

Distinguishing judgment and discretion

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Lord Justice Henry said in a recent Court of Appeal case¹ that the question whether or not a court is sitting in public is one of fact and degree. One must respectfully agree. However he added that when a judge has to decide this question it is a matter for his or her *discretion*. There one must respectfully disagree. It is rather a matter for his or her *judgment*, since the requirement is to assess a factual situation not exercise a power of choice. Is there really an important distinction between judgment and discretion, or is this a quibble? Well, there is clearly a distinction. The question of its importance I will leave till later.

Whether the task 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 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.

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, we have a situation akin to that of the Cadi seated 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.⁴

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 nature of judgment

An example of judgment arises when the court assesses rival testimonies to arrive at a finding of fact.⁵ More complex is the process of arriving at the legal meaning of a doubtful enactment

¹ *Storer v. British Gas p.l.c.* [2000] 2 All E.R. 440 at 445.

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

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 On this problem of differential readings see the work cited in footnote 2 above, pp. 85-86.

⁵ See Lord Devlin, *The Judge* (Oxford, 1979) p. 3.

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. Others 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 here offer any looseness of outcome or scope for variation.

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 only. That echoes Dworkin's view 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 notionally right answers in hard cases at law.'⁶

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*.⁷ 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. So this was essentially a 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).⁸

The area of judgment

Although where judgment is required there is notionally one right answer, in practice there may be what in *R. v. Criminal Cases Review Commission, ex p. Pearson*⁹ Lord Bingham of Cornhill C.J. 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. 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. 319.¹⁰ Sedley L.J. referred¹¹ to 'the limits of possible meaning' of the term 'special educational provision. These led, he said,¹² to a 'potentially large area of judgment' resulting in the fact that it would be acceptable to reach a judgment that given treatment either fell within the range of special educational provision or 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'.¹³

⁶ *Law's Empire* (1986), p. 266.

⁷ [1993] A.C. 593.

⁸ The point is explained at length in Bennion, 'How they all got it wrong in *Pepper v. Hart*' (1995) *British Tax Review* 325.

⁹ [1999] 3 All E.R. 498 at 523.

¹⁰ *Bromley London Borough Council v. Special Educational Needs Tribunal* [1999] 3 All E.R. 587.

¹¹ At 591.

¹² At 596.

¹³ *South Yorkshire Transport Ltd v. Monopolies and Mergers Commission* [1993] 1 W.L.R. 23, per Lord Mustill at 32; cited by Auld L.J. in *R v. Ministry of Defence, ex p. Walker* [1999] 3 All E.R. 935 at 942.

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.

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'.¹⁴ 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 meaning broad enough to call for the exercise of judgment . . .'.¹⁵

The nature of discretion

Discretion, as opposed to judgment, is usually to be applied where it is expressly left to the judge or other 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 by law. However it is also possible for a discretion to relate only to two possible alternatives. 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 defines discretion as arising whenever a judicial decision 'could have been different'.¹⁶ 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 . . .'.¹⁷

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.¹⁸ 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.¹⁹ That would indicate a fully open discretion, but in fact there are always of course

¹⁴ *Hunter v. Chief Constable of West Midlands* [1982] A.C. 529 at 536.

¹⁵ *R. v Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd.* [1993] 1 W.L.R. 23 at 32.

¹⁶ *Judicial Discretion in the House of Lords* (Oxford, 1998) p. 6.

¹⁷ Stephen Sedley, *Cambridge Law Journal* November 1999, p. 627.

¹⁸ *Oxford English Dictionary* (2nd. edn. 1992).

¹⁹ *Re G (a minor) (chambers hearing: assistance) (Note)* (1991) [1999] 1 W.L.R. 1828 at 1829; cited by Lord Woolf M.R. in *R. v. Bow County Court, ex p. Pelling* [1999] 4 All E.R. 751, at 755.

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'.²⁰

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'.²¹ 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'.²²

Rather than itself containing guidelines, an Act may authorise or require them to be laid down by a Minister or other authority.²³ 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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷

²⁰ *Copeland v. Smith* [2000] 1 All E.R. 457, per Buxton L.J. at 461.

²¹ Colin R. Munro, *Studies in Constitutional Law* (2nd. edn., 1999), p. 100.

²² *R. v. Boundary Commission for England, ex p. Foot* [1983] QB 600, per Donaldson M.R. at 624.

²³ See e.g. Housing Act 1985 s. 71 and comment thereon by Lord Griffiths in *R. v Oldham Metropolitan Borough Council, ex p. Garlick* [1993] A.C. 509 at 516.

²⁴ *R. v. Secretary of State for the Environment, ex p. Tower Hamlets London Borough Council* [1993] Q.B. 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).

²⁵ *Ramsden v. Lee* [1992] 2 All E.R. 204 at 211 (concerning the discretion conferred by the Limitation Act 1980 s. 33).

²⁶ *Thompson v. Brown Construction (Ebbw Vale) Ltd* [1981] 1 WLR 744 at 752.

²⁷ *R. v. Lee* [1993] 1 W.L.R. 103 (discretion conferred by Children and Young Persons Act 1933 s. 39(1) to prohibit publication of identity of juvenile defendants).

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'.²⁸ 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'.

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'.²⁹ 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 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 in cases where the legislature cannot as a practical matter carry its will beyond a certain point.

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 Q.C. and Mr David Pannick Q.C. are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment'.³⁰

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. 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.

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

²⁸ *R. v. Gloucestershire County Council, ex p. Barry* [1996] 4 All E.R. 421 at 438.

²⁹ *Devon County Council v. George* [1989] A.C. 573 at 604.

³⁰ *R. v. Director of Public Prosecutions, ex p. Kebilene and others* [1999] 4 All E.R. 801 at 844.

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.³¹ We need to be able to recognise it when we see it.

2000-042 PL, Autumn, 368.

³¹ *New York v. United States* (1951) 342 U.S. 882 at 884.