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Use of Parliamentary Debates in Statutory Interpretation: The unclear position of Bangladesh judiciary

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Abstract

The use of parliamentary debate in the judicial interpretation of statutes is discouraged (The Exclusionary Rule). It is done for a purpose. The judicial consideration of parliament's internal proceedings might invite unnecessary tension between the two constitutional organs. Moreover, the parliament's intention behind a law might not be discoverable from one or more of its members' speeches. Considering the speech of the Ministers or sponsors of a Bill might also be dangerous. In such cases, the court might risk prioritizing the government's intention over that of the legislature. However, a famous British case called Pepper v. Hart argued the opposite. It held that ministerial or sponsor statements in parliament may be considered in certain circumstances to understand the intent of the legislature. The case is being endorsed in other commonwealth jurisdictions like Australia, Canada and India. This short piece considers the position of the Bangladesh Supreme Court and finds that there is a serious judicial (un)mindfulness about the rationales behind the Exclusionary Rule.

1. Introduction

In a system of separation of powers, the parliament legislates and the courts interpret and apply the laws. Interpretation or construction of a statute is guided by certain aims. Determination of the meaning of legal texts is one of them. Courts look into the text itself (literal interpretation) to understand what it means. In certain cases, the courts go beyond the specific text and consult other provisions and parts of a statute (contextual or structural interpretation). The purpose of the contextual or structural interpretation is to understand the context and the structure within which a particular provision is written in a particular way. Say, for example, the courts may look into the preamble or definition clause, aims/objective clause, or other clauses of a statute to understand how a particular provision should be understood and applied. These within-the-statute texts are known as an internal aid to interpretation.

Going beyond the internal aids is generally discouraged. It is argued that the courts' responsibility is to apply the law as it is written. Despite this, courts may need to use external aids in cases where internal aids may lead to absurd, vague, and unclear meanings. In such cases, a court needs to understand the aims and objectives of the law, the previous state of the law the area, etc. Known as the Mischief Rule of interpretation, the idea is that the courts will try to understand the mischief/deficiency/lacuna that the legislature wanted to remove by the statute that is under consideration. Once the mischief is known, the purpose of the law is apparent and the intention of the legislature is clear.

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Now, the question is could the court use parliamentary debates as external aid? This question is generally answered in the negative. Parliamentary debates held on the House floor during the passage of the law should help the court in understanding its purpose. Still, it is discouraged and there are reasons for this. It is argued that the intention of parliament as a collective body is difficult to ascertain. Each speaker speaks from his/her individual point of view and there is no guarantee that everyone's intention will converge into one collective intention at the end. Moreover, consultation of parliamentary debates during the legislative process would invite the court to sit over the judgment of internal proceedings of parliament. Courts may need to comment on the intention of parliament, the rationality of their arguments, etc. An Exclusionary Rule, therefore, provides that parliamentary debate will not be used in statutory construction.[1] The courts should rather look into the enacted intention of parliament that is discoverable from the language of the law itself.

This paper examines the recent changes in the exclusionary rule in the UK and the global trend towards that direction. In this context, the position of the Indian Supreme Court is separately treated. This is because the Bangladesh Supreme Court usually takes clues from the Indian jurisprudence. The paper then addresses the Bangladesh Supreme Court's position in this regard. I find that though Bangladesh Supreme Court has generally refrained from using parliamentary debates in statutory construction, it has referred to such debates in some cases. During those occasional references, the Court has arguably not shown any sign of awareness of the exclusionary rule and its implication for the parliament-judiciary relationship in Bangladesh. I argue that this tendency - which I call the "doctrine-blindness" - of the judiciary is preventing it from being a creator of jurisprudence in its own right and sustaining it as a mere consumer of jurisprudence developed elsewhere.

2. Relaxation of the Exclusionary Rule in the UK

In the UK, there was a longstanding rule of exclusion of parliamentary materials as an aid to statutory interpretation. British MPs had historical concerns about prosecution by the Crown and its courts. There was prohibition on reporting parliamentary debates from 1628 to 1908. In those days, the parliament used to consider the reporting of its debates and use of those by courts as a breach of its privileges. The UK courts also gave in to the parliament's understanding as late as the early 1990s. As Lord Denning put it in a 1958 case named *Escoigne Properties Ltd v I.R.C [1958] AC 549*:

> "In this country we do not refer to the legislative history of an enactment ….. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard [official proceedings of the UK parliament]. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people."[2]

Modern-day courts in the UK, however, disfavour a total exclusion of the parliamentary materials in statutory construction. Ascertainment of the intention of Parliament now constitutes an essential ingredient of the statutory construction process.[3] As Lord Browne-Wilkinson put it in the 1992 case of *Pepper v Hart*, the modern courts' purpose of using

[1] Stefan Vogenauer, 'A Retreat from Pepper v Hart? A Reply to Lord Steyn', (2005) 25(4) Oxford Journal of Legal Studies 629.
[2] *Escoigne Porperties Ltd v I.R.C* [1958] AC 549, 566.
[3] Stephane Beaulac, 'Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?' (1998) 43(3) McGill Law Journal 288, 314-21.

parliamentary debates in the construction of statutes is "far from questioning the independence of Parliament". It rather works to give "effect to what is said and done there."[4]

In *Pepper v Hart*, the House of Lords considered whether the teachers at Malvern College would pay tax on the marginal cost they incur in educating their children or whether they would pay on the average cost of education incurred by the general public. Staff at Malvern College were entitled to educate their children at a twenty percent rate of the cost incurred by the general public. The decision of the case depended on the construction of the word "cost" in the Finance Act of 1976. Question for the Appellate Committee of the House of Lords was whether the court could use the relevant passages from the statement of the Financial Secretary when he withdrew a sub-clause from the Finance Bill, 1976 in the House of Commons. The House of Lords unanimously found in favour of the taxpayer and held that the benefit should be taxed on a marginal cost basis. Most importantly, the Law Lords opined that the exclusionary prohibition on parliamentary debates should be relaxed and reference to Hansard should be permitted in certain circumstances. Lord Browne-Wilkinson delivered the lead argument and set a so-called "triple lock" on the admissibility of parliamentary materials in court.

To sum up, Lord Browne-Wilkinson's three criteria of admissibility permits the use of parliamentary materials only when - a) the usual means of interpretation yield absurd, obscure or ambiguous result; b) the statement sought to be used is made by the promoter of the law or amendment concerned and c) the statement clarifies what the law or amendment was designed for and such law or amendment was approved by the parliament without further amendment.[5]Lord Wilkinson's clearance of the ministerial or promoter's statement for judicial use was not free from criticism. Objection against the use of parliamentary statements by the promoters of Bills is based on a concern that interpreting laws with reference to ministerial statements might result in making the parliament's intention subservient to the governments or the promoters' intention. Lord Browne-Wilkinson seemed to be aware of the concern and he accordingly added a condition of consulting "such other Parliamentary material as is necessary to understand such statements and their effect".[6]

Interestingly, the post-*Pepper* case laws in the UK show that Lord Browne Wilkinson's conditions are sometimes ignored, and the Hansard has allegedly become "an open book"[7] for ascertaining the meaning and purposes of statutes. The *Pepper* decision was vehemently contested by Lord Steyn in 2001.[8] The UK courts then started taking clues from Lord Steyn and attempted occasional retreats from *Pepper* position.[9] For example, in *Wilson v First County Trust (2)*[10] a Human Rights Act case, the House of Lords criticized the way in which the Court of Appeal used Hansard when determining whether a British legislation contravened the petitioner's European Convention rights. The Court of Appeal looked at parliamentary debates not to determine the meaning of an ambiguous term, but to ascertain the aim and purposes of the legislation and the parliament's justification of the means it took towards the aim. The House of Lords argued that the court was wrong to use Hansard in this manner. Lords however

[4]*Pepper (HM Inspector of Taxes) v Hart and related appeals* [1992] BTC 591, 614 (Lord Browne-Wilkinson).
[5]ibid 615 (Lord Browne-Wilkinson).
[6] Mark Keith Heatley, 'Devolution: A New Breath of Life for Pepper v Hart?' (2017) 38 Liverpool Law Review 287, 305.
[7] Stefan Vogenauer (n 1) 636.
[8] Lord Steyn, 'Pepper v Hart; A Re-examination', (2001) 21(1) Oxford Journal of Legal Studies 59.
[9]Stefan Vogenauer (n 1) 663.
[10]*Wilson v First County Trust (2)* [2003] UKHL 40, [2004] 1 AC 816; See also - Alison Young, *Democratic Dialogue and the* Constitution (Oxford: Oxford University Press) 204-06.

held that courts could consult Hansard when applying sections 3 (construction) and 4 (declaration of incompatibility) of the Human Rights Act 1998.[11] In that process, the court will not use the parliamentary material to – a) "question the reasoning found in parliamentary materials"; b) "determine whether reasons justified the conclusions reached by parliament"; or c) "determine the weight to be given to the conclusions reached by the legislature".[12]

Despite the subsequent conditioning of *Pepper v. Hart,* the UK judiciary has moved from the total exclusion of parliamentary debates in the statutory construction process.[13] The British courts have referred to parliamentary materials as background materials to understand the state of the law before an enactment, ascertain the aims of the enactment and the mischief the enactment wanted to remove[14] and also its practical effect.[15] Towards that end, the British courts have consulted ministerial statements in parliament,[16] parliamentary and extra-parliamentary committee reports,[17] ministerial conference reports,[18] and departmental explanatory notes,[19] etc. The basic rule of thumb is that the use of parliamentary materials as external aid in the statutory construction process "is one of weight and not of admissibility".[20] Other common law jurisdictions like the USA, Australia, and Canada have either moved or on the way, to such jurisprudential positions.[21]

3. The Indian position

The Indian Supreme Court's position on the use of parliamentary materials in resolving questions of construction broadly aligns with the English courts. Despite some inconsistency within its jurisprudence, the Indian Supreme Court does not follow the orthodox principle of total exclusion of parliamentary materials now.[22] The court, however, maintains a distinction between the speeches of sponsors of a bill and the other members debating the bill. It is argued that while the statement of a minister or sponsor could likely address the aims and objectives of the law, speeches of other debaters may reflect their subjective intent rather than the parliament's collective intent.[23] On similar logic, the court has considered the statements of sponsors of amendments that prevailed in the House.[24] Like the UK courts, the sponsor or ministerial statements are used for a very limited purpose of identifying the mischief which the law sought to remove. Those are not used for the purpose of identifying the overall intent of the legislature.[25] There is, however, one glaring exception to this. In appropriate constitutional

[11] Ibid (*Wilson v First County*) [52]–[53] (Lord Nicholls); [116] (Lord Hope); and [143] (Lord Hobhouse)
[12]ibid, [117] (Lord Hope)
[13] Heatley (n 6) 205.
[14] *Wilson v First County* (n 10) [118] (Lord Hope).
[15] ibid, [60] (Lord Nicholls), [142] (Lord Hobhouse).
[16] *R v Secretary of State for the Home Department, ex parteBrind* [1991] 1AC 696.
[17]*Black Clawson International Ltd v. Papierwerke AG* [1975] AC 591.
[18] *Attorney-General's Reference* (No 1 of 1988), [1989] 2 WLR 729.
[19] *R (Westminster City Council) v National Asylum Support Service* [*2002*[UKHL 38.
[20]*Pepper v Hart* [1993] AC 593; *R v Warwickshire County Council ex parte Johnson* [1993] AC 583; *Stubbings v Webb* [1993] AC 498; *Director of Public Prosecutions v Bull* [1994] 4 All ER 411; *R v Secretary of State for the Environment, ex parte Berkeley* [*2000*] UKHL 36.
[21] Stephane Beaulac (n 3) 321.
[22] *B. Prabhakar Rao v State of A. P.,* AIR 1986 SC 210; *District Mining Officer v Tata Iron and & Steel,* AIR 2001 SC 3134; *K. P. Verghesse v Income Tax Officer Ernakulam* [1982] 1 SCR 629; *State of Mysore v R.V. Biop,* AIR 1973 SC 2555.
[23] *State of Travancore v Bombay Co Ltd* 1952 AIR 366.
[24] *Express Newspapers (Pvt) Ltd v Union of India* (1985) 2 SCR 287.
[25] *Milton v Crown Prosecution Service* [2007] EWHC 532 (Admin) (UK); *K. S. Paripoornan v State of Kerala* 1995 (1) SCC 367; *Babu Ram v State of U.P.* AIR 1953 All 641; *Chiranjit Lal Chowdhary v Union of India* 1951

cases requiring the Court to ascertain the intention of the framers of the Indian constitution, the Indian Supreme Court lavishly draws from the Constituent Assembly Debates.[26] Apart from these, the Indian Supreme Court is mostly favourable to the use of parliamentary and extra-parliamentary commission, committee, or various drafting stage reports and studies as historical facts and external aid to statutory construction.[27] Like Lord Wilkinson's formulation in the UK's *Pepper v Hart* case, any use of such materials is conditioned on a statute being vague, ambiguous and unclear.[28]

4. The unclear position of the Bangladesh Supreme Court

Though not officially declared at any instance, the Bangladesh Supreme Court has generally refrained from using parliamentary debates in the statutory construction process. It is however impossible to claim that the judiciary does this as a matter of adherence to the exclusionary principle of interpretation. Rather the judges have occasionally referred to parliamentary conducts or debates. In none of those instances, however, the court answered the question of whether such use of debates was actually permissible or not. It appears that the courts consider it permissible to use such materials if necessary.

In *Anwar Hussain Chowdhury v Bangladesh* (1989) for example, there was an argument that the long title of the Constitution (Eighth Amendment) Bill did not disclose all the amendments it sought to make. One of the lawyers, Mr Khandker Mahbub Uddin Ahmed, claimed that most of the members of parliament might have thought that by the eighth amendment, they were introducing Islam as a State religion of Bangladesh. The long title of the amendment bill did not mention that they would also be decentralizing the High Court Division of the Supreme Court by the same bill.[29] While the judges could have rejected the argument on the basis of the exclusionary rule against the use of parliamentary proceedings in the judicial interpretation process, three judges - Shahabuddin Ahmed J.,[30] Muhmammod Habibur Rahman J.[31] and ATM Afzal J.,[32] took it upon themselves to answer the argument on merit. They rejected Mr Mahbub Uddin Ahmed's argument on the basis of a fact that no member of parliament had raised any objection about the long title during the debate on the house floor.

This style of judicial reasoning is problematic because it gives an impression that the judges might have considered the argument seriously had the members raised objection to the title during the debate stage. In such a scenario, the court would probably have sat over the judgment of actions and speeches of the MPs in the parliament floor. This is, of course, barred by the

AIR 41; *PV Prabhoo v PK Kunte* 1996 AIR 1113; *Devdoss (Dead) by L Rs. v Veera Makali Amman Koil* AIR 1998 SC 750; etc,.

[26] *Fagu Shaw v State of West Bengal* AIR 1974 SC 613; *SR Chaudhari v State of Punjab,* (2001) 7 SCC 126; *Banerjee v. Anita Pan* [1975] 2 SCR 774; *Union of India v Harbhajan Singh,* AIR 1972 SC 1061; *Indira Sawhney v Union of India,* AIR 1993 SC 477; *Samantha v State of Andhra Pradesh* (1997) 8 SCC 191.

[27] *CIT v Sodra Devi* AIR 1957 SC 832 (Income Tax Enquiry Report); *Express Newspapers (Pvt) Ltd v Union of India* (1985) 2 SCR 28 (Press Commissions Report); *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd,* 1962 AIR 1543 (Report by Committee appointed to bring changes in Company law); *RS Nayak v AR Antuley* 1986 AIR 2045 (Reports of the Committee which preceded the enactment of legislation, Joint Parliamentary Committee and a Commission set up for collecting information); *M Ismail Faruqqui v Union of India,* (1994) 6 SCC 360 (Government papers about enactment of a law); *Haldiram Bhujiawal and anrs v Anand Kumar Deepak Kumar* 2000(3) SCC 250 (Report of Special Committee of 1930).

[28] *CIT v. Sodra Devi* AIR 1957 SC 832.

[29] *Anwar Hussain Chowdhury v Bangladesh* (1989) 18 CLC (AD) [395] [396], [449]-[454].

[30] ibid [397] (Shahabuddin Ahmed J).

[31] ibid [455] (Muhmammod Habibur Rahman J).

[32] ibid [652] (ATM Afzal J).

articles 78(1) and (3) of the Constitution which provide that validity of parliamentary proceedings or the members' speech or votes in the House floor shall not be amenable to any court's jurisdiction. While article 78 apparently endorses the exclusionary rule, the three judges in *Anwar Hossain Chowdhury* case seem not to be interested in that type of reasoning.

Next, in *Government of Bangladesh v Asaduzzaman Siddiqui* popularly known as the Sixteenth Amendment case (2016), the Appellate Division of the Supreme Court briefly considered the intention of the framers of the Fifteenth Amendment Act 2011. A question in *Asaduzzaman Siddiqui* was whether the previous amendment (Fifteenth Amendment) reflected a parliamentary consensus on the constitutionality of the Supreme Judicial Commission - the matter in dispute in the Sixteenth Amendment. The Fifteenth Amendment retained the Supreme Judicial Council system for the removal of Supreme Court judges. The Sixteenth Amendment however sought to reverse this and re-introduce the original parliamentary removal system. The Supreme Court judges were vehemently opposed to this and they invalidated the sixteenth amendment through their *Asadzzaman* judgment. In his judgment, Surendra Kumar Sinha CJ.,[33] referred to the work and deliberation of the All-Party Parliamentary Committee that worked to finalize the Fifteenth Amendment bill. On the basis of those references, both the judges argued that there was political consensus about the necessity of the Supreme Judicial Council System.

Now, considered from the jurisprudential position of the UK and Indian Supreme Courts, reference to the All-Party Parliamentary Committee as an external aid to interpretation seems to be a valid exercise of interpretative power. The British and Indian courts have used committee reports, etc as external aid but while doing so, they have shown clear awareness of the exclusionary rule and also the limited purpose for which they were using the materials - knowing the context of enactment of a statute. Surendra Kumar Sinha CJ., and Iman Ali J., however, did not justify the use of the committee works. Nor did they clarify the purpose for which they were using it. Similar examples can be found in the fifth[34], seventh[35] and the thirteenth amendment,[36] the declaration of independence,[37] and preservation of the places of historic importance[38] cases. In these judgments, historical materials, constituent assembly debates, etc have been extensively used as an external aid of interpretation. However, apart from mentioning that those were necessary for understanding the historical contexts of the matters at hand, the judgments did not offer much insight into the desirability or permissibility of such use from a statutory construction perspective. The absence of such insight puts the legal community in darkness about the jurisprudential position of the court. To take an example, the Chapter VII (External Aids to Construction)[39] of Advocate Mahmudul Islam's book *Interpretation of Statutes and Documents* rarely mentions Bangladeshi case on the subject.

[33] *Bangladesh v Asaduzzaman Siddiqui* 6 LM (2019) (AD) 272, 362-363, [116]-[121].
[34] *Bangladesh Italian Marble Works Ltd v Bangladesh* 2006 (Spl) BLT 1 (HCD); *Khandker Delware Hossain v Bangladesh* 62 DLR (AD) (2010) 298
[35] *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84; *Siddique Ahmed v Bangladesh* ((Appellate Division) <www.supremecourt.gov.bd/resources/documents/563864_CA48.pdf> accessed 08 August 2021.
[36] *Abdul Mannan Khan v Bangladesh* ADC Vol IX (A) (2012) 10 <www.supremecourt.gov.bd/resources/documents/526214_13thAmet.pdf> accessed 08 August 2021.
[37] *Dr. M A Salam v Bangladesh* 18 BLT (Spl) (2010) 1. Full Text Judgment on the Declaration of Independence of Bangladesh, <http://www.clcbd.org/document/584.html> accessed 08 August 2021.
[38] *Major General A K M Shafiullah v Bangladesh* W/P No 4313/2009; Full text judgment <http://www.clcbd.org/document/585.html> accessed 07 August 2021.
[39] Mahmudul Islam, *Interpretation of Statutes and Documents* (Dhaka: Mullick Brothers 2009) 183-215.

5. Concluding Remark

The exclusion of parliamentary debates in the statutory construction process has a historic alignment with the UK's Parliament-Crown struggle during the seventeenth century. The modern-day relation between the parliament and courts is one of coordination rather than conflict. The courts' strict adherence to the exclusionary rule, therefore, gradually eroded. Judiciaries of the UK, USA, Canada, Australia, and India[40] have shown interest in using the parliamentary materials to understand the aims and purposes of the statutes. In doing so, the courts have given careful consideration to the inter legislative-judiciary relations. Bangladesh's judicial standing on the use of parliamentary debate in statutory construction is, however, incoherent. The judges' tendency to offer temporal reasoning suitable to a case in hand contributes to the incoherence. Hence the litigants are left second-guessing the exact principle of statutory construction which would likely be followed by the court in a given case. This doctrine-blindness is perhaps responsible for the fact that there is hardly anything known as Bangladesh's native jurisprudence in the legal field. Removal of incoherence is necessary not for mere academic purposes. As mentioned earlier, the use of parliamentary debate in the judicial interpretation process has important ramifications for the legislature-judiciary relationship which is recently a matter of extreme focus in Bangladesh and the question is highly likely to be raised in the days ahead.

[40] Robert G. Vaughn, 'A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation', (1996) 7(1) Indiana International and Comparative Law Review 1.