EXACAVATING THE LEGISLATIVE INTENT IN LAW

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ABSTRACT

Since a long time, a debate has surged that has challenged the viability of what people often refer to as the mystical intention of the legislature. Many great scholars like Max Radin, and eminent jurists like Justice Antonin Scalia, have staunchly challenged the efficacy of legislative intent and claimed that it is but a redundant tool. Their concerns surround the unpredictable nature of this 'intent', the impossibility of a collective entity like legislature to acquire 'intent', and the presence of different 'intents' among constituting members. These concerns have, however, one palpable problem and that is the flawed perception of intent, as intent from a mental faculty. In this paper, the parochial conception of intention is challenged and arguments are put forth to show that legislative intent is not a mere figment of imagination.

Keywords: Group intent, Interpretation of statutes, Jurisprudence, Legislative history, Legislative intent.

INTRODUCTION

Interpretation of statues is the traditional purpose for which the courts are established in a legal system. The courts are assigned with the sacred task of providing light to the succinct statutory codes that expand through legislative drafts, popularly known as Acts. The Legislature, after enacting statutes becomes *functus officio* as it is not their function to interpret the statutes. It is the duty and the purpose of the courts to find meaning to the codes and discharge justice and this is achieved through a distinctive set of rules and principles upon which the judges rely and deliver judgments. The Court frequently relies on "canons" of construction to draw inferences about the meaning of statutory language.

The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. Consequently, the Superior Courts had to give us the

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rules of interpretation to ease ambiguities, inconsistencies, contradictions, or lacunas.[2] However, there appears to have been a paradigm shift in all forms of interpretation of legal texts. This shift is palpable in the legal system, with many accusations against the judiciary for transgressing or attempting to transgress the constitutional founded boundaries that remain among the three organs namely, the Legislature, the Executive and the Judiciary.

The rules of statutory interpretation have been attacked as inconsistent, uncertain, and undesirable, in both what they say and how they are applied by the courts.[3] Repeatedly, legal scholars and jurists have alleged deliberate attempt to condition the justice delivery mechanism with a view to suiting the judge's personal convictions. The law of statutory interpretation becomes a bag of tricks from which courts can pull respectable-sounding rules to justify any possible result that the judges desire. This law also provides a cover behind which judges can hide to avoid carefully thinking through solutions to the problems before them, or to avoid declaring the real reasons for their decisions.[4]

Of all the controversies and debates on the aforementioned issue, the application of the mode 'finding the legislative intent' is rather one of the most contentious and distrustful to many scholars and jurists, particularly textualists and purposivists. This mode of interpreting statutes has sparked debates in the legal fraternity and become a fashionable subject matter to any student of legal jurisprudence.

'Legislative intent' is an interesting notion laced with intrigue and inherent complexities, which seemed to have aggravated the tricky business of interpretation of statutory provisions. It is a romantic notion that attempts to arrange a tryst between two inherently distinct legal personalities, legislature, and judiciary. In this attempt, one fundamental issue is raised regarding the legitimacy of 'legislative intent' that appears to be an extremely abstract notion unascertainable from a collective body, Legislature, that seems to have no mental faculty to secure a collective, consensual intent.

INTENTION, A FICTION?

[2] AK Shrivastava, 'INTERPRETATION OF STATUTES' [1995] IJ 1, 1.
[3] Quintin Johnstone, 'An Evaluation of the Rules of Statutory Interpretation' [1954] Kan. L. Rev. 1, 5.
[4] ibid.

It is a longstanding claim that the idea of legislative intent is a figment of imagination. This comes from the argument that the character of legislature is such that it cannot act as a unified body with a single mental faculty. As Kenneth Shepsle famously put it: Congress is a "they," not an "it.[5] Not just Congress, any legal system's legislature would fail to acquire deliberative skills because of its lack of intent. The intent scholars argue against is imagined as an unrealistic approach because it is undiscoverable and remains a figment of imagination. It is often argued that intent is undiscoverable because it is implausible to think that a body comprising of hundreds of politicians would be able to shape a uniform intention shared by all. If there were no common intent, the purpose of legislative intent would be defeated.

The "group-intent objection" was first proposed in a seminal article written in the 1930s by the realist-skeptic Max Radin. His argumentative axe was blunt: A group legislature has no intent precisely because of its collective character: "[t]he intention of the legislature is undiscoverable in any real sense.[6] In his classical statement on legislative intent, Max Radin has said that:

> "It has frequently been declared that the most approved method is to discover the intent of the legislator. Did the legislator have a series of pictures in mind, one of which was this particular [case]? On this transparent and absurd fiction it ought not to be necessary to dwell. A legislature certainly has no intent whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."

The essence of the argument is that it is impossible for a collective entity, like a Legislature, to possess a unified intellect and for that matter, any intellect of its own. It is an amalgamation of myriad of beliefs and opinions of the members, which prevents this entity to possess any unified intention. Some jurists even believe that the use of legislative intent is a mere excuse and directs towards unwarranted exercise of judicial power in the area of statutory interpretation. Some scholars claim that this "classical intentionalism" reflected the orthodoxy, at least among federal judges.[7]

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[5]Victoria Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' [2012] Yale L.J. 70, 80.
[6]Victoria Nourse, 'Elementary Statutory Interpretation: Rethinking Legislative Intent and History' [2014] B.C.L. Rev. 1613, 1622.
[7] John F. Manning, 'Textualism and Legislative Intent ' [2005] Virginia L. Rev. 419, 419.

To legal theorist discrediting legislative intent, the very character of legislature places blockades in what is generally phrased as "determining the intent of the legislature". It seemed a metaphysical mistake to take the "intention" of the legislature itself as primary so long as Hermes was in the grip of some mental-state version of the speaker's meaning theory of legislative intent. So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.[8]

Among other critics of legislative intent, Justice Scalia deserves special mention, for his blunt disapproval of legislative intent as a tool of interpretation. He is renowned for his "objectified intent," a concept predicated on the notion that a judge should read a statutory text just as any reasonable person conversant with applicable social conventions would read it.[9] Scalia's skepticism towards legislative intent is echoed elsewhere where the Justice describes the legislative process as corrupted by interest group politics or as lacking the deliberative qualities it should possess.[10] His 'objectified intent' theory condemned frequent reliance on the committee reports or related discussions on bills and called them unnecessary and insufficient in ascertaining any useful purpose. He had in *Hirschey v. F.E.R.C*[11] staunchly opposed such reliance on committee reports by stating-

> "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it is time for the courts to become concerned about the fact that routine deference to the details of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription."[12]

It can be inferred from the preceding excerpt that Judge Scalia is, in effect, asserting that legislators have abdicated important responsibilities to staff members, who routinely connive to subvert the

[8] Richard Ekins, 'Legislative Intent and Group Action' (Article 2005) <www.trinitinture.com/> accessed 2 November 2015.
[9] John F. Manning, 'Textualism and Legislative Intent ' [2005] Virginia L. Rev. 419, 433.
[10] David Schultz, 'LEGISLATIVE PROCESS AND INTENT IN JUSTICE SCALIA'S INTERPRETIVE METHOD' [1992] Akron L. Rev. 596, 603.
[11] *Hirschey v. F.E.R.C* 777 F.2d. 1, 7-8 (D.C. Cir. 1985).
[12] ibid.

judicial function by planting their (not even their legislators') subjective desires about statutory meaning into committee reports, hoping that their ideas will blossom later in judicial opinions.[13] He has asserted that even if legislative intent is a coherent concept, legislative history provides an exceedingly poor documentary record of it. This assault upon the use of legislative history in statutory interpretation is premised on the notion that legislative history is the product of legislators at their worst-promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected.[14] Nothing but the text reflects the full legislature's purpose. Nothing"[15]

LEGISLATIVE INTENT AND WHERE TO FIND IT?

After perusing all the aforementioned claims of the scholars and jurists, who discredited legislative intent as a viable tool of statutory interpretation, two claims are apparent.

The first is that no group, including a legislature, is able to form and act on intentions. The reason for this is that there are no group minds. The skeptics take intentions to be mental states that exist only in the minds of individual persons and as it is uncontroversial that there are no group minds so it is said to follow that groups, including the assembly, cannot form intentions: true intention is, and may only be, individual.[16] Thus, the first claim questions the inanimate character of a legislative body incapable of possessing human-like intellect of its own.

Second claim questions the uniformity in opinions and intentions among the constituting members of the legislature. Skeptics argue that there is inherent disparity among the intentions and purposes for which every member accepts or rejects a bill or a decision. That the legislature is a group that is characterized by radical disunity amongst its members and as such is unable to form and act on intentions.[17]

These two claims seem to indicate that legislative intent is but an imaginary idea, emanating from the orthodox minds of judges and that it can never be properly ascertained. It characterizes the notion

[13] Daniel Farber and Philip P. Frickey, 'Legislative Intent and Public Choice' [1988] Virginia L. Rev. 423, 439.
[14] Ibid.
[15] Justice Antonin Scalia and John F. Manning, 'A Dialogue on Statutory and Constitutional Interpretation' [2012] GWLR 1610, 1612.
[16] Richard Ekins, 'Legislative Intent and Group Action' (Article 2005) <www.trinitinture.com/> accessed 2 November 2015.
[17] ibid.

of legislative intent as a stupid, trivial idea that has no practical purpose to serve except produce results tasteful to the minds of certain judges. However, it is argued that these claims need to be reconsidered.

There is such a thing as legislative intent, but only if we define intent in a way that does not carry with it embedded assumptions that, by definition, only apply to individuals. Congress has the functional equivalent of intent by acting through its sequential procedures.[18] What is needed to redefine the way we think about legislative intent as a mental state. The notion of congressional intent is built upon a metaphor[19] and hinges on an obvious error of composition: reducing a multi-person institution to a single person.[20] This conception would lead most scholars and jurists believe that legislature, by virtue of its artificial nature, cannot possibly acquire unanimous intent. It is this flawed conception that needs to done away with in order to fully appreciate the purpose of intent in the interpretation of statues.

When it comes to uniformity of intention in a collective entity, there does exist what can be referred to as "functional equivalent of intent". No one believes that collective entities, whether corporations or universities, only act when everyone shares a unanimous intention or set of factual assumptions.[21] These collective entities make decisions even amidst individual disagreements among constituting members. Even when a decision is finalized in, for example, a corporation, there might be individual difference and disagreements with the decision however; the decision so finalized will be regarded as the decision of the entire corporation. The question then arises as to what makes such a decision the decision of the constituting members, despite lingering 'intentional' differences. The answer lies in protocol or system of rules observed by a collective entity in reaching a decision.

As Jeremy Waldron has urged, Congress might choose a machine to aggregate its votes,[22] but even a machine has a written protocol (rules) for aggregating votes.[23] Legislations are the statutory texts emerging out of well settled protocols and procedures adopted in any law making institution. Like

[18]Victoria Nourse, 'Elementary Statutory Interpretation: Rethinking Legislative Intent and History' [2014] B.C.L. Rev. 1613, 1625.
[19] Victoria Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' [2012] Yale L.J. 70, 81.
[20] ibid.
[21]Victoria Nourse, 'Elementary Statutory Interpretation: Rethinking Legislative Intent and History' [2014] B.C.L. Rev. 1613, 1633.
[22] Victoria Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' [2012] Yale L.J. 70, 83.
[23] ibid.

any company where resolutions are passed for certain important decision-making activities similarly in a legislature there are prescribed procedures mandatorily to be observed by all members while functioning as a legislature. These procedures may be customary, constitutionally or statutorily prescribed.

Legislative texts are the product of rules creating stability and facilitating decision-making; these rules are in effect means for aggregating individual preferences.[24] For example, when a bill is introduced in the Indian Parliament, there are procedures envisaged which prescribe for discussion, referral to Joint/ Select Committee Reports, acceptance or rejection of amendments for the bill so proposed and discussed, and publication in the official Gazette, etc. There are prescribed procedures in the Constitution of India and respective rules of the legislatures that are to be compulsorily observed.

Legislative texts, history, etc all tell about the changes the legislature has gone in time. Intent can be very well inferred from the changes in the policy of legislature form time to time. Take for example, Suicide in England was illegal until 1961. Before 1961, the Parliament had a different approach towards it. The Parliament, as a collective body, had considered suicide fit to be a crime and what the members, personally, had thought about it is irrelevant. After 1961, Parliament's policy changed and suicide was no longer a crime. This transition indicates change in the collective intent of the Parliament that is what it once considered to be punishable is now not considered so. Such intent could easily gathered from the discussions, reports on suicide, public opinion, and legislative texts where what matters is what the Parliament thought fit, not individual members. It is this point the a skeptic always misses.

The procedures, discussions, committee reports have to be kept in consideration while attempting to find the mystical 'intent' in a legislature. It is true that while there can be hundreds of members in a law-making body but only few members would be drafting the legislation and therefore, it would be a little difficult but not impossible to accept that the 'intention' of all other members have been duly incorporated in the legislation. In a corporation, or any other institution, for example, school, powers are delegated to a few persons, who make decisions on behalf of the entire body. Not all of this, however, is done arbitrarily or on whims. Everything has to be done in an accorded and prescribed manner. This is indicative of the intent we are so madly looking for.

[24] ibid.

CONCLUSION

Victoria Nourse beautifully summarizes the whole argument in favor of legislative intent in her metaphorical example. She says:

"Sometimes when we talk of intent, it seems almost impossible not to believe in a physical mind. That a group is not individually 'embodied' does not logically bar the functional equivalent of the embodied. So, for example, a wheelchair is not made of biological material, but it enables bodily movement. So too, here, group procedures are not embodied, but they are the functional equivalent of what is generally seen as embodied in mind. Just as the wheelchair allows an individual to move, so too a group's procedures allow it to plan for the future as a group and, in this sense, have group intent."[25]

The debate challenging the viability of legislative intent rests upon the flawed and narrow perception of intent, which wrongly ignores the fundamentally different character of legislature as a group. As a group, the legislature is capable of acquiring a functional equivalent of intent, which is reflective of the aggregate intention of the members reached through a prescribed manner. Therefore, legislative intent is not a figment of imagination, but a potential tool for effectuating the intent of the legislature behind any law.

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