Print Page Close Window

Ceremonial sitting to mark the 175th anniversary of the Supreme Court of New South Wales

Spigelman CJ
The anniversary we commemorate is the inauguration of a free community governed by the rule of law. This Court and the first Legislative Council were both created under the New South Wales Act, the statute of the British Parliament of 1823. This was the first written constitution in Australian history.

As other speakers have emphasised, we do not often recognise just how old our basic mechanisms of governance are.

The beginnings of representative government occurred over 150 years ago. In a few years we will celebrate 150 years of representative and responsible government. In 2001 we will celebrate the centenary of Federation. These are old traditions, by any standards.

The twin great institutional traditions of our civilisation - the rule of law and the need for consent of the governed - form part of the core content of Australian national identity. Their force today, reflected in the universal acceptance of the legitimacy of the institutions which perform these functions, is derived in large measure from the longevity of the traditions by which they are performed. It is appropriate that we commemorate these institutions.

From its very inception under the first Chief Justice, Sir Francis Forbes, this Court established a reputation for independence and impartiality that remains unquestioned to this day. Under Chief Justice Forbes the Court asserted its high constitutional function of protecting individual rights and freedoms. The early decisions of this Court - now, insofar as they have survived, available in accessible form for the first time on the Macquarie University website - speak in terms that we still readily appreciate.

The first constitutional case in Australian history concerned the right to trial by jury in a criminal trial at quarter sessions. This issue reflected the major political divide of the time: Between emancipated convicts and the "exclusives". The latter, predominant amongst the Justices of the Peace who conducted the trials, objected to a jury system in a society with so many emancipated convicts.

Chief Justice Forbes held that trial by jury was a birthright of all free men and women. He referred to the Magna Carta and the development of English constitutional law. He ordered the justices to sit with juries.

The authority of the Court was also invoked to ensure the creation of free institutions, specifically freedom of the press.

Within a month of their admission in September 1824 as the first barristers of this Court, William Charles Wentworth and Robert Wardell, established The Australian, the first newspaper in our history to be critical of the Government. Its reportage and that of its followers soon incensed Governor Darling.

The Governor proposed legislation to require all newspapers to obtain licences. Under the 1823 constitution the Legislative Council could not pass legislation if the Chief Justice proclaimed it to be "repugnant to the laws of England". Chief Justice Forbes struck down the newspaper licensing bill as such. He said:

> *"By the laws of England every free man has the right of using the common trade of printing and publishing newspapers; by the proposed Bill this right is confined to such persons only as the Governor may deem proper. By the laws of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraints; by the proposed Bill a preliminary licence is required which is to destroy the freedom of the press and to place it at the discretion of the government..."*

Governor Darling then proposed to impose a stamp duty on all newspapers in an amount which would have crippled a number of them, including The Australian. Chief Justice Forbes declared the stamp duty bill invalid.

The licensing scheme was overturned by the refusal of a certificate by the Chief Justice. Although, in substance, this was a kind of judicial review, it did not survive in those terms. The stamp duty bill, however, was struck down in a different way.

The New South Wales Act of 1823 permitted the imposition of taxes for stated purposes. Forbes boldly asserted that the true purpose of the stamp duty on newspapers was not for the public works stated in the Act. Rather, the true purpose was to destroy certain newspapers.

This is a form of judicial review of the validity of legislation with which we are very familiar, particularly in the context of the Commonwealth Constitution. It is of abiding significance that the first time in Australian history that a Court exercised this form of judicial review was to protect the right of free speech.

The assertion of judicial independence, so dramatically manifest in this confrontation, has never been the subject of serious challenge since. Over 175 years, it has been, and remains, a fortification of freedom in this nation.

The capacity for such independence is now, and has always been, nurtured by the strength and autonomy of the legal profession, from which the judiciary is drawn. That strength and autonomy, in turn, is a product of the adversary system.

Throughout the history of this Court, in any proceedings, including those in which the State is a party, the litigants determine, in large measure, what issues are raised and how they are fought. This system reflects the significance our society attaches to the autonomy of individuals and to the maintenance of personal freedoms. Individuals are entitled to exercise control over their own lives. They are entitled to participate in decisions which affect their lives to the maximum degree possible. No arm of the State controls how they conduct their legal affairs.

Even in a criminal case, the State, appearing in the guise of a prosecution authority, is required to conduct the entirety of the proceedings as if it were an ordinary litigant in the Court. It receives no privileges. It receives no special access to the magistracy or the judiciary. Its right to call or interrogate witnesses, or to make submissions, is no different from that of any other litigant in the Court.

Personal autonomy and participation have very deep roots in this country. One of the reasons why these values are so secure, is because for 175 years they have been, and continue to be, reflected many times every day, in the procedures within our Courts, indeed in the very structure of our courtrooms.

History suggests that the inquisitorial system with which our own is sometimes compared, is compatible with a society of either dictatorship or of freedom. The adversary system is only compatible with a society of freedom. In an adversary system the administration of justice and the autonomous legal profession are protective devices of freedom. That is not a function necessarily performed by the administration of justice or by the lawyers in an inquisitorial system.

It is true that the adversary system is not the cheapest form of legal decision making. However, nor is parliamentary democracy the cheapest form of government.

There is a tendency today to treat the Courts as some form of publicly-funded dispute resolution service. Such an approach would deny the whole of the heritage we have gathered here to commemorate. This Court does not provide a service to litigants as consumers. The Court administers justice in accordance with law and that is a core function of government.

In conclusion, I wish to acknowledge the speakers here today. Mr Carr, as the Premier of New South Wales, represents the great institutional tradition of Parliamentary democracy. Our other speakers represent both that tradition and the intertwined tradition of the rule of law.

The Presidents of the Bar Association and the Law Society, Mr Barker and Ms Hole, were good enough to step aside on this occasion and to have their respective memberships represented by two of their most distinguished former practitioners, one of whom, Mr Whitlam, has served, and the other, Mr Howard, now serves, as the Prime Minister of this country. Their histories personify the interconnection of the two great traditions of our mechanism of governance - parliamentary democracy and the rule of law - and the respect each has always shown the other.

The tradition of the rule of law is reflected in the presence on the bench of my two immediate predecessors, Sir Laurence Street and Chief Justice Gleeson. Between them they served as Chief Justice of this Court for 24 years. Their presence here today personifies an abiding characteristic of our legal tradition: The concurrent existence of continuity and change.

There is an embedded wisdom in institutions which have grown and developed over long periods of time. Experience indicates that contemporary custodians of such institutions, and those whose conduct can impinge on their activities, should approach their tasks with an element of humility. After 175 years of tradition, it is appropriate that we should conclude in that spirit.

The Court will now adjourn.