

The law factories

Slapper, G. (2002) *The law factories*.

Law is manufactured today in Parliament and also in the appeal courts. Both processes are notably more arcane and mysterious than is necessary in the twenty-first century.

Law governs every aspect of what we do today, so how well it is made is as important an issue as the quality of the milk we use or the air that we breathe. Apart from being important to the consumers, the quality of law is also critical to the lawyers and advisers who have to work with it after it comes off the conveyor belt.

About 35 new public Acts of Parliament are produced every year, thus releasing thousands of new rules into our world. The process is largely cumulative because the abrogation of old law is an altogether less efficient process. The legislative output has more than doubled in recent times, from 1175 pages a year in 1971 to 2581 pages in 1989. During the same period, statutory instruments have risen from 70 a year to over 1200. Adequate scrutiny of such a prodigious generation of rules made that quickly is impossible.

If our legislature were being designed from scratch, several of its current practices would be unlikely to withstand modern scrutiny. What our legislators wear, for example, is probably of no consequence or importance, and yet this recently became a major controversy when Kevin Brennan, MP for Cardiff West, tried to speak in the chamber of the Commons without a tie. He was forced to leave and return when the Speaker ordered him to get knotted. Honouring a long-established chauvinism in the House, Michael Fabricant, MP for Lichfield, said that he noticed 'for the first time in my experience, an MP spoke in the chamber without a tie.' He either has not noticed our female parliamentarians or has not realised they are MPs.

In August 2000, Tess Kingham, MP for Gloucester, announced that she would not be standing for re-election and condemned the House of Commons as an unfriendly 'gentlemen's club'.

One wonders what our sartorially-obsessed legislators made of the recent revelation that beer consumption at the bars in Parliament, never a modest amount, has increased by 100 per cent since last October. Was there a view that this is nothing to worry about provided that no MP was quaffing in an open-neck shirt? When Lloyd George described Parliament's attraction as 'like a pub to a drunkard' he was being figurative, but that was a century ago.

As for law making in the courts, the problem is to define the boundary at which interpretation of a parliamentary statute, or the development of an historic common law principle, is so extravagant or contentious that it breaches the core principle of a constitutional democracy. Not so long ago it was widely accepted theory that, in new test cases, judges did not innovate law but merely declared what the law was, and, by implication, had always been. Thus Lord Esher said in 1892 that there was 'no such

thing as judge-made law'. Today, most observers are more likely to accept the statement of Lord Simon of Glaisdale who, in a case in 1975, said that 'I am all for recognising frankly that judges do make law'. Lord Scarman noted in a judgment in 1980 that 'in our society, the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as lawmakers.' In modern times so much of public, social, medical, political, sporting and educational life has become justiciable that it becomes critical to know what is expected from the judiciary. This point is especially important since the implementation of the Human Rights Act 1998 because judges are required to make a great many judgments after making evaluations that are every bit as social and political as they are legalistic.

Worry about law-making judges can be partially allayed by reference to the relatively tolerant political dispositions of many of those on today's bench. But should the principle of parliamentary sovereignty (part of the constitution since the Bill of Rights in 1689) be abrogated as a result of such an ephemeral and trivial battle between what some see as 'bad politicians' and 'good judges'? The constitutional difficulties requiring to be addressed in public debate now stem from the fact that the judiciary is an unelected and largely unaccountable body whose members carry no public mandate. In any case, there is no clear or commonly accepted code identifying the circumstances in which they can be permitted, like Judge Dredd, to effectively make up new law.

In cases which go to the House of Lords, for example, there is no reliable way of predicting whether the Appellate Committee will keep the old law and say that any change must come from Parliament, or whether it will act boldly to alter the law itself. In a case reported in 2001, Lord Hobhouse noted that the common law develops 'as circumstances change and the balance of legal, social and economic needs changes'. He went on to comment that 'what was previously thought to be the law is open to challenge and review; if the challenge is successful, a new statement of the law will take the place of the old statement.'

Consider the unpredictability of law making in the Lords. In 1992, the House of Lords saw fit to abolish the then 256-year-old rule against a charge of marital rape. Lord Keith noted that: 'The common law is [...] capable of evolving in the light of changing social, economic and cultural developments'. It followed, he said, that the old rule that forbade a charge of marital rape reflected the state of affairs at the time it was enunciated in 1736, and should be abolished as 'the status of women, and particularly of married women, has changed out of all recognition in various ways'. In creating a new crime, the Lords did not shrink back from such law making because this was a matter of public policy or because Parliament had legislated on this area in modern times without changing the rule against marital rape.

Conversely, in a case in 1995, the House of Lords shied away from changing the *doli incapax* rule concerning the criminal liability of children. The case involved a 12-year-old boy from Liverpool caught

interfering with a motorbike using a crowbar. He was convicted of attempted theft. His defence argued that 'mischievous discretion' had not been proven, but, on appeal to the Divisional Court, it was ruled that the antiquated rule (under which defendants between 10 and 14 years old must be shown to know that their actions were seriously wrong before they can be convicted of a crime) was no longer part of English law. The House of Lords could have agreed and changed the law but it declined. Quite contrary to the view in the marital rape case where the Lords made new law, Lord Lowry in this case stated that judicial law making should be avoided where disputed matters of social policy are concerned. He stated that: 'The distinction between the treatment and punishment of child "offenders" has popular and political overtones, a fact which shows that we have been discussing not so much a legal as a social problem, with a dash of politics thrown in, and emphasises that it should be within the exclusive remit of Parliament.' The *doli incapax* rule was subsequently changed by Parliament in section 34 of the Crime and Disorder Act 1998.

Yet in another case, in 1992, the Lords' Appellate Committee was in a law-making mood and decided to sweep away a 223-year-old constitutional rule that had prevented Hansard being consulted by law courts in aid of statutory interpretation. The specially-convened enlarged Appellate Committee of seven could have ruled that changing the law was not something they were able to do, particularly as the case involved a controversial constitutional principle (Article 9 of the Bill of Rights - which prohibits the questioning in any court of freedom of speech and debates in Parliament). But the Committee decided that it *would* change the law, because 'the time had come'. Lord Griffiths, for example, said that: 'I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation.'

Again, conversely, in the case of the soldier Private Clegg in 1995, the Lords declined to make any changes to the law of self-defence, seeing that as something suitable only for Parliament. Lord Lloyd of Berwick approved the words of Lord Simon in an earlier case: 'I can hardly conceive of circumstances less suitable than the instant for five members of an appellate committee of your Lordship's House to arrogate to ourselves so momentous a law-making initiative.'

In *Judicial Discretion in the House of Lords*, David Robertson argues that the conclusions reached by the law lords are not arrived at by the simple mechanical process of interpreting law without a thought as to where such interpretations will lead. Their legal reasoning, he suggests, 'makes it extremely unlikely that they are anything but *post hoc* arguments, intellectual edifices erected around a value position selected otherwise'. Lord Denning was often clearly teleological in his argument, deciding the result before he sought his reasoning.

A recent decision of the Court of Appeal is a good illustration of how social policy is crafted by senior judges. If people who are exposed to high levels of stress at work suffer nervous breakdowns, should they be

able to sue their employers for negligence in allowing the breakdown to occur? And, if the answer is yes, what limits on such actions should be imposed? In *Terence Sutherland v Penelope Hatton* (Times LR 12 February 2002) the court addressed this question.

The case dealt with appeals by four separate employers from four different county court decisions. In each case a circuit judge had awarded damages for negligence against the claimants' employers after the claimants had been forced to stop working because of stress-induced psychiatric illness. Two of the claimants were teachers in comprehensive schools, the third was an administrative assistant at a local authority training centre and the fourth was a raw materials operative at a factory. The employers argued that negligence had not been established against them.

The Court of Appeal formulated a number of key propositions. It held, for example, that the threshold question was whether the kind of harm to the particular employee was reasonably foreseeable. It held also that foreseeability depended upon what the employer knew or ought reasonably to have known. An employer was usually entitled to assume that an employee could withstand the normal pressures of the job unless he knew of some particular problem or vulnerability. The test was the same whatever the employment. To trigger a duty to take steps, the indications of impending harm to health arising from stress at work ought to be plain enough for any reasonable employer to realise that he should do something about it. Applying those propositions to the facts of the cases, the employers won in three of the four disputes

Employment is a key part of social activity as over 20 million [UK] citizens are involved in it. The number of people suffering from clinically diagnosable stress at work is high and rising. It therefore becomes very important for society to know when an employer can be held liable for such stress. The rules governing this area have now been made and revised by unelected judges, and the process by which the English legal system permits this to occur is therefore of great importance. In an episode of the television cartoon *Futurama* the role of the judiciary is executed by a computer that simply applies the rules to new situations without either emotion or politics informing the decision-making process. After the judicial computer has been fed the evidence and the arguments, an oblong timing window gradually fills up with a blue bar on the screen while the word 'judging' flashes on and off. Clearly, there is an argument that, in the case of the stress liability dispute the judges were cognisant of social and employment issues, and were acting in a more creative way than the judicial computer. Social rules will always need to be interpreted, but the point at which we desire those judging the rules to effectively create a new rule needs clarification. The working atmosphere and procedures of our main law factory, the legislature, could also be improved. As John Field records in

his excellent new book *The Story of Parliament*, Fenner Brockway spent three years in prison and three years in Parliament and said he saw character deteriorate more in Parliament than in prison. Clearly, Westminster is not yet a good place in which to nurture our social architects.

An edited version of this essay was published in *The Times* on 29 October 2002 entitled 'Post-prandial snoozes are out'.