Decentralisation and the evolution of Common Law

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28 July 2015

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 de centralization, facilitated with courts employing the use of non-legal agents such as expert witnesses - as evidenced in the Daubert case, Pepper v Hart also illustrates how common law has evolved through the scope and permissibility of aids to statutory interpretation.

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, Daubert, common law, regulatory capture, regulation , The Estate of Edgar A. Berg v. Commissioner

Decentralisation and The Evolution of Common Law

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A Introduction

To Be or Not to Be Regulated: Purposive Rules and the Centralisation of Information

The de-centralisation of the judicial and legislative process has advanced over the years – as evidenced by the engagement of legal, non-legal and economic actors in the judicial and rule making process. This serves as testimony to the fact that judges may not be fully equipped to allocate resources in such a way that maximal efficiency or the best outcome is derived for involved parties. Other non-legal actors such as financial experts are now being engaged as expert witnesses by judges in deciding landmark judgments.

Decentralisation denotes the involvement of and delegation of roles to various actors other than judges. These actors, and more specifically non legal actors, are not responsible for creating the law or making ultimate decisions but their involvement helps shape the processes of judicial decision making. In this sense, decentralisation does not imply a delegation of decision making by judges to such actors, but is used with particular reference to the process of delegation and involvement of processes – not delegation or decentralisation of decisions. The involvement of non-legal actors is not intended to serve as a means of transferring the judge's role to such actors in matters of judicial decisions – even though their involvement influences such decisions. The involvement of non-legal actors and also economic agents helps facilitate accountability into the processes – they are not there to make decisions but to facilitate a more accountable framework in which decisions are made. Judges are still expected to assume some form of responsibility and the involvement of other non-legal and particularly economic actors, serves as a reminder that whilst such actors cannot replace the role assigned to judges, there are also limits whereby a judge can exercise the required competence in arriving at decisions which confer maximum economic efficiency to those parties involved.

As well as a tool which serves to facilitate greater checks and accountability in the judicial and law making process, de centralization is also accentuating its role as a mechanism whereby the efficient allocation of resources can be realized. In addition to highlighting the consensus on the views of Posner and Hayek, in respect of de centralization of information within the judicial process, this paper aims to address why de centralization serves as a vital tool in facilitating the objective of common law as an efficiency allocation mechanism. The central recurring theme of this paper, however, is the illustration of the evolution of common law – as reflected through the decentralization of information resource and the engagement of non-legal actors in the judicial

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process, as well as the rules of statutory interpretation and extrinsic aids of interpretation that have been admitted into the judicial process over the years.

Literature incorporating Cooter and Rubinfeld have been selected to corroborate the theoretical framework and element of my literature review – namely the common law efficiency theory. Observations by Garoupa and Liguerre – particularly with reference to Posner's findings on "important functional systematic differences between the United States and Britain" consolidate the theoretical framework of the literature review. According to Cooter and Rubinfeld,[2] fair and accurate outcomes requires courts to resolve cases by applying the law and courts have complete information when full knowledge of the law and all the facts that are relevant to the case, are available and are at disposal to deciding matters at hand. Further they are of the opinion that complete information at trial results in a judgment that is accurate relative to existing law; and that to the extent that liability law is designed to internalize costs, accurate results will generate efficient incentives. In the same manner, they further argue, that complete information in bargaining before trial promotes settlement on terms approximating the complete information judgment.

The importance of measures aimed at ensuring that the court receives complete information, prior to the case or trial – as a means of generating efficient outcomes in the delivery of judgments, is hereby emphasized. However current issues revolving around procedures aimed at obtaining complete information is also highlighted. Such problems in their opinion, could be mitigated where the court is able to ascertain the value of information to the requesting party – hence ensuring that such a party fully pays the associated costs of complying with rules.[3]

The importance of ascertaining the stakes involved for the involved parties is not only vital from the perspective of delivering efficient outcomes – which would re inforce the role of common law as a tool for promoting the efficient allocation of resources, but also highlight why the determination of such stakes constitutes an influential factor in the evolution of common law. Section II of the Literature Review further corroborates and consolidates on this point.

As well as introducing the central issue surrounding the efficient allocation of resources, namely, informational asymmetries – and how these can be mitigated through decentralization, the literature review section also highlights the central issue surrounding the efficient allocation of resources, namely, informational asymmetries – and how these can be mitigated through decentralization. In so doing, it will incorporate discussions on the theory of Efficiency of the Common Law Hypothesis, as well as evaluate claims that support the view that the evolution of common is influenced by the litigants and not judges.

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[2] R D. Cooter and D. L. Rubinfeld "An Economic Analysis of Legal Discovery" at page 437

The Journal of Legal Studies, Vol. 23, No. 1, Economic Analysis of Civil Procedure (Jan., 1994), pp. 435-463 Published by: The University of Chicago Press for The University of Chicago Law School Stable URL: http://www.jstor.org/stable/724329

[3] ibid

As well as elaborating on how the paper and topic "revisits Posner, Hayek & the Economic Analysis of Law", the third section also consolidates on the de centralization of information retained by judges in the judicial process by way of reference to Posner's views on Hayek and Kelsen's concepts of law. This section highlights Posner and Hayek's consensus on the importance of decentralization, as well as the incorporation of non-legal actors as tools for facilitating the efficient allocation of resources in common law. This section also attempts to harmonise any conflicting views that may appear to arise between Posner and Hayek's views on the role of non legal actors in the judicial process. Whilst reflecting support for de centralization, as well as the consensus of the evolution of the law, the section also contrasts and seeks to harmonise Posner and Hayek's views of what roles should be assumed by economic actors and judges in the judicial process.

In arriving at a conclusion that many factors determine and have influenced the evolution of common law over the years, the concluding section also highlights why it is necessary to engage non legal actors in the judicial process and why European courts and jurisdictions should embrace this trend which is prominent in Forensic Accounting, as adopted in courts in the United States.

The development of judicial precedents and the role of judges in the interpretation of statutes and legislation - to better align with the original intent of the legislator, has been evidenced over the past centuries. Certain cases, however, have reflected possibilities whereby judicial development may generate outcomes which are contrary to legislative intent. This can be illustrated by section10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, which has been highlighted as having been interpreted "to require corporate insiders and tippees to either disclose material inside information or refrain from trading."[4]

[4] SEC v Texas Gulf Sulphur Co, 401 F.2d 833 (2d Cir 1968) (en banc),cert denied,404U.S1005(1971).See D Carlton and D Fischel, "The Regulation of Insider Trading" Stanford Law Review Volume 35 No 5(May 1983)pp 857-895 at page 884

B Literature Review: The Evolution of Common Law

Theories and Analyses on the Efficiency of Common Law

Rubin argues that the efficiency of common law, to the extent that such exists, can be explained by the evolutionary model whereby it is more likely that parties will litigate inefficient rules than efficient rules.[5] As well as his opinion, that, if decisions are made randomly, that there will be a movement in the direction of efficient laws, he is of the view that,

Evolutionary pressure arises from the behavior of the litigants – rather than the judges. In so doing he bolsters this by stating that where neither party is interested in precedent, there is no incentive to litigate and hence no pressure on the law to change.

However, such "evolutionary pressure" can also arise from the stakes involved – independent of the precedents. Where such stakes are high, particular in terms of reputation and benefits to be accrued (which may not even necessarily be immediate), then regardless of costs involved, or the precedent which currently governs such a case, the parties, depending on their bargaining powers, will be induced to pursue the case.

Further, even where such parties, are induced or propelled to contest current judicial precedents, the ultimate outcome, as regards whether such law will be altered or whether a new judicial precedent will be established – overriding or reversing the previous ones, lies with the judge or the court – who may reverse existing precedents or in the case of an appeal, decline such appeal – based on prevailing social attitudes, as well as rules of evidence which may be admissible or in admissible in such cases.

What is admissible in certain cases, can be illustrated with the Daubert Case[6] whereby the criteria of relevance and reliability were highlighted as being crucial factors in the admissibility of evidence. Such factors also having being tried and tested in order to facilitate admissibility. The Daubert case is also reflective of decisions not being ultimately influenced by the judge's opinion – but by way of reference to an expert opinion – in cases where the judge is not adequately equipped with the required expertise or knowledge of the field involved – for example, in cases which relate to Accounting, Finance and Business matters.

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[5] P. H. Rubin, (1977) "Why is Common Law Efficient"? The Journal of Legal Studies Vol. 6, No. 1 (Jan., 1977) at page 61

[6] In distinguishing this statement between previous decisions, it was added that "General acceptance is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence— especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand" see page 597 "Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." See opinion of court at page 594

C The Evolution of Common Law: 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)[7]

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[7] [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.

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."[8]

In relating the above statement to the previous section and the need for the involvement of non legal actors as a means of attaining common law attributes of economic efficiency in efficient allocation of resources, fostering greater accountability in the judicial process, and an avenue which would better serve as aids to statutory interpretation, the vital role served by the decentralization of information as resource, can be re iterated. Ultimate decisions must be left to judges – however, judges require the involvement of non legal actors in certain instances which may be necessary to facilitate the efficient allocation of resources. The efficient allocation of resources may still be achieved without the involvement of non legal actors – however, maximal efficiency may also be derived where such non legal actors are involved. In certain cases, it may well be that non legal actors play such a fundamental role that their exclusion in the judicial process would only generate inefficient results and outcomes for parties involved.

In very interesting fashion, decentralization is also essential towards ensuring that possibilities for regulatory capture are minimised.

Why might firms want to allocate "property rights invaluable information" to managers, rather than to shareholders? Because centralisation of information in the ambit of those better equipped and specialised to handle such information warrants such a move.

Centralisation and decentralisation should thus be viewed from relative (as opposed to absolute) perspectives. Support for centralization of information is justified where such information resides within capable and more equipped ambits who will transform such information for the purposes of maximization of wealth or utilities. Given such merits, there still exists the need for checks and balance to ensure that such powers are not abused. In like manner, decentralization of information may still be facilitated optimally taking into account timing, manner of the dissipation, and agents involved in the distribution of such information.

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

[8] 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

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. The evolutionary nature of common law and the flexibility it confers in introducing greater relevance, by virtue of passage of time or other environmental factors, serves as a vital attribute in its ability to facilitate efficiency in the allocation of resources – and particularly, information resource.

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