JUDICIAL POWER AND JUDICIAL RESPONSIBILITY

GRÉGOIRE WEBBER*

I POWER AND RESPONSIBILITY

Not every act of adjudication by a court is an exercise of judicial responsibility. Some exercises of judicial power are not grounded in the reasons favouring judicial responsibility. Those exercises of power by judges invite reflections on the constitutional role of the judiciary, a role interrogated by thinking through the reasons why communities of persons would seek to regulate their affairs by awarding to a person or body of persons authority over disputes. The judiciary's role is appreciated by reflecting on the constitutional role of the legislature, a role itself interrogated by thinking through the reasons why communities of persons would seek to regulate their affairs by awarding to a person or body of persons authority to make law. These reflections on adjudication and legislation help identify the reasons for aligning the power to legislate with the legislature and the power to adjudicate with the court. In turn, they help identify how and why certain exercises of power by judges (judicial power) are not aligned with judicial responsibility and, thus, why responsible communities of persons should give pause before conferring certain powers on courts and why judges tasked with the exercise of such powers should give pause before exercising them too confidently.

Taking inspiration from H.L.A. Hart's insights into the reasons favouring constitutional rules that empower a person or body to perform the acts of legislating and adjudicating, I reflect on how institutions can be designed to exercise legislative and adjudicative powers *well*, that is, with the necessary capacities to fulfil their constitutional roles (Part II). These reflections point to the foundations of legislative and adjudicative responsibility and to a basic division in orientation.[1] I argue that the responsibility of the person or body exercising the power to change the law is to care for the community's *future*, a future to be directed by guiding and coordinating human behaviour by setting out rights and responsibilities (Part III). By contrast, the power to adjudicate conclusively on the requirements of the law in a dispute discloses a responsibility of a different orientation, a responsibly to relate to the *present* dispute the law as it was at that time *past* when the violation of the law is alleged to have occurred (Part IV). This basic division of responsibility—for the community's future; for relating the community's past acts to present disputes—is a division informed by the need to remedy different defects in human communities. (I leave aside the responsibility of the executive to carry out the community's legal commitments by administering the law in the present.)

With this division in view, I turn to the conferral of judicial power under charters of rights, with a special focus on open-ended charters of rights that leave the resolution of rights-disputes to a later day. The exercise of judicial power in such circumstances

---

* Canada Research Chair in Public Law and Philosophy of Law, Queen's University, and Visiting Senior Fellow, London School of Economics. For comments on a previous draft, I thank Richard Ekins and Graham Gee. My argument here tracks aspects of the argument developed in 'Past, Present, and Justice in the Exercise of Judicial Responsibility' in Grégoire Webber, Rosalind Dixon, and Geoffrey Sigalet (eds.) *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, forthcoming).

[1] My thinking on these matters was greatly influenced by John Finnis's Gray's Inn Hall Lecture for Policy Exchange's Judicial Power Project, 'Judicial Power: Past, Present and Future' (20 October 2016), published in John Finnis, *Judicial Power and the Balance of Our Constitution*, Richard Ekins (ed.) (London: Policy Exchange, 2017).

is, I argue, partially unmoored from the past and open to the future (Part V). In adjudicating whether a change in the law complies with the open-ended requirements of a charter of rights, a court is invited to choose between different possible understandings of those requirements and, in so doing, is invited to chart a path for the community's future. It is a role for which the court is institutionally ill-designed, as revealed by a series of court-led reforms to the judicial forum. Those reforms disclose judicial concern for the misalignment between the conferral of judicial power and settled understandings about judicial responsibility and its significance in a community governed by the Rule of Law (Part VI).

II Reasons for Institutional Design

Hart's account of the reasons favouring constitutional rules that empower a person or body to perform the acts of legislating and adjudicating did not address the question of institutional design, but his explanatory method of identifying defects in need of remedy assists one in thinking through answers to the questions: 'What is a legislature?' and 'What is a court?'. By identifying the purpose (objective, goal, end) of the Rule of Change (to 'deliberately adapt' the primary rules of obligation to 'changing circumstances, either by eliminating old rules or introducing new ones')[2] and the purpose of the Rule of Adjudication ('to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken'),[3] Hart's methodology begins to chart a path for understanding the nature of the legislature and the nature of the court, even if it is a path he did not pursue.[4] It is a path charted before him by Aristotle and repeated by Aquinas that ties together the nature of something and its reasons for being: 'the *nature* of *X* is understood by understanding *X*'s *capacities* or capabilities, those capacities or capabilities are understood by understanding their activations or *acts*, and those activations or acts are understood by understanding their *objects*', their objectives, purposes, reasons.[5]

Following this methodological path, we may explore the nature of the legislature by understanding the capacity of the legislature, a capacity understood by reference to legislative action, an action itself understood by interrogating the reasons for legislating. For the Rule of Change to perform its remedial purpose, it must empower a person or body not only to make changes, but to make *good* changes, changes that are soundly responsive to the defect of more or less static primary rules, changes that do not themselves beget yet more defects in need of remedy. As Hart's account shows in outline, the responsibility that accompanies the Rule of Change is to 'deliberately adapt' the law to 'changing circumstances', that is: to change the law when there are sound reasons to do so.[6]

So, too, with the nature of the court: it is explored by understanding the capacity of the court, a capacity understood by reference to judicial action, action itself

---

[2] H L A Hart *The Concept of Law* (Oxford University Press, 3rd edn, 2012) 92.

[3] Ibid 96.

[4] I do not claim that H L A Hart charted this path or is best read as having done so. I argue only that it is a path invited by his method, even if it is a method that Hart distanced himself from in the Postscript to *The Concept of Law*. On different readings of *The Concept of Law*'s celebrated ch. V, see John Gardner, 'Why Law Might Emerge: Hart's Problematic Fable' in Luís Duarte D'Almeida, James Edwards, and Andrea Dolcetti (eds.) *Reading HLA Hart's* The Concept of Law (Hart, 2013).

[5] *De Anima* II, 4: 415a16-21; *ST* I q 87, a 3c. The quotation is from John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) 29.

[6] Hart, above n 2, 92-93. See also Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 127 and, generally, ch. 5.

understood by interrogating the reasons for adjudicating. For the Rule of Adjudication to perform its remedial purpose, it must empower an adjudicator to rule not on the basis of the flip of a coin (which would be more efficient) or on the basis of what the law should have been either in the past when the alleged rule violation occurred or today when the matter is set for resolution; rather, the Rule of Adjudication must empower a person or body to settle disputes fairly on the basis that a law has been violated; that is, to resolve disputes by 'determin[ing] authoritatively the fact of violation of the rules'.[7]

In thinking through the capacities that an institution will require in order to perform well its remedial function, one may query whether the capacities that are necessary in order to change the law well are the same as the capacities necessary in order to adjudicate well. If one concludes, as do sections 3 and 4, that the capacities needed for good law-making differ in their fundamentals from the capacities needed for good adjudicating, then the division of legislative and adjudicative responsibilities can be justified on the grounds that each responsibility will be better performed if legislative and adjudicative powers are awarded to different institutions. And, as subsequent sections will aim to demonstrate, the design features that award an institution the capacity to adjudicate well will frustrate that same institution's ability to legislate well. These considerations, I argue, invite reflections on the merits of certain conferrals of judicial power.

III Responsibility for the Future

To legislate — to change the law — is to take responsibility for the community's future by determining that the set of inter-personal relationships governed by the law should be this way rather than that. It is to determine what, as a matter of law, is to be prohibited, permitted, and required for the good and rights of the community's members. The power to make this determination and to act on it is in contrast with the defective state of affairs that led Hart to identify the need for a Rule of Change: the 'slow process of growth' with unofficial primary rules, 'whereby courses of conduct once thought optional become first habitual or usual, and then obligatory' only then to be followed, perhaps, by 'the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed'.[8] To remedy this defect of the more or less static character of primary rules, there is a need for a power to 'deliberately adapt' the primary rules of obligation to 'changing circumstances, either by eliminating old rules or introducing new ones'.[9]

Hart's Rule of Change is introduced to empower a person or body to change the law deliberately (with resolve, for reasons) in response to a change in circumstances. Though left underexplored by Hart, those circumstances are far-reaching and include changes both to *factual premises* (confirmation or contradiction of factual predictions, technological advances, changes in membership and environment, etc) and to *normative premises* (evaluations of right and wrong, good and bad, benefits and burdens, etc). Some premises will be informed by expertise on which there is broad consensus, others will be arrived at tentatively due to the burdens of judgment. Though identified by Rawls as sources of reasonable disagreement *between* persons, the burdens of judgment are here intended to encompass the challenges each *one* of us will encounter in making sound judgments. Among those challenges will be difficulties in assessing and evaluating conflicting and complex evidence, difficulties in identifying

---

7 Hart, above n 2, 93-94.
8 Ibid 92-93.
9 Ibid 92.

the relevant considerations and in determining their weight, difficulties in making overall assessments given incommensurabilities, and difficulties in ranking alternative courses of action.[10] All premises will be debated between persons in the circumstances of politics.[11]

Factual and normative premises are *reasons* favouring (or not) a change in the law. Any change in relationships governed by law will be intended to achieve good ends and may have unintended, but accepted side-effects, all held in view in choosing whether to change the law. That choice will be made by evaluating the fairness and justice of the status quo against this or that proposal for change, evaluations that deny easy answers and for which it is reasonable to anticipate that reasonable persons will disagree. The reasonableness of that disagreement turns not only on the burdens of judgment that surround the making of decisions where moral truth cannot be demonstrated without contest and where predictions of future behaviour will be imperfect, but also on the open-ended nature of choice when confronted with reasonable alternatives each supported by reason but left unranked by it.

These realities speak to the design of a good law-making body and the institutional capacities that will facilitate the responsible exercise of its law-making power. Consider membership. Because the community's future concerns each one of its members and because those members will take a view regarding the status quo and alternatives to it, in principle every member should be invited to participate in the law-making activity: *quod omnes tangit ab omnibus decidentur* (what touches/affects all should be decided by all).[12] That principle may be qualified in keeping with the institution's responsibility, which is to act deliberately when there are reasons to change the law. Too large a membership will frustrate the ability of an institution to reason and to act well.[13] When the legislature's membership is qualified in number, as it will be in any community that does not satisfy Hart's conditions for a simple form of social life, the membership *within* the institution should be related to the membership *outside* the institution by a principle of representation, so that those who look upon the law-making institution can understand its activity as their activity, its members as their members, and its debates as their debates. This principle of representation, which requires that the legislature's membership be selected by the community's members, promotes the accountability of the law-makers to the community they serve. From time to time, the community ought to be afforded the opportunity to substitute the membership of the legislature with a new group of members who propose different commitments for the community's future or who make claim to implement existing commitments with greater competence and resolve.

So as to legislate well, the institution should have the capacity to inform itself of empirical premises by commissioning studies and receiving expert witnesses and their reports. So too should the institution have the capacity to ensure that it is well seized of the competing normative premises central to the exercise of its responsibility. To this end, its law-making process should be designed to emphasise deliberation, where the reasons for and against a proposal may be freely debated, with a view to identifying a full range of the normative premises bearing on the proposal's merits. Identifying a full range of reasons will be facilitated if the process invites the contributions of persons

---

[10] John Rawls, *Political Liberalism* (Columbia University Press, expanded edn, 2005) 54-8, esp. 56-7.

[11] Jeremy Waldron, *Law & Disagreement* (Oxford University Press, 1999) 101-3.

[12] I leave aside debates in political theory on the different principles of inclusion or participation suggested by the Latin *tangere* (touch). For discussion, see Robert E Goodin, 'Enfranchising all affected interests, and its alternatives' (2007) 35 *Philosophy & Public Affairs* 40 and Arash Abizadeh, 'On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem' (2012) 106 *American Political Science Review* 874.

[13] Ekins, *Nature of Legislative Intent*, above n 6, 149.

who are not members of the assembly, but who may make known their views, either directly as witnesses and by submitting briefs or indirectly by contributing to wider public debates known to members within the legislature.[14]

The good law-making institution will evaluate the ends of the proposal, the merits of the proposed and alternative measures to secure those ends, its anticipated impact on the overall scheme of benefits and burdens shared by members of the community, and the proposal's relationship to the rights of each member of the community. It will be mindful of the existing state of the law and the disruption caused by fundamental change. The resulting choice — to change the law this way or that or not at all — will, in many instances, be *free*, in the sense that reason, having eliminated countless options as unavailable because unreasonable or outranked in all respects by other superior options, will leave the law-makers with a decision to make as between two or more reasonable alternatives, so that nothing but the choosing itself will determine what is to be done.[15] That resulting choice will be whether the community's future is to continue on its present path or to proceed on the new path charted in the law-making proposal.

Given the need to remedy the defect of *stasis* and to keep all law under ready review, the good legislature requires the capacity to initiate, of its own motion, changes to the law. The importance of this capacity is affirmed by the need for self-correction, so that the law-maker is empowered to reverse previous choices for the community's future when they prove to be misdirected, as some inevitably will be given the many imperfections in predicting the course of human affairs.

These reflections on the good law-maker's *capacities* to exercise law-making powers responsibly are all informed by the *reasons* favouring a power to legislate: a power to change the law in response to reasons, including a change in the factual or moral premises informing the community's current legal commitments. In turn, these reflections on capacity inform an understanding of the legislature's *acts*. The morally significant law-making choices for the community's future can be carried out responsibly by employing a sort of technique to guide human conduct. It is a technique that requires a firm, even if necessarily imperfect, demarcation between the open-ended deliberation on the merits of a change in the law that precedes a legislative enactment and deliberation according to the law.

For the law to be changed with a view to directing human conduct for the good and rights of the community's members, there is a need for 'the law's distinctive devices: defining terms, and specifying rules, with sufficient and necessary artificial clarity and definiteness to establish the "bright lines" which make so many real-life legal questions *easy questions*' under law, even as they remain otherwise *hard questions* in moral inquiry.[16] These technical devices aim to achieve what moral reasoning will often leave unsettled: unanimity on the law's settlement on the direction of the community's future, in the absence of unanimity on what that settlement should have been or should now be. This unanimity is made possible by the law's ability to settle patterns of rights, duties, liberties, powers, immunities, and so forth, such that even those who disagree on the merits of such patterns can agree on the fact that they are the community's selected patterns. This agreement aligns with a principle of continuity in the community's legal affairs: the legislature's *past* decision settled then

---

14 In Grégoire Webber, *The Negotiable Constitution: On the limitation of rights* (Cambridge University Press, 2009) 150-5, I capture some of these thoughts by referring to the legislature as 'a forum of justification'.

15 John Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983) 137. See further 138-40.

16 John Finnis, 'Legal Reasoning as Practical Reasoning' in *Reason in Action, Collected Essays vol. I* (Oxford University Press, 2011) 220. This is not to deny that there will be value in indeterminacy for some legislative enactments.

and settles *now* how the community is to be governed into the *future* and will continue to do so until a new legislative decision is taken for a different future.

IV Continuity Between Past and Present

As a remedy for the defect of interminable disputes over whether 'an admitted rule has or has not been violated',[17] the power conferred on an adjudicator is not simply the power to resolve disputes; it is a power to resolve disputes according to — on the basis of — law, the admitted rules: 'to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken'.[18] The power to make this determination and to act on it is in contrast with the defective state of affairs that lead Hart to identify the need for a Rule of Adjudication: disputes over whether a primary rule has been violated may 'continue interminably', in addition to which there will be 'waste of time involved in the group's unorganized efforts to catch and punish offenders', not to mention the standing risk of 'smouldering vendettas' that may result from 'self-help'.[19] To this defect labelled by Hart *inefficiency* — but which his own brief account expands to include the defects of violence and injustice — is proposed a power to adjudicate conclusively on the disputed question whether a primary rule has been violated.[20]

The responsibility of the adjudicator to the parties in dispute, captured by the legal tradition's commitment to do 'justice according to law', participates in the principle of continuity of bringing the past (the law that pre-dates and governs the dispute) to bear on the present (the dispute). In the special context of adjudication, that principle manifests itself as the distinctively judicial responsibility to adjudicate between parties in dispute over their legal rights and duties by applying to facts the law that defined those rights and duties at that time past when the matter in dispute arose.[21] This responsibility is to bring the past to bear on the present, such that the resolution of the dispute, though issued *now*, by *this judge*, is attributable to the *community's law*, *then* settled.

To design an institution that can adjudicate well is to recall how law and legal reasoning are, in important measures, technique and technical reasoning. The technique that constrains the scope of moral reasoning when reasoning according to law is not an obstacle to justice or fairness, but is in its service. Contrary to the idea that there is an inevitable trade-off in legal reasoning between legalistic Rule of Law values and substantive values of justice and fairness, the artificial reason and judgment of the law is in the service of law's pursuit of justice and fairness, including the justice and fairness of human self-direction. The alternative is to break the continuity between past legal decisions and present dispute resolution, substituting for the law as it was and is now and which will have guided subjects in planning their affairs with what the judge thinks should now be or should have been the case all along. But more than this, the technique that informs legal reasoning is necessary for sound adjudication. Adjudicating without legal direction confronts any number of outcome-related and intrinsic problems, problems that recall Fuller's allegory of the well-intentioned, but

17 Hart, above n 2, 93.

18 Ibid 96.

19 Ibid 93.

20 Ibid 93. I interpret the defect of 'injustice' by reference to Hart's discussion of the 'standing danger' that the fair-minded community members who do their part will 'risk going to the wall' if there is no 'special organization for … detection and punishment': ibid 197-8.

21 Finnis, 'Judicial Power', above n 1, 29-30.

hapless law reformer King Rex.[22] None of this denies that, in determining what choice was made for the community in the law-making act, the good judge may need to retrace the legislature's chain of unconstrained moral reasoning so as properly to interpret the law-maker's choice. That task is an exercise in unconstrained moral reasoning, but it is an exercise oriented to understanding the choices and decisions of the legislature, rather than one oriented to making choices and decisions oneself. In this way, the technical reason of the law contains within it an appeal to a principle of fairness, a principle that is at the heart of a community's commitment to the Rule of Law: that one should be treated impartially by the law, in the sense that one is to be as nearly as possible 'treated by each judge as [one] would be treated by every other judge'.[23] These realities speak to the design of a good law-making body and the institutional capacities that will facilitate the responsible exercise of its law-making power.

All this informs the design of a good law-applying body and the institutional capacities that will facilitate the responsible exercise of a power to adjudicate according to law. Given the ambitions of adjudication according to law, the institution responsible for resolving disputes should have a membership with expertise in the law and legal reasoning. The good court will have as members (judges) persons learned in the law, with demonstrated skill in legal reasoning. The capacity of the judge to understand the law and its relationship to the facts will be assisted by awarding those before the court the right to be heard by the court, so that they — through counsel learned in law — may present to the judge their best understanding of the dispute's just resolution according to law.

The capacity of the judge to decide disputes according to law is promoted by removing fear and favour from the judicial office, so that nothing risks deflecting the judge's commitment to resolve the dispute according to the community's legal commitments. The judge participates in the community's legal order by affirming the parties' rights and entitlements and duties and debts as determined by the law properly applicable at the time of the matter in dispute. This end of doing justice according to law is promoted by granting judges security of tenure and a salary of sufficient value to render unattractive gifts from parties seeking to deflect the bearing of the law in their case. It is an end promoted by disallowing a judge from presiding over disputes in which the judge has (or reasonably appears to have) a connection to the parties or an interest in the dispute's resolution. And it is strengthened by granting judicial office holders immunity from liability for their judgments and, more generally, by making them unanswerable for their decisions save through the legal reasons they give in support of them.

In speaking law to power, judges are to be lions,[24] fearless in resolving disputes according to law. The judge's independence — from litigants and others — is all in service of the judicial duty to resolve disputes according to law. By imputing their decisions to the law, judges are empowered to challenge those in authority or with high

---

22 See Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017), ch. 7 and Lon L Fuller, *The Morality of Law* (Yale University Press, rev edn, 1969) ch. II. Urbina's discussion includes the parable of Judge Berta, a lay adjudicator unguided by the law in the resolution of disputes. The parable powerfully tracks the lessons of Fuller's parable of King Rex, albeit squarely in the context of adjudication. See also Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed.), *Modern Challenges to the Rule of Law* (LexisNexis, 2011).

23 Finnis, 'Legal Reasoning as Practical Reason', above n 16, 228-229. Cf. Jeremy Waldron, 'Lucky in Your Judge' (2008) 9 *Theoretical Inquiries in Law* 185.

24 The thought is Francis Bacon's from his essay, 'Of Judicature' (c. 1601): 'let them [judges] be lions, but yet lions under the throne', available online: <www.ebooks.adelaide.edu.au/b/bacon/francis/b12e/essay56.html>.

standing in the community. In the judicial act of rendering judgment, the court brings the community's past commitments to bear on the resolution of the dispute by concluding that the law, as it was *then* established, bears on *today's* dispute between the parties in this rather than that way. Although the minimal requirement for the Rule of Adjudication is the judge's conclusion itself — 'an admitted rule has or has not been violated' — the reason for the Rule favours accompanying that conclusion with legal reasons that demonstrate how that conclusion was reached.

These reflections on the *capacity* of the court and its judicial *acts* all point to the *nature* of adjudication as bringing the community's past commitments to bear on the present dispute. The Rule of Adjudication gives expression to a principle of continuity, whereby the law enacted by the legislature (or incrementally developed by the common law) legally directs what is to be done by the judge when tasked to resolve a dispute. This focus on the judicial disposition to look back to the law as it was at the time of the disputed action suggests that it is a violation of judicial office for a judge to depart from the law in resolving a dispute. The idea that judges 'make law', that they look not to the past but to the future, strains the judicial vocation. And yet it is known that, in the common law, judges do sometimes depart from the law as judicially approved in the past and on the basis of which a community's members will have acted. Is there no way to make sense of these judicial (common law) acts — even when explicitly said to be acts of overruling precedent — save by denying their judicial quality? There is, and it is a sense that maintains the judicial commitment to bring the past to bear on the present.

The idea of the law's integrity can be understood by situating a rule of law not only within 'particular doctrines here and there', but also within 'the whole structure of law'.[25] The choice of a judge to depart from *this* rule of law and thus to make this change in this law may be motivated by the evaluation that the rule now changed is 'out of line with principles, policies and standards acknowledged (now, and when the dispute arose) in comparable parts of our law', parts that are *already in existence* and *already* shape our community's future.[26] The common law rule now changed in the wake of adjudication is changed because it is concluded to have been a mistake, understood not only on its substantive merits, but principally on account of its fit with the other parts of the community's law. That conclusion is supported not only by the dimension of justification, but also by the dimension of fit: the judicial development of the law differs from a true act of taking responsibility for the community's future precisely because the change in the law is brought about by *looking back* to the whole of the law as it stands. That judicial act of change differs from legislating insofar as it is not taken by *looking forward* to what would be, all things considered, 'a better pattern of inter-relationships', even if unmoored from the past.[27]

In this way, some changes in the common law can be said to be true to the common law's claim to 'declare' and not 'make' the law, because 'though new in relation to the subject-matter and area of law directly in issue between the parties', the new rule is nevertheless '*not a novelty* or act of legislation (taking our law as a whole), and can fairly be applied to the parties and dispute before the court'.[28] Of course, in one sense, the thought that this new rule, like the rule it replaces, is 'declared' is falsified by the fact that it, like much of the history of the common law, is a change in the law. However, when evaluated in the light of the judicial responsibility to relate the past to the present, this change in the law can be said to be a declaration of the state of the law rather than a new legal proposition, because of the method by which the

---

25 Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) 250.
26 Finnis, 'Judicial Power', above n 1, 31.
27 Ibid 5-6.
28 Ibid 5 (emphasis added).

change in the law is brought, a method that speaks to 'the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures'.[29] Indeed, common law courts — even at the apex of the judicial system — have sometimes lamented a long line of common law precedent as having 'taken a wrong turn' and being worthy of change, but declined to make that change themselves. They have declined on the basis that some aspects of the common law are so established, and the line of precedents so deep, that 'until there is legislative change, the courts must live with them and any judicial developments must take them into account'.[30] The thought is that some changes to the law cannot be declared, but can only be made, and thus only be made by the legislature.

V Adjudicating for the Future

The accounts of the good legislature and the good court outlined above track the design of the modern legislature and the modern common law court. They do so not because they take these modern institutions as their starting point, but rather because these institutions, like these accounts, track the reasons that favour empowering a person or body with the responsibility to change the law and the reasons that favour empowering a person or body to make conclusive determinations whether a rule of law has been violated by the act or omission of one or more persons. Those reasons point to the acts that the legislature and adjudicator need to perform (legislation; judgment), which in turn point to the design of the capacities that the legislature and court are to be equipped with, which in turn point to the nature of each institution. The nature of the legislature and the court is thus informed by an investigation into the reasons favouring each institution in a community of persons.

We turn, now, to interrogate the rise of judicial power under charters of rights. Is this at one with the judicial responsibility to bring the community's past legal settlements to resolve disputes? On its face, the exercise of judicial power under a charter of rights is at one with the judicial responsibility to relate past to present. Australian courts review legislation further to the past decision to confer them this power under Victoria's Charter of Human Rights and Responsibilities 2006; Canadian courts review legislation further to the past decision to confer them this power under the Canadian Charter 1982; the Strasbourg Court reviews member state legislation further to the past decision to confer it this power under the European Convention on Human Rights; British courts review legislation further to the past decision to confer them this power under the Human Rights Act 1998. On its face: past to present.

On further inspection, however, the analysis breaks down insofar as the open-ended formulation of many charters of rights stands in contrast to other parts of the law, where the formulation of rights and duties is of sufficient precision as to be legally directive in adjudication. The decisions captured in the Charters, Convention, and like instruments are incomplete attempts to settle what is permitted, required, or forbidden in the name of rights. Charters of rights standardly identify one class of persons

---

[29] John Finnis, 'The Fairy Tale's Moral' (1999) 115 *Law Quarterly Review* 170, 173, reprinted as 'Adjudication and Legal Change' in John Finnis, *Philosophy of Law: Collected Essays, volume IV* (Oxford University Press, 2011) 397-403. It is a claim that, albeit with different motivations, is defended by Ronald Dworkin in *Taking Rights Seriously* (Duckworth, 1997) 81: 'It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively'. For a review of the evolution of Dworkin's thought on this matter, see Paul Yowell, 'Dworkin, interpretation and legal change' in Simone Glanert and Fabien Girard (eds.), *Law's Hermeneutics: Other Investigations* (Routledge, 2017).

[30] *White and Others v Chief Constable of South Yorkshire and Others* [1998] UKHL 45, [1999] 2 AC 455, 504 (Lord Hoffman).

('Everyone', 'Every citizen', 'Every accused person') and one subject matter ('life', 'liberty', 'expression') and unite them by declaring that a class of persons has *a right to* a subject matter. But what is it for everyone to have a right to life, or to liberty, or to expression? The answers are not settled in the charters of rights themselves. Those responsible for these instruments choose to leave it to others to determine how that *past* inchoate commitment to justice and rights will, henceforth and into the *future*, secure a pattern of inter-relationships that will give to each his and her rights. The formulation of rights in charters of rights like the Convention and Charters is open-ended in the sense that the requirements of justice and rights are open to the future. The determination of what the guarantee of rights requires, prohibits, and allows is left 'to a *later day*'.[31]

This invitation under charters of rights for the courts to take responsibility for the community's future has been declined by at least one judge as being inconsistent with the judicial office. Justice Heydon, dissenting in the first case under the Charter of Human Rights and Responsibilities (Victoria) to reach the High Court of Australia, concluded that the Charter 'contemplates the making of laws by the judiciary', a task inconsistent, on his view, with the judicial power under the Australian Constitution.[32] His reasons pay special attention to the Victorian Charter's general limitation clause, which provides that a 'human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[33] The determination of what constitutes a 'reasonable limit' based on the open-ended standards of dignity, equality, and freedom, themselves all evaluated against the open-ended standard of a 'free and democratic society', requires, in Justice Heydon's view, 'giving a meaning to a particular "human right"'.[34] That task is one 'which the legislature failed to carry out' insofar as the choices and decisions required in order to give that meaning to the right were not made by the legislature in the Charter itself. Making those choices and decisions *now* would require one to make choices and decisions respecting the community's future. The Charter's invitation to the courts to make these choices and decisions, on Justice Heydon's view, constitutes a delegation of law-making authority from a law-making institution to a law-applying institution, a delegation said to be 'not possible under the Australian Constitution', even if, as Justice Heydon recognised, it 'may be possible under some [other] constitutions'.[35]

And indeed it is possible under other constitutions. Under many constitutions, courts take responsibility for the future in the wake of adjudication under open-ended charters of rights. They do so by concluding that this or that legislative attempt to take responsibility for the future should be denied because it is contrary to the charter of rights. The charter of rights is incompletely formulated, such that it is open to the court to give meaning to the rights in a manner that charts the community on a course for the future, a future in which hate speech may (or may not) be criminalised; assisted suicide may (or may not) be prohibited; campaign financing may (or may not) be strictly

---

31 Webber, *The Negotiable Constitution*, above n 15, 7 (emphasis in original). See also Rosalind Dixon and Tom Ginsburg, 'Deciding not to decide: Deferral in constitutional design' (2011) 9 *International Journal of Constitutional Law* 636.

32 *Momcilovic v The Queen* [2011] HCA 34 [431].

33 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 7(2). The provision continues with 'and taking into account all relevant factors, including —', followed by five factors inspired by the South African Bill of Rights, s 36.

34 *Momcilovic*, above n 32, [434].

35 Ibid [434]. For further insights into Justice Heydon's constitutional thought, see J D Heydon 'Are bills of rights necessary in common law systems?' (2014) 130 *Law Quarterly Review* 392. See also Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34 *University of Queensland Law Journal* 217, esp. 224-8.

regulated; religious accommodations may (or may not or must) be provided for; and so on. The open-ended language of constitutional rights guarantees is described by Dworkin as 'very broad and abstract' and formulated with 'exceedingly abstract moral language', capturing a commitment by the constitutional drafters to a 'general principle'.[36] The interpretation of those principles should, even on Dworkin's account of a moral reading of the law, be true to 'language, precedent, and practice' — in short, it must *fit* 'the broad story of [the community's] historical record'.[37] Even with this discipline, however, '[v]ery different, even contrary, conceptions of a constitutional principle' will often be open to a judge, so that nothing but the judge's *choosing* from among different futures for the community will settle which future direction shall be pursued in the community.[38] The judge has a choice to make and the community's future will be directed by it.

This is a fundamentally different judicial power. It is not one that aligns with settled understandings of judicial responsibility, understandings that informed the design of the judicial forum. Indeed, many features of adjudication — features that allow a court to adjudicate well when looking to the past to resolve a present dispute between parties — will frustrate the ability of a judge to undertake sound evaluations of the just requirements of the community's future. An institution designed in order to *adjudicate well* will not be designed — will not have the capacities — to *legislate well*. I here review seven features that highlight the mis-alignment between this judicial power and judicial responsibility.[39] As we will see below (Part VI), courts have been mindful to address the failings of these features for their new power under charters of rights.

First, the commitment to legal reasoning. As reviewed above, legal reasoning is in the service of the judicial responsibility to resolve disputes according to law. By the standards not of philosophical inquiry but of legal adjudication, this commitment to legal reasoning is sound. It participates in the principle of fairness and facilitates good adjudication, all the while empowering judges to speak law to power. However, when the judicial task is repurposed to evaluate the overall justice or rights-compliance of legislation under charters of rights, legal reasoning may read as 'technical, at best, and flawed and heteronomous, at worst'.[40] It is a distraction to think that the answers to hard moral questions turn on answers to the principle emerging from a line of precedents or to statutory interpretation. As Waldron has rightly argued, '[w]e may use the phrase "freedom of speech" to pick out the sort of concerns we have in mind in invoking a particular right; but that is not the same as saying that the *word* 'speech' (as opposed to 'expression' or 'communication' etc) is the key to our concerns in the area'.[41] And yet, the commitment to legal reasoning directs some to think that evaluations of constitutionality are to proceed by asking whether pornography is speech or flag burning is speech or racial abuse is speech, and so forth. The constraints of legal reasoning are not fit for purpose when the question is not one of determining

---

36 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 2, 7, 9. Dworkin is here referring to the US Bill of Rights, but his evaluations are applicable more generally.

37 Ibid 11.

38 Ibid 11.

39 The features that follow overlap in important respects with those outlined in Abram Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282-1283. Chayes referred to the 'traditional conception of adjudication' as 'central to our understanding and our analysis of the legal system'.

40 Jeremy Waldron, 'Judges as moral reasoners' (2009) 7 *International Journal of Constitutional Law* 2, 13.

41 Jeremy Waldron, 'A rights-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 26.

which commitments *were* made, but rather of determining which commitments should *now* be made.

Second, the requirement that facts be established on a balance of probabilities. This requirement is sound in an *inter partes* adversarial setting when 'adjudicative facts' are in dispute, facts about 'what the parties did, what the circumstances were, what the background conditions were'.[42] It is well suited to the adversarial context of common law courts, where one or the other party will be held to be in the right and the other in the wrong as a matter of law. The evidentiary standard is too exacting, however, when the available factual premises informing choices for the community's future are a contest between imperfect predictions affecting the whole community. The facts here are, as Kenneth Culp Davis aptly puts it, '*legislative* facts', facts about economic, social, political, and other matters that 'inform … *legislative judgment*'.[43] They are not about who did what, when, where, and why, but are rather concerned with conflicting and complex empirical and scientific evidence that will be imperfectly assessed and evaluated.

Third, the absence of capacity for commissioning research. The struggle with legislative facts is compounded by the absence of capacity for the court to seek the assistance of non-parties in understanding and being exposed to a range of legislative fact-finding. The court is reliant on the parties to submit evidence in support of the positions they wish to advance. Evidence that may provide a more complete picture of legislation and its impact on the community's future is not otherwise available to the court.

Fourth, the adversarial contest between *two* parties, each with *one* position (I win, the other party loses). This feature of adjudication is justified in response to the resolution of disputes between two disputants on whether an admitted rule has been breached by one of the parties. When making decisions for the future of the community and *all* of its members, however, this feature denies a voice to those who want and in fairness are entitled to it.

Fifth, the insistence that a decision by a court may not, subject to appeal, be revisited by the parties (*res judicata*, the matter is judged) nor, subject to exceptional circumstances, questioned by a subsequent court in another dispute (*stare decisis et non quieta movere*, stand by things decided and do not disturb what is settled). Both of these features of adjudication are justified for the purposes of providing authoritative rulings on whether an admitted rule has been violated at some time past, but they impede the ability of the community to *revisit* the court's direction for the community's future if that path proves unwelcome or if some of its premises — factual or normative — prove defective after the passage of time.

Sixth and relatedly, a court may not initiate a dispute by its own motion. If, after ruling that the community's future is to be charted this rather than that way, the court concludes that the ruling was made in error, it must await another dispute before being afforded the opportunity to overturn or reorient its decision. Given the reasons why the Rule of Adjudication is needed as a remedy for the resolution of disputes, the court's passive reception of disputes is sound. However, when the court's function shifts from bringing the past to bear on present disputes to making choices for the community's future, its inability to revisit those choices in the light of changes in factual premises and changes in evaluations of moral premises can frustrate a community's ability to chart a responsible future.

---

[42] This is the account of 'adjudicative facts' provided by Kenneth Culp Davis in his classical essay which introduced the key terms 'adjudicative facts' and 'legislative facts': 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard Law Review* 364, 402.

[43] Ibid (emphasis added).

Seventh, concessions by counsel on a point of law or of fact. Such concessions are quite proper for narrowing the points in dispute in the normal course of adjudication between two parties, but in evaluations about the community's future, concessions may close off from consideration matters that no responsible legislature would allow to be removed from view.[44] Indeed, courts have sometimes openly criticised an Attorney General for concessions that shield from view consideration of the issues. In a 1992 decision respecting the right to equality and its relationship to legislative measures providing different parental benefits to natural parents and adoptive parents, the Chief Justice of Canada 'register[ed] the Court's dissatisfaction with the state in which' the case came before the Court. The Attorney General of Canada had conceded that the equality right was violated, which precluded the Supreme Court from examining the equality issue 'on its merits' and left the Court without argument on 'the legislative objective' and in 'a factual vacuum with respect to the nature and extent of the [conceded] violation'.[45]

The range of features of adjudication that frustrate the responsible exercise of the new power conferred on courts under charters of rights is significant. That range points to a lack of alignment between judicial power and the distinctive judicial responsibility.

VI Judicial Reforms

Responsible courts have not been blind to these imperfections of the adjudicative process for taking responsibility for the community's future. Many courts have sought, within the confines of the judicial role, to effect changes to the adjudicative process so as to allow the judicial forum better to assume its responsibilities for the community's future.

In relation to the first feature of adjudication (legal reasoning), some courts have sought to relax the technical aspect of legal reasoning by recourse to the doctrines of proportionality and balancing. Evaluations of proportionality and overall balance invite open-ended moral reasoning unconstrained by the traditional confines of legal doctrine and precedent.[46] The doctrines invite courts to evaluate the importance of a legislative objective, the relationship between that objective and the means employed to pursue it, the availability and merits of alternative but unselected means to achieve the legislative objective with comparable success, and the all-things-considered overall balance of benefits and burdens realised by the legislative scheme. The scholarly consensus is that the open-ended structure of reasoning under proportionality and balancing calls upon court and counsel to engage in 'an exercise of general practical reasoning, without many of the constraining features that otherwise characterise legal reasoning'.[47] Legal learning and expertise in legal reasoning — the hallmarks of adjudicating *well* under the Rule of Adjudication — offer little assistance, given that 'arguments relating to legal authorities — text, history, precedence, etc — have a relatively modest role to play'.[48]

---

44 Finnis, 'Judicial Power', above n 1, 41-49.

45 *Schatcher v Canada* [1992] 2 SCR 679.

46 For discussion and criticism, see Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 *Law Quarterly Review* 399.

47 Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 131, 139. See also Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012); Urbina, above n 20, ch 6.

48 Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142, 144.

In relation to the second feature of adjudication (standard of proof), some courts have relaxed or substituted the standard of proof in charters of rights cases, maintaining that 'reason, logic or simply common sense' may be relied upon to make findings of legislative fact.[49] Where there is 'very little quantitative or empirical evidence either way' to assist the court in evaluating the justice and rights-compliance of legislation, some courts will look beyond the materials known to legal learning to 'the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies'.[50] These standards for evaluating factual premises are better suited to receive legislative facts.

In relation to this and the third feature of adjudication (research), some courts will invite, and able counsel will know to prepare and submit, 'Brandeis briefs', in which social science and other evidence is compiled and presented on the justice and rights-compliance of the measure in dispute.[51] Good counsel will know that proportionality analysis invites evaluations of the necessity of measures and the comparable efficacy of unchosen alternative measures, as well as evaluations of benefits and burdens in determinations of overall balance.

In relation to the fourth feature of adjudication (two parties), some courts have relaxed the rules for intervention by persons and groups not party to the immediate dispute. Although this attempt falls short of the principle *quod omnes tangit ab omnibus decidentur* (what touches/affects all should be decided by all), it nonetheless recognises the importance of hearing voices beyond those of the parties to the dispute, the resolution of which will directly impact not only them but many others. Intervenors will be invited to speak on the application of law to facts, but they will be invited, too, to speak more generally about the requirements of justice and rights for the community's future.

In relation to the fifth feature of adjudication (*res judicata*, *stare decisis*), some courts have sought to relax the force of *stare decisis* where circumstances have changed, especially when social science evidence is in play. The Supreme Court of Canada has been especially transparent in this regard: the doctrine of precedent, so central to the artificial reason of the law and the relationship of past to present, provides no bar — not even against a trial court confronting 'settled rulings of higher courts' — if 'there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate"'.[52] The alternative, in the Court's view (with echoes of Hart's discussion on the need for a Rule of Change), would be to 'condemn the law to stasis'.[53] The case law of even an apex court under open-ended charters of rights is therefore less controlling under *stare decisis* than is the case law in other areas of law.

The changes courts have introduced to the adjudicative process are the result of evaluations that many features of adjudication are unsuited to taking responsibility for the community's future. Judicial capacities assume a judicial function unlike the one called for under open-ended charters of rights. Confronted with an institution designed

---

49 *RJR-Macdonald v Canada* [1995] 3 SCR 199 [184]; see also [137]. But cf. *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 [150]: 'The task of the courts … is to evaluate the issue in the light, not just of common sense or theory, but of the evidence'.

50 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [90].

51 Such briefs are named after Louis Brandeis, who, before his appointment to the US Supreme Court, argued *Muller v Oregon*, 208 U.S. 412 (1908) before that very court. For discussion, see Paul Yowell, 'Proportionality in United States Constitutional Law' in Liora Lazarus, Christopher McCrudden, Nigel Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014) 110-1.

52 *Carter v Canada (Attorney General)* [2016] 1 SCR 13 [44]; *Canada v Bedford* [2013] 3 SCR 1101 [42].

53 *Carter*, ibid [44]: '*stare decisis* is not a straitjacket that condemns the law to stasis'.

to relate the community's past commitments as embodied in law to present disputes, courts have fashioned changes in order to re-orient the exercise of judicial power. Not every problematic feature of adjudication has been modified and some important features persist — the sixth (passive jurisdiction) and seventh (concessions by counsel) have proved harder to reform. And yet, the wide-ranging changes to the capacities of the court suggest that the judicial acts are no longer the same, which in turn affirm that the nature of the judicial task has changed. The court is no longer exercising a judicial responsibility; the judicial power under charters of rights is *judicial* only insofar as it is a power exercised by *judges*. When evaluated against the reasons that favour instituting a court to adjudicate disputes, the power conferred on judges under open-ended charters of rights is *non-judicial*. That conclusion is re-affirmed by recognising that the power to make choices for the direction of the community's future is a distinctively *legislative* power.

Even if every imperfect feature of adjudication could be addressed with more wholesale reforms to facilitate the exercise of judicial power under charters of rights, it remains that nothing can eliminate the risk that judges will make choices for the community's future that are misdirected and in need of correction. Part of that risk is the common standing risk of injustice that afflicts all exercises of public power. But the greater part of the risk is with the exercise of *judicial* power — a power distinguished for its capacity to *adjudicate well* — for determining the course of the community's future. The imperfect changes to the judicial process are like renovations made to repurpose an existing edifice — no matter the merits of the reforms, they remain reforms to an institution designed for another purpose, a purpose that it continues to serve on a very regular basis when not confronted with a case challenging legislation under the charter of rights. Constitutional drafters who set out to design an institution to supervise the justice and rights-compliance of legislation would be unlikely to take the judicial forum — even as refashioned — as a model. The increased use of Brandeis briefs, for example, assists in putting more information before the court, but does not equip the court with the resources necessary for the sound interpretation and assessment of legislative facts or address the dependence of the court on parties or intervenors for the presentation of such facts. A more wholesale reform would be to redesign the court so that it has a dedicated research service.[54] Similarly, the doctrines of proportionality and balancing allow judges to escape the confines of legal reasoning, but precisely because there is 'nothing particularly *legal*' about these doctrines, the professional qualifications of a lawyer do not make one 'more qualified to apply a balancing test' than someone without legal training.[55] Judges have expertise in the law, but not necessarily in the great many other fields of factual and moral inquiry that will be required in order to arrive at sound evaluations of legislation's conformity with open-ended charters of rights. The changes to the judicial forum are the changes that, short of significant constitutional reform, are within the realm of the possible.

A wholesale, *tabula rasa* design of an institution to supervise the justice and rights-compliance of legislation would likely include capacities to commission studies, to consult experts, to initiate reviews of its own motion, to revisit previous decisions on its own motion, to have a diversified membership with expertise in a range of empirical and moral matters, etc. It would be designed on the basis that there is *reason* to favour awarding to an institution a role to supervise the rights-compliance of legislation. The *acts* of the institution would be to affirm or deny the compliance of legislation with an open-ended charter of rights and perhaps empowered to issue

---

[54] For discussion, see K C Davies, 'Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court' (1986) 71 *Minnesota Law Review* 1.

[55] Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart, forthcoming 2018) 155-6.

advice short of declaration a violation of rights. The *capacities* necessary to do so would include the ones noted. And so the *nature* of the institution would approximate something closer to a 'Council of Revision' rather than a court. Indeed, a made-for-purpose institution would likely resemble a legislature, not a court.[56] This, in turn, suggests that the nature of the power that such an institution would exercise would not properly be called 'judicial'.

VII Conclusion

Not every exercise of a power by a judge is the exercise of a *judicial* power. True instances of judicial power exercise the court's distinctive judicial responsibility to bring the community's past legal commitments to bear on the resolution of present disputes. The conferral of a power on courts to evaluate legislation in the light of open-ended charters of rights strains the responsibilities of the judicial office, as some judges have said explicitly and as many courts have communicated in reforms brought to the judicial forum. The rise of judicial power under charters of rights is a shift away from the distinctive judicial responsibility to bring the past to bear on the present. It is not a power contemplated by the institutional design of courts. It is not a power conferred on an institution with the capacity to exercise it well.

[56] For discussion, see Yowell, ibid ch 7. Yowell's argument concludes (at 163): 'the argument for *judicial* review of legislation is better thought of as an argument for review by a quasi-legislative body that resembles a legislature in all important respects but one: crucially, it is not elected'.