Jaguars and Donkeys: Distinguishing Judgment and Discretion III

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Differential readings

As indicated in the discussion on the "area of judgment" in the second article of this set of three, a court or other adjudicating authority needs in arriving at a judgment on the legal meaning of an enactment to have regard to the phenomenon of differential readings. This is the name given to the situation where different minds arrive at different assessments. Often this involves what can only be called impression. Lord Nolan said of one enactment that the matter "is one of impression which may present and has presented itself differently to different minds".[1]

The problem is not confined to language; differential readings may apply to the legal policy governing the enactment, or to any other intangible factor. Thus in relation to the conviction under the War Crimes Act 1991 of the war criminal Anthony Sawoniuk, who was then in his eighties, Lord Bingham of Cornhill C.J. differed sharply with the trial judge Potts J. on what advice should be given to the Home Secretary regarding the prisoner's release date. Lord Bingham felt the policy of the Act required mercy, so that Sawoniuk should be able to look forward to release in his lifetime. Potts J. thought he should die in prison.[2]

There may be more than one relevant concept, and the various concepts may conflict. Here weighing and balancing of the concepts becomes necessary. There is a point beyond which analysis cannot get: ". . . even when judicial reasoning is based on the cumulative effect of several independent premisses, a time inevitably comes when all that the judge can say is 'I have weighed the pros and cons which I have stated and I now give judgment for so and so in accordance with the principle I have formulated after weighing the stated pros and cons'. The important thing is that it is of the essence of the judicial process that the pros and cons should first be weighed."[3]

It is notorious that different judicial minds may, and frequently do, conscientiously arrive at differential readings. Nothing can be done about this; it is part of the human condition. One cause lies in a difference of values, or what Neil MacCormick called the bedrock-

> "Judges evaluating consequences of rival possible rulings may give different weight to different criteria of evaluation, differ as to the degree of perceived injustice, or of predicted inconvenience which will arise from adoption or rejection of a given ruling. Not surprisingly, they differ, sometimes sharply and even passionately, in relation to their final judgement of the acceptability or unacceptability all things considered of a ruling under scrutiny. At this point we reach the bedrock of the value preferences which inform our

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[1] *R v Secretary of State for the Environment. ex p Camden London Borough Council* [1998] 1 All ER 937 at 944.
[2] *The Times*, 25 June 1999; BBC Radio Four Today programme, 24 June 1999.
[3] Cross, *Precedent in English Law* (3rd edn, 1977), pp 196-197.

> reasoning but are not demonstrable by it. At this level there can simply be irresoluble differences of opinion between people of goodwill and reason."[4]

In the end judges can find no better words to use for this phenomenon than "instinct" or "feel". There is "an instinctive feeling that the event or act being weighed in the balance is too remote".[5] "As Lord Pearce once said: 'I do not know, I only feel'".[6] However there is evidence that some judges are predisposed to reach certain conclusions on some matters. In a recent study of House of Lords decisions arrived at in 1993[7] David Robertson showed statistically that Lord Templeman "was so strongly opposed to tax evasion that his presence on a panel [of the Appellate Committee] must have pleased the Revenue Authorities. Equally strong . . . was the tendency for criminal appeals to go to the defendant when Lord Bridge was on the bench".[8] In recent times, with the increasing appointment of judges from among persons of the female sex or with non-indigenous ethnic backgrounds, the likelihood of differential readings has increased. We now have a multicultural society, so it is no longer appropriate for our law to be applied as if we were still monocultural. The (English) man on the Clapham omnibus, that old touchstone of what is "reasonable", must now it seems be joined by a host of other passengers. However it would not be right for a judge's reading of an enactment to differ according to personal predilection, or sex or ethnic origin; and it is always necessary for the judiciary to strive for uniformity of approach.

The idea of judicial subjectivism, and its separation from objectivity, can be taken too far. It is true that the weight to be attached to a particular factor is not a precise resultant of the combination of the general criterion and the facts of the instant case: our law is not so mechanistic and predetermined as that. Yet it is not accurate to say that the weight to be attached to a factor is a purely subjective matter, entirely dependent on the idiosyncrasies of particular judges. In balancing rival considerations in notional scales it is expected that any judge in the system would arrive at much the same (even though not identical) weighting. One judge who consistently arrived at weightings markedly different from those of the rest would be regarded as a maverick. The reason for that is that such weights are never assessed in a vacuum. Each judge comes to the task equipped with both experience and ability. The experience (compounded of learning and practice) shows him or her in a particular case how other judges have weighed similar factors. The ability equips the judge for the difficult intellectual task of assembling and then assessing the factors bearing on the decision.

The nature of discretion

After that lengthy disquisition on the nature of judgment I turn to examine the nature of discretion. Discretion, as opposed to judgment, is usually to be applied where it is expressly left to the functionary to make a determination at any point within a given range, for example in fixing the sentence, following conviction of an offence, at a point within the range of punishments laid down. However it is also possible for a discretion to relate only to two possible alternatives. For example if asked to give leave to appeal a judge may either grant leave or refuse it. This is discretion not judgment because the decision is left to the judge, and there is no "right" answer.

In the work cited above, David Robertson goes so far as to define discretion as arising whenever a judicial decision "could have been different".[9] This is the language of a political scientist rather than a lawyer. It confuses true discretion with true judgment. As Lord Justice

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[4] *Legal Reasoning and Legal Theory* (1978), pp. 105–106.
[5] *Lamb v London Borough of Camden* [1981] QB 625, *per* Watkins LJ at 647.
[6] *Rost v Edwards* [1990] 2 QB 460, *per* Popplewell J at 478.
[7] *Judicial Discretion in the House of Lords* (Oxford, 1998).
[8] P. 36.
[9] *Judicial Discretion in the House of Lords* (Oxford, 1998) p. 6.

Sedley said when reviewing the book, "[b]y discretion he does not mean what a lawyer means . . . He means the entire process of choosing between or among available outcomes. Since his target audience must in large part be lawyers, this might seem an unfortunate failure of communication . . ."[10]

For an enactment to bestow a discretion on a person (D) involves a built-in looseness of outcome. In reaching a decision, D is not required to assume there is only one right answer. On the contrary D is given a choice dependent to a greater or lesser extent on personal inclination and preference. The discretion may be open, when it is completely at large. Alternatively it may be confined, to be exercised within limits laid down expressly or by implication.

The gift of open discretion bestows total freedom of choice on the recipient. The dictionary definition says it accords liberty or power of deciding, or of acting according as one thinks fit, amounting to an uncontrolled power of disposal.[11] In 1399 the rolls of Parliament[12] recorded the puissance of royal will as the "Mercy and grace of the Kyng as it longes to hym in his owene discretion". In law discretion has been defined as the power of a court of justice, or person acting in a judicial capacity, to decide, within the limits allowed by positive rules of law, as to the punishment to be awarded or remedy to be applied, or in civil causes how the costs shall be borne, and generally to regulate matters of procedure and administration.[13] Balcombe L.J. said of the question whether a judge should permit a litigant's McKenzie friend to be present in chambers proceedings "this must be a matter for the discretion of the judge". He added that he could see no ground upon which the Court of Appeal could possibly interfere with a judge's exercise of this discretion.[14] That would indicate a fully open discretion, but in fact there are of course some limits, as where the judge is proved venal. "It is well known that [the Court of Appeal] will not intervene in an exercise of discretion by a trial judge unless he has erred on a matter of principle".[15]

The most obvious way for an enactment to confer a discretion is by the use of the term "may". This confers on a person power or authority to take a certain decision. Unless more is to be gathered, the decision is at large, and may be whatever that person wishes. In other words the discretion bestowed is open.[16] In former times it was the practice for statutes instead to employ the phrase "it shall be lawful" to bestow this type of authority. Case law has grown up around phrases of this kind to indicate implied restrictions on the apparently unlimited power conferred. In some instances the courts have laid down that "may" is to be interpreted as "shall", when the apparent power becomes a duty. The effect is to convert a discretion into a duty to exercise judgment, the judgment in question being one of determining whether the conditions required for the exercise of the duty have arisen.

The laying down of guidelines is often, though not always, the sign of a discretion. The Parliamentary Constituencies Act 1986 Sch. 2 contains rules for the guidance of members of Boundary Commissions. Rule 7 provides that the Commissions need not aim to give effect to the earlier rules in all circumstances "which emphasises that they are discretionary".[17] Hence

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[10] Stephen Sedley, *Cambridge Law Journal* November 1999, p. 627.
[11] *Oxford English Dictionary* (2nd edn 1992).
[12] III 451/2.
[13] *Oxford English Dictionary* (2nd edn 1992).
[14] *Re G (a minor) (chambers hearing: assistance) (Note)* (1991) [1999] 1 WLR 1828 at 1829; cited by Lord Woolf MR in *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, at 755.
[15] *Copeland v Smith* [2000] 1 All ER 457, *per* Buxton LJ at 461.
[16] See *R. v. Governor of Brixton Prison, ex p Enaharo* [1963] 2 Q.B. 455 at 465; Maxwell, *The Interpretation of Statutes* (12th edn., 1969), pp. 234-235; Craies, *A Treatise on Statute Law* (7th edn., 1971) p. 229; Bennion, *Statute Law* (2nd edn, 1983) p. 199; Bennion, *Statutory Interpretation* (3rd edn., 1997) p. 34.
[17] Colin R. Munro, *Studies in Constitutional Law* (2nd edn, 1999), p. 100.

"the practical effect is that a strict application of the rules ceases to be mandatory, so that the rules, while remaining very important indeed, are reduced to the status of guidelines".[18]

The practice is growing of including in an Act which uses a broad term requiring the exercise of discretion some indication of how Parliament intends the discretion to be exercised. This is an important category of cases where rules of construction are laid down by statute. Apart from itself containing guidelines, an Act may authorise or require them to be laid down by a Minister or other authority.[19] Where, under powers conferred by an enactment, a Minister or other authority issues guidelines as to the construction of that or any other enactment, and the court on judicial review finds that the guidelines are incorrect in law, it may make a declaration to that effect.[20] The mere fact that a statutory power to exercise discretion is in terms unfettered does not prevent the court from laying down guidelines as to its exercise.[21] A court should not however lay down guidelines where the need for them has not been made "entirely apparent", since the risk is then that cases will be treated as matters of law on the interpretation not of the parliamentary enactment but the judicial guidelines.[22] Judge-made guidelines should not fetter a statutory discretion by confining its exercise to rare or exceptional cases if no such restriction is indicated in the enactment conferring the discretion.[23]

Confusing judgment with discretion

The Chronically Sick and Disabled Persons Act 1970 s. 2(1) requires an authority to ascertain the "needs" of certain persons as a preliminary to deciding what benefits they should receive. Swinton Thomas L.J. said of the argument that an assessment of need involved a discretion that it was fundamentally flawed, adding: "A need is a question of assessment and judgment, not discretion".[24] He neatly showed the distinction between judgment and discretion by holding that while a local authority could not take its own financial means into account when deciding, as a matter of judgment, whether a person had "needs" it could do so when deciding, as a matter of discretion, how it was to meet those "needs".

What is judicially described as discretion often turns out to be judgment. In one case Lord Bingham of Cornhill CJ said that under the Police and Criminal Evidence Act 1984 s. 78 the court had a "discretion" to refuse to allow evidence to be given if its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. But, as Lord Bingham acknowledged later in the report, that is truly a matter of judgment not discretion.[25] Unfortunately judges not infrequently blur the distinction between judgment and discretion. Thus Lord Keith of Kinkel said of a local authority's duty under the Education Act 1944 s 55(1) to determine whether free school transport was "necessary": "The authority's function in this respect is capable of being described as a 'discretion', though it is not, of course, an unfettered discretion but rather in the nature of an exercise of judgment".[26] It is in fact nothing else but an exercise of judgment.

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[18] *R. v. Boundary Commission for England, ex p Foot* [1983] QB 600, *per* Donaldson M.R. at 624.
[19] See eg Housing Act 1985 s. 71 and comment thereon by Lord Griffiths in *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509 at 516.
[20] *R v Secretary of State for the Environment, ex p Tower Hamlets London Borough Council* [1993]QB 632 (provision of the Code of Guidance to Local Authorities on Homelessness, issued under the Housing Act 1985 s 71, held to be wrong in law).
[21] *Ramsden v Lee* [1992] 2 All ER 204 at 211 (concerning the discretion conferred by the Limitation Act 1980 s 33).
[22] *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 1 WLR 744 at 752.
[23] *R v Lee* [1993] 1 WLR 103 (discretion conferred by Children and Young Persons Act 1933 s 39(1) to prohibit publication of identity of juvenile defendants).
[24] *R v Gloucestershire County Council, ex p Barry* [1996] 4 All ER 421 at 438.
[25] *Nottingham City Council v Amin* (1999) *Times* 2 December.
[26] *Devon County Council v George* [1989] AC 573 at 604.

Even though the existence of such conceptual questions prevents the effect of an enactment requiring judgment or discretion from being known with certainty until they are answered by a decision of the relevant authority (an official or the court), this does not in itself mean that the enactment's drafting is unsatisfactory, or that it is ambiguous or obscure. On the contrary, the posing of such questions is an essential part of legislative functioning. The Broadcasting Act 1990 s. 92(2)(a) restricts radio advertising which is of a nature which is judged by the Radio Authority to be "political". It was held that the term "political" is not here ambiguous merely because it is a broad term of indeterminate meaning. In view of the wide variety of possible advertisements, it was not possible for Parliament to provide a clear definition of the term "political". So it left the decision to the judgment of the regulatory authority, which had expertise in the field and was able to respond to changing circumstances.[27]

In a recent case Lord Hope of Craighead said in relation to the European Convention on Human Rights-

> "In some circumstances [that is where the margin of appreciation applies] it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made in ***Human Rights Law and Practice*** (1999) p.4, para. 3.21, of which Lord Lester of Herne Hill QC and Mr David Pannick QC are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment'."[28]

This is indeed to muddle judgment and discretion. As I hope to have shown, there can no such thing as a discretionary area of judgment. Properly understood the two concepts are as different as chalk and cheese, or a jaguar and a donkey. The correct analysis in the case mentioned by Lord Hope is that, within the area where the margin of appreciation applies, the court does not interpose its own judgment to displace the judgment exercised by the local body in question. The position is similar where what is in question is the exercise of a discretion.

Judicial law making: judgment or discretion?

I deal finally with the case where the decision-taker changes the law by his or her decision. A judgment which states and applies what the law is would not be expected itself to change the law. Most decision-takers have no power to do this anyway, so for them the question does not arise. However some senior judges do claim to be possessed of a power to change rules of common law. Other senior judges disagree, and would disclaim this alleged power. In the famous 1952 case of ***Magor and St Mellons R.D.C. v Newport Corpn***[29] Viscount Simonds savagely criticised Denning L.J. for his wish to engage in judicial legislation, which in a famous phrase Simonds described as "a naked usurpation of the legislative function".

This disagreement at the highest levels of the judiciary presents problems for the analyst. A recent instance is the decision of the House of Lords in ***Kleinwort Benson Ltd v Lincoln City Council***.[30] It arose out of the wish of some local authorities to evade the full rigour of the Government's capping system by entering into contracts for interest rate swaps. Under these the parties gambled on interest rates by reference to a notional capital sum. One party agreed

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[27] ***R v Radio Authority, ex p Bull*** [1995] 4 All ER 481, following ***R v Broadcasting Complaints Commission, ex p Granada Television Ltd*** [1995] EMLR 163 at 167 (meaning of "privacy").
[28] ***R v Director of Public Prosecutions, ex p Kebilene and others*** [1999] 4 All ER 801 at 844.
[29] [1952] AC 189 at 190.
[30] [1998] 4 All ER 513.

to pay to the other interest over a specified period at a fixed rate. The other agreed to pay, in relation to the same period and capital sum, interest at a floating rate geared to the money market's fluctuating rate. In essence this was a gamble on how the money market would perform over the given period. At the time they were entered into, the general view of the legal profession was that such contracts by local authorities were valid. However in a 1991 decision[31] the House of Lords held them to be ultra vires and void. The bankers Kleinwort Benson then sought to recover payments they had made to some local authorities in the mistaken belief that swaps contracts were valid.

At first instance Langley J, following well-established law, held that their statement of claim disclosed no cause of action. The Appellate Committee of the House of Lords, by a majority of three to two, reversed Langley J. They purported to overturn, as if by parliamentary legislation, the long-standing rule of the common law that payments made under a mistake of law are irrecoverable (the mistake of law rule). One of the majority, Lord Goff, described what they were doing as the "abrogation" of this rule.[32] He described his thought processes quite openly. He was considering whether the mistake of law rule "should remain part of English law".[33] What was in issue at the heart of the case was, he said, "the continued existence of a long-standing rule of law, which has been maintained in existence for nearly two centuries in what has been seen to be the public interest". It was, he went on, for the House to consider whether this rule should be maintained, "or alternatively should be abrogated altogether or reformulated".[34] The boldness of this move is accentuated by the fact that a past Lord Chancellor had asked the Law Commission to examine the mistake of law rule with a view to its reform by legislation. In response the Law Commission produced a report and draft bill, which still awaits consideration by Parliament.[35] What Lord Goff had to say about this was-

> "I am very conscious that the Law Commission has recommended legislation. But the principal reasons given for this were that it might be some time before the matter came before the House, and that one of the dissentients in [***Woolwich Building Society v IRC (No 2)*** [1993] AC 70] (Lord Keith of Kinkel) had expressed the opinion [at 154] that the mistake of law rule was too deeply embedded to be uprooted judicially. Of these two reasons, the former has not proved to be justified, and the latter does not trouble your Lordships ***because a more robust view of judicial development of the law is, I understand, taken by all members of the Appellate Committee hearing the present appeals***.[36]

Another recent example of judicial legislation by the House of Lords is ***Director of Public Prosecutions v Jones and Another***.[37] This concerned a demonstration consisting of around 21 persons congregating on the highway near Stonehenge. The House of Lords, again by a majority of three to two, here purported to revolutionise the common law of highways. It was clearly established, by long authority, that the right of the public is limited to passing and repassing along the highway, together with uses incidental to that. In ***Jones*** Lord Irvine of Lairg L.C. decided this was too constricted for modern conditions: "to limit lawful use of the highway to that which is literally 'incidental or ancillary' to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities".[38] The

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[31] ***Hazell v Hammersmith and Fulham London Borough Council*** [1991] 2 AC 1.
[32] At p 525.
[33] P 525.
[34] P 526.
[35] See ***Restitution: mistakes of law and ultra vires public authority receipts and payments*** (Law Com No 227) (1994).
[36] P. 532 (emphasis added). The decision was followed in ***Nurdin & Peacock plc v D B Ramsden & Co Ltd (No 2)*** [1999] 1 All ER 941.
[37] [1999] 2 All ER 257.
[38] Pp. 263-264.

Oxford English Dictionary[39] defines "warranted" as "allowed by law or authority; approved, justified, sanctioned". That is an apt description of the rule overturned by this decision, so the Lord Chancellor was saying what was the exact opposite of the true position.

Under the rules of equity as laid down by the courts, manifest disadvantage is a necessary ingredient in a case of presumed undue influence. In ***CIBC Mortgages plc v Pitt*** [1994] 1 AC 200 the House of Lords "signalled that it might not continue to be a necessary ingredient indefinitely".[40] This is judicial legislation (or the threat of it) of the most inconvenient kind. How is the legal adviser able to advise a client when it has been announced that the law is liable to be changed by the judiciary at an unspecified and unknowable time?

In so far as a court purports to ascertain and declare an uncertain or disputed legal rule and apply it in the instant case, the decision by which it does this is properly called an exercise of judgment in the sense we are discussing. That is the usual case. If however the court purports to go beyond this and ***alter*** the relevant law, it is exercising a discretion. Whether in juridical truth such a discretion to alter the law truly exists continues to be a matter of debate and controversy; but while some senior judges act on the basis that it does analysts must find a slot for it.

Conclusion

It is important that legislators who bestow a power to exercise judgment or discretion, and judges or officials upon whom they bestow it, should know and observe the clear difference between the two. Judgment leads to but one result; discretion has a range. In the United States Douglas J. said that absolute discretion, like corruption, marks the beginning of the end of liberty.[41] We need to be able to recognise it when we see it.

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[39] Second edition, 1992.
[40] ***Per*** Nourse LJ in ***Barclays Bank plc v Coleman and Another*** [2000] ***The Times*** 5 January.
[41] ***New York v. United States*** (1951) 342 U.S. 882 at 884.