CATHOLIC COMMISSION FOR
JUSTICE,
DEVELOPMENT
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"THE AUSTRALIAN JUDICIARY – SUSTAINING INDEPENDENCE"

> *"What ultimately protects the independence of the judiciary is a community consensus that the independence is a quality worth protecting"*
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> Sir Ninian Stephen, *"Judicial Independence – A Fragile Bastion."*

Introduction

Catholic social teachings consider that justice is an indispensable pre-condition of peace for all. The role of institutions such as the courts is integral in applying the law in a manner which befits a just society and which acts as the protector of human dignity. The law sets and applies standards developed and refined over many centuries in order to ensure that as individuals and as society we are offered protections and remedies in a manner which is consistent and predictable. Whilst the Commission is not saying that court decisions are above criticism, nor that they should be excluded from public debate, the Commission does believe that any criticism should be on an **informed basis**.

Members of the public look to our political leaders for sound, informed knowledge and direction. It is therefore vital that politicians speak out responsibly, constructively and advisedly. Unfortunately, in recent times, comments attributed to for example the Premier of Queensland, Mr Borbidge and the Deputy Prime Minister, Mr Tim Fisher and others have fallen short of this standard.They have failed to acknowledge the role of the courts, and have endeavoured to condemn the courts for failing to perform political ends. On 17th July,1997 Mr Tim Fisher was reported as saying he wanted a “capital-C conservative” to fill any vacancies on the High Court of Australia. Surely the criteria for selection for a judge on the highest court in the land should be based on their level of skill, abilities and legal expertise and not their perceived political allegiance or learnings.

Furthermore, the traditional role of Attorney-General in defending the role of the court has fallen into disuse leading to misunderstanding in the community about the function of courts in society. Until recently, the merger of the political office of Minister for Justice

and the Office of Attorney General increased tension between the dictates of politics and protection of the rule of law. Now that these roles have been seperated again the Attorney General has scope to ensure the courts are not subject to ill-informed criticism. Without this there is an increased risk that there will be a reduction in confidence in our justice system. This can lead to the limited incentive for people to abide by laws which they feel will not be applied fairly and impartially by the courts. Mr Williams, the Federal Attorney General was reported on 17th July 1997 as stating "I adhere to the view that it's not the role of the Attorney General to defend the court...." He has reiterated this view on many occasions. Both the former Chief Justice of the High Court, Sir Anthony Mason in July 1997[1] and the current Chief Justice Brennan on Friday 20 September 1997[2] has lamented the weakening of the Attorney General's position.

Reticence over defending the role of the court by Attorney's General, explains recent public comments by judges endeavouring to explain that role. These same judges were once loath to speak publicly (other than in court judgements). On the rare occasions where such comment has been made by judges, they have been criticised for speaking publicly by some politicians. Concern exists amongst many sections of the legal profession that by entering the media fray on a regular basis, the judiciary will be perceived as an interest group rather than independent and impartial. This is one reason why the Attorney General's traditional role is important. Amidst this public confusion this paper endeavours to restate the role of the court.

The Role of the Court

The court's role is to apply legislation that is passed by the Parliament, having particular regard to the facts and circumstances of the individual case before the court. Courts also have regard to the body of common law that is called precedent and are bound by many of the decisions of an equivalent or superior court unless the particular circumstances of a case can be distinguished from the preceding case law. Where there is no guiding legislation or precedent the jurisprudence of other jurisdictions can lend assistance. The court is required to apply the law in an impartial manner, unhindered by political influence or pressure, and never on an ad hoc basis. The court's role is also to find a balance between the competing interests of the individual and the State representing the community at large. All of these roles are complex.

The Constitution

The Constitution at its inception was largely seen as a document designed to regulate the conduct and relations between the main spheres of government (Commonwealth and State) within the construct of a Federal system of government[3]. It was not conceived as a document purporting to regulate relationships between citizens and citizens and their

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[1] Reported in *The Australian*, 30 January 1998

[2] *The Age,* 20 September, 1997

[3] Fiona Wheeler, "Original Intent and the Doctrine of Separation of Powers in Australia." (1996) Vol 7 *Federal Law Review* p 96-109

State. Accordingly, the High Court which acts as the guardian of the Constitution,[4] has limited scope to protect citizens save under the common law, the Constitution and through the interpretation of statute.

Subject to the limitations contained within the Constitution, the Parliament in the Australian political system is sovereign to all other arms of government.[5] If the Parliament seeks to pass laws which undermine the rights of a person, there are parameters which control the extent to which the judiciary can interfere to uphold the individual rights of citizens.

If the Executive arm of government causes enactment of policies which threaten notions of a fair trial or substantially reduce protections at common law, then the notions of the separation of powers limits the capacity of the courts to intervene, save as the Constitution, legislation and the common law may permit.

The Constitution and the Separation of Powers

The Constitution does not expressly state that there will be a separation of powers between the Judiciary, the Legislature and the Executive but is to be implied. In 1957, the Privy Council held that a doctrine of the separation of powers existed through an examination of the manner in which the provisions were organised in the Constitution into discrete Chapters[6]. For example, the Parliament in Chapter I, and the Judicature in Chapter III.[7]

The Privy Council held that the source of authority for the Parliament in conferring judicial power is contained in Chapter III of the Constitution, subject to the qualifications in section 51, which vest the powers of the Parliament. It stated that the Parliament in seeking to vest a federal power which was essentially judicial in a body other than a court set up under Chapter III was "repugnant" and "contrary" to the notion of the separation of powers which was contained in the Constitution.

The contents of Chapter III of the Constitution, among other things, outline, the principles which underline notions of judicial independence, ranging from the manner of

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[4] *Queen v Kirby and Others; Ex Parte Boilermakers' Society of Australia* (1955-1956) 94 CLR 254

[5] In *Polyukhovic v The Commonwealth* (1991) 172 CLR. 501 at 533 Mason CJ quotes from *Reg v Humby; Ex parte Rooney* (1973) 129 C.L.R.231 at 250 "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."

[6] *Queen v Kirby and Others; Ex Parte Boilermakers' Society of Australia* (1955-1956) 94 CLR 254

[7] Fiona Wheeler in her article entitled, "Original Intent and the Doctrine of Separation of Powers in Australia" June 1996, Vol 7 *Public Law Review* 96-109 at the time when there was significant discussion of the level of implied rights in the Constitution, undertook an examination of the intent of the framers and the convention debates in the lead up to the passage of the Constitution. She argues that too much ,may have been made of the reason for the structure of the Constitution being around a doctrine of separation of powers as the issue was not specifically the topic of much discussion at the time of Federation. She states that it cannot be assumed that the language of section 1, 61 and 71 bespeaks such a doctrine.

appointment of federal judges, their retirement age, and dismissal only by the Parliament, rather than at the whim of a political party of the time.[8]

Usurping the role of the court involves an attempt to take over the judicial function or a part of that function which is critical to the exercise of judicial power. Interference in the court's role involves some attempt to change the direction or outcome of pending judicial proceedings.[9]

In Australia, an incursion into the role of the judiciary was held to have occurred in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR[10]. In this case most of the sections of the *Migration Act* 1958 which were challenged were upheld under section 51(xix) of the Constitution which gave the Commonwealth powers in relation to "naturalization and aliens." Brennan, Deane and Dawson JJ reiterated the doctrine of separation of powers in the *Boilermakers' Case* by stating:

> The Constitution is structured upon, and incorporates the doctrine of the separation of judicial from executive and legislative powers.[11]

Section 54R of the *Migration Act* 1958 was held to be unconstitutional. As the adjudgment and punishment of criminal guilt under the law of the Commonwealth was part of the judicial power, the section was an attempt by the legislature to intrude upon the separation of powers doctrine. Section 54R - which endeavoured to exclude the court from ordering the release from custody of a "designated person" even if unlawful -

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[8] Ustinia Dolgopol in an article entitled, "Threats to the Independence of the Legal Profession and the Judiciary: What Can You do About Them." *South Australian Law Society Bulletin*, September 1988, 231, at 232. Notes the concerns over the political nature of the treatment of the former judge of the High Court Lionel Murphy. She observes that the procedures utilised by the Parliamentary Commission of Enquiry established pursuant to section 72 of the Constitution to look into the conduct of Murphy failed to supply the judge with either a statement of the charges or a list of specific allegations at the initial stages of the inquiry. She adds that the lack of specific allegations would seem to run counter to the *United Nations Basic Principles on the Independence of the Judiciary* which were adopted by the United Nations General Assembly in December 1985.

[9] In *Liyanage v The Queen* [1967] 1 AC 259 a case involving the country Ceylon (now Sri Lanka) the Privy Council, whilst acknowledging the Constitution of Ceylon had no specific provisions vesting judicial power, found in the Ceylon Constitution sufficient indications to reveal separation of powers was intended. In the case, the legislature had endeavoured to pass legislation redefining certain offences and penalties, changing the rules of evidence and validating retrospectively the illegal arrest without warrants and detention of the accused persons. The Privy Council held that the legislation was invalid. The ratio decidendi of the majority was contained within Lord Pearce's judgement in the following terms "These alterations constituted a grave and deliberate incursion into the judicial sphere…They (the judges) were compelled to sentence each offender on conviction to not less than ten years imprisonment….even though his part in the conspiracy might have been trivial…If such Acts as these were valid the judicial power would be wholly absorbed by the legislature and taken out of the hands of judges quoted in *Australian Constitutional Law and Theory, Commentary and Materials*, Tony Blackshield, George Williams and Brian Fitzgerald, The Federation Press, 1996, Sydney p 901

[10] p.1

[11] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 26

departed from Chapter III of the Constitution, even though it was argued there was a head of power under section 51 (xix) of the Constitution.

The judges stated;

> It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Chapter III itself, entrusts to Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts which it designates.[12]

The case demonstrates the connection between the notion of the separation of powers and the right of a court to exercise judicial power to accord due process in clear terms. That is, that the High Court will not tolerate the legislature seeking to take away from the court a clearly judicial domain, in this case the right to review whether the detention of an alien was unlawful.

In an article entitled "Relations Between the Judicial and Executive Branches of Government"[13] Terry Connolly notes how there are many new indirect intrusions into the judicial domain by the executive. He refers to the statement by Brennan J: "We accept judicial independence based on the doctrine of separation of powers – as an underlying assumption upon which Australian constitutional settlement has been established."[14]

Having outlined the acceptance of a doctrine of separation of powers and indicated that judicial independence is considered as having a role in securing the separation, it is interesting to note that in reality there is constant tension between the notion as a principle and its effectiveness in practice[15].

Links Between the Separation of Powers and Judicial Independence

Over the years, different approaches to constitutional interpretation have seen an ebb and flow in the constructions placed on the Constitution. Comments by Gaudron J and Brennan CJ demonstrate a view that judicial process, independence, impartiality and a separation of powers are integral ingredients in order to ensure confidence and respect in the law by citizens.

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[12] Dawson, Brennan and Deane JJ p 37

[13] (1997) 6 *Journal of Judicial Administration* p 215

[14] *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits Tax Case* (1987) 163 CLR 329 at 362 per Brennan J

[15] The former Governor Sir R.E McGarvie (in his paper, "The Ways Available to the Judicial Arm to Preserve Judicial Independence" 32 at 33) in the writer's view adopts an interpretation of the relevance of judicial independence which is too narrow. He sees judicial independence as something which if absent would place at risk the impartiality of a court. Independence in the writer's view is also a critical factor in the actual exercise of judicial power.

Gaudron J in *Kable v Director of Public Prosecutions (NSW)*[16] discusses judicial process as having a critical connection to the notion of courts acting consistently and their proceedings being conducted according to rules of general application.

Likewise, the former Chief Justice Brennan has indicated that there are dangers when the public sees the courts as "instruments in the political game," as this will undermine public confidence in an impartial court which follows the rule of law. In his retirement speech on 21 May 1998, the former Chief Justice stated that mutual respect between the political and judicial branches was important for the separation of powers.[17] It is fair to state that where public confidence in the courts and their integrity is undermined, a lack of respect for laws under which our system is predicated may follow.

<u>Administration and Financial Resources</u>

The manner in which constraints on the financial and administrative resources of the court can impede judicial independence was discussed in Occasional Papers 2 & 4 of the CCJD&P.[18] In summary, both administrative and financial constraints can have a bearing on the capacity of the courts to determine matters in a judicial manner and to ensure that all evidence is presented to the court so that an appropriate determination can be made and to enable the delivery of impartial justice. This was reiterated in the Fitzgerald Report (The Report of the Commission of Inquiry) where it stated,

> The independence of the judiciary is of paramount importance and not to be compromised. One of the threats to judicial independence is an over-dependence upon administrative and financial resources from a government department or being subject to administrative regulation in matters associated with the performance of the judicial role. [19]

In *The Age* on 26 October, 1998 the Chief Justice of the Family Court indicated that the functions of the Family Court were being frustrated by legal aid cuts. His views were reiterated by the Law Council of Australia which claimed that Executive inaction and refusal to appoint extra judges to clear case backlog had pushed the Family Court to "meltdown".

<u>Approaches to Judicial Interpretation of Legislation and the Common Law</u>

Different judicial decisions reveal differing approaches to constitutional interpretation. This can often lead to diverging conclusions as to the state of the law from different judges. Some judges approach constitutional interpretation presuming that certain

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[16] (1996) 138 ALR 577 at 615

[17] Extract from the speech of the former Chief Justice Gerard Brennan reported in *The Australian,* 22 May 1998.

[18] Occasional Paper 2 – April 1998 "Justice a Commodity or Something More Fundamental?", Occasional Paper 4 – September 1998, "Real Justice or Just Justice? The Retreat from Fundamental Legal Protections."

[19] Government Printer, Brisbane 1989, p134

theories underlie our legal system which provide fundamental tools to assist in the interpretation of the Constitution and other statutory instruments. Others insist on a purely textual approach to interpretation, which involves an analysis of the ordinary and plain meaning of the words, and structure of the actual statute.

Brennan J (as he then was) has demonstrated how complex judicial interpretation can be, the tensions which result from the application of the law and the need to resist the temptation of working in a vacuum from the body of law. He states:

> The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a particular campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived. The responsibility for keeping the common law consonant with contemporary values does not mean the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values. Although the courts have a broad charter, there are limits imposed by the constitutional distribution of powers among the three branches of government and there are limits imposed by the authority of precedent…Most significantly, there are limits inherent in the very technique by which the courts develop the common law…Changes in the common law are not made whenever a judge thinks a change desirable…In ultimate courts of appeal, the chief constraints are found in the traditional methods of judicial reasoning which ensure the judicial developments remain consonant not only with contemporary values but also with what I described in *Mabo v Queensland* (No.2) (1992) 175 CLR at 29, as "the skeleton of principle which gives the body of our law its shape and internal consistency. The law must be kept in logical order and form, for an aspect of justice is consistency in decisions…[20]

An *Age* editorial on 23 May 1998[21] demonstrates how murky the waters of judicial interpretation can become when such differences of approach take on a political dimension.

<u>Recent Judicial Criticism</u>

The CCJD&P is of the view that all public institutions should be subjected to scrutiny in the public interest and the courts are not exempted from this. Concern is often expressed about the largely male, Anglo Saxon make-up of the court. Debate often surrounds issues of sentencing, and community demands that judges act with propriety, sensitivity, and consistency in accordance with the rule of law and with dignity. The judiciary is not

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[20] *Dietrich v The Queen* (1992) 177 CLR 291 at 319-20.
[21] Editorial *The Age* 23 May 1998, News Extra p 9

excluded from the processes of normal democratic discussion about their role, their make-up, or decisions of their courts. The CCJD&P however believes that any critique of the role of the judiciary should be undertaken in the context of informed discussion.

Unfortunately, the law which has been built up over centuries is complicated with special words and expressions having attached to them complex legal meaning. Therefore, very precise or detailed technical text is contained in decisions handed down by the courts. Often the media report the verdict or sentence without explaining fully the reasons for the decision which are considered too verbose or technical for media attention and they also often omit coverage of the rules which govern the administration of the law. This is why, in the context of the quick "media grab", so much of the legal process remains a mystery and why there is misunderstanding. The valid arguments for simplifying the law so that members of the community can understand it sometimes overlooks the fact that precision is needed to guide the judiciary in future cases where the precedent case will be used again and to avert the grounds for appeal which may arise from the use of sloppy language. Undoubtedly, this tension between using language that communicates clearly and the necesssity for technical exposition needs to be constantly balanced and borne in mind by members of the judiciary when they write their decisions.

The CCJD&P is not concerned by criticism of the judiciary which stems from valid community discussion. However, the CCJD&P is concerned about criticisms levelled at the judiciary that emerge from a lack of information, misinformation or for party political point scoring which blurr the separation of powers and seek to undermine judicial independence. During the debate surrounding the High Court decisions in the Wik[22] and Hindmarsh Island[23] cases public statements were made about the findings of the court which bore no relation to the actual findings of the court and caused community outrage. This is one illustration as to why the loss of the role of an Attorney General in explaining and defending the operations of the court is to be lamented.

The late 1990s have seen an unprecedented number of attacks on the High Court by the Executive and other sectors as being "an activist" court. Comments by politicians in recent times which state that the High Court ought to stick to applying the law, not interpreting it or extending it, demonstrate a fundamental misunderstanding of the nature of judicial power. In addition, comments by various politicians imply that approaches to judicial deliberations should be political and then these same politicians state that the judges are *too* political.[24] Any such approach would compromise the separation of powers and ultimately due process by tainting the rule of law with a consideration of external transient political and economic considerations unrelated to the specific concerns of the litigants before the court.

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[22] *Wik Peoples v Qld No B8 of 1996; Thayorre People v Qld No B9 of 1996* (1996) 141 ALR

[23] *Kartinyeri & Anor v The Commonwealth of Australia* (1998) 152 ALR 540

[24] See *The Australian* 6 January 1998 comments attributed to Kirby J stating "the current level of political and personal attacks of the judiciary is unacceptable." Comments of Queensland Premier Borbidge, *The Age* 1 January 1998, Comments of Deputy Prime Minister, Mr Tim Fisher, *The Australian* 19 December 1997, *The Age* 17 July 1997

Parliaments make the laws, but often when they are applied to disputes between litigants the laws are unclear and perhaps found to be unconstitutional. In addition, where there is such a lack of clarity the courts must resort to traditional approaches to judicial interpretation, the application of the common law and if necessary seek assistance of international conventions to clarify ambiguities.[25] In an *Age* editorial it was noted that "it is idle to try to distinguish between the law as it is written and the law as the court applies it, for judges can only determine what the law is by interpreting it."[26]

Professor Brian Galligan notes that "in constitutional cases, law and politics are deeply intertwined and thickly interrelated."[27] He states, "Constitutional adjudication does not just have complex social and political issues surrounding the central legal and constitutional questions; they are inherently part and parcel of it. That is because the Constitution is fundamentally both a legal and political instrument."

An analysis of recently published articles reveals an increase in the amount of public criticism from politicians about the manner in which the judiciary performs its function and the way it approaches judicial interpretation. In the past, policies of government which were struck down by the High Court (in cases such as the Communist Party case[28] and nationalisation of banks case[29]) did not lead to the same level of attacks by the Executive as the recent decisions in the *Mabo*[30] and *Wik* cases.[31] Also after the decision in *Dietrich's* case, calls came from the Attorney General that members of the judiciary should consider economic implications of their decisions before embarking on a decision.[32] And the court was criticised as being unconcerned with the realities of government.[33]

An increase in claims of "judicial activism" has emerged in the past decade. It is the writer's view that, although politicians may seek to argue that the doctrine of separation is being put at risk due to the court trespassing into the political arena,[34] such views are not sustainable. The High Court must interpret the Constitution, a document which sets up the parameters of political power, and deliberate between litigants as they come before the court. In most cases, the litigants themselves will be the State, Federal, or Territory

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[25] *Koowarta v Bjelke-Peterson and others*, (1982) 153 CLR 168
[26] Editorial *The Age* 23 May 1998, News Extra p 9
[27] Paper delivered by Professor Brian Galligan to the Institute of Public Administration on 11 November 1997 entitled, "Do We Want Activist Courts?" p 9
[28] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1
[29] (1949) 79 CLR 497
[30] *Mabo v Queensland* (No. 2) (1992) 175 CLR 1
[31] *Wik Peoples v Queensland* NoB8 of 1996; *Thayorre People v Queensland* (No.2) (1992) 141 ALR
[32] Speech of the Attorney General, Mr Daryl Williams delivered at the Law Institute of Victoria May 1996
[33] *The Age* 18 February 1997 p.A13
[34] Comments of the Prime Minister, Mr Howard recorded in the ABC documentary "Highest Court" Australian Film Finance Corporation, May 1998. In addition see comments by the Attorney General , Mr Daryl Williams where he is reported as stating the Family Court had exceeded its proper judicial function and was engaging in law-making. The Age, 18 February 1997 page A13

governments arguing over issues which are largely political. Such determinations by the court, according to the law, are of their very nature political. [35]

Kirby J on 6 January 1998, in a speech entitled. "Attacks on Judges – A Universal Phenomenon" stated that he was concerned by recent trends. He cited these as the personal targetting of identified judges, the attempt to deflect them from their fidelity to their oath of office in deciding each case strictly according to its merits, and an "unrelenting character and partisan political aspect" which were used to condemn decisions of the judiciary by the executive. He noted the attackers also showed a fundamental lack of understanding of what judges do. [36] By contrast more than a decade earlier in 1985, Kirby J had stated, "Cases of overt pressure by the Executive government upon the judiciary are rare in Australia. No present instance springs to mind."[37]

The Strategic Management Review of the Parliament of Victoria, published in 1991, states:

> A system of government in which the executive branch is not subject to the requirement to operate within the rule of law (legislated by an independent parliament and interpreted by an independent judiciary) would not be a parliamentary democracy at all, but at best a form of executive government disciplined by elections if those were held.[38]

Politicians may see such an approach as "problematic" and "uncertain", but for courts to be effective, consistent and to guarantee public confidence they must be armed with the capacity to be flexible enough to deliver justice and ensure that there is no miscarriage of justice in the cases before them, including cases which are often distinct and various in their circumstances and situations. One of the critical elements of judicial power is the capacity of the courts, governed by the rule of law and Constitutional constraints. The courts are required to deliberate in a manner that can interpret a body of legislation formulated by draftsmen in the Office of the Attorney General or Treasury and the common law in the context of real disputes between litigants in a manner which serves the citizenry fairly and justly.

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[35] Some extra-curial statements by some members of the High Court have caused some outcry amongst political leader and academics.[35] Toohey J in a public speech in Darwin stated that the High Court might imply a Bill of Rights into the Constitution. Sir Ninian Stephen in his Southey Memorial Lecture in 1981 "Judicial Independence – A Fragile Bastion"[35] discussed the interpretation by judges of "broadly expressed guarantees of human rights." Both speeches caused some concern in political circles. Much of the debate about implied rights in the Constitution has been put to rest by the decisions in *Kruger's* case and the decisions in *Levy v the State of Victoria* (1997) 189 CLR 578 and *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

[36] See *The Australian*, 6 January 1998

[37] *Judicial Independence: The Contemporary Debate* Edited by Shimon Shetreet and Jules Deschenes, 1985, Martinus Nijhoff Publishers, Dordrecht/Boston/ Lancaster, Netherlands, 1985, Chapter 2 "Country Studies: Australia" Michael Kirby 8 at 12

[38] Foley & Russell, Government Printer, Melbourne, 1991

Earlier this year in an article entitled, "Judging the Judges" by Andrew Murray and Felicity Maher[39] a model for sustaining the independence of the judiciary and their manner of appointment was presented. Many of the suggestions in this article warrant further public consideration especially in view of the current debate surrounding the possibilities of a new Constitution in 2001.

A More Public Role for the Judiciary?

As recently as 1997, the courts have come under media scrutiny because of the Attorney General's reticence in defending its role. The courts have increasingly entered into the public arena to explain their position. This may help the public in understanding the role of the courts.

Sir Ninian Stephen states that what ultimately protects the independence of the judiciary is community consensus that its independence is worth protecting. However, the former Mr Justice Marks (of the Victorian Supreme Court) has said that when the independence of the court is threatened, the silence of the community can sometimes be deafening.[40]

There is therefore an urgent need emerging in the late 1990s to inform and educate the Australian community. Sir Francis Burt at the opening of the 1987 Australian Legal Convention stated that education was critical to ensure the community understood the importance of the rule of law.[41] Sir Ninian Stephen stated, "What ultimately protects the independence of the judiciary is a community consensus that the independence is a quality worth protecting…Without that community consensus operating as a restraint, the temptation for governments to erode the judiciary's independence is likely over time to prove fatal to it."

In recent times, the often ill-informed and ill- conceived criticism of decisions of the court in the public arena excluding as they do any attempt to consider the reasons for the decisions and the binding nature and importance of the rule of law, seriously limit the capacity for such community consensus that the independence of the judiciary is worth protecting. Sir Ninian Stephen notes the judiciary, in times where standards of efficiency were gaining paramouncy, would find it increasingly difficult to sustain unquestionable integrity when other inferences could be so easily drawn. [42]

The writer views the role of the courts in explaining their role as important but is concerned that when the court or members of the court comment on issues such as limited resources which may inhibit the proper administration of justice, they may be perceived as "yet another" interest group rather than as public officials who are the key plank in ensuring the delivery of an impartial justice system.

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[39] *Alternative Law Journal*, Vol 23 No4 August 1998.
[40] Ken Marks "Judicial Independence" (1994) 68 *Australian Law Journal* 173.
[41] "The Moving Finger or the Irremovable Digit?" (1987) 61 ALJR at 469-70
[42] Sir Ninian Stephens, "Judicial Independence – A Fragile Bastion" (1982)13 MULR 334 at 339

In recent months, the publication in newspapers of reasons for decisions[43] and a frank documentary on the High Court[44] have possibly raised public awareness. When these are pitted against the unrelenting condemnation by politicians who find court decisions obstructionist in the implementation of their programmes, the judiciary will find itself insufficiently armed to defend and explain its role. So long as politicians and members of the public focus upon the decision, rather than the process and reasons for the decision, misunderstandings will continue.

Conclusion

Some circles would appear to advocate a court which does not in fact administer and apply the law, but moves with whatever the prevailing political ideology of the time may be. Other circles would rather a court which adheres to a view based on perception rather than information, developed liberal democratic principles and reality. If the courts were to adopt the “ideology” or “perception” course, chaos, inequity, injustice and a lack of consistency in the application of the law would reign supreme.

The courts exist to interpret and apply the law. They are not there to implement Executive policies of the day, unless Parliament as a whole agrees to enact this policy into legislation. Even then the Parliament would be constrained by the terms of the Constitution. The courts must execute their role in accordance with their legal expertise and knowledge of the law and in a way which safeguards citizens from an abuse of power.

The recent blaming of the courts for failing to abide by political or economic dictates completely ignores the Constitutional requirements placed on the courts at State and Federal level. It suggests a dangerous precedent where the community would be left without the protection, standards and certainty of the law and subject to the prevailing mood of the time. A prevailing mood which may disregard the interests of certain members of the community, and downgrade the primacy of human dignity.

This paper was written for the Melbourne Catholic Commission for Justice Development and Peace by Liz Curran its the Executive Officer. Much of the material used is extracted from research undertaken as part of a Masters in Law at the University of Melbourne.

* Friends of social justice are welcome to distribute this paper

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[43] The decision of the Federal Court in the *Patrick's* case surrounding the retrenchment of members of the MUA was published in *The Age* in April 1998

[44] "The Highest Court"ABC TV, Australian Film Finance Corporation, May 1998