictable is contested. For a famous critical or cynical view of canons of interpretation, viewing them as individually or collectively highly manipulable, see Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons of How Statutes Are to Be Construed", 3 *Vanderbilt Law Review* 395 at 401–406 (1950); see also Anita S. Krishnakumar, "Dueling Canons", 65 *Duke Law Journal* 909 (2015).

24 See Eskridge, "Textualism, the Unknown Ideal?", p. 1541 and n. 115.

25 See Daniel A. Farber, "Do Theories of Statutory Interpretation Matter? A Case Study", 94 *Northwestern University Law Review* 1409 (2000).

William N. Eskridge, Jr., "Textualism, The Unknown Ideal?", 96 *Michigan Law Review* 1509 (1998).

William N. Eskridge Jr., Philip P. Frickey, Elizabeth Garrett, and James Brudney, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (5th ed., West Academic Publishing, St. Paul, 2014).

Richard H. Fallon, Jr., "Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and The Irreducible Roles of Values and Judgment Within Both", 99 *Cornell Law Review* 685 (2014).

Kent Greenawalt, *Legal Interpretation: Perspectives from Other Disciplines* (Oxford University Press, Oxford, 2010).

—, *Statutory and Common Law Interpretation* (Oxford University Press, Oxford, 2013).

John F. Manning, "The Absurdity Doctrine", 116 *Harvard Law Review* 2387 (2003).

Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992), Ch. 8 ("Legislative Intent and the Authority of Law").

Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995) (includes articles on statutory interpretation by Michael Moore, Joseph Raz, Jeremy Waldron, Larry Alexander, Heidi Hurd and Meir Dan-Cohen).

Joseph Raz, "Intention in Interpretation", in Robert P. George ed., *The Autonomy of Law* (Clarendon Press, Oxford, 1996), pp. 249–286.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed., Princeton University Press, Princeton, 1997) (an essay by Justice Scalia, with commentary by five academics, including Laurence Tribe and Ronald Dworkin, and a response by Justice Scalia).

Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation* (University of Chicago Press, Chicago, 2010).