JUDICIAL CREATIVITY

1. The extent to which the judges are involved in issues of policy in operation of the system of judicial precedent and in statutory interpretation.

(a) Refer to notes on Judicial Precedent (especially Judicial Law-making) and Statutory Interpretation (from Module 1).

(b) Definition of "**policy**".

According to Ronald Dworkin, a policy is a standard setting out a goal to be achieved, usually in terms of the economic, social or political well-being of the community. Matters of policy should be left to elected legislators.

See the St. Brendan's SFC notes, p25-30, under the sub-heading "Principles and Policies", for the following points:

- On the whole, the judges tend to agree with this view at least in what they say. Questions of social policy are better left to Parliament, they say, and it is not for judges to interfere in such matters.

  Authorities are: *Fisher v Bell* (1960), *Bradbury v Enfield LBC* (1967), *Morgans v Launchbury* (1972), *Blathwayt v Cawley* (1975), *McLoughlin v O'Brian* (1982), *Cambridge Water v Eastern Counties Leather* (1994), *Hunt v Severs* (1994), *R v Clegg* (1995), *C (a minor) v DPP* (1995) and *Al-Masari v Home Secretary* (1996).

- The judges' words are sometimes belied by their actions, however, and there are many examples of cases in which judicial decisions have clearly been based on social policy goals rather than on individual rights.

  Authorities are: *Smith v Hughes* (1960), *Shaw v DPP* (1961), *Chadwick v British Railways* (1967), *Nettleship v Weston* (1971), *DPP v Majewski* (1976), *Ashton v Turner* (1980), *R v O'Grady* (1987), *Hill v CC of West Yorkshire* (1988), *Alcock v CC of South Yorkshire* (1991) and *R v Powell* (1997).

Select three/four cases for each of the two points above and summarise them.

2. Consideration of the balance between the roles of Parliament and the judiciary.

(a) See J. Martin, *AQA Law for AS*, p32, for comment "Should judges make law?".

(b) See *The Times*, July 2 1996, "Should the judges or MPs make the laws?".

(c) Add any further points from the above articles/class discussions to the table overleaf.

Parliament	Judiciary
✓ MPs are democratically elected to make law. ✓ The Government will have a mandate (electoral authority) for proposed law reforms published in its Party manifesto.	✗ Judges are appointed by the Lord Chancellor to decide cases, not to make law.
	✗ The Practice Statement (1966), issued by the Lord Chancellor, gave the House of Lords the power to depart from previous decisions and thus create new law. ✓ The principle of *stare decisis* respects previous decisions
	✗ The mischief rule of statutory interpretation and the purposive approach allow judges to "create" new law, whereas: ✓ The literal rule respects parliamentary sovereignty and the words used by Parliament.
✓ MPs represent the wishes of their constituents. ✓ MPs/Govt can be influenced by the public, eg through the media and lobbying, and thus be kept in touch with society.	✗ Judges are seen as predominantly old, white, male and upper class. ✗ They are also perceived to be out of touch with society and popular events.
✓ Parliamentary law reform is announced in the media.	✗ There is no way of knowing if the House of Lords will uphold a precedent or overrule it. ✗ There is no way of knowing how a statute will be interpreted: restrictively or creatively.
✓ The Govt usually issues Consultation Papers (Green and White papers) before introducing Bills.	✗ Judges cannot consult interested parties, nor conduct non-legal research before reforming law.
✓ Parliament is accountable to the public through General Elections.	✗ Judges are unaccountable.
✓ Parliament can change the law at will	✗ Judges have to wait for cases to come before them; only then can they reform the law. ✗ The quickest way to reverse an undesired ruling of the House of Lords is through statute.
✓ Parliamentary laws are usually prospective (they come into force at midnight on the day of Royal Assent or at a later date).	✗ Legal changes through cases are retrospective, i.e. the law is changed in the actual case before the court. This has been described as "dog's law". See J. Martin, *AQA Law for AS*, p33 for the effect in *R v R* (1991) and *R v Governor of Brockhill Prison, ex parte Evans* (1997).
✗ Parliamentary laws may be based on hypothetical situations	✓ Common law is based upon real-life situations.
	✓ Sometimes judges have no choice but to "declare" the law in a new situation, eg *Re S (Adult: refusal of medical treatment)* (1992) and *Airedale NHS Trust v Bland* (1993).