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Gary Slapper on why judges and politicians are at odds over who makes the law

Should the judges or MPs make the laws?

In the wake of the recent ruling by the Court of Appeal that the Government's withdrawal of welfare benefits from most asylum-seekers was unlawful, Peter Lilley, Social Services Secretary, announced that the judgment would effectively be nullified by new clauses to be rushed into its Asylum and Immigration Bill now before Parliament.

In the Commons, Tony Marlow, MP, voiced the views of several Tories when he said: "Do the judiciary now have a democratic mandate to decide which laws are acceptable, or does this House and Parliament, on the balance of views in the country, continue to decide what the laws should be, while the judiciary apply them without being informed by their personal prejudices?"

This constitutional clash between the judiciary and Parliament is similar to the recent conflict between senior judges and the Home Secretary over the desirability of Parliament acting to curb the sentencing discretion of trial judges.

Both disputes centre on the constitutional role of the judges. Even in fairly recent history, it was still widely accepted that judges did not make law but simply interpreted it: they construed difficult phrases in legislation, and they applied old common law principles to novel situations - but they never substantially changed the law.

Today that view appears naive and most commentators think that judges do play a creative part in fleshing out and shaping the law. The key questions now are when should judges become inventive and how far should they go?

Historically, when Parliament has become involved in any spat with the judiciary, it has been liberal and radical thinkers who have sided with Parliament while conservative thinkers have generally favoured the judiciary.

In today's confrontation, the opposite is true. Progressives are feting the senior judiciary as guarantors of freedom while the Conservatives are championing parliamentary democracy in support of Michael Howard and Mr Lilley. 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 that need to be addressed in public debate now arise because the judiciary is an unelected and largely unaccountable body whose members carry no public mandate.

In cases that go to the House of Lords, for example, there is no reliable way of predicting whether the law lords will keep the old law and say any change must come from Parliament, or whether they will act boldly to alter the law themselves.

On what basis therefore should judges be endowed with the constitutional right to protect public interests in the face of opposition from the manifestly demotic repository of power we have in Parliament?

Consider the institutional capriciousness 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".

But conversely last year 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 aged 10 to 14 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 Lords could have agreed and changed the law but did not do so.

Instead, Lord Lowry stated that judicial law-making should be avoided where disputed matters of social policy are concerned. He said: "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."

Yet in 1992, in another case, the law lords were 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 last year, 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 lordships' House to arrogate to ourselves so momentous a law-making initiative."

There is a reasonable body of evidence to illustrate the mercurial nature of the Lords as a law-making agency. One should be cautious, therefore, about relying on the Lords as a legislative vehicle. In the Commons, by contrast, capriciousness of law-making is forgivable, even desirable, because it is a democratic agency and its activity should reflect the will of a demotic electorate.

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ACTIVITY

1. Identify the cases explained above.

2. Discuss whether you think judges should make law. Give reasons for your opinion.