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THE LAW LORDS IN THE 90s: A NEW SUPREME COURT?

'remember that Solomon's throne was supported by lions on both sides: let them be lions, yet lions under the throne.'

Nearly four hundred years ago Francis Bacon warned the judges that should be like the lions at the foot of Solomon's throne, supporting the King but, 'being circumspect that they so not check or oppose any points of sovereignty[1]'. Judges were to *declare* the law, they were not law-*makers*. This approach formed the basis of the traditional theory of the British Constitution and was still pervasive in the 1950s when Lord Denning was harshly rebuked for suggesting that judges might be able to 'iron out the creases[2]' when a statute was not sufficiently clear. Lord Simonds accused Lord Denning of a 'naked usurpation[3]' of the legislative function of the Queen in Parliament.

By the 1970's however, the mood was beginning the change as it was gradually acknowledged that judges did not simply declare the law, they created it as well. Francis Bacon may have turned in his grave as such constitutional heresy, but for Lord Reid, in his famous 1972 lecture, the traditional theory was the stuff of which fairy tales are made: 'in some Aladdin's cave there is hidden the Common Law in all its splendour and on a judges appointment there descends on him knowledge of the magic words "Open Sesame". But we do believe in fairy tales anymore.[4]'

A year later Lord Scarman gave a series of controversial lectures in which he proposed a new constitutional settlement, 'I would hope that a supreme court of the United Kingdom would be established with the power to invalidate legislation that was unconstitutional and to restrain anyone- citizen, government, even Parliament itself from acting unconstitutionally.[5]' This was a far cry from our docile lions at the foot of the sovereign.

Thus the rumblings of a quiet revolution in the judiciary were spreading. Attitudes were changing. New, more progressive judges were being appointed and the seeds of Lord Scarman's 'new Supreme Court' had been planted. The results of that quiet revolution speak loudly in the decisions of the law lords this decade. The chastising of Michael Howard by the House of Lords in April 1995 is a striking example of the increasing willingness of the law lords to intervene in the day-to-day running of the executive. The Home Secretary's plans to reduce the cost of criminal injuries compensation were described by Lord Browne-Wilkinson as. 'mean, arbitrary and unjust,' and 'not only constitutionally dangerous, but flies in the face of common sense.' In his dissenting judgement Lord Mustill felt that the issues raised in the case. 'push to the very boundaries of the distinction between court and Parliament.' Yet, as Lord Goff conceded in *Woolwich Building Society (1992),* the boundary goal posts may move, 'although I am aware of the existence of the boundary, I am never quite sure where to find it.... Much seems to depend on the circumstances of the case.[6]' In other words, the law lords now enjoy a greater discretion to 'mould and remould the authorities' (Lord Goff[7]). In addition. the House of Lords recently ruled to give greater freedom to statutory interpretation- Parliamentary materials may now be consulted in cases of ambiguity.[8]

The law lords of the 90s are more prepared than any other time in our constitutional history to use their powers of discretion to overturn old law or to probe uncharted territories in highly sensitive social issues. In 1991 the House of Lords overturned the ruling that a husband could not be guilty of raping his wife[9]. Such judicial activism was well received and any damage to the principle of legal certainty by creating a retrospective crime could be considered a small price to pay. Lord Keith suggested that the common law was, 'capable of evolving in the light of social, economic and cultural developments.' Such developments give rise to new ethical dilemmas. In the case of *Bland*[10], the House of Lords decided that a doctor could lawfully withhold life-sustaining drugs from a coma patient who had no hope of recovery. Lord Browne-Wilkinson dissented because he believed that the social, moral and legal issues raised

by the case were the domain of Parliament rather than the courts. The dissenting judgement serves to highlight that the majority were prepared to push out the constitutional boundaries.

The constitutional role of the law lords has also been profoundly affected buy our membership with Europe. By virtue of the 1972 European Communities Act, EC law takes precedent over any inconsistent national measures. The cold reality of this was illustrated in 1991 when the Transport Secretary was hauled into court by a group of Spanish fishermen who claimed that the 1988 Merchant Shipping Act was contrary to EC legislation and should therefore be suspended. The House of Lords found in their favour[11].

EC law has conferred on us new rights and expectations and any enforcement of those rights will require domestic avenues to be exhausted first. This means that the Courts will be obliged to review a statutory rule or policy against a European standard. Such a role is similar to that of the Supreme Court of the United States where judges are called upon to decide if a legal provision meets the criteria of a constitutional Bill of Rights. It also poses the danger of politicising the judges.

So, it is apparent that the lions are no longer sitting at the feet of the king. Far from it. The latter half of this century has witnessed a revolution in judicial thinking and this is borne out by the decisions of the law lords in the 90s and the emergence of a new Supreme Court . The law lords have claimed previously uncharted legal territory and pushed out the boundaries on judicial creativity. So far so good. However, their role in enforcing European Community law could drag them into the political arena. Ironically then, the circumstances which have helped to produce a 'new Supreme Court' could also lead to its downfall if it is allowed to lose its impartiality.

Sources

[1] 'Of Judicature,' Bacon's Essays (Everman edition. 1966)

[2] Seaford Court Estates Ltd v Asher [1949] 2 KB 481

[3] Magor and St Mellons Rural District Council v Newport Commission [1952] AC 189

[4] Lord Reid, 'The Judge as Law Maker' (1972)

[5] Lord Scarman, 'The New Dimension' (1973)

[6] Woolwich Equitable Building Society v Commissioners of Inland Revenue [1992] 3 WLR

[7] Lord Goff inWestdeutche Landesbank Girozentrale v Council of the London Borough of Islington [1996]

[8] Pepper v Hart [1992] 3 WLR 1032

[9] R v R [1991] 4 All ER 481

[10] Airedale NHS Trust v Bland [1993] 1 All ER 821.

[11] Factortame v Secretary of State for Transport, ex p Factortame (no 2) [1991] 1 All ER 106.

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