‘THE HIGH COURT AND ITS HISTORY’.

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Anniversaries are simply dates on the calendar. In themselves they mean little, merely marking the passage of time. But they are revealing. They expose a great deal of the person or institution whose longevity is being celebrated. They also reveal how much people outside the institution, including the funding body, think the occasion is worth, about public and media perceptions, and about cultural and political priorities.

It was certainly thus with the hundredth anniversary of the Constitution two years ago. Having spent close to ten years anticipating the Centenary of Federation and taking part in or observing many of its events, I have had a running interest in what centenaries reveal about Australia. The conceptual separation of the Constitution from the subject of Federation, for example, in the official approach taken to 2001 was itself significant.[1] When one looked, there were large and revealing differences between the Jubilee of Federation in 1951 and the events of 2001 – important keys to the history of their times. However, we will have to wait a good while before any ‘inner history’ of the Centenary (to borrow, with great respect, the sub-title Alfred Deakin attached to his *Federal Story*) sees the light of day. It is no exaggeration to say that there is no interest whatsoever at present, in an historical analysis of the Centenary of Federation. And this too is a sign of our times.

Whether the High Court Centenary fares better remains to be seen. But it is certain that the way in which the High Court celebrates its own centenary this year will be seen, at least in the future, as historically significant. What the Court understands as history, and how it uses history in its jurisprudence will be tied up with

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[1] Programs and events organised by the National Council for the Centenary of Federation (and its state counterparts) included almost no discussion of the Constitution; the Constitutional Centenary Foundation played this role over a ten year period.

the approach it adopts to itself as a historical object. In fifty or one hundred years from now, others will look back and see in 2003 a significant indicator of the Court's position and status, both official and informal, in Australia.

So, with these thoughts in mind, I turn to the various anniversaries, jubilees, and ceremonial occasions the High Court has already enjoyed, to see what these reveal. Australians are not quite the equals of the English in revelling in anniversaries, but we have a very good historical record of public celebrations for all sorts of chronological milestones. People in the 20th century were well attuned to marking royal jubilees, centenaries of towns and anniversaries of civil and public institutions. Fireworks have long exploded over Sydney Harbour; public processions (often, even in the 19th century, with Chinese dragons), banquets, sports carnivals, and special editions of papers – all very familiar today - have been part of our cultural universe all through our white history. There is every reason to believe that Australians in the 21st century are just as good, if not better, at celebrating public milestones. But which ones? It is safe to say that anniversaries of the Court have so far attracted relatively little public interest. And, it must be added, the Court itself has not sought it.

Still, one might have expected the Court's silver jubilee in 1928 to have attracted some attention, but it went effectively unnoticed. In October, that year, a few days after its anniversary, judgments in several cases were concluded. But no murmur was heard of the date's significance. Nor was it a particularly memorable year for the Court in other respects.

At least the Royal Commission on the Constitution was continuing to hear evidence, and would bring down its report one year later. Among other witnesses, the Commission had invited all of the surviving members of the Federal Conventions to appear. Eleven out of eighty three were still on this earth, and two of them were on the Bench. Justice Isaacs did not appear before the Commission, but Justice Higgins had no reservations about commenting on the inadequacies of the Constitution while serving on the Court. The Royal Commission reported, in 1929, with numerous of recommendations, but as with so many distinguished (not to mention, expensive) inquiries into the Constitution throughout the 20th century, nothing at all came of it.

By 1953, things were not as silent as in 1928, but still the Golden Jubilee of the Court was subdued. A ceremonial dinner was held by the Victorian Bar at Menzies Hotel in Melbourne, with a total of more than 120 members of the Bar, Justices and former Judges present. Tantalisingly, the *Australian Law Journal*

reported that – 'Dinners held by the Victorian Bar are invariably private and so no account of the speeches can be published. Suffice it to say that in a brilliant and witty speech the Chief Justice replied to the toast and his reply was supported with distinction by Sir John Latham.' This, it must be said, is quite characteristic of the pattern of ceremonial occasions, especially in earlier years. The Court has celebrated itself by speaking – brilliantly, but effectively - to itself.

Twenty five years on, and finally there was a little more attention to the passing anniversaries and the public standing of the Court. A ceremonial sitting was held in Melbourne, in October 1978. Chief Justice Barwick, it is recorded, 'delivered an interesting address, largely historical',[2] followed by speeches from the Commonwealth Attorney-General, and various State Attorneys, the Queensland Solicitor-General, President of the Bar Association and President of the Law Council. Barwick's speech recalled events of 1903: the passage of the *Judiciary Act*; and the attendance of, among others, the then recently-appointed Prime Minister Alfred Deakin, at the Court's first sitting.

It is interesting to note that in his regular, albeit anonymous column, in the London *Morning Post*, Deakin had written two months earlier on the long-awaited passage of the *Judiciary Act*:

> The High Court will henceforth be what the American Supreme Court has gradually become – the guardian of the Constitution of which it constitutes the legal conscience … The strain to which the Constitution is being submitted is rapidly increasing. Those responsible for the Commonwealth may now draw a long breath of relief, or at least, such of them may as are able to comprehend the risk that has been run … [in the absence of this] third co-ordinate power required by the Constitution.

'No measure yet launched in the Federal Parliament,' Deakin continued, 'was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.[3]

In the Court's own historical reflections, however, one might scarcely know that controversy and dispute attended its beginnings, and have waited in the wings, making an appearance every now and then throughout its history. Chief Justice

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[2] *Australian Law Journal*, vol. 52, December 1978.

[3] *Federated Australia: Selections from Letters to the Morning Post 1900-1910*, MUP, 1968, pp. 118-119.

Barwick's 1978 speech continued through a survey history of the Court's buildings, increases in the numbers of Justices, the statutory conferral of the title Chief Justice in 1918, and the comings and goings of Members of the Bench.

'Understandably', the *ALJ* wrote, 'there was a certain vein of self-congratulation in the address by Sir Garfield', but, it continued, '[c]ertain of the speakers at the commemorative sitting did not show complete enthusiasm for [his] point … that very shortly … the principal seat of the High Court would be located in Canberra.' The Journal was referring to the South Australian Attorney-General, Peter Duncan, and the Solicitor-General for Queensland, Mr Parslow, who both emphasised the desirability for the small states of a peripatetic Court. In addition, Mr Thomson, President-Elect of the Law Council of Australia expressed his hope that: 'when your Honours' new judicial tabernacle is erected by the waters of Lake Burley Griffin, after 75 years of active life, it w[ill] not become a retirement village. It is important in a federal system', he said, 'that the high priests occasionally leave their tabernacle and visit their remoter tribes … as well as in the great centres of Sydney and Melbourne.'[4]

Commonwealth Attorney-General, Senator Durack, used the occasion, among other things, to repeat the undertaking he had given to the Constitutional Convention in Perth that year that there would be consultation between the Commonwealth and the States on High Court appointments, a statement that earned the warm endorsement of his South Australian counterpart, who in his own speech had, 'ironically' (it was reported) regretted that he was 'unable to refer to the work of any South Australian member of the Court'. Senator Durack's 'hint'[5] was, effectively the one thing the press thought worthy of any comment in its report of the anniversary sitting.

While the Court has been, perhaps, a little cautious about celebrating its evolution as an institution, it has not infrequently enjoyed ceremonial sittings for other milestones. Revolving around the elevations and retirements of individual Justices these sittings have been opportunities for reflection on the Court's history. It may be said, without unfairness, that they reflect the Court's (indeed much of the legal profession's) view of its own history, as more a genealogical record of personalities, than an institution. Reading the speeches on these occasions, there is something reminiscent of the final scene of the film 'Goodbye Mr Chipps', when

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[4] (1978) 52 *ALJ* 660.

[5] *The Age*, 6 October 1978.

generations of boys pass before the old school master's eyes. The High Court's history, in the High Court's eyes, has been a sequence of Justices and Benches. With my legal academic's hat on, I can understand this. But, with my historian's hat, I find it quaint and positively 19th century, almost touching in its imperviousness to shifts in historical methodologies and long-running challenges to the Great Man view of history.

Chief Justice Griffith's retirement in 1919, created an important opportunity for such a sitting: Griffith was too ill to attend, but he sent a message to the Court, which was read out by the Principal Registrar. Regrettably, he was reserved, and one could almost hear the weariness in his word – 'I should like to say a great deal of the past' he said,

> but there is a time for all things, a time to keep silence, and a time to speak; and I do not think this is a time fit for me to make anything like a personal retrospective review of my work in the Court since its inception, of my relations with suitors, or with my fellow members of the Bench, and of that great branch of national service, the profession of the law. I hope, however, that I may venture to claim, with Othello, that, 'I have done the State some service in my time'.

'I hope,' Griffith concluded, 'when no longer bound by the trammels of judicial office, to make an occasional contribution to the solution of the social problems by which we are confronted. Although peace between the recent belligerents has been formally signed, we see the whole world threatened with the crudest and most uninstructed forms of revolution, defying all rule and order, and denying all obligations of duty. But I hope that the majority of people who have for centuries enjoyed the advantages of ordered government, will follow saner counsels. I now say Farewell.' If only Griffith had spoken of the past: he died less than a year later, leaving his memories unrecorded and his contribution to social problems undone.

Edmund Barton, himself only three months from death, also sent a message, which was read to the Court by Justice Isaacs: Barton spoke of Griffith as, 'a watchful guardian of the Constitution, conserving to the Commonwealth and State alike the powers which that instrument of government allots to them for the liberty and welfare of the people.' Others followed. Littleton Groom, Acting Attorney-General also sent a speech, read by Queensland's Attorney-General on his behalf: it spoke of the functions of the Commonwealth and corresponding duties of the High

Court having expanded 'to a wondrous extent' since 1903 and concluded that '[t]he States, the Commonwealth and the Empire are under obligations to [Griffith] for great work done in every office you have held. When the history of Australia is written, no name will be more honoured than that of the first Chief Justice of Australia'.

It must have been an unusual, or at least unfamiliar type of Australian history the Attorney-General had in mind. For this prediction to come true, Australia's political culture and sense of history would have had to experience a remarkable shift. One of the early 20th century general histories of Australia, by Arthur Jose, published in 1909, does mention that in 1903 'Sir S. Griffith of Queensland became the first Federal Chief Justice, and two Ministers joined him, thus making a new Ministry necessary.'[6] But this is about as far as his name, as Chief Justice, gets a mention in general histories, and in some of the later works, it is missing altogether. The Court itself fares little better. The 1998 *Oxford Companion to Australian History*[7] devotes one page column to Griffith, albeit with only two lines on his work as Chief Justice, but only half a page column to the High Court (a little less than the entry on Barry Humphries).

Other comings and goings on the Bench were marked as historical occasions. Most of the special sittings convened on these occasions have been accompanied, it must be said, by speeches for the most part anodyne and unmemorable. Each blurs into the next reading them, blind, one could not be certain whether their occasion was a swearing-in or a death, except for the incoming Justice's reply on the former occasion, and the silence of the Justice on the latter). Appropriately anodyne, perhaps, but regrettable from the historian's perspective. Later speeches, however, have been both longer, and a more marked with ideas and perspectives. The deaths of Justice Lionel Murphy in 1986, and former Chief Justice Barwick in 1997 drew forth speeches from the then Chief Justices, in which controversies were mentioned, but with a tact and gentleness, such that fears that the Court might suffer from open acknowledgment of its human and institutional frailties, were not disturbed.

Certain other occasions – not formal or ceremonial, but chronologically significant - have given rise to historical reflections on the Court by individual members. In 1918, a singular occasion was noted by the Court. It deserves mention because it drew forth an unusual and memorable speech from the Chief Justice.

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[6] *History of Australia*, 3rd edn, Angus & Roberston, 1909, p. 248.

Sitting on 13 November 1918, two days after the Armistice, Griffith CJ said: 'I cannot let this day pass without a few words. We meet on an occasion without precedent in the recorded annals of the world'. We may look forward, he continued,

> with confidence and hope. But only a small part of the work is done. The task before the nation involves the recasting of conditions and the revision of doctrines that have long been regarded by multitudes as axiomatic and fundamental. …[T]he matter most urgently calling for treatment … is the question of the mutual relations of the people of a State to one another. The old deeply rooted idea of division into classes, who are natural enemies, and whose destiny and duty are to prey upon each other, must give place to the sense of equality for the paramount duty of every man to bear his part of the load of his neighbours' burdens as well as of his own. I know that a radical change of mental attitude, not in part only of the community, is essential to a wise performance of this task – but I do not despair of the result.

In a speech to the Monash University Law School Foundation in late 1999, - 'Law at Century's End' - Justice Kirby reflected upon the portraits of Griffith, Barton and O'Connor in no. 1 Courtroom of the High Court, and asked what their Honours would say of the Court if they were to come back today. One wonders whether much else, but the last line of Griffith's speech would be any different.

Justice Kirby's talk surveyed the cases from the first volume of the *CLR*, noting differences in subject matter but similarities in techniques between then and now. He compared this to changes in the medical profession, and questioned whether similar changes might also be desirable in the Courts. One of the big changes he highlighted was the ending of appeals to the Privy Council. It is worth remembering that this ending was in fact anticipated as early as 1891, in the draft of the Constitution at the first Federal Convention that year, the work of Samuel Griffith himself. The 1898 draft of the Constitution retained this commitment to a High Court beyond which only the smallest number of appeals might go. The provision was included in the Constitution Bill, passed by the Australian electors in the successful referendums of 1899 and1900, only to be modified at the British colonial authorities' insistence when the Bill was brought to London for passage through the Parliament in 1900. Even then, the Constitution retained the parliament's power to 'make laws

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[7] Oxford University Press, Australia, eds. Graeme Davison, John Hirst and Stuart Macintyre.

limiting the matters' in which leave to appeal to Her Majesty in Council might be granted. Bearing Griffith's 1891 draft in mind, it is more likely that the original Justices would be surprised at how long it took for this power to be employed.

How should a Court celebrate its centenary? To what degree should this be a public, or merely a professional, event? How much should its place in the whole constitutional scheme be acknowledged (as 'Keystone of the Federal Arch'), or alternatively, its independence and detachment be stressed? How much light should we let in on the magic?

As much, I believe, as we can bear. The authority of public institutions and offices in a democracy can no longer reside in their mystique and charisma. Our type of society rests upon rational authority, as the great social theorist Max Weber noted one hundred years ago, not traditional or charismatic authority. Light must be let in. It need not be artificial light, which focuses on personal lives or seeks out presumed biases or political agendas in individual judgment. The public must see the machinery of justice. They will see this all the better if the Court itself sets aside a genealogical approach to its history, and begins to see itself as an institution of democracy, as a complex web of relationships, not a single line of persons or authorities.

Giving the Leo Cussen Lecture in Melbourne in October 2001, Justice Hayne also reflected on the past. His 'Lessons in the Rear View Mirror', as he called his speech, surveyed changes in the law, in the profession and in public expectations over the previous one hundred years. His Honour concluded that 'Unless we know not only *what* we do but *why* we do it, we will learn nothing from what has passed.' This is a wide-ranging, demanding inquiry. But it is the proper historical question.