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Review

The Language of Statutes: Laws and their Interpretation

Lawrence M. Solan (2010)

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Reviewed by Peter R.A. Gray

Reading this book has been a joy. Any book in which a lawyer is the hero is a rarity. A book in which judges are praised for doing a good job, especially in interpreting legislation, is perhaps unique. To a judge who has spent almost the last 28 years of his working life interpreting Australian federal statutes, this is the rough equivalent of *To Kill a Mockingbird*. According to Professor Solan, work of that kind is very important and we do it well. (Of course, not all potential readers will share my delight in being vindicated. There are plenty of other reasons why this book will give understanding and pleasure to those interested in the language of the legal system and the way it is used and abused.)

The major theme of the book is the controversy that rages in the United States about the proper approach to construing statutes. In essence, the controversy is between those who claim that the only focus should be on the words used in the statute and those who have recourse to legislative history, preparatory documents and other legislation in an endeavour to ascertain the intended meaning of the words. The controversy has political, moral and practical, as well as legal aspects. It is about claims of certainty and fidelity to the democratic process, allegations that those who look beyond the words themselves are

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simply engaged in choosing whatever tool assists them to arrive at the result they want to achieve, and the absurdity or general acceptability of results. Solan discusses these themes in the context of a case study of the way in which the federal bribery statute has been interpreted. He acknowledges that the claims of textualists have some attractions, but takes issue with some of those claims, especially those about the ease with which statutory language produces clear results. Solan analyses many of the important statutory interpretation cases, demonstrating how they involve borderline instances of word meaning. He unpacks the concept of legislative intent, arguing that it is neither undemocratic nor incoherent to talk about a deliberative body such as a legislature having a single intent.

A significant part of the book is its exposition of the ways in which agents other than judges are involved in statutory interpretation. The book explains how the tension is resolved between the executive desire to impose its preferred interpretation of legislation and the courts' view that the final determination of the meaning of an Act is a matter for judges. In addition, very often courts are not involved in issues about the application of legislation, so government agencies, particularly regulatory agencies, must form their own views about what the relevant legislation means. So must prosecutorial agencies, who decide whether to lay and pursue charges against people for statutory offences. Interestingly, Solan includes jurors among his non-judge interpreters. Members of a jury must decide whether to convict a defendant when they do not think that the relevant legislative provision ought to be construed as covering what the defendant is proved to have done. The discussion of extrajudicial statutory interpretation provides more than completeness; it provokes thought about the functional dynamics of the legal system and the limits of judicial power.

Perhaps the best feature of the book is the way it puts the controversy about statutory interpretation into context. Solan makes the point that, for the most part, people do not have trouble working out what statutes mean. Disagreements about whether a provision should be applied to a particular set of facts are quite rare and usually involve fact situations at the fringes of the subject matter of the relevant statute. When difficult cases come along, judges will often agree as to the intention of the legislature expressed in the statute. Even if they disagree on what tools should be used to ascertain that intention, their disagreement is only about a relatively small range of the tools available. Once a particular provision has been construed authoritatively by a court, other courts will generally accept that judgment as a precedent. The emphasis Solan gives to the overall unity of the process of statutory interpretation and the efficacy of the system is welcome relief from the heat often generated about whether judges are doing their jobs properly.

To an Australian, it comes as something of a surprise that there is such passionate disagreement in the United States as to how judges should go about determining the meaning of legislation and whether they should have access to extrinsic materials to assist in that task. To a large extent, the questions that divide judges and politicians in the US have been settled in Australia by Parliament. Despite the strict enforcement of the doctrine of separation of powers between the judicial and the legislative and executive, the courts have accepted that Parliament can instruct them on how to approach the task of statutory interpretation. There has not been any adverse reaction of the kind that Solan refers to in the US, where courts have regarded instructions from legislatures about how to interpret statutes as illegitimate attempts to trespass on the exercise of judicial power.

For as long as I have been a judge, section 15AA of the *Acts Interpretation Act 1901* (Cth) has required that '[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'. Section 15AB has permitted courts to consider material not forming part of the Act that is capable of assisting in ascertaining the meaning of a provision, either to confirm that the meaning is the ordinary meaning conveyed by the text taken in its context or to resolve ambiguity. There is a non-exhaustive list of materials courts can consider. Courts are required to consider the desirability of people being able to rely on the ordinary meaning conveyed by the text, taking into account its context and the purpose or object underlying the Act, as well as the need to avoid prolonging legal or other proceedings without compensating advantage.

On the face of it, these provisions appear to be a reasonable compromise of the controversy that continues in the US, but they do give rise to problems themselves. There is the difficulty of looking at 'the purpose or object underlying the Act' as a whole, as against the purpose of the particular provision being construed. Sometimes those purposes can be in conflict. For example, it is sometimes necessary to strike a balance between an exclusionary provision in a statute and the general provision from which the exclusion derogates. The purpose of the general provision will tend in one direction and the purpose of the exclusionary provision in the opposite direction. Emphasis of the first purpose will tend to produce a narrow interpretation of the exclusion, and emphasis of the latter purpose will tend to produce a broad interpretation of the exclusion. The instruction to consider the purpose of 'the Act' offers no guide to the resolution of this issue.

The purpose of an Act is itself a slippery concept. Sometimes, Parliament has

stated that purpose in a series of 'objects' set out in a section near the beginning. It is common for that section to contain several paragraphs, each expressing an 'object' of the Act. The need to select from such a list of objects the one or ones relevant to the construction of a particular provision adds a layer of complexity to statutory interpretation and an opportunity for the court to fall into what others (including an appeal court) might regard as error. The notion of an underlying, unstated purpose of an Act can also lead to difficulties in characterising that purpose. At a very general level, the purpose of an Act might manifest itself in the scheme of the Act. Such a general purpose is usually of no real assistance in construing a particular provision beyond the application of standard principles, such as that remedial legislation should be construed broadly. Perhaps even more importantly, the need for a judge to select a purpose from a list provided by Parliament, to determine what the unstated purpose of an Act is, or to distil from the general scheme of an Act a purpose that assists in the interpretation of a particular provision might lead to the criticism that the conclusion as to purpose has more to do with what the judge thinks the Act should accomplish than with what others might think the Act was designed for.

Nor is it a simple matter to have regard to extrinsic materials. If a commission or committee has conducted an inquiry and made a report with detailed recommendations for legislation, and the purpose of the statute is to enact those recommendations, the Court might be assisted by looking at the report. An Act designed to implement an international treaty or convention might be construed by reference to international law sources, particularly the decisions of committees and tribunals on the meaning of the treaty or convention. Beyond those documents, however, in my experience, and that of my colleagues, almost never do the preparatory documents shed any light on the dispute as to the construction of the particular provision concerned. At best, the explanatory memorandum provided to Parliament with a bill for a proposed Act, and the speeches and debates in Parliament, will provide a précis or paraphrase of the provision, but no guide as to its intended extent. Judges can find themselves being drawn into an exercise in construing an explanatory memorandum or a minister's second reading speech, as a means to construing the provision of the resulting Act. It has become common practice for lawyers to place such documents before courts when there is a dispute about the meaning of a provision in an Act, but most often resort to the documents is a waste of time and effort.

The side of the controversy that Solan favours, the one in which judges do have the option of using legislative history and information from sources other than the text of an Act itself, therefore has its own downside. Both the requirement to seek a purpose of an Act and the opportunity to look at extrinsic

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materials and to choose from a range of those materials increase the uncertainty of the process of statutory interpretation and increase the opportunities for criticism on the basis that the judge has simply chosen the approach that leads to his or her desired result.

Solan acknowledges that the values of individual judges will be reflected in their conclusions as to the meaning of provisions of statutes and that this can make it appear that the process is 'both indeterminate and political'. Whilst he is right to minimise the extent to which this impression should be regarded as the reality, it remains a weakness inherent in judicial statutory interpretation. Like Solan, I do not advocate that judges should be confined to the text of a statute itself in attempting to ascertain the meaning of one of its provisions. Most judges would want the opportunity to consult other sources in an attempt to do the best possible job of interpretation. Many would like to have clear guidelines as to the circumstances that warrant looking outside the text and those that justify reference to particular external documents. Solan does not provide such guidelines, but it is hard to imagine that anyone could – unless they were arbitrary. That is why the accusation that judges are simply choosing their preferred outcomes can continue to be made.

For law students who want to learn the principles of law relating to statutory interpretation, the book is a useful introduction. The principles are dealt with, not by way of a chapter devoted to each one, as a legal textbook might do, but woven into the author's themes. The number of cases used as examples in the book is small compared with the number you would find in a legal textbook. The cases that feature are chosen to illustrate the points Solan wants to make about the process. A few of them feature more than once, demonstrating how well the choice has been made. A lawyer or law student wanting to explore the case law more fully will have to look elsewhere but will do so with a clear understanding of the principle in question and a paradigm example of its application. Forensic linguists and sociolinguists will find the book an interesting study of the process of resolving conflicts about how words are used in a legal context. I found the distinction between the ordinary meaning of a word (Solan's *prototypical meaning*) and the dictionary meaning (Solan's *entire range of possible meanings*) particularly illuminating.

This book deserves to be read by lawyers and linguists for its clear exposition of the process of construing statutes, for its interesting reminder of the role of agencies other than judges in that process and, above all, for its excellent treatment of the controversy about whether judges construing a statute should have resort to sources outside the terms of the statute itself to assist them. It is refreshing to read such a balanced treatment of the controversy about statutory interpretation – one which emphasises the areas of agreement rather than

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those of disagreement, acknowledges the importance of the work of judges in interpreting legislation, and offers a favourable view of their performance of that task.

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