THE HOUSE OF LORDS IN THE 90S: MAKING IT UP AS THEY GO ALONG?

The U.S. Supreme Court has only one rule for interpreting the constitution. In the words of Chief Justice Hughes, the Constitution "is what [we] say it is". That simple approach to the construction has led to some breath-taking flights of 'interpretation'.

In *Roe v Wade*, which established a woman's right to have an abortion, the Court extracted a constitutional right to privacy out what they delicately called the 'penumbra' of several other 'primary rights' (i.e. ones which you could point to with your finger).

The question of what exactly 'penumbra' is supposed to mean was judiciously left unanswered: a wise omission when you reflect that the most important of these 'primary rights' was the constitutional prohibition on "arbitrary search and seizure", a clause designed to protect New England householders against the bailiffs. A nation shook its head and said, 'Ours is not reason why...'

Sometimes, cautiously, the Justices admit that what they are doing essentially is inventing the law. *Brown v Board of Education* ruled segregation in schools unconstitutional. One of the judges on the panel commented, "It is not fair to say that the South has always denied negroes this constitutional right. It was NOT a constitutional right until May 17th 1954" (that is, the day that the court gave its judgment).

In effect, the U.S. Supreme Court has made judicial law-making into a corner-stone of the Constitution.

In this country, the judges used to take a very strict view on judicial law-making. Lord Simonds succinctly stated the conservative view of the law lords' role, "It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation...[but] leave us to trying to find out what the law *is*".

It shows how prevalent and how entrenched that attitude appeared to be that Lord Devlin felt able in the early 80s to say: "I doubt if the judges will now of their own motion contribute much more to the development of the the law".

Yet the last ten years have seen a remarkable flowering of judicial willingness to reform and remake the law. Lord Lloyd spoke for his whole generation when he breezily announced in *Clegg* [95], "I am not averse to judges developing the law, or indeed making new law, even where questions of social policy are involved". The casual tone of his statement should not obscure the fundamental importance of change it announces. 'Developing the law', or 'making new laws', mean one thing and one thing only to a judge: deciding the cases the way the law ought to be, not how it is.

Billson v Residential Apartments [91] shows the extent to which the modern House of Lords is prepared to read the law as what it ought to be, rather than what, on any ordinary view, it manifestly is. Section 146 of the Law of Property Act allows a tenant to get the protection of the Court if his landlord *is* throwing him out.

The problem for the tenant in this case was that the landlord had already thrown him out. It was a *fait accompli*. The Lords were not however to be defeated by the unambiguous words of the statute. They simply held that the statute ought to mean and therefore did mean 'is being, or has been' thrown out. That was the 'robust' interpretation.

If you told me, "My birthday is yesterday", I might not be impressed by your robust grasp of English grammar, but you could take comfort that the House of Lords would know what you meant.

Two impulses underlie the Lords' new outlook: first the feeling that the law must be brought up to date; and secondly the urge to do "practical justice", a phrase which Lord Goff in particular often invokes in his judgments.

The case of *R* [94] shows the Court's determination to bring the law up to date. R raped his wife. An obstacle however lay in the way of convicting him. That obstacle was legal writer of the 16th century by the name of Hale who had declared that forced intercourse with your wife was not rape. This pronouncement had been followed by the English courts (something like once every hundred and twenty years) ever since. But the House of Lords were not to be trapped under the dead hand of the past: the rule was abolished and R was preemptorily packed off to jail. Which is where he is now.

White v Jones [94] gives us the other side of the coin: practical justice. Two daughters were robbed of their inheritance by the negligence of their father's solicitor. They sued, but as the Lords frankly admitted a blindspot in the law prevented it recognising the

wrong they had suffered. The practical Lord Goff however was not to be deterred. Looking at the problem as the ordinary man or woman would see it, he said, the inheritance you get from your parents is enormously important, and it would be disgraceful if a solicitor could get away with having mucked things up, when, if it was any other piece of work (a conveyance or contract) he would be obliged to pay a visit to the solicitor's indemnity fund. The daughters therefore got their money.

The problem with always prefering the law as it ought to be, is that you make your law on the hoof. That, said Bentham, was the way

> *'a man makes law for his dog. When a dog does soemthing you want to break him of, you wait until he does it, then beat him for it...'*

There is some truth in this. But it is a choice we have to make: justice or certainty.

Learned Hand, a famous Supreme Court Justice, once said to O.W.Holmes, an equally famous member of the same court, "Do justice!", to which Holmes replied, "That is not my job. My job is to play the game by the rules". In a similar vein, Viscount Simonds once gave judgment in these terms: "In effect...the plea of the appellants was the the law was not what it ought to be. That is a plea to which this House is not inclined to listen".

Holmes and Simonds both knew what side they were on. And I know what side I am on. I prefer to say with Learned Hand, "Do justice!"

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