# Jaguars and Donkeys: Distinguishing Judgment and Discretion Part I

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## Introduction

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

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

Whether the task, in relation to a particular enactment, is to arrive at a judgment or exercise a discretion the operation can be accomplished only by taking a decision, so what we are talking about here is an aspect of the rules of decision-taking.[1] Nowadays these rules are often worked out and applied in judicial review proceedings, but that must not confuse us. They do not essentially belong to judicial review. To think so is to confuse procedure with substance; these rules of decision-taking are substantial not procedural.

If a decision which requires judgment or discretion is not taken correctly, it can be challenged and perhaps quashed. This can happen if the decision-taker has mistaken a jaguar for a donkey, or vice versa. It can also happen if, because the relevant enactment is not clearly evaluated or the difference is not fully understood, the decision-taker confuses the

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

characteristics of the two beasts. Such confusion may earlier have been experienced by the drafter of the enactment in question.

At one extreme, where the decision is to be taken in exercise of a fully open *discretion*, that is one which is completely unfettered, we have a situation akin to that of the Cadi sitting beneath a palm tree and pronouncing his own individual notions of justice.[2] At the other extreme, where the decision is to be taken in exercise of a duty to arrive at a *judgment*, there is no room whatever for individual choice (even though different decision-takers may legitimately arrive at different outcomes). Discretion is free, except for limitations placed upon it (expressly or impliedly) by the defining formula. Judgment is necessarily confined, because its sole purpose is to arrive at a conclusion of fact or law which accurately reflects reality. Discretion necessarily (by its nature) offers choice; judgment registers a functionary's assessment of a situation offering no choice. Discretion analytically offers a variety of outcomes; judgment but one.

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

**The nature of judgment**

An example of judgment arises when the judge assesses rival testimonies to arrive at a finding of fact: "confronted with two conflicting stories and little else, he has to base his decision, mainly if not entirely, on his impression of the witnesses".[3] A more complex example of judgment is the process of arriving at the legal meaning of a doubtful enactment in its application to given facts. To this conundrum there is only one right answer. However arriving at that answer may involve several decisions. One or more acts of judgment may be required in deciding what the relevant facts are. Other acts of judgment may be needed when it comes to examining and assessing the wording of the enactment in question. Both aspects are present when we seek to identify the factual outline and the legal thrust. However the point to grasp is that none of the judgments that are required to be made offer any looseness of outcome or scope for variation. True, different persons may reach different views on what the outcome is - but that is a distraction. It helps to avoid that distraction if for the purpose of analysis we assume that only one decision taker is involved.

The function of judgment is to assess a situation which requires a definitive answer. Here certain criteria are stated or implied to determine the choice of result. These are inflexible, notionally demanding one answer, and one only. For example in a given situation the criterion of "justice" calls for a single verdict. Justice is an absolute, and when you apply an absolute to a conundrum there can in theory be only one result. If people arrive at different results it must be due to human fallibility or variability. That echoes Ronald Dworkin's view (unpopular in many academic quarters) that even on a difficult question of law there is but one correct answer. "No aspect of law as integrity has been so misunderstood", Dworkin says, "as its refusal to accept the popular view that there are no uniquely right answers in hard cases at law."[4]

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

[3] Lord Devlin, *The Judge* (Oxford, 1979) p. 3.

[4] *Law's Empire* (1986), p. 266.

An example of what this means, and of how difficult it can be to get it right, is furnished by the famous House of Lords decision in ***Pepper (Inspector of Taxes) v. Hart***.[5] In that case the question was what was a "proper proportion" of certain expenses. The relevant decision was to be taken initially by a tax inspector, but the taxpayer had rights of appeal. This was essentially a simple question of judgment on the facts of the individual case, but the Appellate Committee decided, mistakenly in my view, that the phrase "a proper proportion" was ambiguous and that the ambiguity should be settled by referring to Hansard to find out how Ministers had said the phrase was intended to be construed. The matter is dealt with at length in my article "How they all got it wrong in ***Pepper v Hart***".[6] In the article I got it wrong myself by saying that deciding on "a proper proportion" was a matter of judgment or discretion. I now realise it is emphatically a question of judgment, and that discretion does not come into it.

**Broad terms**

The effecting of judgment, or judgment-forming, means one must relate the particular facts to the abstract concept in question, often expressed as a broad term (such as "a proper proportion"). In this sense, concerned with formal logic, the OED defines judgment as the action of mentally apprehending the relation between two objects of thought.[7] Whately said "[j]udgement is the comparing together in the mind two of the notions or ideas which are the objects of apprehension".[8] For various reasons, legislative drafters are forced to strive for brevity. Broad terms assist in this. By use of a word or phrase of wide meaning, legislative power is delegated to the interpreters whose function is to work out the detailed effect. Doubt is thereby necessarily created. Until the details lurking within the broad term are authoritatively worked out, it must be doubtful what they are. The statute reader has to use his own judgment, though it will be a judgment of what considerations a court would deploy if the point were litigated.

A broad term may consist either of a single word or a phrase. In its judgment the court may decide not to apply it to its full extent, so Scott J said of the phrase "pending land action" in the Land Charges Act 1972 s. 17(1) "those words are very broad and cannot be given their full literal meaning".[9] A broad term may perform the function of a verb, adverb, adjective or substantive. If a substantive, it is what was described in an early case as a ***nomen generale***.[10] Other descriptions include "open-ended expression"[11], "word of the most loose and flexible description"[12], and "somewhat comprehensive and somewhat indeterminate term".[13]

The drafter selects a broad term which is either a processed term or an unprocessed term. Either way it is likely to have a core of certain meaning and a penumbra of uncertainty. It may be mobile or static. Its meaning will be coloured by the context, and the legislative purpose. An implied intention that an unqualified broad term shall be construed as if a narrowing provision had accompanied it will not found where the absence of such a provision is explicable only on the ground that it was not intended. Thus the House of Lords declined to treat the term "accommodation" in the Housing (Homeless Persons) Act 1977 ss. 1 and 4 as qualified by an implied epithet such as "appropriate" or "reasonable". If Parliament had

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

intended such a narrowing of its meaning it would surely have said so.[14] (In fact however, Parliament often does not "say so", but leaves it to implication.)

When drafters decide to attain brevity by using a broad term, they look for one which has been processed. If the courts have already worked out the meaning of a term, and that meaning corresponds with the drafter's intention, the term is suitable for adoption. Then, instead of there being uncertainty about whether subsequent interpreters will adopt the legal meaning desired, the drafter may feel reasonably sure that the established meaning will be followed in the case of his or her own draft. Usually, the processed term will be one used in previous legislation. Only rarely will a term whose meaning has been worked out solely at common law present itself as suitable for adoption by the legislature. The drafter of A. P. Herbert's Divorce Act, the Matrimonial Causes Act 1937, used a processed verb when he expressed as a ground of divorce that the respondent "has deserted the petitioner without cause" for three years. The verb "deserted", used by itself, is a typical broad term. There are many different acts which might be held to fall within it. One is a simple refusal of sexual intercourse. But it had been held that such refusal did not constitute "desertion" within the meaning of an earlier Act.[15] When the point was raised under the 1937 Act Tucker L.J took the same line: "I think the Legislature in. . . refraining from defining desertion must be taken as accepting the tests which had hitherto been applied in the courts . . ."[16]

Where they differ, doubt may arise whether use of a processed term in a new Act brings in the processed meaning or the ordinary (dictionary) meaning. Often there is no significant difference. Where there is a difference, the point may turn on whether the new Act is in pari materia with the earlier Acts in which the term appeared. The rule was thus laid down by Lord Buckmaster: "It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase *in a similar context* must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it".[17] Here two points should be noted. First, it is not the practice of drafters (who tend to be over-cautious) to attract processing expressly by saying in the new Act that the term has the same (undefined but processed) meaning as in the previous Act. This renders unrealistic the remark by Lord Simon of Glaisdale that "[i]f Parliament wishes to endorse the previous interpretation it can do so in terms".[18] Second, the courts will be reluctant to attach previous processing to the term in its new use if they think that processing was defective.[19] While the borrowing by the drafter of a term already processed may be convenient, it can give rise to a conceptual difficulty. A word or phrase used in an Act is to be construed in accordance with the purpose of that Act. Decisions on its meaning may be misleading if it is borrowed for another Act with a different purpose.[20]

Doubt arises from the drafter's use of a broad term only where its meaning is to some extent uncertain. There are terms which are broad in the sense that they cover many different cases, but whose meaning is certain in virtually every case: for example "mammal" or "moving". It is anyway unlikely that the application of a statutory broad term will be doubtful in *every* case. Selection by the drafter of such a term would almost certainly be an error, since it would mean that the entirety of the legal rule in question was founded upon uncertainty; which does not accord with the nature of law. A modern Act whose application was uncertain in every

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

case would certainly be considered ill-drawn. It follows that what we are in practice concerned with is the broad term whose application to some cases is clear and to others doubtful. A penumbra is defined as a partial shade bordering upon a fuller or darker one; in other words a twilight. This is a good description here because we are all familiar with the difficulty caused by a phrase such as "during the hours of darkness". Midnight (except in the Arctic Circle) is clearly within this broad term, and noon equally clearly outside it. But there are periods around dawn and sunset during which it must be debatable whether darkness has ceased or fallen.

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

An unnecessarily wide penumbra betokens bad drafting. A standard example used in juristic discussions of what Hart calls the "open texture" of language is the notice reading "No vehicles allowed in the park". We can depict the uncertainty this causes by a diagram in which the inner circle depicts the core of certain meaning while the space between the circles marks the penumbra of doubt about what is allowed in the park. Outside this penumbra the meaning is once again certain - in the opposite sense. Precision can be achieved by detailed wording, but then we end up with the closely-printed park notice that nobody reads. Even the park-keeper may not read it, and so lack conviction in trying to repel the practical villains: motorists and motor cyclists. Modern legislative drafters go into as much detail as they consider practicable. For the rest, they rely on ellipsis - or select broad terms with the smallest penumbra of doubt.

Sometimes, by usage or judicial decision (or a combination of both) the width of a broad term is drastically cut down. The term "immoral purposes" is very wide. Yet as used in the Vagrancy Act 1898 s. 51(1) (reproduced in the Sexual Offences Act 1956 s. 32) it has been held by judicial processing to be doubly limited. First, it excludes all forms of immorality except sexual immorality. Second, even within that narrowed sphere, it excludes all but homosexual acts.[21]

2000.021 164 JP 316.

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