

## Chapter 18

### Legal Oil and Political Vinegar\*

In a speech made in Melbourne in October 1998,<sup>1</sup> a distinguished Canadian judge, Madam Justice Rosalie Silberman Abella, examined the role of the judiciary in upholding human rights. The occasion of the address was the 50th anniversary of the Universal Declaration of Human Rights and of the Genocide Convention. Justice Abella referred to the tension between the judiciary and parliamentarians which arises from the nature of their respective functions. She mentioned an observation made in the 19th century by a British Prime Minister<sup>2</sup> who was irritated by certain decisions of the House of Lords narrowing the intended effect of some social welfare and labour legislation. The Prime Minister said that the salad of justice requires both legal oil and political vinegar, and remarked that disastrous effects would follow if due proportion was not observed.<sup>3</sup>

There are different opinions as to what constitutes due proportion in that mixture, and the ideas of people vary from place to place, and from time to time. Judges in the common law tradition have, for 300 years, claimed, and exercised, powers, and asserted independence, in a manner which has brought them into conflict with politicians and governments.

The starting point was the confrontation which occurred, in England in the 17th century, between King James I and Chief Justice Coke.<sup>4</sup> Coke contradicted the King's assertion that the King had the ultimate power to decide the common law. That power, Coke said, belonged to professional judges. The King, enraged, accused Coke of treason. He said that Coke was asserting that the King, (in modern terms the government, or, in some societies, the ruling party), was beneath the law. Coke said that was exactly what he was asserting, and quoted Bracton as authority for the principle that the King was beneath no man, but was beneath God and the law. This view, soon afterwards established in England, existed alongside, and was supported by, an alliance between the courts and Parliament against the executive government. The principle that it is for the judiciary, with guaranteed security of tenure, and not the government, to declare what the law is, is of basic constitutional significance. But it is to be remembered that when that principle was first established in English law, governments did not claim to represent the people. Coke was confronting a King who claimed to rule by divine right, not by the will of the people. It was in the interests of Parliament, in its struggle

\* An address given at the Sydney Institute, 16 March 1999.

1 *Human Rights and the Judicial Role*, 9th Australian Institute of Judicial Administration Oration, (Melbourne: AIJA, 1998).

2 Lord Salisbury.

3 Abella, *Human Rights and the Judicial Role*, p 15.

4 See Holdsworth, William, *A History of English Law*, 2nd ed, (London: Methuen, 1914) Vol V, pp 428-451; Usher, RG, "James I and Sir Edward Coke" *The English Historical Review*, 1903, Vol XVIII, pp 664-675.

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