Reference to Hansard in the Interpretation of Statutes: Are there prospects for a new approach?

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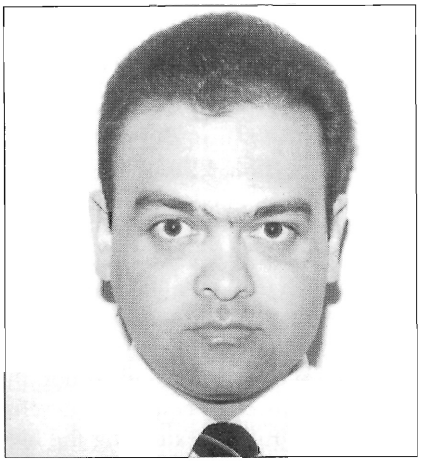

Although the Roman-Dutch writer CH Eckhard thought that debates preceding the enactment of a law were an important aid in the construction of that law (*Hermeneutica Juris* 2.2.60), except to justify a deviation from the clear meaning of the law (*op. cit.* 2.2.82), South African courts have followed the approach which was developed in English law beginning with the judgment of Willes J in *Millar v Taylor* (1769) 98 ER 201, 217:

> "The sense and meaning of an Act of Parliament must be collected from what it says when passed into law; and not from the history of the changes it underwent in the house where it took its rise."

An extract from the judgment of Kotzé, CJ in the case of *Bok V Allen* 1884 SAR 119, the earliest South African judgment on the matter, illustrates very well the practical difficulties faced by the courts in having reference to debates in a legislature in order to discover the meaning of enactments of that legislature (at 131):

> "The debate, when the letter of the State Secretary was under discussion, cannot be regarded as a means of interpretation. It appears that there was a difference of opinion amongst the members. ... The majority of the members took no part in the debate, and there is nothing to show that some of the members ... did not change their opinion when the resolution was taken. ...".

In *Beswick v Beswick* (1967) 2 All ER 1197, 1202, Lord Reid also referred to practical difficulties:

> "For purely practical reasons we do not permit debates ... to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard ...; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court ...".

Practical difficulties may very often be overcome in one way or another. No less so the kind of difficulties alluded to in these judgments, and LC Steyn (*Die Uitleg van Wette,* fifth edition), at least, appears to have found the arguments of the courts unconvincing (at 135):

> "Dit kan toegegee word dat die debatte in bv. die Volksraad heel dikwels geen lig op 'n duistere bepaling sal werp nie, en dat dit soms nie veilig sal wees om daardie debatte as leidraad te neem nie, maar dit is ewe goed moontlik dat bv. die tweedelesingstoespraak van die Minister wat 'n wetsontwerp indien, waarin hy die al-

gemene strekking daarvan verduidelik, of sy antwoord op die debat of op 'n bepaalde gesigspunt deur 'n lid geopper, of dat die verklarende memorandum ... wel kan dien tot beter begrip van so 'n bepaling. Dit is nie duidelik waarom dit nodig sou wees om 'n derglike deugdelike hulpmiddel in beginsel uit te sluit nie.".

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Practical difficulties are not however the only reasons advanced for the exclusion of references to debates preceding the enactment of laws in the construction of those laws. From the earliest judgment, *Millar v Taylor (supra),* the arguments advanced in support of exclusion have often borne a close resemblance to arguments in support of the literal rule, which is of course the primary rule of construction (cf. *Venter v R* 1907 TS 910).

Steyn, *op cit.,* 4 et seq., put the *raison d'etre* of the literal rule in the following terms:

"Dit lê voor die hand dat wat die wetgewer wou bepaal het in die eerste plek gesoek moet word in die medium wat hy gekies het om dit bekend te stel, nl. in die woorde wat hy gebesig het. Uit die aard van die saak moet die woorde van die wet die eerste en hoofbron van inligting wees aangaande die werklike inhoud van die wetgewende wil. En waar die wetgewer woorde gekies het om sy wil teenoor sy onderdane uit te druk, kan ook wel vermoed word dat hy, om 'n bepaalde betekenis weer te gee, dié woorde sou gebruik het wat vir sy onderdane daardie betekenis sal hê, anders sou sy wetgewing onverstaanbaar en futiel wees. Vandaar die vermoede dat sy woorde volgens hul gewone betekenis verstaan moet word, dit wil sê volgens die betekenis wat hul gewoonlik in die samehang waarin hul gebruik word, in die mond van sy onderdane het."

Compare this explanation with the reasons advanced by Lord Diplock, in *Forthergill v Monarch Airlines Ltd* (1980) 2 All ER 696, 705, for excluding references to debates preceding the enactment of a law:

"Elementary justice or ... the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."

The clear implication of Lord Diplock's *dictum* is that the citizen (legal subject) should not have to refer to material extraneous to an enactment in order to ascertain the meaning of that enactment. That is also the assumption which underline Steyn's justification of the literal rule although Steyn necessarily approaches the matter from the other end, as it were, recognising that if the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him, there is an obligation on the legislature to formulate those rules in language which the ordinary citizen understands.

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The need for legal certainty is nothing if not an aspect of the rule of law (cf. Gretchen Carpenter, *Introduction to South African Constitutional Law,* 89-91), and arguments in favour of adherence to the rule of law centre around the protection of individual rights *(ibidem),* especially against interference by Government. It seems strange then that individuals should be denied the opportunity of showing that debates (preceding the passing of a particular enactment) support the one or other argument to restrict the ambit of that enactment in the extent to which it would interfere with individual rights. The need for legal certainty may serve as justification for excluding references to debates which tend to indicate that a greater interference with individual rights was intended than may be reasonably apparent to the ordinary legal subject upon his reading the enactment in question. It should not, however, serve as justification for exclusion in all cases, the whole purpose of upholding the need for legal certainty being defeated if the result were that the individual is weakened in his or her ability to protect his or her fundamental rights. The courts have clearly not recognized this, which may be the best indication that the exclusion of references to debates preceding the passing of an enactment is but another form of adherence to the primacy of the literal rule. However, even if exclusion of such references is adherence to the primacy of the literal rule, there is no reason why such exclusion should be absolute. The primacy of the literal rule is not in other instances an absolute precept of construction. If it were, we would not have the body of rules of interpretation that we do have.

There is yet another justification which is sometimes relied upon, namely that of constitutional principle. Lord Wilberforce, in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* (1975) 1 All ER 810, 828, put this justification as follows:

"Legislation ... is passed by Parliament, and put in the form of written words. This legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law – as distinct from ... the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."

The learned judge went on to point out that adherence to the view that the function of the courts is to ascertain the will or intention of Parliament often leads to neglect of the important element of judicial construction related to –

"such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and ... in some contexts ... social needs."

Even if correct, the argument at best is one for caution and circumspection with respect to references to preceding debate, not for the complete exclusion of such references. There may well be circumstances in which none of these concerns will be adversely affected by having regard to preceding debate.

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Certain writers have come out against the absoluteness of the rule (cf. GE Devenish, *Interpretation of Statutes,* 127, notes 86 + 87). Devenish *(ibidem)* has suggested, following Cote, that –

"(a)ll things considered there is much to be said for defining the rule as 'cautionary rather than mandatory'."

Recently the English courts have reconsidered the desirability of the exclusionary rule. A major inroad on the application of the exclusionary rule in English law was effected by Lord Keith in *Pickstone v Freemans plc* (1988) 2 All ER 803, 807, when he said that it was –

"... entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in which the draft was presented by the responsible minister and which formed the basis of its acceptance".

In an even more recent case, *Pepper (In-*

spector of Taxes) v Hart (1993) 1 All ER 42, the exclusionary rule was subjected to very close scrutiny and the House of Lords, per Lord Browne-Wilkinson, indicated that the time had arrived for limited modification of the rule (at 64):

> "(A)s a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment ... reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria.
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> "(M)y main reason for reaching this conclusion is based on principle. Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are bound to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve ... (and) it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. ... The courts (on the other hand) are faced simply with a set of words which are in fact capable of bearing two meanings. ... In many, I suspect most, cases references to parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such cases should the courts blind themselves to a clear indication of what Parliament intended in using those words?"

The judgment is well-reasoned and carefully worded so as to put all the objections to which I have alluded in their proper perspective, thus opening the way for a more relaxed approach. The criteria set by the learned judge, namely that the material should clearly disclose the mischief aimed at or the legislative intention lying behind ambiguous or obscure words, have obviously been laid down in consideration of at least the first two of the objections dealt with above, namely the "practical difficulty" objection and the "literal rule" objection. I must nevertheless doubt that it is even necessary to set such criteria. Material of the kind under discussion may simply be treated as evidence in support of an argument, the relevance and weight of which may be determined by the court in every specific instance. The time taken up by irrelevant or entirely unconvincing argument should then simply be taken into account in the award of costs, as is suggested by R Cross, *Statutory Interpretation* 158.

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South African courts have not yet had an opportunity to consider the recent decisions of the English courts. However, current developments in our constitutional law, particularly the acceptance of a justiciable Bill of Fundamental Rights (see Chapter 3 of the Constitution of the Republic of South Africa 1993 – the Interim Constitution) will very likely encourage a significant departure from the traditional adherence of our courts to the primacy of the literal rule (cf. Devenish, *op. cit.,* 210-212), and one of the objections alluded to above may therefore lose much of its significance, thus facilitating a reconsideration of the application of the rule in South African courts. In this respect an interesting development is possible.

The rights contained in the Bill of Fundamental Rights may not be abridged by Parliament except as expressly provided for. There is also provision for a Constitutional Court which will, *inter alia,* have the power to test the constitutionality of Acts of Parliament against the provisions of the Bill of Fundamental Rights (section 98(2)). Similar provisions are intended for a permanent constitution still to be drafted. It may well be that in considering the constitutionality of legislation the Constitutional Court will, in order as far as possible to uphold legislation, be prepared to look at indications, including statements made in the debate preceding the passing of such legislation, that the legislature, although it used words in an enactment which could justify a conclusion that it intended abridging a fundamental right, in fact did not so intend. The Constitutional Court may in such a case take an approach similar to the "benevolent approach" of administrative law (cf. LG Baxter, *Administrative Law* 492-4), in order, whenever possible to put a construction on the enactment in question so that it is not in conflict with the Bill of Fundamental Rights, and therefore not invalid for that reason(cf. section 35(2) of the Interim Constitution).

Should such a development occur in our jurisprudence, the Constitutional Court will very likely set its own criteria for allowing such material since its concern will not be (as in the *Pepper*-case (*supra*)) the discovery of the intention of the legislature, but rather finding some justification for a construction which will enable it to allow the enactment to stand.

However, since the various divisions of our Supreme Court will not be competent to test the constitutionality of Acts of Parliament (section 101 (3) (c)), those divisions will be bound to presume constitutionality and try to discover the intention of the legislature. If the Supreme Court adopts a new approach, it seems likely that it will follow the *Pepper*-decision.

It is not unlikely therefore that a new approach to the admissibility of Hansard may be at hand.

Note:

As will appear from Steyn *(supra),* it would be dangerous for the courts to have regard to the full contents of Hansard. Some members of Parliament, when speaking for or against a bill, are guided more by what they have been told by their chief whip than by what they conceive to be the objects of the measure. However, the Minister's second reading speech and the explanatory memorandum on a particular bill are normally compiled by legally qualified officials in an objective manner. As an additional safeguard it is suggested that the Chief State Law Adviser should be required to certify these documents as reflecting the true intention of the legislature. If this has been done, we can see no good reason why the courts should not, in appropriate cases, be free to refer to these papers. Needless to add that the court would retain the sole discretion to decide the extent to which cognisance should be taken of what is said in such documents.

Editor ○

Feeling good about government is like looking on the bright side of any catastrophe. When you quit looking on the bright side, the catastrophe is still there. – **PJ O'Rourke** (New Zealand Law Journal, June 1993)