"The Law Lords in the 1990s : a New Supreme Court?"

"The Supreme Court of this kingdom is the High Court of Parliament ... invested with a kind of omnipotency in making new laws, repealing, and revising old ones."(Bacon's Abridgement).

In the light of various controversial decisions made by the Law Lords since 1990, the question must now be asked : "Are the Lords of Appeal in Ordinary Britain's judicial trouble-shooters or trouble-makers?". Are their Lordships simply dealing with matters of law left in an indeterminate state by Parliament while attempting the Herculian task of remaining true to Parliament, the public interest and their personal perceptions of justice; or are they simply attempting to usurp Parliament's power to "make or unmake any law whatever"(Dicey), thus assuming the Supreme Court power to strike down primary legislation?

The Lords' exercise of their common law powers when compensating for parliamentary inaction are often wrongly regarded as an assumption of Supreme Court authority. The law, like nature, abhors a vacuum and their Lordships may have to provide solutions to certain problems even though judicial lawmaking may not be the best way to proceed. In the *Bland* case[i] the House of Lords had to consider whether a doctor's duty towards a PVS patient permitted the withdrawal of food and drugs when the patient had no hope of recovery. While the Lords decided that withdrawal was permissible, they divided upon the issue whether it was right for judges to make such decisions. Lord Browne-Wilkinson believed it was not the judiciary's role to develop new principles of law which would often be based upon the individual judge's moral opinions, and that such important moral, legal and social problems should instead be considered by Parliament. Lord Goff, however, decided that it would be "a deplorable

state of affairs" if the medical profession were left without directions on how to navigate such an ethical and legal minefield.

I respectfully concur with Lord Goff, but there was a third option: let Bland live until Parliament had legislated on the PVS question. Parliament is seeking to shirk the great ethical issues of our times, and the Lords should not succumb to the temptation to appropriate Parliament's functions under an excuse of necessity.

Reform of the common law is within the Law Lords' "occupied field", yet the decisions of the Lords indicate that they will only alter the law significantly in very limited circumstances. In *R v R*[ii] the Lords abolished the common law rule that a husband could not be found guilty of raping his wife. Although this was a common-sense decision, the question remains should the decision not have been left for Parliament as it involved extending a statutory offence? The decision was a proper one for the Lords to make as it was clearly within their jurisdiction to reform a common law rule which Lord Keith and Lord Lane CJ branded "anachronistic and offensive", and the decision would undoubtedly have met with parliamentary approval.

If any Doubting Thomases still need convincing that the Lords were not attempting to adopt Supreme Court authority at the expense of Parliament, they need look no further than the decision in *C v DPP*[iii] where the Law Lords refused to abolish the presumption of *doli incapax* for children aged 10-14. Although this was a common law rule which they had the authority to abolish, their Lordships refrained from so doing as this was not just a legal, but a social and political problem and thus was in the legislative domain of Parliament. Judicial timidity was the order of the day!

Although the approaches in *C v DPP* and *R* may be somewhat contradictory, they do illustrate how sensitively the Law Lords seek to avoid treading on honourable

parliamentary toes. If the Law Lords did see themselves as a Supreme Court, there was nothing to prevent them from legislating according to their own legal ideals in *C v DPP*. Their deference towards Parliament and respect for public opinion have been admirable.

Their Lordships have another charge to answer! Where parliamentary sovereignty has been eroded by the European Communities Act 1972, the balance of power within the State will alter in favour of the judiciary. The European Court of Justice's seminal ruling in *ex parte Factortame*[iv] has encouraged a veritable revolution against the doctrine of judicial self-restraint where parliamentary sovereignty is concerned. This case, which set the constitutional lawyers' alarm bells ringing at a deafening peal, was the first case of a court disapplying an Act of Parliament since before 1688. The House of Lords imitated a Supreme Court by striking down legislation for being contrary to our "new constitution" - the precepts of E.C. law. Yet do not judge the judges too harshly! They did not want to disapply the Merchant Shipping Act, but their masters in Luxembourg insisted it was their duty under EC law to do so. As their Lordships were only obeying orders, the genuine new Supreme Court of 1990s Britain is really the E.C.J.

Yet the virus of judicial supremacism is extremely contagious and will spread throughout our legal system. Since the *Francovich*[v] and *Factortame No.4*[vi] decisions UK courts have to provide a remedy in damages for loss caused by illegal Acts - a rule totally alien to Britain's Constitution.

The overall view is that the Lords are not seeking to assume authority which would allow them to overrule Parliament's wishes. They regard the common law as their arena and statute law as Parliament's; and while they will not hesitate to exercise

their common law powers, they will avoid walking over Parliament's legislative lawn. The European influence will undoubtedly increase the judiciary's power *vis-a-vis* Parliament and our judges may seek to increase their authority by adopting Mr Justice Sedley's advocacy of a new bi-polar sovereignty of the Crown in Parliament and the Crown in the courts. The House of Lords of the 1990s could mutate into the Supreme Court of the 2000s.

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

[ii] R v R [1992] 1 AC 599.

[iii] C v DPP [1995] 2 All ER 43.

[iv] R v Secretary of State for Transport, ex parte Factortame (No.2) [1990] 3 WLR 818.

[v] Francovich v Italian State (1992) IRLR 84.

[vi] R v Secretary of State for Transport, ex parte Factortame (No. 4) (1996), "The Times".