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REVISITING *PEPPER v HART* –

Part 1

By

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'Our misapprehension of the nature of language has occasioned a greater waste of time, and effort, and genius, than all the other mistakes and delusions with which humanity has been afflicted. It has retarded immeasurably our physical knowledge of every kind, and vitiated what it could not retard. The misapprehension exists still in unmitigated virulence; and though metaphysics, a rank branch of the error, is fallen into disrepute, it is abandoned like a mine which will not repay the expense of working, rather than like a process of mining which we have discovered to be constitutionally¹ incapable of producing gold.'

Alexander Bryan Johnson, *A treatise on Language*, 1836.

Abstract

Johnson's philosophical interests centred upon language, whose misunderstanding he regarded as responsible for endless confusion and error. He distinguished the 'sensible' meaning of terms, tied closely to the experiences to which they refer, from merely 'verbal' meaning. The sensible meaning of a sentence is given by what would now be thought of as the verification conditions or assertible conditions of a sentence, he said. But this can be termed free interpretation today, in the jurisdiction of the European Union (a civil law area of the world) to which the United Kingdom, a common law jurisdiction, belongs. This dichotomy raises its head today when English judges try to insert non- statutory interpretations to the law, making for challenges, though rarely correctly taken up by English lawyers. This paper argues that although *Pepper v Hart* was an important step in legal procedure but that the judges in English courts have gone ahead to make their own extrapolations to this precedent and write in English court decisions, for posterity, inserting certain writers' names from certain journal articles, giving these authors unmitigated and positive publicity. This is an unfair manipulation of English law.

Introduction to *Pepper v Hart* [1993] AC 593

The case decision of *Pepper v Hart*² has had a profound constitutional implication because it ruled that judges may refer to *Hansard*³ as a guide to

¹But constitutions can be changed. See Adrian Vermeule, "Constitutional amendments and constitutional common law", Harvard University Working Paper, 2004.

² [1993] A.C. 593; [1992] 3 W.L.R. 1033; [1993] 1 All E.R. 42; [1992] S.T.C. 898; [1993] I.C.R. 291; [1993] I.R.L.R. 33

The official report of the proceedings and debates of a legislature in the Commonwealth of Nations and in this instance, it refers to English legislature.

interpretation of legislation⁴. The reason that this case pressed the issue of reference to extra-statutory sources so forcefully is that the intention of Parliament, as revealed by Hansard, was at odds with the best literal interpretation of the statute and this case overturned a principle of at least 300 years' standing⁵. Not only did the decision raise some troublesome constitutional issues, but it is extremely disconcerting that judges have taken it upon themselves, without appeal or rebuttal, to extend the way a statute is interpreted to looking further than the parliamentary minutes of the debate of the passage of a statute. Some judges are using persons' articles, certain journals and even newspapers in an unfettered way of describing the meaning, as they see it, of a statute, opening the way for free interpretations of the law.

The facts of *Pepper v Hart*

A number of school-teachers who were allowed to have their children educated at the private school where they worked at a reduced cost appealed against the decision of the Revenue to tax them on the basis of the proportional cost to the school, rather than on the marginal cost of the education, which was minimal, as the children were taking up vacant places which the school had been unable to fill. The relevant legislation (Finance Act 1976, ss.61, 63) was ambiguous, and on appeal the question to be determined by the enlarged appellate committee was whether Parliamentary material could be used in aiding the interpretation of legislation. The House of Lords was anxious that the decision in *Pepper v Hart* not be given to wide an effect. In particular, *Hansard* would only be admissible where: "... it clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.", and the statement is made by the promoter of the Bill (e.g., a Minister).

The Doctrine in *Pepper v Hart*

Parliamentary material may be used to assist in the interpretation of legislation in cases where such legislation is ambiguous or obscure. A number of school-teachers who were allowed to have their children educated at the private school where they worked at a reduced cost appealed against the decision of the Revenue to tax them on the basis of the proportional cost to the school, rather than on the marginal cost of the education, which was minimal, as the children were taking up vacant places which the school had been unable to fill. The relevant legislation (Finance Act 1976, ss.61, 63) was ambiguous, and on appeal, the question to be determined was whether Parliamentary material could be used in aiding the interpretation of legislation.

²The UK is a common law jurisdiction and as in all common law jurisdictions, the judiciary may apply rules of statutory interpretation to legislation enacted by the legislature or to delegated legislation such as administrative agency regulations.

⁵ Dennis Lloyd, *The idea of Law*, (Penguin, Middlesex 1964)

Although judicial interpretation through history, as written about by Sir Henry Maine, Maitland, Pollock and others, describe the attitude that though history might increase understanding of the past and present state of law, and though the extent of the present law's historic condition cannot be ignored, history must not be used as a strait-jacket to impose traditional attitudes on the needs of a new age.

The doctrine of *Pepper v Hart*, therefore means that the rule whereby reference to Parliamentary material is prohibited in questions of statutory interpretation would be overturned; (2) where legislation is obscure or ambiguous reference to statements by a minister would be allowed, where such statements were sufficiently clear; (3) this did not constitute a breach of Parliamentary procedure and did not infringe the Bill of Rights of 1688.

Judges' unofficial extension of the Doctrine of *Pepper v Hart*

In the case of *Bettison and Others v. Langton and Others* [2001] UKHL 24, their Lordships, in summing up, made references to the following sources, including the usual references to caselaw dicta: -

Book by Hall, *Treatise on the Law relating to Profits à Prendre and Rights of Common* (1871).

Book, *Halsbury's Laws of England* (4th ed) (1991).

Book by Elton, *A Treatise on Commons and Waste Lands* (1868).

Book by Scriven, *A Treatise on the Law of Copyholds* (7th ed) (1896).

Book, *Halsbury's Laws of England*, 3rd ed (1953).

Book by *Wolstenholme and Cherry, Conveyancing Statutes*, 13th ed (1972).

They dismissed the appeal and said that an Act of Parliament is to be interpreted having regard to its purpose. The court is looking for the intention of Parliament expressed in the language

In 2003, the House of Lords, in the judgment on *Wilson and others v Secretary of State for Trade and Industry*, restated the scope of *Pepper v Hart*, accepting that its purpose was to require the executive to honour any legitimate expectations created, but stated:

The court is called upon to evaluate the proportionality of the legislation, not the minister's exploration of the policy options. In a recent case⁶ government explanatory notes to Parliamentary statutes which are written and revised as legislation passes through the House, have been allowed to be used to explain the meaning of statutes and this has negated some of the need to examine individual statements in the statute itself. In his ruling on even when the statute was unambiguous, Lord Steyn said:

'Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible as aids to construction. They may be admitted for which logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible...'

In another case decision, *R v Saik*, the judge said at paragraph 37:

'This decision was given before the decision of your Lordships' House in R v Montila. At that time the provenance of the property was not understood to be an ingredient of the substantive offence. It was not a fact necessary for

⁶ *R (Westminster City Council) v National Asylum Support Service*, Lord Steyn considered Explanatory Notes to be admissible.

the commission of the offence. That is no longer the law. For the reasons set out above this reasoning of the Court of Appeal cannot now stand. I would allow the appeal and set aside the appellant's conviction. I would answer 'no' to the first certified question. I would answer the second certified question in the sense set out in the speech of my noble and learned friend Lord Hope of Craighead. In an endeavour to avoid unnecessary complexity I have deliberately refrained from commenting on each of the recent reported authorities in this field. I mean no disrespect thereby to the experienced judges who decided these cases. I cannot conclude without recording my indebtedness to Professor Ormerod's article 'Making Sense of mens rea in Statutory Conspiracies', Current Legal Problems (2006). I have taken the liberty of drawing freely on this valuable survey of a notoriously difficult subject.'

This can be argued to represent a conspiracy to advertise and surreptitiously establish a non-legislator into English caselaw decisions.

Questionable distinction

What has a certain author written that causes a judge to deliberately bypass judicial rules in order to place the person's name within the All England Law Reports? It will be recalled that a certain author wrote a titillating piece in the 'Criminal Law Review' asserting that the Fraud Act 2006 has made the telling of untruths or lies, a statutory offence. Such a titillating piece merely panders to a certain portion of the public which lies to undermine legislative authority. Yet, subsequent to this publication, this writer was promptly included as a notable author and his undergraduate textbook is included in the National police library database, indicating the strength of common opinion. There are many British authors of criminal law textbooks for undergraduates. They not also notably listed. The use of extra-statutory sources as legitimate foundations for legal interpretations is what is occurring in English courts.

Questionable Judges' Continuous Professional Development

No -one is above the law, not even judges. Judges undergo judicial training. Shortly before the Human Rights Act 1998 gained Royal Assent, the then Home Secretary, Jack Straw, said,

'By and large, our legal culture is about finding the true meaning of the law. In the case of the statutes, what matters is what Parliament intended. Moral norms and ethical principles do not normally come into it. The Human Rights Act requires us to look for possible meanings, not the true meaning. And the ambition of the Human Rights Act is that possible meanings that fit with the Convention principles and norms are always to be preferred. Deciding day-to-day legal questions on the basis of such fundamental ethical principles, set out in statute, is a new departure.'

Did Jack Straw, in this public-domain speech, give judges the green light to interpret statute as they see fit? If so, then, the statute books must be considerably overhauled and many hundreds of case decisions must immediately be appealed and overturned. Or did Jack Straw mean that the

Human Rights Act 1998 is the only exception to the strict interpretation of statute? Examine what else Jack Straw said in that speech. Jack Straw, a United Kingdom government minister continued:

'In respect of necessity, Lord Goff said this: "I wish, however, to express my gratitude to counsel for the appellants ... for drawing to our attention three earlier cases in which the doctrine [of necessity] was invoked, viz. Rex v. Coate (1772) Lofft 73, especially at p. 75 per Lord Mansfield; Scott v. Wakem (1862) 3 F. and F. 328, 333, per Bramwell B.; and Symm v. Fraser (1863) 3 F. and F. 859, 883, per Cockburn C.J., all of which provide authority for the proposition that the common law permitted the detention of those who were a danger, or potential danger, to themselves or others, in so far as this was shown to be necessary". I must confess that I was unaware of these authorities though, now that they have been drawn to my attention, I am not surprised that they should exist. The concept of necessity has its role to play in all branches of our law of obligations - in contract (see the cases on agency of necessity), in tort (see In Re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1), and in restitution (see the sections on necessity in the standard books on the subject) - and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law."

The European Court of Human Rights on the Doctrine of Necessity

In Strasbourg, the European Court has taken a different view. It held that there was a breach of Article 5(1) and 5(4) of the ECHR and its decision is contrary to Jack Straw's and the House of Lords. The European Court of Human Rights held that the doctrine of necessity was too vague to satisfy the requirements of the Convention. The Court observed thus:

'1. It is true that, at the time of the applicant's detention, the doctrine of necessity and, in particular, the "best interests" test were still developing. Clinical assessments of best interests began to be subjected to a double test (the Bolam "not negligent" test together with a separate duty to act in a patient's best interests). Broader welfare matters were also introduced to the "best interests" assessment (Re F (Adult: Court's Jurisdiction) and R.B. (A patient) v. Official Solicitor, sub nom Re A. (Male Sterilisation), at paragraphs 59-62 above). It is therefore true that each element of the doctrine might not have been fully defined in 1997. This is reflected in, for example, the conflict between the views of Lady Justice Butler-Sloss in the aforementioned case of R.B. (A patient) and paragraph 15.21 of the Mental Health Act Code of Practice 1999 (see paragraphs 62 and 72 above).

2. Whether or not the above allows the conclusion that the applicant could, with appropriate advice, have reasonably foreseen his detention on the basis of the doctrine of necessity (Sunday Times v. the United Kingdom (no. 1), judgment of 26 April 1979, Series A no. 30, §§ 49 and 52), the Court considers that the further element of lawfulness, the aim of avoiding arbitrariness, has not been satisfied.

3. In this latter respect, the Court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act (paragraphs 36 and 54 above) is, in the Court's view, significant.

In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.'

Why make English law when the English court can 'make it up as it goes along'?

Now, this is where this matter of freely introducing certain favourite names into caselaw reports becomes a very serious matter indeed. The United Kingdom is not a unitary stand-alone body because it is part of the European Union and must comply with European Union Directives.

The European Court of Justice⁷ ('ECJ') has as its objective, the interpretation and application of European law. It is the supreme authority on all matters relating to European Community law. Although it is an interpretative court, it is not the ultimate appellate court in relation to national disputes concerning Community law. A matter may be referred to the ECJ for a preliminary ruling, but the national court must apply the ECJ's ruling to the dispute as per Article 234 of the EC Treaty.

English law must be interpreted in accordance with Directives

English courts must interpret English law in such a way as to ensure that the objectives of a Directive are achieved⁸. In the case, *Marleasing SA v La Comercial Internacional de Alimentacion SA*⁹, in which Italy was found to have been in breach of its Community obligations, the ECJ held that a Member State who failed to implement a Directive was liable to compensate individuals if certain conditions were satisfied.

¹³Consisting of one judge from each Member State and eight Advocates General, as per Article 221 of the EC Treaty. The Advocates General assist the ECJ by making reasoned submissions on cases brought before the ECJ as per Article 222 of the EC Treaty.

⁸ *Von Colson and Kamann v Land Nordrhein-Westfalen*.

⁹ Case C-106/89 [1990] E.C.R. I-4315; [1992] 1 C.M.L.R. 305.

In the case of *Brasserie du Pecheur v Germany; R v Secretary of State for Transport ex parte Factortame Ltd*¹⁰, the *Francovich v Italy* criteria was stretched to state that Member States of the European Union must compensate individuals for damage caused by serious infringements of directly effective provisions of Community law. The right to reparation arises when the breach was sufficiently serious and caused damage to individuals and the ECJ's decision in this case contains guidance in the form of factors that will determine such cases.

Factors that determine English breach of EC law

The factors which the ECJ stated include:

- (i) Clarity and precision of the rule breached.
- (ii) Measure of discretion left to the English court.
- (iii) Whether the infringement was intentional.
- (iv) Whether the infringement was voluntary.
- (v) Whether the damage caused to the individual person was intentional.
- (vi) Whether the damage caused to the individual was voluntary.
- (vii) Whether there was an error in law.
- (viii) Whether such error in law was excusable.

The ECJ, in its decision, stated that if the English courts had persisted in reaching decisions contrary to the ECJ finding on the matter, this was a breach in Community law¹¹. The ECJ has consistently ruled that European Community law takes precedence over national law, even when it was argued, as in the case of *Internationale Handelgesellschaft mbH v Einfuhr- und Varratsstelle fur Getreide und Futtermittel*,¹² that the national law must take precedence because to do otherwise would conflict with the provisions of the country's constitution in this particular case. Soon after this case, that nation's law conflicting with the E.C. law was declared invalid by that nation's government.

In general, English courts have reluctantly recognised the supremacy of E.C. law, but have mostly complied. Cases such as *Macarthy's Ltd. v Smith*,¹³ *Garland v British Rail Engineering*,¹⁴ *Pickstone v Freemans*,¹⁵ *McKechnie v UBM Building Supplies (Southern) Ltd.*,¹⁶ and *Thorburn v Sunderland City Council*.¹⁷

Enforcement of European Community Law must be vigorous

It is of no use that the ECJ make a decision which is not heeded in the English courts and not compulsorily enforced. Laws can be enforced under the E.C. Treaty.

¹⁰ Joined cases C46 & 48/93 [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889. In the decision, the ECJ said that, in the context of interlocutory proceedings, a national court must refuse to apply a rule of national law if such would prevent it from giving interim relief based upon European Community law.

¹⁷ One such matter has been discussed in the article "Police powers of entry into private premises", by S. Ramage, *Crim. Law* (2007) No.177 Pages 9-11.

¹² Case 11/70 [1970] E.C.R. 1125; [1972] C.M.L.R. 255.

¹³ [1979] I.C.R. 785.

¹⁴ [1983] 2 A.C. 751.

¹⁵ [1989] A.C. 66, HL.

¹⁶ [1991] 1 All E.R. 106, Employment Appeals Tribunal.

¹⁷ [2001] E.W.C.H. Admin. 934.

- (i) It can be enforced by using Article 226 which allows the European Commission to bring proceedings against a Member State for that State's failure to fulfil an obligation under the Treaty.
- (ii) Another Member State can bring proceedings against the miscreant Member State under Article 227.
- (iii) An individual in the miscreant Member State can, under Article 230, ask the ECJ to review the legality of acts done by community institutions on the grounds of lack of competence.
- (iv) By Article 232, infringement of a requirement; infringement of the E.C. Treaty; or infringement of a rule of law relating to the application of any part of the EC Treaty.
- (v) By Articles 235 and 288, damages awarded in a case of non-contractual liability against a Community institution, where it is proved that the institution or its servants, have breached the general principles common to the laws of the Member States and institutions of the community.
- (vi) Article 230, which states:
' The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank other than recommendations and opinions of acts of the European Parliament intended to have legal effect vis-à-vis third parties.'
- (vii) By Article 241, which permits parties to plead that a Regulation is inapplicable where such is incidental to the main proceedings in proceedings before the European Court of Justice, though Article 241 cannot be used directly to attack a regulation not to evade time limits under Articles 230 and 232 in cases where the challenged act derives its validity from a regulation being claimed as invalid. Article 241 entitles the European Court of Justice to rule that the regulation is inapplicable *inter partes* only, rather than annul the Regulation altogether.

A suitable case for ECJ ruling- Northern Rock Building Society

As regards money-laundering and other regulatory frauds, banks are a regulated sector as set out in Financial Services and Markets Act 2000 (FSMA). No person may carry on a regulated activity in the UK unless either authorised or exempt (FSMA 2000, s 19). Contravention of s19 is a criminal offence punishable by a fine and up to two years imprisonment (ss23/25). Since 2000, there has been the Consolidated Banking Directive (2000/12/EEC) which consolidated the First Banking Directive 1977/780/EEC; Own Funds Directive 1989/299/EEC; Second Banking Directive 1989/299/EEC; Solvency Ratio Directive 1989/647/EEC; Consolidated Supervision Directive 1992/30/EEC and the Large Exposure Directive 1992/121/EEC. Despite this, Northern Rock was able to have an over-large exposure, in clear breach of EC Directives.

Contradictions between civil law and common law

The differences between civil and common law systems are essentially cultural differences. Common law systems are to be found in the United States of America, the Commonwealth countries and the United Kingdom.

The remaining countries are governed by a civil law system. European countries are governed by the civil law derived from Roman law, a law developed largely as the work of learned jurists, reflecting a university tradition of logical principles and ideas worked out deductively and systematically in a spirit of rationalism.

The common law system, a customary law, like the law of less developed countries, is primarily empiricist and is certainly not inherently logical or systematic doctrine. It is a pragmatic art, left to practical lawyers and judges. This is why it cannot suddenly change the rules and begin to introduce statements from articles and books written by teachers in English universities. This is the ideology of the English common law system, a piecemeal creation of law from case to case, i.e. judge to judge, precedent to precedent, depending on the character of the judge, in contrast to a civil law system, highly systematised and rational codes. In English criminal law, especially, can be seen the law of primitive culture, although it has been said that in civil law system, the classification of crimes contained even in the corpus juris of Justinian are capricious¹⁸. In the United States, criminal prosecutions typically are initiated by complaint issued by a judge or by indictment issued by a grand jury.

In England and Wales, criminal law derives from a number of diverse sources- the definitions of the different acts that constitute criminal offenses can be found in the common law as well as in thousands of independent and disparate statutes and from the EU. The body of English criminal law is considerably more disorganised and finding common thread to English criminal law is very difficult. For this reason, a consolidated English Criminal Code was drafted by the Law Commission in 1989 but, though codification has been debated since 1818, to date, apart from the efforts in the Criminal Justice Act 2003¹⁹, codification has not been implemented²⁰. Scotland and Northern Ireland have their own legal systems and are distinct jurisdictions within the United Kingdom of Great Britain and Northern Ireland.

Judicial reviews- not all they are cracked up to be

Finally, we consider the theory by Ginsberg that judicial reviews, are loaded, rather than the legal balance they are thought of as being. Ginsburg suggests that the development of judicial review in most of the world can be traced to the political interests of powerful politicians, particularly legislators (Ginsburg 2003: 18). In Ginsburg's analysis, these elected politicians grant courts the right of judicial review as insurance against a new and different political party coming into power. Judicial review ensures that a new leading party will be forced to live by the rules set during the current administration (Ginsburg 2003: 9-10; 34-35).

¹⁸ Sir Henry Maine, *Ancient Law*, page 327, (Oxford University Press, Oxford 1931)

¹⁹ The UK Criminal Justice Act 2003 can be viewed as a basic law that overrides all past law, similar to two basic laws passed in the country of Israel in 1992, when the Israel High Court of Justice (HCJ) declared that a constitutional revolution had occurred in Israel since two new Basic Laws were passed that year. Those new Basic Laws are treated as foundational legal principles overriding normal legislation, despite Israel's lack of a written constitution, a way that English law can go. *Bergman v. Minister of Finance*, (Israel), the Israeli HCJ asserted that Israeli Basic Laws (of which there were then nine) held a higher legal standing than normal statute.

²⁰ George P. Fletcher, *Rethinking Criminal Law*, (OUP, Oxford 2000)

Hundreds of Money laundering appeal cases expected due to judge paying attention to an article in a law journal

The case of *P v P* [2003] EWHC Fam 2260, (unreported, 8 October 2003) has been revised since the *Bowman v Fels* decision. Hundreds of appeals against money laundering convictions could be triggered by one of the most significant decisions in criminal law, *Ali and others* [2005] EWCA Crim 87, [2005] All ER (D) 16 (Jun) and this is one of the most significant decisions of the court in criminal law in 2005. Counsel for HM Customs and Excise said that if the court decided as it did, then this would trigger hundreds of appeals against conviction, all of which would have to be upheld. It would thus undermine the success of past law enforcement efforts against money launderers. In *Ali*, the court paid careful regard to the views of one legal academic and Hooper, in delivering the decision, declined to follow previous court authorities, explicitly adopting instead the critique of those authorities expressed by Professor Ormerod in his case note in the Criminal Law Review in April 2005.

The signals in the extension of *Pepper v Hart*

The signals are to be found in law review articles, interviews, and case decisions, legitimising extra-statutory sources of legal interpretation.

