

Devolution: A New Breath of Life for *Pepper v Hart*?

Mark Keith Heatley¹

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Abstract The ruling in *Pepper v Hart* relaxed the exclusionary rule, adding to a series of situations where external material can be utilised in statutory interpretation. Since the judgment, the House of Lords/Supreme Court has defined and regulated its use, to avoid constitutional conflict and ensure acceptance of judgments based on it by parliament and the executive. When the ruling is applied, it is suggested, this will avoid drawing the court into controversy when interpreting “constitutional” Acts and in particular any future conflict between the UK and devolved legislatures when determining their relative powers. External material has been gradually introduced into the interpretation of legislation passed by these devolved legislatures. *Pepper v Hart* will be a suitable model when utilising ministerial statements to interpret these should the need arise, albeit based on the need to respect the separation of powers rather than to observe the requirements of the Bill of Rights.

Keywords Statutory interpretation · Legislative history · Hansard · *Pepper v Hart* · Devolution

Introduction

Lord Neuberger recently summarised the courts’ procedure in statutory interpretation as follows

First, the court’s constitutional role in any exercise of statutory interpretation is to give effect to Parliament’s intention by deciding what the words of the relevant provision mean in their context. Secondly, it follows that, in so far as

✉ Mark Keith Heatley
markkheatley@hotmail.com

¹ University of Leeds, Leeds, UK

any extraneous material can be brought into account, it is only as part of that context. Thirdly, before such material can be considered for the purpose of statutory interpretation, certain requirements have to be satisfied: ——— Fourthly, even where those requirements are satisfied, any court must be wary of being too ready to give effect to what appears to be the parliamentary intention —.¹

Regarding this fourth point, traditionally the courts avoided consulting the record of the parliamentary proceedings that resulted in a statute's enactment. The ruling in *Pepper v Hart*² relaxed this self-imposed exclusionary rule,³ adding to a series of situations where external material can be utilised in statutory interpretation of primary legislation, to avoid a construction that would lead to absurdity, obscurity or ambiguity.⁴

Since this relaxation of the exclusionary rule a framework which respects both parliamentary sovereignty and the roles of the various branches of government has developed which has prevented the courts being involved in political controversy whilst effectively considering ministerial statements. This provides a secure basis for the use of *Pepper v Hart* in the future interpretation of constitutional statutes⁵ should the need arise, in particular when determining the powers passed to the devolved legislatures and executives by the UK parliament in Westminster.

As addressed by Lord Browne-Wilkinson, the senior Law Lord, who gave the main speech in the ruling, there were a number of concerns about relaxing the exclusionary rule. In particular

1. Judicial examination of the history of an enactment would result in an intrusion into parliamentary privilege and that would alter parliamentary practice⁶ and

¹ *Williams v Central Bank of Nigeria* [2014] 2 WLR 355, 387 (Lord Neuberger PSC).

² *Pepper v Hart* [1993] AC 593.

³ The majority's decision to refer to legislative history was contrary to earlier cases (*Davis v Johnson* [1979] AC 264, 329 Lord Simmons) (*Fothergill v Monarch Airlines* [1981] AC 251 Lord Diplock). Their reservations were supported by the report of the Law Commissions in 1969 (Law Commissions, *Joint Report on the Interpretation of Statutes* (Law Com and Scot Law Com No 21, 1969) 31) which urged against using legislation's parliamentary history in its interpretation.

⁴ In *Pepper v Hart* ([1993] AC 593, 615, 633, 635, 640), Lord Browne-Wilkinson described a steady relaxation of the exclusionary rule which had been introduced in criminal cases, when interpreting statutory instruments and the courts were already using extra-parliamentary materials such as law commission reports and draft bills. The ruling therefore was part of a gradual evolution in the use of extraneous material rather than a comprehensive reform. Subsequently other resources have been consulted including explanatory notes (*Westminster City Council v National Asylum Support Service* [2002] UKHL 38 at [5-6] and marginal notes (Simamba 2005).

⁵ Lady Hale and others have summarised the authorities that suggest there are fundamental constitutional instruments in the UK (Lady 2014; Craig 2014. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2002] 3 WLR 247, [2002] EWHC 195 (Admin), [2003] QB 151 at [62] Laws LJ. These include the Bill of Rights, the Acts of Union and the devolution statutes. It is argued that they can only be expressly and not impliedly repealed. This view has been disputed with respect to the Acts establishing the devolved legislatures as discussed below.

⁶ For discussion see Brudney (2007).

2. would result in a shift in the separation of powers with the executive being accorded increased influence in both the legislative process and the subsequent interpretation of that legislation by the judiciary⁷
3. Parliamentary statements reflect the outlook of the times in which they were made. Consulting them would fossilise the meaning of legislation and result in its obsolescence⁸

This article examines how judicial development of the principles established in the ruling in *Pepper v Hart*, has resulted in acceptance of the use of Hansard in statutory interpretation, a previously controversial concept, by parliament, executive and the courts. It goes on to examine how its use, can be applied in “constitutional” legislation including those acts establishing the devolved legislatures and in turn their enactments and examines whether there is further scope for its extension.

Pepper v Hart

As well as the three concerns above, the cost implications of consulting Hansard and the need for the citizen to have access to a known defined text which regulates his legal rights were considered as reasons for preserving the exclusionary rule.⁹ Nevertheless the court relaxed the exclusionary rule providing the following conditions were met and the interpretation adopted was one the wording of the legislation could bear.

Lord Browne-Wilkinson’s conditions were

1. the usual means of statutory interpretation would result in absurdity, obscurity or ambiguity¹⁰
2. a promoter had made a statement to clarify the matter and
3. that statement was clear.¹¹

⁷ See Kavanagh (2005).

⁸ See Laing (2006).

⁹ Lord MacKay opposed the use of Hansard because the time required to research legislative history would add to the costs of a case (*Pepper v Hart* [1993] AC 593, 615). Such research has been described as costly and in some circumstances, probably a waste of time (Scalia and Garner (2008), 48–49). Some assistance is now provided by commercial databases providing links to extracts of the debates which the database editors consider may be helpful in resolving possible ambiguities (see Westlaw UK Help-Legislation Help and Coverage Annotated Statutes Expert Explanation <http://login.westlaw.co.uk/maf/wluk/app/help?docguid=10adffc2f00000109026aaa85f388422c&ndd=2&crumb-label=Westlaw%20UK%20Help&mode=aboutLegislation&crumb-action=replace> accessed 6th October 2016).

In contrast to this suggestion that consulting legislative history merely adds unnecessarily to costs, in *Chief Adjudication Officer and another v Foster* ([1993] 1 All ER 705, 716) Lord Bridge commented that the early use of legislative history would have avoided litigation and the appeal.

¹⁰ For brevity referred to as ambiguity throughout the text of this article.

¹¹ *Pepper v Hart* [1993] AC 593, 645 (Lord Browne-Wilkinson).621. These were subsequently formulated in *Practice Note* [1995] 1 All ER 234; sub nom *Practice Direction (Hansard: Citation)* [1995] 1 WLR 192.

Statements relied on must be made by the promotor of the bill¹² or amendment¹³ and must clearly demonstrate what the legislation was designed to achieve and this must be accepted without further, later amendment¹⁴ by parliament. This avoids conveying the legislative function to the executive and away from parliament¹⁵

Intruding on Parliamentary Privilege and the Separation of Powers

Parliamentary privilege and the separation of powers—evidence for acceptance by the three branches of government.

The Law Lords, citing *Erskine May on Parliamentary Practice*,¹⁶ decided that their use of Hansard would not breach parliamentary privilege because the Law of Parliament was part of the general law as applied by the courts.¹⁷ Their lordships decided that by strictly observing the conditions Lord Browne-Wilkinson specified, referring to parliamentary material would ensure there was no breach of article 9 of the Bill of Rights.¹⁸ Parliament and the executive seem to have accepted this use of parliamentary statements in legislative interpretation, despite the Clerk to the House

¹² *Bocardo SA v Star Energy UK Onshore Ltd and another (Secretary of State for Energy and Climate Change intervening)* [2010] UKSC 35 at [43] (Lord Hope); *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 1 AC 816 at [113], *R (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions and another* [2001] 2 AC 349 (HL), [2001] 1 All ER 195, 227 (Bingham LJ).

¹³ *Chief Adjudication Officer v Foster* [1993] A.C. 754, 770, *R v London Borough of Wandsworth exp. Hawthorne* Lexis QBD, Official Transcripts (1990-1997), *Botross v London Borough of Hammersmith and Fulham* LEXIS QBD (1994) 16 Cr App Rep (S) 622, 27 HLR 179 *London borough of Lewisham (appellant) v. Malcolm (respondent) and Equality and Human Rights Commission (intervener)* [2008] UKHL 43.

¹⁴ *R (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions and another* [2001] 2 AC 349 (HL), [2001] 1 All ER 195, 211 (Bingham LJ), *R v JTB* [2009] UKHL 20 at [35] (Lord Phillips) at [40] (Lord Carswell), [2009] 3 All ER 1, 12.

¹⁵ The distinction between ministerial intent and legislation enacted by the Queen in parliament is reiterated in the recent “Miller Brexit case” *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Reference by the Attorney General for Northern Ireland—In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland)—In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5 [35] Lord Neuberger [196] Lord Reed. Although Hansard was cited in the ruling this related to the governments intent to enact future legislation and not to clarify the wording of an existing Act. *Miller* [263] Lord Carnwath. The use of *Pepper* would not have been necessary in those circumstances as there is as yet no legislation to construe.

¹⁶ *Pepper v Hart* ([1993] AC 593, 645 (Lord Browne-Wilkinson). *Erskine May on Parliamentary Practice*. (1989) 147–160.

¹⁷ This was confirmed in *R v Chaytor and others* [2010] UKSC 52, [2011] 1 All ER 805.

¹⁸ *Pepper v Hart* [1993] AC 593, 614 (Lord MacKay), 17 (Lord Griffiths), 21 (Lord Oliver), 23–24, 33–4, 38, 45 (Lord Browne-Wilkinson), *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 1 AC 816, 40 at [80], [2003] 1 AC 816, [2003] 4 All ER 97, 131–2 (Lord Hobhouse). Article 9 of the Bill of Rights 1689 states “Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament” and refers to proceedings in the UK parliament at Westminster. Although Article 9 of the Bill of Rights is not a factor when interpreting the enactments of devolved legislatures, separation of powers is and *Pepper* allows ministerial statements to be considered when doing this. This is dealt with in greater detail below.

of Commons writing before this ruling, to object to the exclusionary rule's relaxation.¹⁹

Parliament

Bennion has stated that

Parliament is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. If therefore Parliament has a subsequent opportunity to alter the effect of a decision on the legal meaning of an enactment, but refrains from doing so, the implication may be that Parliament approves of that decision and adopts it.²⁰

This has been approved judicially although its applicability is dependent on the context in which the legislation is interpreted.²¹ If this accurately reflects parliament's practice, it suggests parliament's acceptance of the courts' findings and their use of *Pepper* in arriving at them, since parliament has not acted to reverse any of the decisions based on its use or the ruling itself.

Executive

After the decision, the executive established an interdepartmental committee to consider the ruling. Because a court's findings may be influenced, possibly deliberately for political reasons, or by the executive using ministerial statements to ensure a bill's passage, the interdepartmental committee took steps to avoid misstatements by ministers and to correct them when made. Therefore, rather than seeking to reverse the ruling legislatively the executive adapted its practice to accommodate the ruling in *Pepper*.²²

Courts

Although most cases in which legislative history has been consulted since the ruling have received positive or neutral treatment one of the early cases in which it was said to have been applied has been reversed (by *A v Hoare* [2008]²³). The hearings of *Pepper* and *Stubbings v Webb* [1993]²⁴ overlapped and although three law lords were on both panels, there is no indication that Lord Browne-Wilkinson's conditions were followed. Indeed in *Stubbings*, Lord Hoffman indicates that a statement relied on did not clarify the ambiguity.

¹⁹ *Pepper v Hart* [1993] AC 593, 645 (Lord Browne-Wilkinson) 623–624, 46.

²⁰ Jones (2013) S228 (1) 661.

²¹ Regina (N) v Lewisham London Borough Council Regina (H) v Newham London Borough Council [2014] 3 W.L.R. 1548, 1575 (Carnwath JSC).

²² *Pepper v Hart* [1993] AC 593, 634, HC Deb 7 March 1994, vol2390, col 70, HC Deb 17 March 1994 vol2390, col 762).

²³ *A v Hoare* [2008] 1 AC 307 (HL).

²⁴ *Stubbings v Webb* [1993] AC498 (HL).

Implications

Stipulating strict situations in which parliamentary proceedings could be considered in legislative interpretation and how they would be applied, has created an environment free from political influence for the ruling's judicial application. This and the acceptance of the ruling by parliament and executive, who despite their objections before the ruling took no action to negate it and even adapted their practice to accommodate it, is of particular value should it be applied to constitutional and devolution cases.

The Danger of Departing from the Browne-Wilkinson Conditions and its Importance in Devolution Legislation

In any case where the same ministerial statement was used to establish legislative ambiguity and then to interpret that same legislation, that statement would effectively replace the wording of the statute, because it would be the basis on which the legislation was both judged ambiguous, creating the need to consult the ministerial statement and then reinterpreted, using that same statement.²⁵ This would undermine the separation of powers by making a member of the executive effectively the sole legislator for that section of the act as his statement would replace it and, also, because the judiciary would favour the minister's view of what the legislation was intended to mean thus displacing the courts own interpretation of the wording agreed by parliament. The effect of a judicial finding, that favoured the executive's wishes in this way, could undermine the standing and impartiality of the judicial process because the judge and executive would appear to have combined to overrule and replace the elected legislature's intent.

Fortunately because the courts are aware that counsel, will attempt to apply parliamentary statements where this benefits their client's case,²⁶ subsequent judgments stress that Hansard cannot be used to make legislation admissible under the ruling.²⁷ Where the *Pepper* conditions are applied this danger of a politician's statement being used both to identify ambiguity and then to determine what the legislation means, shifting the role of legislating from parliament to executive, is avoided because they require the identification of ambiguity before Hansard is consulted. *Pepper* therefore has the effect of encouraging conventional interpretation and ensuring those options are exhausted, before legislative history is used.

²⁵ This could occur if ministerial statements were used by justices to reassure themselves that their interpretation was the one intended by parliament, should it actually throw doubt on the existing or expected interpretation of legislation as determined by conventional means of statutory interpretation and result in their reconsidering it Mullan (2013) *Pepper v Hart* [1993] AC 593, 618(Lord Griffiths). *Harding v Wealands* [2006] UKHL 32[81] (Lord Carswell), [2006] All ER (D) 40.

²⁶ Lord Oliver said "ingenuity can sometimes suggest ambiguity or obscurity where none exists." *Pepper v Hart* [1993] AC 593, 614-5.

²⁷ *R (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* and another [2001] 2 AC 349 (HL), [2001] 1 All ER 195, 221(Lord Nicholls); *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner* [2002] UKHL 21, [2002] All ER (D) 239, 3All ER 1, 11-12 (Lord Hobhouse).

Importance in Devolution Legislation

This is particularly important when interpreting the UK and devolved legislation²⁸ by avoiding any perception, or reality, of the courts independence and neutrality being undermined where legislative history is to be consulted. Legislative history would only be consulted, where the other methods of statutory interpretation had provided an ambiguous or absurd explanation for what the legislation meant given the fact pattern of the case at trial or if they provided a number of plausible interpretations, in the hope that a ministerial statement, accepted by parliament, provided a pointer as to which interpretation to apply.

Pepper v Harting

A former parliamentary draftsman has suggested that if a parliamentarian is insistent that there is ambiguity on the face of legislation despite the assurances of parliamentary counsel that there is not and where correction would introduce unnecessary material into the Act, it is reasonable for the promotor to give a reassurance to the house and state that his statement is capable of being used under the *Pepper* ruling. He admits to “*Pepper v Harting*” on occasion when it seemed preferable for the promotor to make a statement than “maintaining radio silence”.²⁹

The Potential Importance of the History of *Pepper’s* Development in Devolution Legislation

The case law by which the *Pepper* ruling developed originated in a variety of divisions of the senior court and not just in public law cases. Some of these cases antedate the Scotland Act 1998 and other devolution statutes or reinforce points in the original *Pepper* ruling which was decided five years before those statutes were passed, during a government with a different political outlook to the one which devolved these powers. These conditions are now well established and were accepted by the executive and legislative branches before these acts were passed. They have become part of the general principles of legislative interpretation in the UK and were not specifically developed for “constitutional” legislation.³⁰

As a result should resort to Hansard be necessary in the interpretation of devolution statutes, this would be based on principles established in carefully considered case law decided by judges from different divisions of the superior courts and developed over many years with no suggestion that they have been driven by political interpretation or policy based on particular socio-legal views of how devolution should work. It would avoid the courts being involved in

²⁸ In the interests of brevity “Devolution statute” refers to the Scotland Act 1998 and the Government of Wales Act 2006 and “Devolution enactment” to primary legislation by the Scot’s Parliament and Welsh Assembly in this article. Devolution legislation is used as a collective noun for both.

²⁹ Greenberg (2011) 266-8. For example Jack Straw referred to it during a debate on what became the Freedom of Information Act 2000, HC Deb 24 May 1999 vol 332 col 26.

³⁰ See FN5.

controversy. Such controversy was a concern expressed by Lord MacKay when the Scotland Act was debated.³¹

The established use of *Pepper* in the Supreme Court's judgments where the Browne-Wilkinson conditions have been followed, acceptance by parliament and executive who have adapted their practice to accommodate it, suggests that any future use when interpreting the Acts creating legislative devolution is more likely to be accepted.

Fossilisation of Legislation

Risks of Fossilisation

It is arguably the lack of clarity in statutes that allows judges to develop the law and when they experience difficulty doing so within the rules of interpretation, they can request legislative intervention by parliament.³² Whilst consulting legislative history may avoid the need for such a request, it may result in the meaning of existing legislation being crystallised³³ to reflect the views and principles of the original promoter, interrupting the traditional judicial development of the law which adapts it to the needs of the case at hand and continually updates legislation to the times in which successive cases are heard, whereas confining interpretation to the socio-legal theories of a particular era, as expressed by the legislation's promotor, may be a driver of legislative obsolescence.³⁴ Before the *Pepper* ruling was made Lord Widgery described the value of using parliamentary proceedings in 1939 as "minimal when one is considering the situation in the 1970s".³⁵

When enacting legislation, particularly those of constitutional significance, it is likely that Parliament intends Acts to remain in force for some time and be widely accepted. Their interpretation therefore needs to remain as relevant as possible as circumstances change with time. Referral to the legislative history may, however, result in that interpretation being fixed to reflect the societal views at the time of enactment.

Given that "the court is never entitled, on the principle of non liquet (it is not clear), to decline the duty of determining the legal meaning of a relevant enactment"³⁶ a ruling based on *Pepper*, at least has the legitimacy of having been based on the clearly expressed intent by the promotor that is accepted by parliament at the time of enactment. A dated interpretation may be preferable to one that, after informed legal interpretation is ambiguous or where, to avoid such ambiguity, the court arrives at an interpretation where there is substantial doubt as to whether that

³¹ HL Deb 2 November 1998, vol 594 col 105.

³² *White v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509 (HL), [1999] 1 All ER 1, 43 (Lord Hoffman).

³³ Steyn (2001) 68-69.

³⁴ Westerman (2013) 109.

³⁵ *R v Governor of Winson Green Prison, Birmingham, ex parte Littlejohn* [1975] 3 All ER 208 was heard before the *Pepper* ruling.

³⁶ Jones (2013). S2(2) 4-5, *Morris v London Iron and Steel Co Ltd.* [1988] QB 493.

interpretation is the legal meaning of the enactment.³⁷ If strictly followed, the criteria in *Pepper* limit the opportunities for even this outcome because of the need for a clear statement to clarify parliament's intent. Finally, Parliament has the option to amend legislation to clarify its meaning should it find a supreme court ruling based on *Pepper* unacceptable.

In summary, whilst this does not completely remove the risk of an interpretation that reflects antiquated intentions and views, as highlighted by Lord Steyn and others, at least it ensures that they were the considered and accepted views of parliament when enacted.³⁸

Fossilisation and the Acts of Union

The Acts of Union continue to be regarded as constitutional statutes and reference to them has gradually increased in recent years.³⁹ The *Pepper* ruling effectively removes parliamentary proceedings from their interpretation since, prior to the Parliamentary Papers Act 1840, their recording was illegal. This strict application of the ruling's conditions would avoid the use of partisan seventeenth-century sources in interpreting legislation in the same way that it nowadays avoids the potential for using social media and the popular press, a concern in some jurisdictions.⁴⁰ Therefore, interpretation of these acts will be by conventional judicial analysis of the legislation based on case law and precedent, provided the *Pepper* criteria are adhered to.⁴¹

Contemporary seventeenth-century sources may indicate that a determination arrived at in this way based on precedent differed from the then legislatures' intent but would more probably arrive at an outcome relevant to current society. Strauss reports the ultimate acceptance in the United States of decisions of the US Supreme Court arrived at using case law that initially caused controversy, because they

³⁷ The danger of a dated interpretation is itself mitigated since under the informed interpretation rule, "The court is expected to bear in mind the law is expected to bear in mind that law (even statute law) is, from the time of its creation, subject to a process of development. This means that the intentions of the historic legislator may not indefinitely continue to carry—the same weight" Jones (2013), S214, 561.

³⁸ Steyn (2001), 68–69. Although concern is widely expressed in public, medical and ecclesiastical law in the UK as well as abroad, no ready solution to this concern variously described as crystallisation, ossification and fossilisation, other than amending legislation, has been suggested - see for example Sheldon (2016), Elliot (2012), Roberts (2011). Sheldon for example argues that despite judicial and legislative efforts to update it, UK abortion law reflects the societal outlook of the mid-nineteenth century and that new legislation is needed to correct this.

³⁹ In a Lexis search the Union with Scotland Act 1706 is cited 18 times between 1951–1998 and 14 times since the Scotland Act 1998.

⁴⁰ Ramage (2011).

⁴¹ In *Fitzpatrick v Sterling Association Ltd* ([1999] 4All ER 705, 726) although Lord Clyde acknowledged that "a contemporaneous exposition should be applied only in relation to very old statutes" he continued that "the general presumption is that an updating presumption is to be applied" (see Jones 2013, S288 (1) 797). A similar principle is described for ancient Scottish Statutes by J Fleming Wallace in his "Interpretation of statutes" in *Stair Memorial Encyclopaedia* (1991) vol 12, para 112-3.

differed widely from the views of the eighteenth-century society that created its constitution or an originalist interpretation of its wording.⁴²

Potential Impact on the Devolution Statutes

The Acts which created the devolved governments and those that later extended their powers, were enacted since 1998, after the judgement in *Pepper* and ambiguity in a devolution statute may still await discovery. The parliamentary record in Hansard would be admissible if such an ambiguity were to be identified and given the care with which ministerial statements are now prepared, these are likely to be admissible. A sudden and substantial alteration in the powers of a devolved legislature may therefore await discovery though it is to be predicted that, given the care with which the original Acts and later legislation will have been created and the academic and practitioner analysis of them and their operation since, this is unlikely.

Devolution is currently a sensitive issue and the interpretation of legislation that determined how one part of the UK was governed or how its government or legislature was allowed to act could be particularly divisive resulting in a public outcry particularly if the subject of the judgment were a sensitive one or the outcome of the decision was widely seen as a “retrograde” or reactionary one because it was based on a statement which in turn reflected views that had been superseded. If inconsistent with the views of the government in power and public opinion at the time, it may result in the passage of reflexive urgent legislation,⁴³ possibly not well drafted itself, to “correct” the judgment. In the context of a devolution statute the decision may weaken the union.

The Significance of the Principles that have Evolved from *Pepper*

In *Pepper* Lord Oliver stated “a statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey”.⁴⁴

In the same ruling Lord Browne-Wilkinson concluded that the ruling’s use would add Hansard to a number of other sources the courts could use to determine which of two possible meanings a given set of words had been parliament’s intent, based on what MPs had been told they were intended to achieve.⁴⁵

The statements by their Lordships summarise the role of parliament as sole legislator and the court’s role as sole interpreter of the meaning of legislation, which is necessary because parliament cannot anticipate every situation in which that piece

⁴² Strauss (2010) 77-99.

⁴³ Although predating *Pepper*, the Northern Ireland Act 1972 extending the legislative powers of the Northern Ireland parliament was passed hours after a judgment in the high court. *Reg (Hume) v Londonderry Justices* [1972] N. I. 91. It was repealed the next year. Wallace (1982) 61-2,.

⁴⁴ *Pepper v Hart* [1993] AC 593, 619 (Lord Oliver).

⁴⁵ *Pepper v Hart* [1993] 634 (Lord Browne-Wilkinson).

of legislation might be applied.⁴⁶ They demonstrate their awareness of the dangers posed by the unrestricted use of *Hansard* in statutory interpretation not only to the separation of powers but acknowledge the increased complexity and uncertainty that such unrestricted use would cause in statutory interpretation with increased costs, as described by Lord MacKay.⁴⁷

Gow, which relates to *Pepper's* use in enactments of the Scottish parliament, reiterated the principle that “this approach should be used only where the legislation is ambiguous, and then only with circumspection. When it is used, however, the purpose of the exercise is to determine the intention of the legislator”.

This cannot be taken as necessarily extending the privileges of the Bill of Rights to the devolved legislatures but may provide a convenient framework under which ministerial statements can be applied to statutory interpretation given *Pepper's* history of both avoiding executive influence in statutory interpretation whilst respecting the separation of powers. *Gow* also accommodated different practices in the Scottish parliament where a letter to the committee considering the bill takes the place of a verbal statement by the minister promoting it.⁴⁸

Devolution Legislation

External methods have been used by the Supreme Court when interpreting the statutes that established the devolved legislatures and the enactments of these bodies.

Devolution Statutes

Recent case law has indicated that devolution statutes “must be interpreted like any other statute”⁴⁹ despite a debate around whether different rules of statutory interpretation should be applied to constitutional Acts of Parliament.⁵⁰ Interpretation of the Acts establishing the devolved legislatures is following established rules

⁴⁶ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) per Lord Reid. Since the ruling in *Pepper* the House of Lords/Supreme Court have taken a restricted approach to the use of *Pepper*. Kavanagh (2005) particularly relates this to the decision in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 1 AC 816.

⁴⁷ Lord Browne-Wilkinson advocated the use of cost sanctions to deter the misuse of *Pepper* in *Melluish (Inspector of Taxes) Appellant and B.M.I. (No. 3) Ltd. Respondents* [1996] A.C. 454, 482.

⁴⁸ *Gow (FC) v Grant* [2012] UKSC 29 at [29] [2012] All ER (D) 32 at [29] (Lord Hope). Statements have been made in which ministers have specifically stated that they can be relied upon in court under the *Pepper* ruling (see <http://www.parliament.scot/parliamentarybusiness/28862.aspx?r=4277&i=28818&c=740705&s=Pepper v Hart> and <http://www.parliament.scot/parliamentarybusiness/28862.aspx?r=4431&i=31766&c=795169&s=Pepper v Hart>).

⁴⁹ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [15] (Lord Hope); *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [6] (Lords Hope and Thomas).

⁵⁰ Ahmed and Perry (2014) A definition of “constitutional statutes” is provided above (n 6).

of statutory interpretation. They are to be “construed according to the ordinary meaning of the words used”,⁵¹ using the particular rules that that Act lays down.⁵²

Thereafter, usual methods of statutory interpretation are applied as demonstrated in *Recovery of Medical Costs*⁵³ where the expression “relates to” in the Government of Wales Act 2006 was interpreted in the same way as in previous cases⁵⁴ and in *Imperial Tobacco* where Lord Hope added that headings in side notes and explanatory notes might also have a role though qualifying the latter’s use by adding that whilst a useful source of guidance, “they have no more weight than any other post-enactment commentary as to the meaning of the statute”.⁵⁵ In *Martin*⁵⁶ the permissibility of using Scottish parliamentary statements and reports to determine whether the purpose of an enactment was or was not a reserved matter was confirmed.

Hansard has been considered in the interpretation of devolution statutes to validate the enactments of the legislatures they established. It was examined to determine the purpose of the Government of Wales Act 2006 and whether proposed Welsh legislation was intra vires although the ministerial statement was not considered sufficiently clear to assist in the court’s interpretation.⁵⁷ A statement made by the Cabinet Secretary of Justice to the Scottish Parliament was used to confirm the Scottish government’s opinion that the passage of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 was a matter of social justice⁵⁸ making the legislation intra vires, although the statement was made in advance of the bill being debated and could be regarded as identifying its purpose rather than the intent of a section. An unexpected use was in considering a statement made by Lord Hardie as a promotor of the Scotland Act 1998 to establish if it justified setting aside a decision of the Court of Session where he was on the panel rather than to interpret the act.⁵⁹ This case highlights counsel’s attempts to use Hansard where it

⁵¹ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC).

⁵² *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [6] (Lords Hope and Thomas), *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [18] (Lord Hope).

⁵³ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 (Transcript) at [50] (Lords Hope and Thomas).

⁵⁴ Observing the Barras principle see Jones (2013) S210 (3) 549.

⁵⁵ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [17] and [33] (Lord Hope). The use of these notes is investigated in detail by Steyn (2001) and Simamba [2005].

⁵⁶ *Martin (Appellant) v Her Majesty’s Advocate (Respondent) (Scotland)*, *Miller (Appellant) v Her Majesty’s Advocate (Respondent) (Scotland)* [2010] UKSC 10, 2010 SCCR 401, 2010 SLT 412, [2010] UKSC 40, 2010 SCL 476, 2010 SC [25] (Lord Hope).

⁵⁷ *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [33] (Lords Hope and Thomas). Greenberg (2013) has outlined the evolution of legislation enacted by the Welsh National Assembly and comments that reports by the departmental committees that scrutinise its legislation are mines of genuinely helpful information.

⁵⁸ *AXA General Insurance v Lord Advocate* [2011] UKSC 46. CSIH 31 at [29]–[30] Lord Hope and at [96] Lord Mance.

⁵⁹ *Scott Davidson Respondent (Cross-appellant) against Scottish Ministers Appellants (Cross-respondents)* [2004] S.C.L.R. 991.

may help their case even though the court has stressed its use when determining legislative intent is confined to situations where the criteria in *Pepper* are satisfied.⁶⁰

Devolution Enactments

The interpretation of enactments of the devolved legislatures has also required recourse to external materials. In *Re Agricultural Sector (Wales) Bill*, to enable

the purpose of the provision to be examined, it was necessary to look not merely at what could be discerned from an objective consideration of the effect of its terms. The clearest indication of its purpose could be found in a report that gave rise to the legislation, or in the report of an Assembly committee⁶¹

and as observed in *Recovery of Medical Costs* the courts may “examine background material, including a white paper, explanatory departmental notes, ministerial statements and statements by members of parliament in debate”.⁶²

Conclusion

External material has therefore been used in the interpretation of devolution statutes, in determining if the enactments of devolved legislatures were intra vires and in the interpretation of enactments by these legislatures. This developing use of external materials and case law in interpreting devolution legislation has evolved following a similar pattern as the use of external materials in interpreting other UK legislation, including both documentary materials and statements, prior to *Pepper*, as described by Lord Browne-Wilkinson in his speech in that case.⁶³

Differences in the Court’s Approach to Legislation in the UK and Devolved Legislatures: The Bill of Rights and the Separation of Powers

In *Recovery of Medical Costs*⁶⁴ a distinction is drawn between primary legislation at Westminster and “other legislative and executive” decisions⁶⁵ and although examination of this “difficult area” is specifically avoided we are reminded that,

⁶⁰ *Gow (FC) v Grant* [2012] UKSC 29[29] [2012] All ER (D) 32 at [29] (Lord Hope).

⁶¹ *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [50] (Lords Hope and Thomas).

⁶² *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 (Transcript) at [55] (Lord Mance).

⁶³ *Pepper v Hart* [1993] AC 593, 615 (Lord MacKay), 17 (Lord Griffiths), 31, 33, 35, 40 (Lord Browne-Wilkinson). See also FN 4 above.

⁶⁴ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 (Transcript) at [56] (Lord Mance).

⁶⁵ Hansard had been used to interpret statutory instruments before *Pepper* because parliament had not had an opportunity to amend them *Pepper v Hart* [1993] AC 593, 615.

“domestic courts may (under a rule quite distinct from that in *Pepper v Hart*)—examine background material, including—statements by members of parliament in debate”. “Perhaps in the light of article 9 there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions”.

These comments suggest that legislation in the devolved administrations is not regarded as protected by Article 9. Despite the Scotland Act 1998s.³¹ and the Government of Wales Act 2006s.⁹⁷ requiring ministers and the presiding officer to confirm that the provisions of legislation are within the competence of the legislature, it is for the courts to decide this independently.⁶⁶ They can therefore judge the validity of devolved legislation in a way denied to them in the UK parliament which enjoys legislative sovereignty.

In *Pepper* Lord Browne-Wilkinson said “Article 9 is a provision of the highest constitutional importance” and stressed that care must be taken to avoid its contravention. In contrast in *Re Agriculture Sector (Wales) Bill*, the Government of Wales Act 2006 being described as “an Act of great constitutional significance cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted in the same way as any other statute.”⁶⁷

These statements imply a difference in the significance of the two statutes in the mind of the Supreme Court as is illustrated by the UK legislation being interpreted under the principles of parliamentary sovereignty with that made by the legislatures it created, open to judicial review.

Bill of Rights/Separation of Powers

There is therefore no risk of contravening the Bill of Rights, which was an English instrument by examining the devolved legislatures’ proceedings. Despite this distinction in the standing of the UK parliament’s legislation and that of the devolved legislatures, Lord Mance warns, in respect of the Welsh legislature, of the

considerable constitutional dangers, if the judicial branch of the State in the United Kingdom assumes the role of examining the debate in any of the legislative branches of the State” “being more in the nature of an evaluation by a higher court of the judgment of a lower court on an appeal where the exercise of a discretion is being examined. The better course, in my view, is to examine the legislation itself in its context, as I have set out.”⁶⁸

Therefore, the interpretation of the devolution statutes will continue to follow a system of rules that have evolved since the Bill of Rights including the exclusionary rule and its relaxation in *Pepper*. A similar practice may also be adopted for application to the primary legislation of the devolved legislatures despite their

⁶⁶ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [7] (Lord Hope).

⁶⁷ *Pepper v Hart* [1993] AC 593, 638, *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [6 ii] (Lords Hope and Thomas).

⁶⁸ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 (Transcript) at [126] (Lord Thomas).

lacking parliamentary sovereignty and protection under article 9 of the Bill of Rights, because of the courts, determination to respect the principles of the separation of powers should it be necessary to examine background material including these legislatures proceedings’.

In primary legislation originating in the devolved legislatures the starting point for statutory interpretation is the statutory language used in the text of the act⁶⁹ drafted with the usual methods of interpretation in mind. Where the legislation is found to be ambiguous, applying the interpretative methodology developed from *Pepper*, which is often applied after other methods of interpretation have been found inadequate limits the risk of “political” input into a decision based on ministerial statements.

In the cases considered above, it was sometimes necessary to establish the meaning of the enactment to determine whether it fell within the powers granted to the devolved legislature. Thus, there is a curious outcome whereby *Pepper* could be used to both establish whether legislation enacted in a devolved legislature was intra vires and then, if those conditions were adopted, to interpret the devolved enactment at issue. The first of these processes, dealing with the interpretation of primary legislation in the UK parliament, would not only respect the principle of separation of powers but the principles in Article 9 whereas the second process needs only observe the first of these two principles.

The Scottish Parliament has never enjoyed legislative sovereignty⁷⁰ and recent enactments by it and the Welsh Assembly have been challenged on the grounds of being outside their legislative competence.⁷¹ In the past, this problem has been avoided particularly by the Scottish parliament’s passing legislative consent motions that request that the UK parliament passes legislation on devolved issues.⁷² There is a potential source of difficulty should the court be faced with ambiguous UK legislation passed at the request of the devolved government with two opposing statements made in the different legislatures being advanced to clarify the meaning of the UK statute. One might assume that the statement in the UK parliament would be given precedence because of its legislative sovereignty though if it is judged to be unhelpful or insufficiently clear, the value of statements made in the devolved legislature may then have to be determined. Arguably these will be accorded the value of any statement made outside the chambers of the Lords and Commons, but

⁶⁹ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [188] (Lord Hope). This reflects settled practice respecting legislation from the UK parliament expressed recently by Lord Carnwath’s statement “subject to narrowly defined exceptions (such as under *Pepper v Hart* [1993] AC 593), ‘it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments’: *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816, para 67, per Lord Nicholls”. in *Regina (N) v Lewisham London Borough Council Regina (H) v Newham London Borough Council* [2014] 3 W.L.R. 1548, 1574-5.

⁷⁰ Dicey and Rait (1920) 32-40.

⁷¹ *Imperial Tobacco Ltd Appellant against The Lord Advocate, Respondent* [2012] Scot (D) 12/12 (UKSC) at [1], [15] (Lord Hope) *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 Supreme Court [2014] All ER (D) 84 (Jul) at [4] (Lords Hope and Thomas).

⁷² They were used on 39 occasions in the first term of the parliament but have been used on only 20 occasions since 2011.

whether they should receive the status of, e.g. a law commission report is yet to be addressed by the court.

The use of the UK parliamentary proceedings was introduced gradually into statutory interpretation following the increasing use of other extra textual sources.⁷³ A similar chronology is now developing with devolution⁷⁴ and adhering to the principles that have evolved in *Pepper*, should avoid the court and its judgments being embroiled in political controversy and ensure a fair and predictable means of interpreting the law to decide the case in hand.

Concordats and Conventions

Concordats, agreed between the UK and devolved governments in 1999, to ensure constructive and effective intergovernment relations, have been described as political but not legally enforceable statements.⁷⁵ In this they resemble constitutional conventions, breach of which is not the subject of legal sanction,⁷⁶ although a convention's existence and operation may be considered whilst deciding a case.⁷⁷

The precise constitutional status of a concordat remains undefined⁷⁸ although their breach may, it has been suggested, result in judicial review based on

⁷³ *Pepper v Hart* [1993] AC 593, 615 (Lord MacKay), 17 (Lord Griffiths), 31,33,35,40 (Lord Browne-Wilkinson). See also FN4.

⁷⁴ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 (Transcript) at [55] (Lord Mance).

⁷⁵ “This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties”. Cabinet Office, *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee Presented to Parliament by Command of Her Majesty and presented to the Scottish Parliament and the Northern Ireland Assembly and laid before the National Assembly for Wales* (Cm5240, 2013) part 1 page4.

⁷⁶ See Feldman (2013).

⁷⁷ As stated in *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland)—In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5 [146]. “Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question,—but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has stated, “the validity of conventions cannot be the subject of proceedings in a court of law”—(1975) 91 LQR 218, 228” and in the recent High Court Case *R (on the application of Client earth) (Respondents) v Secretary of State for Environment, Food and Rural Affairs* [2017] CO/1508/2016, Garnham J confirmed that breach of the rules of *Purdah*, a convention that limits taking controversial decisions before an election, whilst potentially constituting a legal wrong resulting in a claim in court, as a convention does not create a legal right that is binding on the court. The breach may result in proceedings based on legitimate expectation or misconduct in public office.

⁷⁸ LeSueur (2015).

reasonable expectation⁷⁹ or breach of contract.⁸⁰ Whilst they are credited with reducing the risks of litigation by promoting compromise,⁸¹ it has been suggested that their effect has been to limit the effective powers of the Scottish parliament in some areas, in contrast to those described in the Scotland Act 1998.⁸²

Perhaps the best known concordat is the “Sewel convention”. Although now incorporated into statute,⁸³ the recent “Miller Brexit case”, whilst acknowledging its role in facilitating harmonious intergovernmental relationships, described it as a political convention that did not give rise to a legally enforceable obligation⁸⁴ but in practise it results in considerable liaison between the UK and devolved departments in deciding when a legislative consent motion (Sewel motion) is required.⁸⁵

Lord Hope credited legislative consent motions and the care taken in drafting legislation amongst a number of reasons why the vires of a devolved enactment is rarely challenged. He went on, however, to stipulate that “if an issue as to legislative competence is raised, it will be entirely a matter for the courts to determine”⁸⁶ and to summarise the principles to be followed in determining whether a provision of an Act of the Scottish Parliament is outside its competence. These principles were subsequently confirmed in relation to the Welsh National Assembly.⁸⁷

Given these strict criteria, are there any situations in which concordats could affect the use of extrinsic materials in statutory interpretation?

Discussions about whether proposed legislation requires a legislative consent motion may act as the basis of a ministerial statement to clarify its intent. If a court later found that the wording of the statute was ambiguous *Pepper* would permit the use of such a statement in its construction. It is admitted these possibilities are limited⁸⁸ as governments do not deliberately enact ambiguous statutes but should any possible confusion be anticipated between what the governments had agreed a

⁷⁹ Parliament and Constitution Centre, *Concordats and Devolution Guidance Notes Standard Note*: (SN/PC/3767 2005) House of Commons Library, HC Deb 12 May 1998, c194; HL Deb 21 April 1998, cc1131-32.

⁸⁰ Rawlings (2000), 282–283.

⁸¹ Rawlings (2000), 270–271.

⁸² Little (2000), 172–173.

⁸³ SubSect. 28 (8) now reads “[F1(8)But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”. It was inserted by Section 2 of the Scotland Act 2016. Spelling out conventions in this way is one way of incorporating them into statute law see Jaconelli (2013)136.

⁸⁴ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Reference by the Attorney General for Northern Ireland—In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland)—In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5 [151] [242].

⁸⁵ Parliament and Constitution Centre, *The Sewel Convention Standard Note*: (SN/PC/2084) 3-5, House of Lords, Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (HL Paper 146 11th Report of Session 2014–15), P43-45 paragraph 161.

⁸⁶ *Imperial Tobacco v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153 [7].

⁸⁷ *Re Agricultural Sector (Wales) Bill* 2013 [2014] UKSC 43 [5]-[6].

⁸⁸ Parliament and Constitution Centre, *The Sewel Convention Standard Note*: (SN/PC/2084)p8.

clause should mean and the perceptions of MPs or MSPs debating it, the point could be clarified by the process of “*Pepper and Harting*” described above. This might be deemed preferable to amending the wording of a clause that if ultimately enacted, would result in a section that was inflexible.⁸⁹

Other Possible Effects on the Use of Extrinsic Materials

It has been stated that there is no rule to prevent the court from using any material it thinks fit to ensure it is well informed and if publicly available to take judicial notice of them.⁹⁰ Currently although the discussions between governments are confidential and no public record is available⁹¹ there is an initiative to have them published in the future.⁹² Therefore, if available and admissible, referral to the report of these discussions may facilitate construction.⁹³ In *Robinson* for example the Belfast agreement was considered and its use compared to the use of the Revolution, the Convention and the Federalist Papers in construing the US constitution by Lord Hoffman,⁹⁴ providing a potential model for the use of intergovernmental discussions in statutory interpretation in the future.

Conclusion

Devolution Acts are to be interpreted like other legislation. Therefore if, given the fact pattern of a particular case, legislation is found to be ambiguous, *Pepper* is applied using the same principles that would be applied to any other type of Act of Parliament. Since the ruling was accepted by parliament and executive who altered their previous practices by ensuring statements made to clarify the intent of legislation were carefully drafted and because the justices will only consider such statements if there is evidence that they were thereafter accepted by parliament, a supreme court decision made adhering to the *Pepper* principles, should be widely accepted and not considered controversial. The outcome would be regarded as an

⁸⁹ House of Lords, Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (HL Paper 146 11th Report of Session 2014–15), p 27 [84], see also FN 30.

⁹⁰ Jones (2013): S222, p642.

⁹¹ Department of Constitutional Affairs, *Devolution Guidance Note 1, Common Working Arrangements Annex IV d* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465289/Devolution_Guidance_Note_1_common_working_arrangements.pdf accessed 8/4/2017, House of Lords, Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (HL Paper 146 11th Report of Session 2014–15), p 17–18.

⁹² House of Commons Justice Committee *Devolution: A Decade On* (Fifth Report of Session 2008–09 Volume 1 HC 529), House of Lords, Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (HL Paper 146 11th Report of Session 2014–15), pp 59–61.

⁹³ In *Imperial Tobacco v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153 [14–6] Lord Hope quoting Lord Rogers said “the clearest indication of its purpose may be found in a report that gave rise to the legislation or in a report from one of the committees of the Parliament”.

⁹⁴ *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32, [2002] All ER (D) 364 [33].

accurate determination of parliament's intent when the legislators passed the legislation rather than the intent of the then government.

Pepper's use is restricted to ambiguous legislation which means legislation that has defeated more conventional methods of interpretation and to some extent is used as a last resort. Careful drafting of statements ensures the meaning of the statement is more likely to have been clear to parliamentarians when they agreed to it and judges when interpreting it. If the interpretation under *Pepper* proves flawed it can be readily amended by the court under PD1966⁹⁵ or alternatively by Act of Parliament.

Examining the vires of devolution enactments is open to judicial review in a way that the UK statutes are not and respecting the principles developed in the ruling should avoid impinging on the separation of powers. More latitude is perhaps needed when interpreting such legislation to allow for the different practices in these legislatures, as demonstrated by *Gow* where the statement was a written letter to a committee of the Scottish parliament rather than a speech or part of a debate in that parliament. Although *Hansard's* use may avoid political controversy because it is consulted using the principles in *Pepper*, it may still lead to a result that is regarded as unacceptable to the government or public opinion, for example because it is considered to be out dated. In that situation the justices' speeches will indicate that having reviewed all the possible means of interpretation it was the only one that they could reasonably apply, preserving the court's reputation for impartiality.

The *Pepper* ruling was controversial when first given and this controversy has persisted, but it has proven robust and rests now on a background of considerable and considered Supreme Court case law. It is therefore suitable for interpretation of Devolution Acts and is a reliable framework that can developed, if needed in the interpretation of ambiguous enactments by the devolved legislatures.

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⁹⁵ 1966 PD Practice Statement (HL: Judicial Precedent) [1966] by which their Lordships recognised the importance of the use of precedence as an indispensable foundation upon which to decide what the law is but that too rigid an adherence may result in injustice and decided to depart from precedent if it appeared right to do so.

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