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More on judicial expansionism

We write in support of Mr J. B. McGuinness (letters, 8 April 1999), who stated that the law lords had stepped over the mark in their decision regarding so-called institutionalised discrimination against women. Unfortunately such judicial expansionism is only too common today.

In an article you published on 16 March 1999, the former Home Office Minister Lord Patten pointed out that over the years judges have taken more and more powers to themselves, and that this, when linked to the new constitutional role that legislation is giving them, radically alters the balance of power in the state. It upsets that separation of powers between legislator and judiciary which is one of the proud boasts of our constitution.

In another recent article (*New Law Journal*, 19 March 1999), one of the signatories to this letter, Francis Bennion, criticised the decision of the law lords in the *Kleinwort Benson* case. Here, by 3 to 2, they purported to overturn, as if by parliamentary legislation, the long-standing rule of the common law that payments made under a mistake of law are irrecoverable. One of the majority, Lord Goff, blatantly described what they were doing as the 'abrogation' of this rule. Abrogation equals repeal, and our judges do not possess the repealing power. It seems that some of them are seeking to assume it.

The latter article also criticised another recent decision where the law lords (again by 3 to 2) purported to change the long-standing common law rule that highways are only to be used for passing and repassing, and matters incidental to that. The Lord Chancellor, Lord Irvine of Lairg, decided this was too constricted for modern conditions. You reported him (*Law Report*, 5 March 1999) as saying-

'To limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The public highway is a public place that the public may enjoy for any reasonable purpose.'

The OED (second edition, 1994) defines 'warranted' as 'allowed by law or authority; approved, justified, sanctioned'. The Lord Chancellor is saying that the well-established existing rule about highways is 'unwarranted' when in fact it is just the opposite.

These matters go to the heart of how we are governed as a nation, and affect everyone. In particular they affect the business community, who look to certainty in the law. Lack of certainty induced by the growing propensity of judges to change the law whenever they see fit is dangerous to our commercial prosperity, as well as to our freedom.

Changes in the law should be made by Parliament after full public consultation and debate. They should not be made by judges who are appointed not elected, and lack the means to consult those affected and to acquire the necessary background information.¹

¹ *The Times*, 14 April 1999 (with Gerald Howarth MP).