Law, Culture & Ideas

20/09/2016 · 6:16 PM

Modern Statutory Interpretation

A Note From the SLS 2016 Conference at Oxford.

Every student of law will know about the 'sources of law': statues, judicial reasoning, European legislation and cases. They will be familiar with the cannons of statutory interpretation, the so called Literal, Golden and Mischief rules, purposive and contextual interpretation.

All students will have studied how under our constitutional settlement, the judges interpret and apply statutes such as to articulate the will of the democratically legitimated Parliament, (the supreme law making body), how the judges attempt to discern the will of Parliament reconciling that with their judicial obligation to serve justice and the principles of legality.

It is apparent that modern law-making in common law jurisdictions comes from a constant recurring argument and debate between Parliament, the judges and legal academics. In this spirit of a debate the conference offered a distinguished panel vividly embodying the dynamic of the 'law making' conversation. On the panel chaired by Lady Justice Arden the speakers were Lord Justice Sales, Professor John Bell from Cambridge and Daniel Greenberg a former Parliamentary Counsel.

Lady Justice Arden argued that the judiciary should cast aside "the baggage of statutory interpretation" and instead ask themselves why that particular statute was drafted. In other words, when interpreting statues the judges need to question the scope and range of the legislation, the so called purposive approach to interpretation, implicitly raising questions about the conventional account of the relationship between the judiciary, executive and parliament which privileges the all too easily accepted notion of judicial deference to the democratic will of Parliament.

The positivist notion that the judges make decisions free of moral considerations and must disregard the context of the particular cases as well as wider questions of social mores, formalistically to 'find' the law is decisively dead, even if not quite yet fully buried. It is only surprising how long academic accounts of judicial law making have taken to catch up with the work of critical legal realists.

Nevertheless, the literalist interpretative approach maintains a brooding presence. The question for the panel was in construing legislation what is the range and depth of the material that the judge is to take into account to give the statute its

full context, how far and to what sort of material is the judge refer to, implicitly raising questions of legal recognition, and the dissolution of the conventional boundary drawn by rules of evidence and litigation procedure.

As every law student knows, the decision in *Pepper v Hart*[1] reversed the long standing common law rule that the judges could not look at legislative history when construing legislative ambiguities, and ever since then the courts have regularly consulted *Hansard*.

In *Pepper v Hart* Lord Griffiths said that:

> "…I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult *Hansard* to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted…. In summary, I agree that the courts should have recourse to *Hansard* in the circumstances and to the extent he proposes. I agree 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 article 9 of the Bill of Rights. I agree that the House is not inhibited by any Parliamentary privilege in deciding this appeal."

Having allowed *Hansard*, the question is what other documents and records should be accessible to the judiciary as aids to construction. Should the scope extend as far as instructions to Parliamentary Counsel and even MP's personal dairies as suggested by Daniel Greenberg in his critique of judicial reliance on too wide range of material, or should the search for legislative intention remain narrower, within the conventional boundary? References to a wide range of material may increase the risk of basing decisions on individualised interpretation of the legislation and the enveloping context.

Interestingly the judges on the panel made it quite clear that only 23 years after the decision in *Pepper v Hart*, consulting *Hansard* was rarely helpful and not that useful. Often the parties to a case spent huge resources searching though *Hansard* for evidence of legislative intention which, at best, was scrappy.

The central question revolves around the contextual richness of material that can be relied on by the judges as evidence of legislative intention, or in legal language the questions revolve around the status of the evidence of intention and context of the legislation. According to Daniel Greenberg, judicial reliance on the widest possible range of material, which could, but does not as yet, involve reading of the instructions to Parliamentary Counsel for instance, means that judgments lack rigour and discrimination weakening the legality of the decision itself, because the range of sources is diffuse and remains forensically untested, that is risks breaching the evidential boundary set by court rules of court and litigation procedure.

According to Daniel Greenberg, the rise of purposive interpretation is a myth based on the correlative observation that as judges look at an increasingly wide the range of materials they actually understand less of the status and credibility of the material they rely on. He argues that whilst judges are not literalists or purposive in their approach, modern statutory interpretation is solely contextual.

Daniel Greenberg argued that we should approach modern statutory interpretation not from the 19th century positivist perspective, but having regard to the existing constitutional relationship and construct interpretation in terms of a conversation between the courts, Parliament and academia.

Lord Justice Sales articulated a deeper normative public law argument as the credible rationale forming the basis of modern statutory interpretation. In his view modern statutory interpretation was "embedded in constitutional law" fully cognisant of the political and social values of democracy, human rights and the joint legal and political construction of legal constitutional norms.

For Lord Justice Sales the normative imperative – that what '*should be'* in the statute intended to reflect the legal constitutional norms – was the key force in judicial law making, he termed this approach vectorial analysis. Under the vectorial approach to interpretation the judges start with the presumption that the effect of the legislation is intended to express the accepted constitutional norms, and thus in interpreting statues the judges can adjust the meaning of the statutes so as to reflect the vales and norms they *should have*.

The vectorial portrayal of the relationship between the judiciary and the legislature in terms of shared yet measured but tensioned aims recalibrating the line of democratic values represented by Parliament and the overarching human rights values driving judicial decision making appears to reflect neatly the reality of the 'conversation' between the legislature and the courts, yet the model appears to reserve the final say on the meaning of a statute to the judges, as after all they are to interpret the law to reflect the norms the statues *should have*.

Unfortunately this elitist judicial perspective privileging a shared cohesive view of what should be the norm, fails to deal with the possibility of a shift or at least a recalibration of the shared accepted the norms. Such as for instance the shift from a universal conception of human rights to human rights defined in terms of the characteristics and history of nationhood, or from a democracy to a permanent state of exception[2] in order to 'preserve' and safeguard that democracy. In other words it is a hyper-realist model recognising that judges are political creatures upholding the prevailing constitutional norms, but omits to tell us what is to happen, for instance when physical assaults on someone because they speak a minority language become acceptable. [3]

Professor John Bell perceived law as an integrated whole, such as seen in law of contract for instance. On this view Parliamentary statues are not isolated missives, but incomplete yet key statements of law, better seen in terms of a contribution to an on-going conversation to which the partners – the courts and parliament – contribute.

Consequently, the 'on-going conversation' theory seeking to integrate law and being a creature of common law it follows that unlike civil jurisdictions, English law does not have a general theory of law.[4] The case law is seen as one of the integrative agents to the law-making conversation, and it comes from the practical application of law in cases coming to court. However, the 'on-going conversation' model, whilst reflecting flexibility and contextuality of common law, overlooks the logical inconsistency of applying 'law' in the course of a 'law-making' conversation, and the question of the legal consistency of the resulting case law, unless one argues that the legal legitimacy of the possibility certainty is intended to be guaranteed in the feudal sense by the institutional status of the body hosting the 'conversation'. The trouble here may stem from the empiricists denial of the possibility of a general theory of law and the double bind of the need to construct a general theory fit for empirical observations.

Professor Bell argued that there is no clash between the various canons of statutory interpretation because the courts are in fact doing contextual reading of the law – starting with the ways of the lawyer and striving to derive meaning from the actual practice of law, yet the circularity of this argument is inescapable in that we know not the meaning of 'meaning'. Moreover using practitioner usage as the principal guide to statutory interpretation risks the individualisation of legal decision making, the point made by Daniel Greenberg regarding the diminution of judicial rigour which places the legality of the judgment at risk.

However, according to Professor Bell, the judges derive meaning from conventional usage, but in order to avoid restrictive meaning of statues the judges must be cautious about deviating from the ordinary meaning, and the practice of law. The principle of legitimate expectation, elevated to a binding duty on the court, provides the conceptual explanation for promoting practice of law as the primary interpretive mechanism: the 'expectation' because it is legitimate becomes vested with the status of a right, and as it is the function of the court to protect legal rights it follows that the court must protect the expectation of the "ordinary practitioner in the field".

Professor Bell argues from the principle of consistency of law and practice that because the court is obliged to protect the expectation of the practitioner, interpretation of statutes is automatically guaranteed to be consistent with legal usage. However, law cannot only be made by practitioner usage; it must also express some norms, as argued by Lord Justice Sales in his vectorial analysis.

To avoid individuation of judicial decisions, Professor Bell argues that the search for 'legal usage' is justified by the principles of legitimate expectation, intelligibility and legitimate aim. In other words, interpretation fits the expectations of the parties and because UK judges cannot strike down legislation, the "ordinary practitioner" approach to interpretation meets the technical inviolability of statute law by the UK courts as looking at what is typically in breach of law and does not invade existing rights. He argues that context is here the expectation of the "ordinary practitioner" which requires the precondition of equality of power and the right to exercise that power.

Thus, it seems that although the panel agreed that the literalist school of interpretation is quite dead, and perhaps the purposive approach was a step too far, it agreed that context, however it is to be circumscribed, is broadly the appropriate approach adopted by the judiciary. However, the trouble is that contextuality cannot always be made to fit the positivist notion of law, and hence some of the attempts at reconciliation we heard were rather convoluted and largely supported by circularity of argument.

[1] [1993] AC 593 available at http://www.bailii.org/uk/cases/UKHL/1992/3.html

[2] See further Carl Schmitt *Political Theology* (The University of Chicago Press, 1985, 2005) and Giorgio Agamben *State of Exception* (The University of Chicago Press, 2005).

[3] Such as the recent murder of Arek Jozwik, a worker living in Harlow, for speaking Polish in England. See http://www.independent.co.uk/news/uk/crime/harlow-attack-arek-jozwik-polish-immigrant-men-hate-crime-murder-reason-what-went-wrong-a7227316.html

[4] The claim that English law does not have the capacity to sustain a general theory is not unchallenged. For instance, the critical legal school argues that if we 'drill down' and uncover the material reality of law (the truth) the recognition of moral, political, economic forces shaping law leads to a recognition of general theory. See for example: Costas Douzinas & Adam Gearey *Critical Jurisprudence: the Political Philosophy of Justice* (Hart Publishing, Oxford-Portland Oregon, 2005)

Suggested citation: J Ressel 'Modern Statutory Interpretation.' *Law, Cult. & Ideas Blog* (20 September 2016) (Available at https://lawcultureblog.wordpress.com/)

Notes:

To find more about the speakers here are some links:

Daniel Greenberg at http://www.danielgreenberg.co.uk/

Lady Justice Arden at https://en.wikipedia.org/wiki/Mary_Arden_(judge)

Lord Justice Sales at https://en.wikipedia.org/wiki/Philip_Sales

Professor John Bell at http://www.law.cam.ac.uk/people/academic/j-bell/6

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