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JUDICIAL IGNORANCE OF THE PARLIAMENTARY PROCESS

Implications for Statutory Interpretation

Judicial Power Project

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Abstract

Judges have felt themselves increasingly obliged in recent years to have express regard to a range of parliamentary and political materials and circumstances in the course of statutory interpretation. This causes more problems than it solves, partly because judges lack the necessary understanding of the Parliamentary process.

Introduction

Things began to go wrong when judges in the courts of the United Kingdom began to be more self-consciously purposive than was once the case.

In fact, of course, our judges have always been purposive in a fundamental sense. At the same time as law students are being told that our judges have traditionally operated a hard-letter or literalist approach to statutory construction, one of the very few canons of statutory construction that students are taught before being tossed unprepared into a sea of statutory law is the Mischief Rule, also known as the rule in *Heydon's Case*.[1] The rule – that in construing the statute it is necessary to consider the mischief at which it is aimed – is simply an early, and concise and effective, statement that one needs to have regard to the legislative purpose or intent in order to make any sense of the words of the statute in accordance with the Cardinal or Golden Rule of primacy of the text.

The United Kingdom's judges have, of course, never been either slavishly literalist or ideologically purposive. What they have been, and what everyone must be in construing any communication whether written or verbal, is contextual.[2]

So what is it that has given rise to the myth or perception that our judges have become significantly more purposive in recent decades? Quite simply, what has changed is not their attitude to the use of context, but the range of materials to which they are prepared to have regard in determining the context within which they construe the hard letter of the statute in front of them. Whereas some decades ago judges determined that context from little or nothing more than the words of the Act with its immediately contextual hints – such as titles and headings – the courts have now become accustomed to, and indeed pride themselves on, having regard to an ever-increasing range of material of all kinds.

Pepper v Hart

As part of this gradual trend, the decision in *Pepper v Hart* [3] was, of course, a significant watershed. In one sense, its constitutional significance was marginal or negligible. None of their Lordships in that decision thought that they were interfering with Article IX of the Bill of Rights or overturning any important point of parliamentary privilege. Indeed, had any of them felt that a substantive Parliamentary privilege attached to taking account of the words of Hansard as printed and published for purposes of statutory interpretation – a proposition the absurdity of which becomes apparent as soon as it is propounded – they would have decided the other way. What had happened, however, was that because of an almost superstitious application of Article IX at the same time as the courts were generally widening the range of materials they were prepared to consider in construing statutes, the situation had been reached in which the courts were prepared to use almost any material to determine the legislative intent of the government of the day in introducing legislation, with the exception of the one source that in other contexts they would regard themselves as bound to use on the grounds of best evidence: namely, statements of Ministers in Parliament.

Even more absurdly, a statement made by a Minister at a press conference or at another gathering outside Parliament could be admitted in evidence as proof of the legislative intent, while a statement made in Parliament in the very act of introducing the legislation would be inadmissible. It was simply to remedy this absurdity, and not to limit or encroach upon any aspect of Parliamentary privilege, that the case of *Pepper v Hart* was decided in the way that it was.

When *Pepper v Hart* was decided it was feared that it would let loose a rush of decisions based on statements in Parliament, with a number of obviously undesirable results. Predictably enough, however, this has not happened. The principal reason is, of course, that two of the conditions for the application of statements under the rule in *Pepper v Hart* are: (i) that there should be an ambiguity or other lack of clarity in the legislative text; and (ii) that the lack of clarity or ambiguity should be directly addressed by an unequivocal statement of a Minister in Parliament. There is no shortage of instances of ambiguity or lack of clarity in statutory text: but unequivocal statements of Ministers in Parliament are rather thinner on the ground.

Although the danger that was identified at the time of the decision has not materialised, and was unlikely ever to materialise, another and more insidious danger has resulted from the new-found freedom of the courts to have regard to Hansard. Put bluntly, the courts are simply not equipped to apply Hansard in an appropriate way. In part, this is an inevitable result of the nature of Hansard and other Parliamentary materials; and, in part, it is because of the way in which judges are educated (as for all lawyers) and trained.

The first issue in relation to Hansard is that it is far less authoritative as a text than the decision in *Pepper v Hart* and the result of the decision requires. Judges are used to consulting transcripts of court proceedings, which are verbatim transcriptions drawn up by expert transcribers using shorthand and modern communication techniques. Despite the fact that Hansard does not present as a transcript with all the imperfections and repetitions of normal speech, and despite the fact that the courts would doubtless be aware if they thought of it that it is therefore not a completely authoritative record, judges have not publicly stopped to ask themselves what is the nature of the record to which they are having regard under the rule in *Pepper v Hart*.

Hansard is not and never has been a transcript in any sense of the word. It is an edited version of the Parliamentary proceedings. In relatively recent times, the Hansard editors were open to persuasion by Ministerial officials, for example, that what the Minister in fact said was not what he or she was meant to have said, and that the record would be more faithfully served by an appropriate correction. It was commonplace for officials to send up the Ministers' speaking notes to Hansard at the conclusion of the Minister's speech, or even to take it up to the Hansard offices themselves by hand, and to make suggestions of appropriate corrections. For a variety of reasons, including significant controversy over particular instances, the editors of Hansard have become much more wary in accepting corrections suggested by Ministerial officials or others, and although speaking notes are very often called for and supplied this is more for help in spelling proper names and the like than in adjusting what was said towards what was supposed to have been said.

But the nature of Hansard as an edited and clarified text remains, albeit that the alterations from what was actually said are now made in a more hermetically sealed and politically neutral environment, and purely for the purposes of achieving a single and clear literary record of Parliamentary proceedings. For these reasons, judges should approach Hansard with very considerable caution and should, in particular, resist the temptation to attach significance to anything but the broadest thrust of what is recorded as having been said. That they do not do so, suggests that they do not appreciate the limitations and constraints on Hansard as a record.

More troubling than that, however, is the possibility that after a decision had been reached with the support (even if only marginal or persuasive) of recourse to Hansard, someone might try to demonstrate that the Hansard version of what was said was in some way misleading. Should the courts allow a transcript taken from the televised record of the proceedings themselves to be adduced as an aid to Hansard, or as a challenge to what is purported to be recorded in Hansard? Should the courts require Hansard to be checked against a transcript of the recorded proceedings before it is produced in evidence? One suspects that in other evidential contexts a verification process of that kind would indeed be insisted upon on grounds of best evidence, even if it rarely or never resulted in

departure from the printed text. The fact that it is never suggested or required, even where Hansard is adduced on a matter of relatively fine detail or nuance, again suggests that both the courts and most litigants are labouring under a misapprehension as to the fundamental reliability of Hansard as a record.[4]

Leaving aside the possibility of actual inaccuracies in Hansard as a record, there are other dangers attaching to the way in which the courts use it, arising out of its fundamentally monotonal nature. Few judges, if any, when they read a passage from Hansard understand anything about the different kinds of conditions in which that passage is produced. At one extreme, there may be a carefully-crafted speaking note prepared on a particular technical point for the lead Minister in Committee in either House. That note will have been prepared with a reasonable amount of time, by legal and other officials who fully understood the policy objectives and the legal effect of the provision in question; and it will have been cleared with relevant stakeholders within government and outside, fed into the Minister's briefing and read out by the Minister in full, clearly and accurately, in speaking to a Clause Stand Part debate or similar Parliamentary proceeding.

But now consider the other end of the spectrum. The Minister is speaking to a particular provision in Committee, in the course of which she or he is interrupted by an Opposition Member and asked a particular point about the interpretation of the clause in front of them. By definition, an interruption of this kind is likely to address a point of detail and technicality, which few if any Ministers will be in a position to understand or answer clearly and authoritatively from their own knowledge. They will give a panic-stricken glance to the officials sitting near them, if in a Committee Room of the Commons, or rather far away from them in the Officials' Box in the Lords Chamber. Those officials will probably miss that glance as they will already be scribbling away furiously, using handwriting made unusually indistinct as a result of nervousness and pressure of time. They will hastily scribble something down which roughly accords to what they hope will answer what they think is the question, all of which will at least buy them time and put the Opposition off the scent for the time being. That paper will be passed from hand to hand between the officials, getting a necessarily inadequate scrutiny from different policy and legal perspectives; and then, hopefully, the crumpled paper will be thrust into the Minister's hand in time for him or her to attempt to read it out as a reply to the Opposition Member, who if he or she is particularly merciful will have deliberately elongated the question in order to give the civil servants a sporting chance of producing a note in response. The Minister's attempt at an answer will be more or less successful depending on the civil servants' ability to think and write at speed, and the Minister's ability to read under pressure. But once read into the record, the editors of Hansard will spruce up the incoherences and trim the inarticulate edges of the Minister's response, and it will form part of the same monotonal record as the carefully crafted speaking notes would be.

Normally in court, when attaching evidential weight to a witness' words, judges are able to consider, and insist upon an opportunity to consider, the

circumstances in which the evidence is given. They will consider what weight to attach depending on the confidence or otherwise that attaches to the witness' words. In relation to the Minister's words as to the legislative intent, however, Hansard is treated as uniformly authoritative and coherent. Instead of appraising whether the Minister was more or less likely to be giving an accurate and authoritative picture according to the circumstances in which the briefing on which it is based was produced, the courts are required to give a uniform and monotonal construction to this kind of evidence, with the obvious danger that the result will be significant misunderstanding.

If the courts used an actual transcript of Parliamentary proceedings taken from the recorded proceedings, or a direct extract of the visual or audio recording, they would be able to judge the reliability of the evidence in the usual way; but that would raise its own Article IX issues if the courts were seen to be interfering with Parliament by judging the relative quality and veracity of different contributions to proceedings. So trying to obtain a more accurate transcript to evaluate in the same way as evidence is probably not the right way to go: but at the same time judges could develop their own ways of treating different kinds of Parliamentary proceedings in different ways. In order to do that, however, they would need a level of knowledge that in general they do not have: although there are of course some judges at all levels who have both interest in and knowledge of the legislative process, for the most part this is neither something that forms part of legal or judicial training nor comes naturally in the course of a standard judicial career.

Affirmative resolution

Pepper v Hart is one of the principal ways in which the judges in general are handicapped by their ignorance of the fundamental processes that sit behind Parliament and politics when they come to construe legislation. But there are other ways, and some of them are as equally disruptive to the integrity of the statutory interpretation process. And like *Pepper v Hart*, these practical applications of judicial misunderstanding are becoming more frequent, as the judges appear increasingly to wish to take account, as they see it, of the realities of the political process.[5] When the Supreme Court in the majority decision in the Brexit case[6] notes "pragmatic" considerations at paragraph 100 of the judgment – though noting immediately afterwards that the judgment did not rest on those considerations – they appear to fail to appreciate that many of the pragmatic considerations that courts might wish to take into account in considering statutory interpretation and other matters, are, in so far as they relate to Parliamentary and political processes, beyond their understanding for a range of reasons.

An example arises in the construction of statutory instruments, which are of increasing importance as they cover an increasing percentage of the statutory

landscape. The courts have recently begun to take more notice of whether or not the instrument in question was processed in accordance with the negative resolution procedure or the draft affirmative procedure, for purposes of Parliamentary scrutiny under the Statutory Instruments Act 1946.[7] Without doubt, when they undertake this exercise – possibly instigated by increasingly active judicial assistants – they are intending to display increasing awareness of the technicalities of Parliamentary procedure. What they are actually doing, however, is risking an approach that has the potential to undermine the fundamental nature of the traditional process of discovering the legislative intent.

When Lord Nicholls in *Spath Holme* [8]discusses the nature of legislative intent in what remains the leading judgment on the issue, he makes it very clear that the search is not for the actual subjective purpose and motive of a group of Parliamentarians at the time when a law was passed once made, but an objective inquiry into the intention that a reasonable reader would impute to notional Parliamentarians of the time having regard to the words used in the light of the context. This was not a display of traditional ignorance by judges of the realities of the political process: it was a deliberate self-denying ordinance based on the judges' understanding of what they did not and could not understand, and the impossibility of obtaining sound evidence of subjective intent in relation to legislation in the way that one would do in construing a contract. In construing a contract the courts are at least in some senses, or to some extent, aiming to get inside the actual minds of the actual parties, so far as possible; and contemporaneous evidence of motive or purpose is good or best evidence of subjective intention for that purpose. The judges have always robustly rejected, for example, any suggestion of admitting in evidence correspondence from or to drafters of the legislation, not because earlier judges were unaware of the importance of drafters and the pivotal degree of influence they can exercise over the shape of the legislation, but because they were aware that since it is impossible to create a full picture of the subjective intent, and to cross-examine evidence on the subject, the only way to avoid imbalance and inaccuracy is to concentrate exclusively on an objective picture.

If one is applying an objective test to construe a statutory instrument, whether it was subjected to negative or affirmative resolution scrutiny procedure is irrelevant to the question of how much weight can be given to a particular nuance or detail of the legislative text (which is the normal implication of the discussion by judges of the question whether a particular instrument was scrutinised by negative or affirmative procedure).[9] Looked at objectively from a perspective of process, the difference between negative and affirmative resolution is not one of the extent of scrutiny in matters of detail, or the extent to which Parliament can be deemed to have considered matters of technical detail. The proof of this is quite simply the fact that statutory instruments are as unamendable in the draft affirmative procedure as they are in the negative resolution procedure: the idea that affirmative scrutiny involves a closer microscopic analysis of the text of the legislation is falsified by the fact that if a Member or peer sees a detail that he or

she doesn't like, there is nothing they can do about it short of pressing the nuclear button of refusing to approve the instrument, and the position is exactly the same for negative resolution instruments. The negative and affirmative resolution procedures are both, in effect, approvals of the overall thrust of an instrument, rather than a detailed consideration of any particular detail within it.

(If one were to draw a valid comparison, it would be with the super-affirmative procedure, as part of which a degree of amendment is possible, in effect, at the draft legislation stage. But judges rarely if ever draw a comparison between negative and super-affirmative resolution, possibly because, the latter procedure being rare, they are mostly unaware of it. And what of instruments that are – as is very common – subject to no express Parliamentary scrutiny procedure at all – are they to be deemed to have received no policy approval from Parliament when it comes to construing or applying them, in which case what is Parliament taken to have been doing when it delegated the enabling power?)

Even if one takes a subjective approach to the search for the legislative intent – and judges frequently fall into doing so whether or not they know or admit it – the difference between negative and affirmative resolution is primarily illusory. When alluding to the fact that an instrument was subject to the draft affirmative procedure, judges sometimes refer to the fact that it has been debated in both Houses of Parliament. But here again they fail to do justice to the realities of parliamentary procedure. It is rare for an affirmative scrutiny instrument to receive anything approaching significant substantive debate in the House of Commons: in almost every case, the reality is that a notional debate lasting minutes or seconds takes place in a Committee room upstairs, and there is not even a formal vote in the Chamber itself – rather, following the Committee Report the vote is taken formally as part of the Deferred Divisions on a single list taken on a Wednesday, with politicians sitting with a list of votes to be cast in one hand a list of instructions from the party Whips in the other ("I always voted at me party's call …"). In the Lords, a debate on an affirmative procedure instrument is most frequently taken either also in the "Moses" Committee room, or, quite commonly, bundled up with a number of related or unrelated instruments and taken as "dinner-hour business", the title of which makes no pretence either as to its perceived importance or as to the number of peers likely and expected to take an active role in it.

In these circumstances, it would be in accordance with traditional understanding and good policy for a statutory instrument to be treated as having the same force of law, and the same deemed rigour and approval of detail, irrespective of the Parliamentary procedure used to scrutinise it (if any). That would not be inconsistent, of course, with taking a *Pepper v Hart* account of statements made by a Minister in speaking to the approval motion for a draft affirmative statutory instrument in either House. But it would avoid the mistake of pretending that the Minister's statement was part of the same kind of scrutiny debate that is given to Bills in Committee.

Non-operative components of legislation

Even when it comes to the text of legislation, ignorance of the Parliamentary process can influence how judges understand or fail to understand the significance of particular provisions; and the same ignorance on the part of legal professionals generally can influence how cases are conducted and lead to a considerable amount of wasted discussion with a consequent waste of expenditure and risk of decisions being reached as a result of ignorance.

Three obvious examples of this are: long titles, headings and sink clauses.

The courts have for decades habituated themselves to considering long titles of Bills as an aid to interpretation in cases of ambiguity, or of doubt as to the fundamental legislative purpose. The reason for that being a long-standing practice relates to the origin of long titles and their historical relationship to preambles – which were once commonly found in Bills of all kinds, and are now found only in Private Acts and statutory instruments. It is entirely reasonable for the court to have regard to the preamble to an Act in construing it: indeed, it would be unreasonable not to have regard to it for that purpose, given the obvious and express purpose of a preamble being to set the context and background for the Act within and against which it must be construed and applied. To use the pre-purposive era purposive language, the preamble exists only to set out the mischief at which the Act is aimed in order that its operative provisions can be construed by reference to that mischief.

When preambles came to be abandoned, the courts naturally turned to the long title as their relic. But in doing so they fell into the trap of ignorance of the Parliamentary process: because the preamble was always intended to form part of the substantive background to an Act and it was always intended to have as much purpose after enactment as before, if not more. The long title, however, always played a key role in the Parliamentary procedural aspects of the Bill for an Act. It was framed for procedural purposes, rather than for any impact and influence it might have on the application and construction of the Act after enactment. This is because, put simply, the long title of the Bill for an Act was at one time more or less determinative of scope in the House of Commons and of relevance in the House of Lords, and therefore determined what amendments hostile interests could table to the Bill during its consideration. A short and tight long title protected the government to a very significant degree from being attacked or hijacked by cognate or related interests. This is all put in the past tense, because over time the House authorities came less and less to see the long title as determinative in either House, and started to make decisions about scope or relevance by reference to the overall feel of the topics addressed by the Bill. Today, therefore, a long title can be drawn at relative length or at a degree of relative generality without giving the same hostages to fortune in relation to scope for amendments as would formerly have been the case, although it

continues to have some influence and its drafting therefore continues to be influenced by procedural considerations. So oddly enough, judges are probably less misled today than they were once when having regard to the specificity or otherwise of the long title; but the fact remains that when having regard to it they are still generally ignorant of the fact that the purpose of its inclusion at all is primarily procedural, albeit that the nature of its Parliamentary purpose has changed and diminished over time.

The problem of judicial ignorance is even more pronounced in relation to titles and headings of Parts of Acts and individual sections. Until 2001, section headings were known as side notes or marginal notes, and appeared in the margin of the text and not as part of it. That made it easier to guess a fact that was even then not generally appreciated, namely that these headings were not treated as being part of the operative text by those responsible for preparing and editing the statute book. They were seen as informal aids to navigation and could be altered by the House authorities editorially during the passage of a Bill through Parliament, and by the Queen's Printer editorially in preparing the published version of the Act as enacted.

Presumably, the judges were not originally aware when they started to take notice of headings in cases of ambiguity or lack of clarity that these headings could not be included in the imputation of notional legislative intent, whether on an objective or subjective basis, given that they could be altered informally at the request of the drafter as the Bill proceeded and even after Royal Assent in preparing the final text.

Now that headings have moved into the body of the text, their position has become even more equivocal. One sometimes sees formal amendments to headings both as amendments to a Bill during its passage in Parliament and as textual amendments of an earlier enactment by a later amending enactment. That would never have been regarded as proper in the days when everyone understood that these titles were purely informal and that the proper way of changing them to reflect changes in the operative text was as an editorial process. Does the fact that they are nowadays sometimes amended formally by amendments to a Bill or by textual amendment of earlier Acts mean that they are now to be regarded as fixed parts of the text? Certainly not in relation to older enactments, because they will have been produced and altered informally. But possibly not in relation to new enactments either. Because when moving them into the body of the text the government was making a primarily stylistic or presentational change, and made no public announcement as to the status of the headings or as to the fact that their status would now change. Judges certainly when relying on headings of sections are acting in ignorance of whether or not those are formally imputable to the legislative intent or whether they are or may have been altered informally by "irresponsible persons":[10] nobody can know the official position, since it has never been officially pronounced in comprehensive form.

In relation to the preambles to statutory instruments, the position was profoundly changed by the decision of the Court of Appeal in *Vibixa*.[11] Until that time, it had been the understanding of government lawyers that the citation of enabling powers in the preamble was a matter of convenience for the reader and not a question of law. It was generally understood by those responsible for drafting statutory instruments that what mattered in determining the *vires* for an instrument was whether or not the Minister purporting to make it actually had the powers that would support the text she or he wanted to enact. If a power was cited that the instrument did not in fact rely on, that was bad drafting practice; but it did not affect the lawfulness of the instrument. Similarly, if a power was omitted from the recital, that was confusing for the reader but could not alter the fundamental question of whether or not the Minister had power to make the instrument in the form enacted. There is both logic and common sense in that approach, and it was suddenly altered by the Court of Appeal without any apparent argument about the general implications and, most importantly, without any evidence having been taken as to the wider practice and understanding of government lawyers in relation to preambles to strategy instruments. It would, of course, have been entirely acceptable had the Court of Appeal decided that the existing practice and understanding of government lawyers was based on a mistake of fundamental legal principle. But no such decision was made, indeed, there was no detailed discussion of why the court came down on this particular side of the question in relation to the status of citations in preambles. In essence, a simple assertion by the Court of Appeal changed decades of practice and understanding on the part of government lawyers and others who understood government practice. And although government lawyers changed their practice to reflect the decision in *Vibixa*, inevitably some discovered it later than others, and there are still instances of apparently insufficiently detailed preambles that result in doubts being raised as to vires.[12]

Sink clauses are a small and relatively recondite example of judicial and wider legal ignorance of the Parliamentary process as it affects the text of legislation. In the case of *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform*[13] a great deal of argument on either side depended on the significance or otherwise of the statement in an Act that expenditure of the Secretary of State under its provisions was to be paid "out of money provided by Parliament". Anyone with any knowledge of the House of Commons Supply procedures, or indeed with understanding of financial legislation in general and the Baldwin Convention in particular, would immediately have recognised this as an empty proposition in terms of legislative effect. There is no other source from which expenditure by Ministers can be paid, except in the few cases in which expenditure is expressly (and therefore deliberately) charged directly upon the Consolidated Fund. This should have been immediately obvious, therefore, as a "sink clause", included for purely procedural purposes in order to "drain the italics" from individual spending clauses within a Bill.[14] This process is relevant only to the arguably archaic practice of italicising, in the first print of Bills starting in the House of Commons, provisions that would impose a charge on public funds

or a charge on the people; it has remaining relevance only in relation to financial resolutions, which are themselves something of a relic, and it last had real political significance when the Ways and Means Committee sat, decades ago. (Similarly, the privilege amendment in a Bill starting in the House of Lords will baffle anybody with no understanding of the Parliamentary process – but since that is routinely removed by amendment in the House of Commons, it does not survive to baffle readers of the Act after Royal Assent.)
Happily in the *Friends of the Earth* case, at some relatively late point in the proceedings an explanation of the puzzling form of the clause was found and a discussion of the nature sink clauses was discovered and accepted by the judge as the most likely explanation of its form. So in one sense it is a happy story of the right conclusion having been reached; but it is a cautionary tale when one sees that a central plank of the argument was based on a general puzzlement about something that should have been immediately recognised by everyone involved, and that it was only by a happily extensive piece of research by someone involved that the correct conclusion was reached.

Conclusion and remedy

The central theme of the discussion above is that judges simply do not understand enough about the Parliamentary process to be able to make sense of many of the materials that they are required to handle, including the text of Acts and subordinate legislation.

To some extent, the remedy is training for the judges in the Parliamentary process. And, of course, all lawyers should be better-educated at degree or law school level in how to read, understand and apply primary legislation, subordinate legislation, and (increasingly) quasi-legislation; and that training should include appreciation of the fundamentals of the mechanisms by which different kinds of law are made.

But that is only part of the solution; and in some ways it could be counter-productive. A little learning is always a dangerous thing; and judges who consider themselves experts in the legislative process could become as dangerous as Ministers who consider themselves experts in the law.

The more important part of the solution is simply for judges to stick more closely to the text of legislation and the objectively inferred intention of Parliament in promulgating that text, and to indulge less in speculation about intention and motive based on materials and events that are extraneous to the text and public context, and that by definition they understand only imperfectly. If the partly illusory move towards "purposivism" gave way to a swing of the pendulum back towards primacy of the legislative text, that would be no bad thing.

About the Author

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Endnotes

1 | *Heydon's Case* (1584) 76 ER 637.

2 | *All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting*, D Greenberg, European Journal of Law Reform, ISSN 1387-2370 Volume 7 2005 issue ½ Eleven International Publishing.

3 | [1993] A.C. 593, HL.

4 | *Hansard, the Whole Hansard and Nothing But the Hansard* – D Greenberg, Law Quarterly Review Volume 124 ISSN 0023-933X Thomson Sweet & Maxwell April 2008.

5 | See, for example, *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, and other cases cited in *Craies on Legislation*, D Greenberg, 2016, paras. 27.1.14.1 – 27.1.14.5.

6 | *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

7 | For examples of references to the form of scrutiny procedure attached to an instrument see the cases discussed in *Craies on Legislation*, D Greenberg, 2016: para.3.6.5, fn.123; para 6.2.21, fns.44, 45.

8 | *R v Secretary of State for the Environment, Transport and the Regions and another, Ex p. Spath Holme Ltd* [2001] 2 A.C. 349, 395 HL.

9 | See *Craies on Legislation*, D Greenberg, 2016: para 6.2.21, fn.45.

10 | A phrase which derives from a rare (and ancient) example of a judge noting the distinction between different kinds of heading – see *In Re Woking Urban District Council (Basingstoke Canal) Act 1911* [1914] 1 Ch. 300, CA.

11 | *Vibixa Ltd v Komori UK Ltd; Polestar Jowetts Ltd v Komori UK Ltd* [2006] EWCA Civ. 536.

12 | See, for example, House of Commons Select Committee on Statutory Instruments Third Report of Session 2015–16 drawing special attention on doubtful vires grounds to the Aggregates Levy (Registration and Miscellaneous Provisions) (Amendment) Regulations 2015 (S.I. 2015/1487).

13 | [2008] EWHC 2518 (Admin) at paras 34–35.

14 | Parliamentary jargon for avoiding the need to italicise each individual spending clause.