

## Chapter 19

# Judicial Activism and the Death of the Rule of Law\*

### The gouty old bullies and the evil old men

On 19 February 1941, George Orwell published his celebrated pamphlet *The Lion and the Unicorn*. In analysing the superiority of English life to that of Axis and Communist Europe, he said:

The gentleness of English civilisation is mixed up with barbarities and anachronisms. Our criminal law is as out of date as the muskets in the Tower. Over against the Nazi Storm Trooper you have got to set that typically English figure, the hanging judge, some gouty old bully with his mind rooted in the 19th century, handing out savage sentences ... People will accept them (and Dartmoor, and Borstal) almost as they accept the weather. They are part of 'the law' which is assumed to be unalterable ... Here one comes upon an all-important English trait: the respect for institutionalism and legality, the belief in 'the law' as something above the State and above the individual, something which is cruel and stupid, of course, but at any rate *incorruptible* ... The totalitarian idea that there is no such thing as law, there is only power, has never taken root ... The hanging judge, that evil old man in scarlet robe and horse hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is one of the symbolic figures of England. He is a symbol of the strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape.

Those observations of the Old Etonian ex policeman and socialist correspond with a deep tradition of the common law. In the great case of *Entick v Carrington*,<sup>1</sup> the Court of Common Pleas set aside warrants purportedly justifying a forceful seizure of the plaintiff's papers. Lord Camden CJ gave instructions that the notes from which he gave his decision should be burned, but by accident they were preserved. According to them, he said, in rejecting an argument that even if the warrants were otherwise unlawful, they were justified on the ground that they were employed to seize documents which were seditious libels:

If it is law, it will be found in our books. If it is not to be found there, it is not law ... [With] respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.<sup>2</sup>

\* Revised address to *Quadrant* Dinner, 30 October 2002.

1 (1765) 19 Howell St Tr 1030.

2 *Entick v Carrington* (1765) 19 Howell St Tr 1030 at 1066 and 1073.

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