Jaguars and donkeys: distinguishing judgment and discretion

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Introductory

The courts are often concerned with cases where finding the legal meaning of an enactment is made difficult by a drafting defect or other avoidable cause of obscurity. In this article I consider a type of enactment which, though often dismissed as ambiguous, in fact is not. Here the reason why the enactment's legal meaning is uncertain does not lie in anything defective in the drafting, but because its perfectly normal wording calls for the exercise of judgment or discretion by a state functionary. The outcome is uncertain only because different functionaries may legitimately arrive at different results, since human minds are not all alike. The functionary may be an administrative official of central or local government or a judicial officer such as a judge, magistrate, or tribunal member.

With the growing political importance in western society of judicial or quasi-judicial functions (whether exercised by the executive or the judiciary), we need to sharpen our analysis of their elements. This most obviously presents itself as a matter of terminology, by the accurate use of which we helpfully allot to specific terms a clear working significance. Assuming the allocation to be correctly conceived we do well to respect it and apply it consistently, for that helps argument and analysis and furthers the deployment of law as a useful social tool. One aspect of this scrutiny concerns the insufficiently perceived distinction between discretion and judgment. Broadly, the first is subjective, the second objective. This article examines in some detail the difference between judgment and discretion as exercisable by public authorities. Although its conclusions have wider import, in terms the discussion is mainly limited to the field of legislation in jurisdictions where the Common Law or Global method of statutory interpretation prevails.[1] We are concerned with cases where an enactment confers on a state functionary the duty or power to reach a judgment or exercise a discretion. Like a jaguar and a donkey, these are very different animals. Unlike a jaguar and a donkey, they are frequently confused.

Whether the task, in relation to a particular enactment, is to arrive at a judgment or exercise a discretion the operation can be accomplished only by taking a decision, so what we are talking about here is an aspect of the rules of decision-taking.[2] Nowadays these rules are often worked out and applied in judicial review proceedings, but that must not confuse us. They do not essentially belong to judicial review. To think so is to muddle procedure and substance: the legal rules of decision-taking are mostly substantial not procedural.

[1] I suggest that the Common Law method of interpretation may alternatively be called the Global method because the common law is worldwide, and also because the method requires the interpreter to take every relevant consideration into account, including (under the doctrine of precedent) previous court decisions.

[2] In relation to public law, these rules are set out in detail in Bennion, *Statutory Interpretation* (3rd edn 1997, Supplement 1999), section 329.

If a decision which requires judgment or discretion is not taken correctly, it can be challenged and perhaps quashed. This can happen if the decision-taker has mistaken a jaguar for a donkey, or vice versa. It can also happen if, because the relevant enactment is not clearly evaluated or the difference is not fully understood, the decision-taker confuses the characteristics of the two beasts. Such confusion may earlier have been experienced by the drafter of the enactment in question.

Broadly, discretion is subjective while judgment is objective. At one extreme, where the decision is to be taken in exercise of a fully open discretion, that is one which is completely unfettered, we have a situation akin to that of the Cadi sitting beneath a palm tree and pronouncing his own individual notions of justice.[3] At the other extreme, where the decision is to be taken in exercise of a duty to arrive at a judgment, there is no room for individual choice, even though different decision-takers may legitimately arrive at different outcomes.

Discretion is free, except for limitations placed upon it (expressly or impliedly) by the defining formula under which it is conferred. Judgment is necessarily restricted, because its sole purpose is to arrive at a conclusion of fact or law which accurately reflects reality. Discretion necessarily (by its nature) offers choice; judgment registers the functionary's assessment of a situation offering no choice. Discretion analytically offers a variety of outcomes; judgment but one.

The context may be more complex than this. For example the decision-taker may first need to exercise judgment in determining whether required conditions are satisfied; and then, if they are, may be called on to judge whether or not to exercise a discretion, and then to decide in what way. This may arise unprompted, or on the application of a person interested. The time for it may be at large, or tied to a specific event or period. Let us look first at the nature of judgment, which involves a lengthy examination.

The nature of judgment

An example of judgment arises when the judge assesses rival testimonies to arrive at a finding of fact: 'confronted with two conflicting stories and little else, he has to base his decision, mainly if not entirely, on his impression of the witnesses'.[4] A more complex example of judgment is the process of arriving at the legal meaning of a doubtful enactment in its application to given facts. To this conundrum there is, in the Dworkinian sense, only one right answer. However arriving at that answer may involve several decisions. One or more acts of judgment may be required in deciding what the relevant facts are. Other acts of judgment may be needed when it comes to examining and assessing the wording of the enactment in question. Both aspects are present when we seek to identify the factual outline and the legal thrust. However the point to grasp is that none of the judgments that are required to be made offer any looseness of outcome or scope for variation. True, different persons may reach different views on what the outcome is - but that is a distraction. It helps to avoid that distraction if for the purpose of analysis we assume that only one decision taker is involved.

The function of judgment is to assess a situation which requires a definitive answer. Here certain criteria are stated or implied to determine the choice of result. These are inflexible, notionally demanding one answer, and one only. For example in a given situation the criterion of 'justice' calls for a single verdict. Justice is an absolute, and when you apply an absolute to

[3] Goddard L.J. said of the Courts (Emergency Powers) Act 1939 that the court 'is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him': ***Metropolitan Properties Co. Ltd. v. Purdy*** [1940] 1 All E.R. 188 at 191.
[4] Lord Devlin, ***The Judge*** (Oxford, 1979) p. 3.

a conundrum there can in theory be only one result. If people arrive at different results it must be due to human fallibility or variability. That echoes Dworkin's view (unpopular in many academic quarters) that even on a difficult question of law there is but one correct answer. 'No aspect of law as integrity has been so misunderstood', Dworkin says, 'as its refusal to accept the popular view that there are no uniquely right answers in hard cases at law.'[5]

An example of what this means, and of how difficult it can be to get it right, is furnished by the famous House of Lords decision in ***Pepper (Inspector of Taxes) v. Hart***.[6] In that case the question was what was a 'proper proportion' of certain expenses. The relevant decision was to be taken initially by a tax inspector, but the taxpayer had rights of appeal. This was essentially a simple question of judgment on the facts of the individual case, but the Appellate Committee decided, mistakenly in my view, that the phrase 'a proper proportion' was ambiguous and that the ambiguity should be settled by referring to Hansard to find out how Ministers had said the phrase was intended to be construed (that is how the judgment was to be exercised). The matter is dealt with at length in my article 'How they all got it wrong in *Pepper v Hart*'.[7] In the article I got it wrong myself by saying that deciding on 'a proper proportion' was a matter of judgment or discretion. I now realise it is emphatically a question of judgment, and that discretion does not come into it.

Broad terms

The effecting of judgment, or judgment-forming, means one must relate the particular facts to the abstract concept in question, often expressed as a broad term (such as 'proper proportion'). In this sense, concerned with formal logic, the OED defines judgment as the action of mentally apprehending the relation between two objects of thought.[8] Whately said '[j]udgement is the comparing together in the mind two of the notions or ideas which are the objects of apprehension'.[9] For various reasons, legislative drafters are forced to strive for brevity. Broad terms assist in this. By use of a word or phrase of wide meaning, legislative power is delegated to the interpreters whose function is to work out the detailed effect. Doubt is thereby necessarily created. Until the details lurking within the broad term are authoritatively worked out, it must be doubtful what they are. The statute user has to use his own judgment, though it will be a judgment of what considerations a court would deploy if the point were litigated.

A broad term may consist either of a single word or a phrase. In its judgment the court may decide not to apply it to its full extent, so Scott J said of the phrase 'pending land action' in the Land Charges Act 1972 s. 17(1) 'those words are very broad and cannot be given their full literal meaning'.[10] A broad term may perform the function of a verb, adverb, adjective or substantive. If a substantive, it is what was described in an early case as a ***nomen generale***.[11] Other descriptions include 'open-ended expression'[12], 'word of the most loose and flexible description'[13], and 'somewhat comprehensive and somewhat indeterminate term'.[14] The drafter selects a broad term which is either a processed term or an unprocessed term. Either way it is likely to have a core of certain meaning and a penumbra of uncertainty. It may be mobile or static. Its meaning will be coloured by the context, and the legislative purpose. An implied intention that an unqualified broad term shall be construed as if a narrowing provision

[5] *Law's Empire* (1986), p. 266.
[6] [1993] AC 593.
[7] (1995) *British Tax Review* 325.
[8] *Oxford English Dictionary* (2nd edn), meaning 9.
[9] *Logic* (1827), p 59.
[10] *Regan & Blackburn Ltd v Rogers* [1985] 1 WLR 870 at 873.
[11] *Hunter v Bowyer* (1850)15 LTOS 281.
[12] *Express Newspapers Ltd. v McShane* [1980] 2 WLR 89 at 94.
[13] *Green v Marsden* (1853) 1 Drew 646.
[14] *Campbell v Adair* [1945] JC 29.

had accompanied it will not found where the absence of such a provision is explicable only the ground that it was not intended. Thus the House of Lords declined to treat the term 'accommodation' in the Housing (Homeless Persons) Act 1977 ss. 1 and 4 as qualified by an implied epithet such as 'appropriate' or 'reasonable'. If Parliament had intended such a narrowing of its meaning it would surely have said so.[15] In fact however, Parliament often does not 'say so', but leaves it to implication.

When drafters decide to attain brevity by using a broad term, they look for one which has been processed. If the courts have already worked out the meaning of a term, and that meaning corresponds with the drafter's intention, the term is suitable for adoption. Then, instead of there being uncertainty about whether subsequent interpreters will adopt the legal meaning desired, the drafter may feel reasonably sure that the established meaning will be followed in the case of his or her own draft. Usually, the processed term will be one used in previous legislation. Only rarely will a term whose meaning has been worked out solely at common law present itself as suitable for adoption by the legislature. The drafter of A. P. Herbert's Divorce Act, the Matrimonial Causes Act 1937, used a processed verb when he expressed as a ground of divorce that the respondent 'has deserted the petitioner without cause' for three years. The verb 'deserted', used by itself, is a typical broad term. There are many different acts which might be held to fall within it. One is a simple refusal of sexual intercourse. But it had been held that such refusal did not constitute 'desertion' within the meaning of an earlier Act.[16] When the point was raised under the 1937 Act Tucker L.J took the same line: 'I think the Legislature in. . . refraining from defining desertion must be taken as accepting the tests which had hitherto been applied in the courts . . .'[17]

Where they differ, doubt may arise whether use of a processed term in a new Act brings in the processed meaning or the ordinary (dictionary) meaning. Often there is no significant difference. Where there is a difference, the point may turn on whether the new Act is in pari materia with the earlier Acts in which the term appeared. The rule was thus laid down by Lord Buckmaster: 'It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase *in a similar context* must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it'.[18] Here two points should be noted. First, it is not the practice of drafters (who tend to be over-cautious) to attract processing expressly by saying in the new Act that the term has the same (undefined but processed) meaning as in the previous Act. This renders unrealistic the remark by Lord Simon of Glaisdale that '[i]f Parliament wishes to endorse the previous interpretation it can do so in terms'.[19] Second, the courts will be reluctant to attach previous processing to the term in its new use if they think that processing was defective.[20] While the borrowing by the drafter of a term already processed may be convenient, it can give rise to a conceptual difficulty. A word or phrase used in an Act is to be construed in accordance with the purpose of that Act. Decisions on its meaning may be misleading if it is borrowed for another Act with a different purpose.[21]

Doubt arises from the drafter's use of a broad term only where its meaning is to some extent uncertain. There are terms which are broad in the sense that they cover many different cases, but whose meaning is certain in virtually every case: for example 'mammal' or 'moving'. It is

[15] *Puhlhofer v Hillingdon LBC* [1986] AC 484.
[16] *Jackson v Jackson* [1924] P.19.
[17] *Weatherley v Weatherley* [l946] 2 All ER 1 at 8.
[18] *Barras v Aberdeen Steam Trawling and Fishing Co* [1933] AC 402 at 411 (emphasis added).
[19] *Farrell v Alexander* [1977] AC 59 at 90.
[20] See e.g. *Royal Crown Derby Porcelain Co v Russell* [1949] 2 KB 417 at 429.
[21] See e.g. *Hanlon v The Law Society* [1981] AC 124.

anyway unlikely that the application of a statutory broad term will be doubtful in *every* case. Selection by the drafter of such a term would almost certainly be an error, since it would mean that the entirety of the legal rule in question was founded upon uncertainty; which does not accord with the nature of law. A modern Act whose application was uncertain in every case would certainly be considered ill-drawn. It follows that what we are in practice concerned with is the broad term whose application to some cases is clear and to others doubtful. A penumbra is defined as a partial shade bordering upon a fuller or darker one; in other words a twilight. This is a good description here because we are all familiar with the difficulty caused by a phrase such as 'during the hours of darkness'. Midnight (except in the Arctic Circle) is clearly within this broad term, and noon equally clearly outside it. But there are periods around dawn and sunset during which it must be debatable whether darkness has ceased or fallen.

The drafter tries to choose phrases whose penumbra of doubt is as small as possible. At common law, burglary was committed when a dwelling-house was broken and entered by night with intent to commit a felony. Night was understood as the period between sunset and sunrise. A later common law refinement held it not to be 'night' if there was sufficient light from the sun by which to tell a person's face. Finally, when statute intervened, night was precisely if arbitrarily defined as the period between 9 p.m. and 6 a.m. So although the penumbra remained in nature, it vanished from the law of burglary.

An unnecessarily wide penumbra betokens bad drafting. A standard example used in juristic discussions of what Hart calls the 'open texture' of language is the notice reading 'No vehicles allowed in the park'. We can depict the uncertainty this causes by a diagram in which the inner circle depicts the core of certain meaning while the space between the circles marks the penumbra of doubt about what is allowed in the park. Outside this penumbra the meaning is once again certain - in the opposite sense. Not everyone would agree with the exact placing of these objects, but assuming it to be roughly correct we may have three doubtful cases. There could be genuine argument with the park-keeper over whether it is allowed to take into the park a ridden bicycle, a motorised bath chair, or a sit-on motor mower. Other doubtful objects can readily be imagined, and we can vary the condition of the ones mentioned. Does it make a difference if the bicycle is pushed instead of ridden, or the motor mower belongs to the council managing the park? Is an ambulance allowed in to take away the victim of an accident on the slide? Suppose a car chassis, minus wheels and engine, is carried in by mischievous youths? The possibilities of doubt are endless. Greater precision can be achieved by detailed wording, but then we end up with the closely-printed park notice that nobody reads. Even the park-keeper may not read it, and so lack conviction in trying to repel the practical villains: motorists and motor cyclists. Modern legislative drafters go into as much detail as they consider practicable. For the rest, they rely on ellipsis - or select broad terms with the smallest penumbra of doubt.

Sometimes, by usage or judicial decision (or a combination of both) the width of a broad term is drastically cut down. The term 'immoral purposes' is very wide. Yet as used in the Vagrancy Act 1898 s. 51(1) (reproduced in the Sexual Offences Act 1956 s. 32) it has been held by judicial processing to be doubly limited. First, it excludes all forms of immorality except sexual immorality. Second, even within that narrowed sphere, it excludes all but homosexual acts.[22]

Static and mobile broad terms

[22] *Crook v Edmondson* [1966] 2 QB 81. Winn LJ said (at 90) that 'immoral purposes' meant purposes considered immoral by 'the majority of contemporary fellow citizens'. This is extraordinary in seeming to suggest that the only thing people then considered immoral was a sexual act by a homosexual.

Broad terms can be divided into two types. First there is the case where the content of the term is static or constant, in both place and time. The circumstances that fall within it are basically the same wherever they happen, and at whatever historic moment. An example is the term 'accident' (see below). Secondly there is the mobile term. What falls within it may differ according to time or place (or both). For instance one person may or may not be regarded as belonging to another person's 'family' according to the place, or the period, in which they live. We now consider the two categories in turn, examining examples from decided cases. We shall see later that failure by the drafter to understand the distinction between the categories can have important consequences.

The static term 'accident' has been frequently employed in legislation. One famous example was in the Workmen's Compensation Acts, which gave a workman a right to compensation for 'an accident arising out of and in the course of his employment'. This is a multiple broad term of epic proportions. Many thousands of judicial decisions proved necessary to process it. This operation began with the very first case to reach the House of Lords under the Workmen's Compensation Act 1909. It concerned a workman suffering from a form of heart disease induced by natural causes, an aneurism. The aneurism might have burst and killed the workman at any time - even while he was asleep in bed. In fact it did so while he was at work, engaged in manual labour of a by no means strenuous kind. Was this an 'accident'? Yes, said the House of Lords in a judgment we are not surprised to find lacked unanimity. The fact was that the purpose of the Act plainly required the term 'accident' to be given a wide meaning. As Kennedy LJ said in another case, when holding that it even covered the murder of a cashier by a thief-

> 'An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact . . But whilst the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable . . .'[23]

This neatly illustrates the difference between the case where the drafter has selected a term which is etymologically capable of the wide meaning it should bear and the case where he has erred by making his wording narrower than the object. Other examples of static broad terms are the following, dealing first with the term 'repairing' and then with the term 'supply'.

Rules made under the Railway Employment Prevention of Accidents Act 1900 protected workers engaged in 'relaying or repairing' the permanent way. Did this include the routine oiling and maintenance of apparatus working the points? The House of Lords, by a majority of three to two, held that it did not.[24] The wording was narrower than the object, a frequent drafting defect. The literal meaning, applied here, defeated the claim of one who on policy grounds clearly should have been covered.

Section 1(1) of the Finance Act 1972 introduced a brand new tax in these words: 'A tax, to be known as value added tax, shall be charged . . . on the ***supply*** of goods and services in the United Kingdom. . .'. Griffiths J said: 'There is no definition of "supply" in the Act itself, but it is quite clear from the language of the Act that "supply" is a word of the widest import'.[25] Many more instances could be given of static broad terms, but this is not necessary. The terms are 'static' in the sense that, by processing, detailed rules can be worked out which will be of universal application despite differences of time or place. I turn now to the ***mobile*** broad term.

[23] *Nisbet v Rayne and Burn* [1910] 2 KB 689.
[24] *London and North Eastern Railway v Berriman* [1946] AC 278.
[25] *Customs and Excise Commissioners v Oliver* [1980] 1 All ER 353 at 354.

Section 4(1) of the Obscene Publications Act 1959 provides a defence against a charge of publishing an obscene article 'if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'. Lord Wilberforce said that the phrase *other objects of general concern* 'is no doubt a mobile phrase; it may, and should, change in content as society changes'.[26]

Changes of this kind may occur in time or in place. Often they occur in both. Since an ongoing Act is always speaking it must be worded so as to accommodate them. The drafter of the Obscene Publications Act 1959 assumed that, throughout the life of the Act, science, literature, art and learning would be of general concern. It was safe therefore to specify them (and helpful to do so, since they gave shape and colour to his proposition). But other topics were to be judged not on what was of general concern in 1959 but on what was of general concern at the time of an alleged offence. If the Act lasted 50 years, and a prosecution was brought at the time of its golden jubilee, the drafter intended the case to be judged by what was of general concern in 2009 not 1959. Let us take some other examples, first of changes in time and then in place.

Suppose it is desired to impose control over firearms, but exempt any antique weapon. The term 'antique' is vague. The drafter might seek precision by referring instead to a weapon 'manufactured more than 100 years before the passing of this Act'. But that would be illogical. If the Act were passed in 1968 a gun made 105 years earlier would be exempt. By 1978 however, a gun made 105 years earlier would not be exempt, because it would have been made only 95 years before the passing of the Act. What is wanted is a rolling period, so that at any moment the Act will exempt guns which at that moment are 100 years old. The drafter of the Firearms Act 1968 s. 58(2) did not adopt this course. Instead, he provided a flurry of broad terms: 'Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament'. No definitions were provided for 'antique', 'curiosity' or 'ornament'. The question of the legal meaning of 'antique' in s. 58(2) came before the Divisional Court.[27] The prosecutor appealed from magistrates' acquittal of a defendant in relation to three guns 'dating from possibly 1886, and after 1905 and 1910'. He told the court that prosecuting authorities needed guidance on what was 'antique' for this purpose. Eveleigh LJ said it was a question of fact, but guns manufactured in the twentieth century 'could not be antique' in 1980. The court directed the magistrates to convict in relation to the guns made after 1905 and 1910. Regarding the gun possibly made in 1886, Eveleigh LJ said that the magistrates were entitled to come to their conclusion, though he would not have done so himself. This judgment seems to put excessive weight on the arbitrary division of time into centuries.

Is 'book' a mobile term? It might not seem so. Everyone knows what a book is. Or do they? Section 9 of the Bankers' Books Evidence Act 1879 defines 'banker's book' as including ledgers, day books, account books, 'and all other books used in the ordinary business of the bank'. In 1879 it was no doubt unthinkable that banks would keep their records in anything but bound books. One cannot blame the drafter for failing to envisage the invention of microfilm. Yet in seeking to make copies of all bank records admissible in evidence he might have managed to find a phrase of more general meaning. The Divisional Court had no hesitation in coming to the drafter's rescue.[28] They treated 'book' as a mobile term wide enough to embrace microfilm - and indeed 'any form of permanent record kept by the bank by means made available by modern technology'. It did not worry Caulfield J that a

[26] *R v Jordan* [1976] 2 WLR 887, 893.
[27] *Bennett v Brown* (1980) *Times*, 12 April.
[28] *Barker v Wilson* [1980] 1 WLR 884.

microfilm 'is not normally called a book'. Had he foreseen the development of computer use by banks he might have hesitated over using the word 'permanent'.

Social change has frequently to be accommodated by the mobile term. When 'single woman' was first used in Affiliation Acts it referred solely to an unmarried woman. The growing frequency with which marriages broke up led to its ultimate extension to a married woman living apart from her husband - even where they shared the same roof.[29] It follows that a judicial decision on the meaning of a term may be disregarded if the popular meaning changes. The Rent Acts gave protection, where the tenant died, to a member of the tenant's 'family'. In 1950 it was held by the Court of Appeal that this did not include the tenant's common law husband.[30] In another case 25 years later the same court reversed its ruling.[31] Bridge LJ said-

> 'If the language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have constantly affirmed that the word is to be understood in its ordinary meaning.'[32]

By this Bridge LJ clearly referred to the fact that a mobile term is to be applied to facts arising at a particular time in accordance with its meaning at that time.

Another legal matrimonial term of long standing is 'cruelty' as a ground of divorce. Here we see the effect of a social change attributable to advancing civilisation. As the times become less rough and barbarous, and the standard of comfort advances, people will put up with less hardship. What was once part of the give-and-take of marriage becomes 'cruelty'. Mental torture enters the scene, alongside physical ill-treatment. There is a similar progression with broad terms like 'riotous', 'disorderly', 'indecent' and 'insulting' as descriptions of public behaviour. A dog may now be held 'dangerous' within the meaning of the Dogs Act 1871 even though its behaviour is something less than savage or ferocious.[33]

Here are two examples of broad terms which are geographically mobile, that is whose content varies from place to place:

Section 59 of the Highways Act 1980 gives a highway authority power to recover compensation from an operator responsible for damage caused by 'excessive' weight passing along the highway, or other 'extraordinary' traffic thereon. Both these broad terms are modified by reference to the average maintenance expenses of highways in the neighbourhood of the one in question. Here the geographical variability of the term is expressed in the statute.

In the other example the variability is not expressed, but has been held by the courts to be implied. Section 74(4) of the Licensing Act 1964 (reproducing earlier legislation) empowers justices to extend permitted licensing hours for the sale and consumption of alcoholic liquor on a 'special occasion'. No definition of this term is provided. In a case decided under earlier legislation, Lord Coleridge CJ said 'the question what is a special occasion must necessarily be a question of fact in each locality'. He added: '[e]ach locality may very well have its own meaning to those words, and it is for the justices in each district to say whether a certain time

[29] *Watson v Tuckwell* (1947) 63 TLR 634.
[30] *Gammans v Elkins* [1950] 2 KB 328.
[31] *Dyson Holdings Ltd v Fox* [1976] QB 503.
[32] P. 513.
[33] *Keddle v Payn* [1964] 1 WLR 262).

and place come within the description'.[34] Thus the Saturday before a bank holiday may be a 'special occasion' in a seaside holiday resort but not in an industrial town.[35]

Not only should the interpreter be alert to the distinction between the static and mobile broad term, but the drafter needs to be aware of it too. It is really a distinction between static and mobile concepts. If the concept for which the drafter needs a term is static, then he should select a static term, and vice versa. If he fails in this he may create unnecessary difficulties of interpretation. The commonest error, and the most troublesome, is where the drafter with insufficient imagination thinks his concept is fixed when it is in fact mobile. The Canadian Criminal Code made it an offence to trade or traffic in 'any bottle or syphon' which had upon it the trade mark of another person, or fill it with any beverage for sale, without his consent.[36] It is obviously possible for beverages to be sold in other forms of container, such as cartons. By looking only at the conditions prevailing at the time he was writing, and failing to exercise his imagination, the drafter made his text unnecessarily and unjustifiably narrow. He could easily have written 'container' instead of 'bottle or syphon'. We saw earlier how a similar difficulty arose in connection with bankers' books. The reverse error, of using a mobile term for a static concept, creates unnecessary vagueness. It would not have been sensible to say 'container' instead of 'bottle' in a provision intended to guard against danger from broken glass.

As we have seen, the wider the penumbra of doubt attached to a broad term the greater the range of judgment effectively delegated to the interpreter. There is an important class of cases where, because the limiting framework is virtually non-existent, this form of delegation occurs practically across the whole field. In effect the legislator abdicates completely. For his judgment is substituted that of the interpreter, guided only by vague concepts such as what is 'reasonable' or 'just' or 'fit and proper'. There are many examples of this form of delegation. Here is one, drawn from the Consumer Credit Act 1974. In this instance the interpreter is an official, the Director General of Fair Trading. Section 25(1) states that a licence to carry on a credit or hire business shall be granted on the application of any person if he satisfies the Director General that he is 'a fit person to engage in activities covered by the licence'. If this stood alone, as it well might have done, it would empower the Director General to set his own standards of fitness. Parliament thought it right to lay down guidelines however, and the section goes on to instruct the Director General to have regard to specified factors - such as whether the applicant has a record of dishonesty or violence.

For obvious reasons, Parliament has been more ready to entrust unfettered discretion to judges than officials. In the early days of divorce law for example, the court was empowered in relation to the children of dissolved marriages to 'make such provision as it may deem just and proper' with respect to their custody, maintenance and education.[37] The modern tendency is for judges to receive (and indeed expect) more detailed guidance from the legislator. When the grounds for divorce were recast in 1969-70 elaborate criteria were laid down for maintenance, including the absurd requirement to put the parties as nearly as possible in the position they would have been in if the marriage had not broken down.[38] This could not last, and was speedily abandoned - but not before it had inflicted great harm on divorcing husbands.

Sometimes, as we have seen, guides to the interpretation of the broad term are stated expressly in the legislative text. Even where this is not done, the meaning is not left

[34] *Devine v Keeling* (1886) 50 JP 551, 552.
[35] *R v Corwen Justices* [1980] 1 WLR 1045.
[36] Cited Driedger, *The Construction of Statutes* (Butterworths, Toronto 1974), p. 86).
[37] Matrimonial Causes Act 1859, s 35.
[38] Matrimonial Proceedings and Property Act 1970, s 5(1) and (2)), succeeded by the Matrimonial Causes Act 1973, s 25(1).

completely at large. Under the noscitur a sociis principle, terms are recognised to gain colour from their context. The context may not furnish much assistance however. The Housing Act 1980 laid down the repairing covenants that are to apply where the secure tenant of a flat exercises his statutory right to acquire a long lease.[39] It enabled the landlord to charge the tenant a 'reasonable' proportion of the cost of non-structural repairs. Often when the broad term 'reasonable' is used, as with the concept of a 'reasonable' rent, the factors by reference to which it is to be applied are obvious. Here they are not. The Act imposed on the landlord the duty to repair whether or not it was 'reasonable' that he should be saddled with this. It then enabled him to transfer to the tenant such part of the duty as might be 'reasonable'. If, from an objective viewpoint it was wholly unreasonable in a particular case to saddle the landlord with the cost of any repairs, how could it be 'reasonable' to transfer only a part of the cost to the tenant - and how could one judge which part? The courts are forced to grope for a meaning in such cases.

The area of judgment

Although where judgment is required there is notionally one right answer, in practice there is what in ***R v Criminal Cases Review Commission, ex p Pearson***[40] Lord Bingham of Cornhill CJ called 'the area of judgment'. In that case the Criminal Cases Review Commission might properly have found either that there was or that there was not a 'real possibility' within the meaning of the Criminal Appeal Act 1995 s. 13(1)(a) that the conviction would not be upheld. This 'area of judgment' may overlap two alternative categories, e.g. two broad terms. In another case the Court of Appeal held that there was such an overlap between the broad terms 'special educational provision' and 'non-educational provision' in the Education Act 1996 s. 319.[41] Sedley LJ referred[42] to 'the limits of possible meaning' of the term 'special educational provision. These led, he said,[43] to a 'potentially large area of judgment' resulting in the fact that it would be acceptable to reach a judgment that given treatment fell within the range of special educational provision or fell within the range of non-educational provision.

The width of this 'area of judgment' depends on the degree of precision with which the standard to be used for forming the judgment is defined. '. . . the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court [of review] is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14'.[44]

As I have said, notionally there is only one correct answer arising from judgment-forming, as opposed to the exercise of discretion, where there may be several. When the question arose whether a certain act was an abuse of process Lord Diplock, stressing that the question was one of judgment, said 'I disavow the word discretion'.[45] In pronouncing on the meaning of 'substantial' in the Fair Trading Act 1973 s. 64(3) (which allows a merger reference to be made where services are supplied 'in a substantial part of the United Kingdom'), Lord Mustill said: 'Even after eliminating inappropriate senses of "substantial" one is still left with a

[39] See Sch 2, paras 13 to 17.
[40] [1999] 3 All ER 498 at 523.
[41] ***Bromley London Borough Council v Special Educational Needs Tribunal*** [1999] 3 All ER 587.
[42] At 591.
[43] At 596.
[44] ***South Yorkshire Transport Ltd v Monopolies and Mergers Commission*** [1993] 1 WLR 23, ***per*** Lord Mustill at 32; cited by Auld LJ in ***R v Ministry of Defence, ex p Walker*** [1999] 3 All ER 935 at 942.
[45] ***Hunter v Chief Constable of West Midlands*** [1982] AC 529 at 536.

meaning broad enough to call for the exercise of judgment . . .'[46] Where the exercise of judgment is required, the term 'evaluate' may be used. In the case of a statutory application to an authority, e.g. under the Housing Act 1985 s. 62(1), it may be necessary for the authority to judge whether the applicant has the necessary mental capacity to be a householder. Lord Griffiths said that Parliament 'must have intended the local housing authority to evaluate the capacity of the applicant'.[47]

Differential readings

As indicated in the above discussion on the 'area of judgment', 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'.[48] The problem is not confined to language; differential readings may apply to the legal policy governing the enactment, or 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.[49]

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.'[50]

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 reasoning but are not demonstrable by it. At this level there can simply be irresoluble differences of opinion between people of goodwill and reason.'[51]

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[46] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32.
[47] *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509 at 520.
[48] *R v Secretary of State for the Environment. ex p Camden London Borough Council* [1998] 1 All ER 937 at 944.
[49] *The Times*, 25 June 1999; BBC Radio Four Today programme, 24 June 1999.
[50] Cross, *Precedent in English Law* (3rd edn, 1977), pp 196-197.
[51] *Legal Reasoning and Legal Theory* (1978), pp. 105–106.

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'.[52] 'As Lord Pearce once said: "I do not know, I only feel"'.[53] 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[54] 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'.[55] 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.

David Robertson goes so far as to define discretion as arising whenever a judicial decision 'could have been different'.[56] However this is the language of a political scientist. It confuses true discretion with true judgment. As Lord Justice Sedley said when reviewing the book, 'By 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 . . .'[57]

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[52] *Lamb v London Borough of Camden* [1981] QB 625, *per* Watkins LJ at 647.
[53] *Rost v Edwards* [1990] 2 QB 460, *per* Popplewell J at 478.
[54] *Judicial Discretion in the House of Lords* (Oxford, 1998).
[55] P. 36.
[56] *Judicial Discretion in the House of Lords* (Oxford, 1998) p. 6.
[57] Stephen Sedley, *Cambridge Law Journal* November 1999, p. 627.

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 (as with the Cadi mentioned above). 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.[58] In 1399 the rolls of Parliament[59] 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.[60] 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.[61] That would indicate a fully open discretion, but in fact there are always of course some limits. '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'.[62]

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.[63] 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 is converted to 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 the sign of a discretion; judgment-forming should not need guidelines. 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'.[64] Hence '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'.[65] 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

[58] *Oxford English Dictionary* (2nd edn 1992).
[59] III 451/2.
[60] *Oxford English Dictionary* (2nd edn 1992).
[61] *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.
[62] *Copeland v Smith* [2000] 1 All ER 457, *per* Buxton LJ at 461.
[63] 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.
[64] Colin R. Munro, *Studies in Constitutional Law* (2nd edn, 1999), p. 100.
[65] *R. v. Boundary Commission for England, ex p Foot* [1983] QB 600, *per* Donaldson M.R. at 624.

to be exercised. This is an important category of cases where rules of construction are laid down by statute.

Rather than itself containing guidelines, an Act may authorise or require them to be laid down by a Minister or other authority.[66] 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.[67] 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.[68] 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 enactment but the guidelines.[69] Judicial 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.[70]

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'.[71] 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.[72] 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'.[73] It is in fact nothing but an exercise of judgment.

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,

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[66] 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.
[67] ***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).
[68] ***Ramsden v Lee*** [1992] 2 All ER 204 at 211 (concerning the discretion conferred by the Limitation Act 1980 s 33).
[69] ***Thompson v Brown Construction (Ebbw Vale) Ltd*** [1981] 1 WLR 744 at 752.
[70] ***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).
[71] ***R v Gloucestershire County Council, ex p Barry*** [1996] 4 All ER 421 at 438.
[72] ***Nottingham City Council v Amin*** (1999) ***Times*** 2 December.
[73] ***Devon County Council v George*** [1989] AC 573 at 604.

the posing of such questions is an essential part of legislative functioning in cases where the legislature cannot as a practical matter carry its will beyond a certain point. 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.[74]

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'.'[75]

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*[76] 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*.[77] 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 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

[74] *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').
[75] *R v Director of Public Prosecutions, ex p Kebilene and others* [1999] 4 All ER 801 at 844.
[76] [1952] AC 189 at 190.
[77] [1998] 4 All ER 513.

legal profession was that such contracts by local authorities were valid. However in a 1991 decision[78] 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.[79] He described his thought processes quite openly. He was considering whether the mistake of law rule 'should remain part of English law'.[80] 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'.[81] 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.[82] 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*.[83]

Another recent example of judicial legislation by the House of Lords is *Director of Public Prosecutions v Jones and Another*.[84] 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'.[85] The Oxford English Dictionary[86] 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.[87]

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[78] *Hazell v Hammersmith and Fulham London Borough Council* [1991] 2 AC 1.
[79] At p 525.
[80] P 525.
[81] P 526.
[82] See *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com No 227) (1994).
[83] 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.
[84] [1999] 2 All ER 257.
[85] Pp. 263-264.
[86] Second edition, 1992.
[87] The foregoing account is taken from an article by the present author in 149 *New Law Journal* (19

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'.[88] 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: is the distinction important?

I suggest that for a number of reasons it is indeed important that legislators who bestow a power to exercise judgment or discretion, and judges or officials upon whom they bestow it, should grasp and respect the difference between the two.

What then is the difference, in summary? With judgment the requirement is to assess and pronounce upon a factual or legal question; with discretion it is to determine how to exercise a power of choice. Broadly, discretion is subjective while judgment is objective. Discretion is free, except for limitations placed upon it by the defining formula. Judgment is necessarily restricted, because its purpose is to arrive at a conclusion which registers reality. Discretion necessarily offers choice; judgment registers the functionary's assessment of a situation offering no choice. Discretion analytically presents a variety of possibilities; judgment but one. Discretion offers looseness of outcome and scope for variation; judgment does not.

At the beginning of the process, the drafter of the provision in question needs to decide whether he or she intends to bestow a power of judgment or a power of discretion, and word the provision accordingly in clear terms. The recipient of the power, whether judge or official, needs to construe the provision in conformity with this intention. If say the legislative intention is that a person's need should be judged objectively, it is not carried out where the functionary behaves as if entrusted with a discretion to decide according to that person's perceived deserts.

In the United States Douglas J. said that discretion, like corruption, marks the beginning of the end of liberty.[89] We need to be able to recognise it when we see it.

[2000.041 'Jaguars and Donkeys: Distinguishing Judgment and Discretion' 31 Univ of West Los Angeles Law Rev (Summer 2000) 1]

March 1999) p. 421. Supporting its argument in a later issue (2 April 1999), Professor Charles Arnold Baker said 'when Lord Gardiner occupied the Woolsack, the Lords and the Judicial Committee of the Privy Council decided, I suppose on the false analogy of the U.S. Supreme Court., no longer necessarily to be bound by their own decisions [see [1966] 1 WLR 1234]. This scarcely noticed constitutional revolution represented, probably, the psychological basis of the two recent cases'.

[88] *Per* Nourse LJ in *Barclays Bank plc v Coleman and Another* [2000] *The Times* 5 January.

[89] *New York v. United States* (1951) 342 U.S. 882 at 884.