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"The law lords in the 1990s: a new Supreme Court?"

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Law lords resolve legal issues presented by litigants, a task which involves interpreting legislation and applying common law principles. While these tasks are different, both must be considered in analysing the judicial function. The legal-political system envisages the democratically elected parliament making law, which courts then apply to fact situations. The idea that unelected judges also create law seems inconsistent with the notion of democracy. However, English law is historically based on the fictitious, if comforting, notion that the "law" already exists and judges, imbued with this knowledge, expound it as required. While the fiction is acknowledged, principles of common law remain, protecting inherent values we take for granted, such as the integrity of body and property.

That law lords should "make law" is accepted as necessary; it is preferable that courts, mindful of objective notions of justice, decide issues, rather than refusing to decide because legislation is lacking. Yet they do limit themselves in this endeavour. For example, in *C (A minor) v DPP* [1996] 1 AC 1, where the common law rule of minors' criminal liability (doli incapax) was in issue, Lord Lowry suggested 5 questions the House should consider before amending common law principles, including whether parliament had examined the issue, whether the issue was one of social policy, and whether the change would increase certainty. Generally, changes that cannot logically or analogously be related to existing principles are the province of the legislature. Since it is usually cases involving difficult social issues that produce split benches, it is propitious that law lords recognise political issues are best left to parliament.

In that case the House did leave the issue to parliament, as it did with the debate whether a murder charge could be lessened if the prisoner had been preventing crime in *R v Clegg* [1995] 1 AC 482. However, sometimes the House modernises the common law "in the light of changing social, economic and cultural developments" (*R v R* [1992] 1 AC 599). A recent controversial example was the abandonment of the marital exception to rape in *R v R* [1992] 1 AC 599. While the social climate had certainly changed, some identified this as "social policy" to be left to parliament. Yet parliament had not considered the issue and was not likely to, so the House acted to provide a just resolution. Other recent modernising decisions include the creation of a right for intended testamentary beneficiaries to sue negligent solicitors (*White v Jones* [1995] 2 WLR 187) and the reformulation of principles concerning money paid by mistake (*Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70).

Then is creative legislative interpretation wrong? The separation of powers ideal prohibits judicial interference with parliament. In jurisdictions with formal constitutions the legislature is subject to the courts' interpretation of it. While Britain has no such constitution, the law lords still interpret laws and review administrative decisions, which is sometimes seen as the courts hindering government functions.

How should the law lords interpret legislation? As Britain lacks a bill of rights (unlike America), or implied constitutional rights (unlike Australia), the courts have no blueprints of social values against which to try legislation. In their attempt to decide justly and objectively, law lords naturally appeal to external accepted principles such as international standards (like the European Convention on Human Rights) or ordinary logic (as in *R v Brown (Gregory)* [1996] 1 AC 543).

But the courts have a limited interstitial role - they cannot guarantee the substantive justice of laws, but merely insist parliament's policies are pursued equitably. The goal is to protect from state interference individuals' freedom to the extent it is not expressly abrogated. A recent example is *R v Secretary of State for the Home Department; ex p Doody* [1994] 1 AC 531, where the law lords stressed prisoners' basic right to natural justice before the Secretary of State makes the the final decision concerning sentences. Also, *R v Preston* [1994] 2 AC 130 decided that the policy behind surveillance legislation to protect secrecy was outweighed by the prosecution's duty to disclose unused material to the defendant. Another example is *R v Horseferry Road Magistrates' Court; ex p Bennett* [1994] 1 AC 212 where it was held that courts should stay prosecutions for abuse of process if defendants are forceably removed to England in disregard of extradition processes and international law. Citizens' freedom of speech has been held to extend to open criticism of government without fear of libel suits in *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011. Finally, the courts apply laws equally to all. Thus, government officers and departments can be in contempt of court, as seen in *M v Home Office* [1993] 3 WLR 433.

Many criticise the courts for interfering with parliament's role, yet the reception of *Pepper v Hart* [1993] AC 593 suggests a "no win" situation. There, their Lordships decided courts could consider the enacting parliament's intention to interpret legislation. Instead of being praised for acknowledging the legislature's supremacy, they were criticised because of the practical difficulties involved. Yet, given that European and EC law allows judges to interpret legislation with regard to social norms, the law lords may soon have to take an even broader approach.

Are the law lords becoming a new Supreme Court? First, it is difficult to claim that today's courts are more proactive than previously. Today's society is different - more complex, litigious and expectant of the judicial process (as the Woolf report indicates). So-called "radical" judgments does not equate the law lords with the Supreme Court. The legal systems are dissimilar, since the USA has a constitution and American judges are politically appointed in anticipation of particular results, unlike here. Furthermore, in America, single judgments are preferred. While this provides some certainty, the law lords' system of individual judgments provides a greater opportunity for open discussion of ideas. And the view of one lord, with changing times, can become the accepted view.

Rather than becoming a Supreme Court, the law lords are merely performing a difficult task in a complex society: addressing the public's desire for justice in individual cases simultaneously with impartially interpreting legislation and developing legal principles that promote the good of society as a whole.