The Relevance of the Rule of Recognition[+]

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I. Introduction

On a Hartian analysis, the Westminster constitution is centred on a rule of recognition, known as the doctrine of parliamentary sovereignty, which provides (in brief) that whatever the queen-in-parliament enacts is law. This fundamental rule establishes the legal supremacy of the legislature and proscribes judicial supremacy, thereby rendering unlawful any judicial assertion of authority to set aside parliament's enactments. Trevor Allan has disputed this Hartian account for many years.[1] Relying on a Dworkinian approach to legal reasoning, he contends that principles of political morality, rather than any absolutist rule of recognition, are constitutionally fundamental. Legislative supremacy is thus subject to the moral ideal of the rule of law: the legislature may have wide authority, but ultimately the rule of law justifies and requires the imposition of judicially enforceable limits on that authority.

The problem for this line of argument is that it is flatly inconsistent with the overwhelming consensus amongst judges, lawyers, officials and citizens in Westminster systems to the effect that parliament has substantively unlimited law-making authority.[2] Allan's latest work offers a new critique of the Hartian account, which seeks to avoid the objection just outlined.[3] His new argument is that parliamentary sovereignty may be the

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1 See for example T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) and T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993).

2 J Goldsworthy, *The Sovereignty of Parliament* (1999); see also R Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127.

3 T.R.S. Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 *Cambridge Law Journal* 685.

rule of recognition, but in practice it does not and cannot constrain legal reasoning. Common law methods of statutory interpretation, in which statutes are integrated with constitutional principle, demonstrate the practical irrelevance of the rule of recognition.

I shall argue against the thesis that the rule of recognition is irrelevant to legal reasoning. My argument proceeds in two stages. First, I contend that the rule of recognition recognises legislative authority and mandates interpretive approaches that facilitate rather than frustrate that authority. Allan's approach frustrates legislative authority and is therefore proscribed by the rule of recognition. Second, I respond to scepticism about the connection between legislative authority and the rule of recognition by contending that interpreters are able to, and in fact do, conform to legislative authority by interpreting statutes by reference to legislative intent. Thus, I outline an argument, contra Allan, that legislative intent is both real and capable of directing interpretation.

II. The irrelevance thesis

There is a consensus amongst British (and New Zealand) lawyers, judges, officials and citizens to the effect that the fundamental rule of their legal system is that whatever the queen-in-parliament enacts is law. Allan grants that this consensus exists but argues that the fundamental rule, the rule of recognition, is not practically relevant to legal reasoning. The rule is an irrelevant formality, he says, because it serves only to identify statutes as a source of law,[4] but has nothing to say about how they are to be interpreted. The rule is '[s]atisfied by the avowed application of duly enacted statutes, and violated only by their explicit rejection [and so] has little or no bearing on what an Act is understood to mean'.[5] Statutory interpretation, Allan argues, is not constrained by criteria for legal validity set out in the rule of recognition. Instead, and notwithstanding common talk of legislative supremacy, the legal meaning and effect of statutes is a function of dialogue between courts and parliament, in which common law constitutional principle is paramount.

For the rule of recognition to be practically relevant, and hence for the doctrine of parliamentary sovereignty to establish unqualified legislative supremacy, Allan contends that it would have to be the case 'that a legislative command, by dint of the "plain language" it deploys, can determine the outcome of particular cases, however cogent may be the

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4 'A rule of 'recognition' *identifies* a statute as a source of law; but the practical consequences are, necessarily, a separate matter of normative legal theory.' ibid, 687.

5 Note though that Allan still argues judges may and should strike down statutes they believe outrageously breach the rule of law: ibid, 704, n58.

reasons for a different decision in all the circumstances.'[6] He argues, however, that common law interpretive practice does not privilege literal meaning. Instead, judges interpret statutes to advance the statutes' purposes in a manner that is consistent with enduring constitutional principle. Therefore, ordinary literal meanings are properly qualified by reference to statutory purpose or constitutional principle and interpreters cannot determine what parliament has done without asking what it should have done.[7]

Judges find the true legal meaning of a statute, Allan argues, not by simply reading the language of the statute but instead by engaging with the fundamental principles of political morality that constitute the common law. The true legal meaning of a statute, he insists, is partly constructed by the judges. The judges do not have a wholly free choice in interpretation as the moral value of democracy requires they pay some respect to the general purposes that legislators seek to pursue by means of legislation. The role of the legislator is to choose a text that pursues some good purpose; the role of the judge is to read that text to do justice in the particular case, taking into account the statutory purpose and relevant constitutional principles. These principles form the legal order to which each statute is a particular, limited contribution and so constitute the interpretive context. The legal meaning of a statute turns on the judge's reading of that statute against that backdrop of principle. It follows, Allan says, that the enactment of a statute does 'alter the grounds of correct legal judgment; but the nature and scope of the change must be regarded as the joint responsibility of Parliament and the courts.'[8]

Allan argues that courts harmonise the statutory text, the legislative purpose and constitutional principle by taking statutes to be intended. This is not to say that the actual intentions of the legislators (or legislature) constrain or direct interpretation. Allan denies that any true legislative intent exists, and he insists that rather than fruitlessly searching for such an intent judges should engage in 'an imaginary dialogue'[9] with a fictional ideal legislator, who is taken to have chosen the statutory text, to endorse the purposes the text may advance, and to be committed to constitutional principle.[10] The dialogue, which is obviously sensitive to the judge's own moral evaluations, yields an interpretation that takes seriously the statute's text and purpose, but integrates both with principle. Thus, the dialogue with the fictional ideal legislator is a device to direct and constrain the

6 Ibid, 685.
7 Ibid, 688.
8 Ibid, 689, n13.
9 Ibid, 689.
10 Ibid, 690.

judicial moral judgment as to the meaning that should be assigned to the statute.

Legislators are presumably as reasonable and moral as judges, and so, Allan contends, judges may properly assume that all or most legislators will agree with the interpretation that the ideal legislator device generates.[11] And in the absence of any real or accessible legislative intent, interpreters have no choice but to make a judgment of political morality as to what, in context, the statute should mean. If judges refer to principles of political morality (including democratic fairness) to construct meaning from the statutory materials that Parliament has enacted, then, Allan insists, interpretive decisions may only be condemned or praised by reference to those principles and not by reference to the rule of recognition. No reasonable legislator would truly intend to breach fundamental principle and so judges may and should adopt interpretations that otherwise seem inconsistent with the statute's text or apparent purpose if this is necessary to avoid breach of principle. Therefore, Allan concludes, judges are legally entitled and indeed obliged to adopt radical interpretations of legislation to avoid injustice, where radical interpretations may appear indistinguishable from outright disobedience.[12]

Allan refers to the decisions of *Riggs v Palmer*[13] and *R v A (No 2)*[14] to show that common law judges do conform to the constitutional dialogue model and to illustrate how the ideal legislator device is to function. In his view, the judicial qualification of the literal or plain meaning of the Statute of Wills in *Riggs* was justified by the ideal legislator device. He accepts the prima facie plausibility of Jeffrey Goldsworthy's reconciliation of the decision with constitutional orthodoxy, in which the judiciary is said to act as the legislature's faithful agent, but argues that this shows the bankruptcy of that orthodoxy as whatever the formal explanation, 'in *substance* the meaning and application of a statutory text were heavily dependent on judicial evaluation, coloured by common law principle.'[15] Similarly, the decision in *R v A*, despite the apparent judicial belief that the decision was only justified because of s 3 of the *Human Rights Act 1998* (HRA), is said to be 'a perfect example of the constructive dialogue that intelligent interpretation, sensitive to constitutional principle, always entails.'[16] Allan and I agree that s 3 does not introduce a radically new interpretive

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11 Ibid, 702-3.

12 Ibid, 710-1, Allan (2001), above n 1, 217-8.

13 22 N.E. 188 (1889)

14 [2002] 1 A.C. 45

15 Allan, above n 3, 702, emphasis in original.

16 Ibid, 706-7.

method,[17] although he reaches this conclusion because he believes the common law already licensed such radicalism

> Although semantic considerations place genuine constraints on what is acceptable, they are rarely decisive. In practice, almost anything is "possible" when the requirements of justice are sufficiently pressing; and, properly understood the common law reaches precisely the same conclusion.[18]

Thus, Allan contends that statutory interpretation is an exercise in moral judgment directed through the constitutional dialogue device, with the legitimacy of various interpretations turning on their justification in moral principle rather than consistency with any rule of recognition. If this is true, then it is clear that parliament does not enjoy law-making supremacy, as the scope and effect of its enactments turns on the judicial response to those statutes, in which the court is guided by principle. Allan concludes that parliament 'is finally subject to the rule of law because it can change existing legal rules only by participating, through accepted modes of law-making, in the dialogue that seeks to *persuade* other citizens and officials of the need for change.'[19]

III. Authority in the constitutional dialogue

The constitutional dialogue model effectively provides that a statute's legal meaning and effect is determined by the judicial choice as to how it is to apply to a particular case. Allan's approach thus entails that the statute is a source of law but the law is not made until the judge chooses what meaning to assign to the statutory text in the particular case. It is true in one sense that the statutory text is only a source of law: the legal propositions that the statute instantiates, the content of which will turn on non-linguistic factors such as the pre-existing state of the law, are the law.[20] On the orthodox account however, statutes are interpreted in order to identify, declare, and apply the legal propositions that the statute already instantiates. Applying those propositions may require the exercise of authoritative choice, as when a statute introduces a vague standard or confers a discretion, but in the central case of statutory interpretation, the law exists already, before the judge is called on to interpret the statute.

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17 I take the view that, like its New Zealand counterpart, s 3 only modestly strengthens the pre-existing interpretive method: R Ekins, 'A Critique of Radical Approaches to Rights-Consistent Interpretation' [2003] *European Human Rights Law Review* 641.

18 Allan, above n 3, 707.

19 Ibid at 704.

20 J Finnis, 'Helping Enact Unjust Laws Without Complicity in Injustice' (2004) *American Journal of Jurisprudence* 16.

Allan's position is that statutes have no meaning until judges choose how to apply them to particular cases, which choice is an exercise in moral judgment informed, but not determined, by the semantics of the statutory text and its presumed purpose. The problem with this description of statutory meaning is that it cannot account for the authority either of law or of the legislature. The dialogue model provides that legislators may pursue general purposes by enacting general texts; however, in enacting a text they are able, at best, to initiate the law-making dialogue. The legislature thus provides judges with material from which to construct the legal propositions that actually settle what is to be done. Legislators choose a semantic shell which judges then rework, through the attribution of purposes, qualifications, etc., before finally settling on an interpretation of the text that is consistent with the judges' understanding of constitutional principle.

On this approach, the legislature has no authority to make law. Instead, the legislature acts to provide material that another institution takes into account when it chooses what the law shall be in particular cases (with the rules of precedent meaning that the choices of higher courts bind everyone). This is an exceptionally odd description of legislative practice. It requires us to accept that when legislators choose to enact a certain statutory text, no matter how specific, comprehensive, or contested, all that they could rationally understand themselves to be doing (as this is, in law, all that they would be doing) is to provide a template for future judicial creativity. Allan's protestations that semantic restraints are real and that the legislators' purposes constrain interpretation are not particularly comforting, especially given his belief that anything is practically possible when justice is at stake. If *R v A* was an example of dialogue in action, even if an extreme example, then we know full well what judicial-legislative "collaboration" may involve: legislators making specific choices designed to exclude judicial discretion, which judges then ignore, rationalising their rejection of legislative authority as a constructive dialogue about the content of the law.[21]

It is hard to understand how the constitutional dialogue model could be said to retain any authority for parliament. Legislative authority is the authority to make law by enacting statutes which instantiate the legislature's binding choice as to what shall be done, thereby introducing, modifying or repealing legal propositions. Legislative authority is thus a form of practical authority and to be a practical authority is to be able to provide those who are subject to your authority with a reason to act in a way they would otherwise not, together with a reason not to act on the relevant antecedent reasons. Thus, if a child has reason to do his homework, clean his room, play in the park, walk the dog, or spend time with his siblings, his parents are for him a practical authority as they may determine what he

21 See Ekins, above n 17, 646-8.

shall do by directing him to act on a particular reason. The parents' exercise of their authority does not merely entitle them to provide the child with an additional reason to consider or weigh up; instead their exercise of authority means that the child now has a decisive reason to act in the stipulated way and not to act on the other reasons he had before they exercised their authority.

If, as Allan argues, statutes are as authoritative as the reasons that justify their application then they are not authoritative, and the legislature that enacts them will be mistaken in its belief that it has authority to determine what shall be done. Each statute would collapse to its underlying justifications and the legislature would have authority only to choose the wording of the statutory text, which the courts would then deal with as they saw fit. This position, that common law methods of statutory interpretation entail the rejection of legislative authority and the authority of statutes, I find highly implausible.

Interestingly, Allan takes judicial authority much more seriously. His discussion of interpretation assumes that judicial decisions as to the meaning and effect of statutes are to be authoritative, that is, to be obeyed irrespective of their merits.[22] This assumption is in turn dependent on another assumption, namely that the practical implications of principles of political morality are either uncontroversial or easy to determine. Allan has to assume this if he is to have any prospect of grounding his claim that his interpretive approach subjects legislative will to the rule of law rather than the rule of judges. If, as I and others believe,[23] our political discourse is characterised by widespread (good-faith) moral disagreement, then the imaginary dialogue with the ideal legislator is a device to rationalise the judicial revision of statutes rather than a means to collaborate in law-making. Judges could not assume that legislators would necessarily agree with their moral judgment as to what the statutory text should mean. Further, judges have no monopoly on moral wisdom and therefore authorising judges to make statutes mean whatever they think they should mean, as Allan enjoins, cannot guarantee justice.

The interpretive method Allan argues for is not a dialogue. And it is not an alternative to legislative and judicial supremacy.[24] Instead it just is judicial supremacy, albeit rendered less obvious by the renunciation of an

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22 Elsewhere Allan has argued that immoral judicial decisions, like immoral statutes, are not authoritative. However, he hedges that conclusion with conditions that largely preclude disobedience and thereby provide that the judiciary is a true practical authority: Allan (2001), above n 1, 76, 220-2. For criticism, see Ekins, above n 2, 142-3.

23 Ekins, above n 2, 139-41 and Jeremy Waldron, *Law and Disagreement* (1999) chpt 8.

24 Allan, above n 3, 708.

explicit power of judicial review. Nonetheless, it may be that Allan is right and the common law approach to statutory interpretation is evidence that the doctrine of parliamentary sovereignty is an irrelevant formality. I have not yet proved that claim to be false. What I have shown, however, is that the interpretive method he enjoins entails two highly implausible conclusions: first, that parliament does not have legislative authority and statutes are not authoritative; and second, that despite the overwhelming consensus supporting legislative supremacy, in practice our legal system instantiates judicial rather than legislative supremacy. In the next section, I shall argue that the rule of recognition prescribes interpretive methods that respect legislative authority and so proscribes constitutional dialogue.

IV. The rule of recognition and statutory interpretation

Not every rule of recognition is directly concerned with legislative action or the legal validity of statutes. That is to say, rules of legislative competence are not necessarily the rule of recognition. It is a common mistake to think that a legal system's constitution is its rule of recognition, but as Raz has argued the rule of recognition is a fundamental legally unchangeable custom rather than a set of amendable rules.[25] Of course, rules conferring or recognising legislative competence are used to identify law, and to that extent they provide criteria that determines legal validity. But it is only the rule of recognition that provides criteria that are fundamental, that is, which cannot be explained by reference to a higher source of legal validity. This explains the difference between the doctrine of parliamentary sovereignty, which is both the central constitutional rule and the rule of recognition, and Article I of the US Constitution, which is a set of contingent constitutional rules identified as law by that system's rule of recognition.

The distinction between legally fundamental and legally contingent legislative rules is obviously important. We speak of parliamentary sovereignty because the basic, legally unalterable rule of our system recognises Parliament's substantively unlimited law-making authority. The scope of legislative action authorised by a less fundamental rule is likely to be subject to substantive restraints (as required to respect other rules identified by reference to the rule of recognition) and may be further restricted by constitutional amendment. However, setting aside the possibility of constitutional conflict, rules of legislative competence are likely to take the same form, and be relevant to legal reasoning in the same way, irrespective of whether or not they form part of the rule of

[25] J Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 152, 161-2.

recognition.[26] And that form is that the rule confers, or recognises, the legislature's authority to make law by enacting statutes. This may be a truism, but it has significant implications. Rules of legislative competence, whether fundamental or contingent, establish the legislature as a practical authority. Within the scope of its jurisdiction (substantively unlimited in the Westminster system), the legislature thus has authority to settle what is to be done by choosing standards to which other officials and citizens are legally obliged to conform.

It might be argued that the doctrine of parliamentary sovereignty, for example, makes no explicit mention of legislative authority and so it is question-begging to assert that the doctrine establishes the legislature as a practical authority. This line of argument would be mistaken as it cannot explain how legal actors understand the function of the legislature: officials and citizens understand the legislature to have authority to make law, not merely authority to contribute to a collaborative law-making process.

Constitutional settlements allocate authority amongst the relevant branches of the state. Typically, the settlement will authorise a legislature to exercise legislative authority, perhaps within certain constitutional restraints, and the judiciary to exercise adjudicative authority. It is central to the separation of powers, and in turn to the rule of law, that the conferral of legislative authority provides that the legislature has authority to settle in advance what is to be done, and it follows that its authoritative choices to this effect must be applied to particular cases by the courts, as well as other officials. Of course, not everything can be settled in advance, and legislatures will often enact vague standards or confer discretions on officials in order to ensure flexibility. But when and how (and if) to do so is the legislature's choice and is thus a contingent rather than a necessary feature of the exercise of legislative authority.

Most rules of legislative competence do not provide explicit direction as to how statutes are to be interpreted. The rules of competence simply provide that the legislature has legislative authority and stipulate a means for the exercise of that authority, namely enactment of statutes in proper form. The rules do entail, however, an obvious and fundamental restraint on statutory interpretation, namely that statutes must be interpreted consistently with the legislature's authority, that is, to respect and facilitate the exercise of legislative authority rather than to frustrate and usurp it. The restraint is obvious as statutory interpretation is plainly secondary to statute law-making. The rule that provides for legislative authority (whether it is the rule of recognition or not) sets out general criteria to identify legal propositions to the effect that the legislative choices disclosed in enactments

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26 J Goldsworthy, 'Parliamentary Sovereignty and Statutory Interpretation' in Rick Bigwood (ed), *The Statute: Making and Meaning* (2004) 187.

are the law. Statutory interpretation is just the identification of those choices in order to enable the legislature to fulfil its constitutionally mandated function.

Legislative authority is, as I have noted already, exercised through the enactment of texts. The nature of language is therefore highly relevant to how officials should go about trying to understand the exercise of legislative authority. Disagreements about language and about how best to identify and implement legislative choices may explain some legitimate divergence amongst different approaches to statutory interpretation. However, all these disagreements are subject to an overriding constraint: an interpretive approach is only constitutionally legitimate to the extent that it is consistent with the constitutional authority of the legislature. An approach that breaches this constraint imposes an unlawful restraint on legislative authority and fails to give effect to propositions of law (that is, those chosen by the legislature) that are valid pursuant to the rule of recognition.

I argued above that Allan's constitutional dialogue approach is inconsistent with legislative authority and in effect transfers that authority to the judiciary. If my argument to that effect was sound then it follows that the constitutional dialogue approach is proscribed by our rule of legislative competence, which is also the rule of recognition. Thus, the rule of recognition is not practically irrelevant but instead posits a basic constraint on interpretation, namely that it must respect legislative authority.

V. Scepticism about legislative intent

My argument thus far strongly suggests Allan's irrelevance thesis is false. However, it is still open to Allan to argue that interpretation simply has to be an exercise in moral judgment because no other alternative is available; that is, because it is impossible for interpretive methods to respect legislative authority as I have outlined itAnd in fact this is what he does argue. The traditional explanation for how statutory interpretation facilitates rather than frustrates legislative authority is that the intention of the legislature, as expressed in the statute, constrains interpretation. If this explanation is sound then legislative authority is possible. Therefore, for the constitutional dialogue approach not to be proscribed by the rule of recognition (that is, to make out the irrelevance thesis) Allan needs to establish that legislative intent is incapable of constraining interpretation.

He advances two arguments to this effect.[27] The first is an argument of principle, namely that the rule of law requires the meaning of the text to be chosen by the courts in the light of context rather than to be derived from the (possibly inaccessible) intentions of legislators. The argument is expressed thus:

> It is... a cardinal principle of common law (reflecting the principle of the rule of law) that a statute's authority attaches to its formally enacted text, which must be distinguished from the intentions, desires or purposes of legislators, whether regarded as separate individuals or as a collective body sharing common aims. Such intentions and purposes are pertinent only insofar as they illuminate the text... Legislative supremacy is therefore a matter of the special authority of the canonical text, which must be accorded an officially approved meaning, for all practical purposes, by the courts of superior jurisdiction. Legislative supremacy, or parliamentary sovereignty, therefore entails a counterbalancing judicial sovereignty: the consequences of formally enacted texts for the content of people's rights and duties are ultimately a matter of judicial determination.[28]

I agree that legislative authority is exercised only through the enactment of statutes, not through the formation of intentions unconnected to a statutory text; however, I argue that we need to refer to intent to understand what has been expressed by the words used. The words alone provide a set of semantically plausible alternative sentence meanings, from amongst which we conform to that meaning we believe was intended. Allan takes the authority of the text, as opposed to unexpressed intention, to require authoritative interpretation, and this in turn he takes to support the conclusion that legislative supremacy entails a counterbalancing judicial sovereignty. The last step is a non sequitur and demonstrates the sceptical conflation of judicial finality with infallibility that Hart critiqued.[29] Judicial decisions on interpretation are authoritative because the courts have adjudicative authority. It does not follow that the courts have sovereignty to choose what statutes should mean. They have lawful authority and duty to apply statutes to disputes. Their mistaken interpretation of a statute is indeed authoritative but this does not mean that they are not legally obliged

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27 I will not reconsider his claim that judges may safely assume that legislators will approve of whatever radical or creative reading judges choose: as I have argued already, that claim is plainly false.

28 Allan, above n 3, 687

29 H.L.A. Hart, *The Concept of Law* (1994, 2nd ed) 141-7.

to identify and implement the legislature's authoritative choices, as communicated in the intended meaning of the statutory text.

Allan's second objection to legislative intent is the practical argument that there is no single legislative intent (that is, an intention of the legislature) and that the intentions of particular legislators are inaccessible. His reasoning is seen in two extracts:

> In the absence of a single speaker, whose intentions or expectations can be reliably ascertained, a statute can only be accorded an "intended" meaning in the sense of purpose and structure: we can seek the "intention of the statute" by ascribing a meaning to particular provisions that makes sense of its enactment as a purposive communication, consistently construed. The relevant intention is essentially metaphorical, since it does not belong to any particular author, whether draftsman or legislator; but the mode of constructive interpretation its delineation requires is a necessary means of loyal co-operation between judge and Parliament.[30]

> The practical difficulties in divining particular legislators' hopes or expectations (or their counterfactual equivalents) and the arbitrary nature of the choices involved in constructing their institutional counterparts – problems Dworkin's discussion so clearly reveals – are matched by constitutional objections of equal gravity. The citizen should, in principle, be bound by the formally enacted text, reasonably construed in the light of the apparent legislative context. The rule of law is plainly distinct from the rule of the legislator whose intentions lack firm moorings in the pertinent text.[31]

The first extract makes plain the implications of Allan's belief that there is no real legislative intent. The courts are enjoined to interpret each statute as a purposive communication – but not a communication from real legislators. Instead the statute should be read as though it were a communication from the judge to himself, via the thought experiment of the ideal legislator. This line of reasoning leads to the mysterious conclusion that intention is metaphorical (although for what is never made clear[32]) but

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30 Allan, above n 3, 693.

31 Ibid, 696.

32 P Craig, 'Legislative Intent and Legislative Supremacy: A Reply to Professor Allan' (2004) 24 *Oxford Journal of Legal Studies* 585.

that interpretation still somehow involves loyal cooperation between courts and Parliament.

The rule of recognition prescribes interpretive methods that respect legislative authority. The traditional common law position, with which I agree, is that respect for legislative authority requires intent-centred interpretation. The constitutional dialogue approach does not respect actual legislative intent and thus frustrates legislative authority and is proscribed by the rule of recognition. To avoid this conclusion, which is fatal to his claim that the rule of recognition is practically irrelevant, Allan argues that it is unprincipled and impractical to refer to legislative intent. His argument from principle is either wrong, as it presupposes that law is just what judges say it is, or redundant, as it collapses into the practical argument that there is no legislative intent. That practical argument I have yet to address. It must be addressed, however, because if his scepticism is well-grounded then that would strongly suggest that legislative authority is incoherent (as unattainable) and therefore the rule of recognition, with its injunction that interpretation respect authority, would indeed be irrelevant.

The second extract confirms Allan's reliance on the standard critique of legislative intent,[33] advanced most notably by Dworkin,[34] in which the facts that intentions are mental states and that there is no such thing as a group mind are taken to warrant the conclusion that groups are incapable of forming intentions. Groups may be said to have intentions only if conventions exist to attribute the intentions of a particular individual to the group. Legal systems use conventions to identify legislative acts, but no such conventions enable the identification of legislative intent.[35] Therefore, 'legislative intent' is at best a shorthand reference to the intentions of most or many individual legislators: there is no true legislative intent. Those who argue for a single legislative intent face the onerous task of combining individual legislators' intentions into an artificial aggregation. This task is hopeless as legislators hold multiple, inconsistent intentions (which must be either hopes or expectations) and there is no non-arbitrary means of combining these intentions into a single institutional intent.

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33 My account of the standard skeptical critique is drawn in part from Andrei Marmor, *Interpretation and Legal Theory* (1992) 161-2.

34 R Dworkin, *Law's Empire* (1986) 313-37; see also Waldron, above n 23, 124-45.

35 This point is not uncontested: see J Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism', in J Goldsworthy and T Campbell (eds) *Legal Interpretation in Democratic States* (2002), 45; and J Evans, 'Questioning the Dogmas of Realism' [2001] *New Zealand Law Review* 145, 160. However, I make no claim that we have any such conventions.

The pivotal assumption in the standard critique is that without conventions groups may not form intentions. However, work in the philosophy of action suggests otherwise. In the next two sections, I argue first that groups may form intentions without convention and second that application of that argument to legislatures suggests that legislative intent is not fictional. This line of inquiry is intended to support my claim that legislative intent is able to constrain statutory interpretation and facilitate the exercise of legislative authority. I substantiate that claim further in section VIII, explaining how legislative intent may direct interpretation.

VI. The structure of group action

Talk of group intentions or beliefs is sometimes explained as mere shorthand used to refer to the intentions or beliefs of most members of the group.[36] Margaret Gilbert has termed such accounts of collective action 'summative'.[37] The fatal objection to summative accounts is that they cannot distinguish coincident intention from jointly held intention. It is futile to explain group action by pointing to the fact that several individuals acted in a certain way, unless those individual actions are in some way coordinated, and, crucially, understood by the individuals involved as constituting a group action. As Searle has argued, no strategy of noting isolated individual intentions can explain how those individuals act together.[38] The strategy cannot be salvaged by stipulating common knowledge of the various intentions as, again, the sum of many individual intentions is many individual intentions, not joint intention.[39]

The summative accounts may derive what plausibility they have from the dual meaning of "group". We use group to refer either to associations of individuals united by their possession of a common feature (the group of taxpayers earning over $100,000 per annum, etc.) or to associations united by their coordinated pursuit of a common purpose.[40] Summative accounts explain our talk of intention in respect of groups of the first type only, because such groups do not seek to engage in coordinated action towards some end and therefore do not truly form group actions or intentions. However, not all groups are of the first type and it is only purposive groups in which I am interested.

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36 For example: A Quinton, 'Social Objects' (1975) 75 *Proceedings of the Aristotelian Society* 67.

37 M Gilbert, *On Social Facts* (1989) 19.

38 J Searle, "Collective Intentions and Actions" in P Cohen, J Morgan and ME Pollack (eds.) *Intentions in Communication* (1990) 401, 402-406

39 Gilbert, above n 37, 273.

40 J Finnis, *Natural Law and Natural Rights* (1979) 150-53.

A purposive group is formed whenever two or more persons act to realise a shared purpose. The common purpose must require their joint coordination, such that they have reason to act to secure an end that neither is able or willing to pursue alone. We know from observation and experience that group action is real and in some sense distinct from individual action. Group action is also obviously irreducible in that, contra the summative accounts, we cannot explain all that is going on just by noting the series of individual acts.[41] The cooperation of more than one person towards some shared end is central to the reasoning of each person and both/all persons understand their individual action to be in some way part of a group act.

Bratman advances an account of joint intentional action that explains joint intention not as a mental state existing in any one mind (including the mind of a super-agent, as there is no such mind) but instead as a state of affairs that exists when two or more persons adopt a particular interlocking set of intentions.[42] That state of affairs, which forms the basic structure of shared intention, is as follows:[43]

> We intend to J [joint action described in cooperatively neutral terms] if and only if:
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> 1. (a) I intend that we J and (b) you intend that we J.
> 2. I intend that we J in accordance with and because of 1(a), 1(b), and meshing subplans of 1(a) and 1(b); you intend that we J in accordance with and because of 1(a), 1(b), and meshing subplans of 1(a) and 1(b).
> 3. 1 and 2 are common knowledge between us.

This structure is built on Bratman's account of individual intentions as commitments to future action which, while revisable, are sufficiently stable to enable us to act as planning agents. When two or more persons (his model is explicitly limited to simple social settings lacking authority structures[44]) seek to act together, they form intentions with respect to their putative joint action, which intentions, while individual (as there is no group mind), are common to both parties and by virtue of their content and contingency enable the agents to plan joint action. That is, my intention that we J interlocks with your intention to similar effect and this means we may rationally plan on the basis that we will J, although that commitment may be revised or abandoned prior to action.

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41 J Finnis, 'Persons and their Associations' (1989) *Aristotelian Proceedings Supplementary Volume* LXIII, 267, 271-2.

42 M Bratman, *Faces of Intention* (1999) 111.

43 Ibid, 121.

44 Ibid, 94.

Bratman's account of the structure of joint intentional action is sophisticated and controversial. However, for the purposes of this discussion, I will assume that his account is broadly sound. What I want to consider now is how the account of two agents forming a joint intention might be extended to include more complex groups, especially those that use authority procedures.[45]

Joint intentional action requires unanimous intention. That is, for a group to J all members of the group must intend that the group J. (This is not to say an individual's intention may not be coerced.) Groups build authority structures, and engage in competitive behaviour,[46] on top of this necessary starting point of unanimity. A group uses an authority procedure to select the plan of action on which it is to act when all members of the group form interlocking intentions to the effect that the outcome of the application of the procedure (say, majority voting) shall count as the group's act. We may thus distinguish two types of group intention. The first is the primary or particular intention of the group, which is the intention (the plan, the means-end package) that explains and defines the particular action of the group on this occasion. The second is the secondary or standing intention of the group, which is the group's general intention to use certain procedures to determine its particular intentions: that is, the group's general plan to select particular plans, which are to be the means to its defining purpose. We understand the particular intentions of a complex group in light of its standing intentions.

Explicit procedures may stipulate that one member's intentions count as that of the group (the intention of a CEO in respect of a company for example). Such formalised procedures need not be posited, however, for an individual member's intention or action to count as that of the group. Indeed, most groups that adopt explicit attributive rules do not employ a full set of such rules and yet their group acts are not exhausted by reference to the rules. Hence, a company may have explicit rules in respect of the CEO, but the act of a company clerk or the guard at the gate may still, without convention, count as acts of the group. And the same individual act may also count as the act of multiple groups, again without the need for procedures.

That procedures are not fundamental to the structure of group action further confirms that they are not necessary for an individual act to count as a group act. Still, it is not immediately clear what else may determine whether an individual act counts as a group act. Indeed, if an act counts as

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45 See also S Shapiro, 'Law, Plans and Practical Reason' (2002) 8 *Legal Theory* 387

46 Both chess and prize-fighting are instances of competitive behaviour structured within unanimous joint intention. See Bratman, above n 42 , 107, 122; Searle, above n 38, 413-4.

a group act only if the group intends it to so count, then it would seem impossible to identify an act as a group act without the use of procedures: if the group intends the particular act to count as its act it would seem to have adopted a procedure to that effect. The problem dissolves when we note that group action is the coordinated pursuit of a common purpose by means of a jointly accepted plan of action. The group acts when its members execute the plan of action that the group has adopted (whether directly as with a simple group or via procedures as with a complex group) and it follows that each individual action taken to execute the plan counts as a group act. The member of the group intends his particular act to be a means to the end of executing the common plan. His individual action thus stands as means to the end of joint action and is only explicable as part of the larger group act.

A group act is action by members of a purposive group in accord with a proposal for action (the shared intention that we J, with meshing subplans) that is common to and accepted by them. In the central case, each member of the group adopts the common proposal as his or her plan for coordinated action, and the group acts when that proposal is executed by members of the group. The plan needs to be adopted and acted on by each member of the group as and when his or her participation is called for. However, the members need not accept the plan for the same reasons. One may accept it because he wants all the ends that the group act realises; another may accept the plan because he or she wants only one such end, and is prepared to accept the others (which are equally part of the group plan) as unwanted side-effects.[47]

It follows that members of the group need not adopt the same full chain of reasoning in order to act together as a group: all they need is to coordinate their action on a proposal they know will occupy the required place in the planning of each other member of the group. The act is constituted by their coordinated action and defined by the common proposal. And as the plan is a proposal common to them, which need not be synonymous with the full chain of reasoning of any member, in which they may participate for their own reasons, the group act has a certain detachment and existence apart from the individual intentional action of each member.[48] Their actions constitute the group act and their interlocking intentions enable joint action, but the intention of the group, which defines the group act, is to act on the proposal that was common amongst and adopted by the members of the group.

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47 Finnis, above n 20.

48 Finnis, above n 41, 271-3.

VII. The act of legislating

The legislative assembly is a group that exists to fulfil the legislative function.[49] That is, the legislature exists to oversee the content of the law, with authority to choose what the law shall be. The defining end of the assembly is thus the fulfilment of the legislative function, which is to be in a fit state to legislate on particular occasions if need be. The standing intention of the group is to seek this end by means of a set of procedures – including majority vote on a proposal for legislative action – that frame the group's decision-making and thus stipulate how the group is to legislate in particular cases. The particular intention of the group defines and explains the particular legislative act and arises from within the standing intention, which is the structure the group has adopted as its means to the end of being ready and able to legislate. Each legislative act may be said to be a more specific means to that end. However, a particular legislative act is best seen not to be a means to the end of fulfilling the legislative function but rather to be an instantiation of that end. Thus, the group intends to fulfil the legislative function by means of this set of procedures and its legislative action in any case is an instantiation of the legislature acting as it should, in fulfilment of its reason to be.

The assembly's standing intention, which arises out of the interlocking intentions of all individual legislators, is its plan to adopt particular plans, which is to say its plan for how to legislate on particular occasions. This standing intention is not what is ordinarily meant by the term legislative intent. Instead, legislative intent is taken to refer to the group's intention in a particular legislative act, that is, the means-end reasoning that explains and defines the act. I shall use the term in this way. However, the structure of group action is such that the legislature's particular intentions, like those of any other group, may only be understood by reference to the standing intention within which they are framed and formed. I claim that the standing intention of the assembly entails that the legislature's particular intention in any legislative act is just the plan that the enactment sets out for the community, understood as if it had been put forward by a sole legislator or to be chosen by a sole legislator. The legislature is structured to act only by adopting such plans of action. Thus, its intention in the particular legislative act is just to choose the proposal that has been put to the assembly.

The best explanation for how legislators consider and respond to particular legislative proposals, and thus how they seek to fulfil the legislative function, is that the legislators intend the legislature to act like a sole legislator. I do not suggest that each legislator consciously forms the

[49] For ease of analysis and exposition, I set aside complexities relating to bicameralism, royal assent, etc.

intention "I intend that we legislate like a sole legislator". Instead, I claim that all share an understanding of what it is to legislate (of what legislative authority is for) central to which is the idea of a coherent, reasoning authority choosing what shall be done. Legislators intend that they shall legislate, together not individually, and that is to aspire to be an authority that responds to reasons by choosing standards that are means to valuable ends: in short, to act like a sole legislator.

The legislative process is structured to put before the assembly proposals for legislative action that are fit to be chosen by an authority, by an institution that exists to provide standards for action that serve to coordinate citizens to good ends. Legislators consider and respond to those proposals on this footing, taking each complex proposal (i) to rest on a chain of reasoning that is transparent, (ii) to purport to be coherent, and (iii) to be intended to be a means to valuable ends. The focus of legislative deliberation is thus a proposal that is fit to be chosen by a sole legislator. The legislature acts on the intention that defines the proposal if, in accord with the group's standing intention, a majority votes "aye". The legislative intent thus arises from the intentions of all legislators but is not reducible to the intention of any one or more legislators

Legislative intent is the legislature's intention in a particular legislative act, which is the proposal for legislative action that it adopts. The proposal for legislative action is the plan that the statute as enacted is to set out for the community, being a set of standards adopted for reasons as a coherent means to the end of certain valuable states of affairs. The legislature intends (its standing intention is) to choose to adopt proposals that are put before it and for which a majority of its members vote. It thus intends to act like a sole legislator and on a majority vote the legislature chooses the open proposal.[50]

VIII. Legislative intent and interpretation

The legislature has authority to choose the content of the law and the proposals that it enacts are its choice as to what shall be law. Legislative authority is coherent and possible, and the rule of recognition practically relevant, because interpreters may, and are duty-bound to, identify and give effect to the proposal on which the legislature acted, which is the legislative intent. The application of semantic conventions alone is not sufficient to identify the meaning of statutory texts.[51] Instead, the statutory text must be read to identify the proposal that was open to the legislators, which is set

50 The account of legislative action that I have set out here is incomplete in many respects. I attempt a more detailed exposition and defence in an unpublished MPhil thesis entitled '*Legislative Intent and Group Action*'.

51 Cf Waldron, above n 23, chpt 6.

out in the intended meaning of the text. In this section, I explain why interpreting texts requires reference to the intentions of their authors, thus providing further indirect support for the claim that legislatures may form and act on intentions, and outline how interpreters may and should identify and give effect to the legislative intent

Semantic conventions alone do not determine a text's meaning, but instead direct readers towards a range of possible sentence meanings. Within this range, readers may not choose the semantically plausible meaning they would like the words to bear (or think the words ought to bear) but instead seek to identify the particular meaning the author intended to communicate. Intended meaning must have this primacy over sentence meaning if we are to use language to communicate with one another. Speakers and authors may use words in a novel or mistaken fashion, that is, either in a way that is not clearly explicable by, or is simply inconsistent with, one or more conventions. Such language use does not necessarily result in meaningless garble (although that is possible), as listeners will strive to understand what the speaker or author intended to convey through his unorthodox use of language. The correction of grammatical mistakes, the implication of relevant terms or phrases, and the recognition of ellipsis are all justified in this way, by reference to judgments that readers make as to the intentions of the author.

The meaning of a text is thus its intended meaning. However, my position is certainly not that language is private.[52] When intended meaning diverges so sharply from linguistic conventions that competent language users, who have access to all relevant information, are simply unable to judge what meaning was intended, then the text can be said to be meaningless even if it could be given a semantically plausible meaning that the author did not intend. Conventions do not determine meaning but they do provide the broad framework within which we judge what meaning was intended.

If legislators are to be able to jointly exercise legislative authority, interpreters must identify as the legal meaning of the statutory text the meaning which appears, on the basis of the available evidence,[53] to have been open to the legislature and hence to have defined its act. The alternatives – arbitrarily treating one semantically plausible meaning as the plain meaning, choosing the semantic meaning one prefers, or ignoring semantic constraints entirely – are inconsistent both with legislative

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52 Cf Marmor, above n 33, 25.

53 My defence of legislative intent does not necessarily entail that interpreters should consult legislative history: there are good prudential reasons not to do so and indeed examining legislative history may be less than helpful as evidence of legislative intent, if, for example, interpreters fail to understand it or if the practice of using it corrupts subsequent legislative deliberation.

authority and with our experience of language use, in which communication is possible despite the insufficiency of semantic and linguistic conventions. Therefore, the legal meaning of a statutory text is its intended meaning, which is the meaning of the proposal on which legislators acted.

It might be argued that context rather than intent determines which semantically plausible meaning a text should be taken to have. In fact, however, context is used as evidence of authorial intent. Context is not conventional but is instead the set of judgments we make in any setting, however novel, as to what the relevant background (including what people tend to value and how they tend to act) suggests a person's utterance is likely to mean. Hence when language is used in a certain setting we usually judge a certain meaning to have been intended. But context is defeasible as other evidence may beat back the conclusions we draw from it. That is why the discovery of new information about a speaker may justify understanding his language differently then would have been the case in context before the speaker's peculiarities were known. If context is extended to include all such information then it subsumes, rather than repudiates, intention. Thus, context enables us to understand a speaker's intention in using words in a certain setting.

The primacy of intended meaning does not mean evaluative reasoning has no role in interpretation. Timothy Endicott has argued that we cannot understand a term until we see what counts as a good instance (paradigm or central case) of the term and that its application beyond the central case does not involve applying a set of features common to each instance, but instead involves extension by analogy, whereby certain similarities are taken to justify particular extensions.[54] Evaluative reasoning may thus be necessary to determine the central case of a term and to justify its extension. As he puts it: 'what counts as a good instance depends on the context in which the word is to be used, and on the concerns and purposes which justify the use of the word.'[55]

I agree that evaluative reasoning is sometimes needed to understand language. However, Endicott's account seems to me ambiguous as to whether the purposes that direct a term's application are those of the person using the language or those that the language ought to have been used to pursue.[56] In my view, the former alternative must be preferred. Language users seek to communicate their own thoughts and choices. It may be that the meaning of certain terms cannot be understood without evaluative reasoning, but such reasoning is not unconstrained: instead, the evaluative

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54 T A O Endicott, 'How to Speak the Truth' (2001) 46 *American Journal of Jurisprudence*, 229, 234

55 Ibid

56 Ibid, 234-5, 238, 242, 248.

reasoning is detached in that it determines the central case of an author's terms in light of her purposes and concerns.

My argument, however, is not that meaning collapses to the author's purpose. The intended meaning of a rule will be a means to a further end, which is the overall result the author hopes the rule will achieve. Understanding that desired end will often clarify the distinctions the author intended to draw, but it does not follow that the end determines meaning. That would be to abandon the intended meaning of the rule (the linguistic means) and to reformulate it into whatever alternative form would best pursue its underlying purpose. Replacing intended meaning in this way would ignore the logic of language use, disrespect the author's choice of means to end, and be hopelessly unstable. To the extent that the statutory text's apparent purpose is not part of the proposal that defines the legislative act, a judge could not rely on purpose to justify ignoring intended meaning without thereby failing to respect the authoritative group act.

Contra Dworkin, intended meaning is also distinguishable from the author's hopes or expectations as to how his language will be applied.[57] Expectations are often, but not always, good evidence of what an author intended a term to mean. Plainly, an author may hold false application beliefs without this affecting meaning.[58] Authors may also misunderstand the implications of their language or, as is very often the case, may intend to use a general term, the full extent of which they cannot list or imagine. Thus, the rule that prohibits dangerous weapons is not limited to the weapons that the rule-maker contemplated in formulating the rule or to which he hoped or expected the rule to apply.[59]

The intended meaning of a statute may also, in exceptional cases, diverge from the legislature's practical choice as to what is to be done. This possibility is endemic to rule-based governance and arises from our limited foresight of the future. The legislature's practical choice is the means/end package that the intended meaning of the relevant rule was formulated to capture. The legislature's language may fail to capture its practical choice if the intended meaning of the statute constitutes a rule that either omits cases to which the choice applies (where the rule does not apply but the reasons for the rule apply) or captures cases to which the choice does not apply (where the rule applies but the reasons for the rule are absent or outweighed by a previously unforeseen factor).[60]

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57 Cf, L Alexander, 'All or Nothing at All? The Intentions of Authorities and the Authority of Intentions' in Andrei Marmor (ed), *Law and Interpretation* (1995) 357, 369-70.

58 Evans, above n 35, 148.

59 L Fuller, *The Morality of Law* (1969), 84; see also ibid, 147-8.

60 Evans, above n 35, 154-9.

Where practical choice and intended meaning diverge, we face a difficult choice as to how best to respect legislative authority. Conformity to intended meaning reduces the risk of interpreters wrongly limiting legislative choices; but failing to qualify intended meaning by reference to practical choice may often result in absurd outcomes that the legislature has not chosen. Within the common law tradition, in cases such as *Riggs*, courts seem on occasion to have exercised an equitable jurisdiction to qualify intended meaning by reference to the legislature's practical choice.[61] The making of such equitable exceptions is consistent with legislative authority – and therefore with the rule of recognition – if the exceptions are justified by reference to the legislature's practical choice, which is constitutive of the authoritative group act.

IX. Conclusion

The rule of recognition establishes the legislature as a practical authority and thereby imposes the basic but fundamental constraint on statutory interpretation that it must facilitate rather than frustrate the exercise of legislative authority. Allan's constitutional dialogue model is inconsistent with this stricture and is therefore proscribed by the rule of recognition. It follows that the thesis that the rule of recognition is practically irrelevant may only be sustained if statutes simply cannot be interpreted so as to respect legislative authority. I take legislative authority to be possible and Allan's model to be false accordingly. However, a complete refutation of the irrelevance thesis requires an explanation as to how interpretative methods may facilitate legislative authority.

I have outlined the shape that such an explanation should take, arguing for the traditional view that interpreters are able to conform to legislative authority by interpreting statutes in accord with legislative intent. When the act of legislating is understood as a coordinated group act legislative intent seems not to be fictional. And this means that in practice, as the proposal that was open to legislators defines their joint act, so the legal meaning of statutes is their intended meaning, subject to possible divergence with the legislature's practical choice. There seems good reason then to continue to accept the relevance of the rule of recognition.

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61 J Evans, 'A Brief History of Equitable Interpretation in the Common Law System' in Goldsworthy and Campbell (eds), above n 35.