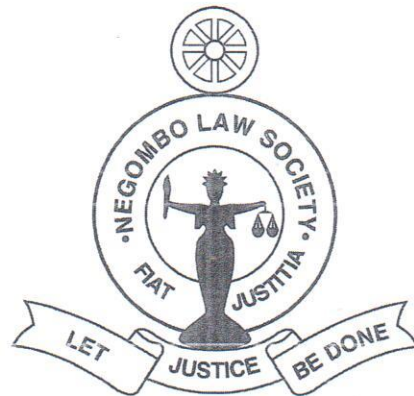


NEGOMBO LAW JOURNAL 2019



Published by
Negombo Law Society



Use of Hansard In UK and Sri Lanka: A Comparative Analysis

K.A.A.N. Thilakarathna

Attorney-at-Law, Lecturer, Institute of Human Resource Advancement, University of Colombo.

Introduction

There has been much debate on the use of Hansard as an external aid in interpreting an Act of parliament for centuries and it took 15 odd years for the House of Lords after the above remark made by Lord Denning where he stated that, “[Not to use Hansard] would be to grope around in the dark for the meaning of an Act without switching the light on”¹. Finally, the light was switched on in *Pepper v. Hart*² where exceptions were made to the exclusionary rules relating to the use of Hansard in aiding to interpret statutes. However, it is important to note that since the decision in *Pepper v. Hart*³ in the House of the lord back in 1992, it has received much criticism than blessings from the judges and others alike.

In any event it would be important to know the theoretical or the policy reasons for rejecting the use of Hansard. This has been in the fore front of the discussion for many years. In the good old days when the number of legislations that were passed was limited in numbers, a judge could have easily consulted those who would have passed the legislation, of which he himself would have been a member, as Geoffrey Marshall⁴ states “Hengham CJ needed no gloss on the statute because he has played his part in its making. In 1366 Thorpe CJ and a fellow judge went together to the council where there was a good dozen bishops and earls and asked those who made the statute what it meant”⁵

The above situation changed as more and more statutes were laid out by the parliament and there was no possibility for the judges themselves to individually go out and ask the members of the legislative branch as to what they really meant in a part of a statute really or what they themselves have really intended. Therefore, judges were made to focus their attention to the use of parliamentary records in the form of Hansard where, the speeches of ministers and other members speaking about a bill are recorded when they for the first time introduces certain bills to the house for its approval.

The Early Years of the Exclusionary Rule

This is the especial situation in Britain where the parliamentary supremacy is founded as a corner stone of the constitutional foundation where judges are duty bound to interpret legislation according to the intention of the legislature. However, in finding this so-called intention of the legislature, judges have not been so fond of using Hansard as a guide in order to ascertain the intention of the parliament. This is clear from the passage found in *Millar v. Taylor*⁶ where it was opined that “[t]he senses and meaning of an Act of parliament, it was supposed must be collected from what it says.... not from the changes it underwent in the House it took its rise. That history is not known to the other House or to the Sovereign”. Therefore, the common law rule of excluding the use of Hansard by the courts in interpreting statutes has something to do with the conscious growth of the separation of powers.

1 *Davis v Johnson* [1978] HL, 2 WLR (HL).

2 [1992] UKHL 3

3 *Ibid*

4 Dawn Oliver and Gavin Drewry, *The Law and Parliament* (Butterworths 1998).

5 *Ibid* at Page 139

6 (1769) 4 Burr 2303 at 2332



It is also linked with parliamentary privileges and perhaps something from the doctrine of the sovereignty of the Queen-in-parliament. In expounding that doctrine in the 19th century it was held that, when an Act had received the royal assent, no court of justice can inquire into the manner in which it was introduced into parliament, what was done previously to its being introduced, or what passed in parliament during the various stages of its progress through both the Houses⁷.

Commenting on this issue Alisdair Gillespie⁸ states that, it was thought that, it might be a challenge to the parliamentary supremacy where it was thought that, the law is which was passed by the parliament, not that which was discussed. Only the final Act is the law and looking at the proceedings may lead to the suggestion that the courts were questioning or impeaching the process of parliament contrary to the Article 9 of the Bill of rights⁹. In 1969, the English and Scottish Law Commissions considered the appropriateness of the exclusionary rule.-' Primarily for practical reasons, they recommended that the rule be maintained: "In considering the admissibility of Parliamentary proceedings, it is necessary to consider how far the material admitted might be relevant to the interpretive task of the courts, how far it would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed.

In *Fothergill v. Monarch Airlines*¹⁰ the meaning of 'damage to baggage' under Article 26 of Warsaw Convention on Carriage of Goods by Air was in issue and it was sought to introduce as aid to construction, the minutes of the working meetings in 1955 at which the Hague protocol was negotiated. The House of Lords did not find it necessary to rely on these convention

7 *Edinburgh v. Wouchope* (1842) 8 CL and F in 710 at 724-725

8 Alisdair Gillespie and Siobhan Weare, *The English Legal System* (OUP 2015).

9 *Ibid* at Page 61

10 (1981) AC 251

materials. Lord Wilberforce thought they should be admitted only if such material was public and accessible. Lord Diplock opined that, it would be 'a confidence trick by parliament and destructive of all legal certainty. If citizens could not rely on the words of an enactment but had to search through all that had happened before and in the course of the legislative process.' However, as with so many other things, the rule was then relaxed or had to be relaxed and according to Gordon Bale¹¹ several reasons combined to bring about the demise of the exclusionary rule. Perhaps the most important is the move towards a purposive approach to statutory interpretation that has gained momentum in Britain in the last 4 decades. Also, the volume and complexity of modern statutes made the judiciary to seek greater knowledge of the legislative context in order to construe them properly.

The rejection of the exclusionary rule is a direct consequence of the move towards a purposive approach to statutory interpretation which has taken place in the UK since the second world war. Formerly the dominant approach to statutory interpretation was the 'literal rule', where its gloss is known as the 'golden rule', supplemented by the 'mischief rule', where the courts consider the purpose of the Act. Whichever approach the courts took, they were clear that: '[courts] are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four comers of the Act itself. This approach may be characterized as an approach founded upon the construct of 'the statute, the whole statute and nothing but the statute'. Since the end of the second world war, however, and following on the recommendations of the Law Commission's report, 'The Interpretation of Statutes' in 1969, the 'purposive' approach has been increasingly favored by the British courts. Under the purposive approach, which is really a development of the old mischief rule, the courts construe statutes in the light of the overall purpose of the legislation

11 G Bale, 'Parliamentary Debates And Statutory Interpretation' (1995) 74 *Canadian Bar Review*.



rather than relying solely on the mere text of the statute¹².

The Exception to the General Rule of Hansard in Interpretation

The House of Lords in *Pepper v. Hart*¹³ decided that when a statute is unclear, ambiguous or leads to an absurdity, parliamentary debates maybe consulted as an interpretive aid. This decision finally modified the exclusionary rule which prohibited recourse to parliamentary debates in interpreting a statute, a rule which had held sway, with several notable lapses, for more than two hundred years. In *Pepper v Hart*¹⁴ the House of Lords abolished the 'exclusionary rule' that reports of parliamentary debates could not be consulted by the courts when seeking guidance as to the meaning of a piece of legislation.

The 'exclusionary rule', which was one of the best established rules of statutory interpretation, has now been replaced by what is termed the 'inclusionary rule', that is, the rule that courts may, in certain circumstances, make use of Hansard as an aid to the construction of a statute¹⁵. The impetus for the decision is well summarized by Lord Bridge. If the Section 63 of the Finance Act 1976 was to be construed by conventional criteria it appeared to support the assessments of income tax according to the arguments brought by the Inland Revenue. However, the material from Hansard contained a statement from the Financial Secretary to the Treasury in which he had "in effect, assured the House of Commons that it was not intended to impose" the very tax which a conventional reading of the provision demanded. His view was that the material indicated "unequivocally" which of the two possible interpretations of s. 63(2) was "intended by Parliament" The

headnote records the decision of the House of Lords is as follows¹⁶: the rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where:

- (a) The legislation was ambiguous or obscure or led to an absurdity;
- (b) The material relied on consisted of one or more statements made by a minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as was necessary to understand such statements and their effect; and
- (c) The statements were clear.

In arriving at his judgment, Lord Browne-Wilkinson reviewed, but did not accept as definitive, the traditional justifications given for the exclusionary rule. Therefore, the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers), to construe the meaning of the words finally enacted; second, the practical difficulty of the expense of researching Parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, the improbability of finding helpful guidance from Hansard. He went further and stated that "In many, I suspect most, cases, references to Parliamentary materials will not throw any light on the matter. However, in some cases it may emerge that the very question was considered by Parliament in enacting the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The courts cannot attach a meaning to words which those words cannot bear, but if the words are capable of more than one meaning, why should Parliament's true

12 Scott C. Stiles, 'The Rule Of Parliament: Statutory Interpretation After Pepper Y Hart' (1994) 14 Oxford Journal of Legal Studies.

13 [1992] UKHL 3

14 [1992] UKHL 3

15 Ibid supra 13

16 E Laing, 'Pepper V Hart: Where Are We, How Did We Get Here, And Where Are We Going?' (2006) Judicial Review.



intention be enforced rather than thwarted¹⁷ was the reasoning behind for the justification put forward by the House of Lords.

Lord Griffiths similarly stated: “why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament¹⁸?” The same arguments for a general relaxation of the rules exist for the other stringent conditions currently imposed, except as outlined above in relation to explanatory notes. For an example, it appears from *Melluish v BMI (No. 3)*¹⁹ that reference can be made to Hansard only if clear statements were made on the very point in question in the litigation. It is not open to parties to put forward debate concerning a different provision that is drafted in the same terms, in order to shed light on the meaning of similarly worded phrases elsewhere in the same legislation or in a different piece of legislation²⁰. Given the seemingly entrenched nature of the exclusionary rule, it was surprising to see that the courts greeted *Pepper v Hart*, if not with enthusiasm, then at least with cautious sympathy. In *Stevenson v. Rogers*²¹ the phrase “in the course of the business” was interpreted with the use of Hansard with regards to the introduction of the Sale of Goods bill in 1979. This was one of the last cases before the relaxation of the exclusionary rule came under massive attack.

The Criticism and the Demise of *Pepper v. Hart*

The ruling in *Pepper*, which held sway till the beginning of the new millennium, came under a heavy dose of criticism. At the forefront of this was Lord Steyn²² and commenting on the

development of the rule in *Pepper*, Campbell²³ states that the case of *Pepper* is generally considered to be a leading case, in that it represents a high-water mark in the common law courts’ use of a liberal, purposive approach to statutory interpretation. This at least appeared to be the approach of the House of Lords until 2000 when there began a retreat from the more liberal approach to a formalistic narrowing of *Pepper*. The occasion of this retreat is generally taken to be an extra-judicial speech given by Lord Steyn, himself an appellate judge, subsequently published in the *Oxford Journal of Legal Studies*. The speech was somewhat remarkable in that Lord Steyn had previously gone on record in support of the ruling in *Pepper*, Steyn’s argument was that *Pepper* was inconsistent with a judge’s constitutional duty to determine the intent of Parliament through the interpretation of the actual text of the legislation. He supported his argument by reference to the experience of judges in the application of the ruling in *Pepper*. Steyn also argued that “in light of the practical experience of *Pepper* it may have become an expensive luxury in our legal system²⁴. Lord Steyn’s main criticism can be summarized as follows;

- (1) The freedom offered by *Pepper v Hart* has become too much of an expensive luxury in our legal system, and has substantially increased the cost of litigation to very little advantage.
- (2) The intention of the executive, and even of individual members of the executive, should not be allowed to be substituted for that of Parliament: “the only relevant intention of Parliament can be the intention of the composite and artificial body to enact the statute as printed”.

17 D Manknell, ‘Time To Revisit Pepper V Hart?’ (2004) 9 *Judicial Review* <<http://www.tandfonline.com/doi/abs/10.1080/10854681.2004.11427285#.VcQS8vmqpHw>> accessed 7 August 2015.

18 *Ibid*

19 [1996] 1 AC 454

20 *Ibid* Supra 18

21 [1999] QB 1025

22 J. STEYN, ‘Pepper V Hart; A Re-Examination’ (2001) 21 *Oxford Journal of Legal Studies*.

23 N Campbell, ‘36 Canadian Law Library Review 2011 Legal Research And The Exclusionary Rule’ (Heinonline.org, 2011) <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/callb36&div=48&id=&page=>> accessed 7 August 2015.

24 *Ibid*



- (3) The decision permits an ambiguous statute to be interpreted against the citizen as well as against the state.
- (4) It encourages courts to find that legislation is ambiguous when it is not, once it is apparent that there is a relevant indication of opinion by Parliament.
- (5) It introduces a "new form of literalism" and restricts the courts' capacity to cope with changing conditions.

Commenting on this Vogenauer²⁵ states that overall, *the scope of Pepper* has been reduced to such an extent that the ruling has almost become meaningless. Arguably, this goes well beyond confining the decision to its facts, and effectively amounts to a partial overruling. This development represents a fundamental change in our law on statutory interpretation, and, as far as I can see, it has gone largely unnoticed. It thus merits a critical examination. A 're-examination' of the change initiated by Lord Steyn's, 're-examination'. Amongst the current Law Lords, Lord Steyn is probably the one who has made the most valuable contributions to the development of statutory interpretation in this country. In *Wilson v Secretary of State for Trade and Industry*²⁶ the House of Lords imposed restrictions on when the courts could refer to Hansard where it was held that, only statements made by a Minister or other promoter of legislation could be looked at by the court, other statements recorded in Hansard had to be ignored. In that case a lawyer, Mr. Sumption, was appointed to put forward the concerns that Parliament had if Hansard was too readily relied upon, as this could serve to subvert the will of Parliament as expressed in the legislation passed. In *Thet v DPP*²⁷ it was held that, Hansard should not be called in aid of a criminal prosecution

as it could lead to a situation in which a person was made criminally liable not on the basis of the words in a statute, but rather on the basis of supporting material that extended the ambit of liability in that statute.

The Sri Lankan Experience

Unlike the other aspects of the British common law where we have been like slaves to follow the path, in the use of Hansard as an external aid to interpretation of statutes we have not been enslaved by the UK approach. Instead we have used Hansard as an external aid in interpreting statutes at least from the 80's. In the famous case of *J.B Textiles v Minister of Finance*²⁸ the Supreme Court held that, the Court of Appeal had erred in holding that Hansard containing statements made in parliament could not be used by the petitioner as evidence in support of their case. Hansard is admissible to prove the course of proceedings in the Legislature subject to the qualification that the statement therein must be accepted in to without question. The Court of Appeal took the view that the Hansard is a closed book for them.

However, there is a twist to this, according to section 78(2) of the Evidence Ordinance no 14 of 1895. A Hansard is recognized as an admissible piece of evidence, According to Section 78 the following public documents may be proved as follows:

(The proceedings of the Legislature-)

- (i) By the minutes of that body, or
- (ii) By published enactments or abstracts, or
- (iii) By copies purporting to be printed by order of Government;

Therefore, as a general law of Evidence the courts are by a statute authorized to investigate what has been said and done by the legislature

25 S. Vogenauer, 'A Retreat From Pepper V Hart? A Reply To Lord Steyn' (2005) 25 Oxford Journal of Legal Studies.

26 [2003] UKHL 40

27 [2006] All ER (D) 09

28 [1981] 1 Sri LR 156



which is recorded in a Hansard which falls in to the Evidence admissible under the Ordinance. Even in other instances, the courts have not as a matter of fact as in UK rejected the use of Hansard. However, the Courts has been very cautious to use it in earlier times which is made obvious in the decision of *Sirisena and Other v. Minister of Agriculture and lands*²⁹ where justice Vythyalingam held that we ought not to do so unless there is such great ambiguity in the words that looking at Hansard alone would be decisive. It could be argued convincingly that the Court was of the view that Hansard must be used only if it is a decisive move. But it could be argued that what was held in *Pepper v Hart* was also akin to this point. A fact reiterated by justice Wijesundera in his dissenting judgment where he held that there is room for an exception when examining the Hansard would almost certainly settle the matter one way or other. Here his Lordship had recourse to the English authority found in *Warner v. Metropolitan Police Commissioners*³⁰

Even after the decision in *Pepper v Hart* our Courts have not made much recourse to that judgment. This is evident from the Judgment given by the Supreme Court in *Jeyaraj Fernandopulle v premachandra and others*³¹ where the Court considered the matter relating to admissibility of Hansard, not so much in interpreting a statute but nonetheless made no remarks on *Pepper*. Justice Mark Fernando in *De Silva and other v. Jeyaraj Fernandopulle*³² referred to the dictum of Samarakoon CJ in *J.B Textiles v Minister of Finance*³³ where his Lordship held that the Hansard is the official publication of Parliament. It is published to keep the public informed of what takes place in Parliament. It is neither sacrosanct nor untouchable.

29 [1974] 80 NLR 1

30 [1968] 2 W.L.R. 1303

31 [1996] 1 Sri L R 70

32 [1996] 1 Sri L R 22

33 Supra 28

The Court of Appeal in *Ravindra Karunanayake v. Ruwan Gunasekera*³⁴ for the first time, convincingly I might add, made recourse to the rule laid out in *Pepper v Hart* and allowed the use of Hansard in Interpreting the Section 3 of the Bail Act No 30 of 1997 where the Court made reference to the Hansard dated 02.10.1997 where the speech of Hon. Prof G.L Peiris was relied upon to interpret the particular section. The court went on to state that "it is manifest from the Ministers speech that the intention of the legislature is to exclude...." This reiterates the fact that the intention of the legislature was recouped with the use of Hansard.

On one final note, the Supreme Court again referred to *Pepper v Hart* in *Shiyam v. Officer-in-Charge, Narcotics Bureau and Another*³⁵ the following remarks were made. It is therefore apparent that the Court which now adopts a purposive approach could refer to the Hansard for the purpose of ascertaining the intention and the true purpose of the legislature in order to interpret the legislation which is ambiguous, obscure or leading to an absurdity. The Court came to this Conclusion with reference being made to all the above cases. In a Sri Lankan context where the Courts being not restricted by the Supremacy of the Parliament has generally used Hansard as an external aid to statutory interpretation where it leads to a conclusive outcome where the Hansard will enable the judge to decide it in one way or the other. The judicial hunch and the hunt have been remarkably different between the use of Hansard between local and UK judges, a point that is contradictory in other forms as we have always heavily relied on the UK Practice.

Pros and Cons of Using Hansard

The lifelong argument against the use of Hansard as an aid in interpreting statutes has been mainly three-fold, it is expensive, time consuming and

34 Application No 05/2004

35 [2006] 2 Sri LR 156



at times may be confusing. However, with the rapid growth of the technology it would not be correct to argue that getting your hands-on Hansard is any longer a difficult task, as even the Sri Lankan Parliament publishes the Hansard online, so recourse to it can be had easily and it is freely available. The second argument that it may be time consuming that has much force. In interpreting a statute if the literal approach is to be followed the meaning or the so called intention of the legislature must be ascertain from the actual words used but if we are to have recourse to a speech made by a particular minister on a particular date on a particular Bill, it may not be a true reflection of the intention of the legislature as the legislature is not a single minister, therefore, it would not be right to argue that the intention of the parliament as a whole is laid down in the Hansard. Therefore, it would be time consuming for both the counsel and the judges to interpret the Hansard as well, when let alone interpreting the section of the enactment is difficult itself.

Commenting on the use of use of legislative history as an aid for interpretation Antonin Scalia in his seminal work³⁶ states that the objective indication of the words, rather than the intent of the legislature, is what constitute the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning. According to him, getting more and more outside materials as an aid will obscure the true intent and the meaning of an Act.

From a jurisprudential view if one were to be a slave of Hansard a judge may never be creative and he will not be interpreting a statute instead would be repeating what has been said and done in a place which is duly recorded in a thing called Hansard. This may be very bad for the development of the law as judges won't be able to take into account the current prevailing social

and political factors in interpreting statues. Llewellyn may also have feared that recourse to historical sources would degenerate into a kind of rigid formalism in which words would matter more than policy³⁷. However, it would be not right to conclude that there should be a total prohibition on the use of Hansard. In a practical sense it may bring the gleam of light in to the shades of darkness when no alternative would bring clarity. But it should be carefully done and one should always be extra cautious in using such an external aid in interpreting a statute.

Conclusion

As we have seen, the debate at least in UK has continued and the little hope brought about by the decision in *Pepper v Hart* has clearly faded in UK. On the contrary however in a Sri Lankan Context it would be safe to say that the Courts here have generally developed the ruling in *Pepper v Hart* and rather than restricting its application they have expanded it within limit. In any event one must not should the moon, the rule should remain as to the inadmissibility of Hansard and the exception must be to use it where the Hansard is able to decide the matter one way over the other. The darker the room the need of a light to look inside is more valuable yet with a statute even the light that shines may not clear the paths; the door may still be shut or the keys lost. Hansard is not a lamp of Aladdin which gives meaning to every word of an enactment with the whispering of the words open sesame.

³⁶ Antonin Scalia and Amy Gutmann, *A Matter of Interpretation* (Princeton University Press 1997).

³⁷ J M Breen, 'Statutory Interpretation and The Lessons of Llewellyn' (2000) 1 *Loyola of Los Angeles Law Review*.