Legal Oil and Political Vinegar
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In a speech made in Melbourne in October 1998[1], 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 fiftieth 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 nineteenth century by a British Prime Minister[2], 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[3].

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 three hundred years claimed, and exercised, powers, and asserted independence, in a manner which has brought them into conflict with politicians and governments.

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1 "Human Rights and the Judicial Role", 9th Australian Institute of Judicial Administration Incorporated Oration, published by AIJA.

2 Lord Salisbury.

3 Oration, above, page 15.

The starting point was the confrontation which occurred, in England in the 17th century, between King James I and Chief Justice Coke[4]. 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 for power against the Crown, to align itself with the courts, and to support their claim, as against the King, to have the power to decide what the law, including the law of the constitution, was.

If we move ahead a century, to consider the work of Lord Mansfield, one of Coke's most notable successors, the context is changing, but the basic principle remains the same. A large part of Lord Mansfield's work consisted of developing English commercial law as a body of judge-made rules. To a substantial extent those rules were later codified or amended by Acts of Parliament, but they were originally declared to be part of the common law by judges. Some of the rules that he developed, which formed an important basis for England's commerce, were imported from the mercantile law of

[4] See Holdsworth, A History of English Law, 2nd Ed., Vol V pp 428-451; R G Usher, The English Historical Review, ed. Reginald L Pode, 1903 Longmans, Vol XVIII pp 664-675.

Europe. This judicial activity of making, refining, and developing the law is familiar to common lawyers, and continues to the present time. Without it, much of our law would be either non-existent or anachronistic. Nowadays, however, that judicial function is carried out against a different social and political background. Modern parliaments intervene, by way of legislation, in a wide range of subjects which in previous times were left to lawyers and judges. Moreover, parliaments are now democratically elected, and claim to represent the will of the people. Judges, who have been making and developing the common law for centuries, are categorised as unelected and relatively unaccountable, and the judicial role is seen as undemocratic. What judges are doing has not changed. The change that has taken place is in context in which they are doing it. The legitimacy of judicial law-making is questioned in an age when the public equate legitimacy with democratic election and direct accountability.

Consider a more striking instance of the power exercised by Lord Mansfield and his judicial colleagues. This example is to be found, not in the development of England's mercantile law, most of which was politically uncontroversial, but in a celebrated decision which shows clearly the role which English judges assumed in the governance of the nation. It was necessary for Lord Mansfield, and his court, in 1772, to decide an issue concerning the rights of owners of foreign slaves. An African slave named James Somerset was on board a ship in the Thames, bound for Jamaica. Members of the anti-slavery movement made an application for his release. The question for the court was whether English law recognised a foreigner's ownership of a slave. Lord Mansfield, delivering the judgment of the Court, said[5]:

> "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only (by) positive law, which preserves its force long after the reason, occasion, and time itself from when it was created, is

[5] Lofft 19, 98 ER at 510.

> erased from memory; it is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from (the) decision, I cannot say this state is allowed or approved by the law of England; and therefore the black must be discharged."

Although there is some scholarly debate about the matter, the predominant view is that by positive law Lord Mansfield meant legislation.

This is an example, from 1772, of what would now be described as judicial activism. The state of slavery is odious, declares the Chief Justice of England, one hundred years before the American Civil War. Therefore, regardless of the inconvenience to trade which may be caused, it will not be recognised by an English court unless legislation compels that. If Parliament chooses to legislate, it may do so. It has not done so. The black must be set free[6].

The judicial power there being exercised may come as a surprise to some people. How does such a power co-exist with the legislative power of modern, democratically elected parliaments, intensively regulating the affairs of citizens?

In recent years some people prompted by a few well-publicised examples of the law-making power of judges, and especially of the High Court of Australia, have begun to take an interest in a subject which previously concerned only a relatively small group of lawyers. Even amongst lawyers, it was of little interest to most practitioners, and, in truth, it had, and has, little bearing upon the day to day work of most judges. I refer to the methodology by which, in a common law system, judges refine, develop, and sometimes create, the law.[7] It is interesting to read differing opinions as to how they do it.

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6 For a more detailed analysis of this case, and of Lord Mansfield's views on slavery, see Oldham J, *The Mansfield Manuscript*, 1992 USA, Ch. 21.

7 For a recent discussion of the subject by a member of the High Court of Australia, see M H McHugh *"The Judicial Method"*, (1999) 73 ALJ 37.

Of equal importance is why they do it, and how their power to do it relates to the powers of Parliament and of the executive government.

It has been said that "(t)he hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law."[8] That is the essential difference between the legal systems of countries in the common law tradition, such as Australia, England, Canada, the United States of America, and New Zealand, and those of countries in the civilian or Napoleonic tradition, where the laws are substantially based on statutory codes, such as France, Germany and Italy. In common law systems, judicial decisions, based on precedent, developing the law incrementally from case to case, are just as important a source of the law affecting the rights and obligations of citizens as are statutes enacted by Parliament. The interaction between judge-made law and statute is itself a complex subject of legal scholarship, but it may be put to one side for the purposes of this paper.[9]

The primary feature of the technique by which judges develop the common law was described in an English appeal as follows[10]:

> "The appeal raises directly a question as to the balance in our law between the functions of judge and legislature. The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps; there can be no 'casus omissus'. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court seeks to do, it starts from a base-line of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised.
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> The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations

8 J Beatson, *"Has the Common Law a Future?:* [1997] CLJ 291.

9 It is a subject examined in Professor Beatson's article, above.

10 *McLoughlin v O'Brian* [1983] 1AC 410 at 429-430, by Lord Scarman.

> will have to be weighed: but the objective of the judges is the formulation of principle.
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> The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach. If that should happen .... there would be a danger of the law becoming irrelevant to modern social problems."

Two observations may be made. First, descriptions of judicial attitudes are usually subjective, and an English law lord's ideas as to what amounts to a progressive or conservative judicial approach are likely to be different from those of many other people. However, the explanation of the judicial technique as starting from a base-line of existing principle, and working incrementally from there, explains why, to the eyes of many observers, the judicial method is inherently conservative. Secondly, many people would say, with justification, that there are plenty of modern social problems to which the law has become irrelevant, or with which it copes inadequately. Even so, a proper awareness of the deficiencies of the system should not blind us to its achievements. Some of the achievements can best be seen by comparing the relative stability and security of our circumstances with those of others.

The place of the judiciary in a common law system differs in significant respects from that of the judiciary in a civil law system. Civil law systems tend to have many more judges per head of population. Germany, for example, has about five times the number of judges per head of population that

Australia has.[11] On the other hand, the judiciary in civil law countries is, by our standards, institutionally self-effacing. In an article in the Yale Law Journal entitled *"Judicial (Self) Portraits: Judicial Discourse in the French Legal System"*[12], a French legal scholar wrote[13]:

> "The French civil law system is premised on a supposedly all-encompassing and all-generating legal code. French judicial opinions merely apply the Code, which patterns their syllogistic form and mechanical structure. Implicit in this official portrait is a definition of the role of a civil judge. [The judge] mechanically (and unproblematically) fits fact situations into the matrix of the Code. Thus 'the Code is supposed to have already judged' – the judge is but its passive and invisible agent."

The author explains that this is reflected in the form and style of French judgments. They are, by our standards, very brief; they make no provision for dissent; and the outcome is expressed so as to appear inevitable. The reality of French judicial decision-making is different, and the contrast between the way in which the process in fact works and the way in which it appears is the main theme of the article; the contrast is between the official and the unofficial portraits of a judge. A desire to remove the law-making power of judges, exercised in "parlements", was one of the objectives of the French Revolution, so this is a subject which runs deep in French constitutional arrangements.

In civil law systems the theory is that judicial decisions do not make law; they merely provide particular examples of the operation of the legislative Code. In common law systems, judicial decisions, especially those of appellate courts, create precedents upon which the law grows and develops.

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11 Source, Federal Statistical Office, Germany, figures for 1995 and 1996, showing more than 20,000 judges compared with 880 judges and magistrates in Australia.

12 Mde S Lassers, [1995] 104 Yale Law Journal 1325.

13 At 1327.

The role which a common law system assigns to judges has certain inescapable consequences. First, judges, especially those who have most occasion to discharge the law-making responsibility, are inevitably subject to scrutiny, and criticism, of their efforts. Such criticism is sometimes fair, and sometimes not. One thing, however, ought to be remembered. Judges do not choose the cases that come before them; they are bound to decide the issues which litigants present for decision, and it is not open to them to say that the law provides no solution to the case. There is no judicial too-hard basket. Modern citizens, and lawyers, make aggressive use of litigation to establish all manner of claims, and the courts have to deal with the cases they bring. It is not open to judges, on the basis of a sampling of public opinion, to decide that it is expedient to defer an issue, or to ignore it altogether. Secondly, the demands for accountability which accompany any exercise of power or authority in the present age are in some respects difficult to reconcile with the imperative of judicial independence. Thirdly, as various interest groups in the community become more aware of the power which the system gives to judges, they naturally take a greater interest in issues such as judicial appointment and judicial training and education. There is nothing wrong with this; it is to be encouraged, so long as it does not reflect itself in a desire to compromise independence. Fourthly, judges themselves have to expect that not all of their critics will be models of courtesy. Fifthly, much of the scrutiny and criticism will come from parliamentarians and governments, and dissatisfaction with judicial decisions will be represented as a conflict between the judiciary and the other branches of government. Judges need to be willing and able to acquit themselves respectably in such conflicts, whether they be real or artificial.

Whilst many observers of judicial development of the law concentrate only on outcomes, and either applaud or deplore results, the real test of the legitimacy of this activity lies in the process. So long as judges continue to accept the constraints inherent in the judicial method, working from a base-line of existing principle, and solving new problems, or re-evaluating old solutions, consistently with principle, then they can provide an effective

answer to a criticism that they are trespassing into a field which belongs to Parliaments.

It is not only, or even mainly, the role of judges in developing the common law which is likely to bring them into collision with governments and parliaments. Three other areas of judicial activity require particular mention: constitutional interpretation; the developing importance of human rights law; and judicial review of administrative action.

A Federal system of government necessarily involves a demarcation of powers between the entities which constitute the Federation: the central government and the State or provincial governments. That demarcation is made by a written constitution which, in the case of Australia, confers legislative power over specified subjects to the Federal Parliament and allocates the remainder to the State. The history of Federation is one of recurring litigation between State and Federal governments over this division of legislative authority, and between citizens and governments over the limitations placed upon Federal and State legislative power. Furthermore, the Australian Constitution contains certain rights or guarantees, express or implied, which, although few in number compared with the position in the United States, have given rise to litigation and the need for judicial decision.

It is self-evident that the exercise of jurisdiction such as this will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.

There is another development which has emphasised a different aspect of the judicial role; one also calculated to bring it into conflict with parliaments and governments.

The subject matter which has given rise to this form of tension in truth represents a fundamental problem of democracy. Paradoxically, the problem has become more significant as governments have become more democratic and, therefore, more responsive to the will of the majority in the community.

In a paper delivered in 1965[14], Viscount Radcliffe said:

> "We shall never begin to approach the ideal of a just and defensible society unless we shake ourselves free of the notion that there is any moral sanction whatsoever behind the votes or wishes of a majority. To respect majority opinion is the duty of a civilised man in all matters in which such deference may properly be required. A democracy cannot conduct its affairs on any other working principle. But the art of political theory is hardly begun with the rules for ascertaining and enforcing the wishes of a majority: the real art lies in analysing and expounding the circumstances and occasions upon which, whatever the wishes of a majority, they ought not to be given effect to at the expense of a minority, large or small, and of that art, so far as I can see, our public life is almost totally deficient. We do not attend to it in our Constitution, we do not discuss it on any intellectual level that commands respect, and yet there is no question more crucially important for the health of democratic society."

The observation that the subject is not discussed on any intellectual level that commands respect might have been fair in 1965, but, since that time, there has been an upsurge of human rights discourse. While it may not all command respect, some of it does. The modern preoccupation with the subject of human rights, which in large part involves questions as to the circumstances in which the rights of a minority, large or small, may not be swept aside by the wishes of a majority, has given a new dimension to the judicial role, and one which is guaranteed to give rise to trouble between the judiciary, and parliaments and governments which represent, and must be responsive to, the wishes of the majority. In some respects this role has been placed upon judges by legislation enacted by parliaments, some of it in

[14] "The Dissolving Society", oration at the London School of Economics and Political Science, 10 December 1965, reprinted in Viscount Radcliffe, *Not in Feathered Beds: Some Collected Papers*, 1968, London at 229.

response to international commitments undertaken by the executive government.

Even before the current concern with human rights, it was always an important aspect of the role of the courts to defend the rights of the individual citizen against the executive government, and against the wishes of a majority in the community. In the administration of criminal justice, for example, it has always been the duty of the courts to insist upon due process of law, and upon strict observance of the rules of procedure and evidence, even though the person being prosecuted might have been charged with conduct of a most extreme and anti social nature. Similarly, in sentencing law and practice, it is the responsibility of judges to insist upon strict observance of the rules of statute and common law. This has often drawn criticism from people, including parliamentarians, who are well-attuned to popular sentiment. Parliamentarians, naturally responsive to the wishes and demands of the majority in the community, are sometimes not well placed to uphold individual or minority rights.

Another important field of modern judicial activity is that which involves judicial review of administrative decisions, nowadays usually pursuant to statutes such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Such legislation has subjected the conduct of government officials to a form of judicial scrutiny which is often unwelcome. It is not my purpose to discuss the merits of the policy underlying the legislation. Indeed, there are indications that the policy is far from settled, at least in relation to some areas of administration.

An essential difference between public servants and judges is that public servants are, within the limits of the law, obliged to implement the policy of the executive government. Judges must give effect to the will of Parliament expressed in legislation (which is not necessarily the same thing as the policy of the executive government), but, in resolving a dispute between a citizen and the government, they must act in an even-handed manner. They do not set out to give effect to government policy. They administer justice, according

to law. When a matter is committed for decision to the judicial branch of government then, to the extent defined by the scope of the litigation, it is out of government control. It is not in the nature of governments to relish matters being taken out of their control.

This is an even more sensitive issue in a context in which so much of modern administration emphasises the importance of outcome as distinct from process. Judicial insistence on due process, and decision-making according to law, may be seen as sacrificing efficiency to technicality, and policy to legalism. Impatience with process, and concentration upon outcome, is regarded, in some quarters, as the mark of good management. But a moment's reflection shows that our constitutional, political and legal systems are deeply concerned with process. A Federation is in some respects a model of inefficiency. Parliamentary democracy has many virtues, but, if getting the trains to run on time were our first priority, we would probably be better off with a different system of government.

There have been some well publicised encounters between the judiciary and the political branches of government in Australia in recent years. In truth, this is a world-wide phenomenon, and such conflict as has occurred in Australia has been fairly restrained by international standards. People in the USA are accustomed to much more robust interchange between courts and government than has so far been common in this country. In Canada there have, over the last twenty years, been some serious confrontations, especially between provincial judges and governments[15]. The Supreme Court of Canada has found it necessary to deliver a number of major judgments defining the minimum requirements of judicial independence[16]. The Chief Justice of Canada said in a 1997 judgment that "(t)he

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15 See the article by Gerald T G Seniuk, *Judicial Independence and the Supreme Court of Canada*, (1998) 77 Canadian Bar Review 381.

16 eg The Judges Reference [1997] SCJ No 75.

independence of provincial court judges is now a live legal issue in .... four of the ten provinces in the federation"[17]. Writing in 1996 two commentators said that the decade of the nineties was a time of unparalleled conflict between Canadian Provincial Court systems and the governments which established them, and that there was scarcely a single Canadian jurisdiction in which serious tension did not exist between judges and cabinet[18]. These problems are not confined to common law jurisdictions. A recent publication by two authors collecting studies on what they describe as the judicialization of public policy[19] finds that since World War II a number of the larger civil law democracies have seen a major expension of judicial power. They assert that in Germany the Constitutional Court "now regularly and authoritatively determines policies that might have been the prerogative of the majoritarian institutions"[20]. In Italy, they say, "we encounter what may well be the most striking and significant example of the expansion of judicial power in a Romano-Germanic democracy"[21].

It is necessary to understand what is occurring in Australia both in its historical and in its international context. Our democracy is not in danger of becoming judicialized. Judges continue to perform the traditional functions of a common law judiciary. They uphold the Constitution and the rule of law. They decide demarcation issues between governments. They resolve disputes between citizens, and between citizens and governments. They administer criminal justice according to law. They sometimes make unpopular decisions; and they sometimes make noisy enemies. By and large, however,

17 Above, note 3 at para 6.

18 DA Schmeiber and W H McConnell, *The Independence of Provincial Court Judges: A Public Trust* (Toronto: Canadian Association of Provincial Court Judges, 1996).

19 CN Tate and T Vallinder, *The Global Expansion of Judicial Power*, 1995 New York University Press.

20 Above, p 519.

21 Above, p 520.

the different branches of government in this country relate to one another with civility and, usually, although not invariably, with as much restraint as can reasonably be expected.

The courts and the parliaments have their own distinctive countributions to make to justice, and there is no reason why each side cannot continue to maintain a decent regard for the role of the other.