The Law Lords in the '90s - A New Supreme Court?

It is both true and trite to compare the Law Lords of the '90s with the U.S. Supreme Court. True, because the House of Lords has been more proactive in making new laws; and trite, because the contrast between English and American judges is one born out of historical myopia - for the English legal tradition has had its own share of great law-making judges in the figures of Lords Coke, Holt and Mansfield.

There are three areas which best illustrate how the House of Lords is beginning to shrug off the shackles it has imposed on itself this century:

Firstly, the present House of Lords has shown itself capable of adapting the law to fit the needs of a modern society. The clearest example is its sensitive management of the gender problem. A woman is now no longer taken as implicitly consenting to sexual intercourse by virtue of marriage; R v R (1991) has made it possible for a man to be guilty of raping his wife. Yet the House of Lords has recognised that in certain situations women still require protection - for example, despite the much-touted gender equality of the '90s it is a practical fact that many women still abdicate financial management to their husbands. The Lords recognised this in *Barclays Bank Plc* v *O'Brien* (1993) when they imposed a duty on banks to warn wives of the implications of agreeing to guarantee their husbands' debts.

The case of R v *Brown* (1993) is however often cited as a hallmark of the persisting paternalism and bigotry of the House of Lords. The Lords had decided with a majority of three to two that adults could not consent to sado-masochistic activities. Critics point out this is pure hypocrisy - it is plainly anomalous that harmful activities like boxing, rough horseplay, and even amateur tatooing (most recently confirmed in R v *Wilson* (1996)) can be consented to, while sado-masochism cannot. However, a less cynical observer might choose to see the strong dissent as a seed of change rather than as a legal cul-de-sac. Indeed, Lord Mustill's powerful argument that there exists a sphere of private morality over which the law had no business to interfere was akin to that promulgated by the Wolfendon Report in 1957 which led eventually to the legalisation of homosexuality. The Lords are rightfully cautious in condoning behaviour which can have serious repercussions on the fabric of society. A progressive judiciary is one which pays careful consideration to the sensitivities involved in

difficult moral issues, not one which simply jumps on the bandwagon of political correctness.

Secondly, the House of Lords has been especially active in carving out a firm constitutional role for itself, be it in the spirit of rediscovery or even revisionism. Not satisfied with the Home Secretary's belief that he could ignore an injunction from the court, in *M* v *Home Office* (1993) the Lords put forth no less than a constitutional restatement along the lines of a separation of powers doctrine. Lord Templeman unequivocally stated that the courts had power to coerce the executive under pain of contempt to comply with the law, this being no less than the fait accompli of the Civil War. Lord Keith in *Derbyshire County Council* v *Times Newspapers Ltd* (1993) likewise pulled a rabbit out of the hat when he discovered an ancient principle of freedom of speech in the common law (which just coincidentally satisfies the requirements of the ECHR) to which he committed the courts to defend.

The third manifestation of judicial activism is seen in the increased daringness of the Lords' interpretive role. The mask that judges used to wear as being mere interpreters of Parliament's laws has dropped - they have to supply definitions where the law is "open-textured", and fill gaps which Parliament had simply left out. But the Lords seem to be unclear on how exactly they are to fulfil this role - in the recent case of *Westdeutsche Landesbank Girozentrale* v *Council of the Loundon Borough of Islington* (1996) the majority was unwilling to intervene where Parliament had in passing two Acts clearly chosen to authorise only simple and not compound interest claims. Yet in other areas some Lords have no qualms about simply staking their claim on virgin territory - as seen in Lord Goff's honest admission that he was simply a repairing a lacuna in the law in the controversial decision of *White* v *Jones* (1995). But critics of what seems to be arbitrary patchwork are not convinced - for Lord Goff failed to justify convincingly why beneficiaries should be allowed to sue negligent solicitors for economic loss when they neither had a contractual claim nor fell properly within the *Hedley Byrne* principle.

The objection to judges making law is chiefly that they may get these difficult poly-centric issues wrong. But here one should dispel the prejudice that the reason they get it wrong is simply because they are white, male, rich, and Oxbridge-educated - it is rather that

their reluctance to *openly* acknowledge the policy issues underlying seemingly mechanical judgments makes them more susceptible to error. A classic example is the recent case of *Banque Bruxelles Lambert SA* v *Eagle Star Insurance Co.* (1996) where Lord Hoffman sought to cap the negligent house valuer's liability to lenders. He argues that causation can limit the amount of damages - a valuer should not be responsible for a market crash which was not really *caused* by him.

This is, with respect, a travesty of the settled principle that foreseeability is the true measure of damages. It is perhaps in Lord Hoffman's unwillingness to enter into the difficult but profoundly important policy issue about the extent of foreseeability of the loss caused by the negligent valuer that the criticism that judges "get it wrong" really lies. For there is nothing really objectionable about the idea that judges can supplement the legislature given the growing complexities of regulating modern society. An independent, fair-minded law lord can hardly do worse than a legislature increasingly polarised by partisanship and dominated by the executive. After all, it was due to a supine legislature that great English judges like Lord Coke emerged. As long as the Law Lords are open about the fact that they *do* make policy choices and give reasons for them, it is no constitutional affront to a supreme Parliament which can always override its decision.

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