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Ojo, Marianne

North West University South Africa

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ABSTRACT

This paper is aimed at highlighting how common law has evolved over the centuries, namely through the flexibility accorded to judicial precedents, as well as through the evolutionary nature evidenced in the processes and rules applied in statutory interpretation. In addition to illustrating how informational asymmetries can be mitigated through decentralisation, the paper also illustrates how a particular case, *Pepper v Hart* has revolutionised the scope and permissibility of aids to statutory interpretation. Whilst the decision in the case has been criticised as having facilitated a transfer of powers from the executive and legislature, to the judiciary, it is also evident that any form of aid to statutory interpretation - which would greatly assist judges in arriving at reasonable outcomes - in terms of legitimate expectations and efficient allocation of economic resources, should be permitted in judicial proceedings.

Whilst financial markets and changes in the environment impact legislators, and whilst it is widely accepted that legislation constitutes the supreme form of law, the necessity for judges to introduce a certain level of flexibility will also contribute towards ensuring that legitimate expectations of involved parties are achieved - particularly where the construction of the words within a statute gives rise to considerable ambiguity.

Key words: legitimate expectations, certainty, flexibility, judicial precedents, statutory interpretation, allocative efficiency, *Pepper v Hart*, Posner, Hayek. common law

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The Evolution of Common Law: Revisiting Posner, Hayek & the Economic Analysis of Law

*Marianne Ojo*¹

A Introduction

Flexibility is certainly a crucial and vital element in all evolutionary processes, and as highlighted by Zywicki and Sanders:

“Preservation of legitimate expectations often will be best furthered, not by adherence to precedence, but by a prudent and thoughtful updating of rules to adapt to changing needs and expectations. In particular, because legal rules are just one element of the set of rules and practices that guide individual behavior in society, changes in non-legal rules may also affect legal rules such that in order to best preserve expectations and predictability about others’ actions, it will become necessary to amend some legal rules to better cohere with changing legal and non-legal rules.

The objective is to increase social coordination such that individuals will have maximum freedom to act on local information as it arises. Interpersonal coordination, not aggregate economic efficiency, should be the overarching goal of the legal system.”²

Hence the need for a reasonable balance between certainty and flexibility in the judicial process is also evident. To what extent should certainty and rigidity in the process be sustained in order to preserve the legitimate expectations of those parties involved? Moreover, it is also reflected that “the thoughtful updating of rules” as a means of adapting to changing needs and expectations is necessary in the goals of preserving legitimate expectations.

The aim of the ensuing section is to highlight the importance of the purposive application of rules in the “updating” process. Such a goal will be facilitated by way of reference to the rules of statutory interpretation.

¹ Professor, Faculty of Commerce and Administration, North-West University, South Africa
Email: marianneajo@hotmail.com

² TJ Zywicki and AB Sanders, “Posner, Hayek & the Economic Analysis of Law” Iowa Law Review Volume 93 No 2, pp 559-603 February 2008, George Mason University Law and Economics Research Paper Series

B “The Thoughtful Updating of Rules”: Rules of Statutory Interpretation

The purposive intent of rules and the legislator constitutes a fundamental characteristic of the common law system. In illustrating the increased role of judges, by not only adhering to the legislator or legislation, and the growing importance of interpreting rules with intent, the application of rules of statutory interpretation and the evolution of such rules will be elaborated on:

The Literal Rule of Statutory Interpretation

This usually constitutes the basic, starting point in construing a piece of legislation. Under this rule, judges are required to interpret statutes and legislation according to their ordinary, natural and dictionary meaning even if the outcome of such an interpretation may generate absurd or ridiculous results. Judges' roles are considerably limited and restricted under this rule and may be regarded as being more passive when compared to their roles under the other methods of statutory interpretation. Whilst certainty appears to be an advantage of complying with this rule, such advantageous attributes must be weighed against the results which are obtained where absurd outcomes are generated and the legitimate expectations of parties involved are effectively not met.

For this purpose, the golden rule constitutes the next resort where absurd results need to be mitigated.

The Golden Rule of Statutory Interpretation

Under this rule, judges are not only required to give effect to the literal meaning and application of the rule, but should also do so with the aim and purpose of avoiding an absurd result. The golden rule is namely, thus:

“The golden rule is that the words of a statute must prima facie be given their ordinary meaning.”

- Viscount Simon (*Nokes v Doncaster Amalgamated Collieries*)³

³ [1940] A.C 1014 at page 1022

The Mischief Rule of Statutory Interpretation

The mischief rule represents a much narrower application of the golden rule - narrower in the sense of its greater focus on the intent of the legislator. Its application is considered necessary where a statute is considered to have been introduced as a means of remedying or rectifying a defect or problem (the mischief) in the common law.

An extension of the application of the mischief rule is embodied in the fourth and final rule of statutory interpretation being considered under this heading: namely, the purposive rule or the Rule in Heydon's Case.

The Purposive Rule or The Rule in Heydon's Case

The purposive rule or the rule in Heydon's case, has at its core purpose, the discovery of the intent of Parliament or the legislator, namely,

What purpose was the statute enacted to rectify - for which the common law had a defect or needed to be rectified?

From the above-mentioned rules an evolvement of the role of judges is demonstrated - both in respect of a greater role given to judges to interpret according to the intent of the legislator, and also in respect of analytic reasoning and balancing.

It is quite understandable as regards why Hayek and Posner's backgrounds have considerably impacted their perspectives of the role of judges.

According to Zywicki and Sanders,⁴

"Posner conceives law to be a series of disparate rules and as purposive. He believes that a judge should examine an individual rule and come to a conclusion about whether the rule is the most efficient available," whilst Hayek is considered to "conceive law as a purpose independent set of legal rules bound within a large social order."

⁴ TJ Zywicki and AB Sanders, "Posner, Hayek & the Economic Analysis of Law" Iowa Law Review Volume 93 No 2, page 559

These views will now be examined to a broader context under a landmark ruling which has not only contributed to judges' abilities to introduce aids as a means of interpreting statutes to a more effective extent, but also demonstrates the interdependency of rules - from one social order to the next.

C Pepper v Hart : The Mischief Rule and the Inclusion of Aids (Parliamentary Privileged Information) as a Means to Statutory Interpretation

Pepper v Hart⁵ represented a landmark ruling in the sense that it was the first time whereby the use of privileged parliamentary debates, information and records (Hansard) were permitted as admissible aids to statutory interpretation. The case involved the valuation of employee benefits for income tax purposes - given the ambiguous wordings of the statute involved.

The following issues were raised in the case:

- 1) Should existing rule prohibiting any reference to Parliamentary material (Hansard) in construing legislation be relaxed, and if so, to what extent?
- 2) If so, does the case fall within the category of cases where reference to Parliamentary proceedings should be permitted?
- 3) If reference to Parliamentary proceedings is permissible, what is the true construction of the statutory provisions?
- 4) If reference to Parliamentary proceedings is not permissible, what is the true construction of the statutory provisions?

As per Lord Browne-Wilkinson:

“Reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure, or the literal meaning of which leads to an absurdity. Even in such cases, references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.”

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⁵ [1992] 3 WLR 1032, [1993] 1 All ER 42, HL (E)

⁶ See *ibid*, also see S C Styles, “The Rule of Parliament: Statutory Interpretation After Pepper v Hart” Oxford Journal of Legal Studies Vol 14 No 1 (Spring 1994) pp 151-158 Oxford University Press

Section 63 of the 1976 Finance Act constituted the central piece of legislation in the case. It is obvious that in such cases - not just those cases involving contentious attributions to the construction of the piece of legislation, but those whose scope may lie beyond the scope and principal expertise of the judge, aids to statutory interpretation may be justified where such aids are vital to efficient allocation of resources, as well as generating outcomes which could be considered to be reasonably efficient within the ambit of legitimate expectations of the parties involved.

Should judicial decisions be criticised for generating more efficient and purposive outcomes - particularly where the legislative source being referred to (regardless of whether such a source is privileged information), has not been altered in any sense, but has simply served as a means of shedding more light, providing more information, and giving purpose and meaning (or more meaning) to the legislation at hand?

D `Conclusion

“If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them.

We need decentralization because only thus can we ensure that the knowledge of the particular circumstances of time and place will be promptly used.”⁷

Judges should certainly not make and unmake the law in certain cases - the supremacy of Parliament should be adhered to. Judge made law, namely common law, however constitutes an exception where the principle of *stare decisis* cannot hold in a world which is constantly changing and where those changes need to be incorporated into decisions if such decisions are to generate meaningful results.

Prices, for example, constitute examples of vital information which need to be updated constantly if wages which were earned centuries ago, are to have meaningful and reasonable importance and values in modern day valuation and measurements. The rise of macroeconomics has certainly played a part in impacting and interpreting the values attributed to information and macro indicators. Markets will

⁷ F A Hayek, “The Use of Knowledge in Society” The American Economic Review, Vol. 35, No. 4. (Sep., 1945), pp. 519-530

<http://www.jstor.org/discover/10.2307/1809376?uid=3739920&uid=2&uid=4&uid=3739256&sid=21104299293711>

definitely evolve and adequate rules are needed to regulate the markets. This is very evident given the fact that market failures, namely information asymmetries exist, and also the fact that the Efficient Markets Hypothesis does not hold in its entirety. Decentralization, hence constitutes a means of not only mitigating information asymmetries, but also ensuring that efficient maximisation of resource utilisation and allocation, takes place.

Hence the decentralisation of powers and information, in this case, from the executive and legislature to the judiciary, should be viewed positively as a means of addressing and mitigating informational asymmetries resulting from ambiguous, confusing and misleading words within a statute and also resulting in more efficient allocation of resources, and awarding of damages to the parties involved.

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