

Chapter 17

Parliamentary Sovereignty, the Rule of Law, and the Separation of Powers: Involving Other Actors in the Legislative and Judiciary Process

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ABSTRACT

This chapter is aimed at highlighting how common law has evolved over the centuries, namely through the flexibility accorded to judicial precedents, as well as through the evolutionary nature evidenced in the processes and rules applied in statutory interpretation. In addition to illustrating how informational asymmetries can be mitigated through de centralization, facilitated with courts employing the use of non-legal agents such as expert witnesses - as evidenced in the Daubert case, Pepper v Hart also illustrates how common law has evolved through the scope and permissibility of aids to statutory interpretation. Whilst financial markets and changes in the environment impact legislators, and whilst it is widely accepted that legislation constitutes the supreme form of law, the necessity for judges to introduce a certain level of flexibility will also contribute towards ensuring that legitimate expectations of involved parties are achieved - particularly where the construction of the words within a statute gives rise to considerable ambiguity. By way of reference to landmark rulings in the United States, cases such as Daubert and The Estate of Edgar A. Berg v. Commissioner, this paper also aims to illustrate the vital role increasingly assumed by non-legal actors, and why this approach should constitute a trend to be adopted in European common and civil law jurisdictions. This being the case given the failures and flaws of references to Parliamentary material and whether these should be permitted as an aid to the construction of legislation which is ambiguous or obscure, as illustrated in the case of Pepper v Hart.

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INTRODUCTION

To Be or Not to Be Regulated: Purposive Rules and the Centralization of Information

The de-centralization of the judicial and legislative process has advanced over the years – as evidenced by the engagement of legal, non-legal and economic actors in the judicial and rule making process. This serves as testimony to the fact that judges may not be fully equipped to allocate resources in such a way that maximal efficiency or the best outcome is derived for involved parties. Other non-legal actors such as financial experts are now being engaged as expert witnesses by judges in deciding landmark judgments.

Decentralization denotes the involvement of and delegation of roles to various actors other than judges. These actors, and more specifically non legal actors, are not responsible for creating the law or making ultimate decisions but their involvement helps shape the processes of judicial decision making. In this sense, decentralization does not imply a delegation of decision making by judges to such actors, but is used with particular reference to the process of delegation and involvement of processes – not delegation or decentralization of decisions. The involvement of non-legal actors is not intended to serve as a means of transferring the judge's role to such actors in matters of judicial decisions – even though their involvement influences such decisions. The involvement of non-legal actors and also economic agents helps facilitate accountability into the processes – they are not there to make decisions but to facilitate a more accountable framework in which decisions are made. Judges are still expected to assume some form of responsibility and the involvement of other non-legal and particularly economic actors, serves as a reminder that whilst such actors cannot replace the role assigned to judges, there are also limits whereby a judge can exercise the required competence in arriving at decisions which confer maximum economic efficiency to those parties involved.

As well as a tool which serves to facilitate greater checks and accountability in the judicial and law making process, de centralization is also accentuating its role as a mechanism whereby the efficient allocation of resources can be realized. In addition to highlighting the consensus on the views of Posner and Hayek, in respect of de centralization of information within the judicial process, this chapter aims to address why de centralization serves as a vital tool in facilitating the objective of common law as an efficiency allocation mechanism. The central recurring theme of this chapter, however, is the illustration of the evolution of common law – as reflected through the decentralization of information resource and the engagement of non-legal actors in the judicial process, as well as the rules of statutory interpretation and extrinsic aids of interpretation that have been admitted into the judicial process over the years.

Cooter and Rubinfeld have been selected to corroborate the theoretical framework and element of my literature review – namely the common law efficiency theory. According to Cooter and Rubinfeld (1994: 437), fair and accurate outcomes requires courts to resolve cases by applying the law and courts have complete information when full knowledge of the law and all the facts that are relevant to the case, are available and are at disposal to deciding matters at hand. Further they are of the opinion that complete information at trial results in a judgment that is accurate relative to existing law; and that to the extent that liability law is designed to internalize costs, accurate results will generate efficient incentives. In the same manner, they further argue, that complete information in bargaining before trial promotes settlement on terms approximating the complete information judgment.

The importance of measures aimed at ensuring that the court receives complete information, prior to the case or trial – as a means of generating efficient outcomes in the delivery of judgments, is hereby

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