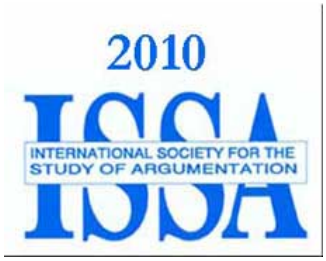
# ISSA Proceedings 2010 – The Argument From Legislative Silence




*1. Inferring the Intention*

According to the argument from legislative intention, a judicial decision is justified if it is based on the law-maker's intention. In particular, on the basis of this argument, the interpretation of a statute should express the law that the legislature intended to make. But what if the legislature is silent on a certain matter or case? What can be inferred from the silence of the legislature? Are there any intentions that can be inferred from it? As we will show, the argument from legislative silence is ambiguous and we need to specify the conditions under which its different uses are justified. Before doing this, however, we need to recall some features of the more general argument from legislative intention.

Inferring the legislative intent is considered a reasonable and politically sound requirement on judicial interpretation and decision-making, especially in the systems governed by the principles of separation of powers and legislative supremacy (Goldsworthy 2005; Naffine, Owens & Williams 2001). Politically speaking, it is required by the democratic principle. More in general, it can be derived from the reasons to comply with legal authorities and from the very idea of legislative power (Raz 1996, p. 258; Marmor 2001, p. 90). However, the argument from legislative intention faces several theoretical and practical problems.

Firstly, the notion of legislative intention gives rise to what we might call the *Ontological Problem*: What is the entity we are talking about? Many legal writers claim that, on the one hand, the intention of the legislature as a collective body does not exist, and that, on the other, the intentions of the individual legislators are practically undiscoverable and, in any case, irrelevant (Radin 1930; Greenawalt 2000).

Secondly, such notion faces an *Epistemic Problem*: How are we to know the

legislature's intention once we assume that something of this kind exists? Apart from the cases in which it is clearly expressed in legislative texts and provisions, the legislature's intention is not easily discoverable, in particular when we deal with old statutes and constitutions (Marmor 2005, chaps. 8-9; MacPherson 2010). The so-called *travaux préparatoires* often provide insufficient evidence to this effect, especially when various documents, subjects and institutional bodies are concerned (cf. Pino 2008, pp. 401-403).

Thirdly, if we assume that the intention of the legislature exists and can be discovered, we might face an *Abstraction Problem*: What is the relevant level of abstraction in singling out the legislative intent? Should we seek for the abstract legislative intent or rather for its details? Sometimes this issue is addressed in terms of the distinction between enactment intentions and application intentions (Stoljar 1998, p. 36). In any case, we need criteria guiding us to more or less abstract answers (Moreso 2005, p. 136).

Fourthly, in those systems where legislative decisions are *de facto* in the hands of the executive, we face a *Political Problem* (see Bernatchez 2007 on this problem in the Canadian legal system): What is the relevant intent? The legislature's or the executive's?

Finally, as far as legal argumentation theory is concerned, the so-called *Autonomy Problem* can be raised: Is the argument from intention an autonomous or a transcategorical argument? MacCormick and Summers (1991, p. 522) claim it is transcategorical, because in their view the appeal to legislative intent can range over all possible contents of each of the other kinds of legal argumentation **[i].**

Notwithstanding these problems, the argument from intention is widely used by courts and deserves therefore our understanding and discussion**[ii]**. In this paper, in particular, we will focus on those versions of the argument in which the intentions underlying a legal ruling are inferred from the *silence of the legislature*. These "hypothetical" or "counterfactual" intentions are inferred indeed from the fact that the legislature has *not* explicitly ruled the case at hand, and thus are beyond what has been literally stated by the law. This topic, which is relatively neglected in the scholarly literature, is in our opinion an interesting and challenging feature of this argumentative technique. On the one hand, the appeal to hypothetical or counterfactual intentions is frequent in legal practice and argumentation; on the other hand, such an appeal is hard to justify although it is

rhetorically effective.

We hope that throwing some light on the uses of this argument will help us understand what its structure is and what its justification conditions are. The theoretical perspective from which we will try to analyze such uses is an inferentialist one, namely a perspective where the justification conditions of the argument are conceived of in terms of the rules of inference governing an exchange of reasons in the legal domain. These rules, in turn, are expressed in terms of the normative statuses (commitments and entitlements) attributed and assumed by the participants in a legal dispute by means of their linguistic contributions to the discussion.

*2. On Silent Legislatures*

What can be inferred from the silence of the legislature about a certain case that might *fall under the law*, although it is not explicitly ruled? Compliance with existing legislation? Acquiescence with recent adjudication? Desire to leave the problem fluid? What kind of intention, if any, can be attributed to the silent legislature? And what does the legislature's silence say, if anything, about a case that might constitute an *exception to the law*, although it is not explicitly treated as such? Different answers are plausible (Levi 1948, pp. 538-539). We will try to show that even contradictory rulings can be inferred from the silence of the legislature, depending on the assumptions that one uses as major premises of the argument.

An important presupposition of the argument is that the legislature can be considered as silent on the basis of the wording of a legal text. So, the argument from silence is in a sense parasitic on the argument from literal meaning: it presupposes that a certain case does or does not *prima facie* fall under a rule according to the literal meaning of the relevant text.

Now consider, first of all, the cases that *prima facie* fall under a rule but might constitute an *exception to it* (according to some argument other than the argument from literal meaning, for instance an argument from purpose). Suppose that the legislature is silent on case $C_1$: one could infer that $C_1$ is not a relevant exception, since the legislature would have mentioned it if it had the intention to treat it as such. But one could also draw the opposite conclusion, namely that $C_1$ is a relevant exception, since the legislature would have treated it as such if it had the opportunity to take it into consideration. The two versions of the argument

can be schematized as follows:
(*a*) If the legislature had the intention to treat the case as an exception to the rule, it would have done it; but it did not. Therefore, the case falls under the rule.
(*b*) If the legislature had the opportunity to take the case into consideration, it would have treated it as an exception to the rule. Therefore, the case does not fall under the rule.

Similar considerations can be made about the cases that do not *prima facie* fall under a rule but might *fall under it* (according to some argument other than the argument from literal meaning). Suppose that the legislature is silent on case $C_2$: on the one hand, one might infer that if the legislature had the intention to treat $C_2$ as such, it would have mentioned it. On the other, one might claim that if the legislature had the opportunity to take it into consideration, it would have included $C_2$ within the cases so ruled. The two versions of the argument can be schematized as follows:
(*c*) If the legislature had the intention to rule the case, it would have done it; but it did not. Therefore, the case does not fall under the rule.
(*d*) If the legislature had the opportunity to take the case into consideration, it would have included it within the regulation. Therefore, the case falls under the rule.

In all these situations we deal with unexpressed intentions inferred from the legislature's silence. The difference lays in the fact that the argument is used, in versions (*a*) and (*d*), to include a case within the scope of a rule and, in versions (*b*) and (*c*), to exclude a case from it. The first kind of inferred intentions can be labeled *Inclusive Unexpressed Intentions*: they refer to the cases taken to fall under a rule either because, in version (*a*), the legislature did not treat a certain case as an exception or because, in version (*d*), it would have included it within the regulation if it had the opportunity to do that. Instead, we will call the second kind of inferred intentions *Exclusive Unexpressed Intentions*: they refer to the cases taken *not* to fall under a rule either because, in version (*b*), if the legislature had the opportunity to take a certain case into consideration it would have treated it as an exception or because, in version (*c*), the legislature did not explicitly rule it.

What we have been considering so far shows that Fuller (1969, p. 231) was right in claiming that "deciding what the legislature would have said if it had been able

to express its intention more precisely, or if it had not overlooked the interaction of its statute with other laws already on the books, or if it had realized that the supreme court was about to reverse a relevant precedent – these and other like questions can remind us that there is something more to the task of interpreting statutes than simply 'carrying out the intention of the legislature'".

We will try to point out on what inferential conditions such diverse and even opposite uses of the argument from legislative silence are justified in the domain of legal interpretation and argumentation. Even if contradictory rulings can be inferred from the fact that the legislature is silent on a certain case or matter, once a certain premise is included in the argument reconstructing legislative intention the path of justification is bound to a set of pragmatic constraints, which need to be specified and taken into consideration. Here these constraints will be conceived of in terms of *commitments* and *entitlements* to a certain claim (Brandom 1994). The first kind of constraints, or deontic statuses in an argumentative practice, amounts to the situations in which an interpreter is assumed, by the participants in the practice, to have a *duty* that she can be asked to fulfill. The second kind of constraints amounts to the situations in which an interpreter is assumed to be *authorized* to perform a certain claim, on the basis of what the participants have been previously claiming and acknowledging. The analysis of the interplay between pragmatic commitments and entitlements in an argumentative practice permits to figure out what rules of inference govern the uses of this argument in a given legal context, and thus the conditions under which these uses are sound.

*3. Is Exchanging a Firearm for Narcotics "Using a Firearm"?*

Let us give an example of the argument we are dealing with. In *Smith v. United States* (508 U.S. 223, 1993) the U.S. Supreme Court had to decide whether exchanging a firearm for narcotics is "using a firearm", since the legislature did not explicitly regulate such a case.

The facts were as follows. After petitioner Smith offered to trade an automatic weapon to an undercover officer for cocaine, he was charged with numerous firearm and drug trafficking offenses. Title 18 U.S.C. 924(c)(1) required the imposition of specified penalties if the defendant, "during and in relation to" a drug trafficking crime, "uses a firearm". In affirming Smith's conviction and sentence, the Court of Appeals held that 924(c)(1)'s plain language imposed no requirement that a firearm be "used" as a weapon, but applied to any use of a gun

that facilitates in any manner the commission of a drug offense.

So, the issue was whether "using a firearm" covered *any use* of a firearm in relation to a drug trafficking crime or just the uses of a firearm *as a weapon*. The Supreme Court affirmed the judgment of the Court of Appeals against the narrow interpretation of the statute. To this effect, some crucial passages of the decision refer to unexpressed legislative intentions. Consider the following: "Section 924's language and structure establish that exchanging a firearm for drugs may constitute 'use' within 924(c)(1)'s meaning. Smith's handling of his gun falls squarely within the everyday meaning and dictionary definitions of 'use'. *Had Congress intended 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner – as a weapon – it could have so indicated in the statute*. However, Congress did not" (point (a) of the decision; our emphasis).

This passage contains two arguments: an argument from literal meaning ("the everyday meaning and dictionary definitions of 'use'") and an argument from legislative silence. According to the second, since the legislature was silent on the circumstance of exchanging a firearm for narcotics, the Court argues that such a case does not constitute an exception to the rule, for, had Congress intended to treat it as an exception, "it could have so indicated" (or, better, it would have so indicated). Congress did not, and, continues the Court, there is no reason to suppose that it had a different intent. "There is no reason why Congress would not have wanted its language to cover this situation, since the introduction of guns into drug transactions dramatically heightens the danger to society, whether the guns are used as a medium of exchange or as protection for the transactions or dealers" (point (b) of the decision).

In the opinion of the Court, written by Justice O'Connor, it is also said the following: "*Had Congress intended the narrow construction petitioner urges, it could have so indicated*. It did not, and we decline to introduce that additional requirement on our own" (part II.A of the opinion; our emphasis). Moreover: "We […] see no reason why Congress would have intended courts and juries applying 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity" (part II.C of the opinion).

Therefore, according to the opinion, exchanging a firearm for narcotics is "using a

firearm" within the meaning of the statute. Now the Court used version (*a*) of the argument: Had Congress intended that the statute should be given a narrow meaning, it would have so indicated; but it did not, so the statute should not be given a narrow meaning. However, is this the only conclusion justified by the argument from legislative silence?

The Court could have used other versions of the argument as well. It could have used version (*b*), arguing as follows: If Congress had considered the case of using a firearm as a means of barter, it would have treated it as an exception to Section 924; therefore, the case is not ruled by this Section **[iii]**.

The Court could have also used version (*c*) of the argument, claiming this: Assuming that the case is *not* ruled by Section 924, if Congress had the intention to rule it, it would have done it; but it did not; therefore, the case is not ruled. This was in fact Justice Scalia's argument in his dissenting opinion in *Smith*. He contended that "using a firearm" ordinarily means *using it for its intended purpose*. If we construct the legislative provision according to this, we should conclude that it does not cover all possible uses of a firearm in relation to a drug trafficking crime, but restricts to the uses of it *as a weapon*.

"To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?', he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon" (from Scalia's dissenting opinion).

Scalia claims that the words "as a weapon" are *implicit* in the statute. From this, we can draw an inference to the effect that the legislature had an *exclusive* unexpressed intention with regard to such uses of a firearm as exchanging it for narcotics. This can be put in counterfactuals terms: Had Congress the intention of including such uses within the meaning of the statute, it would have so stated; but Congress did not. Or, had it intended that the statute should be given a less narrow meaning, it would have so indicated; but it did not. This is version (*c*) of the argument**[iv]**.

Finally, it was also possible to use version (*d*) of our argument, making this claim: Although the case is *not* explicitly ruled by Section 924, if Congress had

considered it, it would have ruled it according to Section 924; therefore, the case is ruled by this Section**[v].** At the end of the day, both inclusive and exclusive unexpressed intentions can be inferred from the legislature's silence, as the present example shows.

*4. Is the Use of this Argument Arbitrary?*

On the basis of the analysis we have been presenting so far, is the use of this argument arbitrary? If we consider the standard approach to the study of legal argumentation, it is. The argument from legislative silence is vague and ambiguous, and simply masks a political choice or preference of the interpreter. But this does not give a perspicuous explanation of the actual uses of the argument. Can we put forward a better explanation of them, showing the constraints put on those who resort to this argumentative technique?

Our aim is to analyze the argument from legislative silence by means of a theoretical framework we have put forward in a number of previous papers (Canale & Tuzet 2007; 2008; 2009; 2010). Our approach might be outlined as follows:

1. the semantic content of a legal text depends on the exchange of reasons among the participants in a legal dispute (judges, lawyers, experts, etc.);
2. this content has an inferential structure (it consists of a set of inferences the text is involved in);
3. this structure can be analyzed from a pragmatic point of view, on the basis of the discursive *commitments* and *entitlements* that the participants undertake and acquire in a legal dispute.

Let us start then our inferential analysis by considering versions (*a*) and (*c*) of the argument with reference to *Smith*. As we will see, these versions do not present the same argumentative problems that the others do.

Versions (*a*) and (*c*) can be considered as (sets of) speech acts performed by a legal interpreter during a trial. By performing them the interpreter is committed to the following claim: "Congress intended to be silent". Silence is here conceived as an *intentional event*; indeed only if this presupposition is accepted the interpreter is justified in claiming either that the case is not an exception to Section 924, or that it is not actually ruled by this Section.

Now the question is: Under what conditions is the interpreter entitled to this

claim? An interpreter typically resorts to three kind of *reasons* in order to get entitled to (*a*) or (*c*) by the other participants in the trial:
(1) reasons from legislative history (the enactment process and all the documents produced in it);
(2) reasons from the assessment of the consequences of statutory construction (if these consequences are taken to be just, fair, right, etc., then the interpreter is entitled to the claim);
(3) reasons from systemic coherence (if the intentional silence of the legislature avoids conflicts between norms, then the interpreter is entitled to the claim).

Notice as an important point that each set of reasons presupposes a *different concept of legislature*. The use of these versions of the argument rests upon an idea of the nature and role of the legislature in general: in (1), it is the historical legislature which originally enacted the statute; in (2), it is the rational legislature (where the relevant concept of rationality is that of instrumental rationality); in (3), finally, it is the idea of a legislature which avoids antinomies among norms.

Thus, being entitled to such a counterfactual claim is not easy. In particular, determining the consequences of statutory construction is a controversial task, which calls for further argumentative resources and cognitive devices. Those who make use of this argument can be requested to give reasons as to the fact that a certain consequence is taken to be reasonable/unreasonable, just/unjust, fair/unfair, acceptable/absurd. This evaluation requires other kinds of arguments in order to be carried on and justified; typically, it requires an argument from purpose or an argument from principle.

According to the former, the consequences of interpretation are valuable as means to achieve a purpose of the law (*ratio legis*). According to the latter, they are valuable on the basis of their coherence with the relevant principles of the legal system. In this last case, it seems correct to argue that what counts as the intention of the legislature is a "question not about meaning […] but about constitutional principles" (Honoré 1987, p. 26).

However, those sets of reasons are not mutually exclusive; in principle one can make appeal to all of them, once the differences among them are pointed out and their tensions are addressed. Let us move now to the other uses of the argument.

Versions (*b*) and (*d*) of the argument are more tricky than the previous ones.

Indeed by performing these (sets of) speech acts the interpreter is committed to the following claim: "The legislature did not want to be silent: if it had considered the case, it would have ruled it". Silence is here considered as an *unintentional event*. Now, under what conditions is the interpreter entitled to this counterfactual claim? Before addressing this question, let us develop some further considerations on the kind of intentions we are dealing with.

The unexpressed legislative intentions we have been focusing on in this paper are sometimes called "hypothetical intentions". They consist in "what the legislator himself would have thought the statute to mean *if* he had more closely considered such cases as the one being decided" (Ekelöf 1958, p. 91); or, more broadly speaking, what the legislature would have intended on certain conditions different from the actual ones (Marmor 2005, p. 130). Sometimes they are called "counterfactual intentions" and are expressed by *counterfactual conditional statements*. This is a proper naming when the issue is not what the legislature actually intended, but what it would have intended had things been different (Stoljar 2001). Indeed in versions (*b*) and (*d*) of the argument from legislative silence the intentions at stake are counterfactual.

Now, from a logical point of view, counterfactual statements are traditionally puzzling. Do they have truth-values, so that they might be considered true or false?

According to Quine (1950, p. 14), they do not. Take his famous example of the Bizet-Verdi case, with the following counterfactual statements: (i) "If Bizet and Verdi had been compatriots, Bizet would have been Italian"; (ii) "If Bizet and Verdi had been compatriots, Verdi would have been French". What are their truth-values? It is hard to say, at least for the reason that both (i) and (ii) seem to be true but they contradict each other (if Bizet had been Italian and Verdi had been French, they would not have been compatriots). According to Lewis and Stalnaker, instead, these and similar conditionals can have determinate truth-values within the framework of possible worlds semantics (Stalnaker 1968; Lewis 1973; Stoljar 2001, pp. 457-458). In particular, a counterfactual conditional is true if and only if in the most similar world to the actual in which the antecedent is true, the consequent is also true.

Obviously the similarity between possible worlds is vague and depends on the context of discussion. Lewis claimed of the counterfactuals (iii) "If Caesar were in

command in Korea, he would use catapults" and (iv) "If Caesar were in command in Korea, he would use the atom bomb" that one context might resolve the vagueness of the comparative similarity in a such a way that some worlds with a modernized Caesar in common come out closer to our world than any with an unmodernized Caesar, while another context might resolve the vagueness in the opposite direction.

Now, if Lewis was right, what are the relevant contexts to be considered in a legal dispute for resolving**[vi]** or at least reducing the vagueness of the counterfactual claim of versions (*b*) and (*d*) of our argument, so that the interpreter gets entitled to it? First of all, the historical context, that is the time of the enactment of the statute and its social and political characteristics. Second, the socio-political context at present time, which might lead the interpreter to resolve the vagueness in a different way. Third, the context of the legal system, which requires coherence and consistency in statutory construction. As far as unintentional silence is concerned, each of these contexts presupposes a *general conception of legal interpretation and argumentation*. Thus being entitled to such counterfactual claim depends on sharing the same conception of interpretation and argumentation. If this is not the case, the use of the argument from unintentional legislative silence is hardly justified.

However, again, these conceptions are not mutually exclusive; in principle one can make appeal to all of them, once the differences among them are pointed out and their tensions are addressed.

*5. Conclusions*

From what has been shown, it becomes clear that the argument from legislative silence is not a single autonomous argument, but a way of interpreting a legal provision based on and justified by (a combination of) different arguments. So, its justification conditions depend on the justification conditions of other arguments and assumptions. It is important to understand what version of the argument is at stake in a specific dispute and what other arguments and assumptions can justify it.

This is also helpful to settle some of the problems we pointed out at the beginning presenting the more general argument from legislative intention. Recall the Ontological Problem: What kind of entity is the intention of the legislature? On the basis of our analysis, we could argue that this question does not admit a

categorical answer but a functional one: such an entity can be identified looking at the functions it fulfills in legal reasoning, that is, at what it serves to do and not at the ontological properties it is supposed to have.

If one adopts this point of view, it follows that the intention of the legislature is a legal device useful for connecting textual and meta-textual arguments in the legal argumentative practice. To put it as MacCormick and Summers do, it has a transcategorical role. On the basis of its transcategorical function, it permits to use a certain set of arguments (textual, systemic, or purposive) as a means to integrate or dismiss the use of a different set of arguments. In this sense, the legislative intention represents a fundamental connection component of legal argumentation, despite the fact that it is not as such an autonomous argument.

An inferential analysis of legal argumentation throws also some light on the Epistemic Problem affecting the idea of legislative intent. In those cases in which such an intent is not explicitly stated, it can be found first by looking at the textual and meta-textual clues that the legislature has let slip in the legal materials; then one has to formulate a hypothesis as to the content of legislative intentions, to infer the norms which could comply with it, and finally to test these norms by means of other textual, systemic and purposive arguments, which help eliminate the hypotheses which are not supported by these arguments. In this sense, the knowledge of legislative intent is always revisable in the face of further argumentative evidence.

As to the Abstraction Problem, we could agree with the criterion suggested by Moreso (2005, p. 136): if the text is detailed, an interpretive doubt must be solved at the same detailed level, looking for the precise legislative intent; if the text has an abstract formulation (as many constitutional provisions have), a doubt must be solved in the abstract, leaving room for contextual considerations from time to time.

However, as we saw, things get harder when what is at stake is not an actual but a counterfactual intention. Then the argument from legislative silence seems to create more problems than it solves.

NOTES

**[i]** This might find a confirmation in the distinction of various kinds of legislative intentions: for instance, intentions manifest in the language of the law itself,

intentions concerning the purposes of the rule enacted, intentions concerning the application of the law (Marmor 2005, pp. 127-132).

**[ii]** However, we don't want to say that this argument is *more* important than others. There is a standard distinction between subjective and objective methods of interpretation: in EU law, for instance, the latter are presently preferred (literal meaning, purposes, principles); but in Italy the law itself (art. 12 of the "Preleggi" to the Civil Code) requires the ascertainment of the law-maker's intention as a canon of interpretation.

**[iii]** To take another example, consider the following passage from *Riggs v. Palmer* (1889), 115 N.Y. 506, 22 N.E. 188: "It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. *If such a case had been present to their minds*, and it had been supposed necessary to make some provision of law to meet it, *it cannot be doubted that they would have provided for it*" (our emphasis). A similar argument is used in *Holy Trinity Church v. U.S.* (1892), 143 U.S. 457; on this case see Feteris (2008).

**[iv]** To take another example, in *McBoyle v. United States* (283 U.S. 25, 1931) the Supreme Court had to decide whether the National Motor Vehicle Theft Act applied to aircrafts (which were not explicitly mentioned in the text). The opinion delivered by Justice Holmes stated the following: "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that *if the legislature had thought of it, very likely broader words would have been used*" (our emphasis).

**[v]** It has to be noticed, however, that this version of the argument would be in tension with the prohibition of reasoning by analogy in criminal law.

**[vi]** Note that Stoljar (1998, p. 59) is skeptical about this: "the counterfactuals required to be used in intentionalist interpretation are sensitive to context, and hence are vague or indeterminate. If I am right, we cannot have recourse to intentionalism to solve interpretive problems when counterfactuals are required. We must look to some other theory of interpretation".

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