INTERNATIONAL JOURNAL OF ADVANCE RESEARCH, IDEAS AND INNOVATIONS IN TECHNOLOGY

ISSN: 2454-132X
Impact factor: 6.078
(Volume 6, Issue 5)
Available online at: www.ijariit.com

Encroaching the legislative field? Purposivism v. Textualism in practice: A clear distinction or a convergence of theories: Analysis of Cardozo's Methods of statutory interpretation

Priya Dharshini A.
Symbiosis Law School, Pune, Maharashtra

ABSTRACT

The Judge laws down the law, is a statement that is more often that not under dispute. Interpretation of States has a wider connotation and an impressive history situated in the common law tradition. In certain events the judges interpret the statute as it means i.e. to the text and at others wherein there exist legislative discrepancies the judges interpret the law as per individual judicial discretion. The statement the Judge laws down the law is under dispute because it is the task of the legislative to draft the laws of a nation and that of the judiciary to implement in practice. The idea of judicial law-making albeit not ideal to separation of powers has seen a growth in recent times. This paper aims in delimiting judicial discretion as explained by Benjamin Cardozo in several of his works. While judicial discretion prima facie cannot be disputed upon but there exist limits to such discretion. This paper primarily focuses upon textualism and purposivism in the interpretation of statutes. As different they are, they also need to co-exist and operate separately at times for the functioning of the judicial machinery.

Keywords: *Benjamin Cardozo, Judicial Law making, Purposivism, Textualism, Judicial Discretion.*

1. INTRODUCTION

In accordance to the Rule of Law, in a country such as India which follows a tripartite structure of government the role of the courts lies in stating the law as it is i.e. it provides the decision as to the meaning of statutes. The task of a judge is not to make the law but rather to interpret the law made by the legislature. This article focuses on two theories of statutory interpretation which are purposivism and textualism, which disagree about how judges can best adhere to the rule of law establishing the supremacy of the legislature. Especially this dispute is more apparent in circumstances wherein the legislature did not anticipate a specific circumstance which could be disputed before the courts.

The Purposivists state that courts must prioritise interpretations which help in the advancement of the statutory purpose of a particular statute while the textualists state that a judge should interpret a statute by confining himself to interpretation of the statute's text. There are different stages of interpretation, Firstly, a judge looks into the ordinary meaning of a statute. Secondly, the courts look for a much broader statutory context for interpretation. Thirdly, The Courts look into the legislative history of a particular provision. Lastly, the judge reaches the stage wherein he considers how a particular statue can be implemented or has already been implemented. Both the Purposivists and the Textualists use the above-mentioned tools of interpretation, however the order of application or the weightage of each tool applied depends on the judge's ideology or theory of statutory interpretation. The author wishes to draw upon the conflict of the judges while interpreting the statutes while at the same time maintaining the supremacy of the legislature. The author will review contemporary and historical approaches towards interpretation of statutes while focusing on Benjamin Cardozo's appropriate methods of Interpretation of Statues.

2. OBJECTIVES AND RESEARCH ISSUES

a) Purposivists *v.* Textualists the Distinction and Convergence explained *via* Cardozo's 'The Nature of Judicial Process'.
b) Is Judicial Law-making Justified? in accordance to Cardozo's 'The Nature of Judicial Process'
c) Factors which limit Judicial Discretion due to the risks which arise out of judicial law making.

The Objective of the research paper is to obtain an overview on the handling of Purposivists and the textualists when it comes to statutory interpretation. This lays the primary ground work of Cardozo's appropriate methods of statutory interpretation. Then taking it further by a brief introduction on approved judicial law-making as defined by Cardozo. Finally, delimiting such law-making by establishing factors which limit judicial law making via Cardozo's Study.

3. SCOPE OF THE PAPER

The Scope of the Research Paper focuses on the two major theories of Statutory Interpretation (*i.e. Purposivism and Textualism*) and the article draws major inferences from these theories of Statutory Interpretation. The article then focuses on Cardozo's research on Statutory Interpretation and his methods to provide a skeletal framework to the authors research. With the aid of case laws, the author provides a clear distinction between the Purposivists and the Textualists. The author Draws upon on judicial law making with experts from Cardozo's study. The author also establishes delimiting principles on judicial discretion.

4. REVIEW OF LITERATURE

The Author has derived heavily from Benjamin Cardozo's: Nature of Judicial Process Book, the author has also referred to journals which provide summaries on Cardozo's writing from Yale School Journal. The Primary Source of Information was from Cardozo's book while the Secondary source of material the author relied upon was Indian Resources on Interpretation of Statutes.
**The Author was able to obtain several insights into the topic through the Interpretation of Statutes Lecture Series.*

5. THEORETICAL UNDERPINNINGS AND RESEARCH HYPOTHESIS

'How do Judges Decide a Case?' is a question to which there are several insights in Cardozo's 'The Nature of Judicial Process'. Cardozo states that judges should follow the Anglo-American Legal Tradition which stated that in certain cases judges should apply the law as the text dictates and in some cases judicial discretion can be applied with social welfare being one of the considerations. The Four leading methods of interpretation of the law as identified by Cardozo are (a) Logical Method i.e. legal constructs are analysed in a way that preserves logic; (b) Historical Method i.e. it deals with the legal origins of the law or the way a particular provision under law has evolved; (c) Customary or Tradition Method i.e. the element of custom adding to social values and thus in communal and social welfare is considered; (d) Sociological Method i.e. here the elements of consideration are justice, social welfare, utility, reason etc. Cardozo states that the abovementioned methods have elements which help in statutory interpretation in a case to case basis. Judicial Discretion according to Cardozo comes into the picture only when there are gaps in law which needs immediate effect for social relief or to do away with an outdated law and in a few other instances, but such discretion cannot be applied in every case. It can be observed that the textualists deal with interpretation of the law in the manner as prescribed by method (a) of Cardozo while the Purposivists deal with interpretation of the law as dealt with under a few of Cardozo's approved methods of legal analysis mentioned in this paper and in some cases the Purposivists approach and the textualists approach can seem to convene.

6. ANALYSIS

'The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.'
Cardozo's Book consists of four chapters (a) The Method of Philosophy; (b) The Methods of History, Tradition and Sociology; (c) The Method of Sociology: The Judge as a Legislator and (d) The Adherence to Precedent, The Subconscious Element in Judicial Process. Justice Felix Frankfurter has stated that when it comes to interpreting statutes would be inherent in the very nature of the words as the definition and meaning might change with the context and with time. There might exist instances wherein the law might be silent on a particular point of substantial importance. Especially in instances wherein a statute becomes the point of contention in the courts the judges interpret the law. It does not matter if the law is ambiguous on the point. In Marbury v. Madison., C.J John Marshall stated that the judicial department has the duty to establish what the law states. Judgement and Judicial Pronouncements have the final say when it comes to the interpretation of statutes until the legislature brings forth a change, such as, amend the provision. The role of the judiciary is subordinate to the legislatures position as the drafter of laws. The judges carry out the will of the legislature in saying what a law is, and success of any method of interpretation of statutes lays with how well the will of the legislature is translated into the judgment.

6.1 The Goals of Statutory Interpretation

6.1.1 The Brief History: The Difference between a dispute under the Common law and a Statutory dispute is that under the tradition of common law courts judgments are provided on a case to case basis upon the principle of equity, natural justice and public policy (or justice equity and good conscience) while in regards to a statutory dispute, the courts apply the statutory law in resolving such disputes. The role of judges in statutory interpretation is constrained. Under Natural Law and Formalism developed the idea that judges stated the intent of legislator i.e. what the legislator would have said if he were present. Legal Realism brought forth the idea of applying insights from sociology and psychology to judicial decisions. Realism brought forth the need of judges to justify a particular judgment. It put away the notion of a single accurate way to read a case. Modern Jurisprudence has brought with it a new phenomenon of judicial discretion, this forms an important part of any democracy when applied with necessary safeguards.

6.1.2 Purposivists v. Textualists: The Purposivists focus on the law i.e. the reason such a provision was enacted by the legislature and the problem the legislature was trying to solve by enacting such a law. Hart stated that purposivism is based upon the benevolent presumption wherein it is presumed that the legislature is composed of reasonable men who pursue reasonable purposes reasonably. They believe a judge to preserve the integrity of the legislation by paying attention to the legislative process. The Purposivists state that the benevolent presumption would be applicable until the contradictory is expressed. The Textualists care about the statutory purpose only to the extent that intent or purpose is deliverable or as evident from the text or legal provision. They reason that a statute when read with the corpus juris the meaning a reasonable person would thus gather would be the meaning of such provision. The author takes note of both the theories while also stating the textualism is a formalistic approach to interpret a statute. Courts are delegated with interpretative power under the constitution. This interpretative power in textualism is undermined as provisions are supposed to be interpreted as per the textual meaning.

a) The Four Chapters of Cardozo's Book

The First Chapter talks about the Method of Philosophy wherein deals with logical development. Here Cardozo talks about a human positive law that grew with time. He stated that the method of philosophy will aid in the principle of the growth for human positive law. This he stated was a work of reason. Under the Second Chapter i.e. The Methods of History, Tradition and Sociology, he stated that the method of custom will aid the judge in the application of a principle of law. Customs achieve the dignity of positive human law through legislation. Under the Third Chapter the Method of Sociology and the Judge as a Legislator primarily applies to constitutional law cases wherein certain rights need to be given utmost importance and the existence of general concepts. This concept deals social welfare and works in regards to the Common Good. The Fourth Chapter talks about adherence to precedents which should not be abandoned in any case. There might be isolated incidents wherein precedents are not followed but that should not be made the norm in accordance to Cardozo.

b) Judicial Discretion

The Judiciary rarely interferes with an executive decision. In the Indian Context to deal with the Separation of Powers and maintain the constitutional norm, this is the scenario. But instances wherein the civil rights of groups or individuals are sometimes in jeopardy due to the exercise of discretion that the executives exercise while moving legislations. So, while the courts have the authority to exercise judicial discretion there also exit certain limitations to the same. Discretion is the power which is vested in the hands of the judges which provides them with the power to choose while making official decision using reason and rationale effectively make a decision amongst acceptable alternatives. Some level of discretion is unavoidable as the legislature cannot foresee every eventuality. It is possible in both civil and criminal proceedings, in instances inevitable. For instance, the principle of proportionality was laid down in the case Munna Chaubey, which played an important part in prescribing liability based upon culpability for different kinds of criminal conduct. It helped reflect the subtleties in consideration of culpability i.e. each case had special facets that needed consideration. Application of this principle involved judicial discretion while reading the law. Similarly Cardoza has stated in his book that while judges are involved in the making of law he was with the proto-realists such as Chipman Grey, Roscoe Pound and Wendell Holmes in challenging the traditional formalists, that judicial discretion and review is a part of the Separation of Power and does not violate the rule of law. While maintaining that the judges only discover pre-existing laws and apply them i.e., they cannot make a new law but rather act in cognizance of the constitution and if any legislation was in contrary to deem it void. This is clearly observed in Cardozo not siding with radical critics of formalism such as John Chipman Grey who rejected the idea of law as a set of binding rules. Cardozo has stated that most legal questions have clear answers and must be interpreted to the letter of the law. Judicial discretion and review of such matter comes into picture only when there exists an ambiguity and a need for the judiciary to intervene. Usually in cases of such intervention the legislation rights what the courts have deemed to be an error.

c) Methods of Interpretation

In India there exist three main techniques to interpret a statute. They are the Literal Rule, Golden Rule and The Mischief Rule. The Literal Rule reads the law as it is, this is the textualists way of interpreting a statute. In Fisher v Bell, the statute was interpreted to mean the ordinary meaning of the literature. In this case the defendant had displayed a flick knife with a price tag, if this was an offer for sale the shopkeeper will be liable under Section 1 (1) of the Restriction of Offensive Weapons Act 1959. But as the Contract law was read using the literal rule it was considered to be an invitation to treat, thus the shopkeeper was not guilty in the eyes of the law. As in accordance to contract law display of items in the shop window was only an invitation for potential customers to treat. The Golden Rule of Interpretation is used in instances where the literal rule creates an absurd situation. In the case of Adler v George., the use of literal rule has sometimes a narrow or wider approach with different effects and the statute should be interpreted in such a way that it helps the cause of a case. Adler had obstructed a member of the RAF engaged in security detail, the official secrets act, 1920 punished such an act performed in the vicinity of a prohibited place but Adler argued he had been in the prohibited place and not in its vicinity. Adler was however considered guilty as the text of the statute should be interpreted in the sense it was intended otherwise it is absurd. Similarly, in Re Sigsworth., a case about inheritance the English law read that children inherit the estate when a person dies without a spouse. The defendant killed his mother and the question was whether he could be eligible for such property, the courts clearly answered in the contrary. In accordance to the Mischief Rule, the judge is given more leeway when it comes to interpreting a statute. It helps in covering the gaps left in the law. In Corkery v. Carpenter., the defendant was found drunk while driving his bicycle the English law dictates that it was an offence to be drunk while in the charge of a carriage. The judgment included bicycle to be in the category of carriages however no such direct reference was made in the statute. This is how the mischief rule operates. It is observed that there exists a narrower interpretation of the law at times and the law is interpreted at times to fulfil the purpose of the legislation.

d) Cardozo's Judicial Approaches an Analysis

The author wishes to draw upon the distinction between Purposivists and textualists and then compare it to Cardozo's study. In Arlington Central School District board of Education Case., the majority opinion, a textualist approach was observed, where the statute was read according the text. The parents required compensation for expert fees for a student governed under the Disabilities Education Act, however the majority interpretation was that of the textualists and such claim was rejected when the statute was read to the word. However, we can observe the Purposivists approach in the dissent of Justice Breyer's opinion wherein he stated the term costs which was disputed in the statute to include expert fee was that was the intent of the statute i.e. to provide children with disabilities to receive quality public education. But he agreed that the literal interpretation of the statute would not facilitate the cost that was sought by the parents. Usually judges do not identify themselves as textualists or Purposivists however combine these methods of interpretation to obtain justifiable conclusions. In SW General Case., The Majority opinion represented a textualist point of view wherein it also included the elements of a textualists., the statute in dispute covered the question of the ability of federal employees to serve as acting officers. The Court went into the statutory history but considered it irrelevant to pronounce a judgment in this particular case and went on the hold that the acting officer's service violated the statute

under dispute. However, the dissent stated otherwise when the historical significance of the statute was taken into consideration but even the dissent had to agree that when the statute was read with the corpus juris the majority opinion was absolute. Cardozo has stated that the judges while interpreting cases do not stick to a tool of interpretation but it is coupled with several elements including the discretion of the judges. He has stated that judges interpret the law differently and different judgments can be apt for the same case but neither could be wrong or that there could be the same judgment made by two judges for the same case but the reasoning could be different and that does mean that one of the judgments should be an error. This is a very correct analysis made by Cardozo the author observed because the judge interprets the law and chooses the most apt result when he is faced with a number of options and this involves judicial discretion to a certain extent.

e) Judicial Review, Judicial Discretion and The Limitations on Such Discretion

Judges use methods of interpretation to assist them while interpreting statutory laws. There are five kinds of Interpretive apparatuses they are (a) Ordinary Meaning, (b) Statutory Context; (c) Canons of Construction; (d) Legislative History; (e) Evidence of the State. These methods usually overlap. But what happens when the judge has to go beyond the law. The judges are given ample discretion when it comes to pronouncing judgments but where is the line drawn as regards to this discretion. Cardozo while agrees with Judges having ample powers draws the line at the Judge having the right to do so. Judges do not have the right to make laws rather to create a temporary flux, to write a wrong the legislation did not predict as the legislators make 'reasonable laws to justify reasonable purposes using reasonable means.' When such a flux is created by the judiciary it is again the duty of the legislators to right such a wrong. In the Vishaka Judgment the way Cardozo imagined the law to transform is clearly exhibited. A PIL to enforce fundamental rights of women under art 14, 19 and 21 of the Constitution of India. This arose after the brutal gang rape of a social worker who worked on stopping child marriage in Rajasthan. The Constitution of India and the International Conventions and norms in place to guarantee gender equality and the right to work with human dignity dictated that immediate action was taken to ensure that safeguards against sexual harassment were in place firmly. Thus, the court enacted the famous Vishaka Guidelines with the stipulation that be in force implicitly until a legislation was passed for the same. These guidelines served to alleviate problems of sexual harassment in 1997 but the act i.e. Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) came into force in 2013. This is in the nature of what Cardozo perceived i.e. when there exists a need the judiciary shall work within the framework of the constitution to alleviate and redress where the legislature is yet to take action. In the case of Shah Bano. Case, the conflict between the judiciary and the legislature was apparent. The Supreme Court due to the lack of a Uniform Civil Code in the Country had applied a criminal statute while providing the judgment. The Legislature responded to it by introducing an Act that diluted the judgment of the Supreme Court. In this case the conflict is clearly shown when the courts have to act on a matter on which there is no codified law and judgments are as per judicial discretion. The Supreme Court had recently exhibited the changes in law through its judgments such as in Decriminalising Section 377, The Decriminalising adultery under the Indian Penal Code while still holding it as a ground of divorce the shift in the laws of the nation is through the Judiciary. The Indian democracy has entered into a much liberal period wherein such technical gaps need filled in and the most efficient way to do that is through the judiciary. Finally, there are also perils to the judiciary taking matters into its own hands as was the case in ADM Jabalpur. The Habeas Corpus Case is notorious for the violation of the Fundamental rights under Article 21 of citizens by the very courts to which such protection was entrusted to. However, cases like Keshavnanda Bharti, Minerva Mills and recent judgments of the supreme court has strongly established the limits of such judicial review and discretion. The courts do not have the power to change the law as Cardozo's accepted view of the law states that the courts merely work within the constitution framework and the judges interpret the law and in easy cases the law is applied as it is but in hard cases judicial discretion is applied. This maybe the difference in textualism and purposivism, sometimes not all cases can require a unilateral approach of either method of interpretation, at times a convergence of the principles is required and this depends on the judge and the manner in which he interprets the law. Judges usually do not use a particular method while interpreting statutes but rather use different tools as it serves best the case.

7. CONCLUSION AND RECOMMENDATIONS

Textualism and Purposivism are two important methods of statutory interpretation. They are different from each other vastly but are applied as tools in interpreting the statutes sometimes together both textual meaning and legislative history are considered in interpreting the statute. There is no hard and fast rule in methods of interpretation rather these are tools at the judge's disposal which he can employ in a manner it manifests the most desirable outcome or the more efficient option in a series of course of actions at the judge's disposal. Cardozo in his book st has defined four major methods of interpretation he has also stated that no judge can only be said to employ one over the other and that all tools of interpretation are of equal importance. The Judge does not make the law, the legislature makes the law but the court acts on the enforcement of law, each precedent shapes the way the legislative text is interpreted. At times in the narrow textualist approach at times it takes a broader connotation with purposivism. But at all times the interpretation of a statute is conducted in a manner to serve justice and at times there can be instances when the legislature did not predict the happening of an event and at those times to fill the unperceived gaps in the legislation the judiciary might intervene but there are limits to such intervention and as Cardozo has rightly stated, '*he is to draw his inspiration from consecrated principles.'*

8. RECOMMENDATIONS

- The Author suggests that standard drafting practices should be adopted, to encourage lucidity and effective correspondences.
- Shorter sentences, recognizable jargon and more clear grammatical structures must be utilized. Specialized or technical jargon to be avoided as reasonable possible.
- The Author suggests that the format of legislation needs to be modernized, and that there must be a more prominent utilization of headings to encourage clarity.
- Also, legislative enactments should start with a reasonable object statement, which would set out the aim and intent behind the Act.

- The author believes that upon interpreting Statutory provisions, the courts ought to be allowed to think about the object and intent behind the provision.
- The Author suggests that, in deciding the importance of a legal provision's courts ought to likewise be allowed to inspect, as aids to interpretation, a resource material including the significant parliamentary discussions, early drafts of the Act as a Bill, and preliminary reports.

9. REFERENCES

[1] Sir Frederick Pollock, *'Essays In Jurisprudence And Ethics'*, (1882) 85 P. 138.
[2] Carbonier, Jean, *'Droit Civil'*, 177, 12th Ed. 1979.
[3] Sarathi, P. Vepa, *Interpretation Of Statutes*, EBC, 4th Ed. 2003, P-110.
[4] Dickerson, *The Fundamental Of Legal Drafting*, (1965) Indiana Law Journal: Vol. 41: Is. 1, P. 19.
[5] Cardozo, B., *A Ministry Of Justice*, (1921) 35 HARV. L. REV. 113.
[6] Great Northern Ry. V. Sunburst Oil And Refining Co., 287 U. S. 358 (1932).
[7] Cardozo, B., *The Nature Of Judicial Process*, (1921) Yale University Press, P. 30-31.
[8] Pound, R., *An Introduction To The Philosophy Of Law*, (1922) 239.
[9] Dewey & Tufts, *Ethics in Jurisprudential Law*, (rev. ed. 1932) 276.
[10] Llewellyn, Karl N., *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-406 (1950).
[11] *Supra n.*, 7 *The Nature.*
[12] Whitefad, 'Modes of Thought', (1938) 194.
[13] Cardozo, B., 'The Growth of The Law', (1924) I42.
[14] Cardozo, B., 'Law, Literature & Other Essays', (931).
[15] Marbury v. Madison., 5 U.S. (1 Cranch) 137, 177 (1803).
[16] Antonine Scalia & Bryan A. Garner, Reading Law, (2012).
[17] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 445 (2005).
[18] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).
[19] Molot, Jonathan T., '*Re-examining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation'*, 96 NW. U. L. REV. 1239, 1251-52 (2002)
[20] William Baude & Stephen Sachs, '*The Law of Interpretation*', 130 HARV. L. REV. 1079, 1116 (2017).
[21] Cardozo, B., *The Nature of The Judicial Process*, 29-35 (1928).
[22] John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397.
[23] *Ibid.*
[24] Molot, Jonathan T., *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10. (2006)
[25] Kent, Kirk, Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas, 9 REGENT U. L. REV. 33, 41-50 (1997).
[26] State Of M.P. v. Munna Chaubey., AIR 2005 SC 682.
[27] Pound, Roscoe, *'Jurisprudence'*, Vol. II, 1959 Ed., Pp. 447-448.
[28] *Supra* n. 25.
[29] Posner, Richard A., *The Problems Of Jurisprudence*, 5 (1990).
[30] Fisher v. Bell, [1960] 3 ALL ER 731.
[31] Adler v. George., [1964] ALL ER 628.
[32] Re Sigsworth., [1935] ALL ER 789.
[33] Section 46, Chapter 89, Administration Of Estates Act, 1925.
[34] Corkery v. Carpenter [1951] 1 KB 102.
[35] The Licensing Act, 1872.
[36] Arlington Central School District Board Of Education v. Murphy., 548 U.S 291 (2006).
[37] NLRB v. SW Gen., 137 S. Ct. 935 (2017).
[38] Dilliar, Irving., How Far Is a Judge Free in Rendering a Decision? in The Spirit Of Liberty: Papers And Addresses, Learned Hand 107. (1925)
[39] Mohd. Ahmed Khan v. Shah Bano Begum And Ors., [1985] AIR 945.
[40] Navtej Singh Johar v. Union of India., (2018) 1 SCC 791.
[41] Joseph Shine v. Union of India, 2018 (7) SCC 1676.
[42] Section 377, Indian Penal Code, 1860.
[43] ADM Jabalpur v. Shivkant Shukla., 1976 SCR 172.
[44] Kesavananda Bharti V. State Of Kerala, [1973] AIR SC 1461.
[45] Minerva Mills v. Union Of India, AIR 1980 SC 1789.
[46] Loyd, William H., *The Equity of a Statute*, 58 U. PA. L. REV. 76

