Richard Ekins
Balliol College
2 May 2007

DRAFT[1]

How intentional is legislative action?

I aim to explain the extent to which legislative action is intentional. Raz and Gardner each argue that legislative action is necessarily intentional but that the intention in question is minimal and not practically relevant to interpretation. The minimal intention is just the intention that the statutory text be enacted as law. The meaning of the text, on this account, is stipulated by convention. I argue that legislative action on the minimal intention is not rational. The point of legislative authority entails that the legislature acts for reasons. Further, the nature of language is such that if authority is to be exercised the legislature must intend to convey a meaning. The legislative process, I argue, is set up to enable the legislature to form and act on specific intentions that are practically relevant.

The minimal intention account

Raz and Gardner have each set out an argument for what I term the minimal intention account of legislative action. The arguments are for the most part very similar, but do differ somewhat, which I will note when appropriate. I will at times speak of the minimal intention account in general, by which I mean the type of approach to legislative action that aims to explain the sense in which legislating is necessarily intentional without claiming, implausibly, that legislators may form and act on complex, specific intentions. Kavanagh, a student of Raz, argues for such an account, as in a way does Waldron. The strategy that characterises the account is to locate the intention on which the legislature acts at a high level of generality and then to explain how the product of the legislative act, the statute that is enacted, may be interpreted without reference to particular intentions and yet remain an intelligible exercise of the legislature's authority.

The first move in the argument is to explain why legislating is an intentional act. Raz and Gardner each argue that the legislature exists to make law deliberately and that it cannot intelligibly act to make law unless it acts intentionally. That is, the purpose of the institution is to make and change the law and, therefore, the legislature must act on an intention to change the law. Gardner puts the point this way:

> Whoever does the legislating, does he or she or it intend to change the law in the process? The answer is clearly yes. An agent acts intentionally inasmuch as it does what it does for (what they take to be) reasons. Those who legislate, whether they be human beings or institutions, must do so for (what they take to be) reasons for and against changing the

[1] Balliol College, Oxford and Faculty of Law, Auckland. I am grateful to John Gardner for permission to cite and discuss his forthcoming paper. I am also indebted to John Finnis and Jan van Zyl Smit for helpful comments on an earlier version of this paper. The usual disclaimer applies. This is a rough draft so please do not cite or quote it without permission. Any comments would be gratefully received and may be sent to me at richard.ekins@law.ox.ac.uk.

> law. If they did not there would be no sense in having legislative debates… Such debates make sense only on the footing that whoever it is that legislates will, in legislating, respond to at least some supposed reasons for and against changing the law.[2]

Note that the strategy here is to argue that the institution must act intentionally if the action of its members, who participate in debates concerning changing the law, is to make sense, to be rational and intelligible. Raz argues likewise that there is no point setting up an institution with law-making power unless the laws the institution makes or those it intends to make.[3] He says that we would have no reason to be concerned about who belonged to the legislature if the intentions of legislators did not have a direct connection to the content of the law. This might not be true, Raz argues, if there was some indirect method by which desirable laws might be produced as a function of the beliefs and intentions of members, yet without matching any of those intentions. No such mechanism exists, however, so intentions must matter.[4] To be a legislative act, Raz contends, an act must be undertaken with the intention to legislate, absent which, the act is just an act to which legal consequences attach. He explains why:

> The reason is that the notion of legislation imports the idea of entrusting power over the law into the hands of a person or an institution, and this imports entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator. This is inconsistent with the idea of unintentional legislation.[5]

It follows, Raz argues, that

> …legislation requires not merely intending to legislate, it requires knowing what one legislates. One is hardly in control over the development of an aspect of the law, if, while one can change the law by acts intending to do so, one cannot know what change in the law one's action imports. The natural suggestion is that legislators make the law that they intend to make, and they make that law by expressing the intention to do so.[6]

I agree with this. The legislature exists to exercise voluntary control over the content of the law and it would be senseless for the legislature to be entrusted with such authority – it would not truly have authority – if it was unable to make the law it intended to make.

The next step in the argument is to explain why the intention on which the legislators act is just the minimal intention that the enacted text shall be law. Raz's remarks in the preceding extract may suggest a more expansive understanding, in which legislators must and do know the full content of the law they intend to make. The problem with this, however, as Raz acknowledges, is that legislators do not have to, and very often do not, know all the details of the legislation they vote for. Often they may know the general outline, but sometimes even this may be unknown. The answer, Raz says, is that "while

---

[2] J Gardner, "Some Types of Law" in D Edlin (ed), *Common Law Theory* (2007, forthcoming) 1, 10
[3] J Raz, "Intention in Interpretation" in R P George The Autonomy of Law: Essays on Legal Positivism (1996) 249, 258
[4] In an endnote, he asserts that Waldron's voting machine model is implausible: Raz 282, n 10.
[5] Raz 265-6
[6] Raz 266

the intention must identify the law being enacted, it need not identify it through a comprehensive statement of its content."[7] Instead, there is a more general description under which the act is intentional:

> For the characterization to succeed in capturing the nature of the intention required for an act to qualify as a legislative one, it must be the case that whenever one legislates one intends, under some description, to make the law that one is enacting. I believe this is so, and that the following description is present in all but the most anomalous circumstances. A person is legislating (voting for a Bill, etc.) by expressing an intention that the text of the Bill on which he is voting will – when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country – be law.[8]

It is not quite clear, from this extract, whether the legislator intends just that this text be law, assuming that it will be interpreted in accordance with prevailing legal culture, or whether he intends that the text be law and that it be interpreted in this way.

Why is the ignorance of some legislators a problem? Raz takes it to mean that not all of the legislators act on specific intentions concerning the content of the law. Some, most, or all act only on the very general intention that this text be law. A further assumption is apparent here, namely that the intention of the legislature consists of the intentions that are commonly held by all legislators. This is in part a stipulative move by Raz. He notes the possibility of institutional intentions but does not explore it further, instead focusing just on the intentions that are commonly held by all. Gardner's consideration of group intention is more thorough and so he is more emphatic in his conclusions. He agrees with critics of legislative intent that the legislature ordinarily has no intention concerning the scope or meaning of the text that is enacted. He denies, however, that the reasons to doubt that particular intentions exist (intentions that define the particular propositions that a statute introduces) extend to the more general intention that the statute be law. This intention is well grounded in the legislators' own intentions. His argument is as follows:

> Doubts about whether Parliament is capable of having intentions often stem from the well-known difficulty of using Parliamentary intentions as a guide to the interpretation of statutory texts. When courts say that they are interpreting statutes according to 'the intention of Parliament' this is widely accepted to be an empty courtesy. Parliament usually had no intentions concerning the meaning, application, use, or effect of the statute in question, because the members of Parliament who debated and voted on it – even those who supported it and voted in favour of it – invariably had diverse and conflicting intentions concerning its meaning, application, use and effect. Indeed, some members of Parliament possibly had no intentions at all concerning any of these matters (they were just lobby fodder who voted when they were told to by their political masters). All of this is true and important. One could design a constitution for Parliament which would determine whose intentions on matters such as the meaning, application, use and effect of a statute were to be regarded as constituting Parliament's intentions on these matters, in the event of conflicting intentions among ordinary members of Parliament. There has

[7] Raz 266
[8] Raz 266-7

> been a halting move in that direction in recent English law. But for the most part there are no such rules, and hence Parliament has no such intentions.
>
> So Parliament often has no intention to make the particular changes in the law that it ends up making when it legislates. What does not follow is that, when it legislates, Parliament has no intention to change the law. Worries about the diverse and conflicting intentions of individual Parliamentarians do not apply to this more humble intention. Barring the occasional misfire (e.g. an accidental stumble through the voting lobby by a drunken Parliamentarian) all of those who participate in Parliament's changing of the law intend to participate in it.[9]

Gardner takes it then that in the absence of any attributive rules, the fact that legislators "invariably" have conflicting specific intentions defeats the claim that the legislature may have any such specific intentions. The minimal intention, however, is more generally held and therefore it survives sceptical scrutiny. This account of group action, in which the focus is on commonly held intentions, is in my view unsound. An alternative account of group action is needed to respond to the minimal intention argument.

The legislature is thus said to act only on the very general intention that the text in question shall be law. The obvious problem is that this seems to leave unexplained how legislators retain control over the law. That is, if the legislature's specific intentions concerning the meaning and effect of its enactments do not constrain or direct statutory interpretation then the legislators cannot know what they enact and so their intentional act of changing the law is irrational. The solution that Raz proposes, and which Gardner seems implicitly to accept, is that there is a predictable connection between enacted text and changes in the law. The bridge between the general intention to change the law and the resulting changes is provided by the interpretive conventions that prevail in the legal culture at the time. Gardner notes that the statutory text is canonical and that it is the object of interpretation, with what one looks for in interpreting it being the set of legal norms that it creates.[10] He says no more than this in the paper I am examining. It seems likely, however, in the absence of an alternative mechanism, that he would follow Raz in relying on conventions to generate meaning.

What is important, says Raz, is not actual knowledge of the legal changes that their act will bring about but instead the possibility that they may know. Thus, the existence of a stable mechanism to stipulate the meaning of statutes enables legislators to act knowing that their act will have predictable effects, which they may examine if they wish. Therefore, the legislators retain control over the law even though they, as a group, act without intending to realise those specific changes. As Raz puts it:

> The minimal intention is sufficient to preserve the essential idea that legislators have control over the law. Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them, when

[9] Gardner 8-9
[10] Gardner 5

> understood as it will be according to their legal culture, assuming that it will be promulgated on that occasion.

A sound theory of authority might demand more, Raz notes, namely that the legislators make an informed judgment of the merits of legislation before endorsing it, but it is intelligible that it might be left to the legislators to decide of what they need to satisfy themselves and so it is intelligible, he concludes, that no more specific intention is called for.[11] The content of the general intention to change the law is cashed out by convention:

> In the cycle of convention and intention, convention comes first. Not in the sense that we follow convention rather than intention, but in the sense that the content of any intention is that which it has when interpreted by reference to the conventions of interpreting such expressive acts at the time. And that is the case even with regard to an intention which, once expressed, changes these conventions.[12]

For Raz, legislative intent is necessary to explain legislative authority but it is not practically relevant to statutory interpretation, save in the negative sense that it grounds the focus on the text understood by reference to prevailing conventions. The minimal intention is to adopt a text that it is known will have the meaning that it will have when read in light of interpretive conventions. And there is no escape from this process, save by acting, per the old conventions, to introduce new conventions.

Legislating for reasons

The legislature is an institution, with one or more members, that exists (is set up and maintained), like all institutions, to serve a public purpose. The purpose of the legislature is to change the law when need be, positing new legal propositions that direct the action of members of the community. There may of course be several institutions with authority to change the law. The legislature is first amongst these in that, in the central case, it is vested with very wide, perhaps plenary, authority to settle the content of all legal propositions. It is also self-directing, for its authority to change the law is not conditional on an approach from another party and it is instead free to legislate on any topic, within its jurisdiction, as it sees fit. The point of legislative authority is of course related to the point of law. The common good of the community is realised in part by the coordination of its members by reference to public standards of behaviour (laws). The task of the legislature is to set out, and to oversee and revise the content of, these standards. Thus, legislative authority is practical authority to direct how others shall act, with the point of that practical direction being to serve or realise the common good.

The community accepts the authority of the legislature because it recognises the need for law and for an institution to oversee and change the law when necessary. The exercise of practical authority is deliberate action in response to reasons. The common good of the community is complex and there are many ways to attempt (or fail) to serve or realise it. The legislature is needed precisely to settle the particular content that the law of this

[11] Raz 267
[12] Raz 269

community shall have, amongst the otherwise open alternatives. The community needs the legislature to act in response to the reasons that bear on these various alternatives, selecting that which it is judged should direct the community: that is, which will serve or realise the common good. The act of the legislature claims to be a reasoned decision as to what should be done and it is received in this way by the community. That is, the act of legislating involves an assertion by the legislators who constitute the legislature that "we, jointly, thought about how this issue should be settled and for reasons that seemed good we chose this standard to direct you; therefore be so directed".

To change the law is to change the set of propositions that constitute the law. The law is this set of propositions in the sense that its primary reality is that it provides reasons for action for the members of the community whose law it is. That is, a law is an ordinance of practical reason promulgated by a legal authority which the person subject to the authority is to adopt as if it were his own. I talk of propositions because what matters is the reason for action, the directive conceived of as an abstract object of thought, rather than the particular textual formulation in which that proposition is expressed. The same legal proposition may be set out in various alternative formulations and much of legal reasoning seeks to distinguish that proposition from its contingent formulation. It follows that in acting to change the law the legislature should aim to change the existing set of propositions, otherwise the law will not change.

If the purpose of the legislature is, as I have said, to change the law in response to reasons that bear on the common good, then a rational legislative act (an act that makes sense, is not futile) is an act that aims to introduce certain propositions that are judged to be means to, or instantiations of, good ends. The alternative is that the legislature does not act to introduce propositions and does not respond to reasons that explain why the propositions are sought. An act of this kind is not a rational exercise of legislative authority for it cannot succeed in fulfilling the institution's purpose. The act would neither change the law in a deliberate fashion nor would it do so in response to reasons. The act might result in a change in the law, but not a deliberate change or a reasoned change. Instead, the act would, to use Raz's distinction,[13] be more like a natural event to which legal consequences attach than the exercise of legislative authority.

Rational legislators, who seek the purpose of the institution, would have no good reason to participate in an act of this kind. Further, the members of the community would have no reason to accept the act as creating reasons for action for them. The continuing acceptance of the practical authority of the legislature rests on the judgment that it acts to change the law for reasons that it judges to be good. This is consistent with mistaken judgments and unfortunate changes, but not with an absence of reasoning altogether.

There is a further reason why the rational legislature acts on a chain of reasoning that sets out the legal propositions sought and the good ends thereby to be realised. The reason is that citizens and officials who seek to identify and use the propositions that a legislative act introduces often need to refer to the reasons for which the legislature acted. That is, a well-formed legislative act, which succeeds in making the legal change for which it aims,

[13] Raz 265

is an act that is taken for reasons that are at least in principle available to those whom the legislature directs. The interpretation of statutes is largely a matter of discovering the propositions that the textual formulation expresses. Interpreters very often ask what reasons the rational legislature would have sought to achieve by adopting this particular textual formulation, with those reasons being taken to inform the interpreter's judgment of the propositions that the formulation discloses. The whole exercise of purposive interpretation obviously entails just such an inquiry. The legislature's reasons are also relevant, however, to interpretive questions concerning conflicts (real or apparent) amongst propositions, as well as the possible defeasibility of propositions.

These aspects of interpretive practice are irrational if the legislature does not act for reasons. The nature (and rationality) of statutory interpretation cannot, of course, be fully judged without investigating the nature of language, which I attempt below. Raz and Gardner, among others, argue that the application of conventions settles meaning. I deny this, but even if we grant it for the moment, and assume that conventions stipulate the meaning of texts, some reference to the legislature's reasoning, as with purposive interpretation, seems to remain. One might claim that conventions also exist to stipulate the legislative reasoning that attaches to any particular textual formulation, but this is implausible. The openness of legislative action and the diverse possibilities for securing various aspects of the common good defeat the claim that the reasons for which the legislature acts may be stipulated by means of conventions laid down in advance of particular legislative acts. The reasoning that may explain any particular legislative act is too varied and particular to be convincingly stipulated by conventions. The absence of conventions of this kind in interpretive practice is of course also significant. And the general inadequacy of convention as an explanation for interpretation is also made much clearer when the importance of reasoning in language use itself is noted.

A possible line of response to the account I outlined above is to argue that while it is true that legislative authority is action in response to reasons, it is the legislators that reason, rather than the legislature. This response is not sound. It is true of course that legislators reason and act and it would be surprising if at least some legislators did not consider the reasons for or against some legislative possibility and vote for those reasons. The problem for this line of argument is that it is the legislature that legislates, not any subset thereof. In a sense it is true that the legislature just is the legislators when coordinated in a certain way. The focus of the action of the legislators is on what they do together, as a group, and the community looks to the legislature itself for authoritative direction. Thus, for both participants within the institution and those to whom the acts of the institution are addressed, what is important is what is done jointly, by all. Therefore, it is the joint act of the legislature itself that must be reasoned if it is to be authoritative and it is the reasoning on which the group acts, rather than that of any member, that is relevant to the identity and use of the chosen propositions. The fact that legislators each reason cannot ground the judgment that the legislative act in which they participate is reasoned for without some known, open connection to the act in which they participate this reasoning is, and must remain, each for his or her part only. Thus, I contend that if the legislature is an authority, then it must act on a chain of reasoning, which may be partly constituted by but does not reduce to the reasoning of its members.

The intelligibility of legislative action on the minimal intention

I now want to consider the intelligibility of the minimal intention account in light of my argument above. The minimal intention on which the legislature is said to act is just we intend that this text shall be law. (Strictly speaking, Raz and Gardner say that each legislator forms this intention himself, which means that the legislature does likewise.) Thus, the end the legislature seeks, its reason for acting, is "so that this text shall be law". Raz and Gardner are a little unclear on the precise content of the intention on which the legislature acts. That is, their formulations seem to vary slightly across the argument.

Of the two, Raz is the more precise, for he says that the legislators each act on the most general description of the act, which is "I intend this text, when read per prevailing convention, be law". Later in his account he takes the legislature's intention to be cashed out by the application of those conventions. Thus, the legislature intends whatever is the conventional meaning of the text, including each particular provision.[14] If we assume that conventions stipulate meaning then this collapse to intending the conventional meaning is understandable. The meaning of the text as settled by convention is before the legislature when it acts and so when the legislators intend to participate in the enactment of the text the legislature intends to enact the conventional meaning of the text.

There is a problem here, namely that the enactment of a text is not identical to the selection of final legal propositions, and it is the latter that authority exists to provide. The importance of these final propositions in legislative deliberation and action does not seem to be clearly at the forefront of this account. Instead, Raz seems to assume that the application of conventions to the text gives rise to the legal changes. I think this is too hasty, for even once the meaning of the text is known, it remains necessary to determine what legal propositions that meaning creates. This is often obvious, for the meaning clearly expresses the proposition. Other times, it may be more difficult, especially if what is at issue is how a certain formulation should be understood to form part of an existing, complex set of propositions. I argue that it is open to interpreters to go beyond textual meaning to ask what proposition the legislature chose. Raz's claim that the legislature intends just what conventions entail seems to foreclose this approach and may only be dealt with by (further and implausible) expansion of the role of conventions.

Gardner's account of the minimal intention is more general than is Raz's, for he says that the legislature intends to change the law but not to make the particular changes in the law that it ends up making when it legislates. Thus, Gardner does not make Raz's later step and say that the legislature intends the conventional meaning of the particular provisions. He assumes, I think, that conventions will stipulate meaning, so that the effect of the legislature's act is a function of the text, but he does not conclude that the legislature intends those changes. Instead, the legislature intends no particular changes at all, but just intends some change (in general). This would be an irrational legislative act. A legislature that acts to change the law but not to make particular changes is not acting to fulfil its function, to be an authority. Its actions are not consistent with its defining aim,

[14] Raz 270-1

which is to direct the actions of others, for reasons that justify such direction. The legislature has not acted to change the law deliberately or for reasons, because it is not acting for (to secure) certain changes, and if is not aiming for certain changes then it is inexplicable how it may be said to act in response to reasons.

The general intention to change the law is not a rational intention on which to act. It requires specification before the legislature, understood as the group cooperating to attain their purpose, is rational to act on it. Raz gives some such specification in saying that conventions cash out the otherwise general intention. But this is to collapse (rightly) to the position that the legislature, as distinct from the legislators, does intend precisely the particular textual meaning of each provision as convention dictates. Gardner's position as it stands does not make this further step and so is plainly an account only of irrational legislative action. I would suggest, further, that Gardner's account is internally contradictory. He argues, rightly, that if legislative debates are to make any sense, if legislating is to be intelligible, then the legislature must act for reasons, in response to reasons for or against changing the law. This is true, but such action in response to reasons cannot culminate in a general intention to change the law: the nature of the change matters. The reason for this is that the nature of the change is determinative of whether the act is a response to reasons or simply a random, bizarre act. A rational legislative act is an exercise of authority to direct others to act in certain ways and it requires, first, reasoning as to what should be done, and second, action to secure the particular changes that the authority judges there is good reason to introduce.

I should also note that Gardner argues that because legislating is an attempt by someone to make normative changes expressly we need to think of the text as having an author who was trying to convey a meaning.[15] I agree. A rational author cannot, however, just intend to adopt a text. As I argue below, the author must intend the text to have particular meanings (some of which may be underspecified or ambiguous). Therefore, that the legislature acts as an author is inconsistent with the minimal intention argument.

The minimal intention as set out by Raz is the more credible of the two versions and is not quite as minimal as first stated. The legislature intends the conventional meaning of every particular provision of the statute. The idea that the intention of the legislature is somehow settled by what is before or open to the legislators is sound. But it opens up alternative possibilities. That is, if the legislature may intend more than each individual legislator actually knows, then the determinant of what the legislature intends is not the lowest commonly held intention at all, but rather what the individual legislator has good reason to understand the legislature to be doing when all act together. I will explore this point more thoroughly below.

So Raz holds on to the idea that the legislature intends to realise something specific, namely the conventional meaning of the statutory language. The question is whether this is a rational legislative act. My arguments above provide reason to conclude that it is not. First, that which is intended seems to be linguistic meaning understood in a legal context, rather than final propositions, yet it is the latter at which the exercise of authority rightly

[15] Gardner 13

aims. Second, and fundamentally, action on the intention to introduce conventional meanings is still not action for reasons. To cash out the content of intention by applying prevailing conventions to the text is to deny that the legislature acts on a chain of reasoning that grasps a good to be pursued (some aspect of the common good) and sets out to posit propositions that somehow serve that good. The authority of the legislature requires action on reasoning of this kind. Indeed, Raz's own theory of authority would seem to require some such account. How else is the legislature to have any prospect of satisfying the normal justification thesis? The law must purport, Raz argues elsewhere, to set out someone's view of how we should act, and for that view to be authoritative it must be grounded on the reasons that already apply to us. If the legislature intends just a set of conventional meanings, rather than choosing those meanings for reasons, than it has no plausible claim to authority.[16] It would therefore be irrational for legislators to participate in, or constitute, an institutional action of this kind.

Language use and legislating

The engine of the minimal intention argument is convention. The argument relies on the application of conventions to texts to stipulate predictable meanings that the legislature may intend when it intends to enact this text as law. Raz also relies on conventions to provide negative support for his account. He argues that because meaning is always a function of convention, what language users, including the legislature, intend to mean is just the conventional meaning of their language.[17] Thus, he effectively argues that it would be irrational for the legislature to intend its language to convey a meaning other than that which the application of conventions to the text dictates. It is of course true that Raz has an expansive account of convention. He includes not just semantic conventions, but also knowledge of context, as well as conventions peculiar to legal interpretation, which may include a variety of constitutional rules and such like. Raz concedes there are exceptions, where someone does not mean what he says, but argues that these are explicable as slips of the tongue or otherwise careless use of language. They do not disturb the central picture of language users saying what they mean and intending to mean what they say. The use of language in legislation is in fact a case where this is all but unavoidable because the legislative process is structured to avoid the possibility for slips of the tongue and the like and instead to focus action on exactly what is being said.

The problem with this account of language use is that it is not true. Language is much more creative, flexible and open than Raz's brief account suggests. This is not to endorse scepticism about meaning or interpretation, but is instead just to deny that the simple picture of stipulated conventional meanings, which we may adopt or not, captures the way language use proceeds. There is little agreement amongst philosophers of language concerning how language works. The line of argument that opposes Raz's account is, however, well known and well argued. The application of conventions does not stipulate

[16] Raz does talk of the possibility of legislators forming further intentions, which are the various policy ends that their statutes are intended to realise. However, it seems clear from his account that these exist only when they are commonly held by legislators (which will be rare) and that he does not take them to form an important part of the account of legislative authority.
[17] Raz 269-70

what the language user means. The speaker means what the speaker intends to mean, which is to say the meaning of his communication is what he intended to convey to the audience. The speaker intends further, of course, that the audience recognise this intention (so it is reflexive) and structures his language use to that end.

It is common for language users to mean more or less, or something quite apart from, the literal meaning of what they say. Indeed, literal meaning has no priority in communication in that we only conclude it is what is communicated when we judge the speaker intended to convey the literal meaning of what was said. Raz's account relies on context and legal conventions as well as semantic conventions, as I said. I will critique his view by working through the adequacy of each, so starting with semantic conventions alone, adding context, and then seeing if law makes a difference.

Word meanings together with semantic operators give us a vast array of grammatically correct sentences, most of which will never be uttered or identified. Semantics is a formal system, which expands and contracts with changes in word meaning and so on. It is a vast coordination convention in the sense that it structures our attempts to engage with one another. However, it plainly does not exhaust those attempts. Speakers are able to use sentences which have a certain semantic content to convey meanings that go well beyond, or differ wildly from, that semantic content. This is unsurprising if we think that very often what is literally said, what is carved out just by the application of semantic conventions, is quite limited. The sentence "I have not had breakfast" says just that "I have not had breakfast".[18] It is likely to be intended to mean "I have not had breakfast today" but it does not say that. (Equally it does not mean "I have never had breakfast".) I may use the sentence to convey that I have never had breakfast or that I have not had a substantial enough meal to be said to have breakfast ("I had a banana but not breakfast").

Kent Bach argues that what goes on in language use is explained by a difference between what we say (semantics) and what we mean (pragmatics).[19] The latter is a matter of what the language user intends to communicate, with a rational and competent language user doing his best to make clear the intended meaning. It is worth noting that we very often underestimate the sheer number of semantically plausible available sentence meanings. Bach notes that this gives rise to a sampling problem, where we focus only on sentences that are likely to be used, and assume that our grasp of how they are likely to be used is a function of semantics, thus ignoring the fact that semantics yields us many alternatives, which we quickly and easily discard in understanding a communication.[20]

Grice et al argue that in communication the meaning of the speaker's utterance is determined by what the speaker intends to convey to the audience, with the audience being intended to recognise that very same communicative intention. This approach has driven the recognition of the difference between semantics and pragmatics. The problem

---

[18] K Bach "Context *ex Machina*" in Z Szabó (ed.) Semantics vs. Pragmatics (2003) 1, 22-24; see also the examples set out in J Evans, 'Questioning the Dogmas of Realism' in R Bigwood (ed) Legal Method in New Zealand (2001) 283, especially the multiple literal meanings of "time flies like an arrow".
[19] K Bach, "Minding the Gap" in C Bianchi (ed.) The Semantics/Pragmatics Distinction (2004) 27
[20] Bach (2004) 40

it may seem to create is that it simply makes "meaning" a problem for the philosophy of mind rather than language. There is some force to this point, although it is more an observation than a criticism. The relationship between language and thought is extremely controversial. All I would say is that the study of pragmatics suggests that thought is somewhat wider than language. Of course, much reflective thought is undertaken in, and enriched by, language but it is possible not to be able to articulate in language one's thoughts and language develops, somehow, in the wake of advances in knowledge.[21] Further, it is not the case that in ordinary instances of communication we first formulate a thought in strict and exhaustive semantic form, which we then decide to abbreviate by means of a concise statement, while leaving clues for our audience to unpack the more expansive thought. Instead, we just go straight to the use of language, understanding it to mean more than what it says, and conveying that understanding to others.

The obvious way to rebut this pragmatic intentional account of language use is to point to the importance of context and to argue that while semantics may otherwise leave us unable to judge what a sentence means (as opposed to what it says), relative to context the problem disappears. It is important to be clear about what is meant by context. If what is meant is just that in certain circumstances rational language users are likely to mean one thing rather than another then it is entirely consistent with the pragmatic account, for what context picks out, on this account, are just regularised patterns of intentional language use. It is not the case, in other words, that the setting dictates the meaning of what is said but rather that in this setting a certain meaning is likely to have been intended. It remains the intention that determines what is meant, with the setting informing what a rational speaker is likely to intend to mean.

The claim that context settles meaning becomes apparently more plausible the more detail it is taken to include. That is, when context is first approached, as pointing simply to features of the situation that are salient to both speaker and audience, it has an important place in outlining the rationality of certain instances of language use, but it leaves important room for the open formation of communicative intentions. However, more is often fed into what is called context, so that context is made relative to the language already used, to information that both parties know about one another, and to every other relevant fact that might point to one or other intended meaning. At this point, context is being used just to capture the best judgment of what the speaker is likely to have intended. It collapses then into the pragmatic intentional account.[22]

The waters are muddied somewhat by the argument concerning whether meaning is objective or subjective. The audience should of course aim to understand what the speaker means and the speaker should intend to convey to the audience what he means. Where the speaker's language use fails to convey what he truly means for some reason the audience may judge that a certain meaning was intended when that is not in fact the case. This is the best judgment of what was intended. But it is not what was intended. Bach and others insist that what was meant is settled by the speaker. Goldsworthy argues

---

[21] J Finnis, "Natural Law: The Classical Tradition" in J Coleman and S Shapiro (eds.) The Oxford Handbook of Jurisprudence & Philosophy of Law (2002) 1, 38.

[22] Bach (2004) 36 and Bach (2003) 24

that what is important is the meaning of the utterance, which is what we may best judge the speaker to have meant.[23]

The dispute is, I think, not theoretically interesting. The important features of communication or legal interpretation are not settled by how theorists, who are also language users, understand the word "meaning". What is significant is that speakers intend to convey meanings, audiences intend to grasp them and sometimes audiences reasonably grasp the wrong meaning. In law, we usually have good reason to protect that which is reasonably ascertained, but not always. If the charge is threatening to kill then the speaker's meaning is entirely decisive.[24] This may show that the question "yes but what was really meant?" has no moorings absent an end it serves. Of course, when our position is that of interpreter, we can ask nothing other than what we reasonably think was intended. Note that this differs from insisting that what is meant is what it would be reasonable to mean. We may know, from other accompanying uses of language and the like that the speaker does not intend what another speaker, a more reasonable speaker let us say, would intend in this context. I maintain that we are not free to say that what the speaker's use of language means is the latter.

The understanding or likely understanding of the audience is of course always very important for the speaker wants the audience to grasp the meaning he intends to convey. The act of communication is in a sense a group act, in that the speaker seeks to convey a meaning, which his listener seeks to grasp, and the jointly intended outcome is shared understanding. The effort by philosophers and linguists to explain how we judge what is intended, and how we form communicative intentions at all, has pointed to the operation of various maxims of communication, which may be said to guide the speaker in forming intentions. They may also be seen just to be presumptions about what speakers are likely to intend. Recall that when we discuss acts of communication there are various intentions at play. That in which we are most interested is the communicative intention, rather than further intentions. The end my act of communication seeks is your grasp of the meaning I intend to convey. The means adopted is the saying of some sentence that manifests the intention to convey the meaning I intend to convey.

It is fair to ask whether the law has special resources which modify the otherwise intentional character of communication. That is, are there legal conventions that stipulate the meaning of statutory texts? The first question to ask is whether it would be plausible for such conventions to exist and be so used. I think not. The openness of language is striking. It is possible to stipulate a closed set of meanings by formulating an artificial language – computing, cryptography – but where the means of communication is a natural language, the possibilities for novel communication are not closed. Further, it would be very unwise to attempt to design a closed set of meaning-stipulative legal conventions. The demands of the common good are so complex and the possibilities for legislative action so open-ended that any attempt to specify strictly the meanings that

[23] J Goldsworthy "Moderate versus Strong Intentionalism: Knapp and Michaels Revisited" 42 San Diego L. Rev. 669

[24] This may not be the best example, because here what is at issue is likely to be not what the defendant's meant when he said "I will kill you" or some such, but rather precisely whether he intended to threaten.

attach to statutory texts yet to be written would unjustifiably limit and distort the legislature's freedom to make the legal changes it thinks reason demands. That the legislature may choose any proposition by making clear its intention to choose that proposition is essential to its authority. The prospect of having to force that choice through the filter of a closed set of conventions would frustrate the straightforward case of legislative action: deciding that some legal change should be made and using language to manifest the intention that the law is now, by this very act, changed to that effect. There might be good reason to cut down this freedom in some respects, but that would be at best a partial exception to the ordinary case of legislative action.

The various legal conventions that are invoked in statutory interpretation, including the so-called canons of construction, operate as defeasible presumptions of legislative intent. That is, they serve either as specifications of the conversational maxims that operate in natural language more generally or as part of what is known about what the legislature is likely to try to achieve. There is of course feedback in the sense that the presumptions structure how the legislature forms communicative intentions, which is precisely why the presumptions justifiably continue. The interpretive practice of all known legal systems fails to use conventions to stipulate meaning. Raz does not explore in any detail particular interpretive conventions, noting simply that they vary by jurisdiction. MacCormick and Summers have investigated interpretive practice across a range of jurisdictions, however, and they note three broad, recurring categories of interpretive argument – linguistic, systemic, and teleological-evaluative – as well as the "trans-categorical" set of arguments relating to the law-maker's intention.[25]

Meaning is not produced by a set of complete conventions. Any such strategy would be hopeless in part because, as Llewellyn argued,[26] if the conventions are understood to be stipulative rules then they plainly contradict one another. However, the conventions are best understood as ways of pointing us towards what is intended, acting as presumptions which in turn do indeed inform what is intended. Again, none of this should be a cause for scepticism. Instead, it simply suggests that interpreters employ conventions not as the device that stipulates meaning but rather as a means to help inform judgments as to the meaning that was intended. It means further, that the legislature need not spell out certain aspects of its communicative intention which otherwise might need to be made more salient. The presumption that this will be the case unless there is some reason to suggest otherwise thus improves the efficiency of communication. The set of presumptions and other institutional facts or peculiarities that pertain to understanding the intentions of a legislature constitute an interpretive regime. The existence of that regime assists but does not replace the use of language in which legislation is formulated.

The upshot then is that if we do not have a language user, we are going to have grave difficulty understanding the meaning of the language. If there is a language user, then the

---

[25] N MacCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth Publishing, 1991) chapters 12 and 13; N MacCormick *Rhetoric and the Rule of Law* (OUP: Oxford, 2006) chapter 7

[26] K Llewellyn "Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed" (1950) 3 Vand. L. Rev. 395

interpretation of his language is a matter of identifying the communicative intention on which he acted, which will disclose the meaning he intended to convey by means of that utterance. Without a language user, our various presumptions as to what is intended obviously have no traction. What we would be left with, if a speaker is abandoned, is a semantic form, perhaps with some contextual assistance (although the very notion of context absent a possible communicative exchange is questionable), into which the interpreter would have to vest meaning. The result is either a random form of meaning-allocation or an exercise in rewriting.

I have assumed thus far, in reliance on my account of authority, that the legislature (the legislators organised in a certain way) aims to communicate a choice of legal changes. The means by which the choice is communicated is the use of language to convey a meaning which picks out the relevant legal propositions. Doubts about the existence of a speaker have led Hurd to reject the idea that legislating involves communication at all. She argues that the legislature is not a practical authority and so we are not searching for communicative intentions when we read statutes. One might wonder what it is that we are doing then. The answer, she argues, is that legislatures act as moral experts, with the texts they enact serving as signs to true moral standards. It is not that the legislature chooses what should be done but that its musings are a helpful guide to us in deciding what we should do. Interestingly, Hurd needs to hold onto the idea that texts have meaning independent of communicative intention for any of this to work. That is, the statutes act as signs because there is an obvious, literal meaning available to us from the texts. We are not bound by what they mean, we just use what they say. This is quite confused, in my view, and cannot explain the way legislators and others understand legislative action. It is striking however that Hurd's rejection of a communication model is supposed to work because meanings are available without a speaker.

My argument is thus that the legislature is a speaker. It uses language to communicate meanings, which is to say it intends to convey a meaning to the audience. The meaning is of some utterance, which has a semantic form, but the meaning need not be confined to that form. The communicative intention is complex in that the intended end is to convey a certain meaning, which is itself either supposed to point to (to be a means to) or to express the propositions of law to which the use of language is a means. The questions "what did you mean?" and "what propositions did you choose?" are very close but not identical. And of course, the use of language and choice of propositions is taken for reasons that inform intended meaning and propositional effect. The nature of language, I conclude, supports my claim that the legislature intends particular propositions rather than just the text and that it is the reasoning on which the legislature acts that defines the exercise of legislative authority.

How legislators act jointly

It is possible for the legislature to intend more than just that this text shall be law. It may be that the only intention that most or all legislators (in the majority) can be expected all to form and hold in common is that the text on which they are voting shall be law. In fact the intentions which they form are very likely to be more complex than this. However,

what is of interest is the complexity of their intention in respect of the content of the law. I agree with Raz and Gardner that very often legislators will not be aware of the detail of the propositions that the statute's enactment will introduce and so they may act intending to enact the proposal whatever may be its precise content. It does not follow, however, that the legislature acts on the minimal intention that this text shall be law.

Raz does not discuss group intentions but instead (rightly) assumes that they exist.[27] His argument focuses, however, on the commonly held individual intentions. Gardner provides a detailed, and generally plausible, account of how group intentions are constituted by but do not reduce to the intentions of individual members. Yet Gardner, like Raz, takes the absence of a commonly held intention regarding the specific propositions that the statute will introduce to mean that the legislature has no such intention. Without some change to the constitution of Parliament, as he says was perhaps introduced in *Pepper v Hart*, Gardner contends that there is no basis to attribute the intentions of particular legislators regarding the specifics of the statute to the legislature as a whole. This is true so far as it goes, but it wrongly suggests that absent common knowledge of the specifics or a rule attributing one person's intentions to the group there is no way for the group to intend anything more than the minimal adoption of the text. What this misses is that legislators formulate proposals that are intended to create specific propositions and the content of the proposal may be open to legislators so that they know and intend that if a majority votes for it the legislature will act on that open proposal, intending the specific propositions that were set out therein.

The legislature needs no explicit rule attributing the understanding of any one legislator to the group. Instead, the action of the group is structured by how the group perceives its purpose and hence how it understands any particular proposal for action. The texts that are proposals for statutory action are, I suggest, understood to be candidates for legislative choice, setting out particular propositions that will be created if the legislature acts on the proposal. Raz and Gardner are quite right that legislators need not know all the detail; they are wrong to take this to entail that the legislature is therefore unable to act intending the detail. Indeed, as I suggested above, Raz's own move from the legislators intending just that this text be law to the legislature intending the particular conventional meanings of each provision shows how this is possible. The point was that if the existing conventional meanings that were open to the legislature were what legislators acted for (assume Raz is right and this is all a language user may intend), even if they did not each know the detail, then that is what the legislature acted to introduce.

The structure of the institution is grounded in commonly held intention, namely the unanimously held standing intention to be ready to legislate and to consider and act on particular legislative proposals as need be. Thus, the legislative process exists in part because of the place it has in the intentional action of legislators. (The fact that the legislature is an institution complicates matters in that it is a partly formalised group that endures over time. Central to the explanation of any acting institution, however, is an account of the institution as purposive group.) The jointly intentional action of legislators constitutes that process and structures the reasoning that culminates in particular acts.

---

[27] Raz 263-4

The legislative process is a lengthy and complex means for the generation and adoption of specific proposals, which are set out to capture particular propositions for good reasons, and which are adopted by legislators who may not know all the detail in order to act on those proposals. (In what follows, I take the practice of the Westminster Parliament to be illustrative.) The legislature acts mainly on proposals that have been carefully formulated by expert draftsmen to give effect to instructions received from certain leading legislators (who also serve as Ministers) and their officials. The proposal is introduced, tabled and thus made available in the first reading. The text is open for inspection, with an intended meaning already available on its face. That is, legislators will read the text, grasping the intended meaning of its authors but also, and more importantly, asking what meaning they will be taken to intend to convey if they adopt this text. This is consistent with the original act of drafting, for parliamentary counsel write on behalf of legislators, setting out a text that is aimed at particular legal changes, and seeking to capture the meaning that it will have if they adopt it.

The proposal is debated in the second reading, with its promoters having to explain and defend the bill in detail and as a whole. Argument may concern the adequacy of the reasons that explain the bill or the meaning of particular provisions. The text of the proposal may be modified in response to some of this debate, partly to win support, other times to fix problems that were not initially apparent, whether in the substance of the choice or in the its formulation. The bill as amended is then sent to committee, where it is closely scrutinised, the meaning and effect of its provisions argued over, and various amendments made to correct the detail and precision of the proposal. Each stage of this close working over of the proposal is driven by certain legislators (with expert help) who devote time and energy to improving and clarifying the proposal. Further, each stage is open to legislators and the point of each stage is to improve, at least by clarifying, the proposal. The point of this public hearing and revision (I mean public amongst the legislators) is to keep before the legislators the proposal for action in which they are invited to participate. Not all legislators will scrutinise the proposal. But some will and the others will know that on the table before them is such a proposal.

When the third reading takes place, the vote is to accept or reject the proposal that is before the legislators. That proposal is the set of particular conveyed meanings, chosen propositions, and reasons for choice, that the formation and advancement of the proposal have brought together, unified by the ongoing question, “what will this mean if we, the legislature, adopt it?” The conscientious legislator does of course have clear in his mind the way in which this will be understood by other officials and citizens. And he wants, more precisely, the meaning that it has for the legislators to be transparent to the rest of the community. When this occurs, authority is exercised rationally. The law is changed in a way that makes clear what is to be done and makes clear further that the choice of what is to be done has been considered and chosen for reasons.

The legislative proposal is in part an ongoing communication amongst legislators. But it is a communication that has always in mind the further communication to citizens and officials at large, who have before them a legally circumscribed body of evidence, and to

whom, especially, the detailed content of the text is of first importance. The defining point of the institution – to exercise authority to choose what the law shall be to serve the common good – is met by forming and adopting proposals that have the form I have outlined. The legislative process is indeed structured to enable such proposals to be formed and adopted and when a majority votes for said proposal then, per the standing intention of the group in which majority voting rules are situated, the legislature acts to choose the specific legal changes that the proposal sets out.

Conclusion

Legislative authority calls for the reasoned choice of specific propositions. The nature of language means that these choices will take the form of utterances that convey an intended meaning, which seeks to express the chosen propositions. It is irrational for legislators to intend just that this text be law or to change the law in general. It is also irrational for the legislature just to intend the conventional meaning of the text, for: this is not a choice for reasons, it is not a choice of propositions and there is no such meaning so it cannot be chosen. The absence of commonly held intention does not preclude the legislature from choosing propositions for reasons. Instead, the legislative process is structured to enable the formation and adoption of proposals that convey meaning and choose legal changes for reasons that appear to legislators to be good.