cover story

The independence of the judiciary and a fair trail

Excerpts from an address given by Her Honour Antionette Kennedy, Chief Justice of the District Court of Western Australia*

"At Runnymede, at Runnymede,
Your rights were won at Runnymede!
No freeman shall be fined or bound,
Or dispossessed of freehold ground,
Except by lawful judgment found
And passed upon him by his peers.
Forget not, after all these years,
The Charter signed at Runnymede."

'What Say the Reeds at Runnymede' – Rudyard Kipling (1865-1936)

The 18th century social commentator Walter Bagehot is reputed to have said something to the effect that: "The British are famous for inventing wonderful institutions which they themselves don't understand." If he did not say it, someone should have because it is correct.

Australians have inherited these institutions and the principles which make them great with no more understanding than the British. There is always a risk that we will lose what we have because we do not understand why it came about, its purpose and benefit.

I am concerned here with parliamentary democracy and the various principles of law which it both sustains and requires such as the separation of powers, judicial independence, and the fundamental principle which underlies our entire system of justice and government, *the rule of law*. For these purposes, that is simply that we are ruled by law and not by people; everyone and every institution is subject to the law.

We have inherited from the British the separation of powers; that is to say, the powers of the executive, the legislature and the judiciary are separate. The power of each operates as a check upon the others; this is what prevents us from ever becoming a totalitarian State and from being ruled by men and not laws.

Frequently, when judges make decisions with which some citizens disagree, there are letters to the editor demanding the executive sack the particular judge or all of us for that matter.

One cannot help thinking that news is slow at getting through – the executive has not been able to sack judges since the *Act of Settlement* in 1700.

It is also the case that politicians, aggrieved by the decision of judges, declare that the judges are not doing what they are paid to do and, in one well known case, stating that from now on all judges should be capital 'C' Conservatives. I thought this was something akin to the Captain of Essendon demanding that all referees be supporters of Essendon.

There are times when judges could be excused for thinking that there is a concerted effort to convince the populace that we are the enemy rather than the power to protect them from the excesses of the executive, the legislature and the self-righteous, ill-formed publicity.

Judges are frequently called upon to decide issues between the citizens and the State and to stand between the citizen and the State, increasingly between the citizen and the lynch mob aroused by sensational or self-righteous pre-trial publicity; a lynch mob who does not want the law applied to an accused about whom they have already decided the guilt, still less to an offender who is guilty. What they want in the latter case is a free for all between the offender and the victim, regardless of the harm this will do to the common good. Anyone who resists is immediately categorised as a person who does not care about victims and must live his or her private life in a crime free bubble.

No judge could be expected to carry our judicial tasks with impartiality if one side in the dispute had the power to dismiss that judge, move the judge out of office, or reduce his or her salary or could cause its elected representative to do so. It has been said that:

> *The ultimate test of public confidence in the judiciary is whether people believe that, in a contest between a citizen and government, they can rely upon an Australian court to hold the scales of justice evenly.*[1]

We should never be complacent. We should never assume that, if we allow the independence of the judiciary to be in any way undermined, it will have no effect upon us.

There are many complaints about the judiciary in Singapore. Whether it is biased in favour of the government or whether that is simply the perception, is for others to say. But justice must not only be done, it must be seen to be done. In Singapore, the judicial system has two levels of courts – the Supreme Court, which

continued page 6...

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includes the High Court and the Court of Appeal, and then the Subordinate Courts. Subordinate Court judges and magistrates, as well as public prosecutors, are civil servants whose specific assignments are determined by the Legal Service Commission which can decide on job transfers to any of several legal service departments. Judges therefore know what can happen if they make a decision the government does not like and litigants know it too.

Government leaders historically have used court proceedings, in particular defamation suits, against political opponents and critics. Both this practice and consistent awards in favour of government plaintiffs raise questions about the relationship between the government and the judiciary; this has led to a perception that the judiciary reflected the views of the ruling party in politically sensitive cases.[2]

The judges are not the enemy of the people, unless they join the government or the media or give that impression. The judges themselves must be very careful to ensure that justice is not only done but seen to be done and the executive and legislature must not make laws that create the impression that judges have joined the government or laws that seek to remove judicial protectors from citizens. The media should not get itself into a frenzy when judges refuse to do what the media wants.

A fair trail

I want to move on now to discuss other aspects of a fair trial. This plainly involves a whole range of issues, apart from the independence of the judiciary and, to assist me in confining the issues I will deal with, I have sought help from no lesser a personage than John Mortimer (aka *Rumpole of the Bailey*) who said on one occasion:

> *What some people would like is to repeal Magna Carta, suspend habeas corpus, abolish trial by jury, reverse the onus of proof and replace the whole thing with a summary trial in front of the station sergeant.*

I never took this to be a criticism of the station sergeant. The station sergeant has his role as an aid to the executive but it is not a substitute for the judiciary and all that it can offer in a fair trial.

The Magna Carta

Most of what I knew about Richard the Lion Heart and his brother King John, I learnt from old episodes of *Robin Hood*. Richard was good and John was bad. In John's eyes, since John was King, there was no law above him, he was not subject to the *rule of law*. The only entity higher than the King was God.

By 1215 the Barons had had enough. They decided that John was so untrustworthy that he must be tied down by a Charter of *Ancient and Accustomed* liberties which they put to him. When John stalled, they captured London and refused to give it back. Eventually, a meeting was arranged at Runnymede field on 15 June 1215. The agreement was sealed.

There were a whole range of matters in the great Charter, including a section on forests which might owe something to Robin Hood, but our interest is in the clauses on justice and on the overall principle that the law existed on the plane above the King, that is the *rule of law*. Thus, even the King, future government and judges were subject to law.

The Magna Carta became associated with those fundamental rights that formed the foundation of parliamentary democracy – trial by jury, habeas corpus, equality before the law, freedom from arbitrary arrest and parliamentary control of taxation.

> *Clause 38: No official shall place a man on trial upon his own unsupported statement without producing credible witnesses to the truth of it.*
>
> *Clause 39: No freeman shall be seized or imprisoned, or stripped of his rights or possessions or outlawed or exiled, or deprived of his standing in any other way nor will we proceed with force against him or send others to do so except by the lawful judgment of his equals and by the law of the land.*
>
> *Clause 40: To no one will we sell, to no one deny or delay right or justice.*

It was said in the 17th century that these clauses embodied the principles of the writ of habeas corpus and trial by jury. Magna Carta certainly meant a great deal to the people and the clauses to which I have referred were put into the Charters of various States of the United States of America and eventually called "due process".

Trial by jury

Originally, trial was by ordeal, by battle or by compurgation. Over a period of time, people did not want to fight each other and decided that trial by ordeal was a little unsophisticated.

The use of the jury system in legal proceedings began at about the time of Henry II, the father of Richard and John. In arguments over land, 12 local men would be summoned to give their answer as to who was in the right. So, at that time, the jury was part of the proof; it provided the local knowledge. Slowly juries became the independent judges of the facts.

The juries themselves, that is the ordinary people, were largely responsible for the proper development of the jury system and for the recognition of the need for jurors, like any other judges, to be completely independent and not to be at the mercy of the government or whoever happened to be in power at any particular time.

An early and great example of this was in September 1670 when William Penn (who subsequently founded the

judiciary and a fair trial cont...

colony of Pennsylvania in the United States) and William Meade were tried at the Old Bailey for agreeing to hold, and for holding, an unlawful assembly in London.

The court was presided over by the Recorder and the Mayor who were bullies, but Penn and Meade declined to be pushed around. The evidence against them was transparently inadequate and they were not timid about asserting their rights. The jurors were inspired by their example and convinced by them and refused again and again to hold them guilty. The court threatened, but the jury refused to give in. Finally, the jurors showed their courage by announcing a defiant verdict of "not guilty". For this, the court fined them 40 marks per man and imprisonment until paid. The jurors were taken away to gaol.

Several weeks passed with the fines unpaid and the jury locked up in Newgate Prison. In November, one of them, Edward Bushell, made an application to superior judges for an inquiry into the grounds for imprisoning the jury and a finding was made that the fines and the imprisonment of the jury were contrary to law – the jurors were freed immediately.[3]

This really set juries on the right track and guaranteed that they would be independent and would not be punished for making a decision that the authorities of the day, or the community , or we could say in this day and age, the media and talkback radio, did not like. This guaranteed people would have a fair trial and would have their guilt determined on the basis of the evidence and not on the basis of what was politically expedient or what the media and talkback radio wanted to happen.

There is now of course a recognition by judges and lawyers that the jury system is a bulwark of democracy. In the case of *Duncan V Louisiana*,[4] the United States Supreme Court said:

> *Those who wrote our Constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the Constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.*

This has been approved in Australia's High Court where it was said, in addition:

> *Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgment are comprehensible by both the accused and the general public and have the appearance as well as the substance, of being impartial and just.*
>
> *The presence and function of a jury in a criminal trial and the well known tendency of jurors to identify and side with a fellow citizen who is, in their view, being denied a 'fair go' tend to ensure observance of consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance as well as the substance, of impartial justice in criminal cases.*[5]

Habeas corpus

I move on now to habeas corpus. Habeas corpus literally means "bring up the body" (to court). It is used to compel a person who is in custody to be brought before the court. This is so that people do not simply remain in custody at the King's (or in today's language, the government's or the police's) pleasure and they can have their grievance about being in custody aired in public.

Today we have legislation that requires that any person who is arrested must be brought before a justice as soon as reasonably possible, which usually means the next day. It was not always so and, even today, a writ of habeas corpus is available in certain circumstances.

In 1627 Charles I imprisoned five Knights in the Tower of London. They sought their release through the issue of a writ of habeas corpus. The King did not release them but sent the writ back saying that they were being held by special command of His Majesty. The court affirmed the King's absolute prerogative and denied the Knights' petition to get out. Parliament responded by forcing the King to sign the *Petition of Right* of 1628 which referred back to Magna Carta and asserted that no person should be subject to arbitrary arrest or imprisonment. The King then accepted the petition and the Knights were released.

Then, during the English Civil War 20 years later, political prisoners were sent to prisons off the mainland beyond the reach of habeas corpus (this sounds ominously like Guantanamo Bay). In 1667, by which time Charles I had had his head cut off, the first Earl of Clarendon was impeached in part for his role in the illegal imprisonment of these political offenders and in 1679 Parliament passed the *Habeas Corpus Act* foreclosing that potential for abuse in England but maybe not in the

continued page 8...

The independence of the judiciary and a fair trail cont...

USA. In April 1689 William and Mary of Orange were crowned King and Queen after swearing obedience to the laws of parliament and reading the *Bill of Rights* as part of their oaths.

The *Bill of Rights* established strict limits on the Sovereign's legal prerogatives, including a prohibition against arbitrary suspension of parliament's law. It also established the fundamental constitutional principle of parliamentary supremacy and made the executive (in those days the King and Queen and their advisers) fully accountable to parliament and the court – this has often been referred to as the *rule of law*.

In addition, in this *Bill of Rights*, the King, that is the executive, was forbidden from establishing his own courts or acting as judges. That remains the position today, although sometimes you would think that politicians are judges and that judges should do as politicians say. This comes about from a complete failure to understand what our law is, why it is necessary and where it came from.

If we move forward to today and consider the people being held by the United States' government at Guantanamo Bay, we can see how the application of habeas corpus should apply to those people.

These prisoners have no access to the writ of habeas corpus to determine whether their detention is justified. The military will act as interrogators, prosecution, defense counsel, judges and, when the death penalty is imposed, executioners. Every attempt has been made to exclude the United States' courts. The President, that is the United States version of the executive, has already called them all killers.

The United States' Court of Appeal has recently ruled that, despite the fact that the United States has had exclusive control over Guantanamo Bay for 100 years, the courts have no jurisdiction to examine the legality of the detention of prisoners.[6] The Supreme Court of the United States heard an appeal on the question of whether the lower courts were right to conclude that they had no jurisdiction to entertain habeas corpus applications on 20 April 2004; a decision is expected in June or July.[7]

The difficulty is that the further we get away from the historical basis for these rules, the easier it is for citizens to forget why we have the rules and for government to simply go ahead and do as they please without protest.

The onus of proof

Finally, to the onus of proof. It is customary for judges to tell all juries:

> The State makes the allegation and therefore the State must prove it. The standard of proof the State must reach is proof beyond reasonable doubt.

There is good reason for this. Apart from anything else, it is almost impossible to prove a negative. The standard of proof is proof beyond reasonable doubt so that, before you can be convicted of a criminal offence, the judge or jury must be satisfied beyond reasonable doubt of your guilt. This originally comes from the idea that it is better for 10 guilty people to go free than for one innocent person to be convicted and punished. Just in that regard, I note from the media that, where a jury verdict is not a verdict the media think was the correct verdict, the media query the jury system. However, when the verdict is the verdict that the media expect, then the jury system is lauded as having worked "on this occasion".

To end, can I quote from the legal writer, Justin Fleming, who said, and he was referring to Magna Carta, but it can be said of all the principles about which I have spoken tonight:

> *A careful study [of all of these principles] reveals a required standard of fairness which modern citizens would expect to reflect an essential attitude of any government. Societies would tolerate nothing less than these unequivocal strictures. They are principles that arise in the human heart today as if they were natural. But they are not natural. They were hard fought for and they were hard won. They were bled from a King by uncompromised extraction. They were demanded by a human wall of courage which had no comfortable precedent that favoured success. What astonishes the modern thinker is that any official in the world in the [21st century] can actually abuse one of these principles without feeling the sordid weight of historic pain bearing down upon him or her.*[8]

Acknowledgements

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Footnotes

1 Chief Justice Murray Gleeson. *The Rule of Law and the Constitution*. Boyer Lectures, 24 December 2000

2 US State Department. Human Rights Report 2002.

3 *Bushell's* Case 84 Eng. Rep. 1123; 6 State Trials 999 (CP 1670)

4 *Duncan V Louisiana* (1968) 391 US 145, p156

5 *Kingswell V R* (1985) 159 CLR 301.

6 *Khaled AF & Al Odah et al. V United States of America et al.* United States Court of Appeals for the District of Columbia Circuit, (02-5251, 11 March 2003).

7 *Shafiq Rasul et al. V George W Bush et al.* United States of America Supreme Court (03-334, heard 20 April 2004).

8 Justin Felming. *Barbarism to Verdict*, p 42.