Asif Tufal

DOCTRINE OF PRECEDENT - LAW MAKING POTENTIAL

THE JUDGES' ROLE IN PRECEDENT

The old view of the judges' role was that they were merely 'declaring' the existing law (the 'declaratory theory'). Lord Esher stated in *Willis v Baddeley* [1892] 2 QB 324:

"There is … no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

The modern view is that judges do make law. Lord Radcliffe said (*Not in Feather Beds*, p215, 1968):

"… there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?"

The reality is that judges are continually applying the existing rules to new fact situations and thus creating new laws.

THE POSITION OF THE HOUSE OF LORDS

In the mid-nineteenth century the House of Lords developed the practice that it would be bound by its own decisions. This was reaffirmed in *London Tramways Co v London County Council* [1898] AC 375. The House of Lords felt that decisions of the highest appeal court should be final in the public interest so that there would be certainty in the law and an end to litigation. However, this practice was criticised from the 1930s. Some of the Law Lords said that the rule did not produce the desired certainty in the law and it had become too rigid (eg, Lord Wright, Lord Denning and Lord Reid).

Nevertheless, the practice was not changed until 1966 by Lord Gardiner LC, through the Practice Statement [1966] 3 All ER 77. The practice statement was accompanied by a press release, which emphasised the importance of and the reasons for the change in practice:

- It would enable the House of Lords to adapt English law to meet changing social conditions.
- It would enable the House to pay more attention to decisions of superior courts in the Commonwealth.
- The change would bring the House into line with the practice of superior courts in many other countries. In the USA, for example, the US Supreme Court and state supreme courts are not bound by their own previous decisions.

A. Paterson's survey of nineteen Law Lords active between 1967 and 1973 found that at least twelve thought that the Law Lords had a duty to develop the common law in response to changing social conditions (A. Paterson, *The Law Lords*, 1982).

EXAMPLES OF JUDICIAL ACTIVISM & SOCIAL CHANGE

1. In *Herrington v British Railways Board* [1972] AC 877, the House of Lords overruled (or at least, modified) *Addie v Dumbreck* [1929] AC 358. In *Addie*, the House of Lords had held that an occupier of premises was only liable to a trespassing child who was injured by the occupier intentionally or recklessly. In *Herrington*, their Lordships held that a different approach was appropriate in the changed social and physical conditions since 1929. They propounded the test of 'common humanity' which involves an investigation of whether the occupier has done all that a humane person would have done to protect the safety of the trespasser.

2. In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, the House of Lords overruled *Re United Railways* [1961] AC 1007. In *Re United Railways*, it had been held that damages in an English civil case could only be awarded in sterling. In *Miliangos*, the House of Lords held that damages can be awarded in the currency of any foreign country specified in the contract. A new rule was needed because of changes in foreign exchange conditions, and especially the instability of sterling, since 1961.

3. In *R v Howe* [1987] 2 WLR 568, the House of Lords overruled *DPP for N. Ireland v Lynch* [1975] AC 653, and decided that the defence of duress is not available to a person charged with murder, whether as a principal or as a secondary party. In *Lynch*, the House of Lords had held that duress was available as a defence to a person who had participated in a murder as an aider and abettor. In *Howe*, their Lordships desired to restore this part of the criminal law to what it was generally understood to be prior to Lynch, even though to do so would produce the illogical result that, whilst duress is a complete defence to all crimes less serious than murder, it is not even a partial defence to a charge of murder itself. But note that in *R v Gotts* [1992] 1 All ER 832, the House of Lords extended the decision in *Howe* by holding that duress is not a defence to attempted murder.

   Lord Griffiths said: "We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight".

4. In *R v R (Rape: marital exemption)* [1991] 4 All ER 481, the House of Lords abolished altogether a husband's 250 year old immunity from criminal liability for raping his wife. Their Lordships justified the decision on the basis that the case was not concerned with the creation of a new offence but with their duty to act in order to remove from the common law a fiction which had become unacceptable. Lord Keith saw the decision as an example of the ability of the common law to evolve in the light of changing social, economic and cultural developments.

GUIDELINES FOR JUDICIAL LAW-MAKING

In two subsequent cases, the House of Lords declined to change the law on the ground that to do so was the province of Parliament:

1. In *R v Clegg* [1995] 1 All ER 334, it had been argued that the House should make new law by creating a new qualified defence available to

a soldier or police officer acting in the course of his duty of using excessive force in self-defence, or to prevent crime, or to effect a lawful arrest, which would have the effect of reducing murder to manslaughter.

However, Lord Lloyd, though not averse to judicial law-making and citing *R v R* as a good recent example of it, declared that he had no doubt that they should abstain from law-making in the present case since the reduction of murder to manslaughter in a particular class of case was essentially a matter for decision by Parliament, and not for them as a court, to decide upon. That point in issue was part of the wider issue of whether the mandatory life sentence for murder should be maintained. These issues can only be decided by Parliament.

2. In *C v DPP* [1995] 2 All ER 43, the House referred to the anomalies and absurdities produced by the rebuttable common law presumption that a child between the ages of 10 and 14 is incapable of committing a crime. Nevertheless, their Lordships refused to abolish the presumption, preferring instead to call upon Parliament to review it. Lord Lowry gave the following guidelines for judicial law-making:

   (a) judges should beware of imposing a remedy where the solution to a problem is doubtful;
   (b) they should be cautious about making changes if Parliament has rejected opportunities of dealing with a known problem or has legislated while leaving the problem untouched;
   (c) they are more suited to dealing with purely legal problems than disputed matters of social policy;
   (d) fundamental legal doctrines should not lightly be set aside; and
   (e) judges should not change the law unless they can achieve finality and certainty.

   On the issue of the treatment and punishment of child offenders Lord Lowry concluded that this was a classic case for parliamentary investigation, deliberation and legislation.

RECENT EXAMPLES OF JUDICIAL LAW-MAKING

1. In *Gillick v W. Norfolk Area Health Authority* [1985] 3 All ER 402, the House of Lords was asked to consider whether a girl under sixteen needed her parents' consent before she could be given contraceptive services. One side claimed that teenage pregnancies would increase if the courts ruled that parental consent was necessary, and the other side claimed that the judges would be encouraging under-age sex if they did not. The House of Lords held, by a majority of three to two, that a girl under sixteen did not have to have parental consent if she was mature enough to make up her own mind. (Note: since Parliament had given no lead, the House of Lords had no option but to make a decision one way or the other.)

2. In *Re S (Adult: refusal of medical treatment)* [1992] 4 All ER 671, a health authority applied for a declaration to authorise the staff of a hospital to carry out an emergency Caesarian section operation upon a seriously ill 30 year old woman patient. She was six days overdue beyond the expected date of birth and had refused, on religious grounds, to the operation. The evidence of the surgeon in charge of the patient was that the operation was the only means of saving the

patient's life and that her baby would not be born alive if the operation was not carried out.

Stephen Brown P, made the declaration sought, in the knowledge that there was no English authority directly on the point. There was however, some American authority which suggested that if this case was heard in the American courts the answer would likely have been in favour of granting a declaration in these circumstances.

3. In *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, the House of Lords allowed the use of Hansard as an extrinsic aid to the interpretation of statutes (subject to certain conditions). In doing so their Lordships declined to follow dicta in three of their earlier decisions.

4. In *Airedale NHS Trust v Bland* [1993] 1 All ER 821, the House of Lords considered the fate of a football supporter left in a coma after the Hillsborough stadium disaster. The court had to decide whether it was lawful to stop supplying the drugs and artificial feeding that were keeping the patient alive, even though it was known that doing so would mean his death soon afterwards.

   Several Law Lords made it plain that they felt that cases raising “wholly new moral and social issues" should be decided by Parliament, the judges role being to “apply the principles which society, through the democratic process, adopts, not to impose their standards on society". Nevertheless the courts had no option but to make a decision one way or the other, and they decided that the action was lawful in the circumstances, because it was in the patient's best interests.