HANSARD GAINS JUDICIAL RECOGNITION
Pepper. v. Hart

By Robert N. d'Arceuil

There are many implications of a constitutional and general nature arising from the 1993 House of Lords decision in Pepper v. Hart.¹ The decision has compelled a re-examination of the relationship between parliament and the courts. The Pepper case was really a tax case, but in order to determine the issues before it the House of Lords felt the need to look at the Hansard to construct sections 61 and 62 of the United Kingdom Finance Act, 1976. It is important to see how and where the decision impacts on Public Law in the United Kingdom.

Lord Browne-Wilkinson felt that reference to the Hansard enabled the courts to give a broad interpretation to the Act in question, and that the narrow literal method would lead to absurdity resulting in an unjust situation for the taxpayers. Lord Mackay dissented, but held that a review of parliamentary material would not breach section one article 9 of the United Kingdom Bill of Rights, 1688². Lord Mackay also gave due attention to the possibility of increased costs for litigants resulting from recourse to the Hansard, and noted that two reports of the Law Commission, the Renton Report on the Preparation of legislation (Cmnd. 6053 (1975))³, and the Scottish Law Commission on the interpretation of statutes dealt with the matter aptly.

The Attorney General contended that consultation of Hansard by the courts may breach parliamentary privileges and rights the Commons obtained in the Bill of Rights, 1688. But this view was dismissed by Lord Griffiths. His Lordship agreed that the use of Hansard as an aid to assist the court to give effect to the true intention of parliament is not ‘questioning’ within the meaning of section article one of the Bill of Rights, 1688.⁴ This view commends itself to Francis Bennion who submits that ‘article nine was badly drafted and ambiguous, since ‘freedom’ may qualify only ‘speech’ or it may also qualify ‘debates’ and

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¹ First year student, Faculty of Law.
² [1989] 1 All E.R. 42. (H.L.)
³ [1993] 1 All E.R. 42. (H.L.), at pp. 48, per Lord Mackay..."advised against a relaxation".
⁴ [1993] 1 All E.R. 42 at pp. 50
proceedings in parliament'. He asks the question, "is it merely the freedom of parliamentary debates and proceedings that ought not to be impeached or questioned or is it the debates and proceedings in their entirety?"5

With its fictional notions of exclusivity, and perhaps as a reaction to Royal power6, in the seventeenth century, parliament developed its own sense of immunity within the separation of powers. Since the Bill of Rights parliament became an organ in the body to politic for the executive to legitimise its actions.

Past decisions like the *Edinburgh and Dalkieth Railway v. Wauchope*7 seemed to have cast a veil between the court and the legislature. Lord Denning, however, challenged the rule against consulting parliamentary debates in *Davis v. Johnson*8, and admitted that he reached his decision in that case by referring to what was said in parliament. Denning's admission did not pass unnoticed. Lord Diplock was particularly critical of Denning's approach. In his view, consulting Hansard without informing counsel that he intended to do so, "breached a fundamental rule of natural justice: the right of each party to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is."9

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6 [1993] 1 All E.R. 42 at p. 69 (H.L.), *per* Lord Browne Wilkinson, "... In my opinion, the plain meaning of article 9 viewed against the historical background in which it was enacted was to ensure that M.P.s were not subjected to any penalty civil or criminal, for what they said, and were able, contrary to previous assertions of the Stuart Monarchy....."
7 *Edinburgh & Dalkieth Railway v. Wauchope*, (1842) 8 Cl. & F. 710 at 728, *per* Lord Campbell, "All a court of justice can do is look to the parliamentary roll; if from that it should appear that a bill has passed both houses and received the Royal Assent, no court of justice can enquire into the mode in which it was introduced into parliament, nor what was done previous to its introduction, or what passed in parliament during its progress in its various stages through both house."
Now, as a result of *Pepper v. Hart*,\(^{10}\) Lord Denning has been vindicated. There are, however, some limitations\(^{11}\). For example, Lord Browne-Wilkinson said that the rule should apply only where the sponsors statement "discloses the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words."\(^{12}\) His Lordship also notes that the "lack of satisfactory indexing of committee stages makes it difficult to trace the passage of a clause after it is redrafted or renumbered."\(^{13}\)

Bennion quotes Robert H. Jackson, a Justice of the United States Supreme Court, who stated ":..The Lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available."\(^{14}\)

The new found freedom of the courts to refer to Hansard should not be taken as a panacea in solving ambiguities found in parliamentary enactments. For it has been said that the process of legislation was not, 'an intellectual exercise in the pursuit of truth but an essay in persuasion or perhaps almost seduction, and that, in these circumstances, appeal from the carefully pondered terms of the statute to the hurly burly of parliamentary debate is to appeal from Philip sober to Philip drunk."\(^{15}\)

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\(^{10}\) [1993] 1 All E.R. 42. (H.L.)

\(^{11}\) *Beswick v. Beswick* [1968] A.C. 58, (H.L.) at p.349-50, "such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures on executive responsibility, essential features of open and responsible government, are not always conducive to unbiased explanation of the meaning of statutory language."

\(^{12}\) [1992] All England Law Review 290. pp 387. "Lord Browne-Wilkinson justified the limitation by saying 'as at present advised I cannot foresee that any statement other that statement of the minister or other promoter of the Bill is likely to meet these criteria' (i.e. that it clearly discloses the mischief aimed at or the legislative intention lying behind the words of the enactment). A bill is introduced to rectify a mischief , and obviously it is those responsible for drafting and introducing the Bill who know best what mischief it is intended to deal with and the nature of the intended remedy....."

\(^{13}\) [1993] 1 All E.R. 42. at pp. 66-67


Lord Mackay noted that reference to proceedings in parliament had already been allowed. The courts have always expressed an interest, prior to these developments, to refer to parliamentary material for assistance in statutory construction.

The Crown feared that the respective roles of parliament as maker of law and the courts as interpreter would be confused.

The Crown submitted that parliamentarians may become fearful of expressing their opinions in parliament if regard may be had to Hansard in court. Lord Browne-Wilkinson referred to Church of Scientology of California v. Johnson Smith which involved a libel action against a Member of Parliament who made certain statements on the floor of the commons in a televised debate. It was held by Lord Brown-Wilkinson that such an action, if successful, would indeed be a breach of article 9 of the United Kingdom Bill of Rights 1688. The court cited Brind v. Secretary of State for the Home Department to show the Attorney General where the Crown had invited the courts to look to the Hansard.

To a large extent the fears of the Crown are exaggerated. The Pepper v. Hart decision does not effect any real changes to the British Constitution except that it invites the courts to treat speeches that parliamentarians make more seriously. The United Kingdom courts enjoy an independent status in a political culture that understands compromise and consensus.

The relationship between parliament and the courts may well be enhanced. It would seem that parliamentary supremacy has been given added impetus. The true intention of parliament can now be divined if recourse is made to the Hansard.

The reasoning of the House of Lords would lead to considerable progress in the construction of statutes notwithstanding the reservations

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17 Beswick v. Beswick [196] 2 All E.R. 1197 at 1202. "... Room for an exception where examining the proceedings in parliament would almost certainly settle the matter one way or the other."
18 [1993] 1 All E.R. 42 at p.69.
21 [1993] 1 All E.R. 42.
raised as to costs and the narrow guidelines\textsuperscript{22} within which the new rules are to be employed. \textit{Pepper v. Hart} is a remarkable victory for the purposive approach to interpretation.

\textsuperscript{22} [1992] All England Annual Review.

"The following is the revised version of the code s.217(Use of Hansard."

'(1) This section applies to an enactment contained in Act, in the opinion of the court construing the enactment, it is ambiguous or obscure, or its literal meaning leans to an absurdity.

(2) In arriving at the legal meaning of the enactment, the court may have regard to any statement, as set out in the official report of the debates ('Hansard') on the bill for the act.....together with such other parliamentary material (if any) as is relevant for understanding that statement and its effect. In allowing an advocate to cite such material the court must ensure that he or she does not in any way impugn or criticise the statement or the reasoning of the person making it.

(3) The statement must be made by or on behalf of the minister or other person who is the promoter of the Bill.

(4) The statement must disclose the mischief aimed at by the enactment or the legislative intention underlying its words.

(5) The statement must be clear.

(6) In applying the rule set out above in this section (‘the rule in \textit{Pepper v. Hart}’) the court may overrule an earlier decision which is not binding on it and was arrived at before the rule was introduced."