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Liberty, the archetype and diversity: a philosophy of judging

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***P.L. 727** A conscientious judge always wishes to reach the correct decision. It is important for us that the judge does so for we wish to live in a just society. It is usually said to be a critical feature of the advanced liberal democracy, which is Great Britain today, as of other such democracies, that it is governed by the rule of law. There is no fixed meaning to that term,¹ but it would at the least carry for most people the idea of law that is ascertainable and consistently and fairly applied. How can we be certain, however, that the correct decision, that is to say, the best possible decision, or at least a legitimate one, has been reached in a case in which different judges of the highest ability, knowledge and sensitivity disagree on the outcome, and either outcome would be regarded by some other judges, lawyers and citizens as correct² ? We are not so naive as to think that difficult and important legal decisions are merely the result of a process in the nature of an algorithm. Is there, then, an analytical and adjudicative approach that will enable the conscientious judge to be confident that the decision reached is the best possible decision, and certainly a legitimate one, even if judicial colleagues, politicians and other citizens disagree with it?

These are not, of course, new questions. Members of the judiciary, legal philosophers and others have addressed them, in one guise or another, throughout the ages. Three features make them of particular significance at the present time. First, the incorporation of the European Convention on Human Rights (the Convention) into English law by the Human Rights Act 1998 (the HRA) has highlighted the role of the judges in confronting, reconciling and resolving social, political and moral values in important and novel areas which often define the essence of our society. Secondly, our society itself has changed extensively and rapidly over the past 50 years, and continues to do so. Not only is it more culturally and ethnically diverse, but we live with a greater awareness of civil and human rights, particularly of those who have previously been oppressed because they are ***P.L. 728** different. Finally, the UK Supreme Court, detached from the House of Lords, has just been established. Its composition, and the way in which its judges reach their decisions, are a legitimate focus for consideration.

I shall examine the way in which judicial decisions, particularly decisions in hard cases, have been reached from the classical common law period until present times, with particular regard to the impact of judicial review and the HRA. I will also consider whether legal philosophers can help us better to understand the processes for reaching just decisions, particularly in our complex and rapidly changing community. I shall conclude that, in every period, but especially as a result of the HRA, the personal outlook and judicial philosophy of each judge plays a critical role in the outcome of hard cases and the defining of our society's values; and that a judiciary with a diversity of experience, particularly at the highest levels, is more likely to achieve the most just decision and the best outcome for society.

Precedent and the declaratory theory

There is wide agreement that there was no firm doctrine in English law of binding precedent before the 18th century.³ For the classical common lawyer, the inherent value and authority of the common law were that it represented common and immemorial custom: the expression of shared values and reason and tested wisdom.⁴ On the basis of those values, the concept emerged of the declaratory nature of the judge's role. The judge was the "living oracle" of the law⁵ . The judge was the mouthpiece of the law--*judex est lex loquens*⁶ --"an expert to it, not its creator", whose office was not to make it, but to expound and declare it⁷ .

The reality and the theory of the classical common law tradition were more subtle and complex. The common law was never regarded and was never treated as immutable. Sir Edward Coke, emphasising the rational content of the law, said that: "Reason is the life of the law".⁸ Accordingly, the

common law was able to change over time to accommodate changes in the life of the community, reflecting the views, practices and expectations of the community, while at the same time forming an historic link with the past. It was both moulded by the community and itself defined the community and its values.⁹ Sir Matthew Hale drew an analogy with “the Argonauts Ship [which] was the same when it returned home, as it was when it went out, tho’ in the long Voyage it had successive Amendments, and scarce came back with any of its former Materials”.¹⁰

***P.L. 729** These features are reflected in the concept of precedent. The common law is moulded and developed by distinguishing cases, and extending the principles underlying them by analogy to new situations. The legal positivism of the utilitarians, such as Jeremy Bentham and John Austin, at the end of the 18th and the first part of the 19th centuries when the doctrine of precedent was hardening in English common law, threw into sharp relief the law creating function of the judges where precedent ran out. They saw the judge in such a situation as creating law, rather than merely revealing the hitherto hidden potential that was always there.

A century and a half later Lord Diplock spoke succinctly of “it being implicit ...[in] every judgment that the Court is performing a judicial function -- a legislative power”.¹¹ That sentiment was reinforced, at an official level, when the 1966 Practice Direction of the House of Lords recognised that the House could in future diverge from its own decisions “when that appears right to do so”.¹² By the early 1970s Lord Reid felt able famously to dismiss the declaratory theory of the common law as a “fairy tale”.¹³

Developments in the law in the 20th century, particularly in the areas of tortious liability, public law and human rights, have both intensified and highlighted the law making role of the judge. I shall look later in greater detail at the judicial function in the areas of public law and human rights since they play such an important role in the consciousness of the public and the modern view of the rule of law, and they are the most apt context in which to appraise any philosophy of judicial decision making in current times. I have said enough at this point, by way of background, to begin to examine the pragmatic and philosophical approaches to correct judicial decision making in hard cases, and the influences that bear on that process.

The traditional judges' approach

The traditional analysis of British judges of the decision-making process is marked by a bluff, anti-intellectual, pragmatism. It contrasts significantly, not only with the approach and conclusions of legal philosophers, but with those of eminent members of the senior judiciary in the United States.¹⁴ Lord Reid reflected the traditional British judicial approach well when he said of the English:

***P.L. 730** “... [T]hey have always obstinately preferred [practice to theory. Their national motto ought to be -- an ounce of fact is worth a ton of theory. For myself I would not quite accept that proportion but I do not quarrel with the sentiment.”¹⁵

Common sense looms large as a favoured yardstick. Lord Reid's statement that, in a case in which the judge is not bound by precedent, the judge “should have regard to common sense, legal principle and public policy, in that order”¹⁶ is a good example. Common sense, as a touchstone, is entirely consistent with the common law tradition. It reflects the notion that the law is the expression of shared values and reason within our community, tried and tested by a long history. In many cases, that remains true today. Easy cases are those where precedent and the community's plain shared values combine to produce an obvious result, rather like the unexpressed (implied) contractual term, which, if hypothetically mentioned by the officious bystander to the parties, would have been testily met with a common “oh, of course”.¹⁷

It is impossible, however, to see the scope for a common sense solution in hard cases about which knowledgeable and experienced jurists and judges can reasonably disagree.¹⁸ By definition, those are not cases in which obvious shared community values can provide a solution. Moreover, the shared values in our modern, pluralist, liberal democracy are inevitably far fewer than in past times when social, political and economic change was much slower, and wealth, social standing and political influence were distributed quite differently. When Lord Cozens-Hardy M.R. wrote to Lord Buckmaster in May 1915, on Lord Buckmaster's appointment as Lord Chancellor, suggesting that the latter be proposed as a member of the Athenaeum since “all the judges, without exception, are members of the Athenaeum, and I presume you will wish to be a member”, he was making a clear statement about the social cohesion and common values of all the senior judiciary, including the new Lord Chancellor.¹⁹ The common sense of those times was the common sense of those judges for they would scarcely have accepted that the common “sense” of other citizens was different from their own.

Today, by contrast, Baroness Hale, reflecting a more diverse community and judiciary, can pointedly remark: "One man's common sense is another woman's hopeless idiocy."²⁰ Moreover, as Baroness Hale's remark reflects, it is always necessary to bear in mind the lack of any analytical content in a justification of "common sense".²¹ Litigants are entitled, ***P.L. 731** particularly in hard cases, to judgments that set out rational and transparent reasoning, rather than a gloss which effectively does no more than articulate the judge's belief that other like minded people would agree with him or her.

Lord Bingham has favoured "sound judgement", shorn of prejudice or personal predilections of the Judge, as the key to judicial decision making. He introduced his 2005 Maccabean Lecture on "Judges: Active or Passive"²² quoting Peter Birks' statement that "Authority in interpretation of the law naturally derives from learning combined with good judgement and discretion in its deployment". He concluded the lecture quoting Lord Devlin's statement that "The first quality of a good judgment is good judgement". "Good judgement" is, however, no more supportable as an objective adjudicative tool for judicial decision making than common sense, and is open to precisely the same grounds of criticism.²³

The test of reasonableness is sometimes suggested as the yardstick. Lord Reid was impressed with the assumed views of the reasonable man. He mused as to whether the relevant reasonable man, who was not a lawyer, was "the man whose thought and conduct are governed by pure reason, or is he the rather superior man in the street -- the man we hope to find in the jury box today". His conclusion was that "he is certainly the latter but we must not dismiss the former too summarily".²⁴ Lord Reid warned:

"The law departs at its peril from the views of the reasonable man. He could not give a definition of what he means by justice and neither can I. But that does not prevent him from saying that particular things are clearly unjust. We as lawyers and legislators can go far but we cannot afford to go so far that we offend his sense of justice. We may try to educate our masters, but we shall do incalculable harm if we try to override the views of the average reasonable man."²⁵

In a similar vein, Aharon Barak, the former President of the High Court of Israel, has said that the judge must exercise the law-making discretion reasonably, as a reasonable judge would in the circumstances, and so as to achieve the most reasonable solution.²⁶

As I have said, however, it is of the very essence of hard cases that reasonable and knowledgeable jurists, judges and other citizens may fairly disagree about their correct outcome. They may disagree widely and with passion, reflecting broad divisions--including, economic, social, religious, ethical, political, gender and ethnic--within the community. It is difficult to conceive the possibility that any judge hearing such a case would exclude his or her own view, characterising it as being unreasonable or different from the view of every other reasonable person in the community. The test would, therefore, seem to be a self-defeating one as an objective standard or touchstone.

***P.L. 732** Lord Woolf's approach is that "Judges should strive to achieve justice" in all cases.²⁷ Many others express the same view.²⁸ That is plainly a sentiment with which we can all agree, but it provides no assistance in knowing what is a just or the most just decision in hard cases. Different judges and others may reasonably perceive the justice of the case, and the application of apparently clear precedent, to be quite different in the new situation.

The HRA presents further insuperable difficulties in the way of those pragmatic approaches to decision making in hard cases. That Act, as I have said, gives rise to some of the most difficult issues where important social values compete, such as security, liberty, privacy, freedom of speech and of the press, and respect for family life. The concept of "margin of appreciation", which underlies much of the practical application of the Convention, is an acknowledgement that those values will often clash and that different views may legitimately be held about the appropriate balance between them. Disputes about human rights are required to be determined, not by reference to any of the pragmatic tests I have mentioned, but in accordance with the HRA and the Convention, and having regard to decisions of the European Court of Human Rights; and all primary and subordinate legislation is, so far as possible, to be read and given effect in a way which is compatible with the Convention rights.²⁹

The point is well illustrated by the way in which the law moved between *Fitzpatrick v Sterling Housing Association*³⁰ and *Ghaidan v Godin-Mendoza*.³¹ In the former all five members of the House of Lords' judicial committee decided that "a person who was living with the original tenant as his or her wife or husband" in the Rent Act 1977 did not include the survivor of a same-sex relationship. In *Ghaidan*, having regard to art.8 of the Convention, four of the five members thought that, in accordance with s.3(1), it was possible to interpret the statute to the opposite effect.³² Common sense,

reasonableness, sound judgment and justice had not changed, but the legal framework and general approach had.

Dworkin, Fuller, fidelity to law, and the overlap

For all those reasons, none of the traditional judicial pragmatic approaches seems to provide a satisfactory answer to the inquiry how judges do and should decide hard cases. Ronald Dworkin offers, from a philosophical perspective, a different approach: the adjudicative principle of integrity. This principle, set in the context of a view of our society as a fraternal egalitarian community, requires judges to interpret the law, so far as possible, as a single coherent scheme of justice and fairness in the right relation. It requires them to identify and interpret a coherent set of principles in accordance with the best constructive interpretation of the community's political structure and legal practice. They must interpret **P.L. 733* contemporary legal practice "as an unfolding political narrative".³³ Past decisions must be interpreted to identify, understand and promote a coherent scheme of principles to be applied in the contemporary setting, and so provide a way for the future.³⁴ That is a continuous process by which judges reach their decisions in a way which, so far as possible, both fits and justifies what has gone before, as part of a long story which is continued by them in the best way possible from the standpoint of political morality.³⁵

Other legal philosophers have suggested particular factors of fairness and justice which should be taken into account in judicial decision-making. They have done so in the context of exploring the idea of "fidelity to law"; that is to say, in seeking to identify, in Lon Fuller's words, "the inner morality of law".³⁶ This philosophical approach may be contrasted with that of most judges, who tend to conceive of the law as something which owes its significance and force to the penalties which flow from breach of it, and, in particular, its recognition and enforcement by the power and institutions of the state.

Fuller's eight "desiderata", described by Nigel Simmonds as "the archetype of law",³⁷ are among the best known.³⁸ Fuller considered these to be a distinct standard by which excellence in legality may be tested and as making up the internal morality of law. Hart and Sunstein are among other legal philosophers who have put forward particular factors to be taken into account in the process of judicial decision-making.³⁹ Underlying this approach is the idea of fairness as lying at the heart of justice. Fairness means that citizens are able to decide upon courses of action in the knowledge of what the law is, so that they can act within it, or at least they can form a reasonable view of what the law is likely to be; and it also means that like cases are treated alike. This requires that, at its best, law is clear, intelligible, capable of being complied with, coherent and consistent. These are among the qualities that some legal philosophers say mark out law as having a moral value in itself; and at least the first three would generally be regarded as falling within the concept of the rule of law.⁴⁰

There is clearly an overlap, or at least no inconsistency, between such archetype factors, the classic common law tradition and an adjudicative approach like Dworkin's. Those factors provide a critical standard to which all judicial decision making should aspire, but they do not say much about how the law should properly be developed by judges to meet and reflect changed institutions and conditions in society. On that issue, there is much in common between Dworkin's approach and the classic common law tradition. Both of them proceed on a view of the law as the reflection of the community's values and as itself a formative source of cohesion within society. They recognise, therefore, that the law is always evolving as the values, aspirations and political morality and institutions of the community evolve.

**P.L. 734* For a judge, pragmatic as well as principled considerations make it difficult, if not impossible, however, to achieve to the full extent both the archetype of law and Dworkin's adjudicative principle of integrity.

The basic principles of fairness I have mentioned illustrate why precedent is so important, and why retrospective law making should be approached with considerable caution. Indeed, it can be said that all judicial law-making has a retrospective quality⁴¹.

There are also purely pragmatic considerations why judges should be cautious in making decisions which represent large leaps in the development of the common law, and in deciding new approaches to large issues of policy.⁴² In a judicial system based on adversarial litigation, the parties and their representatives choose the issues before the court, provide the evidence, and decide which legal arguments to advance. Their object is to win the case, rather than to improve the law. In an age of increasing specialisation, advocates and judges may not have the knowledge, or, in view of cost and time, the inclination to examine the impact of particular outcomes on other areas of the law.⁴³

Moreover, judges in our system rarely have the information or resources to assess soundly wider policy issues, and, in particular, their social, economic and political impact. Parliament and Law Commissions are far better equipped to do so.⁴⁴

Further, unlike Parliament, the executive or the Law Commissions in the United Kingdom, judges have no facility to consult interested groups in the community on new law or policy issues.⁴⁵ As Jeremy Horder has said, such consultation provides a measure of moral authority for policy.⁴⁶

Dworkin has himself emphasised the distinction between policy and principle. In describing his model judge, Hercules, as no “activist”, he said that Hercules will refuse to substitute his judgment for that of the legislature when he believes the issue in place is primarily one of policy rather than principle, when the argument is about the best strategies for achieving the overall collective interest through goals like prosperity or the eradication of poverty or the right balance between economy and conservation.⁴⁷ In his view, courts are the forum of principle, whereas policy is properly the province of government.

***P.L. 735** In *Malone v Commissioner of Police for the Metropolis* Sir Robert Megarry said⁴⁸ :

“... [I]f the principles of English law, and not least analogies from existing rules, together with the requirements of justice and common sense, point firmly to .. a right existing, then I think the court should not be deterred from recognising the right [notwithstanding the absence of English authority]. On the other hand, it is no function of the court to legislate in a new field. The extension of the existing laws and principles is one thing; the creation of an altogether new right is another.”

The same point is underscored by the position of judges within our political community, and the public perception of their role. In our democracy changes in the law driven by policy considerations are primarily for Parliament. This is an essential feature of the principle of separation of powers. The government of the day is accountable to the public for its legislative programme. It is elected and may be removed by the public. The judges are not accountable in that way. The public has a right to expect judges to be restrained in making policy or large leaps in the law, and to proceed by what has been called interstitial advances⁴⁹ or nudging.⁵⁰ As Justice Holmes said: “I recognise without hesitation the judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions.”⁵¹

All these principled and practical constraints on judges departing from what is generally perceived to be established law and precedent limit the manner and pace in which the common law can be developed. They explain why judges can never achieve perfect implementation of Dworkin's adjudicative principle of integrity or, in some cases, a decision consistent with the archetype, particularly in relation to consistency and coherence within and across areas of the law.

A synthesised adjudicative approach

It is possible, at this stage of the analysis, to summarise as follows a synthesis of the common law tradition of judicial decision-making with those features of Dworkin's adjudicative principle of integrity and of law's inner morality consistent with that tradition. The common law (including equity) is decided in accordance with precedent. It is developed by extending the principles underlying cases by analogy so as to reflect the evolving values, practices, and institutions of the community and also so as to achieve, so far as practicable, law which is clear, intelligible, capable of being complied with, and coherent and consistent within and across different areas. Such development of the law is constrained by recognition of the dangers and difficulties of an adversarial system of litigation in which evidence of the economic, social and other consequences of changes in the law may be limited or non-existent, as may be the impact on other areas of the law, and there will have been no or limited evidence of the views of other citizens ***P.L. 736** or bodies, and giving due acknowledgement of the constitutional reservation to Parliament of the right to decide policy. Judicial decision making in relation to legislation is with the overriding objective of fulfilling as faithfully as the judge can the will of the democratically elected Parliament, and, subject to that, with the same considerations as for case law.

What is implicit in that summary is that individual judges in every hard case may have different perceptions of the extent to which, and manner in which, the law should properly reflect the evolving values, practices and institutions of the community. In this respect, Dworkin's approach is helpful in highlighting the inevitable personal and political role of the judge. As he put it: “law in integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers ... to the questions it asks.”⁵² His approach recognises hard cases as those

where there is more than one possible interpretation of past cases, and of the best constructive interpretation of the political structure of institutions and morality and legal doctrine, and so of the coherent set of principles which should be applied in the instant case. Dworkin expressly and candidly acknowledges that in these hard cases the judge's decision will reflect "not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete".⁵³

It follows that, in most cases, the synthesised adjudicative approach I have described ought to produce the correct answer, in the sense of the best possible answer: a better answer than others reached through some other adjudicative method.⁵⁴

Liberty, dignity and human rights

This analysis can be usefully tested in the context of liberty, dignity and human rights, for they are particularly important in the political and legal values and institutions of our community. Simmonds has described the inherent moral value of law itself as being that it defines the scope within which citizens can act freely. In his view, the value which the rule of law serves is the value of liberty, in the sense of independence from the power of another.⁵⁵ In his words:

"The idea of law is the idea of a domain of universality and necessity within human affairs, making it possible to enjoy a degree of freedom and independence from the power of others, in the context of a life within a political community."⁵⁶

Sunstein also considers that rules operate to constrain the exercise of arbitrary power, and that they create a space in which people can act free from fear of the state. While a rule is on the books, everyone subject to state power may invoke its ***P.L. 737** protections and disabilities.⁵⁷ Dworkin also saw justice and the rule of law as a matter of individual right, and not independently a matter of the public good.⁵⁸ Fuller sees commitment to the internal morality of law as reflecting a view of people as free, self-determining and responsible agents, and as possessing inherent dignity in virtue of their autonomy.⁵⁹

This philosophical analysis reflects the values of the liberal Western democracy which is our community. Concepts of individual human rights and human dignity lie at the heart of such a political system, not simple majoritarianism. It is of the essence of democracy that its fundamental values, including in particular human rights, are protected and given effect. As Baroness Hale said in *Ghaidan*, "democracy values everyone equally even if the majority do not".⁶⁰

That ethos of equality in dignity and rights has been enshrined in the Preamble to the 1945 Charter of the United Nations, in the 1948 Universal Declaration of Human Rights, and in the Convention signed in 1950. These represent, as Lord Steyn has put it in connection with the Universal Declaration of Human Rights, a "distillation of ethical values".⁶¹

Although those public documents are relatively recent, it is not unreasonable to see the broad historic sweep of the common law as, slowly but surely, advancing over time the same principles of individual liberty and human dignity.⁶² Lord Radcliffe, for example, described the lengthy historical process which resulted finally in the abandonment of the universal judicial assumption that the state, its laws and its institutions were all subordinate to, and bound to give effect to, the Christian religion. That assumption had sanctioned all manner of discrimination against adherents of other faiths and those of none.⁶³ It was only finally jettisoned by the decision of the House of Lords in *Bowman v Secular Society Ltd.*⁶⁴

In commenting on the place of public policy in judicial reasoning, Lord Radcliffe said:

"We must see ourselves, therefore, as committed for good to the principle that the purpose of society and all its institutions is to nourish and enrich the growth of each individual human spirit. This is liberty in the sense in which we have chosen to understand it. This is the only permanent public policy for countries such as ours: and there are no considerations of convenience, or material welfare, or national prestige that can weigh heavily enough to counterbalance it ...

***P.L. 738** When we turn to the common law, it is no vain claim for it to say that it has been a strong guardian of individual liberties and that its philosophy, if that is not too grand a word for something so little philosophical, is worthy of free men. But for all that, it is a subtle essence. So much of critical import that would be explicit in another setting is in English law a matter of some turn of procedure or results from a unwritten rule in the conduct of a trial or a case."⁶⁵

The post-war international statements I have mentioned above, a collective rejection of all that Nazism and fascism stood for,⁶⁶ have provided, particularly since the incorporation of the Convention in our own law by the HRA, a clearer focus and quickened the pace for what was always inherent in the common law.⁶⁷ Under both the common law and the HRA the protection of human rights reflects the moral, legal and political values of our community in its unfolding history. Prior to the HRA, their promotion and protection were on a slow and incremental basis, with adherence to precedent and deference to the policy forming role of Parliament limiting the rate of progress and coherence in and across different areas of the law. Since the HRA, the combination of its provisions, decisions of the European Court of Human Rights and the terms of the Convention have liberated the courts to a considerable degree from the restraint of common law precedent, both in the recognition, protection and promotion of human rights, and in bringing clearly within the ambit of the court's jurisdiction the right to question the legitimacy of Parliament's policy decisions.⁶⁸

These developments have thrown into sharp relief the political role of judges and their personal outlook. Even at common law, judges have not always been able to adhere to the broad distinction between issues of policy, which ought to be determined by Parliament, and those of legal principle, which are the proper preserve of the judge. The boundary between the two is not always clear cut. Lord Goff observed that, although he was well aware of the existence of the boundary, he was never quite sure where to find it: "Its position seems to vary from case to case ...".⁶⁹ Further, what was originally policy becomes over time legal principle:

"When a legal rule has been adapted by a court of high authority from considerations of legal policy in a series of cases, it takes on the character of a legal principle. In this sense, legal principle is the distilled product of earlier considerations of authority and policy."⁷⁰

It must also be borne in mind that judges have no option but to decide the cases which come before them, including where the law is unclear or undecided, even where they raise important policy considerations. Indeed, in some cases it is plain that Parliament has deliberately decided not to intervene and has left it to the courts **P.L. 739* to develop the law. Some would see the developing law of privacy, and its implications for free speech and investigative journalism, as falling into that category.⁷¹

In the recent case *Stack v Dowden*,⁷² which concerned a dispute over ownership of property between two people who had lived together as a couple, the judicial committee of the House of Lords explicitly recognised that the subject matter raised important policy issues, but nevertheless decided to tackle some of them since it was unlikely that Parliament would legislate on it for some time.⁷³

Turning to the specific areas of human rights and judicial review, the political role of the judges is plain and inevitable. A remarkable development of public law, that is the power of the courts to review the decisions of public bodies, was led from the early 1960s by Lord Reid, Lord Wilberforce and Lord Denning. The application of established principles of natural justice and fairness to bodies exercising public power and curtailing unfettered administrative discretion by such bodies⁷⁴ has led to a developed set of distinct public law principles which are of general application, independent of private law and comparable to those in civil jurisdictions.⁷⁵ The HRA and the Convention have made the judges the guardians of human rights.⁷⁶ In that role, judges are required to decide novel and profound questions of moral and political significance.

Both judicial review and the HRA have cast on the judges the right and the obligation to determine the propriety and, in some cases, the justiciability of legislative policy and executive conduct. In cases in which Convention rights are engaged, it is for the courts to say whether or not the legislative policy or executive conduct is proportionate and so does not offend the Convention.⁷⁷ In cases both within and outside the Convention, it is for the courts to determine whether an area of executive conduct, such as national security and foreign policy, or legislative policy falls within executive or parliamentary discretion.⁷⁸ In short, the limits of judicial "deference" to the other branches of government are for the judiciary, **P.L. 740* whether as a matter of law or as a matter of judicial discretion,⁷⁹ to determine: that is to say, which branch of government has in any particular instance the decision-making power and what the legal limits of that power are.⁸⁰

Lord Woolf has stated that, in certain extreme circumstances, namely if Parliament was to attempt to abolish the courts' entire power of judicial review, the courts would refuse to recognise the legislation even if passed by Parliament in accordance with its proper procedures.⁸¹ This conclusion follows from his analysis that our parliamentary democracy is based on the rule of law, twin principles of which he considers are the supremacy of Parliament in its legislative capacity, and that the courts are the final

arbiters as to the interpretation and application of the law. He sees the courts and Parliament as partners engaged in a common enterprise, or parties to a fundamental bargain, of upholding the rule of law.⁸²

None of this has changed, in principle, the legitimacy of the synthesised adjudicative approach I have described earlier. As fundamental principles of our community, liberty, dignity and human rights, and what goes with them, the restraint of excessive and abusive exercise of executive power, can and should be promoted by the law; but, subject to the constraints of the Convention itself and Strasbourg jurisprudence, and so far as practicable in a way which accords with the archetype, so as to provide law which is clear, coherent and consistent.

What plainly have changed with the HRA are the size and importance of the gaps, left unfilled by common law precedent, where the personal outlook of judges and their political role feature much more prominently. There is now more truth than ever in Dworkin's vision of law as a special part of political morality, and that judges are, inescapably, political philosophers.

The personal outlook and judicial philosophies of judges

It seems obvious that, when eminent judges disagree about hard cases in areas which are policy laden, or concern human rights or constitutional rights, it is because their own "worldview",⁸³ that is to say their personal outlook based on personal experience, and their judicial philosophy, that is to say their view of the judicial role, influence their decision⁸⁴ (although the borderline between the two is not easy to define since the one inevitably merges into the other). This will be true even if the judges do not appreciate that influence and they have never considered what is their judicial philosophy, and even if such personal influences and judicial philosophy are not coherently or consistently applied. As Cardozo wrote:

***P.L. 741** "Every one of us has in truth an underlying philosophy of life. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action."⁸⁵

Such personal experience and judicial philosophy may influence judges in hard cases in ordinary litigation outside the particular areas of human rights and judicial review, for example in the many situations where there is a tension between consistency and certainty, on the one hand, and fairness, on the other hand. In Cardozo's words:

"... [S]ymmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare."⁸⁶

A good example of a recent civil case is *Yeoman's Row Management Ltd v Cobbe*,⁸⁷ which concerned the equitable doctrine of proprietary estoppel. The unanimous judgment of the five Law Lords disagreed with the unanimous decision of the judge at first instance and the Court of Appeal. It turned in part on the boundary between the need for certainty and the desirability of providing equitable relief for unconscionable conduct. In the House of Lords, certainty won the day.⁸⁸

An example in the field of criminal law, highlighted by Horder,⁸⁹ is *R. v K*,⁹⁰ in which the defendant was charged with indecent assault on a woman, contrary to s.14(1) of the Sexual Offences Act 1956. The victim, who was 14, consented to the defendant's acts. At the time, the consent of a girl under 16 was no defence to the offence. The defendant claimed, nevertheless, that he should be acquitted because the victim had told him she was aged 16, and he had no reason to disbelieve her. The House of Lords held that the presumption of statutory interpretation that mens rea was an essential ingredient of statutory offences applied, and so the prosecution was required to prove the absence of genuine belief on the part of the accused that the victim was 16. Lord Millett, agreed with the result, but said that he did so with some misgiving because he thought that it would fail to give effect to the intention of Parliament and would reduce s.14 of the 1956 Act to incoherence. He did so because:

***P.L. 742** "44. ... the age of consent has long since ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society ... the persistent failure of Parliament to rationalise this branch of the law even to the extent of removing absurdities which the courts have identified, means that we ought not to strain after internal coherence even in a single offence. Injustice is too high a price to pay for consistency."

Even before the HRA the influence of the personal outlook and judicial philosophies of judges at the most senior levels was plain in cases which excited their moral outrage but the scope of the criminal law to render the defendants' conduct criminal was unclear. The majority of the Appellate Committee of the House of Lords (Lord Reid dissenting) held in *Shaw v DPP*⁹¹ (where the accused had published a booklet in which prostitutes inserted paid advertisements) that there was a common law offence of conspiracy to corrupt public morals. Viscount Simonds said that there is a residual power in the courts "to enforce the supreme and fundamental purpose of the law, to conserve ... the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for",⁹² and that "The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society".⁹³ In *R. v Kneller (Publishing, Printing and Promotions) Ltd*⁹⁴ the publishers of *International Times* were charged with conspiracy to corrupt public morals and conspiracy to outrage public decency for publishing contact advertisements by gay men. The House of Lords rejected a challenge to the decision in *Shaw* (Lord Diplock dissenting) and upheld the defendants' conviction for conspiracy to corrupt. They also held by majority of three to two (Lords Reid and Diplock dissenting) that there was a common law offence of outraging public decency. In *R. v Brown*⁹⁵ the Law Lords held, by a majority of three to two, that gay men having SM sex were guilty of criminal conduct and properly sentenced to imprisonment notwithstanding the consensual nature of their activity. Lord Mustill and Lord Slynn dissented on the grounds that these were matters of private morality and for the legislature to criminalise.⁹⁶

Sometimes a judge is described as an "activist". There is no universal definition or common understanding of that expression.⁹⁷ In some countries, it has been usually used as a derogatory term,⁹⁸ and in others not.⁹⁹ In view of the nature of judicial decision-making which I have described, particularly in hard cases on which equally eminent and competent jurists and other citizens can reasonably **P.L. 743* disagree, it is difficult to see what the expression can sensibly mean.¹⁰⁰ Perhaps the best, and only, sense it can properly bear is conveyed by Lord Bingham's description of judgments motivated by a personal conservative, liberal, feminist, or libertarian agenda as not legitimate because they are not in truth legally motivated.¹⁰¹ The word "agenda" is plainly critical in that description. It denotes an approach to decision-making which is based on a preconceived view of a correct outcome irrespective of the ordinary constraints of proper judicial analysis. What is impossible to exclude, however, is a general outlook, or personal philosophy, based on an individual judge's life experience; but the difference between that and an "agenda" may itself be a matter of personal interpretation informed by personal outlook.

Diversity

Questions about the composition of the judiciary, and their selection, are inevitably raised by this analysis of the judicial resolution of hard cases, which throws into high relief the importance of a judge's personal outlook and judicial philosophy in determining some of the most important principles defining the values of our community.

There are two separate, but related, issues here. The first concerns the respect of our community for the judiciary as a body and judicial processes in general. The second concerns the quality of judicial decisions in individual cases.

I began this article by observing that the rule of law is a critical facet of an advanced liberal democracy, such as ours. It seems obvious that the rule of law is undermined if the community, or any significant section of it, has no respect for the judiciary and legal processes. As Professor Dame Hazel Genn put it in the third of her superb 2008 Hamlyn series of lectures¹⁰² : "[The courts] are sites of justice. They must have authority and legitimacy for which they have to command public confidence and respect."

The composition of the judiciary, and in particular its diversity, are important in securing and maintaining that respect. Professor Genn perceives concern about lack of diversity as really about, and only about, participation in power, that is to say the participation of people who are neither male nor white (nor barristers) in the judiciary as the third arm of government.¹⁰³ I do not consider that is a correct or appropriate way of characterising the issue of respect for the judiciary as a body. I suggest that there are two aspects to this issue. First, in a diverse community such as ours, the reflection of that diversity in the composition of the judiciary gives legitimacy to the courts because the composition of the judiciary can then be seen to reflect the very values of which they are the guardians--human rights and equality inherent in a liberal democracy.

***P.L. 744** Secondly, a judiciary which is not reflective of the different elements within the community, particularly minority groups, is less likely to command their respect. In Stonewall's 2008 Report "Serves You Right", a report of empirical research into lesbian and gay people's expectations of discrimination, it was stated that one in six lesbian and gay people think that they would be treated worse than heterosexuals if they appeared before a magistrate for a minor offence, and nearly a quarter think that they would be treated worse if they appeared before a judge for a major offence. This disheartening impression is not the result of a frustrated desire to share power, but simply a feeling of disconnection with a judicial system manned by judges who are perceived to be "the other" and not reflective of "us".

I turn to what may be thought to be more directly relevant to this article, namely the importance of diversity to the quality of judicial decisions in hard cases. Generally, Professor Genn is rather scathing about the notion that diversity has any relevance to judicial decision making. She asserts that there is no empirical research to support such a proposition. She says:

"In fact, the conclusion of behavioural studies is that judicial decision-making is so complex and the difficulty of creating realistic experiments so challenging that it is difficult to conclude anything other than that the constraints of precedent, concern about internal criticism through appeal, and interest in promotion are more consistently important in predicting judicial decisions (below the Supreme Court) than any particular social or demographic factors."¹⁰⁴

It is necessary to be cautious in appraising that rather hard-edged approach. The studies to which Professor Genn is referring are, I understand, US studies. More important, as she herself has emphasised, the judiciary is not a single, homogeneous group. Different levels of the judiciary have different functions, and reach their decisions in different ways, some singly and some in panels, some with juries and some with lay assessors. If her observations about the irrelevance of diversity to judicial decision-making is intended to refer to decisions on hard cases by our most senior courts, the Court of Appeal and (formerly) the House of Lords or the Supreme Court, then I do not agree with her.

The starting point here is, as this article has sought to show, that a judge's personal outlook and judicial philosophy inevitably play a critical role in decisions on hard cases, as we have defined them. The next point is that the most important hard cases, those which resolve conflicts of values presented by new societal situations, are decided at the appellate level by panels of judges, three or more in the Court of Appeal, and five or more in (formerly) the House of Lords and (now) the future Supreme Court.

The analysis of, and empirical research into, group decision-making is a well-established branch of social psychology. In very general terms, so far as relevant to this article, such analysis and research provide support for the following propositions. First, in defining or categorising themselves as members of a particular group, people typically associate themselves with the various common attributes and norms which they see as part of that group. In a collective setting, they are ready to conform to the majority in the group and to abandon their personal beliefs ***P.L. 745** and opinions.¹⁰⁵ Secondly, groups tend towards more extreme decisions than individuals, in either a more cautious or more risky direction, depending on the initial "average" position of the group (known as "group polarisation").¹⁰⁶ Thirdly, an extreme example of group polarisation, "groupthink", leading to very poor decisions, may occur in cases where the following combination occurs: the group making the decision is very cohesive; it is insulated from information outside the group; the decision-makers have not searched systematically through alternative policy options to appraise their relative merits; there is a need to reach a decision urgently; and the group is dominated by a very directive leader.¹⁰⁷ Fourthly, a well-reasoned and well-presented minority view may be effective in shifting the position of the majority to a more qualified and compromising position than it otherwise would have taken.¹⁰⁸

These propositions have an obvious bearing on decision making by panels of judges, especially in relation to hard cases, but also more generally.¹⁰⁹ An early study of decisions by US federal district judges during the years 1963-1968 in civil liberty cases, sitting individually and in panels, showed considerable support for the hypothesis that the same judges shifted their decision making preferences and civil liberty attitudes when they sat as panels. Parties claiming a violation of constitutional rights increased the probability of successfully convincing a district judge from 30 per cent to 65 per cent when they were able to have their litigation heard by a three-judge court.¹¹⁰

A more recent study of 6,408 published US Federal Appeal three-judge panel decisions and the 19,224 associated decisions of individual judges has clearly shown evidence of group polarisation, by

which a panel of people of the same political or social outlook (i.e. Republican or Democrat appointees) move towards a more extreme position in judicial decision-making in line with that outlook; and, by contrast, the presence of single panellist of a different outlook, has a marked disciplining or moderating effect.¹¹¹

The conclusion of the researchers was that, in general, the existence of diversity on a three-judge panel is likely to bring the law to light and perhaps move the panel's decision in the direction of what the law requires.¹¹²

This raises, of course, the meaning of “diversity” in this context. For my part, in the context of the quality of decision-making, “diversity” is best viewed as diversity of experience in life. Such diversity is plainly not restricted to, or synonymous, with gender, ethnicity or sexual orientation. On the other hand, those factors are likely to be an indication of valuable experience which is different to **P.L. 746* the norm.¹¹³ The analysis of social psychologists, and the examples of their empirical research to which I have referred, highlight the importance on panels of appellate judges who, due to their diverse experience, can bring to bear on a case, particularly a hard case, a wider range of personal experience and judicial philosophies than would otherwise be the case. They will thereby make it more likely that the decision, and the reasoning which underpins it, will reflect the evolving values and institutions of the community, and that relevant arguments are not overlooked or brushed aside, and that insupportable preconceptions are challenged.¹¹⁴

Aside from the empirical studies to which I have referred, we cannot ignore the experience of distinguished past judges whose own judicial experience endorses the value of diversity and the distorting effect of the lack of it. As Cardozo said nearly a century ago:

“We are constantly misled by our extraordinary faculty of ‘rationalising’ -- that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong. We are abjectly credulous by nature, and instinctively accept the verdicts of the group. We are ever and always listening to the still small voice of the herd.”¹¹⁵

The Supreme Court

The creation of the UK Supreme Court, with the accompanying physical separation of the most senior judiciary from the legislature, is and was always intended be powerfully symbolic of the importance of the judiciary in our constitution. There can be no better time to understand, and be honest about, the true nature of how they do and should make their decisions, and what bearing that has on their appointment, composition and procedures. This involves recognition of the absence of a single correct answer in some hard cases, and of the critical importance in such cases of the personal outlook and judicial philosophy of each judge. In the light of those considerations, diversity in the composition of the senior judiciary, in terms of diversity of experience, is likely to produce better decision-making. The same issues are relevant to the debate about the merits of our most senior appellate judges reflecting in a separate judgment, not merely dissent from the decision of the majority, but also a significant difference in analysis even if leading to the same majority decision. That, however, is a topic for fuller consideration and debate on another occasion.

Lord Justice of Appeal, England and Wales. A slightly abridged version of this article was given as a lecture at the Institute of Advanced Legal Studies on July 9, 2009. I am very grateful to Dr Nigel Simmonds, Dr Juliet Foster, Nick Piska and Aruna Nair for their invaluable assistance and constructive criticism. The lecture was subsequently the subject of discussion in the Birkbeck Judicial Conversations Series organised by the School of Law at Birkbeck, University of London: two contributions to that event appear in *Public Law* as Erika Rackley, “In conversation with Lord Justice Etherton: revisiting the case for a more diverse judiciary” [2010] P.L. 655 and Leslie J. Moran, “In conversation with Lord Justice Etherton: judicial legitimacy, diversity and the representation of judicial authority” [2010] P.L. 662.

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^{1.} Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67. Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) p.5.

^{2.} These are what legal philosophers call, and I shall refer to in this article as, “hard cases” (see below fn.18). They are the cases with which this article is principally concerned.

3. Gerald J. Postema, "The Philosophy of the Common Law" in J.L. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of the Law* (2002).
4. Gerald J. Postema, *Bentham and the Common Law Tradition* (1986), pp.4-8.
5. William Blackstone, 1 *Commentaries on the Law of England* (1767), p.69.
6. *Calvin's Case* (1608) 7 Co. Rep. 1a at 4a.
7. Postema, *Bentham and the Common Law Tradition*, 1986, p.9.
8. Coke, Institutes i. Sec. 138. Gerald J. Postema, "Some Roots of our Notion of Precedent" in L. Goldstein (ed.), *Precedent in Law* (1987), p.11.
9. Lord Bingham has pointed out that Lord Mansfield, as Chief Justice of the Queen's Bench, reserving to himself cases on insurance, mostly marine insurance, fashioned a coherent, principled body of law to serve the needs of an ambitious and expanding commercial nation: "The Judges: Active or Passive" (2006) 139 *Proceedings of the British Academy* 55. Postema, *Bentham and the Common Law Tradition*, 1986, p 37: "If it is possible, then, to capture in a single phrase what law is, according to classical common law theory, one might say that it is a form of social order manifested in the practice and common life of the nation."
10. Hale, *A History of the Common Law* (1971), p.40.
11. K. Diplock, "The Courts as Legislators" (Holdsworth Club Presidential Address, 1965) cited in A. Barak, *Judicial Discretion* (1987), p.91.
12. *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 HL.
13. Lord Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22. See also *Hallett's Estate, Re* (1879-80) L.R. 13 Ch. D. 696 CA at 710 (Sir George Jessel M.R.).
14. Where the divide between theory and pragmatism has sometimes been less marked: for example, the classic text, Benjamin N. Cardozo's 1921 Storrs Lectures at Yale University published as *The Nature of the Judicial Process* (1921). Even in the US, Justice Holmes encapsulated the pragmatic approach with his statement that "the life of the law has not been logic; it has been experience". In Britain, it is noteworthy that one of the most thoughtful modern contributions to the discussion has been by Baroness Hale, a former academic and a self-confessed feminist. As she said in her 2007 Maccabaeian Lecture "A Minority Opinion" (2008) 154 *Proceedings of the British Academy* 319: "Most judges in this country never have occasion to own up to a personal philosophy, whether of life or judging. Because of my unusual professional career, however, I have had to develop and express some sort of personal philosophy. I have been a legal scholar and later a law reformer, rather than a legal practitioner, before becoming a judge. It is difficult to be a legal scholar, still less a professional law reformer, without developing a point of view about what the law both is and should be."
15. Maccabaeian Lecture 1968, "The Law and The Reasonable Man" (1970) 54 *Proceedings of the British Academy* 189.
16. Lord Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22.
17. *Shirlaw v Southern Foundries* [1939] 2 K.B. 206 CA at 227 (affirmed [1940] A.C. 701 HL).
18. What H.L.A. Hart called "problems of the penumbra" in "Positivism and the Separation of Law and Morals" (1958) 71(4) *Harvard Law Review* 593, and Ronald Dworkin and other philosophers call "hard cases".
19. Letter dated May 26, 1915 quoted in J.A.G. Griffith, *The Politics of the Judiciary*, 5th edn (1997) quoting R.F.V. Heuston, *The Lives of the Lord Chancellors 1985-1940* (1964), p.269. For a different perspective, emphasising the range of views and backgrounds of the judges deciding the celebrated trades union case *Allen v Flood* [1898] A.C. 1 HL, see R.V.H. Heuston, "Judicial Prosopography" (1986) 102 *Law Quarterly Review* 90.
20. John Maurice Kelly Memorial Lecture, "Law Maker or Law Reformer: What is a Law Lady for?" (University College Dublin Faculty of Law, 2005).
21. R. Posner, *How Judges Think* (2008), p.117: "Appeals to common sense ... do not define a distinct method of legal reasoning that can make a plausible claim to intellectual rigour." See also Lord Hoffmann, "Common Sense and Causing Loss", Lecture to the Chancery Bar Association June 15, 1999.
22. Lord Bingham, "The Judges: Active or Passive" (2006) 139 *Proceedings of the British Academy* 55.

23. Posner describes "good judgement" as "an elusive faculty best understood as compounds of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense": R. Posner, *How Judges Think* (2008), p.117.
24. Lord Reid, "The Law and the Reasonable Man" (1970) 54 *Proceedings of the British Academy* 189.
25. Lord Reid, "The Law and the Reasonable Man" (1970) 54 *Proceedings of the British Academy* 189. Lord Reid, however, rejected the implied term test, based on the assumed views of the reasonable man, in formulating the doctrine of frustration in *Davis Contractors Ltd v Fareham Urban DC* [1956] A.C. 696 HL.
26. A. Barak, *Judicial Discretion* (1987), pp.5, 78, 115.
27. Lord Woolf, *The Pursuit of Justice* (2008), p.1.
28. See, for example, A. Barak, *Purposive Interpretation in Law* (2005), p.213 "My advice, at this stage of interpretation, is for the judge to aspire to achieve justice -- justice for the parties before the judge; justice in law itself. Justice accompanies the interpretive process from start to finish. It is one of the values of the legal system. Justice becomes a 'residual' value that decides the hard cases."
29. Human Rights Act 1998 ss.2(1) and 3(1).
30. *Fitzpatrick v Sterling Housing Association* [2001] 1 A.C. 27 HL.
31. *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557.
32. Lord Millett dissenting.
33. Dworkin, *Law's Empire*, 1986, p.225.
34. Dworkin, *Law's Empire*, 1986, pp.227-228.
35. Dworkin, *Law's Empire*, 1986, p.239.
36. L. Fuller, "Positivism and Fidelity to Law -- a Reply to Professor Hart" (1958) 71(4) *Harvard Law Review* 630.
37. N. Simmonds, *Law as a Moral Idea* (2007), p.53.
38. Rules should be general, made known and available, prospective and not retroactive, clear and understandable, free from contradictions, should not require what is impossible, should not be too frequently changed, and in practice complied with by official action: L. Fuller, *The Morality of Law* (1969), pp.41 et seq.
39. H.L.A. Hart, *The Concept of Law*, 2nd edn (1994), p.207; Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996), p.192.
40. Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67.
41. Lord Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 23: "judge-made law is always retrospective". The conventional view was that, unlike judges in, e.g., Ireland, the US, Canada, India, Israel, the ECJ and the ECtHR, judges in England and Wales cannot or should not overrule prospectively, but the contrary view has more recently gained judicial support, limited to exceptional circumstances: M Arden, "Prospective Overruling" (2004) 120 *Law Quarterly Review* 7; D. Sheehan and T.T. Arvind, "Prospective Overruling and the Fixed-Floating Debate" (2006) 122 *Law Quarterly Review* 20 (discussing the opinions on the point in *Spectrum Plus Ltd (In Liquidation), Re* [2002] 2 A.C. 680 HL). See also Lord Mackay "Can Judges Change the Law?" (1988) 73 *Proceedings of the British Academy* 285, and Anthony Lester QC, "English Judges as Law Makers" [1993] P.L. 269, 287.
42. Sir Richard Buxton, "How the Common Law Gets Made: Hedley Byrne and other Cautionary Tales" (2009) 125 *Law Quarterly Review* 60.
43. A reason for valuing highly the contribution that can be made by academics in analysing the impact of decisions within and across wide areas of the law.
44. Under s.3 of the Law Commissions Act 1965 the Law Commissions of England and Wales and of Scotland are to keep the law under review with a view to its systematic development and reform. Posner, *How Judges Think*, 2008, pp.211, 235, emphasises the importance of economic analysis, which he says "has helped move judges from reliance on instinct and semantics to something closer to cost-benefit

analysis”.

45. Intervention by third parties in appeals may give a wider perspective in particular cases, but intervention cannot be compelled and may still only provide a limited insight into the potential wider consequences of a particular judicial decision.
46. J. Horder, “Judges’ Uses of Moral Arguments in Interpreting Statutes” in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law -- Essays in Honour of Jim Harris* (2006), p.78.
47. Dworkin, *Law’s Empire*, 1987, p.398.
48. *Malone v Commissioner of Police for the Metropolis* [1979] Ch. 344 Ch D at 372; later endorsed by Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 A.C. 406.
49. Hart, *The Concept of Law*, 1994, p.272.
50. Sunstein, *Legal Reasoning and Political Conflict*, 1996, pp.178-179; Cass R. Sunstein, *One Case at a Time -- Judicial Minimalism in the Supreme Court* (1999).
51. *Southern Pacific Co v Jensen* 244 U.S. 205, 221 (1917).
52. Dworkin, *Law’s Empire*, 1986, p.239.
53. Dworkin, *Law’s Empire*, 1986, pp.255-257.
54. Dworkin thought that “in most hard cases there are right answers”: Dworkin, *Law’s Empire*, 1986, Preface, p.ix. This may be correct, but it would be difficult to know whether the correct result has been achieved in the absence of consensus and the passage of time; and his statement would seem to underplay the possibility in such cases of different results being the appropriate, or most appropriate, one from the perspective of different personal, but legitimate, outlooks.
55. Simmonds, *Law as a Moral Idea*, 2007, pp.100, 119, 141.
56. Simmonds, *Law as a Moral Idea*. 2007, p.189.
57. Sunstein, *Legal Reasoning and Political Conflict*, 1996, p.193.
58. Dworkin, Maccabean Lecture 1978 “Political Judges and the Rule of Law” (1980) 64 *Proceedings of the British Academy* 259.
59. Fuller, *The Morality of Law*, 1969, pp.162-163. Simmonds argues that, to the extent that Fuller’s eight “desiderata” are complied with, citizens will enjoy domains of optional conduct within which they enjoy some degree of protection against the forcible interference of other citizens; what he calls “domains of liberty”: N. Simmonds, *Central Issues in Jurisprudence*, 3rd edn (2008), pp.264, 265, 273. Evan Fox-Decent also argues that each of the principles of the internal morality of law can be justified and explained as prerequisites to the legal subject’s exercise of her agency within legal order: “If a lawgiver infringes on the principles of the internal morality, she infringes on the dignity inherent to the person conceived of as a free and self-determining agent susceptible to legal justice.” See E. Fox-Decent, “Is the Rule of Law Really Indifferent to Human Rights?” (2008) 27(6) *Law and Philosophy* 533, 558.
60. *Ghaidan* [2004] UKHL 30; [2004] 2 A.C. 557 at [132]. See also R. Dworkin, *Life’s Dominion* (1993), p.123.
61. Cited by Justice Michael Kirby in *Judicial Activism* (2004).
62. *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534 HL 551 (Lord Keith of Kinkel) cited by Lord Hoffmann in “Bentham and Human Rights” (2001) 54 *Current Legal Problems* 61, 70.
63. Lord Radcliffe, *The Law and its Compass* (Rosenthal Lectures, 1960), pp.12 et seq.
64. *Bowman v Secular Society Ltd* [1917] A.C. 406 HL.
65. Lord Radcliffe, *The Law and its Compass*, 1960, pp.65, 80.
66. J.M. Finnis, Maccabean Lecture 1985, “A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence” (1986) 71 *Proceedings of*

the British Academy 303.

67. Lord Bingham considers that the rule of law means that the law must afford adequate protection of fundamental human rights: Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67, 75. Tom Bingham, *The Rule of Law* (2010) p.67. See also Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 27(6) *Law and Philosophy* 533.
68. By the right to issue certificates of incompatibility under s.4 of the HRA, leading to a right under s.10 to change the law through subordinate legislation.
69. *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70 HL.
70. Kirby, *Judicial Activism*, 2004, p.84.
71. Another example might be the law, practice and procedure for validating the termination of life support treatment for someone in a persistent vegetative state: *Airedale NHS Trust v Bland* [1993] A.C. 789 HL.
72. *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432.
73. *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 at [47] and [48] (Baroness Hale).
74. Lester, "English Judges as Law Makers" [1993] P.L. 269, 278.
75. Lord Woolf, *The Pursuit of Justice*, 2008, p.70. In 1980 there were 525 public law applications to the court; in 1991 2,089, a fourfold increase; and by 1994 there had been an increase of almost a further 50%: Lord Woolf, *The Pursuit of Justice*, 2008, p.73. In 2008 the Administrative Court received 12,614 public law claims.
76. *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 at [27] (Simon Brown L.J.); Dame Mary Arden, "The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament" (2008) 67(3) *Cambridge Law Journal* 487. She describes how the effect of the HRA has been to move from an agency model of statutory interpretation, under which the judge interprets the written language to fulfil as faithfully as possible the will of Parliament, to a dynamic model, under which the judge is looking at the wording critically to consider whether it complies with the Convention.
77. *R. v DPP Ex p. Kebilene* [2000] 2 A.C. 326 HL; *International Transport Roth* [2002] EWCA Civ 158, [2003] Q.B. 728, esp. [81]-[87] (Laws L.J.); *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167. Jeffrey Jowell has said that "the most difficult question for the courts in the interpretation of the [HRA] is the extent to which they should defer to Parliament and the other institutions of government on matters relating to the public interest" in "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] P.L. 592 (in which he analyses the different approaches of the Law Lords in *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 A.C. 185).
78. *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153.
79. Lord Steyn, "Deference: a Tangled Story" [2005] P.L. 346. In the article he sets out his disagreement with Lord Hoffmann's approach in important respects, and comments on Lord Hoffmann's lecture "The COMBAR Lecture 2001: Separation of Powers" (2002) 7(3) *Judicial Review* 137.
80. *ProLife Alliance* [2003] UKHL 23; [2004] 1 A.C. 185 at 212 [75]-[76] (Lord Hoffmann), [136]-[138] (Lord Walker).
81. Lord Woolf, *The Pursuit of Justice*, 2008, pp.83-84. Compare *R. (Jackson) v Attorney General* [2006] 1 A.C. 262 [102], [104] (Lord Steyn).
82. "The judiciary is as much a part of the organs of a democratic government as are the other branches": Kirby, *Judicial Activism*, 2004, p.76. See also Sir John Laws, "Who Shall be Master?" *Clifford Chance Essex University Lecture*, February 2006, esp. at paras 31 and 38.
83. Barak, *Judicial Discretion*, 1987, p.120.
84. "Judicial discretion reaches its peak when the judge strikes a balance between competing principles, according to their weight and their strength at the point of confrontation": Barak, *Judicial Discretion*, 1987, p.72.
85. Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), p.12; Posner, *How Judges Think*, 2008, pp.8 et seq. In *Political Liberalism* (2005), pp.54-58 John Rawls, discussing the idea of reasonable disagreement, attempts to identify the sources of disagreement between reasonable persons, which he calls "the burdens of judgment". One source is that: "To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ".

86. Cardozo, *The Nature of the Judicial Process*, 1921, p.112. In his Atkin Lecture, "On Never Doing Anything for the First Time", November 16, 2001, Sedley L.J. referred to Lord Atkin's statement that finality is a good thing, but justice is better, and observed: "The two positions are locked for ever in an arm-wrestling bout which neither possesses the strength to win outright. What one sees in the daily life of the law is their constant lurching to and fro."
87. *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752.
88. *Yeoman's Row* [2008] UKHL 55; [2008] 1 W.L.R. 1752 esp. [17] and [18] (Lord Scott).
89. J. Horder, "Judges' Uses of Moral Arguments in Interpreting Statutes" in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law -- Essays in Honour of Jim Harris* (2006), p.77.
90. *R. v K* [2001] UKHL 41; [2002] 1 A.C. 462.
91. *Shaw v DPP* [1962] A.C. 220 HL.
92. *Shaw* [1962] A.C. 220 at 267.
93. *Shaw* [1962] A.C. 220 at 268.
94. *R. v Kneller (Publishing, Printing and Promotions) Ltd* [1973] A.C. 435 HL.
95. *R. v Brown* [1994] 1 A.C. 212 HL.
96. *R. v Brown* [1994] 1 A.C. 212 at 273D-E, 274F, 281ü-282A, 282F-283A.
97. Barak describes such a judge as "a judge who chooses, from the group of possibilities open to him, the possibility that changes the existing law more than any other possibility": *Judicial Discretion*, 1987, p.148.
98. e.g. the US, Canada, Australia, New Zealand and the UK.
99. e.g. Ireland, South Africa and India.
100. Sedley L.J., commenting extra-judicially, has observed that there is no point, in academic discourse, in distinguishing between "activist" and "non-activist" judges: the only differentiation is between a judge who is awake and one who is asleep: The Foundation for Law Justice and Society Workshop (June 25-27, 2006).
101. Lord Bingham, 2005 Maccabean Lecture, "The Judges: Active or Passive" (2006) 139 *Proceedings of the British Academy* 55.
102. H. Genn, Hamlyn Lectures 2008, Lecture 3, December 4, 2008, "Judges and Civil Justice". H. Genn, *Judging Civil Justice*, (Cambridge: Cambridge University Press, 2010) pp.136-137.
103. Genn, "Judges and Civil Justice", Hamlyn Lectures 2008. Genn, *Judging Civil Justice* (2010) p.152.
104. Genn, "Judges and Civil Justice", Hamlyn Lectures 2008. Genn, *Judging Civil Justice* (2010) p.153.
105. J.C. Turner, *Social Influence* (1991) esp. Ch.6; R. Brown, *Group Processes, Dynamics within and between Groups* (2000), esp. Chs 1 and 4.
106. Turner, *Social Influence*, 1991, esp. Ch.3; Brown, *Group Processes, Dynamics within and between Groups*, 2000, esp. Ch.5.
107. I.L. Janis, *Victims of Groupthink* (1972); I.L. Janis, *Groupthink* (1982).
108. Turner, *Social Influence*, 1991, Ch.4; Brown, *Group Processes, Dynamics within and between Groups*, 2000, Ch.4.
109. Cases before lay magistrates, appeals from magistrates, and cases in the Divisional Court are all heard by panels of judges.

110. T.G. Walker and E. Main, "Choice Shifts in Political Decisionmaking: Federal Judges and Civil Liberty Cases" (1973) 3 *Journal of Applied Social Psychology* 1, 39.
111. C.R. Sunstein, D. Schkade, L.M. Ellman and A. Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006). The investigation was often limited to a recent time period, sometimes from 1995 to 2004, although occasionally longer when necessary to produce a sufficient number of cases in a particular category: p.75.
112. Sunstein, Schkade, Ellman and Sawicki, *Are Judges Political?*, 2006, pp.135, 136.
113. The "norm" here is a reference to the life experience of middle-class, white, heterosexual men, whose entire pre-judicial career has been as barristers in private practice, and who currently comprise the overwhelming majority of the judiciary.
114. Similar views were expressed by the Rt Hon. Beverley McLachlin, Chief Justice of Canada, quoted by Baroness Hale in the John Maurice Kelly Memorial Lecture, "Law Maker or Law Reformer: What is a Law Lady for?" (University College Dublin Faculty of Law, 2005); and by Baroness Hale herself in "A Minority Opinion" (2008) 154 *Proceedings of the British Academy* 319. As she said there: "It becomes harder to give voice to sexist or racist views if there is a woman or a minority ethnic judge around the lunch table, no longer a servant but an equal. Better still, perhaps, if they are voiced and can then be challenged." In Posner's words "The heterogeneity of the judiciary encourages a proliferation of varied insights and retards group polarisation, and at the same time anchors law more firmly in durable public opinion": *How Judges Think*, 2008, p.255.
115. Cardozo, *The Nature of the Judicial Process*, 1921, p.175. Richard Posner discusses "dissent aversion" (the phenomenon of the inclination of judges not to dissent from other members of the panel for a variety of reasons) in *How Judges Think* (2008), pp.32-33. See also above fn.115.

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