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by

ROSEMARY PATTENDEN

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Preface

This book is a much expanded and completely revised and rewritten version of *The Judge, Discretion, and the Criminal Trial*, which appeared in 1982. The aim of this book is much the same as that of the previous edition, viz. to catalogue the discretions which are regularly exercised by the courts in the course of criminal trials, in so far as they are mentioned in published sources, to discover as many factors that are relevant to the exercise of these discretions as possible, to examine how an erroneous exercise of discretion may be corrected, and to provide a theoretical framework within which to assess and discuss judicial discretion. To include every discretion which a criminal court may exercise, and to create an exhaustive list of all the factors pertaining to the exercise of each discretion, is an impossible task. Infinite variations of the facts upon which discretion is exercised are possible and judges, stipendiary magistrates, and justices of the peace have an inherent power to control proceedings. This inherent power can be utilized in quite unpredictable situations, frequently of a trivial and unrepeatable nature. For example, the first edition of the book recounted (at p. 43) a decision of an Oxford Crown Court judge forbidding the accused to drink beer at lunchtime. He was tired of disruptions to afternoon sessions of the trial when the call of nature became too strong and one by one the accused disappeared from the dock to make use of the Crown Court conveniences. Even discretions which are exercised on a more permanent basis are not always recorded in the standard repositories of legal information. By chance we saw the minutes of a meeting of the Tutorial Representatives of the University of Cambridge in 1985. This document noted that a letter had been received from the Clerk to the Cambridge Magistrates' Court which said that when junior members of the University facing charges came before that court an inquiry would be made as to whether the accused had sought his or her tutor's guidance, and if not, the court would be willing to adjourn a case until this had been done. *The Times* of 14 January 1978 draws attention to a previously unpublicized discretion which a judge of the Crown Court has to suggest privately to court officials, who make up the lists and allocate courts, that he should not be given a particular kind of case, for example, in the case of a judge inexperienced in financial matters, complicated fraud trials. This article was prompted by an announcement by Judge McKinnon that he did not

wish to have cases of a racially sensitive nature listed before him following public criticism of observations he had made after verdict and in the summing-up in a prosecution under the Race Relations Act.

This edition, apart from being more up-to-date, differs from its forerunner in a number of respects: first, it examines discretions exercised by appellate courts below the House of Lords and to some extent in this highest judicial tribunal. Second, it contains a chapter specifically directed toward the exercise of discretion in courts of summary jurisdiction. Third, the text is only about the law in force in England and Wales. References to the law of other jurisdictions, namely, Canada, the Australian states, and New Zealand, are made in the text *inter alia* because there is a gap in known English law, or the author prefers the legal position in one of these jurisdictions to the law in England and Wales, or there is a good example of the exercise of a discretion in one of these places, or a Commonwealth court has set out the law in a clear and helpful fashion. Fourth, the footnotes to the chapters which deal with judicial discretion in jury trials (chapters 2–7) contain extensive citation of Canadian, Australian, and New Zealand cases. Frequent mention of the legislation in these jurisdictions is also made. By including a great deal of Commonwealth information in the footnotes the author hopes that the book will prove a useful research tool to those interested in Canadian, Australian, and New Zealand law, as well as to those who want to know the English legal position. However, while every effort has been made to deal comprehensively with the English legal material not all relevant cases and statutes from these Commonwealth jurisdictions have been included and where the law in Canada, Australia, or New Zealand is different from that prevailing in England and Wales the legal divergence is not usually pursued. Procedural and institutional differences make it difficult to follow a multi-jurisdictional line in the chapters dealing with summary trial discretion and appellate court discretion and by and large this has not been tried. Fifth, chapter 10, which discusses remedies for an improper exercise of discretion, goes beyond appeals to the Court of Appeal (Criminal Division) and looks at judicial review, the case stated procedure, and appeals to the Crown Court. The opportunities for challenging the exercise of a discretion vested in an appellate court are also briefly considered. Sixth, this book has been written with practitioners very much in mind and to enable them to find their way around the volume quickly extensive use is made of headings. As in the first edition of the book there is little discussion of pre-trial judicial discretion although such discretion is considerable, and only passing references are made to the sentencing discretion about which much has already been written by others.

The author was very lucky to be able to persuade colleages to read a number of chapters of the book and is very grateful for the helpful comments received from D. Birch, P. Mirfield, V. Tunkel, C. Lewis, and M. Purdue. The author would also like to thank those who provided materials on particular points, especially T. Shorthouse, the New South Wales Law Reform Commission, P. Carter and J. Spencer.

English legal materials to hand before 31 January 1989 have been incorporated into the book. The law of Canada, Australia, and New Zealand is that available in the Squire Law Library, Cambridge at the close of 1988. The author would appreciate it if users of the book were to contact her about any errors which they discover in it.

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1 Discretion: Meaning, Rationale, and Regulation

THE MEANING OF DISCRETION

Discretion is an imprecise word which takes its meaning from the context in which it is found. The term has been used in legal materials in so many ways that in 1923 one despairing commentator advocated dropping it from the vocabulary of the law.[1] Since, however, the term is in widespread use, and appears in legal literature going back at least as far as Callis's book *Upon the Statute of Sewers*[2], which appeared in 1622, this is scarcely possible. The best that can be done is to distinguish the various ideas that have become attached to this slippery concept. A number of different, albeit overlapping, usages of discretion can be made out. All are concerned in some way with choice.

In common parlance the word describes the mental quality of prudence and circumspection.[3] This is what Hensman J. had in mind in *R.* v. *Foster* when he said that the power of an Australian court to order a retrial 'should be exercised with discretion'.[4] All the other meanings of discretion are concerned with the mechanism of decision. This one focuses on the quality of the result.[5]

To many jurists discretion denotes a situation where instead of deciding a question by recourse to a fixed rule of decision (if *a* the judge *must* do *b*), the court is able to decide between alternative courses of action (if *a* the judge *may* do *b* or *c* . . .).[6] We shall call this type of discretion 'overt'. In *Judicial Review of Administrative Action*,[7] de Smith wrote that the 'legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can

[1] N. Isaacs, 'The Limits of Judicial Discretion' (1923) 32 *Yale LJ* 339 at p. 340.

[2] R. Callis, *Upon the Statute of Sewers* (London, 1622) at p. 112.

[3] Cf. B. MacKenna, 'Discretion' (1974) 9 *Irish Jurist* 1, 2.

[4] (1898) 1 WAR 21 at p. 22.

[5] A. Rosett, 'Connotations of Discretion', *Criminology Review Yearbook* ed. S. L. Messinger & E. Bittner (London, 1979) at p. 380.

[6] See *Viscount De L'Isle* v. *Times Newspapers Ltd* [1987] 3 All ER 499, 504 (CA). The discretion may take the form (1) of a liberty to decide whether to act or not to act and/or (2) a choice between different ways of acting.

[7] 4th edn. ed. J. E. Evans (London, 1980) at p. 278. Cf. *Evans* v. *Bartlam* [1937] AC 473, 489 (HL); *Russo* v. *Russo* [1953] VLR 57, 62.

lawfully be adopted the decision is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.' Dworkin has named this type of discretion 'strong'[8] discretion. He distinguishes it from the 'weak' sense in which the term 'discretion' is used by some American legal writers to denote decisions which are unappealable.[9] Such a 'weak' discretion is a *de facto* discretion. There is no lawful freedom of choice. The discretion exists because nothing can be done if the judge misapplies a rule of law. M. R. and S. H. Kadish[10] have drawn attention to what they call 'deviational' discretion, which is something very similar to Dworkin's 'weak' discretion. By 'deviational' discretion they mean the power to ignore legal rules with impunity. The jury, as was recognized by the Supreme Court of Canada in *Morgentaler*,[11] is the prime example.[12]

Dworkin also uses the label 'weak discretion' to describe rules which leave the decision-maker with considerable freedom of choice (of which the decision-maker may be unconscious) because they contain value-qualified precepts which require a personal assessment of the circumstances.[13] We shall call this kind of evaluative discretion 'concealed'[14] discretion.[15] Rules which contain vague standards such as 'reasonable', 'just', 'necessary', 'fair', or the converse of these, fall into this category:[16] 'the language . . . signals a balancing test at the culmination of the

[8] R. M. Dworkin, 'Is Law A System of Rules?', in *The Philosophy of Law*, ed. R. M. Dworkin (London, 1977) at pp. 53–4.

[9] See N. Isaacs, 'The Limits of Judicial Discretion' (1923) 32 *Yale LJ* 339; Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 3rd edn. (Boston, 1940) vol. i para. 16; M. Rosenberg, 'Judicial Discretion of the Trial Court, Viewed from Above' (1971) 22 *Syracuse LR* 635, 638; M. Rosenberg, 'Appellate Review of Trial Court Discretion' 79 FRD 173. For examples of unreviewable decisions see p. 27 *post.*

[10] *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Standford, 1973).

[11] (1986) 62 CR (3d) 1, 37 (SCC).

[12] For other examples see D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, 1986) at p. 47.

[13] R. Dworkin, 'Is Law A System of Rules?', at p. 52. Cf. *Norbis* v. *Norbis* (1986) 60 ALJR 335, 336 (HC).

[14] However, there are many cases where a court cannot fail to notice that choice exists.

[15] For examples of the use of discretion in this sense by the courts see *Triplex Safety Glass Co Ltd* v. *Lancegaye Safety Glass Ltd* [1939] 2 KB 395, 405 (CA); *Cummings* [1948] 1 All ER 551, 552, (CCA); *Bashir* [1969] 1 WLR 1301, 1306.

[16] For an excellent statutory example see s. 23AA (3) Evidence Act 1908 (NZ) which provides: 'The Judge shall not grant leave under subsection (2) of this section [*inter alia* to allow oral evidence of a rape victim's name, address, or occupation] unless the Judge is satisfied that the evidence to be given . . . is of such direct relevance to facts in issue that to exclude it would be contrary to the interests of justice.'

preliminary factfinding process'.[17] Further examples include the rule of public interest immunity under which courts are obliged to exclude evidence because the public interest in secrecy exceeds the public interest in disclosure of otherwise admissible and relevant information[18], and the public policy exception—adumbrated in *ITC Film Distributors* v. *Video Exchange Ltd*[19] and confirmed in *Goddard* v. *Nationwide*[20]—to the rule proclaimed in *Calcraft* v. *Guest*[21], that secondary evidence of a privileged document, however come by, is admissible.

A further usage of discretion lies at the centre of the Hart–Dworkin controversy about the way judges function 'at the margin of rules and in the fields left open by the theory of precedents'.[22] Hart argues that because of the open texture of language, a lawmaker's indeterminacy of aim and relative ignorance of fact, and the uncertainty associated with our system of precedent, situations will arise in which no rule is clearly applicable (does 'if *a* then the judge *must* or *may* do *b*' apply?). Faced with a hiatus in the law the judge exercises a *legislative* discretion, which once exercised evaporates. Dworkin does not agree that a judge is ever free from authoritative legal standards to decide as he wishes; for him the law is a 'seamless' web.[23] In the absence of binding precedent there will, in his view, always be sufficient principles to resolve the dispute. Should relevant principles be in conflict the court must weigh them up and apply the one which predominates.

The final usage of discretion[24] has been aptly named 'fact' discretion by Frank.[25] It is that element of judgment called for when ascertaining

[17] J. R. Waltz, 'Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence' (1985) 79 *Northwestern ULR* 1097 at p. 1110; A. Barak, *Judicial Discretion* (New Haven, 1989) at pp. 50–54.

[18] See p. 289 *post* where this and other examples are discussed.

[19] [1982] 2 All ER 241, 246 (Ch. D).

[20] [1986] 3 All ER 264, 272 (CA).

[21] [1898] 1 QB 759.

[22] H. Hart, *The Concept of Law* (New York, 1961) at p. 132.

[23] R. M. Dworkin, 'Is Law A System of Rules?', at p. 52.

[24] Consider the following example taken from *Roberts* v. *Ruggiero* DC 3 Apr. 1985: 'In my judgment, the magistrates rightly considered that they had a discretion to exercise in assessing the evidence in this case. They had to decide whether the criminal offences charged had been proved with the degree of certainty which is required in relation to all criminal charges. This was essentially a question of fact and degree and it depended upon the evidence adduced relating to the conditions in this particular unit so far as the particular animals were concerned. The magistrates heard the evidence . . . and they visited and inspected the unit. . . . They saw and heard the witnessess. . . . I am satisfied that it is not possible to say that the magistrates erred in the conclusion to which they came. This was essentially a matter for them to decide whether the specific charges had been proved.' *per* Stephen Brown LJ. Cf. *Washer* (1947) 92 CCC 218, 219; *Boisjoly* (1955) 115 CCC 264, 267 (QueCA); *Duncan* [1969] 2 NSWR 675, 678 (CCA). See also B. McKenna, 'Discretion' (1974) 9 *Irish Jurist* 1, 8.

[25] J. Frank, *Courts on Trial* (Princeton, 1949) at p. 57.

the facts. In theory there is but one correct outcome to a question of fact, but there is no litmus test for discovering whether a court has got the facts right, and there is plenty of scope for getting them wrong, for a court must decide the facts 'unguided by rules or even standards'[26] upon the basis of evidence, possibly incomplete, often conflicting, submitted by witnesses of varying degrees of veracity whose memory and perception may be imperfect.[27] A finding of fact is an informed guess and in many trials there is room for legitimate differences of opinion as to the facts which have been proved by the evidence. A magistrates' bench during full committal proceedings may insist that a child of 8 give his evidence unsworn. The judge at the subsequent trial may decide that the child has reached a level of maturity and understanding which entitles him to give sworn evidence. Neither the judge nor the magistrates can probably be shown to have been in error in determining the competency of the witness.[28]

FINDING AND DEFINING DISCRETION

Decisional choice is conveyed by a variety of phrases and expressions. 'There are . . . no talismanic labels that can safely be relied upon by those currently searching for grants of decision making discretion.'[29] The term 'discretion' is popular with appellate courts. Legislators tend to use a wider vocabulary. A sample includes 'unless in the particular circumstances of the case [the court] considers it right to do so',[30] the court 'shall have power',[31] the court finds it 'necessary or expedient',[32] and '[not] without leave of the court'.[33] The most popular method is to use the word 'may' either on its own or in combination with some phrase, like 'if he thinks fit'.[34] One has to treat the word 'may' with care.

[26] N. Brooks, 'The Law Reform Commission of Canada's Evidence Code' (1978) 16 *Osgoode HLJ* 241, 308.

[27] Cf. D. J. Galligan, *Discretionary Powers*, p. 34.

[28] For a discussion of the discretion to determine whether and how a child witness can give evidence see p. 77 *post.*

[29] J. R. Waltz, 'Judicial Discretion in the Admission of Evidence under the Federal Rules of Evidence' (1985) 79 *Nw ULR* 1097 at p. 1104. Cf. M. Louis, 'Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion' (1986) 64 *North Car LR.* 993, 1040 n. 346.

[30] Prosecution of Offences Act 1985 s. 18(4).

[31] Magistrates' Courts Act 1981 s. 64(1).

[32] See generally *Secretary of State for Defence* v. *Guardian Newspapers Ltd* [1984] 3 All ER 601, 607 (HL).

[33] Civil Evidence Act 1968 s. 2(2) (a), s. 4(2).

[34] e.g. Magistrates' Courts Act 1980 s. 49. Cf. Criminal Appeal Act 1968 s. 23(1)—'may if they think it necessary or expedient in the interests of justice'.

Though it is prima facie faculative, 'may' can mean 'shall'[35] or can refer to the discretion of a party rather than that of the court.[36] An apposite example is section 643(1) of the Canadian Criminal Code 1970 which reads: 'Where, at the trial of an accused, a person whose evidence was taken at a previous trial upon the same charge against the accused or upon the preliminary inquiry into the charge . . . (a) is dead, (b) has since become and is insane, (c) is so ill that he is unable to travel or testify or, (d) is absent from Canada, and where it is proved that his evidence was taken in the presence of the accused, it *may* be read as evidence in the proceedings without further proof . . .'[37] When this section came before the Ontario Court of Appeal that Court held that wherever circumstances of death, insanity, illness, or absence are proven a party can insist on the deposition being read out in court, subject to the limited discretion recognized by the Supreme Court of Canada in *R.* v. *Wray*:[38]

> It is our view that the word 'may' in s. 643 relates to the parties to the proceedings, that is the prosecution or the defence and relates to the right of the prosecution or the defence to have evidence read if either so desires. In other words, if the necessary conditions have been established either party may have the evidence of the witness read but neither is required to have it read. We do not think that the word 'may' relates to the power of the trial Judge to permit the evidence to be read.[39]

This book is about decisions, however described in authoritative legal materials, which must be based 'upon reason and the law, but for which . . . there is no special governing statute or rule'[40] (overt

[35] 'The authorities show that the word "may" imports a discretion and must be so construed unless there is a sufficiently clearly expressed intention to the contrary . . . [I]t lies upon those who contend that an obligation exists to exercise the power to show in the circumstances of the case something which . . . creates that obligation.' *per* Jenkyn J., *Oser* v. *Felton* (1965) 8 FLR 3 at p. 13. See also *Ex Parte McGavin; Re Berne* (1945) 46 SR (NSW) 58, 60–1 (CCA); *R.* v. *Judge Martin; Ex P. A–G* [1973] VR 339, 355 (CCA). Section 6 (1) (c) of the Criminal Law Act 1967 may be a case where 'may' must be read as 'shall'.

[36] Consider s. 3 of the Criminal Procedure Act 1865 which provides that '[a] party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he *may*, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence . . .' (italics added). As interpreted in *Greenough* v. *Eccles* (1859) 5 CB (NS) 786, 141 ER 315 this section gives a party a *right* to call evidence which contradicts that of a hostile witness.

[37] Italics added.

[38] (1970) 11 DLR (3d) 673 (SCC). See p. 282 *post.*

[39] *Per* Martin JA, *Tretter* (1924) 18 CCC (2d) 82 at pp. 89–90 (OntCA). Cf. *Oda* (1980) 54 CCC (2d) 466 (BCCA). Contrast *Sophonow (No. 2)* (1986) 25 CCC (3d) 415, 433 (ManCA).

[40] R. Bowers, *The Judicial Discretion of Trial Courts, A Treatise for Trial Lawyers* (Indianapolis, 1931) at p. 14.

discretion), and about those open textured rules which within a wide range of facts are too elastic to compel a particular result (concealed discretion) and which are consequently widely perceived as calling for the exercise of discretion. In the main it is not about fact or legislative discretion[41] or about unappealable decisions. However, it is not possible to ignore these types of discretion entirely *inter alia* because of inconsistent handling of discretion by the courts and the absence of clear-cut divisions between the various strands of discretion. Indeed overt and concealed discretion can be viewed as part of a spectrum running from the complete absence of rules to inflexible rules which leave nothing to the judgment of the court. Where one marks the boundary between rule and discretion, and within discretion between concealed and overt discretion, is a matter of personal preference.

What we shall treat as discretion in this book comes close to Galligan's definition of discretion in *Discretionary Powers: A Legal Study of Official Discretion*,[42] though he eshews an analytical approach to the subject. For him discretion is any power entrusted to an official which leaves the decision-maker with 'some significant scope for settling the reasons and standards according to which the power is to be exercised, and for applying them in the making of specific decisions'.[43] This process, he says, extends beyond the creation of standards by an official where none are given to cases where loose standards must be individualized and interpreted and the relative importance of conflicting standards assessed. Unlike Galligan, we will attempt to distinguish between different kinds of discretion because this book is appeal orientated and in assessing the prospect of a successful appeal against the exercise of a discretion it can be helpful to know whether the discretion is an overt or a concealed one. Or put another way, designation of a discretion as overt or concealed may help to explain why the superior courts have approached an appeal in a particular way.

Where a court is not committed in advance to a rule which governs its choice (overt discretion) the trial court's decision is accorded considerable insulation from appellate intervention. 'On appeal, the question is not whether the trial level result is the better or best one but only whether it is a legally permissible one.'[44] Higher courts will interfere if the judge directed himself incorrectly in law or failed to take into account relevant matters or took into account irrelevant ones or acted unreasonably, but not otherwise.[45] Where the court applies a dispositive rule, however uncertain the rule is in its application because it requires the judge to make value judgments, the Court of Appeal is sometimes

[41] See p. 3 *ante*. [42] (Oxford, 1986) p. 20 *et seq*. [43] Ibid. 21.

[44] M. B. Louis, 'Allocating Adjudicative Decision Making Authority Between Trial and Appellate Levels' at p. 999. [45] See chapter 10 *post*.

readier to review the decision and, if it does not like it, to substitute its own exercise of judgment for that of the trial court.

The different ways in which, in theory, appellate courts handle overt and concealed discretion are discussed in the judgment of the Court of Appeal in *Viscount De L'Isle* v. *Times Newspapers Ltd.*[46] This case was about section 69 of the Supreme Court Act 1981, which contains both a concealed and an overt discretion. The section provides:

> (1) Where, on application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue . . . (b) a claim in respect of libel, . . . the action shall be tried with a jury, *unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot be conveniently be made with a jury* . . .
> (3) An action to the tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury *unless the court in its discretion orders it to be tried with a jury.*[47]

The Court of Appeal held that section 69(3) conferred on the judge a 'discretion'.[48] On the facts found and applying the relevant law the judge 'was required in the exercise of his judicial function to decide between two or more courses of action without any further rules governing the decision . . . other than that he should act judicially'.[49] In consequence the Court of Appeal 'was restricted by the authorities to the extent to which it can interfere'. On the other hand, the questions raised by section 69(1) did not call for the exercise of 'discretion'[50] by the judge. The judge had to weigh up the conflicting considerations in the light of the pleadings and the other material before him and the Court of Appeal was not restricted by the judge's decision that the projected trial would require prolonged examination of accounts which could not conveniently be made by a jury, save by the respect which the Court of Appeal always paid to the opinion of the judge below.

The greater restraint which the Court of Appeal exhibits when faced with an appeal against the exercise of overt discretion, as opposed to an appeal against the application of a rule containing a concealed discretion, is also demonstrated in the judgment of the Criminal Division of the Court of Appeal in *Viola.*[51] This case concerned the refusal of the trial judge to permit the prosecutrix at a rape trial to be cross-examined about her sexual experiences with persons other than the appellant. Cross-examination of rape victims is governed by section 2 of the Sexual

[46] [1987] 3 All ER 499 (CA).
[47] Italics added.
[48] i.e. an overt discretion.
[49] *Per* May LJ, [1987] 3 All ER 499 at p. 504 (CA).
[50] In the sense of an overt discretion. Plainly there was a concealed discretion.
[51] (1982) 75 Cr App R 125.