

MACCABAEAN LECTURE IN JURISPRUDENCE

CAN JUDGES CHANGE THE LAW?*

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THE OATH which a judge swears on his appointment, north and south of the Tweed, to 'do right to all manner of people after the laws and usages of this Realm without fear or favour affection or ill will' raises profoundly difficult issues not only where there is no rule of law or usage on which to base a decision but also where the just solution of a dispute would involve abrogating an apparently established rule of law.

The position of the early Scottish judges was attractively simple. They had no power to make law. In his *Practicks*, compiled between 1574 and 1583, Sir James Balfour wrote:

Gif any queſtion fall happen to aryſe before any jugeis of this realme, quhilk cannot be decydit, be no cleir writtin law, the deciſion and declaratioun thair of aucht and ſould be referrit and contiewit into nixt parliament, than an law may be cleirly maid be the Lordis if the ſaid parliament, how the ſaid queſtioun—and all uther materis ſiclike, ſould be decydit and reullit in time to cum: and to that effect, the ſaidis parteis ſould be wairwit to compeir in the porſaid parliament, becaus na jugeis within this realme has powar to mak any lawis or ſtatutis except the parliament allanerlie.¹

If, on the other hand, the existing law needed to be changed to deal with new situations, the judges could take comfort from the

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¹ Stair Society ed., Vol. 1.c.III. See also the introduction by Dr McNeill at p. xliii. Some examples of cases remitted to Parliament by the Lords Auditors and the Lords of Council are given in G. Neilson and H. Paton (eds.), *Acts of the Lords of Council in Civil Cases 1496–1501* (1918), p. xlv. See also T. M. Chalmers, 'The King's Council 1460–1513' (1982, unpublished Ph.D. thesis). I am grateful to Dr John Imrie for drawing this last reference to my attention.

fact that as early as 1425—almost five and a half centuries before the Law Commissions were established—the Parliament of Scotland had authorized representatives of the three Estates ‘t mend pe lawis pat nedis mendmet’.²

The problems which confront a judge seeking to do justice according to the law have to be faced, for a judge cannot refuse to give a decision. If he decides that the imperatives of certainty and consistency of decision point to the application of a known rule whose utility has become outmoded, he may perpetrate an injustice. He may, of course, be bound by the rules of precedent to accept such a result; he may simply ‘shrug his shoulders, bow to what he regards as inevitable and apply [the law]’.³ If he decides to distinguish an earlier case he may do so in such a way as to create uncertainty in future cases by setting up new distinctions and qualifications.⁴ If, on the other hand, he is able to overrule a previous decision, the effect of doing so may be to cast doubt on the validity of arrangements made on the basis of the earlier law which he has just overruled, and, unless he is careful, an overruling decision may cause dislocations elsewhere in the legal system, disturbing the basis on which Rules of Court, for example, may have been predicated.

Whether a judge can merely apply the law or whether, as a bold spirit, he should extend it to deal with circumstances to which it has not previously been held authoritatively to apply are problems which go to the core of the judicial function. Positivist jurisprudence from Austin to Hart has emphasized the importance which judicial discretion plays in filling gaps in the law. For Hart the rule-making authority must exercise a discretion. There is no possibility of treating the question raised by different cases as if there were one correct answer waiting to be found. What characterizes this conception of the judicial function is the choice which a judge must exercise. For Dworkin, on the other hand, reacting one suspects as much to excesses of American Realism as to positivism, the law is a seamless web which can be relied upon to provide the right solution. In hard cases, he believes, judicial decisions are generated by the application of principle and enforce existing political rights.

² *Acts of the Parliament of Scotland*, ii, 10, 10.

³ *Duport Steels Ltd. v. Sirs* [1980] 1 All E.R. 529, 547, *per* Lord Edmund-Davies.

⁴ Cf. Lord Reid in *E.L. Oldendorf v. Tradax Export S.A.* [1974] A.C. 479 at p. 535: ‘The decision of the Court of Appeal was plainly right, but in order to reach it they had to distinguish *The Aello* on such inadequate grounds as to create uncertainty in the law.’

The power of the judges in England to make new law or to change the existing law was not readily acknowledged. Writing in the seventeenth century Matthew Hale noted that the decisions of English courts could not:

make a law properly so called, for that only the King and Parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law in this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons, as such whatsoever.⁵

The declaratory theory of judicial decision making rested on the notion that the whole of the law reposed *in gremio iudicum* and could be conjured up as occasion demanded. According to this theory the common law consisted of ancient customs and usages made known by the judges, the 'living oracles' as Blackstone described them,⁶ who were bound by their oath to decide according to the law of the land. Their decisions were not sources of law but simply evidence of what the law was.

Although the writings of Ronald Dworkin and Rolf Sartorius have infused the declaratory theory with new life, few contemporary observers would support the theory that judges merely declare the law that is. For one thing, this theory fails to explain the remarkable development of the common law. Virtually the whole of the modern law of tort and contract, for example, was constructed by the judges consciously moulding and adapting the principles of the law in response to the changing usages of society. In 1932 in *Donoghue v. Stevenson*⁷ the House of Lords overruled dicta by which the Court of Session had considered itself bound and imposed on manufacturers a duty of care to the ultimate consumers of their products. By judicial law-making they established a new basis of liability, or at least re-emphasized a pre-existing basis in the law of Scotland, which has spread far and wide.

Secondly, the declaratory theory does not fit comfortably with

⁵ *History of the Common Law* (6th edn), p. 90.

⁶ *Commentaries on the Laws of England* (15th edn, 1809), i, 68. Cf. Montesquieu's observation that 'the judges are the mere mouthpieces of the law': *Esprit de Lois*, xi, 6. A more contemporary view is that of Lord Devlin who considered, 'the judges are the keepers of the law and the qualities they need for that are not those of the creative law maker': (1976) 39 M.L.R. 1 at p. 16.

⁷ [1932] A.C. 562.

accounts of the development of equity whose rules owe their authority to the fact that they are judge-made, as Sir George Jessel MR observed:

It must not be forgotten that the rules of the courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time. In many cases we know the names of the Chancellors who invented them.⁸

In an address which he gave to the Edinburgh meeting of the Society of Public Teachers of Law in 1972, Lord Reid sought to bury the Blackstonian conception of the judicial function in a passage which has become well known:

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him the knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.⁹

The scope for judicial creativity, however, has been circumscribed at different times, and at different levels in the judicial hierarchy, by limits set down by rules of precedent. Although it has been argued¹⁰—to my mind not very convincingly—that precedent justice is unfair, on the ground that it interferes with the wiser conclusions of a later judge through the 'prejudice' of an earlier, and therefore serves to comfort the indolent judge, a scheme of precedent is clearly capable of providing important benefits. It assists litigants and their advisers to assess the nature and scope of legal obligations and, to the extent that it enables

⁸ *Re Hallett's Estate* (1880) 13 ChD 696, 710.

⁹ 'The Judge as Law Maker' (1972) 12 J.S.P.T.L. (N.S.) 22. Lord Edmund-Davies has observed: 'The simple and certain fact is that judges inevitably act as legislators . . . The inevitable interim between the discovery of social needs and demands and the provision of legislative remedies to meet them presents judges with the opportunity (indeed, it imposes on them the duty) of filling the need and meeting the demand in accordance with their notion of what is just. Nolens volens they thereby act as lawmakers': 'Judicial Activism' (1975) 28 C.L.P.1.

¹⁰ W. Englemann, *Die Wiedergeburt der Rechtskultur in Italien* (Leipzig, 1938), p. 29.

them to predict the likely outcome of disputes, it restricts the scope for litigation. By allowing the vast bulk of disputes to be settled in the shadow of the law, a system of precedent prevents the legal apparatus from becoming clogged by a myriad of single instances. It reflects a basic principle of the administration of justice that like cases should be treated alike and therefore generates a range of expectations from different participants in the legal process. Rules of law based on a system of precedent are therefore likely to exhibit characteristics of certainty, consistency, and uniformity. But such rules, depending on the practices of the courts, are, by the same token, liable to prove difficult to remove or modify.

The importance of precedent in English law has been recognized since the days of the Year Books but in those days it was a relatively fluid doctrine. In 1469, for example, the court had to consider whether a party should be held to the fulfilment of a judgment which it was impossible for him to fulfil owing to the lack of notice.¹¹ The question had not arisen before. In considering the court's approach to such a *res integra*, Yelverton thought that if the court was to lay down a settled rule ('un positive ley') it had to consider its general effect on moulding the common law. In his conclusion he states: '... for this case has never been before and therefore our present judgment will be taken for a precedent ("un president") hereafter.'

Respect for precedent gradually increased as attempts were made to develop and record principles of judicial technique but nowhere as yet do we encounter the notion that precedents were binding. In 1673, John Vaughan, Chief Justice of the Common Pleas, said:

If a Court give judgment judicially, another Court is not bound to give a like judgment, unless it thinks that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted, nor a reversal of them. Therefore, if a judge conceives a judgment given in another Court to be erroneous, he being sworn to do justice according to law, that is, in his conscience, ought not to give the like judgment, for that were to wrong every man having a like cause, because another has wronged before ...¹²

By the time of Lord Mansfield the doctrine of precedent had reached an advanced stage of development but it was not until

¹¹ *Anon.* Y.B. 8 Ed. IV 9 (Mich. pl. 9).

¹² *Bole v. Horton* (1673) Vaugh. 360, 363.

the nineteenth century that it became an inflexible feature of the English legal system, a characteristic that was to persist for some seventy years. Until then the uneven quality of law reporting and the complex organization of the courts were potent forces which militated against the application of *stare decisis* as a general rule. For a long time it was a contempt of Parliament to publish a report of proceedings in the House of Lords, and it was not until 1865 that a semi-official series of law reports appeared following the establishment of the Incorporated Council of Law Reporting. Furthermore, before 1873 there existed in England and Wales no fewer than three common law jurisdictions alongside an entirely separate jurisdiction in equity, in addition to the superior jurisdictions of the Court of Exchequer Chamber and the House of Lords. The rationalization of the court structure by the Judicature Acts 1873–5 saw the creation of the Supreme Court of Judicature in which law and equity were thenceforth to be administered concurrently in the High Court of Justice and the Court of Appeal. In 1876 the ancient appellate jurisdiction of the House of Lords was confirmed and strengthened by the Appellate Jurisdiction Act with the result that appeals were determined at the apex of the newly created pyramidal structure by professionally qualified Peers, applying their knowledge and experience of the law.

In these circumstances it was inevitable that the decisions of courts higher in the hierarchy would bind those lower down. What is less clear is that these developments should have required the court of final appeal to consider itself bound by its own previous decisions, an obligation the House of Lords authoritatively asserted in 1898. In *London Street Tramways Co. Ltd v. London County Council*¹³ the Lord Chancellor, Lord Halsbury, articulated the strict doctrine of *stare decisis* in the following uncompromising terms:

... a decision of this House once given on a point of law is conclusive upon this House afterwards, and ... it is impossible to raise that question again as if it were *res integra* and could be reargued, and so the House be asked to reverse its own decision.¹⁴

He concluded: '... nothing but an Act of Parliament can set

¹³ [1898] A.C. 375. In *Beamish v. Beamish* (1861) 9 H.L.C. 274 the House had held themselves bound by their previous decision in *R. v. Millis* (1844) 10 Cl. & F. 534, although they disapproved of the decision in that case.

¹⁴ *Ibid.*, at p. 379.

right that which is alleged to be wrong in a judgment of this House.¹⁵

The 'strongly coercive nature'¹⁶ of the English doctrine of precedent is not mirrored in Scotland, a result which may be accounted for by the collegiate nature of the Court of Session. Since the establishment of that court the judges have developed the law by 'judicial custom' or what we would call judge-made law, drawing on various sources, including the *ius commune* or evolved civil law. The following assessment by Erskine indicates the respect given in the eighteenth century by the Scottish judges to earlier decisions:

Judgment ought not to be pronounced by examples or precedents. Decisions therefore though they bind the parties litigating create no obligation on the judges to follow in the same tract if it shall appear to them contrary to law. It is however certain that they are frequently the occasion of establishing usages which after they have gathered force by a sufficient length of time must from the tacit assent of the state make part of our unwritten law.¹⁷

Until the nineteenth century, when the role of the Sovereign in Parliament as pre-eminent law maker was stressed, the Scottish judges could make and change the law within limits, and they did so. They could even declare Scottish statute law to be repealed by contrary use and desuetude but interestingly not, according to Stair, ancient custom. Neither the Court of Session nor the High Court of Justiciary have been bound to follow their own previous decisions. A Division of the Court of Session has power to reverse one of its own decisions by referring a case for a hearing before a court of seven judges or before the whole court.

It will be apparent that rules of precedent have exerted an important, and at some levels no doubt decisive, influence on the ability of judges to change the law. They have also shaped conceptions of the judicial function in a powerful way.

In 1917 the House of Lords was invited to overrule the common law rule enunciated in 1808¹⁸ that the death of a human being could not be complained of as an injury in a civil court. The House declined to do so. In a revealing passage in his speech, Lord Sumner noted:

¹⁵ Ibid., at p. 381. (See also Lord Halsbury's speech in the *Earldom of Norfolk Peerage Claim* [1907] A.C. 10 at 12.)

¹⁶ R. Cross, *Precedent in English Law* (3rd edn, 1977), p. 4.

¹⁷ Ersk. I, 147.

¹⁸ *Baker v. Bolton* (1808) 1 Camp. 493.

This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow, in the case of a legal system such as ours, that a principle can be said to be truly part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined.¹⁹

The respect for earlier authorities, the desire for consistency of decision and the concern shown by their Lordships to confine their judicial role to the disinterested application of the known law were to be echoed in numerous other decisions and no more so than by Lord Simonds who sat in the House of Lords from 1944 to 1962. During the time that he dominated the House, its purpose, both intellectually and practically, remained the preservation of the status quo.²⁰ Lord Simonds emphatically reaffirmed the doctrine of *stare decisis* in *Midland Silicones Ltd v. Scruttons Ltd*,²¹ in which Lord Denning had invited the House to overrule the long-established rule of privity which prevents a third party from suing on a contract, in the following celebrated riposte:

To that invitation I readily respond. For to me heterodoxy, or as some might say, heresy is not more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by an Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of these principles is the task not of the courts of law but of Parliament. . . . I would cast no doubt upon the doctrine of *stare decisis* without which law is at hazard.²²

The desire to preserve certainty, albeit at the cost of perpetrating an error,²³ was a powerful reason given by Lord Reid in his speech in *Myers v. D.P.P.*,²⁴ in which the House of Lords was invited to consider an extension of the exceptions to the general

¹⁹ *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, 41.

²⁰ R. Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979), p. 342.

²¹ [1962] A.C. 446.

²² *Ibid.*, at pp. 467-9.

²³ See, for example, the remarks of Diplock, LJ in *Garthwaite v. Garthwaite* [1964] p. 356 at p. 391 commenting on the decision of the House of Lords in *Ross-Smith v. Ross-Smith* [1963] A.C. 280.

²⁴ [1965] A.C. 1001.

rule that hearsay evidence is inadmissible. In seeking to delimit the boundaries within which judges could change the law, Lord Reid observed:

If we are to extend the law it must be by the *development and application of fundamental principles* [my emphasis]. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases when our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.²⁵

I think Lord Reid's remarks show very clearly the problems which face judges when contemplating a change in the law because the court can only decide on the facts of the case which happens to come before it. Unlike Parliament, the court cannot examine the effects of a range of alternative options, having regard to a multiplicity of interests.²⁶ Secondly, it must frame a judgment between the competing claims of the opposing parties. If it is disposed to change the law it must also be conscious of the disturbance this will cause in other related areas which it is in no position systematically to examine or evaluate. In *Hesperides Hotels Ltd v. Muftizade*,²⁷ for example, the House of Lords had to consider whether the rule that the court had no jurisdiction to hear an action to recover damages for trespass to land overseas should be overruled. The rule went back at least as far as 1792.²⁸ The House upheld the rule, for reasons of consistency and continuity. Lord Wilberforce observed that it had been accepted with differing degrees of force and emphasis in other common

²⁵ *Ibid.*, at pp. 1021-2. Not long afterwards Parliament enacted the Criminal Evidence Act 1965.

²⁶ A matter to which Lord Simon of Glaisdale adverted in *Jones v. Secretary of State for Social Services* [1972] A.C. 944 at p. 1025. See also Lord Kilbrandon's remarks in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 at pp. 700-1.

²⁷ [1979] A.C. 508.

²⁸ *Doulson v. Matthews* (1792) 4 T.R. 503.

law jurisdictions. He considered that revision of the rule (which would have involved possible conflicts with other jurisdictions and questions of political delicacy) could not be achieved by judicial decision and would require legislation, and he remarked that revision of the rule would necessitate consequential changes in the law including English rules on *forum non conveniens*.²⁹ As Lord Simon of Glaisdale has noted, 'a long-established rule of law almost always gathers juridical adhesions so that its abrogation causes dislocations elsewhere in the legal system. Parliament on executive or expert advice can allow for these: the judiciary can rarely do so.'³⁰

The problems of reconciling the desire for certainty and stability on the one hand with the need for change on the other came more sharply into focus following the Practice Statement read by Lord Chancellor Gardiner, on behalf of all the Lords of Appeal in Ordinary, before judgments were delivered on 26 July 1966.³¹ While acknowledging that the use of precedent provided at least some degree of certainty on which individuals could rely in the conduct of their affairs, as well as providing a basis for the orderly development of legal rules, their Lordships recognized that too rigid adherence to precedent might lead to injustice in a particular case and also 'unduly restrict the proper development of the law'. Although they would continue to treat their own previous decisions as normally binding, they agreed to depart from a previous decision where it appeared right to them to do so.

This change in attitude to precedent was clearly a response to the changing social and political climate of the 1960s,³² but it was also the culmination of a period of increased willingness by the House of Lords to take a freer attitude to precedent,³³ to which Lord Reid, with his considerable experience as a Lord of Appeal spanning twenty-four years, made a remarkable contribution. It is interesting to note that the Practice Statement may have been precipitated by the then recently established Scottish Law Commission which, in pursuance of their first programme,³⁴ had drafted a Bill to declare for the avoidance of doubt that the

²⁹ [1979] A.C. 508 at p. 536. (But see now s. 30(1) of the Civil Jurisdiction and Judgments Act 1982.)

³⁰ *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443, 487.

³¹ *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.

³² R. Stevens, *op. cit.*, pp. 403-5.

³³ A. Paterson, *The Law Lords* (1982), pp. 143-6.

³⁴ (1965) Scot. Law Com. No. 1.

doctrine of *stare decisis* in the House of Lords did not apply in Scottish appeals.³⁵

Since the Practice Statement was made, it has become possible to discern certain principles which the House has applied to limit the ambit of judicial law-making. First it is clear that the power to overrule a previous decision is to be used sparingly, on the ground that it would otherwise weaken existing certainty in the law.

In *Jones v. Secretary of State for Social Services*³⁶ the House was faced with a decision whether to overrule *In re Dowling*,³⁷ which concerned a claim for injury benefits under the National Insurance (Industrial Injuries) Acts. In *Dowling* the House had held five years previously that a decision that an injury which occurred in the course of the claimant's employment which was taken by the statutory authorities in a claim for injury benefit was binding on the medical authorities in respect of a claim for disablement benefit arising out of the same employment. The majority of the Committee of seven considered that *Dowling* had been wrongly decided but they declined to overrule it. Lord Reid considered that certainty would be impaired unless the practice of overruling was used sparingly,³⁸ a view with which Lord Simon of Glaisdale agreed.³⁹ Lord Pearson considered that the distinctive advantages of a decision of the House of Lords—of being final in the sense that it put an end to litigation between the parties and in the sense that it established the principle embodied in the *ratio decidendi*—should not be thrown away by too ready use of the power to depart from their previous decisions.⁴⁰

Secondly, the House has indicated that only in rare cases should it be prepared to overrule cases concerning the construction of statutes or other documents. As Lord Reid explained in the *Jones* case, in many cases it could not be said positively that one construction was right and the other wrong.⁴¹ Construction frequently depended, he thought, on weighing one consideration against another and much would depend on the judge's ap-

³⁵ See further the interesting Note by Lord Kilbrandon (a former Chairman of the Scottish Law Commission) in (1967) 83 L.Q.R. 176-7, and A. Paterson, *op. cit.*, pp. 149-50.

³⁶ [1972] A.C. 944.

³⁷ [1967] 1 A.C. 725.

³⁸ *Ibid.*, at p. 966.

³⁹ *Ibid.*, at p. 1024.

⁴⁰ *Ibid.*, at p. 996.

⁴¹ *Ibid.*, at p. 966.

proach: if more attention was paid to the meticulous examination of the language used in the statute the result might be different from that reached by paying more attention to the apparent object of the statute so as to adopt that meaning of the words which best accorded with it.⁴² In the same case, Lord Simon of Glaisdale considered that a variation of view on a matter of statutory construction, which he described as 'so much a matter of impression', would rarely provide a suitable occasion for changing the law by itself, although he admitted the possibility that it might if it could be convincingly shown that a previous construction had caused administrative difficulties or individual injustice.⁴³

Another opportunity to depart from a previous decision on a question of construction might be available if the alleged error was of recent origin,⁴⁴ for 'if a serious error embodied in a decision . . . has distorted the law, the sooner it is corrected the better'.⁴⁵

Two recent attempts by the House of Lords to unravel the complexities afforded by the law of criminal attempts illustrate this point very well.

In *Anderton v. Ryan*⁴⁶ the defendant, Mrs Ryan, had bought a video-recorder believing it to be stolen. She was charged, and subsequently convicted, of handling stolen property contrary to section 1(1) of the Criminal Attempts Acts 1981, but there was no evidence as to whether the video-recorder had in fact been stolen. By a majority, the House held that she was entitled to be acquitted on the ground that a defendant could not be convicted of an attempt to commit an offence where, irrespective of his belief, the completed act could not, on its true facts, have amounted to a criminal offence. Only a year later the decision was overruled. In *R. v. Shivpuri*⁴⁷ the appellant had been convicted of attempting to be knowingly concerned in dealing with and harbouring a controlled drug. He believed he had been

⁴² Lord Reid's observations were approved in *Taylor v. Provan* [1975] A.C. 194 at pp. 216 (*per* Lord Wilberforce), 218 (*per* Lord Simon), 227 (*per* Lord Salmon), and in *Farrell v. Alexander* [1977] A.C. 59, 90, *per* Lord Simon. See also *Vestey v. I.R.C.* [1979] 3 All ER 796, 1187 (*per* Lord Dilhorne) and 1196 (*per* Lord Edmund-Davies).

⁴³ *Ibid.*, at p. 1024.

⁴⁴ *British Leyland Motor Corporation v. Armstrong Patents Co. Ltd* [1986] 1 A.C. 577, 655, *per* Lord Griffiths.

⁴⁵ *R. v. Shivpuri* [1987] 1 A.C. 1, 23, *per* Lord Bridge of Harwich.

⁴⁶ [1985] A.C. 560.

⁴⁷ [1987] A.C. 1.

dealing with heroin but scientific analysis showed that it was snuff or some similar harmless vegetable matter. The Court of Appeal dismissed Shivpuri's appeal against conviction before the House of Lords had decided *Anderton v. Ryan*, on the correctness of which Shivpuri subsequently relied. Overruling their previous decision, the House held that the distinction drawn in *Anderton v. Ryan* between 'objectively innocent' acts and 'guilty acts' could not be sustained and that the *actus reus* of the statutory offence of attempt required an act which was not merely preparatory to the commission of an offence and which the defendant did with the intention of committing an offence, notwithstanding that the commission of the actual offence was, on its true facts, impossible. Lord Bridge (whose opinion in *Anderton v. Ryan* had been approved by the majority of their Lordships in that case) found that Shivpuri's case was indistinguishable from that of Mrs Ryan, but he considered that, notwithstanding the especial need for certainty in the criminal law, to which the Practice Statement⁴⁸ had drawn attention, the earlier decision should be overruled.

The House is reluctant, however, to sanction a change in the law which will disturb vested rights. This is apparent from the words of the Practice Statement itself in which their Lordships declared they would 'bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into'. As Lord Reid observed, extra-judicially, 'judge-made law is always retrospective. We cannot say that the law until yesterday was one thing, from tomorrow it will be something different. That would indeed be legislating.'⁴⁹

The importance of these considerations was illustrated in *West Midland Baptist Association v. Birmingham Corporation*,⁵⁰ in which the House of Lords approved a change in the law on the ground of changed circumstances which had rendered the earlier rule capable of producing injustice. In that case the House had to consider the basis of compensation for land which had been compulsorily acquired. On 14 August 1947 Birmingham Corporation obtained a compulsory purchase order in respect of land in the city centre, on part of which 'The People's Chapel', owned by the West Midland Baptist Association, was situated. Registration of the order had the effect that notice to treat was deemed to have been served on the Association on that date. The

⁴⁸ [1966] 1 W.L.R. 1234.

⁴⁹ 'The Judge as Law Maker' (1972) 12 J.S.P.T.L. (N.S.) 22, 23.

⁵⁰ [1970] A.C. 874.

land was purchased as part of a scheme for the redevelopment of a large area which was not intended to take place at once and, indeed, could not do so. It was a long-term project. Eleven years later the site for a new chapel was offered by the Corporation to the Baptist Association, which they accepted. The determination of the amount of compensation due to the Association was referred to the Lands Tribunal, for assessment under the Acquisition of Land (Assessment of Compensation) Act 1919. The Association contended that the relevant date of assessment was the date at which they might reasonably have begun reinstatement; the Corporation, on the other hand, contended that the relevant date was the date on which notice to treat was deemed to have been served. The Lands Tribunal awarded compensation amounting to £50,025 on the basis of this latter contention. But the Court of Appeal awarded £89,575 on the ground that the relevant date was that on which rebuilding might have been commenced.

In the House of Lords, Lord Reid said that the rules provided by the Act of 1919 had to be interpreted in the light of the provisions of the Lands Clauses Consolidation Act 1845 and subsequent decisions of the courts. He noted that in the nineteenth century the purchasing power of money remained fairly constant over long periods and that there was seldom any long delay by promoters in completing the acquisition of land after notice to treat had been served. Although from a practical point of view, therefore, it did not much matter which stage in the process of acquisition was taken as the time at which compensation should be assessed, it had been convenient to take the date of notice to treat, and since 1870 it had been assumed that this was the right date to take. 'So the question', Lord Reid thought, 'is whether it is proper for this House to re-examine a judge-made rule of law based on an assumption of fact which was true when the rule was formulated but which is no longer true and which now in many cases causes serious injustices.'⁵¹

The Corporation had argued that the House could not do so on the ground that subsequent legislation had recognized the validity of the rule and that it was important not to upset existing proprietary or contractual rights. In response to the former argument Lord Reid observed: 'the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was

⁵¹ *Ibid.*, at p. 898.

in fact something different.⁵² In relation to disturbing vested rights he acknowledged that 'we cannot say that the law is one thing yesterday but is to be something different tomorrow. If we decide that the rule as to the notice to treat is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation.'⁵³ In that case he considered there was little or no chance that by reopening the matter the House could alter the future operation of existing vested rights and that the date of reinstatement was the right date for the assessment of compensation.⁵⁴ The effect of the decision in that case, however, undoubtedly changed the basis on which earlier arrangements had been entered into.

In the *West Midland Baptist Association* case the House of Lords had to decide whether to change the law by overruling previous decisions but the House may approve a 'significant change of approach' which, although it does not involve overruling earlier decisions, nevertheless marks a change in the law. In this situation the House may consider itself less inhibited from 'changing' the law on the ground that previous decisions are properly to be regarded as developmental, in that they establish emerging principles. In *Furniss v. Dawson*⁵⁵ the House had to consider a tax deferment scheme. Previous decisions of the House of Lords had been interpreted by the courts as suggesting that the only ground on which it was proper to distinguish between the form and substance of transactions was if they were shams. But in *Ramsay v. Inland Revenue Commissioners*⁵⁶ the House of Lords had held that a composite transaction could produce an effect which brought it within the ambit of a fiscal provision. *Ramsay's* case was subsequently described by Lord Scarman in *Inland Revenue Commissioners v. Burnham Oil Co.*⁵⁷ as marking 'a significant change in the approach adopted by this House in its judicial role' towards tax avoidance schemes, although in fairness to the Revenue it must be said that in *Inland Revenue Commissioners v.*

⁵² Ibid.

⁵³ Ibid., at pp. 898-9.

⁵⁴ In 'The Law and the Reasonable Man', *Proceedings of British Academy*, liv (1968), 197, Lord Reid had said: 'When we are dealing with property and contract it seems right that we should accept some degree of possible injustice in order to achieve a fairly high degree of certainty.'

⁵⁵ [1984] 1 A.C. 474.

⁵⁶ [1982] A.C. 522.

⁵⁷ [1982] S.T.C. 30 at p. 39.

Brebner,⁵⁸ the approach had been taken some years beforehand, by the House of Lords to defeat the Inland Revenue. Since it was the Revenue that was defeated little was learnt about it. In *Furniss v. Dawson* itself, the House held unanimously that liability to tax was to be determined according to the substance of the scheme as a whole and its end result. As Lord Bridge remarked, the case represented 'a further important step . . . in the development in the courts' increasingly critical approach to the manipulation of financial transactions to the advantage of the taxpayer'.⁵⁹

The case of *Furniss* provides an example of the role of the courts in determining how far a person may legitimately regulate his affairs in order to diminish the burden of tax. Lord Scarman considered that 'difficult though the task may be for the judges, it is one which is beyond the blunt instrument of legislation'.⁶⁰ Such an instrument, however, may be necessary in order to encompass a wider range of issues than those revealed by a particular case. The recognition by judges that some changes are best left to Parliament 'by legislation following on a wide survey of the whole field'⁶¹ represents an important limitation on the extent to which the judges can and do change the law. The House of Lords has frequently recognized, in a number of very different contexts, that change in the law may well raise issues of wide-ranging importance and complexity which transcend the instant case and which can be examined properly only by Parliament.⁶² Family

⁵⁸ [1967] 2 A.C. 18.

⁵⁹ [1984] 1 A.C. 474 at p. 516.

⁶⁰ [1984] 1 A.C. 474 at p. 514.

⁶¹ *Myers v. D.P.P.* [1965] A.C. 1001, 1022, *per* Lord Reid.

⁶² The record of the Law Commissions in stimulating Parliamentary reforms in family law is particularly impressive: see the Law Commission's *Twentieth Annual Report 1984-1985* (1986) Law Com. No. 155 at paras. 1.25-1.29. For judicial comments on the role of the Legislature in changing the law in other contexts see, for example, *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361, 406, *per* Lord Reid; *National Provincial Bank v. Ainsworth* [1965] A.C. 1175, 1259, *per* Lord Wilberforce; *Launchbury v. Morgans* [1973] A.C. 127, 137 (*per* Lord Wilberforce), 142 (*per* Lord Pearson); *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443, 480, *per* Lord Simon of Glaisdale; *D.P.P. v. Nock* [1978] A.C. 979, 992, *per* Lord Scarman; *Hesperides Hotels Ltd v. Muftizade* [1979] A.C. 508, 537, *per* Lord Wilberforce; *R. v. Lemon* [1979] A.C. 617, 658, *per* Lord Scarman; *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 189 *per* Lord Scarman; *Pirelli General Cable Works Ltd v. Oscar Faber & Partners* [1983] 2 A.C. 1, 19 (*per* Lords Fraser and Scarman); *President of India v. La Pintada Compania Navigacion S.A.* [1985] A.C. 104, 111 (*per* Lord Scarman), 111-12 (*per* Lord Roskill); and *B.L.M.C. v. Armstrong Patents Ltd* [1986] 1 A.C. 577, 623, *per* Lord Bridge.

law is, I think, a good example where change is not best promoted by judges but rather by Parliament with the advice of the two Law Commissions following extensive and unhurried consultations geared to the *systematic* development and reform of the law. I agree with Lord Scarman when he said during the Parliamentary debates on what became the Matrimonial and Family Proceedings Act 1984 (which gave effect to three Law Commission reports and one report from the Scottish Law Commission) that Parliament should give favourable consideration to Bills based on recommendations of the Law Commission.⁶³

It is understandable that judges should feel inhibited from changing the law and it is certainly arguable that since the two Law Commissions were established, for the purpose of promoting reform of the law,⁶⁴ the opportunities for judge-made law have become fewer. This applies not only when the Commissions are actively engaged in reform within a defined or definable field but also where Parliament has enacted legislation based on recommendations of the Commissions or where it has chosen not to do so after the Commissions have reported, or where Parliament chooses to give effect to some but not all of their recommendations. For the judges to change the law to give effect, by another route, to recommendations which Parliament appears to have taken a policy decision not to do, could indeed be regarded as a usurpation of the functions which properly belong to the Legislature rather than an exercise of judgment to depart from an earlier decision on the ground that it was obsolete and could still, in some cases, cause injustice.⁶⁵ On the other hand, if the House of Lords does change the law in advance of recommendations by the Law Commissions, as it did in *British Railways Board v. Herrington*⁶⁶ in relation to liability for injuries suffered by a trespasser on an occupier's property, it may be criticized subsequently by the Law Commissions or by others, for failing to state a clear principle applicable to the generality of cases.⁶⁷

⁶³ *Official Report* (H.L.) 21 November 1983, Vol. 445, Col. 63.

⁶⁴ Law Commissions Act 1965, section 3(1).

⁶⁵ See *President of India v. La Pintada* [1985] 1 A.C. 104, 130, *per* Lord Brandon.

⁶⁶ [1972] A.C. 877.

⁶⁷ See the Law Commission's *Report on Liability for Damage or Injury to Trespassers and Related Questions of Liability* (1976, Cmnd. 6428; Law Com. No. 75), para. 6. The Occupiers Liability Act 1984 gave effect to the Commission's recommendations for reform. On the Law Commission and their effect on the common law see H. K. Lucke, 'The Common Law: Judicial Impartiality and Judge-Made Law' (1982) 98 LQR 29.

I do not think judges should be taken to task if they are reluctant in some cases to change the law, for in every case where the judge overrules or modifies an earlier decision this has retrospective effect, as Lord Reid pointed out in the passage cited from the *West Midland Baptist Association* case. The overruling decision will thenceforth govern all future cases including those which relate back to a period before the new rule was stated (except, that is, to those matters which are *res judicata* as between parties to earlier decisions).⁶⁸ This result is a consequence or, as some would see it, a relic of the declaratory theory of adjudication for if judges do not 'make' law but only declare it, it follows that the overruled decision must have been wrong from the start, for 'it was not the law'. The overruling decision must therefore be given full retrospective effect, even if it causes injustice by disturbing reasonable expectations and reliance placed on earlier decisions. Bentham saw this as a major defect of the common law, which he dubbed 'dog law' for this reason:

Do you know how [judges] make the [common law]? just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow his being told: they lie by until he does something which they say he *should not have done* and then they hang him for it. What way, then, has any man of coming at this dog law?⁶⁹

And yet, as Sir Kenneth Diplock, said in his Presidential Address to the Holdsworth Club in 1965, 'the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process',⁷⁰ and I should like, at this juncture, to accept the invitation he and others⁷¹ have issued to consider the technique of prospective overruling.

When a court overrules a decision prospectively it makes a distinction between matters arising before the decision and those

⁶⁸ *Re Waring* [1948] 1 All E.R. 257.

⁶⁹ Sir John Bowring (ed.), *Works* (1843), v, 235.

⁷⁰ 'The Courts as Legislators', reprinted under the title B. W. Harvey (ed.), *The Lawyer and Justice* (1978), pp. 265 ff., at p. 281.

⁷¹ See, for example, Lord Reid, 'The Judge as Law Maker', *op. cit.*, p. 23, and Lord Simon of Glaisdale in *Jones v. Secretary of State for Social Services* [1972] A.C. 944, 1027, and in *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443, 490.

which occur afterwards. Those which occur before the decision are decided with reference to the old law (which is applied in the overruling case); those which take place afterwards will be governed by the new rule (which is formulated in the overruling case). In a sense the Practice Statement of the House of Lords in 1966 was an example of prospective overruling.

Prospective overruling is a collective term used to describe an agglomeration of techniques which have been used by judges in the United States,⁷² Canada,⁷³ India,⁷⁴ in the European Court of Justice,⁷⁵ and in a number of non-common law countries where a ruling of unconstitutionality may be held to operate only prospectively.

A very early example of prospective overruling, although the term was not in fact used at the time, was the decision in 1848 of the Supreme Court of Ohio in *Bingham v. Miller*,⁷⁶ in which that court had to consider the power of the Legislature to permit divorce. The court held that they had no such power but, mindful of the 'fearful consequences' their decision would have on questions of status if it applied retrospectively, the court declared it to have only prospective effect. The leading American authority on prospective overruling is *Great Northern Railway Co. v. Sunburst Oil Refining Co.*⁷⁷ Under Montana State Law a state rail commission was empowered to fix carriage rates. The Montana Supreme Court had permitted a right of recovery for the excess to carriers unreasonably burdened by the new rate. In reliance on this decision Sunburst sued the railway company but the Supreme Court of Montana overruled its previous decision, holding that the right to recover did not exist. However, since the old rule had been relied upon by shippers and carriers, the Court allowed Sunburst to recover. The United States Supreme Court held that prospective overruling was not a denial of due process or contrary to the Federal Constitution. Giving the judgment of the Court, Mr Justice Cardozo observed: 'A State in defining the limits of precedent may make a choice for itself between the

⁷² See the survey by Professor Traynor, 'Quo Vadis Prospective Overruling: A Question of Judicial Responsibility', Lecture at the University of Birmingham, 7 May 1975.

⁷³ *Manitoba Language Rights Case* (1985) 19 DLR (4th) 1. See also *Edward v. Edward* [1987] 5 W.W.R. 289, 297-300.

⁷⁴ *Golak Nath v. State of Punjab* [1967] 2 S.C.R. 762.

⁷⁵ *Defrenne v. Sabena (No. 2)* [1976] E.C.R. 455.

⁷⁶ (1848) 17 Ohio 45.

⁷⁷ 287 U.S. 353 (1932).

principle of form and operation and that of relation backward. It may be said that the decisions of its highest courts, though later overruled, are nonetheless law for intermediate transactions.⁷⁸

The technique of prospective overruling has been employed by several states and by the United States Supreme Court in cases in which the courts have been persuaded that there is some justification for limiting the retrospective effect of decisions, having regard first, to the purpose of the rule and whether it would be furthered by retroactive application, secondly, the degree of reliance on the old rule, and thirdly, the effect retroactive application would have on the administration of justice.⁷⁹

A number of variations of this technique have been devised by the courts in the United States. For example, the Supreme Court has limited the retrospective effect of the overruling decision, not in the overruling case itself but in a later case. In *Mapp v. Ohio*⁸⁰ the Supreme Court held that evidence which had been illegally obtained from the defendant was inadmissible, but it was subsequently held in *Linkletter v. Walker*⁸¹ that the rule in *Mapp* was to be prospective only.

Another variation of the technique is to give the benefit of the new rule (which is otherwise held to operate prospectively) to the party who has succeeded in persuading the court to change the law, on the ground that otherwise there would be no incentive to challenge the old rule. In *Molitor v. Kaneland Community School District No. 32*,⁸² which concerned an action for damages for personal injuries suffered by school children injured in a school bus accident caused by the driver's negligence, the court prospectively overruled an old decision which protected the defendant school district from liability by government immunity but applied the new rule to the defendant who had of course relied on the earlier law. This was unjust not only to the defendant but also to the other school children who had been travelling on the bus at the same time. They were denied a remedy by the decision. Had there been another accident in Kaneland County before the decision in *Molitor*, the school district would not have been liable. The result is unfair because it offends against the basic principle of justice that like cases should be treated alike, but it also invests

⁷⁸ Ibid., at p. 364.

⁷⁹ For an excellent analysis see A. G. L. Nicol, 'Prospective Overruling: A New Device for English Courts?' (1976) 39 M.L.R. 542.

⁸⁰ 367 U.S. 643 (1961).

⁸¹ 381 U.S. 618 (1965).

⁸² 163 N.W. 2d 89 (1959).

the timing of the overruling decision, which is entirely fortuitous, with an artificial significance with potentially important consequences.

Yet another technique, which has been applied in criminal procedure cases, is to exclude from the denial of retrospectivity pending cases or those which are on appeal. But even a cursory examination of the authorities, reviewed by the Supreme Court in their recent decision in *Griffith v. Kentucky*,⁸³ reveals that the selective application of new rules violates the principle of treating similarly situated defendants in the same way, and it is interesting to note that the court in that case came down in favour of a rule of general retroactivity to all cases still pending on direct review or not yet final.

The practice of prospective overruling has three important effects. First, it disposes of the Blackstonian theory that judges merely declare the law. It acknowledges, frankly, their law-making function. Secondly, prospective overruling relaxes the grip of precedent as a guide to the solution of new problems by excluding from its application contracts, fiscal arrangements, and settlements entered into on the basis of earlier law. It removes a particular source of injustice which arises when the legal basis of an agreement or arrangement is changed *ex post facto*. Thirdly, by preserving existing rights it is more conducive to the general stability of the legal system because it avoids sudden discontinuities from previously established rules and practices.

Should the practice of prospective overruling be adopted in appropriate cases in our courts? In his 'Afterthoughts' in *Jones v. Secretary of State for Social Services* Lord Simon of Glaisdale said he was:

left with the feeling that, theoretically, in some ways the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in *Dowling's* case, but to have overruled that decision prospectively.⁸⁴

It is interesting to speculate whether Lord Reid would have considered himself bound to follow *Shaw's* case in *Knulier v. D.P.P.*,⁸⁵ whether in *Morgans v. Launchbury*,⁸⁶ Lord Wilberforce would have applied the well-known and certain rules of vicarious

⁸³ 479 U.S. 708 (1987).

⁸⁴ [1972] A.C. 944, 1026.

⁸⁵ [1973] A.C. 435.

⁸⁶ [1973] A.C. 127, 137.

liability in that case had the opportunity prospectively to overrule earlier decisions been available, or whether the availability of the technique would have encouraged the House of Lords to reach a different result for the parties in *Furniss v. Dawson*.⁸⁷

However, there are a number of objections to prospective overruling.⁸⁸ The first, I believe, is that prospective overruling does not necessarily ensure certainty, stability, or predictability, as cases like *Linkletter* and *Molitor* demonstrate. For that reason I believe it would pose a real threat to the view, widely held in our society, that judges apply the law even-handedly to all who seek justice from the courts and it would thereby undermine confidence in the judiciary. I accept that in some cases 'certainty' is an unattainable objective but the experience of the American courts has shown different variations of the practice of prospective overruling are perfectly capable of producing different results in the same type of cases, which, according to our principles of justice, are entitled to be treated on a like basis. I would argue that it is not the business of judges to weigh up competing claims beyond the boundaries of the dispute, such as the effect retroactive application might have on the administration of justice. The parties before the court are in my view entitled to a decision which deals with the problems revealed in their case, not with those of imaginary litigants and their advisers. To the extent that the practice qualifies a basic principle of the administration of justice that like cases are to be treated alike, it would, I believe, be very likely to encourage more cases to be taken to appeal. Even if it had been available in a case like *Miliangos*, for example, it is not clear that the new rule would have applied to debts incurred after the cut-off date or to debts which fell after that date.

Secondly, there is a danger that the opportunity provided by the particular factual matrix of the overruling case to decide a rule for future cases would not encompass all the legitimate interests and claims relevant to analogous cases in the future. The adversarial process is based on pitching claim against counter-claim by the parties to a dispute; the court is not concerned with wider issues beyond those raised by the instant case even with the benefit, in some cases, of an *amicus*, or with issues which are of merely theoretical interest.⁸⁹ These considerations weighed hea-

⁸⁷ [1984] 1 A.C. 474. See Avery Jones [1983] B.T.R. 203; [1985] B.T.R. 14 and *Tax Law in the Melting Pot* (no date), a report by the Revenue Law Committee of The Law Society, at pp. 48-9.

⁸⁸ See A. G. L. Nicol, *op. cit.*, pp. 548-57.

⁸⁹ *Ainsbury v. Millington (Note)* [1987] 1 W.L.R. 379.

vily on Lord Simon of Glaisdale who observed in *Miliangos*:

Law is too serious a matter to be left exclusively to judges.⁹⁰

The last, and to my mind the most important, objection to prospective overruling is that the opportunity it would provide judges to change the law might provoke political and constitutional problems about the relationship between the Legislature and the Judiciary in the law-making process. Speaking of prospective overruling in his Chorley Lecture in 1975, Lord Devlin said:

I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators . . . The need for disguise hampers activity and so restricts power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.⁹¹

He concluded:

It is a great temptation to cast the judiciary as an elite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however long and winding the path, to the totalitarian state.⁹²

Even if one does not share Lord Devlin's concern to the same degree, I believe that a technique of adjudication which drew judges much more openly into the political arena in which policy issues are discussed would weaken, if not ultimately undermine, the collaborative process between the Legislature and the Judiciary. It would, I believe, damage the perception that judges are impartial figures who seek to administer justice according to law, especially in those cases where they are called upon to reach decisions about the application of legislation designed to give effect to policies which have been the subject of intense public and parliamentary controversy, for example in the field of industrial relations where there is plenty of room for differences

⁹⁰ [1976] A.C. 443, at p. 481, echoing what he had said in *Aries Tanker Corporation v. Total Transport Ltd* [1977] 1 All E.R. 398, at p. 407.

⁹¹ [1976] M.L.R. 1, at p. 16.

⁹² *Ibid.*

of opinion about what is just and reasonable but on which, under our Constitution, the opinion of Parliament is paramount.⁹³

On a balance of disadvantage and advantage I do not consider the technique of prospective overruling would be a useful addition under our Constitution.

If judges are to change the law, and I see no reason to conceal the fact that they do, it must be by the development and application of fundamental principles to disputes between parties concerned about specific events which have occurred in the past. Such development and application may show that a particular rule used in the past should no longer apply but the fundamental principles were always part of the law and it is therefore justifiable to apply them to the case before the court. A judge who in this way administers justice does no more, and no less, than perform that which his oath requires.

⁹³ See *Duport Steels Ltd v. Sirs* [1980] 1 All E.R. 529, 541-2 (*per* Lord Diplock) and 551 (*per* Lord Scarman).