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Decentralisation and The Evolution of Common Law

Ojo, Marianne

North West University

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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 de centralisation, 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.

By way of reference to landmark rulings in the United States, cases such as *Daubert* and *The Estate of Edgar A. Berg v. Commissioner*, this paper also aims to illustrate the vital role increasingly assumed by non-legal actors, and why this approach should constitute a trend to be adopted in European common and civil law jurisdictions. This being the case given the failures and flaws of references to Parliamentary material and whether these should be permitted as an aid to the construction of legislation which is ambiguous or obscure, as illustrated in the case of Pepper v Hart.

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*

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Decentralisation and The Evolution of Common Law

Marianne Ojo[1]

A Introduction

I 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 expect 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

[1] Professor, Faculty of Commerce and Administration, North-West University, Email: marianneojo@hotmail.com

decentralization of information resource and the engagement of non-legal actors in the judicial 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

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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] See ibid

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.

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.

II Role Assumed by Judges and Growing Involvement of Non Legal Actors in Judicial Process

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]

Carlton and Fischel argue that such judicial development is contrary to legislative intent and that no evidence exists to support the fact that Congress intended to prohibit insider trading.[5]

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[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

[5] see ibid

Further, whereas Hayek is considered to view the common law as a "spontaneous order which regulates society better than a person could"[6], Posner is considered to view the law as "an order consciously made through the efforts of judges and legislators."[7] Such differing views about levels of control of the law and perceptions of being regulated and the ability to regulate, can be regarded as influential factors governing the opinions also shared by Posner and Hayek on the roles of judges – one which Posner considers to be more active than passive, based on his conception of law as "an order consciously made through the efforts of judges and legislators."

However Posner's conception of the law as an "an order consciously made through the efforts of judges and legislators," appears to exclude his acknowledgement of the engagement of non-legal actors as instruments or means of attaining legal goals. This will be now be discussed in greater detail, as well as under section C of this paper.

The evolutionary nature of common law and the more passive role assumed by judges is highlighted in the landmark case of The Estate of Edgar A. Berg v. Commissioner (T. C. Memo 1991- 279).

According to DiGabriele,[8] the discipline of valuing closely held companies further evolved with each organization's development and issuance of competing business valuation standards creating dissimilarity among the discipline.[9] He contrasts this with reference to the difference of opinion by Beatty, Riffe and Thompson (1999), who contend that the court expects an expert's valuation to be biased toward the benefit of the party compensating them. Accordingly, he adds that this produces subjective valuation estimates that are consistent with the underlying incentives of the expert and that the Courts are then left to rely on these subjective and imperfect valuations in deriving the final estimated value.

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[6] F.A. Hayek (1960). The Constitution of Liberty. Chicago: University of Chicago Press and F.A. Hayek (1973_. Law, Legislation and Liberty: Rules and Order, Volume 1. Chicago: University of Chicago Press.

[7] See R. A. Posner, (2005) "Hayek, Law, and Cognition," 1 New York University Journal of Law and Liberty 147

Also see 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, see particularly abstract

[8] See J.A. DiGabriele, (2007). To Have and to Hold: An Empirical Investigation of Preferences for Valuation Methods of Closely Held Companies in the Matrimonial Court. Journal of Forensic Accounting. Vol. VIII. No. 1 & 2.

[9] In this respect he makes reference to Cercone, L. J., Jr. (2002). Uniform standards for business valuations. The CPA Journal. Volume 72, No 2 and Beatty, R. P. Riffe, S. M. and Thompson R.(1999). The method of comparables and tax court valuations of private firms: An empirical investigation. Accounting Horizons. September. Volume 13, Issue 3. Bosland

In highlighting how the Tax Court responded to the above fragmentation, DiGabriele[10] makes the following observations:

- In rejecting the Estate's experts, the Tax Court accepted the IRS's expert because he had the background and training desired by the court and developed discounts by referring to specific studies of comparable properties and demonstrating how they applied to the asset being examined.

- This case marked the beginning of the Tax Court leaning toward the side with the valuation perceived as the most comprehensive and logical (Wietzke, 2002).

The above case not only illustrates the more passive role assumed by judges in relying on expert opinions which may influence courts' decisions, but also acknowledgement on the part of judges, that they may not be well equipped with the necessary competence, expertise and knowledge in arriving at decisions which can be considered maximally efficient. The allocation, delegation or decentralization of information resource, as well as the involvement of other actors in the judicial process, also serves as a means of ensuring that greater accountability, supervision and more efficient outcomes are achieved. The value attributed to expertise and the need to engage experts in achieving more efficient outcomes, also extends to the principal agent and stakeholder theory.

The question revolving around why firms might want to allocate "property rights in valuable information"[11] to managers, rather than to shareholders, is not merely based on the premises that managers may value such information more than shareholders, but also attributed to the ability of such agents to better monitor, supervise and account for the distribution and dissipation of such information in a manner and timing (which shareholders are less better equipped and specialised to handle).

Why firms might want to allocate "property rights in valuable information" to managers, rather than to shareholders? Even though certain shareholders may value information more than others and qualify to assume the role of residual holders of property rights, such shareholders may not be well equipped with the necessary expertise to undertake the required levels of monitoring activities – hence resulting in greater inefficiency or costs than would be the case where monitoring responsibilities are undertaken by the agents or managers.

From this perspective, it could be argued that whilst information may overwhelm and control those who are less specialized and equipped to handle such information – by virtue of inadequate accountability mechanisms, the delegation and de centralization of such information to those

[10] See J.A. DiGabriele, (2007). To Have and to Hold: An Empirical Investigation of Preferences for Valuation Methods of Closely Held Companies in the Matrimonial Court. Journal of Forensic Accounting. Vol. VIII. No. 1 & 2. Also see J.A. DiGabriele, (2009). Gender, Valuation of Private Companies, and State Specific Variables in the Division of Marital Assets. Journal of Legal Economics. Volume 15, Number 2.

[11] See D Carlton and D Fischel, "The Regulation of Insider Trading" Stanford Law Review Volume 35 No 5 (May 1983 at page 866

who are better specialised and equipped to handle such priceless resources and privileged public utilities, generates an outcome whereby such information is better regulated, as well as delegated, to achieve maximimal efficiency and optimal outcomes. Even in cases where regulation is undertaken by adequately equipped regulators, lack of adequate accountability mechanisms may result in incidents involving regulatory capture.

In their article, Carlton and Fischel, also argue that "even if Federal regulation is justified on the basis of law enforcement cost, firms should have the opportunity to opt out of the regulation in the absence of any showing of third party effects, and that such firms are best judges of how to structure the terms of their employment contracts."[12] In this sense, self-regulation is justified on the basis of flexibility and the potential to minimize unwarranted regulatory costs and burdens.

The argument for enforced self-regulation relates to the fact that whilst individual firms may be the best judges to decide on the design of their contracts, in order for those contracts to be tailor made to adjust better to their firm's needs, self-regulation through these firms, may be better enforced by the State and through the courts. Furthermore, even with its advantages, certain disadvantages can also be attributed to self-regulation.[13] As well as being consequential of a lack of transparency in a regulatory and supervisory regime, regulatory capture is also more likely to occur where a system of self-regulation operates.

Posner's contribution to Law – particularly in the fields of regulation and regulatory capture, as well as Economics, will now be discussed briefly.

Accountability in Regulation: Posner and the Theory of Regulatory Capture

The theory of regulatory capture was introduced by Richard Posner who argued that „regulation is not about the public interest at all, but is a process, by which interest groups seek to promote their private interest."[14]

Posner also provides criticisms of both the traditional public interest theory of regulation and "the newer economic theory" which regards regulation as "a service supplied to effective political interest groups."[15]

The independence of the regulator from the industry which is being regulated is vital to ensuring that regulatory capture does not occur. Regulatory capture is less likely to occur where more actors are involved in the regulatory process and is more likely to occur where there is regular

[12] see ibid at page 895
[13] For further information on the advantages and disadvantages of Self-Regulation, Enforced Self-Regulation see M Ojo, "Co-operative and Competitive Enforced Self-Regulation: The Role of Governments, Private Actors and Banks in Corporate Responsibility http://mpra.ub.uni-muenchen.de/27850/1/MPRA_paper_27850.pdf; also see I Ayres and J Braithwaite, Responsive Regulation: Transcending the Deregulation Debate Oxford University Press at page 102
[14] See R Posner "Theories of Economic Regulation" (1974) 5 Bell Journal of Economics and Management Science at pages 335-358
[15] Ibid at page 356

contact between the regulator and the regulated (firms). Whilst these actors may have their interests, and whilst despite such interests, it may be optimal allocating these resources to certain agents, the engagement of courts serves in many respects, as a means of efficiently allocating available resources – in such a way whereby a greater level of maximisation of utilities is achieved.

As well as the attribute of efficient allocation of resources, flexibility is also certainly a crucial and vital element in all evolutionary processes, and has been a feature of common law- within the context of judicial precedents- particularly when contrasted with the principle of *stare decisis*.

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."[16]

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. The section also aims to highlight why the engagement of non-legal actors in the judicial process serves as a tool for bolstering claims relating to the efficiency of common law as a resource allocation mechanism.

[16] TJ Zywicki and AB Sanders, "Posner, Hayek & the Economic Analysis of Law" Iowa Law Review Volume 93 No 2,pp 559-603 February 2008 at page 577

B Literature Review: The Evolution of Common Law

I 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.[17] 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[18] 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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[17] P. H. Rubin, (1977) "Why is Common Law Efficient"? *The Journal of Legal Studies* Vol. 6, No. 1 (Jan., 1977) at page 61

[18] 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

The Daubert standard of evidentiary reliability, according to DiGabriele,[19] is codified in Federal Rule of Evidence 702 which he further adds, defines the admissibility of expert testimony based on the following:[20]

- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

He also highlights the fact that whilst Daubert is the law in federal courts and more than fifty percent of the states, the Frye standard still remains the general acceptance test for the determination of the admissibility of scientific evidence in the remaining venues.[21]

Where the financial environment has evolved to such an extent that calls for a change in the law, such a change may be instigated by legislators, rather than through the courts. In exceptional circumstances, however, courts may be induced to alter or amend the law – depending on the level of determination of the parties involved in pursuing such cases further – which arises from the stakes involved. As evidenced, through the hierarchical structure of the judicial system in the UK, (as well as the US), relatively few cases progress to the Courts of Appeals and even fewer to the House of Lords – in proportion to those which initially advance to district or high courts.

In the UK, Parliament (Acts of Parliament, statutes and legislation) remains supreme and it is more frequently the case that judges are trying to overturn previous court decisions than the law lords trying to interfere with judge made law. Legislation cannot be changed – till a new one is passed by legislature to repeal a current or previously existing one. Till this is done and till a Bill becomes a Statute or Legislation orAct of Parliament, it must only be interpreted by judges (according to the intent of Parliament). The form of law which is more subject to manipulation and which also subject to being overridden, overturned or reversed in subsequent cases is judge made law which is being interpreted on the basis of a legislation – hence the rules of statutory interpretation which are aimed at aiding judges to interpret legislation. The legislation remains the same till superseded by new legislation which comes into being as a result of an introduced and approved Bill – the interpretation of the legislation also constitutes the basis for overturning or reversing previous or current judicial precedents.

In concluding that "courts should decide only the questions presented, and to leave the further development of this important area of the law to future cases", the Daubert case also highlighted the fact that even though judges were expected to assume a degree of gate keeping role in

[19]J.A.DiGabriele, (2011). Evidentiary Reliability, Valuation Standards, and Rules of Thumb. American Journal of Family Law. Volume: 25, Issue: 1, 16-22

[20] See ibid

[21] In this respect he adds that Frye does require expert testimony to be founded in generally accepted scientific principles that are recognized in the particular field; and there must be evidence that the technique has been used.

deciding on matters involving admissibility of "proffered"[22] expert opinion, that this did not impose on them the responsibility to become amateur scientists in assuming such a role.

II Efficiency of The Common Law Hypothesis: Addressing Information Asymmetries

Parisi states,[23] that, according to the efficiency of the common law hypothesis, first introduced by Coase (1960), and then extended by Posner in 1994, common law rules attempt to allocate resources efficiently in a typically Pareto or Kaldor Hicks efficient manner.

Further, he makes reference to Priest's analysis that "inefficient rules impose greater costs on the parties who are governed by such rules than is the case with efficient rules – thus making the stakes in the dispute greater", and that where such stakes are greater, litigation is more evident than settlement.[24]

Such emphasis on the stakes – rather than the litigants, as being influential in the evolution of common law constitutes a focal point of discussion. Stakes, in this regards, is considered to embrace all driving factors which govern and impact the current judicial environment - as well as a consideration of repercussions (present and future) which could arise from a failure to address such conditions. It is precisely because of those stakes which could be involved, that the availability of relevant and complete information – at the court's disposal, as well as mechanisms and tools which aid in facilitating the collection of such information, hence avoiding unnecessary information asymmetries which could affect the efficiency of the Common Law Hypthesis, need to be secured and deployed.

Parisi's reference to Cooter and Rubinfeld (1989) also highlights the application and importance of ascertaining property rights in valuable information:

That "an efficient resolution occurs when:[25]

- legal entitlements are assigned to the parties who value them the most

- where legal liabilities are allocated to those parties who can bear them at the lowest cost

-when transaction costs are minimised

As already highlighted under the introductory section, it is vital to ascertain the parties who value the information most, as well as recover the full compliance costs for the request of such

[22] See ibid at pages 600 and 601 DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC 509U.S.579 (1993)
[23] F Parisi, (2004) "The Efficiency of the Common Law Hypothesis" The Encyclopedia of Public Choice at page 195
[24] See ibid at page 196

[25] See ibid; also see R. D. Cooter and D L. Rubinfeld. (1989) "Economic Analysis of Legal Disputes and Their Resolution" http://works.bepress.com/robert_cooter/30

information. Such a stance, in Cooter and Rubinfeld's opinion, would not only mitigate incidences whereby misuse and abuse by externalizing costs, occurs but also facilitate a process whereby discovery misuse and abuse can be eliminated by shifting the reasonable cost of compliance to the requesting party.[26]

Whilst Whitman's model emphasizes the role of judicial opinion in shaping the evolution of the system, and whilst he affirms that judges' opinions and beliefs affect the development of law might seem obvious, he also re iterates the importance of recognizing that such ‘‘demand-side’’ approaches can only explain so much - in light of models of the evolution of law that emphasize the capacity of law to develop independently of or even in spite of judges' opinions.[27] He adds that the model confirms the intuition that trends in judicial thinking do indeed strongly influence the direction of legal change, though not so strongly that current legal doctrine can be explained exclusively in terms of the opinions of the present pool of judges.[28] Further, he lists history, expectations, and judicial preferences as factors which interact to determine the course of legal change.[29]

Notable and interesting points are raised by Garoupa and Liguerre[30] , who argue that lack of basis, theoretical or empirical, exists to support the assertion that courts and juries are in a better position in common law than in civil law jurisdictions to calculate the consequences of their decisions more appropriately than the government, and that judge made law can be better understood as a set of rules designed to maximize economic efficiency. Further references are made by them to Posner's findings on “important functional systematic differences between the United States and Britain” as well as an acknowledgement of salient similarities between the current institutional arrangements in Britain and in continental Europe, and it is the assertion that “bad statutes can be effectively corrected under civil law, by the judiciary”[31], as well as the argument that “case law outperforms statute when political institutions are weak”, that raises very interesting observations on the comparisons between civil law and common law systems.

Whilst the efficiency of common law derives from its ability to update and override, reverse or distinguish judicial precedents, setting the way for new principles and ratio decidendi to be established, and whilst it may appear that civil law is also efficient in the same manner - given

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[26]see R. D. Cooter and D L. Rubinfeld. (1989) "Economic Analysis of Legal Disputes and Their Resolution" at page 437

[27] See DG Whitman, "Evolution of Common Law And the Emergence of Compromise Journal of Legal Studies, vol. XXIX (June 2000)] at page 781

[28] ibid

[29] ibid

[30] N Garoupa and CG Liguerre, “The Syndrome of the Efficiency of Common Law” (2011) Boston University Journal of Internal Law, Research Paper No 10 – 23 at page 13 http://papers.ssrn.com/pape.tar?abstract_id=1674170

[31] In this sense, reference is made to V Fon and F Parisi, ―Judicial Precedents in Civil Law Systems: A Dynamic Analysis, 26 International Review of Law and Economics 519 (2006) and Carmine Guerriero, ―Democracy, Judicial Attitudes, and Heterogeneity: The Civil versus Common Law Tradition, Cambridge Working-paper 917 (2009) See ibid

the ability of the judiciary to "correct bad statutes", the efficiency of common law under the British legal system, in particular, derives from the supremacy of legislation and statutes – over judicial or judge made law.

Whilst judiciary are able to reverse and override previous judicial precedents, under the British doctrine that Parliament is supreme, statutes still have to be adhered to, at least to a certain extent, before they are repealed by subsequent legislation. Furthermore, in accentuating the superiority of statutes, legislation and Acts of parliament, the process and rules governing statutory interpretation acknowledges the role of the judiciary in interpreting legislation – not correcting it. Even where a certain piece of legislation constitutes the central issue in generating ambiguity, case laws and judicial precedents are merely established to address prevailing circumstances and may still be superseded by future judicial precedents. The legislation remains in force however – till it is repealed by a new and approved Bill which becomes legislation – subject to checks from the three arms of legislature: namely the executive or government, the Crown or House of Lords. Even though the Crown is considered a figure head in approving Bills – before they become Acts or legislation, such Bills need to be approved by the House of Commons – as well as the House of Lords – by a majority, before the current or prevailing legislation is repealed.

Interestingly enough, Garoupa and Liguerre also add that new literature supports the premises that "that legal systems originated in the English common law have superior institutions for economic growth and development than those of French civil law".[32] Legal systems originating from the English common law still need to be appraised on the basis of the legislative structures operating in these systems. In this respect, their reference to Posner's findings on "important functional systematic differences between the United States and Britain" is to be highlighted. Whilst certain common law systems accord greater authority to the executive branch or government (than is given to the legislature or rather, the legislative arm which also carries out judicial functions), it is also the case that in certain common law jurisdictions, the legislature and executive may have parity or equal say in matters which influence the decisions to repeal a certain legislation. This may well accord with the decision to distinguish Lower Houses of Parliaments from Upper Houses of Parliaments – with such a distinction being applicable to both civil and common law jurisdictions. This is also not to conclude that systems according greater power to the executive, have less checks or accountability mechanisms in the legislative process.

Hence whilst the efficacy of common law also derives from the doctrine of the supremacy of Parliament, as a check and form of accountability mechanism to safeguard from unwarranted political interference in judicial decisions, as well as a means of restricting the judiciary (that is the House of Lords, in their capacity as legislature) in their ability to repeal legislation, it is also

[32] See ibid at page 16

the case that some civil law systems do not allow for as much political interference,[33] as is the case with certain civil law systems.

The following section is aimed at illustrating 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 and the role of judges in such interpretation.

III 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:

[33] See also ibid at page 17 whereby particular reference is made to Paul Mahoney, ―The Common Law and Economic Growth: Hayek Might Be Right, 30 Journal of Legal Studies 503 (2001).

"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)[34]

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.

As will be illustrated under section C, the de centralization of the judicial process, through the participation of economic and non legal actors, as means of achieving judicial goals in the efficient allocation of resources, is acknowledged by Posner. Hence to the extent that both Posner and Hayek share the view that the decentralization of law respectively facilitates the

[34] [1940] A.C 1014 at page 1022

attainment of goal of efficient resource allocation and promotes the rule of law, a consensus for the de centralization of rules is shared by Hayek and Posner.

According to Zywicki and Sanders,[35]

"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."

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.

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

Pepper v Hart[36] 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:[37]

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:

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

[36] [1992] 3 WLR 1032, [1993] 1 All ER 42, HL (E)

[37] **Pepper** (Her Majesty's Inspector of Taxes) **v Hart**. Decided, 26 November 1992. [1992] UKHL 3 [1993] AC 593 [1992] 3 WLR 1032

"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."[38]

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?

The decision has been criticized from the perspective that it leads to rigidity in the application of of its judgment rather than the flexibility intended under the 1976 Legislation by Parliament. The ratio decidendi or principle decided, namely that "that the 'proper' proportion must always be the marginal cost", in Bennion's view, results in rigidity which could not have been intended by the legislators.

As concluded by Bennion:[39]

- Parliament, in adopting the wording of clause (6), must have contemplated not only that the conferred power of judgment would exercised by officials rather than Ministers (and on appeal or review the courts), but that it would produce answers that would be different in different cases and might, in the light of experience or changing circumstances, be varied over time."

[38] 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

[39] F Bennion, "How they all got it wrong in Pepper v. Hart"(1995), and HANSARD - HELP OR HINDRANCE? A Draftsman's View of Pepper v Hart (1995) http://www.francisbennion.com/topic/peppervhart.htm

C Non Legal Factors Which Have Impacted An Evolution In Common Law: Economic Analyses of the Law

I Decentralisation Through Non Legal Agents: A Trend for European Common and Civil Law Systems to Adopt?

Given the failures and flaws of references to Parliamentary material and whether these should be permitted as an aid to the construction of legislation which is ambiguous or obscure, as illustrated in the case of Pepper v Hart, should greater involvement of non-legal actors in European jurisdictions, civil and common law systems, not be encouraged?

As highlighted in the Daubert case, and The Estate of Edgar A. Berg v. Commissioner the de centralisation of information resource, has been increasingly taking place over the years – as evidenced by the engagement of legal, non-legal and economic actors in the rule making process and judicial process. This serves as testimony to the fact that judges may not be fully equipped to allocate information in such a way that maximal efficiency or the best outcome is derived for involved parties. As already highlighted under the introductory section, other non-legal actors such as financial experts are now being in engaged as expert witnesses whose expertise are incorporated by judges in deciding landmark judgments. The use of legal actors to fill in gaps which are aimed at ensuring that judges acquire complete information which is fundamental to the efficient allocation of resources, is illustrated by the following extract from Posner's statement:[40]

- The point I want to emphasize here is that the content of the legal norms that judges create by their decisions is not given by Kelsen's concept of law. As one of his natural-law critics puts it, "How the judge arrives at his decision is [for Kelsen] a 'meta-legal' question without interest for the jurist." Kelsen's rejection of natural law, his emphasis on jurisdictional at the expense of substantive norms, his repeated references to judicial discretion, his claim that application of law is not mechanical but often involves "the creation of a lower norm on the basis of a higher norm," his acknowledgment that sometimes the only preexisting law that a court can apply to decide a case is the law that confers the power of decision on the court, and his concept of interpretation as a frame rather than an algorithm, delimit a broad range of judicial action that is free (in the sense of "free range" chicken) yet lawful. The judges have to fill it with something, but while that something is lawful, it is not the law."

[40] See R.A.Posner, (2001) "Kelsen, Hayek, and the Economic Analysis of Law" at page 20

The role of judges, hence has evolved to the extent whereby the expertise of non-legal actors, as well as the incorporation of non-legal medium, through decentralization, whether these constitute non-governmental organisations, or financial experts, are required to be engaged in the legislating and interpretation of the law, in order for such judicial capacities to attain their maximal potential.

Reasons in favor of decentralization are as follows:

1) The need to mitigate incidences related to regulatory capture and the abuse of concentrated powers and information in the hands of centralized system – as well as facilitating separation of powers between the executive, legislature and judiciary.
2) The need to facilitate the goal of efficient allocation of resources
3) Mitigating inefficiencies attributed to increased costs arising from poor allocation of resources and unfavorable outcomes – which result in re- litigation.

As already highlighted under the literature review, 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.[41] Further, "inefficient rules impose greater costs on the parties who are governed by such rules than is the case with efficient rules – thus making the stakes in the dispute greater, and that where such stakes are greater, litigation is more evident than settlement."[42]

The efficiency of common law as a mechanism for the efficient allocation of resources, and particularly information resources, would also be enhanced through the engagement of other actors in the legislative and judicial process.

II Disadvantages of Centralisation and Concentration of Information: The Need for Engagement of Other Actors in the Legislative and Judicial Process

Maintaining the Rule of Law and Avoiding the Abuse of Powers

Disadvantages associated with the centralization and concentration of information in the hands of a powerful actor usually revolve around insufficient checks and balances which could result in abuse of powers and lack of adequate mechanisms of accountability.

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

[42] F Parisi, (2004) "The Efficiency of the Common Law Hypothesis" The Encyclopedia of Public Choice at page 196 and also ibid at page 437

As illustrated with the need to ascertain those litigants who value information most – hence conferring not only the rights of property information to such litigants, but also ensuring that adequate funds are collected from such litigants to facilitate efficient allocation of resources and adequately cover compliance costs – it is necessary to ensure that discovery abuse does not take place. The access to, and availability of information in the judicial process is increasingly assuming fundamental importance. Of vital significance are also those channels through which such vital information is dissipated. As previously highlighted,[43] discovery misuse and abuse can be eliminated by shifting the reasonable cost of compliance to the requesting party.

The following section is aimed at highlighting 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.

As illustrated previously, decentralisation and the involvement of non legal medium also serve to illustrate the evolution of common law from the more centralized role previously assumed by judges (now devolved through other non-legal actors) as well as the increased role being assumed by litigants through the need to ascertain those who value information rights the most. Whilst it is argued that litigants influence the evolution of common law,[44] the role of judicial opinion in shaping the evolution of the system, is also emphasized.[45]

The effectiveness of de centralization as an information gathering mechanism, employed in the judicial process is illustrated in the following statement by Posner:[46]

There are two ways of establishing norms to guide human behavior. In one, which Hayek calls "constructivist rationalism," they are prescribed from the top down by a legislature, a bureaucracy, or a judiciary—in other words by experts who gather the information necessary to formulate by the method of reason the best possible set of norms. This method, as we might guess from Hayek's aversion to central planning, he rejects as requiring too much information to be feasible; in addition, it endangers liberty by enlarging the administrative powers of government and thus weakening the rule of law."

[43] See P. H. Rubin, (1977) "Why is Common Law Efficient"? *The Journal of Legal Studies* Vol. 6, No. 1 (Jan., 1977) at page 437

[44]G L. Priest, "The Common Law Process and the Selection for Efficient Rules," 6 Journal of Legal Studies 65 (1977) page 63 and 72. Roubini agrees with Priest's opinion on judges – his model focusses on decisions of potential and actual litigants rather than on judges driving the model.

[45] See DG Whitman, "Evolution of Common Law And the Emergence of Compromise Journal of Legal Studies, vol. XXIX (June 2000)] at page 781

[46]See R.A.Posner, (2001) "Kelsen, Hayek, and the Economic Analysis of Law Page 30

Posner further adds:[47]

The alternative method of creating norms is that of custom, and is based on the superiority of what Hayek calls "spontaneous order" over order brought about by plan or design. The word "spontaneous," with its connotation of suddenness, is not the best term for what he has in mind; "unplanned" or "undesigned" would be better and "evolved" would be best, given his emphasis on the analogy of natural selection.

The above statements, whilst reflecting support for de centralization, as well as the consensus of the evolution of the law, is to be contrasted with Posner and Hayek's view of what roles should be assumed by economic actors and judges in the judicial process:

Whilst Posner highlights his support for Hayek's view that law owes much to custom and that custom is a reliable guide to efficient methods of cooperation, he considers Hayek's idea, "that the only thing a judge should do is enforce custom, without any consideration of its consequences, because custom is the only legitimate law and so a legal judgment not founded on it is not true law",[48] as being too narrow – adding that it "extinguishes any explicit role for economic analysis in adjudication." Posner herein underlines his support for a more active (rather than passive role) to be assumed by judges.

He also distinguishes Hayek and Kelsen by adding that whilst Hayek, excludes the possibilities and position that economic analysis might occupy in adjudication, Kelsen, opens that space wide.

However, it appears that Hayek is also in favor of the engagement of non-legal actors in the judicial process. This is reflected where he states that "the ultimate decisions must be left to the people who know directly of the relevant changes and of the resources immediately available to meet them" – as well as his affirmation of the need of decentralization as a means of ensuring that "the knowledge of the particular circumstances of time and place will be promptly used."

"Ultimate decisions" should still be left to judges – however this is not to preclude the fact that judges will be able to facilitate better ultimate decisions through the involvement of non-legal and/or economic actors who will not only assist judiciary in informing them of "relevant changes and immediate resources to meet them", but also inform them in acquiring vital knowledge of circumstances which would not have been otherwise gained if the recruitment of such actors had not been possible.

[47] See ibid at page 31

[48] Which he regards as a slight exaggeration of his position, see ibid at page 37

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."[49]

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

[49] 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

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 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.

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. Markets will 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 decentralization 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.

Given the possible failures and flaws of references to Parliamentary material and whether these should be permitted as an aid to the construction of legislation which is ambiguous or obscure, as illustrated in the case of Pepper v Hart, greater involvement of non-legal actors in European jurisdictions, civil and common law systems, should definitely be encouraged.

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