

The scope of judicial law-making in the common law tradition

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1. Judge-made law is an independent source of law in common law systems.¹ To jurists brought up in legal systems which have codified law this is one of the striking features of the common law tradition. Instead of interpreting a code to develop the law, common law judges develop the law which their predecessors have made. While statute law now impinges on many areas of private law, large tracts of our private law remain predominantly the product of judicial decisions. Today, I wish to discuss some of the areas of private law which have been and remain predominantly judge-made and the limits in the common law tradition on judicial law-making.
2. The great constitutional lawyer, A. V. Dicey, had a high opinion of judge-made law. In a lecture entitled “Judicial legislation”, which he published in 1905, Professor Dicey said:
“Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law.”²

I have three comments on his statement. First, in this talk I confine the use of the word “legislation” to parliamentary legislation and speak instead of “judicial law-making” as I would not wish to confuse the two, which perform different roles in our society. Secondly, while much legislation, both then and now, seeks to cure deficiencies in the law or put into effect the governing party’s social or economic policies, Parliament has also used statute to codify rules which judges have made in order to make them more accessible. For example, in the later nineteenth century and early twentieth century, enactments on bills of exchange, the sale of goods, partnership and marine insurance sought to codify judge-made law and, although subject to some criticism, have stood the test of time. Thirdly, as I shall seek to

¹ When I speak of common law systems I am including Scots law which is a mixed system with civilian roots and a strong common law influence.

² A V Dicey, *Lectures on the relation between Law and Public Opinion in England during the Nineteenth Century* (1905), p 362.

show, the judges' pursuit of justice has on occasion interfered with the logic and symmetry, which Dicey admired, and has damaged the coherence of the common law. But the discipline of preserving the logic and symmetry of the law is both a spur to and an important restraint on judicial law-making.

3. The law of obligations is essentially judge-made. The law of contract remains in large measure judge-made and in recent years the House of Lords and now the Supreme Court has tackled questions of interpretation,³ the implication of terms,⁴ rectification,⁵ penalty clauses⁶ and illegality⁷ unconstrained by statutory provisions. The law of tort (delict) is, with a few statutory adjuncts, also judge-made as is the law of unjustified enrichment. Thus, the boundaries of a person's involuntary obligations have been and are a matter of judicial decision-making. Judges have been responsible for determining the boundaries of the tort of negligence, including, famously, a manufacturer's liability to the ultimate consumer,⁸ and negligent misstatements,⁹ and limiting the circumstances in which there is liability in negligence for causing pure economic loss¹⁰ and where the injury suffered is psychiatric damage.¹¹ Similarly, the extent of the damage for which a negligent person is liable is determined by judge-made rules on remoteness of damage.¹² The economic torts of inducing breach of contract, interference with trade by unlawful means, and conspiracy, which set limits on the lawful infliction of economic harm by commercial competition, have been developed and reshaped by judicial decision.¹³
4. Much of the law of property, and the law of succession in England and Wales, remains the domain of the common law but statutory provision has come to predominate in family law. Today I will focus mainly on the law of obligations.

³ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900; *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173.

⁴ *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742.

⁵ *Marley v Rawlings* [2015] AC 129.

⁶ *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.

⁷ *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467.

⁸ *Donoghue v Stevenson* [1932] AC 562, 1932 SC (HL) 31.

⁹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465.

¹⁰ *Hedley Byrne* (above); *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181.

¹¹ *McLoughlin v O'Brian* [1983] 1 AC 410; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

¹² *Overseas Tankship (U.K.) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 A.C. 617.

¹³ *OBG v Allan* [2008] 1 AC 1.

5. The myth that judges discover the law rather than make law has long been recognised. Lord Nicholls, a distinguished member of the House of Lords, which was the precursor of the Supreme Court, has stated:

“The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary.”¹⁴

6. In his magisterial work, “A Historical Introduction to the Law of Obligations”, Professor David Ibbetson has mapped out the judicial development of the common law in the field of obligations from medieval times to the end of the twentieth century.¹⁵ The move from medieval law, which was structured by the forms of actions and procedural rules, to the modern common law of obligations, with its focus on substantive rules and principles, has been the result of many forces. He shows that a motor for legal change was the desire of litigants to avoid rigid procedural rules or outdated precedents by recharacterizing their claims. Another motor was the need clearly to articulate formerly ambiguous rules, following the decline of the role of the jury from the mid-18th century onwards. Legal theory, often from the civilian tradition, has exercised a profound influence. The common law has been developed through the decisions of litigants, doubtless, on some occasions in recent years, encouraged by the extra-judicial writings of senior judges which have sought to give structure to underdeveloped areas of law, such as unjust enrichment. But how far do judges respond to the blandishments of skilled advocates?
7. Lord Reid, who was a dominant figure in the House of Lords in the 1960s and 1970s, acknowledged the role of the judge as a law maker in a famous address which he presented to the Society of Teachers of Public law in 1972.¹⁶ He dismissed the idea that judges only declare the law as “a fairy tale”. He recognised that such law-making was properly constrained by the need for judges to be impartial in determining the disputes of the litigants in the particular case, by avoiding taking sides on political issues and leaving to Parliament to settle controversial issues, by the need for certainty on which people rely in settling their

¹⁴ *In re Spectrum Plus Ltd* [2005] 2 AC 680, para 32.

¹⁵ Oxford University Press, 1999.

¹⁶ *The Judge as Lawmaker*, 12 JSPTL (1972) 22.

affairs, and by observation of the doctrine of precedent. When moulding the development of the common law he advised judges to have regard to common sense, legal principle and public policy in that order. Other distinguished judges, as I will seek to show, have since addressed the constraints on judicial law-making in different ways. That is not surprising as the boundaries of such law-making are not precise. In this lecture I will set out my own views on those constraints.

8. Historically, practice and procedure have influenced the ways in which judges make law, as Professor Ibbetson has shown. In more modern times, in my view, two developments are of particular importance. They are the decline of the role of the jury and the development of a coherent system of appeals. From the mid-18th century judges took over from the jury questions such as whether a specific form of action should be used and whether, as a matter of law, the claimant was entitled to a remedy on the facts found.¹⁷ Slowly, the role of the jury was limited to decisions on the facts. Until 1854, issues of fact in common law actions had to be heard before juries.¹⁸ This had a profound effect on the appellate system. The judgment on a jury's verdict was issued by the court in *banc*. Review of the judgment of the court in *banc* was confined to cases where there was an error of law arising on the face of the record, in other words, on the ground that the judgment was not supported by the written pleadings, the issue or the jury's verdict. This could prevent dubious decisions from being challenged on substantive grounds.¹⁹ There were reforms of the appeal system in the early 1850s, but it was the statutory reforms in the 1870s,²⁰ aimed to fuse common law and equity and rationalise the hotchpotch of conflicting jurisdictions,²¹ which introduced the modern system of appeal in England and Wales. Until then, the task of a court of appeal, to give coherence and consistency in the law, was not performed with the regularity that it has been in modern times. There was a strong tendency to decide cases by looking for an analogy with already decided cases but without a strong doctrine of precedent. Lord Wright spoke of the process in a colourful simile. He said that judges proceeded

¹⁷ Ibbetson (footnote 15) ch. 6 especially pp161-162.

¹⁸ C. H. O'Halloran, *Right of review and Appeal in Civil Cases before the Judicature Acts 1875* 27 Can. B. Rev. 46 (1949).

¹⁹ J. Baker, *An Introduction to English Legal History*, (5th ed.) (2019), p 147.

²⁰ The Judicature Acts 1873 and 1875.

²¹ M D Chalmers, *The English Judicature System*, 16 AM. L. Rev. 873 (1882) p876; G Drewry, L Blom-Cooper, C Blake, *The Court of Appeal* (2007) p25.

“from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science”.²²

The Judicature Acts of 1873 and 1875 enlarged the right of appeal from courts of first instance and created a hierarchy of courts which reduced the risk of conflicting judgments. The Appellate Jurisdiction Act 1876, by creating professional Law Lords and excluding lay Lords from judicial functions, enhanced the legal authority of the final court of appeal. These developments, together with the establishment of an official series of Law Reports in 1865, hastened the arrival of a strict doctrine of precedent to which I will return.

9. In Scotland, which was my home jurisdiction before I joined the Supreme Court, there has been an appeal court in the form of the Inner House, since 1532, which was an unwieldy collective body of 15 judges. It has sat in Divisions of three or more judges since 1808. Reasons for its decisions were seldom given in any detail, and if they were, they were generally not reported. Scots reports before the nineteenth century consisted of a summary of the pleadings and the result. It is said that in about 1800, Lord Eskgrove, who was the Lord Justice Clerk (the second most senior judge in Scotland) reacted angrily when he saw a man taking notes as he delivered a judgment, protesting “the man’s taking down ma very wurds”. Until the early 19th century, judges relied on the authoritative institutional writers, such as Stair and Erskine, and the published notebooks, or “Practicks” of some judges rather than judicial precedent, although some leading cases were seen as settling certain points of law. But, as in England, the reorganisation of the Court of Session, the enhanced authority of the House of Lords and improved methods of law reporting contributed to the development of a doctrine of precedent.²³

10. Legal philosophical writing by thinkers in the Natural law tradition, such as Samuel Pufendorf, influenced English judges in the development of the law of tort in the 18th century;²⁴ and Robert-Joseph Pothier has a strong influence on the development of the law of contract in the 19th century.²⁵ The availability of reliable law reports which recorded the reasoning of appellate decisions provided the tools for the continued and systematic

²² Lord Wright, *The Study of Law* (1938) LQR 185, 186.

²³ Some writers suggest that the rules of precedent continue to be more flexible in Scots law than in English law: S Reid and J Edwards, *The Scottish Legal System* L. I. M. (2009) 9(1), 9-15.

²⁴ Ibbetson (footnote 15) p166f.

²⁵ Ibbetson (footnote 15) ch. 12, p220f. The delay in the reception in England of Pothier as a jurist may have been the result of the absence of translations of his works until the early 19th century. *Plus ca change*.

development of the common law. Those reports, the rise of the academic study of the law and the production of high-quality legal literature have encouraged the gradual identification and evolution of legal principles. I would suggest that over time, there has been a reduction in judges' reliance on inductive reasoning and an increased reliance on deductive reasoning. The great Israeli judge and jurist, Aharon Barak, has described the method of thinking of the common law as a combination of inductive reasoning and deductive reasoning²⁶ and I think that there is much truth in that analysis. But older ways of thinking leave their mark. As a lawyer trained in Scots law but now working principally in the field of English law, I detect subtle differences in the approach of lawyers from the two jurisdictions. I notice a marginally stronger tendency of lawyers from the mixed system of Scots law to go straight to a legal principle rather than build their legal submission by a historical presentation of the law, case by case. This may be because, in the early centuries of Scots law, it was the practice of lawyers to fill gaps in the law by referring to Roman law and the *Corpus Juris Civilis* of Justinian and the judges were able to rely on institutional writers²⁷ to give structure to the law. But I would not wish to overstate the difference in approach as I have no doubt that an informed outsider observing legal practice in our courts would now be struck by the similarity in legal reasoning rather than the differences.

11. The creativity in private law of outstanding judges is not a new phenomenon. In the eighteenth century, Lord Mansfield, who was Chief Justice of the Court of King's Bench for 32 years, relied on first principles, mercantile custom and borrowing from the civil law to adapt English law to the emerging commercial needs of his time. His judgments on contract, commercial law, insurance, and unjust enrichment continue to be cited in our courts. His legal creativity and his opposition to the demands of the American colonists caused some of the Founding Fathers of the United States of America to view him with great suspicion. Indeed, Thomas Jefferson advocated that the new state's common law should exclude all English judicial decisions since 1756, which was the year in which Mansfield became Chief Justice, to exclude the "sly poison" of Mansfield's innovations. Fortunately, Jefferson's view did not prevail.²⁸

²⁶ Aharon Barak, *The Judge in a Democracy* (2006) chapter 6.

²⁷ The principal institutional writers are James, Viscount Stair (1619-1695) who published his "Institutions"; John Erskine (1695-1768) who wrote the "Institutes" and George Joseph Bell (1770-1843) who wrote both "Commentaries" and "Principles".

²⁸ Norman S Poser, *Lord Mansfield, Justice in the Age of Reason* (2013), pp 396-400.

12. In the nineteenth century, common law judges continued to develop the common law. A striking example of the development of a systematic corpus of law is the law on the sale of goods, which was developed in a series of judicial decisions²⁹ before being subjected to statutory codification in 1893.
13. In the twentieth century perhaps the most striking example of judicial innovation is the development of the law of negligence. The landmark case of *Donoghue v Stevenson* in 1932³⁰ became the *fons et origo* of the modern law of negligence in the common law. The case itself was concerned with product liability and its ratio as the headnote in Appeal Cases shows was that:
- “the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.”
- But the neighbourhood principle, which Lord Atkin articulated, became the standard test for tortious or delictual liability for personal injury or damage to property.
14. From there judges have developed the law of negligence, as I have said, in the context of negligent misstatements, pure economic loss and psychiatric injury and have struggled to determine the limits of such involuntary obligations. In the United Kingdom there was a false dawn in 1978 when the House of Lords thought that there was a generalised principle of negligence based on a two stage test, namely (i) whether there was a sufficient degree of proximity between the wrongdoer and the person who suffered damage giving rise to a *prima facie* duty of care and (ii) if so, whether there were considerations which ought to negative, reduce or limit the scope of that duty or the class of persons to whom it is owed or the damages to which it may give rise.³¹ In that case, it was decided that a local authority, which had statutory powers to inspect the foundations of buildings, might owe a duty of care in private law to the purchaser or assignee of a lease of a defective building. The decision was

²⁹ *Nichol v Godts* (1854) 10 Ex. 191, *Jones v Just* (1867-68) L.R. 3 Q.B. 197, *Mody v Gregson* (1868-69) L.R. 4 Ex. 49 and *Drummond & Sons v Van Ingen & Co* (1887) 12 App. Cas 284.

³⁰ [1932] AC 562, 1932 SC (HL) 31.

³¹ *Anns v Merton London Borough Council* [1978] AC 728, 751 per Lord Wilberforce.

reversed by the House of Lords in 1991.³² And the two stage approach has been departed from in favour of a more pragmatic incremental assessment of the boundaries of tortious liability which relies on drawing analogies from established case law.³³ In the United Kingdom, the courts having established a core principle as the basis for liability in negligence, have reverted to the caution of Lord Wright's ancient Mediterranean mariner in identifying the boundaries of the tort or delict. By contrast, in Canada the Supreme Court has embraced the two-stage test and, in applying the second stage test, has relied on its own analysis of policy and the social and economic implications of its decisions in setting those boundaries.³⁴

15. Other examples of judicial development in the law of obligations include the extension of the doctrine of vicarious liability, in which a doctrine which imposed no fault liability on an employer has been extended to institutions such as the prison service which was held vicariously liable for the negligence of a prisoner carrying out work in a prison³⁵ and to behaviour by an employee, such as assaulting a customer, which by no stretch of the imagination could be considered to be within the scope of his or her employment but was part of what judges have called "enterprise risk".³⁶ In medical negligence, perhaps as a result of the greater emphasis which society places on individual autonomy since the domestication of human rights law of the European Convention on Human Rights, the courts have developed the law governing the obligation of the medical practitioner to obtain informed consent for surgical procedures. Instead of deferring to a responsible body of medical opinion as to whether a patient should be warned of specific risks of such procedures, the Supreme Court has developed an objective test of what the reasonable person would expect to be told in order to make an informed decision.³⁷ The development of a right of privacy may also be a response to public expectations arising out of human rights norms. The courts have developed the law of breach of confidence to protect reasonable expectations of privacy between private parties, again influenced by the growing social importance of the concept of personal autonomy.³⁸

³² *Murphy v Brentwood District Council* [1991] 1 AC 398.

³³ *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] A.C. 1732; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] A.C. 736.

³⁴ See Lewis N Klar, *Judicial Activism in Private law* (2001) 80 Canadian Bar Review 251-240.

³⁵ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660.

³⁶ *Lister v Helsey Hall Ltd* [2002] 1 AC 215 (sexual abuse); *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11, [2016] A.C. 677 (assault); *Catholic Child Welfare Society v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 A.C. 1 (the concept of enterprise risk).

³⁷ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] A.C. 1430.

³⁸ *Douglas and others v Hello! Ltd and others (No 3)* [2008] 1 A.C. 1; *Campbell v Mirror Group Newspapers* [2004] 2 AC 457.

16. In court proceedings we have witnessed the curtailment and eventual removal of the immunity from suit of the advocate³⁹ and the removal of a similar immunity from the expert witness.⁴⁰ The English courts have responded to the needs of the commercial community by developing new forms of injunctive relief in the form of *Anton Piller* orders or civil search warrants, which provide a right to search premises and seize evidence without prior warning in order to prevent the destruction of evidence in disputes about confidential information or intellectual property,⁴¹ and worldwide freezing orders,⁴² which, as their name implies, are designed to freeze a defendant's assets in appropriate circumstances, pending the determination of a claimant's claim. Innovation in response to changing social attitudes extends to the criminal law, in the abolition of the rule that a married person could not commit rape.⁴³
17. Changes in the judicial approach to the interpretation of taxing statutes, while beyond the boundaries of this talk, have had a radical effect on the tax avoidance industry, as the shift from a literalist interpretation of taxing statutes to a more purposive interpretation has undermined many sophisticated tax avoidance schemes.⁴⁴ This shift in approach is to some extent a judicial response to a perceived social ill, and reflects changing social attitudes. It has been recognised for some time that statutory interpretation involves judicial creativity.⁴⁵
18. What Lord Goff has described as the “fundamental attribute of pragmatism” of the common law,⁴⁶ that is the desire to know how ideas are going to work in practice, and judges' wish to reach a just result in a particular case have on occasion led to unprincipled decisions. An example of such a decision can be seen in the attempt by judges to give justice to workers who contracted mesothelioma as a result of inhaling asbestos dust in the course of their

³⁹ *Rondel v Worsley* [1969] 1 A.C. 191; *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198; *Arthur JS Hall & Co v Simons* [2002] 1 A.C. 615.

⁴⁰ *Jones v Kaney* [2011] UKSC 13, [2011] 2 A.C. 398.

⁴¹ *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

⁴² A judicial innovation initiated by the Court of Appeal's judgment in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509.

⁴³ In Scotland, *S v H M Advocate* 1989 SLT 469; in England and Wales, *R v R* [1991] 2 All ER 257 (CA), [1992] 1 AC 599 (House of Lords).

⁴⁴ See, for example, *Barclays Mercantile Finance Ltd v Mawson* [2005] 1 AC 684, *UBS AG v HM Revenue and Customs* [2017] 1 WLR 1105 and *RFC 2012 Plc (in liquidation) v Advocate General for Scotland* [2017] 1 WLR 2767.

⁴⁵ Lord Justice Laws, *Should Judges Make Law?* In J Cooper, *Being a Judge in the Modern World* (2017), pp 199-212; R. Zimmermann, *'Statuta sunt stricte interpretanda?' Statutes and the Common Law: A Continental Perspective* (1997) 6 CLJ 315-328. See also M Brenneke, *Judicial Law-Making in English and German Courts* (2018).

⁴⁶ Lord Goff, *The Future of the Common Law* (1997) 46 *International and Comparative Law Quarterly* 746.

employment. The problem is the state of knowledge of medical science of the causation of the disease, which typically has a gestation period of decades. While it is clear that the more fibres inhaled the greater the risk of contracting mesothelioma, the specific causation of the disease is unclear. As a result, an employee in, for example, the shipbuilding industry who worked for several employers during his working life cannot point to negligence on the part of one employer as the “but for” cause of his illness. Applying the normal rules of causation, his claim would fail. In the case of *Fairchild*,⁴⁷ the House of Lords crafted a special common law rule that a person with the disease who had been exposed to significant quantities of asbestos dust originating from different sources can sue any person who has been responsible for such a source of exposure, although the claimant is unable to show which exposure probably led or contributed to the disease. This rule has created problems.

19. The courts then had to decide whether one employer could be held liable for the whole damages attributable to the disease or each of those responsible for the sources of exposure should be only proportionately liable, and their decision in favour of the latter outcome⁴⁸ was reversed by the UK Parliament in the Compensation Act 2006, which created joint and several liability. But the problems did not stop there. The Supreme Court then had to consider whether employers held liable on the basis of *Fairchild* causation could claim an indemnity from their insurers under policies which insured against liability for a disease suffered by an employee which had been caused during the insurance period. The Court held, by majority, that the insurer must indemnify the employer.⁴⁹
20. Then the question arose as to the liability of a particular insurer which had insured the employer during only part of the period in which the employee was exposed to asbestos fibres. It was, formally at least, a question of interpreting the insurance contract. One “interpretation” limited the insurer’s liability to the proportion of the policy years in which it provided cover relative to the whole period during which the employer exposed the employee to asbestos fibres. The other required the insurer to meet the whole of the liability and left the insurer to seek proportionate contributions from other insurers, or, for periods when there was no insurance, from the employer.⁵⁰ By the narrow majority of four to three the Supreme Court preferred the second option. I supported the majority because I saw it as

⁴⁷ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

⁴⁸ *Barker v Corus (UK) Ltd* [2006] 2 AC 572.

⁴⁹ *Durham v BAI (Run-Off) Ltd* [2012] 1 WLR 867.

⁵⁰ *Zurich Insurance PLC UK Branch v International Energy Group Ltd* [2015] UKSC 33, [2016] A.C. 509.

more consistent with Parliament's intentions in enacting the 2006 Act and for the pragmatic reason that it chimed with the way the London insurance market had operated in handling mesothelioma claims. There is thus in our law a rule which applies only within what has been called "the Fairchild enclave". The courts have declined to relax the established rules of causation in a similar way in other contexts outside the Fairchild enclave, for example in the field of medical negligence.⁵¹ One can pay a price when pragmatism causes the court to depart from principle. The courts, having dug a hole, have had to keep digging but have sought to encase the sides of the hole to prevent its lateral extension.

21. The cautionary tale of the Fairchild enclave leads me to discuss an approach to legal reasoning before I turn to the constraints on judicial law-making which judges have recognised. When I read law at Edinburgh University in the late 1970s I had the great privilege of studying jurisprudence under Professor Neil MacCormick, who published an important work entitled "Legal Reasoning and Legal Theory",⁵² which has had a profound influence on my approach to the law. My appointment as a judge 27 years later coincided with his publication of a restatement of his theory of legal reasoning, entitled "Rhetoric and the Rule of Law"⁵³ which confirmed my view that his analysis provided a useful guide to the role of the judge in a common law system.
22. How can I explain in a few words what I take from Professor MacCormick's sophisticated writing which is relevant to my theme? My starting point is the obligation of the judge to determine the disputes between litigating parties according to the rules of the law. The judicial oath in the United Kingdom is "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will". In this context the important words are "after the laws and usages of this realm". Judicial decisions should be justified by the law as it is. The judge is to decide cases, when he or she can, using existing legal principles. Changes to the law should be derived from existing legal materials by applying established principles and legal values in new contexts. Where necessary a judge is to work by analogy. He or she is to look for coherence, by assessing how far a possible ruling would be consistent with existing legal rules. In difficult cases where there is a clash between opposing legal principles, a judge looks to the consequences of rival legal rulings. This consequential analysis involves an assessment of whether the grounds of judgment are

⁵¹ *Gregg v Scott* [2005] 2 AC 176.

⁵² Oxford University Press, 1978.

⁵³ Oxford University Press, 2005.

repeatable in other cases as universal propositions of law, a requirement which one might describe as “rule universalism”. A consequential analysis also involves the judge in assessing, so far as he or she can, the socio-economic consequences of a particular determination. While this second form of consequential analysis is important, the decision which most closely fits the existing common law should be adopted. Thereby judicial development of the law would remain interstitial⁵⁴ and would avoid radical legislative change which requires a democratic mandate, which judges do not have.

23. Professor MacCormick recognised however that judging involves what he described as “practical reasoning” rather than purely deductive reasoning and that legal norms were open-ended and open to interpretation. He acknowledged also that universalistic rules were defeasible because unforeseen circumstances occur for which a carefully crafted prior ruling and justification are inept. Such circumstances would call for a rephrasing of the original legal statement or the creation of an exception. Wisdom, humanity and common sense – in short, judgement - had a role to play in judicial reasoning. Thus, while he created institutionalised criteria for judicial law-making which could provide a norm, he recognised that the framework did not create fixed boundaries.
24. What have judges said about those boundaries? The answer is that judges recognise that there is a boundary to judicial law-making but there is no consensus as to where it is. In *C v Director of Public Prosecutions* Lord Lowry, using a maritime metaphor, spoke of finding in the authorities “some aids to navigation across an uncertainly charted sea”. Those aids were:
- i. “(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.”⁵⁵

⁵⁴ Interstitial law-making, in other words the filling in of gaps in the law, is the felicitous expression of Justice Oliver Wendell Holmes in *Southern Pacific Co v Jensen*, 244 US 205 (1917), 221, which another great American Justice, Benjamin Cardozo, used (p 69) in his celebrated lectures which were published as “The Nature of the Judicial Process” in 1921.

⁵⁵ [1996] AC 1, 28.

25. Lord Walker in an extrajudicial writing⁵⁶ accepted only the third and fourth of Lord Lowry's points without qualification. In relation to the first, he pointed out that many of the most significant changes in the law had been made by a bare majority of 3:2 in the House of Lords, including the development of the law of unjust enrichment in *Woolwich Equitable*⁵⁷ and *Kleinwort Benson*,⁵⁸ and the landmark negligence case of *Donoghue v Stevenson* itself. In relation to the second point, parliamentary inactivity was often difficult to interpret. As to the fifth point, Lord Walker saw finality and certainty as a worthy but unachievable aspiration which was contradicted by the incremental development of the common law. Indeed, other commentators have emphasised the pragmatic nature of the common law, the building up of its principles by accretion from case to case,⁵⁹ and Lord Goff has suggested that common lawyers "worship at the shrine of the working hypothesis".⁶⁰
26. Lord Bingham in an extrajudicial essay in 1997⁶¹ identified five situations in which most judges would be reluctant to make new law. Those situations were, first, where right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law. Secondly where a rule of law, which is accepted as defective, requires to be replaced by a detailed legislative code with qualifications, exceptions and safeguards, and that code requires research and consultation which judges are not equipped to perform. Thirdly, where the question involves an issue of current social policy on which there is no consensus in the community. Fourthly, where the issue is currently being addressed by Parliament. And fifthly, where the issue is far removed from ordinary judicial experience. But I note that Lord Bingham cautiously said that he was attempting to identify the views of "most judges". There is no unanimity of view and Lord Dyson in a more recent extra-judicial lecture questioned some of those points and has highlighted the temperament of the individual judge; some judges are more conservative than others in developing the common law.⁶² Lord Denning, who was an iconic figure when I was a law student was firmly in the latter category.

⁵⁶ *How far should judges develop the common law?* Cambridge Journal of International and Comparative Law 2014, 3(1), 124-135.

⁵⁷ [1993] AC 70.

⁵⁸ [1999] 2 AC 349.

⁵⁹ Jack Beatson, *Has the Common Law a Future?* (1997) 56 Cambridge Law Journal 291, 295.

⁶⁰ Footnote 46 above, p753.

⁶¹ Tom Bingham, *The Judge as Lawmaker: An English Perspective* in Paul Rushworth (ed.) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thoroton* (1997).

⁶² Lord Dyson, *The Limits of the Common Law* Singapore Academy of Law (2014) [2015] 27 SAclJ 271-285.

27. In the final part of this lecture I will seek to set out my views on the constraints which judges should recognise on their role as law-makers.

28. The first and perhaps the most significant constraint on most judges is the doctrine of precedent, without which judge-made law could descend into arbitrariness. The obligation on a court lower in the hierarchy to abide by a precedent set by a hierarchically superior court is essential for the discipline and coherence of the common law. The obligations imposed by precedent underpin the obligation on judges to act impartially and the requirements of the rule of law that one treats like cases alike and different cases differently. The constraints of precedent are confined to the *rationes decidendi*. Professor MacCormick's definition of a *ratio decidendi* is in my view helpful in its focus on the nature of the dispute which the parties have brought before the court. It is:

- i. "A *ratio decidendi* is a ruling expressly or impliedly given by a judge which is sufficient to settle the point of law put in issue by the parties' arguments in the case, being a point on which a ruling was necessary for his/her justification (or one of his/her justifications) of the decision in the case".⁶³
- b. A judge's *obiter dicta*, which may include arguments from legal principle and legal authorities and an evaluation of the consequences of alternative rulings, are not binding but they can have a profound influence on the development of the law in providing material for other judges to make their rulings when faced with analogous claims.

29. Since 1966 the House of Lords (now the Supreme Court) has not been bound by its own precedents. In a Practice Statement in 1966⁶⁴ the House of Lords gave itself authority to depart from its previous decisions when it appeared right to do so to avoid injustice and allow the proper development of the law. It made clear that the announcement did not affect the use of precedent in the lower courts and recognised the need to "bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

⁶³ *Legal Reasoning and Legal Theory* (above) p 153.

⁶⁴ [1966] 1 WLR 1234.

30. In the 43 years between 1966 and 2009 the House of Lords used this power on about 25 occasions.⁶⁵ My impression is that the Supreme Court in its first decade (2009-2019) has been similarly cautious about departing from prior decisions, notwithstanding the rapidity of changes in social values in recent decades. The Court requires parties seeking the court to overrule a prior decision to give notice of that intention in their application for permission to appeal⁶⁶ and the court will usually create an enlarged panel to hear such an appeal. I can recall 8 cases in which the Supreme Court has departed from prior decisions. But the court has not always stated expressly that it was invoking the power under the Practice Direction when departing from the reasoning of an otherwise binding authority and I include such cases in my tally. Except where human rights law or EU law has driven the court to reconsider binding authority, the court has been cautious over the exercise of the power.
31. Another important constraint on judicial law-making is the declaratory theory of the common law, namely that a judicial decision, even when it is in reality innovative, is stating what the law has always been. Fairy tales rule. The judgment therefore has retrospective effect and has great potential to disrupt a settled understanding of the law on which people have relied in transacting business. The principle of legal certainty and the legitimate expectations of people militate against judges taking what Professor Burrows has described as “giant and sudden leaps forward” and confine them to “the incremental interpretation of principle, applied to new ideas and conditions”.⁶⁷ But even then, the courts are still struggling with the consequences of the judicial recognition in the 1990s of a claim in unjust enrichment arising out of a mistake of law, where the “mistake” is created retrospectively by an innovative judicial decision.
32. A third constraint is the general recognition that, when faced with circumstances which are not governed by established rules, a judge is to search for and apply a principle. The extensive case law which has developed in the last 150 years together with academic writing which seeks to systematise the common law has assisted the judge’s task in finding the relevant principles. Departing from principle to achieve a just result in a particular set of

⁶⁵ A. Paterson, *Final Judgment, the Last Law Lords and the Supreme Court* (2013) pp267-268. Other commentators have suggested that it was on 21 occasions: L Blom Cooper, B Dickson and G Drewry, *The Judicial House of Lords 1876-2009* (2009) pp143-144.

⁶⁶ UKSC Practice Direction 3, para 3.1.3.

⁶⁷ Andrew Burrows, *Common Law Retrospectivity* in A Burrows, D Johnston and R Zimmermann, *Judge and Jurist, Essays in Memory of Lord Rodger of Earlsferry* (2013) ch 41 pp 453-557.

circumstances can give rise to unforeseen complications and unintended consequences as the case law relating to the Fairchild enclave clearly demonstrates.

33. A fourth constraint is what I have described as role recognition.⁶⁸ This is sometimes called judicial restraint but I will stick with my preferred expression, because it points to an objective constraint rather than mere judicial self-denial. It has also been referred to as the separation of powers but that expression begs the question because it does not identify the boundary of the judicial power. I would include within the heading of role recognition such ideas as the acknowledgement of institutional constraints. Unlike the Law Commissions in the UK, the judiciary does not have the resources to research a wide area of law, to consult interested parties, and to frame legal policy informed by the consultees' responses. Judges deal with the cases which parties present to them. The Law Commissions do not legislate; they prepare reports and draft Bills for Parliament to enact. It is the democratic legislature that makes the law in response to those reports. The judiciary has no democratic mandate to frame socio-economic policy. It has been suggested that judges are most ready to develop common law rules which are recognised as "lawyer's law",⁶⁹ such as the immunity of an advocate or witness, or mistake of law, or the boundaries of the law of negligence, while leaving matters which affect large sections of the community and which raise issues which are the subject of controversy to the democratic legislature.⁷⁰

34. But judges cannot always avoid areas of public controversy when a claimant brings a claim which the court must address. These cases are usually within the field of public law but not always. For example, the courts have had to deal with controversial questions of medical practice concerning the withdrawal of clinically assisted hydration and nutrition from patients who have suffered severe brain damage⁷¹ and whether to authorise the separation of conjoined twins who could not survive if they remained joined but one of whom would die if they were separated.⁷²

35. A fifth constraint, which is closely related to role recognition, is a reluctance to develop the common law in ways which have serious consequences for public expenditure. One of the

⁶⁸ P S Hodge, *Judicial Law-making in a Changing Constitution* (2015) 26 Stellenbosch L R 471-485.

⁶⁹ *Pettitt v Pettitt* [1970] AC 777, 794-795 per Lord Reid.

⁷⁰ Lord Walker footnote 55 above and Lord Dyson footnote 61 above.

⁷¹ *Airedale NHS Trust v Bland* [1993] AC 789; *An NHS Trust v Y* [2018] UKSC 46, [2018] 3 W.L.R. 751.

⁷² *Re A (conjoined twins: surgical separation)* [2001] Fam 147.

reasons why in *Gregg v Scott*⁷³ the House of Lords refused to alter the rules of causation to create liability for the loss of a chance of a better outcome when the lost chance did not amount to a probability, was the significant impact of such an innovation on public expenditure because most medical negligence claims are directed against the National Health Service.⁷⁴ That was a matter for Parliament and not the courts.

36. Sixthly, there is the legislative sovereignty of Parliament, the *grundnorm* of the United Kingdom's constitution. Judges recognise that they are not permitted to develop the law in a direction which is contrary to the expressed will of Parliament.⁷⁵ They may fill in gaps left by Parliament but must not create incongruity.⁷⁶

37. Parliamentary sovereignty has another important effect: judges' rulings are defeasible. If Parliament dislikes the consequences of a judicial ruling it can legislate to reverse it.⁷⁷

38. So, judges do not get the final say. Nor, except at appellate level, do they choose the cases which they hear. It is the private citizen, the commercial corporation or public body that invokes the court's jurisdiction and the judge responds to their demand to be heard. Sir David Edward concluded his Presidential Address to the David Hume Institute in 1993⁷⁸ with these words:

“We are the guardians of rights and the arbiters of power only so far, and for so long, as the citizen, by legal process, invites us to be so.”

a. In so far as the rule of law amounts to the rule of judges, this is a further and important constraint on judicial law-making.⁷⁹

39. Judicial law-making is therefore constrained law-making. It is also a minority activity. The vast majority of judicial work, well over 90 percent, involves no law-making but is what Lord Devlin famously described as “the disinterested application of known law”.⁸⁰

⁷³ [2005] 2 AC 176.

⁷⁴ Para 90.

⁷⁵ *R v Chief Constable of the Royal Ulster Constabulary ex parte Begley* [1997] 1 WLR 1475, 1480 per Lord Browne-Wilkinson; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, para 42.

⁷⁶ *Johnson v Unisys Ltd* [2003] 1 AC 518, para 39 per Lord Hoffmann.

⁷⁷ Except to the extent which it is constrained by EU law.

⁷⁸ *The Role of Law in the Rule of Law* (1993) Hume Occasional Paper no 42.

⁷⁹ Judges are also constrained by the submissions which counsel make in court unless the judges are able to invite further submissions on arguments which they wish to consider.

⁸⁰ Patrick Devlin, *The Judge* (1979) p 4.

40. The fact that judge-made law is an independent source of law contributes to its flexibility; and judges continue to adapt the common law to changes in commercial practice and social values as Lord Mansfield did 180 years ago. He had a relatively undeveloped legal canvas on which to paint. When appellate courts develop the common law, they now have the assistance of academic writing, EU law, human rights law and comparative law (especially from other common law jurisdictions) as guides and sources of values in a way they did not even only fifty years ago. This is welcome as the development of the law is a collaborative endeavour which is no longer confined to lawyers pleading in court and judges who respond to their arguments.

[Please note that an edited version of the lecture will appear in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* in the summer of 2020].