

JUDICIAL ACTIVISM

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FORMER LORD JUSTICE OF APPEAL

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1. Judicial activism is an ambiguous phrase. It may mean lawmaking by judges. Or it may mean judicial decision-making in areas of policy. Though the distinction between these two has fuzzy edges, it is a real distinction. I think it is both inevitable and desirable that the judges should make law. But in policy areas, where they have to some extent been invited to tread by the Human Rights Act, I think the judges need to show a good deal of restraint.

STATUTES

2. Let me first explain what I mean by the statement that the judges make law. In very many cases the judicial act of interpreting statutes itself constitutes law-making; and so, of course, does the autonomous development of the common law. I will concentrate on the interpretation of statutes. The act of interpretation often (not always: sometimes it is mechanical) makes law. This is a necessary and unavoidable truth in a system where the law is not *dirigiste*, consisting in the unquestioned dictates of an unquestioned sovereign. The judges mediate Parliament’s legislation so that, so far as possible, it conforms to civilized constitutional principles whose guardians are the courts. Consider the following.

FILLING IN GAPS

3. The case of *Omychund v Barker*¹ in 1744 concerned a question whether the testimony of a witness who refused to swear a Christian oath could be received in English proceedings. Witnesses appearing before Commissioners in India would only swear in the manner of their “Gentoo” (Hindu) religion, which was to touch the foot of a Brahmin priest with their hand. William Murray (later Lord Mansfield: at this time Solicitor General, but representing a private party in the proceedings) submitted that in the absence of precedent “the only question is whether upon principles of reason, justice, and convenience, this witness ought to be admitted”. Then he said this:

¹ (1744) 26 Eng Rep 14. I owe this reference to Poser’s excellent biography *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen’s University Press 2013), p. 99.

“All occasions do not arise at once; now a particular species of *Indians* appears; hereafter another species of *Indians* may arise; a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”

4. Now compare this very different text:

“92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice... However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances...”

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain... The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States”...

This is, of course, a much more recent text; it comes from the judgment in 2014 of the Grand Chamber of the European Court of Human Rights in the case of *Del Rio Prada v Spain*². It is couched in the baleful prose of European translations; but the Strasbourg court in 2014 and William Murray 270 years earlier (leave aside for the moment his claim for the superiority of the common law) are making the same point.

5. Legislation typically addresses broad positions; it cannot usually prescribe with exactitude the limits of its own application in every case; so the courts have to decide how the legislation is to be applied. The added insight of Lord Mansfield in *Omychund*'s case was to recognize that this process is not merely interpretive, but evaluative. It is a creative process. It makes law.
6. We should regard this fact as entirely unsurprising. Consider these familiar truths. (1) The common law has long held that criminal statutes must be interpreted strictly. (2) The same used to be true of taxing statutes, but that, perhaps, is less clear nowadays. (3) The courts lean against retrospective applications. All of these are normative, not merely descriptive, positions; but they are part of the warp and weave of statutory construction. They, and other nostrums of statutory interpretation, are the creatures, not of any rule laid down by Parliament, but of successive judges' perception of what may reasonably be called foundational principles of the constitution, about which I will have more to say. The rigour applied to criminal statutes springs from the principle that the State must prove criminal guilt strictly, according to the letter. The rigour

² (2014) 58 EHRR 37.

that used to be applied to taxing statutes sprang from the principle, as it was then perceived, that private property likewise deserved strict protection from the incursions of the State. If tax law now favours the Revenue more, it is because of a shift in the principle: the good citizen should be ready to pay his tax according to the spirit, as well as the letter, of the law: so taxing statutes may be interpreted more purposively. The rule against retrospectivity springs from the principle that the citizen should know what law applies to what he does. Between them these principles exemplify more general principles of the constitution: foundational principles: freedom, fairness, reason, legal certainty. These are in the keeping of the judges.

7. Many other examples may no doubt be found. My point is that in the act of construing statutes, the judges very often develop, refine and apply such constitutional principles; and in doing so, they make law. To the extent that the words of the Act do not dictate its interpretation – “a statute very seldom can take in all cases” – it is necessarily so. Interpretation is supposedly the servant of Parliament’s will. But it is an autonomous creative process.

NOT ONLY FILLING IN GAPS

8. This autonomous creative process does not, however, arise merely from the circumstance that “a statute very seldom can take in all cases”, as William Murray put it. It is not just a matter of filling in gaps which the legislature would itself have filled if the legislators had thought about it. The translation of words on a page into what should be done or not done is of its nature an autonomous creative process. Words on a page only come to life when they are interpreted; and more often than not there is more than one possible interpretation. Not because there are gaps; but because that is in the nature of language, especially a language as rich as English. Consider these lines from TS Eliot’s *Burnt Norton*:

“Words strain,
Crack and sometimes break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still.”

Or this utterance by the *guru* of linguistics, Professor Noam Chomsky:

“Language is a process of free creation; its laws and principles are fixed, but the manner in which the principles of generation are used is free and infinitely varied. Even the interpretation and use of words involves a process of free creation.”

Or this rather more mysterious passage from Plato’s dialogue, the *Phaedrus*, where Socrates says:

“Writing, Phaedrus, has this strange quality, and is very like painting; for the creatures of painting stand like living beings, but if one asks them a question, they preserve a solemn silence. And so it is with written

words; you might think they spoke as if they had intelligence, but if you question them, wishing to know about their sayings, they always say only one and the same thing. And every word, when it is written, is bandied about, alike among those who understand and those who have no interest in it, and it knows not to whom to speak or not to speak; when ill-treated or unjustly reviled it always needs its father to help it; for it has no power to protect or help itself.”³

9. Here is what these insights tell us. Time and again there will be a choice how a text is to be interpreted – how it is to be given life: how its words are to have effect in the world. And time and again the choice will not be concluded by the language of the text. When it comes to Acts of Parliament the choice will be concluded (nearly always) within the constraints of the text, but often also by the interpreter’s view of what it should be taken to mean in light of basic principles of the common law: in light of the constitution’s foundational principles. The very subject-matter of the constitution is the relation between citizen and citizen, and between citizen and State; the very purpose of Acts of Parliament is to regulate what is and is not required, forbidden, or allowed, to the citizen or to the State; so time and again Acts of Parliament will touch our constitutional fundamentals; and whenever that is so, the judicial act of statutory construction – the interpretive choice – makes law, because it insists that the statute complies with the applicable constitutional principle, and such principles are themselves evolving.

THE WILL OF PARLIAMENT

10. But even if the judges make law when construing statutes, is it plausible to suggest that in doing so they are merely drawing implications from the statutory language – and therefore doing no more nor less than fulfilling the will of the legislature?
11. It is beyond doubt that in constitutional cases just as in others, time and again judges claim that the exercise of interpretation involves no more than the ascertainment of the intention of Parliament; and there are undoubtedly cases where the judges indeed draw inferences from the statutory language, just as they draw inferences from the language of contracts. Is that, in reality, the whole story? Is the creativity of the judges in shaping Acts of Parliament so that they conform to the constitution’s fundamentals no more than an exercise in fulfilling Parliament’s will?
12. This question calls up an old debate – is the *ultra vires* doctrine the foundation of judicial review? The debate has consumed the energies of academic public lawyers for twenty years and more, and has spawned a considerable literature. An effective conspectus of the controversy is to be found in the essays collected in *Judicial Review and the Constitution*, published in 2000 and edited by Professor Christopher Forsyth⁴.

³ Plato, *Phaedrus*, 275d-e (tr. HN Fowler, Loeb Classical Library).

⁴ Hart Publishing.

13. I cannot traverse the whole scope of that debate in this lecture. This is not the occasion on which to enter into a full discussion of the proposition that the judicial review jurisdiction depends upon an implied grant of power by the legislature – a proposition which, for what it is worth, I regard as mythological. In any case the correctness or otherwise of that proposition is not the same question as the question whether, in the creative act of interpreting statutes, the judges are doing no more than ascertaining and giving effect to the intention of Parliament.
14. The question I suggested earlier was whether the exercise of statutory construction, even if it involves making law by the application of constitutional principles, involves no more than the assertion of implications drawn from the statutory language – no more, therefore, than fulfilling the will of the legislature.
15. I do not think so. The judges’ protection of constitutional principle cannot be reduced to an exercise in ascertaining Parliament’s will, and the cases show as much.

EXAMPLES

16. Now let me turn to some concrete instances in which the courts make law in the act of construing statutes: instances in which it is not plausible to suggest that the act of interpretation does no more than give effect to the will of the legislature. Note these examples.
17. First, the celebrated decision of the House of Lords in *Anisminic v Foreign Compensation Commission*⁵. The Commission made a determination which it had no power to make. But s.4(4) of the Foreign Compensation Act 1950 provided: “The determination by the commission of any application made to them under this Act shall not be called in question in any court of law”. And so the question arose: was it open to the court to correct the Commission’s error? It was submitted that “determination” meant a real determination and did not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity. Here is a very familiar passage from Lord Reid’s speech at 170 – 171:

“Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word ‘determination’ as including everything which purports to be a determination but which is in fact no determination at

⁵ [1969] 2 AC 147.

all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others: if that were intended it would be easy to say so...”

S.4(4) of the 1950 Act was construed to ensure that it did not prevent the court’s supervision of subordinate bodies so as to confine their acts and decisions within the proper limits of the power given to them. Most certainly this was making law through the medium of statutory interpretation. It was done, though it may not have been so obvious in 1968 when the case was decided, to protect the rule of law, which of course underpins all our constitutional fundamentals. And I do not think that nowadays we would find it necessary to use the metaphysical language of “nullity”. I will come shortly, after describing the other examples of the judges making law, to the light which *Anisminic* throws on our question, are the judges in such a case doing no more than fulfilling Parliament’s will?

18. The second case is *Witham*⁶, decided by the Divisional Court in 1997. S.130(1) of the Supreme Court Act 1981 (now the Senior Courts Act) provided:

“The Lord Chancellor may by order under this section prescribe the fees to be taken in the Supreme Court...”

The Lord Chancellor made a statutory instrument, purportedly under the authority of s.130(1), increasing certain court fees payable on the issue of civil proceedings and revoking earlier provisions which relieved litigants in person who were in receipt of income support from the obligation to pay fees. The changes made it impossible for the applicant, who had no resources and relied on income support, to bring libel proceedings as a litigant in person. There was also evidence of other persons on very low incomes who were prevented from taking proceedings. In my judgment (with which Rose LJ agreed) I said:

27. In my judgment the 1996 Order’s effect is to bar absolutely many persons from seeking justice from the courts. Mr Richards’ elegant and economical argument contains an unspoken premise. It is that the common law affords no special status whatever to the citizen’s right of access to justice. He says that the statute’s words are unambiguous, are amply wide enough to allow what has been done, and that there is no available *Wednesbury* complaint. That submission would be good in a context which does not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically - in effect by express provision - permits the executive to turn people away from the court door. That has not been done in this case.”

19. The third case is *Cooper v Wandsworth Board of Works*, decided in 1863⁷. Statute forbade the erection of a building in London without giving seven days

⁶ [1998] QB 575.

⁷ (1863) CB (NS) 180.

notice to the local board of works, on pain of having the building demolished. A builder nevertheless began to erect a house in Wandsworth without having given due notice. The board of works sent men late in the evening to demolish it. “The board did exactly what the Act said they might do in exactly the circumstances in which the Act said they might do it”⁸. But the builder’s action for damages for injury to the building succeeded. The court held that the board had no power to act without first asking him what he had to say for himself. In a well-known passage Byles J said this:

“[A] long course of decisions beginning with *Dr Bentley’s* case, and ending with some very recent cases, establish that, although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.”

Reminiscent, you may think, of William Murray in 1744: “the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament”.

20. Lastly, *R v Registrar General, ex p. Smith*⁹. In that case the court had to consider s.51(1) of the Adoption Act 1976, by which the Registrar General owed a duty to disclose to the applicant, as an adopted person, his birth certificate. But the applicant had killed two people, one of whom he had thought was his foster mother; and if he obtained the certificate he was very likely to use the information to find and kill his birth mother. The court upheld the Registrar’s refusal to disclose the certificate, reasoning that the statute was subject to an implied exception based on public policy, namely that statutory rights were not given to facilitate the commission of serious crimes.
21. These four cases are of course my selection; you could readily choose others. What should we make of them? As for *Anisminic*, I very much doubt whether anyone believes that Parliament actually intended that unlawful decisions of the Foreign Compensation Commission should be subject to what we now call judicial review for all the world as if s.4(4) of the 1950 Act did not exist. As for *Witham*, I am quite certain that there was no actual legislative intention that s.130(1) of the Supreme Court Act 1981 would not authorize the changes in court fees which the Lord Chancellor purported to make; I apprehend that the intention of the legislators, or those who thought about it, was that the Lord Chancellor should have a free hand in deciding what the court fees should be. *Cooper v Wandsworth Board of Works* (cited with approval in 1964 by Lord Reid in the landmark case of *Ridge v Baldwin*¹⁰) was, I suppose, not really a case of statutory interpretation at all. Certainly the result in *Cooper’s* case plainly involved no inferences drawn from the statute, no implications derived from the text. It is a case where “the common law [supplied] the omission of the legislature”: a case, in other words, where the court held that the statute was deficient when it came to the protection of basic fairness in the shape of the right

⁸ Wade & Forsyth, *Administrative Law* (9th edn) p. 480.

⁹ [1991] 2 QB 393.

¹⁰ [1964] AC 40.

to be heard. As for *R v Registrar General ex p. Smith*, no doubt Parliament would have excluded a right of access to the birth certificate of someone as dangerous as the applicant had the legislators thought about it; but presumably they did not.

22. In every one of these authorities the courts were concerned with the protection of constitutional fundamentals, and in none of them were the courts in truth giving effect to a legislative intention.
23. I acknowledge of course that there are very many cases, no doubt the majority, where the words of the statute clearly dictate the result, notwithstanding the fact that as William Murray said “a statute very seldom can take in all cases”. Often no potential conflict with constitutional principle arises. Not every statute engages a constitutional question. Many statutes support and strengthen the principles of the constitution. And there will be cases where the words do not conclude the meaning, and the judges are left to find it, but constitutional questions do not enter into the exercise. Statutes are of course drafted with meticulous care to achieve a particular result – usually at least: sometimes they are drafted with the specific intention that the judges should resolve difficult questions of interpretation. Where the judges are left to find the statute’s meaning but there is, so to speak, no constitutional overlay, they will straightforwardly seek to ascertain the legislation’s purpose and interpret the Act accordingly.
24. But where an Act of Parliament touches a constitutional fundamental, then as I have said the judicial act of statutory construction makes law, because it insists that the statute complies with the applicable constitutional principle. And it seems to me artificial – and in the end simply untrue – that in fulfilling this duty the judges are giving effect to the will of Parliament. That is not what happens in reality, as I think the cases demonstrate. I see not the slightest point in pretending that the reality is other than it is; indeed it seems to me bizarre that the courts’ duty to protect constitutional fundamentals should be covered with a fig-leaf, even so apparently respectable a fig-leaf as the intention of the democratically elected Parliament.
25. Statutory interpretation, then, is very often value-laden. It is driven by general principles of the constitution and is a means by which the judges develop, refine and apply those very principles. The old rubric that Parliament makes the law and the judges apply it is misleading and unhelpful.

COMMON LAW CASES

26. We must also recognize that the courts embark on the same exercise, the development and protection of constitutional principles, whether they are engaged in the task of statutory interpretation or the administration of self-standing issues of the common law. As for the common law, it must be plain that the development of such principles pervades our public law: *Wednesbury*, proportionality, legitimate expectation – all these give effect to a philosophy of the State which is rooted in reason, fairness, the presumption of liberty, legal certainty. The same philosophy characterizes our criminal law: fair trial and

proportionate punishment. In the law of tort Lord Atkin's famous question – who then is my neighbour? – possesses so great a power because it invites a balance to be struck, a balance given concrete form by the reach of the duty to take reasonable care. Much of the law of contract also involves a balance, between freedom and fairness. These balances in our private law themselves invoke constitutional principle, in these cases between citizen and citizen, rather than citizen and State. I think that the constitutional principle is that the rights and freedoms which the law guarantees are essentially the same for every citizen; and therefore, when such rights are in conflict between one citizen and another, the law has to strike the kind of balances which the law of contract and tort prescribe.

27. So I suggest that in considering the question whether the judges should make law, or what law do they make or should they make, the distinction between their duty to interpret statutes and their duty to develop and apply the substantive common law is nothing but a distraction; as unhelpful and misleading as the traditional view that Parliament makes the law and the judges interpret it.

THE TRADITIONAL VIEW

28. But that, of course, is indeed the traditional view: Parliament makes the law and the judges interpret it. The first chapter of Lord Devlin's book *The Judge*¹¹, is headed *The Judge as Lawmaker*: it is a reprint of a lecture first published in 1976. This passage marks a striking contrast with what I have been saying:

“Judges, I have accepted, have a responsibility for the common law, but in my opinion they have none for statute law; their duty is simply to interpret and apply it and not to obstruct. I remain unconvinced that there is anything basically wrong with the rule of construction that words in a statute should be given their natural and ordinary meaning. The rule does not insist on a literal interpretation or require the construction of a statute without regard to its manifest purpose. There should be, as Lord Diplock has said¹², ‘a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them’. But in the end the words must be taken to mean what they say and not what their interpreter would like them to say; the statute is the master and not the servant of the judgment.”

29. Lord Devlin was a great judge. However this view of statutory interpretation is impoverished. It allows no place for the judges' insistence on constitutional principle. But since 1976, when Lord Devlin was writing, the common law has begun to give express recognition to the legal category of constitutional principle; and the process has been compounded by the Human Rights Act. Once there were dangers in judicial conservatism, timidity even: but now there are dangers in judicial activism. My views about judicial creativity in the

¹¹ OUP, 1979.

¹² *R v National Insurance Commissioners* [1972] AC 914 at 1005.

interpretation of statutes are only credible to the extent that we recognize the dangers that may be associated with it.

JUDICIAL RESTRAINT

30. Now I will turn to judicial decision-making in areas of policy, where, as I said at the beginning, I think the judges need to show a good deal of restraint. The danger is that the judges may step too far, or be thought to step too far, onto territory that properly belongs to the elected arms of government. In considerable measure the danger has been foisted on the judges by the Human Rights Act 1998. The statutory incorporation of the ECHR, with its catalogue of rights expressed in very general terms, has amounted to an invitation – no, a requirement – that the judges decide issues which for all the world look very much like political questions for politicians to decide, and about which reasonable and informed people might readily disagree. Claims based on the right to respect for private and family life, guaranteed by ECHR Article 8, are the most notorious instance. An acute kind of case is that of the foreign criminal who has married a British citizen and has a child or children born here. He commits a serious crime; he has no established right to remain here; the Secretary of State decides to remove him to his home State; he pleads Article 8. Which should prevail – the public interest in removing him or his private right to family life?
31. It is hardly a question of law. It is really a question of policy. In some cases, of course, the merits are so far on one side of the argument or the other that the decision is quite straightforward. But very often that will not be so. The government has made strenuous efforts – by obtaining fresh legislation from Parliament, and by making new Immigration Rules – to see that (broadly at least) its view of such cases prevails. But like it or not, the judges have been drawn into these controversies by the human rights jurisdiction.
32. Too muscular a vindication of such human rights claims seems to expose the judges to the complaint that they are making political decisions. The response that they are doing no more than their duty under the Human Rights Act is not entirely convincing: it does not answer the question, how much weight should the judges give to the public interest?
33. Now, I think it is very important to understand that the duty of the judges, under the Human Rights Act, to referee these passages of arms between private right and public interest is a different kind of duty from their natural and proper obligation to protect constitutional fundamentals; and there is a danger of confusion between these two quite different duties. Consider: what in truth *is* the constitutional fundamental involved in this conflict between public interest and private right? It is, surely, the very insistence by our law that both have objective value and there is a balance to be struck between them. If the public interest is denied, the freedom and security of the many is sacrificed to the interests of the few. If the private right is denied, the door is open to oppressive and capricious conduct by the State.

34. So the relevant constitutional fundamental in this context, in a society which is to deliver both freedom and security to its citizens, is that a balance has to be kept between these interests, public and private. The judges as guardians of constitutional principle owe a duty to see that the balance is respected. That must involve ensuring that the competing interests are properly considered by the primary decision-maker. This is a duty which the common law requires of the judges, quite aside from the Human Rights Act. But it is one thing for the court to insist that the constitutional fundamental which this essential balance represents be kept and respected. It is quite another to require the court to strike the balance *itself*.
35. I think this distinction needs emphasis. My claim that the judges are the guardians of constitutional principle, and that in construing statutes which touch the constitution they make law by insisting on the vindication of constitutional principle, is no affront to democratic sensitivity. On the contrary: the democracy can surely thrive only in a legal *milieu* in which reason, fairness, freedom and legal certainty are axioms: they are the very premises upon which democracy is constructed. But within limits imposed by these axioms it is the primary responsibility of the elected arms of the State to decide how our constitutional balances should be struck. To the extent that the courts strike it themselves, they are invitees on a territory that is not their own. Parliament can, of course, issue such invitations as it pleases.
36. If I am right that the judges do and must make law when construing statutes, and that they do it and must do it for the vindication of constitutional principle, there is inevitably the question: where is the proper boundary between judicial and political power? Is not the legislature also responsible for constitutional principle? In our uncodified constitution, the question offers no single answer. The legislature may of course effect constitutional innovations, as in recent years it has in enacting the European Communities Act, the devolution legislation, and the Human Rights Act. But elected government is buffeted by the rancour and asperity of party politics and the dictates of populism: so that elected governments will always struggle – sometimes they will not even try – to confine their legislative endeavours within the disciplines of constitutional principle. Democracy is our best guarantee against arbitrary and capricious government; constitutional principle is our best guarantee against democracy's own occasional aspirations to arbitrary and capricious rule. Constitutional principle is in the keeping of the judges; they are protected from overweening aspirations of their own, not by any inherent wisdom – for certain, they have no more of that than anyone else – but by the method of the common law, matured over centuries: the balance between precedent and innovation, the gradual construction of principle case by case: in short, the continuous process of self-correction.
37. The legislature is by nature given to experiment. The common law is by nature given to conservation. Judges do, and must, make law; but they do it, not by re-inventing the wheel, but only by making new lamps from old.