

## What *Yemshaw* Could Have Said

Presentation to the Statute Law Society  
12 October 2015

Donald L. Drakeman<sup>1</sup>

### Abstract

The Supreme Court, in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, set out to update the meaning of ‘domestic violence’, leading to public and academic criticism for thwarting the legislature’s intention. The Court could have invoked *Hansard* to reach the same result. I will argue that the separation of powers issues inherent in judicially updating a statutory text adopted just a few years before are substantially greater than the use of Parliamentary debates, despite the continuing controversy surrounding *Pepper v Hart*.

### Introduction

In the 2011 *Yemshaw* case, Lady Hale’s leading judgment set out to update the meaning of ‘domestic violence’ in a statute dealing with housing for the homeless. The definition would not be limited to physical violence, but would include ‘threatening or intimidating behavior’, as well as ‘any other form of abuse which...may give rise to the risk of harm’. Lady Hale believed that, by the time the statute was enacted in 1996, the meaning of the term ‘had moved on from a narrow focus on battered wives’, but she concluded—and this is the interesting part – ‘if I am wrong about [that] there is no doubt that [the meaning] has moved on now’.<sup>2</sup>

---

<sup>1</sup> Distinguished Research Professor, Program on Constitutional Studies, University of Notre Dame, [Ddrakema@nd.edu](mailto:Ddrakema@nd.edu). This is a working draft. Please cite only with permission.

<sup>2</sup> *Yemshaw v London Borough of Hounslow* [2011] UKSC 3 at [24].

The judgment was hailed as ‘insightful’ and ‘a master class in persuasive judicial reasoning’ by some,<sup>3</sup> and dismissed as ‘thumpingly wrong’ by others.<sup>4</sup> On the subject of statutory interpretation, Lady Hale’s updating approach has been described by Professor Ekins as an example of ‘amend[ing] a statute by judicial fiat’,<sup>5</sup> and Eleanor Mills in *The Times* called it ‘mission creep’.<sup>6</sup>

I will argue that there was, in fact, no need to update the statute. Rather, there were actually two controversial ways to reach the same outcome in *Yemshaw*. Both raise interesting and important separation of powers issues. One is Lady Hale’s approach to updating the statutory meaning. The other would be to refer to the parliamentary debates in Hansard. I believe that the sounder approach is the use of the legislature’s debates, especially, as here, when the statutory provision was enacted less than 15 years before the case was decided.

## The Statute

---

<sup>3</sup> Erika Rackley *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge-Cavendish 2012) 117, C.J.S. Knight ‘Doing (Linguistic) Violence to Prevent (Domestic) Violence? *Yemshaw v Hounslow LBC* in the Supreme Court, Case Commentary’ (2012) 24:1 *Child and Family Law Quarterly* 104.

<sup>4</sup> Jenny McCartney, ‘These shouts will reverberate’ *The Telegraph* [January 2011]. <<http://www.telegraph.co.uk/comment/columnists/jennymccartney/8290392/Those-shouts-will-reverberate.html>> (date accessed 26 August 2015). See also Anna Cowan and Besim Hatinoglu ‘Social Welfare’ (2012) *Cambridge Journal of International and Comparative Law* (1) 2:94-101, 95: ‘[G]iven the undisputed long-term harm that can result from non-physical abuse, the protective purposes of the homelessness regime is surely served by this decision.’

<sup>5</sup> Richard Ekins *The Nature of Legislative Intent* (Oxford University Press 2012) 265. A portion of the arguments herein appear in an earlier form in Donald L. Drakeman, ‘Charting a new Course in Statutory Interpretation: A Commentary on Richard Ekins’ *The Nature of Legislative Intent*’ (2014) 24 *Cornell Journal of Law and Public Policy* 107-143.

<sup>6</sup> Eleanor Mills, ‘Calling this violence mocks true victims’ *The Times* [30 January 2011]. <<http://www.thesundaytimes.co.uk/sto/comment/columns/eleanormills/article526716.ece>> (date accessed 26 August 2015). See, also, Lorne Neudorf, ‘The Supreme Court and Judicial Independence’ (2012) *Cambridge Journal of International and Comparative Law* (1) 2:25-43, pointing to the *Yemshaw* case as an example of ‘judicial lawmaking’.

The statute was originally adopted as the Housing Act of 1977, which specified who would have priority for housing provided by local authorities. It was revised in 1996, when the critical term 'domestic violence' was introduced as follows:

It is not reasonable for a person to continue to occupy accommodation if it is probable that it will lead to domestic violence again him....

The provision then continued with a definition of the term 'domestic violence'. It read:

For this purpose, "domestic violence"...means violence from a person with whom he is associated, or threats of violence from such a person which are likely to be carried out.

This section was amended again in what became the Homelessness Act of 2002. The phrase 'or other violence' was inserted after the words 'domestic violence', and the definitional section was revised as follows:

Violence means – (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is "domestic violence" if it is from a person who is associated with the victim.

### **The Prior Case**

The meaning of the word 'violence' under this statute was considered by the Court of Appeals in the 2006 case *Danesh v Kensington*.<sup>7</sup> In that case, which involved harassment by local youths rather than allegations of domestic violence, the justices unanimously concluded that physical violence 'is the natural meaning of the word "violence"'. Lord Justice Neuberger reasoned that, '[W]hen an ordinary English word is used, one is entitled to assume that, in the absence of good reason to the contrary, it should be given its primary natural meaning'. He

---

<sup>7</sup> *Danesh v Kensington* [2006] EWCA Div 1404.

then concluded, '[T]o my mind, when one is talking of violence to a person, it involves physical contact'.<sup>8</sup>

### **The *Yemshaw* Case**

In another unanimous decision, the Court of Appeals in the *Yemshaw* case extended the *Danesh* approach to a possible case of domestic violence. Lord Justice Etherton's leading judgment emphasized the fact that the statutory language 'indicate[s] that Parliament did not intend "violence" to have a different meaning according to whether it was "domestic" or not, since the only distinction made between domestic and other violence in those provisions is that...violence is "domestic violence" if it is from a person who is associated with the victim'.<sup>9</sup>

From a purely textual point of view, these are powerful arguments. The Oxford English Dictionary tells us that the use of the word 'violence' to describe physical harm is the oldest use of the term.<sup>10</sup> And the point of the statutory language, which defines 'domestic violence' as violence 'from a person who is associated with the victim',<sup>11</sup> could simply mean, as Lord Rodger's judgment later pointed out, that 'the law does not give a discount to the perpetrator because of the domestic setting'.<sup>12</sup>

Lady Hale's judgment countered with the argument that physical violence 'is not *the only* natural meaning of the word'. Instead, she noted, it is 'common place to speak of the violence of a person's language or of a person's feelings'. She cited the version of the OED published in 1973, which also included as one of the definitions: 'vehemence of personal

---

<sup>8</sup> *Royal Borough of Kensington & Chelsea v Danesh* [2006] EWCA Cir 1404 (Neuberger, LJ, joined by Lord Justice Jacob and Lord Justice Mummery).

<sup>9</sup> *Yemshaw v. London Borough of Hounslow* [2009] EWCA Civ 1543 (Etherton LJ joined by Waller LJ and Laws LJ).

<sup>10</sup> See *The Oxford English Dictionary* (2d ed. 1989), where the first definition (i.e., the oldest usage) is: 'The exercise of physical force so as to inflict injury, or cause damage to, persons or property....'

<sup>11</sup> *Yemshaw* UKSC at [44] (Lord Rodger of Earlsferry) (appeal taken from 2009 EWCA (Civ) 1543).

<sup>12</sup> *Ibid.*

feeling or action: great, excessive, or extreme ardour or fervor;...passion, fury'. She then pointed out that, by the time of the 1996 Act, 'both international and national governmental understanding of [domestic violence] had developed beyond physical contact', which she supported with citations to a range of documents, including a Law Commission report and the Family Law Act of 1996.

At this point, it is perhaps most reasonable to say that this issue – What did the statute mean in 1996? – could be argued either way, although Lord Justices Neuberger and Etherton have made very persuasive arguments in favor of a narrow definition. If the statutory term violence means physical contact, and if domestic violence is defined – at least in this statute – as a subset of violence based solely on who is the perpetrator, then it is difficult, from looking at the structure and text of the provision, to conclude that Parliament intended the broader definition for which Lady Hale has argued. In fact, by the end of her discussion, even Lady Hale seems to lose enthusiasm for a broad definition of violence outside of the domestic setting. In her conclusion, she says that the words added in 2002 to include 'other violence' might, in fact, 'relate to a narrower set of behaviors' than her definition of domestic violence.<sup>13</sup>

But all of this discussion is mostly for background. What has put *Yemshaw* on the jurisprudential map is what comes next.

At this point, Lady Hale abandons her search for the 1996 meaning. Instead, she invokes the *Fitzpatrick* principle to ask 'whether an updated meaning is consistent with the

---

<sup>13</sup> *Yemshaw* UKSC at [15]. Post *Yemshaw*, the Court of Appeals has determined that the word 'violence' bears the same meaning under the statute, irrespective of whether it is 'domestic' or 'other'. According to Lord Justice Underhill's leading judgment, the 'way [this statute] was drafted there was a single concept of "violence," of which domestic violence was a sub-category.' *Hussain v Waltham Forest London Borough Council* [2015] EWCA Civ. 14.

statutory purpose'.<sup>14</sup> As Lord Slynn said in the *Fitzpatrick* case, although judges 'must not substitute their own views to fill gaps...[t]hey must consider whether...new facts "fall within the Parliamentary intention...."'<sup>15</sup> In Lady Hale's argument, the new fact is the degree to which society's understanding of 'domestic violence' has expanded over time, and the two purposes of the Act that she identifies are to ensure (1) 'that a person is not obliged to remain living in a home where she...[is] at risk of harm'; and (2) 'that the victim of domestic violence has a real choice between remaining...and leaving to begin a new life elsewhere'.

Lady Hale concludes that the broader definition of domestic violence will best achieve these legislative purposes, which are focused on providing alternate housing options for victims of domestic violence. In her view, 'the general understanding' of the language used in the statute has now 'moved on' to include a broader class of victims of domestic violence than may have been the case in 1996.<sup>16</sup>

### **The Criticism**

Lady Hale does not explain how she determined the legislature's purpose beyond looking at the text of the statute itself. Interestingly, Chris Bevan, in a recent article, has marshalled considerable contextual evidence to reach a very different conclusion about the law's purpose.<sup>17</sup> He points out that this statute was not enacted as part of an effort to expand

---

<sup>14</sup> *Yemshaw* UKSC at [12].

<sup>15</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2011] 1 AC at [33] (F) (Lord Slynn of Hadley).

<sup>16</sup> Lord Hope and Lord Walker agreed with Lady Hale's judgment. Lord Rodger's judgment focused on 'the serious nature of psychological harm.' Lord Brown expressed significant concerns about the use of an updating principal in this case: '[T]he Court has no alternative but to decide whether it is indeed now right, pursuant to the *Fitzpatrick* principle, to give to the terms "domestic violence" and "violence" the wider meaning.... In taking this course we would, of course, be overturning two clear and unanimous decisions of the Court of Appeal.... I have already indicated my very real doubts about doing so. At the end of the day, however, I do not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent.'

<sup>17</sup> Chris Bevan, 'Interpreting Statutory Purpose – Lessons from *Yemshaw v. Hounslow London Borough Council*' (2013) 76(4) *The Modern Law Review* 735-756.

protection for the homeless. Rather, the then-Conservative government's housing policy was part of its overall efforts to reduce public spending. The goal of the 1996 amendments – of which the section on domestic violence was a part -- was 'that the burdens and duties placed on local authorities for the provisions of accommodation to the homeless should be curtailed....'<sup>18</sup>

That is, contrary to Lady Hale's focus on potential victims, he finds that the actual purpose of the act was to lessen the government's responsibilities. He concludes, 'The tempestuous social and political context surrounding the Housing Bill surely feeds Lord Brown's 'profound doubt as to whether at any stage of their legislative history the "domestic violence" provisions...were intended to extend beyond the limits of physical violence'.<sup>19</sup> Quoting Professor Ekins, Mr. Bevan argues that 'the fundamental problem with the [updating] approach is its inattention to what it is that Parliament did – what it decided and intended to convey – in 1996 – in uttering the statutory text'.<sup>20</sup> For similar reasons, Professor Duxbury has called Lady Hale's judgment in the *Yemshaw* case 'perhaps the closest any English judge has ever come to entertaining the possibility of dynamic statutory interpretation without regard for the real or hypothesized intentions of the enacting legislature.'<sup>21</sup>

### **Parliamentary Debates**

To determine the legislature's intention, Professor Ekins has urged us to look at the 'structure and detail of Parliament's choice of language',<sup>22</sup> and Mr. Bevan points to the broader political context. I suggest that we might also consider what Parliament said it was

---

<sup>18</sup> Ibid at 752.

<sup>19</sup> Ibid at 755.

<sup>20</sup> Ibid at 750, quoting Richard Ekins, 'Updating the Meaning of Violence' (2013) 129 *Law Quarterly Review* 19.

<sup>21</sup> Neil Duxbury, *Elements of Legislation* (Cambridge University Press 2013) 230.

<sup>22</sup> Ekins at 20.

doing.

As it turns out, this exact issue was discussed in the House of Lords in 1996 when the domestic violence terminology was added to the housing statute. Lord Monkswell, a peer from the Labour party, asked, ‘What is meant by “domestic violence”?’ In particular:

Do the Government include within that term psychological violence as well as physical violence? I bear in mind the recent successful court case where a stalker was prosecuted for psychological rather than physical damage. Is that now included in government thinking about the term domestic violence? Does it include psychological as well as physical violence?<sup>23</sup>

The statute had been introduced on behalf of Earl Ferrer, a Conservative who was Minister of State for the Department of the Environment, Transport and the Regions. Responding directly to the definitional point, Earl Ferrer stated:

[P]sychological violence.... is not ruled out, but psychological violence covers a very wide spectrum. It would depend on the nature of the violence. We do not rule out the fact that psychological violence could be covered.<sup>24</sup>

The debates in the House of Lords on these statutory provisions were brief, but it is notable that the minister responsible for the bill directly addressed the definitional issue,<sup>25</sup> and he indicated that abuse not involving physical contact could be included.

---

<sup>23</sup> 574 PARL.DEB.H.L. (5<sup>th</sup> ser.) (1996) 72. Lord Monkswell is likely to be referring to *R v Ireland* [1996] EWCA Crime 441, [1997] QB 114, in which the Court of Appeals said that harassment in the form of silent telephone calls could constitute ‘assault occasioning actual bodily harm....’ It was reported in *The Times* on 22 May 1996, about six weeks before the House of Lords debates on the Housing Bill. That case was combined with a similar case, *R v. Burstow*, and appealed to the Law Lords, where, coincidentally, Lord Steyn’s speech discussed the concept of updating statutory meaning, in this case, in the context of the ‘Offences against the Person Act’ of 1861, saying: ‘[W]e frequently refer to the actual intention of the draftsman, [but] the correct approach is simply to consider whether the words of the Act of 1861 considered in the light of contemporary knowledge cover a recognizable psychiatric injury.... Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes.... In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But... statutes will generally be found to be of the ‘always speaking’ variety....’ *Burstow R v Ireland*, *R v* [1997] UKHL 34.

<sup>24</sup> *Ibid* at 72-73.



## Pepper

The question, then, is whether it is appropriate for courts to use this information, which is not discussed in any of the judgments in *Yemshaw*. For a very long time, the exclusionary rule would likely have prohibited references to Hansard. Then, Lord Browne-Wilkinson in *Pepper v Hart* said that such evidence could be considered if it met three criteria: the legislation is 'ambiguous or obscure'; the statements are made by a minister or other promoter of the bill; and the statements are clear.<sup>26</sup> *Pepper* has, of course, been very controversial. The probably predictable spectrum of views ranges from Professor Baker and Lord Phillips who have called it an 'aberration'<sup>27</sup> and 'an apparently wrong turning',<sup>28</sup> respectively, to suggestions by Professor Vogenauer<sup>29</sup> and Lord Justice Sales<sup>30</sup> that *Pepper* appropriately allows for potentially important evidence to be considered.

Shortly after the *Pepper* decision in the early 1990s, Hansard use became increasingly frequent.<sup>31</sup> Then, Lord Steyn's influential Hart lecture sought to narrow it to an estoppel-like claim against the government.<sup>32</sup> More recently, Lord Hope, on behalf of five members of the

---

<sup>25</sup> Lord Brown noted, 'The issue identified by the parties for the Court's determination on this appeal is: "Is the concept of 'domestic violence' in section 177(1) of the Act limited to actual physical violence or is it capable of extending to abusive psychological behaviour which could reasonably be described as 'violence'?"' *Yemshaw* at [47].

<sup>26</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

<sup>27</sup> Sir John Baker, 'Our Unwritten Constitution' (2010) 167 *Proceedings of the British Academy* 91, 99-100.

<sup>28</sup> Lord Phillips, First Lord Alexander of Weedon Lecture, 15.

<sup>29</sup> Stefan Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25 OJLS 629. See, also, Daniel Greenberg, 'All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting,' (2006) *European Journal of Law Reform* VII 31-46, 36, who writes that *Pepper* 'make[s] an important symbolic step in the determination of the courts to throw off self-imposed evidential shackles artificially preventing them from doing their job of construing legislation in its proper context.'

<sup>30</sup> Philip Sales, '*Pepper v Hart*: A Footnote to Professor Vogenauer's Reply to Lord Steyn' (2006) *Oxford Journal of Legal Studies* Vol. 26, No. 3, 585-592.

<sup>31</sup> James J. Brudney, 'Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court,' (2007), 85 *Washington University Law Review* 1, 16-20.

<sup>32</sup> Johan Steyn, '*Pepper v Hart*: A re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59-72. See also Lord Hope's leading judgment in *Star Energy Weald Basin Limited v Bocardo SA* [2010] UKHL 35. '[A] limited exception

Court, has observed that, although references to Hansard have become ‘commonplace’, ‘this approach should be used only where the legislation is ambiguous, and then only with circumspection’.<sup>33</sup> Other recent judgments have employed similarly restrictive language, saying that material from Hansard should be used only where *Pepper’s* conditions are met,<sup>34</sup> and ‘in the plainest of cases’.<sup>35</sup>

There is a strong argument in *Yemshaw* that *Pepper’s* conditions are satisfied. The minister responsible for the domestic violence language clearly stated that its meaning could be broader than just physical violence, which is the precise question addressed by the Court. That addresses two of the three criteria. The other major inquiry under *Pepper’s* strict safeguards is whether the ‘legislation is ambiguous or obscure...’<sup>36</sup> It seems that the various judgments already discussed in the Court of Appeals and the Supreme Court demonstrate that

---

to the general rule that resort to Hansard is inadmissible... was recognized in *Pepper*.... This is available to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting legislation in Parliament; see *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2012] 2 AC 349, 407-408.’

<sup>33</sup> *Gow v. Grant* [2012] UKHL 29, 29 (Leading judgment by Lord Hope with whom Lady Hale, Lord Wilson, Lord Reed and Lord Carnwarth agreed).

<sup>34</sup> See Lord Carnwarth’s statement that ‘The special exception allowed by *Pepper v Hart* is directed at Ministerial statements in support of legislation, and even then the circumstances in which reference is permissible are closely defined.’ *R v London Borough of Newham* [2014] UKHL 62, 86.

<sup>35</sup> *R (Brown) v Secretary of State* [2015] UKSC8, 27. Potentially also relevant here is Lord Toulson’s statement about the interpretation of statutes that consolidate prior legislation, as is the case in *Yemshaw*, where the Homelessness Act of 2002 included (and amended) provisions of the Housing Act of 1996. Lord Toulson said that he would ‘not wish to lay down a firm rule that the Hansard record of a ministerial statement in a debate or predecessor legislation can never be admissible in circumstances where the wording of the later Act is materially identical.’ *Ibid.* See also, Lord Bingham’s leading judgment in *R v Secretary of State, Ex Parte Spath Holme Limited* [2000] UKHL 61: ‘[C]ourts should not routinely investigate the statutory predecessors of provisions in a consolidation statute, particularly where. . . the issue concerns the construction of a single word or expression . . . . But the overriding aim of the court must always be to give effect to the intention of Parliament as expressed in the words used. If, even in the absence of overt ambiguity, the court finds itself unable, in construing the later provision in isolation, to place itself in the draftsman’s chair and interpret the provision in the social and factual context which originally led to its enactment, it seems to me legitimate for the court...to consider the earlier, consolidated, provision in its social and factual context for such help as it may give, the assumption, of course, being (in the absence of amendment) that no change in the law was intended.’

<sup>36</sup> *Pepper v Hart* at [603].

the phrase 'domestic violence' in this statutory context is sufficiently ambiguous that it can reasonably lead to opposite outcomes.

If further evidence of ambiguity is necessary, we can see it in the practices of the housing authorities administering this Act. A survey was completed in 2000 to determine how they were implementing the law discussed in *Yemshaw*.<sup>37</sup> (That is, four years after the term 'domestic violence' was added, and two years before the most recent amendments). One of the survey questions was whether the housing authority usually included 'emotional/psychological abuse' within the definition of domestic violence.<sup>38</sup> It turned out that 75 percent of the authorities included emotional/psychological abuse, and the remaining 25 percent did not.

Accordingly, in the social, political and linguistic context existing around the time of the legislation, the term 'domestic violence' was being used by knowledgeable people in the two different senses at issue in this case. While the term 'ambiguous' is itself vague, there are good reasons to believe that the statute in *Yemshaw* should qualify as exhibiting the necessary ambiguity for *Pepper* purposes. Without looking at Hansard, it would be reasonable to conclude, with the Supreme Court, that Parliament intended a broad definition of domestic violence, much as it is also at least equally possible that it did not, as the Court of Appeals decided. Moreover, since Earl Ferrer's statement contradicts the housing authority's position, this use of Hansard may also fall under Lord Steyn's narrow version of *Pepper* because its use represents an estoppel-like argument against the Government.

---

<sup>37</sup> Rebecca Morley, Susan Parker, & Sarah-Jo Lee, *The Impact of Changing Housing Policy on Women's Vulnerability to Violence* 10 (Economic and Social Research Council, Grant No. L133251047, 2005).

<sup>38</sup> *Ibid* at 10.

There is no time this evening to go through all of the lively and interesting debates surrounding the use of Hansard in general. For a variety of reasons, I am generally persuaded by the expansive arguments advanced by Lord Justice Sales and Professor Vogenauer. But, today, my goal is a brief exercise in comparative constitutionality. The question, in this case, is: Would referring to Hansard under *Pepper* have been a better basis for a broad reading of domestic violence than judicially updating the statute under *Fitzpatrick*? I think the answer is clearly yes.

### **Updating vs. Hansard**

The 'always speaking' approach to statutory interpretation recognizes that the fixed language of statutes needs to be flexible enough to deal with an ever-changing environment.<sup>39</sup> It is certainly hard to argue against the concept that courts may need to apply old laws to new circumstances, including ones that may not have been foreseeable when the law was adopted. A real concern, however, is that, in setting out to update a statute, courts will substitute their own preferences about public policy for the ones chosen by the legislature. As the *Daily Mail* said about *Yemshaw*, this decision came 'at a time of growing concern over the powers of senior judges and their willingness to alter laws made by parliament'.<sup>40</sup>

---

<sup>39</sup> See Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6<sup>th</sup> edn Oxford University Press 2015): '[T]he constitutional orthodoxy which has developed is that statutes should (generally) be presumed to be "always speaking". The position is put in this way in Bennion's influential text, *Statutory Interpretation*: "[T]he interpreter is to presume that Parliament intended the original Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words and other matters."

<sup>40</sup> 'Shout at your spouse and risk losing your home: It's just the same as domestic violence, warns woman judge' *Daily Mail* [30 January 2011]. <<http://www.dailymail.co.uk/news/article-1350761/Women-entitled-council-house-partner-shouts.html#ixzz3kbuU6G00>> (date accessed 26 August 2015).

The first part of Lady Hale’s judgment actually makes the separation of powers issue even more acute. If Lady Hale’s lengthy and detailed argument is correct that in 1996 the term ‘domestic violence’ was often understood to include abusive behavior other than physical violence, then the structure and text of the Housing Act could mean that Parliament chose a narrow definition on purpose. As Lord Roger, the Court of Appeals, Professor Ekins and other commentators have pointed out, the way the text defines ‘domestic violence’ as a subset of violence, and separately mentions threats of violence, makes it appear that violence *per se* is the critical gating issue for a determination of ‘domestic violence’. Moreover, the introductory phrase, which reads ‘*For this purpose, “domestic violence” ...means*’ could be intended to distinguish this statute’s approach to defining domestic violence from how the term is used elsewhere in the law or in society generally.

In short, the more convincing Lady Hale is that a broad definition of domestic violence was well enough known to have been considered by Parliament in 1996, the more it looks as if the legislature opted for a narrow version instead. The ‘always speaking’ approach is based on the notion that circumstances will have changed since the law was enacted: key words have new meanings, societal conditions have shifted, and so on. In Lord Wilberforce words, ‘a new state of affairs, or a fresh set of facts bearing on policy [has] come... into existence’.<sup>41</sup> In the updating cases typically cited by the courts and leading commentators,<sup>42</sup> the judges have shown that they are avoiding Lord Slynn’s concern about replacing Parliament’s views with

---

<sup>41</sup> He continues, ‘They may be held to do so, if they fall within the same genus of facts ... [or] if there can be detected a clear purpose ... which can only be fulfilled if the extension is made.’ Ibid. *Royal College of Nursing v Department of Health and Social Security* [1980] UKHL 10.

<sup>42</sup> See, e.g., above n 38, Loveland; F.A.R. Bennion, *Understanding Common Law Legislation: Drafting and interpretation* (Oxford University Press 2001) 52-55.

their own views<sup>43</sup> by pointing to the scientific, legal and societal changes since the statute's enactment. Most of the cases involve technological advances or newly created classifications, such as applying the 1861 Offences Against the Person Act to harassing telephone calls,<sup>44</sup> extending the 1734 Engraving Copyright Act to photographs,<sup>45</sup> and taking into account the emergence of dukes and viscounts subsequent to Magna Charta.<sup>46</sup> More relevant here are the smaller number of cases involving changes in societal practices and understandings. These updating cases are typically based on multi-generational shifts, such as how usual it is now to leave your house locked today compared with common practices in the middle of the nineteenth century.<sup>47</sup> The *Fitzpatrick* case tracked how the meaning of the word 'family' had changed over the course of nearly a century,<sup>48</sup> and, even then, two justices dissented because '[i]t is not for the judiciary to extend the meaning of "family" simply to reflect contemporary social attitudes, particularly if those attitudes may be controversial within society'.<sup>49</sup>

In *Yemshaw*, there were no technological advances, and not even one generation had passed. The statutory language was adopted less than 15 years before, and Lady Hale has made a convincing case that the broad definition of domestic violence was well known, widely used, and clearly available to Parliament at that time. Since the meaning of the words and the societal circumstances appear not to have materially changed between the statute's enactment and the *Yemshaw* case, it is hard to see why updating would be either required or

---

<sup>43</sup> See above n 15, *Fitzpatrick v Sterling Housing Association Ltd*.

<sup>44</sup> *R v Burstow, R v Ireland* [1997] 3 WLR 534.

<sup>45</sup> *Gambart v Ball* [1863] 32 LJCP 166.

<sup>46</sup> Bennion, *Understanding Common Law Legislation*, 53, citing Lord Coke's Institutes.

<sup>47</sup> *Khazanchi v Faircharm Investments Ltd* [1998] WLR 1603.

<sup>48</sup> See above n 15, *Fitzpatrick v Sterling Housing Association*.

<sup>49</sup> Alec Samuels, 'How to Construe Statutory Language Which has Changed its Meaning in Ordinary Usage: *Fitzpatrick v Sterling Housing Association*,' (2001) *Statute Law Review* Volume 22, Number 2, 154–156.

appropriate.<sup>50</sup> As Lord Wilberforce argued in the 1980 *Royal College of Nursing* case, where updating was controversial even in light of technological innovation, '[C]ourts should be less willing to extend expressed meanings if it is clear that the Act...was designed to be restrictive or circumspect ..rather than liberal or permissive'.<sup>51</sup> Therefore, since the text of the 1996 Housing Act seems to point toward a narrow definition, the result of judicial updating could be seen – as, in fact, as it has been seen – to reverse the policy choice that Parliament had recently made.

## Conclusion

In *Yemshaw*, the statutory term 'domestic violence' was ambiguous. One path toward resolving that ambiguity was an updating analysis that could – and did – expose the court to criticism for thwarting the legislature's intent. That separation of powers issue, I would

---

<sup>50</sup> Lord Steyn's judgment in an employment law case, with which Lords Nichols, Hoffman, Rodger, and Brown agreed, noted the importance of change for the application of the 'always speaking' approach to statutory interpretation: 'The question before the House is the meaning of the word "loss" in section 116(1) of the 1971 statute. If properly construed it was restricted to economic loss, the re-enactment of the statutory formula in 1996 must bear the same meaning. It is not a case in which the ambulatory consequences of the always speaking canon of construction has any role to play. Nothing that happened since 1971 could justify giving to the statutory formula a meaning it did not originally bear.' *Dunnachie v Kingston-Upon-Hull City Council* [2004] UKHL 36.

<sup>51</sup> *Royal College of Nursing v DHSS* [1981] 2 WLR 279. Lord Wilberforce's description of the updating concept, including this language, was described as 'authoritative' in Lord Bingham's leading judgment in *R v Secretary of State for Health ex parte Quintavalle* [2002] UKHL 13 at [10]. The full quotation is: 'In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot be asking the question 'What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself.'

submit, is of greater constitutional concern than using a clear ministerial statement that confirms that interpretive conclusion that the Court had unanimously reached in any event.

This is not to say that ministerial remarks should necessarily be dispositive in this case or any other, but that they can offer potentially relevant evidence alongside other contextual information. Lady Hale cited ten different sources to support her argument for a broad meaning of domestic violence at the time the statute was originally adopted. These include the dictionary, U.N. and Home Affairs committee reports, and the Department of the Environment's Relationship Breakdown Working Party.<sup>52</sup> An eleventh source – a statement by the minister responsible for the bill – could have blunted the subsequent criticism of the Court for reversing Parliament's policy choice.

If the separation of powers issue raised by the appearance of accelerated updating had thus disappeared, another would potentially have taken its place – that is, letting the Government or an individual member of Parliament define the meaning of the statute, thus usurping the Court's interpretive role (and perhaps Parliament's law-making role, as well).

The exclusionary rule has had a long and much honored history, and there are important issues inherent in attributing statutory meaning to ministers' remarks.<sup>53</sup> As Professor Kavanagh has written, referring to Hansard can allow statements by individual

---

<sup>52</sup> One commentator expressed concern that these materials 'represent . . . either the opinion of the government of the administration of the legislation, or on policy, or, in some cases, the opinion of non-governmental agencies,' resulting in 'a somewhat open-ended extrusion of using post-enactment material for interpretation purposes.' 'Editorial, Serendipity' (2011) *Statute Law Review* 32(3), iii-vi, v.

<sup>53</sup> See above n 31, Steyn, *passim*.



members of Parliament 'to trump the enacted intentions contained in the authoritative text',<sup>54</sup> and the use of ministerial comments would 'give...the executive the power to make law'.<sup>55</sup>

Although an automatic judicial default to statements in Hansard certainly raises these concerns, even Professor Kavanagh admits that 'there may be no constitutional impropriety in relying on Parliamentary material as background or contextual information'.<sup>56</sup> There is, therefore, a significant difference between using Parliamentary statements as interpretative trump cards, and weighing them – along with other things – as evidence. In weighing them here, the Court could have cited a ministerial statement about the term domestic violence that would clearly have confirmed the definition that the justices of the Supreme Court had selected anyway.

In *Yemshaw*, the Court was prepared to choose a broad definition even if the result would have been to reverse Parliament's choice. In that judicial environment, it seems unlikely that the Court will be unduly deferential to what it finds in Hansard. It is 'not for government and official bodies to interpret the meaning of the words Parliament has used', wrote Lady Hale. 'That role lies with the courts.'

The arguments against *Pepper's* relaxation of the exclusionary rule are most powerful when they point out that loose comments in Hansard will tightly bind the Courts, thus impeding or impairing the normal process by which judges interpret and apply the law. Those are serious concerns. But, as Lord Justice Sales has said, when aids to construction are needed, 'there is no good reason in principle why...a clear statement by a Ministerial or other

---

<sup>54</sup> Aileen Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) *Law Quarterly Review* 98-122, 101.

<sup>55</sup> *Ibid* at 102.

<sup>56</sup> *Ibid* at 104.

promoter of a Bill to Parliament itself should not be taken into account to establish Parliament's own intended meaning....'<sup>57</sup>

By citing Hansard as merely confirmatory evidence, the Court could have reached its chosen result in *Yemshaw* without appearing to thwart the will of Parliament and without delegating or abdicating its interpretive responsibilities. As Lord Cooke said in the *Spath Holme* housing case, '[T]here are cases in which the court can in the end derive real help from Hansard, even if it is not necessarily decisive help...[as in cases where] Hansard shows that the courts will not be thwarting a clear intention of the legislators....'<sup>58</sup> The separation of powers issues in such a case would be far less significant than the appearance of, as Professor Ekins has put it, amending a statute 'by judicial fiat'.<sup>59</sup>

The rule of law is about more than just rules and laws. It encompasses as well the public's confidence that even those who make and interpret the law are following the rules. Here the Supreme Court subjected itself to considerable public and academic criticism for departing from the will of Parliament. Since that is not, in light of Hansard, what actually happened, the Court would have done well to say so. Statutes may be always speaking, but so are the members of Parliament. In figuring out what the laws are saying, it can sometimes be fruitful to listen to what the lawmakers had to say.

---

<sup>57</sup> Philip Sales, 'A Footnote to Professor Vogenauer's Reply to Lord Steyn,' (2006) *Oxford Journal of Legal Studies* 26, 585-592, 87-88.

<sup>58</sup> *R v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2000] UKHL 7.

<sup>59</sup> See above n 5, Ekins, at 265.