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The Art of Statutory Construction: Texas Style

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THE ART OF STATUTORY CONSTRUCTION: TEXAS STYLE[1]

I. INTRODUCTION

A. An Art: The Nature of a Statute

"Art" is defined as a "skill acquired by experience, study or observation."[2] Nothing better describes the act of lawyers and judges attempting to discern the legislative intent of a statute. For it is through the subordination of the judiciary to the legislature that our laws are assured their democratic pedigree.[3] Yet, many times the text may be unclear in the context of a particular fact pattern and a statute's meaning must be drawn from other sources. Thus, the court and lawyers must follow the legislative command by applying the statute's language or referring to the legislative intent or purpose as discerned through the legislative history or canons of construction.[4]

So, there is an assumption of legislative supremacy, but also the necessity of notice. It is a fundamental basic of jurisprudence that a person cannot be bound by a law of which he or she has no notice.[5] Therefore, statutory law must be set forth in a determinative string of words of intelligible scope, communicable content and finite length.[6] Yet, such words in the context of specific facts before the court may be elusive and in which judicial reference to legislative meaning is almost fictional. In all cases, the overwhelming principle is to not open the door to judicial lawmaking.[7]

However, such a goal is easier said than done. Among scholars, there is general agreement that there are three basic approaches that can be used by the judiciary to determine what a statute means: (1) by legislative intent, *i.e.*, intentionalist, or (2) by textual meaning, *i.e.*, textualists, or (3) by a more dynamic, pragmatic assessment of institutional, textual and contextual factors, *i.e.*, a dynamic approach.[8] Yet, these scholars identified the real problem with "theories" of how judges and lawyers should determine the meaning of a statute by pointing out:

> This ignores the pragmatic insight that our intellectual framework is not single-minded, but consists of a "web of beliefs" interconnected but reflecting different understanding and values. As a consequence, human decisionmaking tends to be polycentric, spiral and inductive, not unidimensional, linear and deductive. We consider general values and the strength of each in the context at hand, before reaching a decision.[9]

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[1] This is an adaptation of my article published at 64 *Baylor Law Review* 342 (2012).
[2] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 69 (11th ed. 2006).
[3] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, 113 (1990).
[4] ABNER J. MIKVA AND ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS, 4-5 (Aspen Pub., 1st ed. 1997).
[5] MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION, 7 (LEXIS Law Pub., 1st ed. 2000).
[6] *Id.* at 15.
[7] ABNER J. MIKVA AND ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS, 50-51 (ASPEN PUB., 1ST. 1997).
[8] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION, 219 (Foundation Press, 2nd ed. 2006).
[9] *Id.* at 249.

Thus, understanding and engaging in statutory construction is an art and not a science. There is no "right" formula that will always yield one concrete and correct result. Thankfully, though, due to judicial experience and the preservation of judicial opinions within a particular judicial system, they can be analyzed by lawyers and judges alike to discern particular "canons" or "rules" of construction that have been utilized time and again by the judiciary to resolve particular types of statutory ambiguities.

It is critical to understand that these canons are not ends in themselves, but rather serve as a means to get to the intent of the legislature.[10] They are merely guideposts in determining legislative intent. Canons of construction are no more than rules of thumb in determining the meaning of the law;[11] they are simply a "by-product" of *stare decisis* and precedent. If a certain type of ambiguity arises in a statute, the Supreme Court resolves it by using "x" rational. If in another statute with the same or similar factual controversy arises, the doctrines demand that the same rationale be used. However, as the Texas Court of Criminal Appeals has stated, the canons are merely rules of logic in the interpretation of text.[12]

Yet, there is no hierarchy of the canons of construction, and multiple canons may apply to a particular ambiguity. The lawyer or judge must thereby be ultimately guided by common sense, seeking simply to fulfill the constitutional right of the legislature to set forth the law while bearing in mind what interpretation most likely gives their notice to all as to what was prohibited or allowed. Once again, it is an art and not a science. Has the Texas Supreme Court recognized that its job of "interpretation" can have a dramatic impact on what a statute ultimately means? Yes! As early as 1864, the Texas Supreme Court stated that there were, "two **limitations upon legislative power**: (1) the relevant constitutions, and (2) the power of a court to construe what the law means or what it actually prohibits, allows or requires to be done…"[13]

Therefore, determining the meaning of a statute is done on a case-by-case basis with mere guides to aid the judge or lawyer in determining what the legislature meant to set forth as a standard of conduct. It cannot be achieved by a cursory, quick review of the words chosen, but it takes patience, time, thought and deliberation to achieve a meaningful explanation of the legislative intent. It is simply a skill, *i.e.*, "the ability to use one's knowledge effectively and readily in execution or performance."[14]

B. As Contrasted By the Common Law

The Texas Supreme Court has held that the common law is not static and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in light of current conditions.[15] For the common law is not frozen or stagnant, but evolving and it is the duty of the court to

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[10] Chickasaw Nation v. U.S., 534 U.S. 84, 94 (2001); Alliance For An Open Society Int'l v. U.S. Agency for Int'l Dev., 430 F. Supp.2d 222, 246 (S.D.N.Y. 2006); Haffner v. U.S., 585 F. Supp. 354, *aff'd* at F.2d 920 (1984).

[11] Chickasaw Nation v. U.S., 534 U.S. 84, 94 (2001); Ct. Nat'l Bank v. Germain, 503 U.S. 249, 265 (1992).

[12] Boykin v. State, 818 S.W.2d 782, 785 n.3 (Tex. Crim. App. 1991).

[13] Ex Parte Abraham and Mayer, 27 Tex. 573, 576 (1864)(emphasis added); *see also* Boykin v. State, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991).

[14] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 1168 (11th ed. 2006).

[15] Horizon/CMS Health Care Corp. v. Auld, 34 S.W.3d 887, 899 (Tex. 2000); Whittlesex v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).