

1475

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

WINTER LEADERSHIP MEETING

MAUI, HAWAII 5 JANUARY 1998

ATTACKS ON JUDGES - A UNIVERSAL PHENOMENON

The Hon Justice Michael Kirby AC CMG

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

WINTER LEADERSHIP MEETING

MAUI, HAWAII 5 JANUARY 1998

ATTACKS ON JUDGES - A UNIVERSAL PHENOMENON

The Hon Justice Michael Kirby AC CMG^{*}

A UNIVERSAL PHENOMENON

Introduction

In the last decade, in many countries of the common law, the general deference formerly paid to judges, has been eroded. Attacks on judges have now become commonplace. Many are now made by politicians who see mileage in that course. But beyond politicians, the attacks have been made by the media, public commentators, academics and members of the legal

^{*} Justice of the High Court of Australia. President of the International Commission of Jurists. Formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

profession, the last omitting to dress up their words in the respect for the judicial office which were formerly obtained.

In the United States the most serious feature of the phenomenon has been the intensely political character of much of the criticism. The retiring President of the American Bar Association, Mr N Lee Cooper observed, on the eve of leaving office, that it was his view that the biggest challenge to the legal profession and justice system of the United States "is the continuing attack upon our federal judiciary"¹. As I shall illustrate, he could have widened that focus to the attacks upon the State judiciary as well. At least the federal judiciary enjoys constitutional protections provided by the wisdom of the Founders of the United States Constitution who, even two hundred years ago, saw the dangers². Many State judges in the United States are specially vulnerable to removal from office. Some have suffered that fate for performing no more than their judicial duty.

1 "On Independence, Once and For All", *ABA Journal*, August 1997 at 8. See also American Bar Association, Report of the Commission on Separation of Powers and Judicial Independency, *An Independent Judiciary*, 1997.

2 *The Federalist*, No 78. See G P Joseph, "Judicial Imperfection and Judicial Independence", 23 *Litigation* No 4, 1 (1997); cf Lord Steyn, "The Weakest and Least Dangerous Department of Government" [1997] *Public Law* at 84.

United Kingdom

In the United Kingdom, from whose judiciary common law countries ultimately derive their model, the deference paid to Her Majesty's judges has lately begun to decline. The man who is now the Lord Chancellor called attention, in a speech in the House of Lords in June 1996, to "unprecedented antagonism" occasioned by what he described as "a major clash over the distinct roles of parliament, ministers and the judges"³. He condemned "judicial invasion of the legislature's turf"⁴. He called the judges of the United Kingdom back to A V Dicey's submission to the absolute supremacy of parliament.

The media of Britain fell upon the differences which emerged between the last government and the senior judiciary, taking "delight in both highlighting - and, one suspects, fuelling - the split between judiciary and government"⁵. The Beaverbrook press claimed that there was a "sickness sweeping through the

3 Lord Irvine of Lairg, House of Lords, *Hansard*, 5 June 1996 at 1254.

4 *Ibid*, at 1255.

5 R Stevens, "Judges, Politics, Politicians and the Confusing Role of the Judiciary" in K Hawkins (ed) *The Human Face of Law*, Clarendon, 1997 245 at 264.

senior judiciary - galloping arrogance"⁶. With just a little *hubris*, the editorialist declared that "[w]hile European Human Rights judges, some from countries which once sent political prisoners to Siberia, are venting their spleen on Britain, legal weevils here at home are practising their own brand of mischief"⁷. The Rothermere press joined in with comments that seem astonishing to lawyers from the United States and Australia, brought up in the tradition of constitutional review⁸:

"Now it seems that any judge can take it on himself to overrule a Minister, even though Parliament might approve of the Minister's action. This is to arrogate power to themselves in a manner that makes a mockery of Parliament. ... The judges are giving the impression that they are acting on a political agenda of their own."

The Times, once the bastion of the Establishment in Britain, under new management, demanded that a new Chief Justice be appointed who could "steer his profession away from the sound of gunfire"⁹.

The more courageous and articulate members of the

6 *Daily Express* 4 November 1995, cited Stevens, *loc cit*.

7 *Sunday Express*, 1 October 1995.

8 *Daily Mail*, 2 November 1995.

9 *The Times* (London), 4 May 1996.

English judiciary, such as Sir Stephen Sedley, answer back. They remind those who have forgotten about the peril of supine judges. They call in aid Sir Edward Coke's assertion of the sovereignty of the courts in the face of the Crown's prerogatives¹⁰. They caution against mob rule. Increasingly, they draw on United States experience in the refurbishment of the constitutional institutions of Britain¹¹. Sometimes their leaders rise in the House of Lords to defend the judiciary from attack and to espouse its causes¹². Because of our notion of the separation of powers, that facility is unavailable to judges in the United States and Australia. The forums available to us are rather more limited.

New Zealand

In New Zealand, in recent times, the old deference has also taken something of a battering. Judges have been castigated ferociously for bail decisions which went wrong. They have

10 Sir Stephen Sedley, "Human Rights: A 21st Century Agenda" in R Blackburn and J J Busuttil, *Human Rights for the 21st Century*, Pinter, London 1996 at 1. cf Lord Ackner, "The Erosion of Judicial Independence" [1996] *New LJ* 1289.

11 Lord Steyn, above n 2, 84.

12 See eg Lord Bingham LCJ, House of Lord, *Hansard*, 3 November 1997 1245.

been prosecuted for false travel claims. They have been attacked for failing to respond to media criticism. When the Chief Justice, in a public speech, cautioned against¹³:

"The increasingly strident cries of the well heeled sector of the community, pressuring Government and the judiciary as to the particular brand of justice they seek, are not a pretty sight either, nor are the supportive noises made by acolytes in the profession."

he was denounced in the *New Zealand Law Journal*, of all places, for getting into politics, damaging the independence of the judiciary and insulting the legal profession.

Australia

The debates in Britain and New Zealand seem positively genteel by comparison to those which have engaged the Australian judiciary in the past year or so. The problem is a general one. But it came to the fore after the High Court of Australia, the nation's federal supreme court, decided in December 1996 that the native title to land of the indigenous peoples of Australia was not, as a matter of law, necessarily

13 Sir Thomas Eichelbaum cited in "Judges and Politics" [1996] NZLJ 361 at 361. See also Editorial, "Dismissal of Judges" [1997] NZLJ 333.

extinguished by the pastoral leases granted by the Crown and under statute over vast areas of the Australian continent beginning in the 19th century¹⁴. The decision was by a majority of four to three of the Justices of the seven member Court¹⁵. As a result, politicians in both Federal and State Parliaments appeared to compete with each other to attack the Court and especially the majority judges. Few indeed demonstrated any familiarity with what the judges had written. A senior Federal Minister singled my reasons out for special castigation, declaring that he was "underwhelmed" by them. A State Premier described them as nothing more than "rantings and ravings". The attacks, the like of which we have never seen before in Australia, continued for months, unrepaired by an effective defence of the Court by the traditional political guardian of judicial independence, the Attorney-General. He stated that he did not agree with the convention that the Attorney-General should defend the courts from criticism. They must, he declared, find ways of defending themselves¹⁶. For this, he, in turn, was

14 *The Wik Peoples v Queensland* (1996) 187 CLR 1. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

15 Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, Dawson and McHugh JJ dissenting.

16 D Williams, "Who Speaks for the Judges?", Address to Australian Judicial Conference, 3 November 1996; D Williams, "Judicial Independence, the Courts and the Community", Address to South Australian Chapter of the Australian Institute of Judicial Administration, 7 February

criticised by judges and retired judges¹⁷. The politicians maintained their attack. Some do to this day¹⁸.

The derogatory comments of politicians soon became the springboard for academic and media castigation. Recent High Court decisions, the Court and the justices were labelled "bogus"¹⁹, "pusillanimous and evasive"²⁰, guilty of "plunging Australia into the abyss"²¹, a "pathetic ... self-appointed [group of] Kings and Queens"²², a group of "basket-weavers"²³, "gripped ... in a mania for progressivism"²⁴, purveyors of "intellectual dishonesty"²⁵, unaware of "its place"²⁶,

1997.

- 17 Sir Gerard Brennan, "State of the Australian Judicature", Address to the Australian Legal Convention, 19 September 1997 noted *Sydney Morning Herald*, 30 August 1997 at 2.
- 18 Reviewed, D Cass, "Constitutional Debate Puts the High Court in the Dock", *The Age* (Melbourne) 7 November 1997 at A 17.
- 19 *Canberra Times*, 9 March 1997 at 4 referring to comments of Professor G Craven.
- 20 B Mandle in *Canberra Times* 9 March 1997 at 9.
- 21 Senator R Boswell reported *The Age* 4 March 1997 at A 4.
- 22 Premier R Borbidge (Qld), *The Age* 4 March 1997 at A 4.
- 23 G Richardson, "Oh, what a tangled web they've weaved" *The Bulletin*, 4 February 1997 at 31.
- 24 G Craven, "The High Court: An Abuse of Power", 31st Alfred Deakin Lecture, Melbourne, noted *Australian Financial Review*, 10 October 1997 at 29.

"adventurous"²⁷, needing a "good behaviour bond"²⁸, needing, on the contrary, a sentence to "life on the streets"²⁹, an "unfaithful servant of the Constitution"³⁰, "undermining democracy"³¹, a body "packed with feral judges"³², "a professional labor cartel"³³. There were many more epithets of a like character, many stronger.

These attacks eventually called forth defences of the High Court of Australia by judges and retired judges³⁴, the organised

25 *Loc cit.*

26 W R Hassell, "High Court Must Know its Place", *Australian*, 24 September 1997 at 12.

27 J M Fraser (former Prime Minister) in *Australian*, 24 September 1997 at 13.

28 G Milne, "Government Puts Judges on Good Behaviour Bond", *Australian*, 9 June 1997 at 11.

29 L Kavanagh, "Sentence Judges to Life on the Streets", *Courier Mail*, (Brisbane) 14 June 1997 at 25.

30 G Craven, "The High Court and the Founders: An Unfaithful Servant", in Australian Parliament, Senate, Papers on Parliament, *The Constitution Makers*, Canberra 1997, 63.

31 Sir John Gorton (former Prime Minister) quoted P Akerman, "Telling the Truth", *Sunday Telegraph*, 16 November 1997 at 63.

32 P Akerman, *Daily Telegraph* (Sydney) 20 November 1997 at 11.

33 "Dilute the Judges' Cartel" in *Australian Financial Review*, 12 May 1997 at 20.

34 S Jacobs, "Judge Warns of Short-Cut to Tyranny", 26 March 1997, *The Advertiser* (Adelaide), at 5; Judge Anthony

legal profession³⁵, leading members of the Bar³⁶, a former Governor-General³⁷, legal academics³⁸, a few members in Parliament³⁹, selected editorialists⁴⁰ and even a law student⁴¹.

Smith, "Attacks by Senior Politicians on the Integrity of the High Court of Australia" in *Judges' Forum Newsletter*, August 1997 at 3; R D Keal, "Stop Attacking the Judges" in *West Australian*, 10 March 1997 at 12.

- 35 C Pullin, "From the President" in *Australian Bar Gazette*, March 1997 at 1; P J Short, President, Law Council of Australia, "Who Speaks for the Judges?" in *Australian Lawyer*, April 1997 at 6; "Attacks on the High Court by People who Ought to Know Better", Law Soc of SA, *Bulletin*, May 1997 at 6; C Merritt, "LCA Backs High Court", *Australian Financial Review*, 19 March 1997 at 6.
- 36 Sir Maurice Byers QC, "Doubtful political wisdom" in *Sydney Morning Herald*, 20 March 1997 at 16; R Castan QC, "Judge-bashing reveals an ignorance on legal principles", *Australian*, 1 October 1997 at 13; J Cain, "A Low Attack on our High Court", *The Age*, 25 February 1997 at A 15; M Tobias QC, "I beg to differ", *Sydney Morning Herald*, 30 October 1997 at 18.
- 37 Sir Zelman Cowen, Address to the Rotary Club of Richmond, 3 March 1997, unpublished, at 7.
- 38 D Skapinker, "Gross over-reaction", *Sydney Morning Herald*, 7 March 1997 at 14; G Williams, "Attacks undermine role of High Court", *Sydney Morning Herald*, 9 March 1997 at 11; D Cass, "Constitutional debate put the High Court in the dock", *The Age*, 7 November 1997 at A 17.
- 39 See eg Senator Helen Coonan, *Commonwealth Parliamentary Debates (Senate)*, 18 June 1997 at 3974.
- 40 See eg "Besieging the Bench" in *The Age*, 22 February 1997 at A 14; "Diversionary attacks on the High Court", *Courier Mail*, 19 February 1997 at 20; "High Court plans are sour grapes", *West Australian*, 20 February 1997 at 12; "In defence of judges", *Sydney Morning Herald*, 22 September 1997 at 16. cf J R McClelland, "Criticism of courts unfounded", *Sydney Morning Herald*, 27 January 1997 at 13.

One professor warned of the consequences of such a prolonged confrontation between Executive Government and the judiciary in Australia. He did so on the basis of the experiences of the land of his birth, Malaysia, in 1988 when the highest judge was driven from office⁴². The Chief Justice of Australia, in an unusual move, wrote a private letter to the Acting Prime Minister to correct the erroneous suggestion, made publicly, that the Court had deliberately delayed its decision in the pastoral leases case. Promptly, this letter was secured by journalists (presumably knowledge of its existence was leaked in Parliament) under the *Freedom of Information Act*. It was given widespread publicity⁴³. Later, at a series of legal conferences in Australia⁴⁴ and overseas⁴⁵, the Chief Justice of Australia spoke of the dangers of such sustained attacks on the judiciary. From the United States, Kathryn Graham wrote to the Australian press to castigate the "disappointing lack of understanding of the role

41 S Ioannou in *Australian Financial Review*, 15 October 1997 at 18.

42 Professor Hoong Phun Lee, "Why we must protect the protectors", *Sydney Morning Herald*, 13 June 1997 at 17.

43 Noted in A Ramsay, "High Court gets short shrift", *Sydney Morning Herald*, 8 March 1997 at 43.

44 Sir Gerard Brennan, Address on the Australian Judicature above n 17. See also by Chief Justice Brennan, Address to the Twelfth South Pacific Judicial Conference, noted *Australian*, 15 April 1997 at 3; *Sydney Morning Herald* 15 April 1997 at 3.

45 Address in Dublin, 23 April 1997 at 7.

of the Court"⁴⁶. The Chief Justice of Australia's most populous State, New South Wales, in October 1997, called for a truce and for mutual respect between the branches of government⁴⁷. But the debate and the attacks go on.

The feature of the Australian debate that has concerned many lawyers has been the complete shift from the bipartisan political acceptance of constitutional and other important decisions of the Court which had marked Australia's history in the past, even when those decisions were extremely important and controversial⁴⁸. There is also the concern that such an unrelenting barrage of criticism and denigration would, if unabated, undermine the community's confidence in the courts and acceptance of court decisions⁴⁹. Editorialists might declare that "robust legal debate [is] good for [the] country"⁵⁰. But a lot of judges and lawyers, unused to such unrelenting assaults, had

46 K Graham, "Judges obliged to take a stand", *The Age*, 4 March 1997 at A 14.

47 A M Gleeson, "Who Do Judges Think They Are?", Sir Earle Page Memorial Oration, Sydney, 22 October 1997 unpublished.

48 A Ramsay, "High Court gets short shrift" in *Sydney Morning Herald*, 8 March 1997 at 43.

49 cf B Smith, "Craven attack on Court dubbed 'alarming'", *Australian Financial Review*, 17 October 1997 at 26.

50 *Weekend Australian*, 15-16 February 1997 at 22.

their doubts.

United States of America

The prize for the worst examples in a developed country in this *genre* of political attack on the judiciary must go to the United States of America. Of particular concern to outsiders (and possibly to citizens as well) has been the appearance of federal political leaders, looking around for themes for their electoral campaigns, selecting the easy targets of the judiciary as a means of promoting themselves as tough on law and order⁵¹.

Senator Robert Dole's call for the impeachment of Judge Harold Baer of the United States District Court⁵² and his consignment of United States Appeals Judge Rosemary Barkett to his "judicial hall of shame"⁵³ did not work very well as an electoral theme once it was pointed out that the Senator had voted in the Senate to confirm 97% of President Clinton's judicial nominees. But the gravest attacks in the United States

51 S B Bright, "Political Attacks on the Judiciary", 80 *Judicature* 165 (1997). See also P J White, "An America Without Judicial Independence" 80 *Judicature* 174 (1997).

52 Bright, above n 51, 166.

53 *Ibid*, at 169.

have been made by State politicians seeking to punish judges for decisions in criminal, and particularly death penalty cases which tend to engender strong public passions. The Governor of Tennessee (Mr Don Sundquist), after effectively securing the removal of Justice Penny White from the Supreme Court of that State by electoral recall, declared that judges *should* be looking over their shoulders to see whether the same would happen to them⁵⁴. This assertion drew the retort of Justice John Paul Stevens of the United States Supreme Court, speaking at the 1996 ABA annual meeting⁵⁵:

"It was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."

There have been a number of cases in other States of the United States. They include the removal of Chief Justice Rose Bird and two other Justices of the Supreme Court of California, and Justice James Robertson who was voted off the Mississippi Supreme Court in 1992⁵⁶. The action of Judge Baer, in changing his ruling after the heat of political pressure was

⁵⁴ *Ibid*, at 166.

⁵⁵ *Ibid*, at 169.

⁵⁶ *Ibid*, at 170.

applied may have been unconnected with that pressure. But it certainly did not look good⁵⁷.

Fundamental human rights defend the right of every person in a cause affecting them to be heard by an independent, neutral and unbiased judge. The Declaration of Independence of the United States listed amongst the grievances against King George III that "He has made judges dependant on his Will alone, for the tenure of their offices ..." ⁵⁸. Constitutional decisions uphold the promise of judicial independence⁵⁹. It is also guaranteed in international law by the *International Covenant on Civil and Political Rights*⁶⁰. However, political pressure, applied with a fair measure of brutality, to secure particular results from sitting judges, undermines the principle of independent, neutral and impartial justice according to law. It is no more to be tolerated

⁵⁷ *Ibid*, at 172.

⁵⁸ Noted Bright, *loc cit*, at 172.

⁵⁹ In the United States see *Chambers v Florida*, 309 US 227 (1940) per Black J. See also American Bar Association, *An Independent Judiciary*, 1997, above n 1 at 9-12.

⁶⁰ *International Covenant on Civil and Political Rights*, Art 14.1 "All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Cf *Liteky v United States* 510 US 540, 555; 114 S Ct 1147, 1157 (1994).

where the brutality is verbal than where it is physical.

One of the features of the United States attacks on the judiciary which is most disturbing to an outsider is the way they have been followed up by removal from office, or threats of impeachment, of judges who require popular retention or re-election votes. Another concern is the complete misrepresentation of judicial opinions and serious oversimplification of complex issues⁶¹. Yet another are reports of elected judges in the United States running for office or re-election on the boast that they are "*too tough on criminals*"⁶².

61 Bright, above n 51, 173.

62 Advertisement reproduced in S B Bright, "Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?" (1997) 72 *NY Uni L Rev* 308 at 323.

The truth and the detail about controversial cases tend to elude headstrong politicians on the campaign trail. A particular concern is the failure of leading political officer-holders to speak up to defend judicial independence. A United States commentator has asked, in relation to Senator Dole's call for the impeachment of Judge Baer: "Where was Senator Orrin Hatch, a lawyer and the Chairman of the Senate Judiciary Committee when this attack was made?" The answer given is:

"Unfortunately, he was not defending the independence of the judiciary. After Baer reversed

his ruling, Hatch told reporters 'Unfortunately this sort of attention cannot be brought to bear on all of the other soft-on-crime decisions issued by other activists that President Clinton has appointed'"⁶³.

The author went on:

"Similarly, those in the Democratic Party should have taken President Clinton - a former constitutional law professor - to task for the suggestion that he might call for Baer's resignation because he disagreed with Baer's decision"⁶⁴.

For anyone wanting to read the catalogue of United States equivalents to the Australian list of verbal denigration recently hurled at the judiciary, a good starting point is the article by Judge Joseph W Bellacosa of the New York State Court of Appeals⁶⁵. "Screwballs"⁶⁶ is the kindest of the epithets. Judge Bellacosa concludes⁶⁷:

"Judges can take criticism, I am very confident, but whether the public interest can stand and absorb mal-informed, drum-beaten and heated attacks on the judicial process is worth pause and reflection."

63 *Ibid*, at 173.

64 *Loc cit*.

65 J W Bellacosa, "Remarks - Judging Cases v Courting Public Opinion" 65 *Fordham L Rev* 2381 (1997).

66 *Ibid*, at 2385.

67 *Id*, 2388.

ASSESSMENT OF THE STORM

What can be said about the period we are living through, illustrated, in several jurisdictions, by the examples which I have cited?

1. *Always some criticism:* It is wrong to think that criticism of the judiciary is completely new. In the United States, under the protection of the First Amendment, the media and politicians commonly said nasty things about particular judges. For example, when Hugo Black was nominated by President F D Roosevelt to the Supreme Court, the *Chicago Tribune* declared that "If he wanted the worst man he could find, he has him"⁶⁸. In *News Week*, a commentator was quoted as saying: "There have been worse appointments to high judicial office; but, with Rodgers and Hart, I can't remember where or when". The *Washington Post* said that the nomination combined "lack of training on the one hand and extreme partisanship"⁶⁹. Black went on to distinguished service on the Court. It is a little ironic

⁶⁸ Quoted W E Leuchtenberg, *The Supreme Court Reborn*, Oxford, NY, 1995 at 186.

⁶⁹ Cited *ibid*, at 186.

(but not perhaps entirely surprising) that it was he who said in *Chambers v Florida*⁷⁰ that courts serve:

"[A]s havens of refuge for those who might otherwise suffer because they are helpless, weak, out numbered, or because they are ... victims of prejudice and public excitement."

In England, a memorandum from the Permanent Secretary to the Lord Chancellor's Department, recently disclosed, asserted⁷¹:

"In recent years ... it has been difficult for the State to obtain justice from the judges of the High Court. It is not too much to say that in recent years, the weight of prejudice against the State in the minds of many members of the Court of Appeal and judges of the High Court has been such as seriously to affect the administration of justice.

This was not written during the current debates. It was penned in March 1929 to the first Lord Hailsham who was Lord Chancellor in Stanley Baldwin's first administration. However, in the England of that time the opinion was privately expressed and kept so for decades.

70 309 US 227 at 241 (1940).

71 Cited R Stevens, above n 5.

In Australia, as in Britain, the law of contempt, in the form of "scandalising the court", imposed a measure of restraint on attacks on judges⁷², particularly where it was considered that the statement was an attempt to influence specific court proceedings⁷³. However, from the outset, this power was used cautiously in Australia⁷⁴. It has faded in most developed common law countries during the course of this century in harmony with expanded notions of free speech. One liberal High Court judge in Australia, Justice Lionel Murphy, suggested fifteen years ago that there was actually insufficient, and not excessive, attention to the courts and their importance to the government of the country⁷⁵. Going back to the good old days when politicians, the media and others would show respectful obeisance to the judges, confining their criticisms to private mutterings is now an impossibility. In any case, when explored, those old days included some

72 See eg *Gallagher v Durack* (1983) 152 CLR 238; *Lewis v Judge Ogden* (1984) 153 CLR 682.

73 See eg *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15.

74 See eg *R v Nicholls* (1910) 12 CLR 280.

75 J Hocking, *Lionel Murphy - Political Biography*, Cambridge, Sydney, 1997 at 267-268 citing Justice Murphy's address to the National Press Club of Australia.

political and personal attacks, admittedly rather more muted than of recent times.

2. *Inevitability:* In a free society some criticism of the judiciary is inevitable. This is especially so at a time when there is a growing appreciation of the inescapable choices which fall to judges (particularly in the highest courts). It is naive to expect that commentators will be silent about such choices. Just as decisions of the other branches of government attract criticism and occasional calumny, important and controversial decisions of the courts will inevitably do the same. Into this milieu has been injected the technology of the modern media of communications. In his lecture on this subject, the Chief Justice of New South Wales reflected on the politics of law and order⁷⁶:

"It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television programmes depicting casualties with unprecedented visual and emotional impact. To an extent, a similar phenomenon may account for the fact that modern citizens have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims or relatives of victims of violent crime, telling their stories and being asked whether they are satisfied with the

76 Gleeson, above n 47, at 10.

sentences imposed on convinced offenders. Talk-back radio programmes are filled with people expressing feelings of insecurity and demanding ever-increasing severity of penalties. To all of this politicians respond by competing with each other to be seen to be tough on crime."

The same phenomena impose unrealistic expectations on police⁷⁷. It is an inescapable feature of the information world we are living in. The media encourage conflict, dramatic visual images, demands for instant solutions. Uncomfortably for the judiciary, they are locked into a profession whose mission is to serve the ages, not the instant sound-bite or spin considered appropriate to most of the actors in the other branches of government and most of the contemporary media.

3. *Some good:* Some of the heightened attention to the courts and their doings is justifiable; some desirable. The principle of public justice and open courts is designed constantly to submit the judges themselves to public scrutiny. Incompetent, dilatory, ill-tempered, prejudiced judges may deserve to be exposed so long as the object is truth not just entertainment at the behest of a disgruntled

⁷⁷ J R Wood, "Address to NSW Police Academy by Royal Commissioner", unpublished, 23 May 1997, cited in Gleeson, above n 47, at 10.

litigant whose views are given currency at the expense of a judge who cannot effectively answer back. A lot of criticism of courts and of the legal profession itself is perfectly healthy⁷⁸. Judges are citizens too. They live in their communities. It is right that they should be alert to community feelings. It would be naive to declare that they are completely unaffected in their professional decisions by the public debates which swirl around them. But what is expected is that, when the crunch comes and a serious attack is made on vulnerable people, the courts will uphold the law and the Constitution. The High Court of Australia did exactly this in 1951. In the midst of the Korean War, the Red scare and an enormous public fear of communists and communism, the Court struck down as unconstitutional the *Communist Party Dissolution Act*⁷⁹. That Act had been enacted by the Australian Parliament, proposed by a government which had a specific electoral mandate to do so. A referendum to authorise amendment of the Constitution to overcome the decision was defeated⁸⁰. Although the Court was criticised by some at

78 Gleeson, *loc cit*, 7. cf Bellacosa, above n 64, 2389.

79 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

80 M D Kirby, "H V Evatt, The Anti-Communist Referendum and Liberty in Australia" (1990) 7 *Australian Bar Review* 93.

the time, the politicians faithfully accepted the decision. There was none of the ferocity of comment that has lately been voiced against the Court. It would not have occurred and any criticism would have been of the decision or the reasoning, not of the judges personally.

It is because courts are obliged to protect the rights of unpopular individuals and minorities that they are exposed, in elected democracies, to political castigation⁸¹. If judges are to perform their functions when the going gets rough, they need tenure to underwrite their independence. Personal courage may not always be enough. Even with tenure, ambition or thirst for popularity may sometimes get in the way. Judges may sometimes wilt under the barrage of criticism, as Judge Baer appeared to do.

4. *Some too far:* Having acknowledged the legitimacy of public debate about cases and issues, criticism of decisions and attention to judges who are lazy, slow, incompetent or rude, it remains to be said that the current level of political and personal attacks on the judiciary is unacceptable. It has gone too far. Unless there is a measure of mutual

81 Bright, above n 51, at 165.

restraint, the judicial institution will be damaged and judicial integrity undermined. When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who should know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified⁸². Yet silence is ordinarily imposed by judicial convention. Generally, judges cannot answer back. At least most cannot do so in effective forums. From inexperience their attempts to respond sometimes result in compounding their problems and demeaning their office.

In Australia, where neither federal nor State judges are subject to election, recall or popular removal, new

82 H L Sarokin, "The Dangers of Judge-Bashing - Politicians are 'Willie Hortonizing' the Bench, *Legal Times*, 27 October 1997 at 25. Judge Sarokin resigned from the US Court of Appeals (Third Circuit) to convey the "gravity of [the] dangerous course [and] in protest over the politicization of attacks on the federal judiciary in the United States. He concedes that his "grand gesture" was a "complete fizzle" which actually emboldened further attacks and calls for impeachment.

developments have been occurring which are a source of added concern. State courts and State and federal tribunals have been abolished and targeted members not reappointed to the successor body⁸³. Independent office-holders who criticise governments may find that their statutory powers are diminished. In the wake of the recent controversies in Australia, proposals have been made, for the first time, that judges should be appointed for a term of years or chosen with participation of the people. The retirement from the High Court of Australia of two of the seven Justices and the pending retirement of the Chief Justice on attaining the constitutional retiring age of 70 years, led to a declaration by the Deputy Prime Minister of Australia, that the Government would appoint "capital C conservatives"⁸⁴ to replace the retirees. Governments in Australia are not subject to Senate confirmation hearings for their judicial appointments. They can appoint whom they choose. They have always been entitled to make

83 See eg *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; cf M D Kirby, "Abolition of Courts and Non-reappointment of Judicial Officers" (1994) 12 *Australian Bar Review* 181 at 189-204.

84 *The Age*, 6 March 1997 A 6; *Courier Mail*, 5 March 1997 at 1. Cf "Politicising High Court appointments", *Courier Mail*, 10 March 1997 at 10; "Merit the best judge", *Canberra Times*, 8 March 1997 at 17.

judicial appointments with reference to what they hope may be the appointee's philosophical inclinations. But in Australia we have not, until now, had such a clear indication that ideological leaning, rather than professional reputation or intellectual merit, will be the chief criterion for appointment to judicial office. Needless to say the comment drew much criticism. The Federal Attorney-General, by an unprecedented procedure of consultation, has tried to repair the impression that the political inclinations of candidates rather than their ability and independence will be the chief criterion for appointment to the nation's highest court.

5. *Some bad:* Distinctly bad have been the following features of the recent attacks on the judiciary. The personal targeting of identified judges. The attempt to intimidate them or to deflect them from fidelity to their oath of office to decide each case strictly on its merits. The unrelenting character and partisan political aspect of the attacks of the last decade. Little wonder, that some good judges prefer to resign. Small surprise that good people of independent mind now refuse judicial appointment. Once proud and famous courts are criticised for buckling under to political

pressure⁸⁵. Another feature of the barrage which should not pass unnoticed is the way in which women judges have tended to be singled out for special attack, whether in the United States⁸⁶, New Zealand⁸⁷ or in my own country⁸⁸. Targeting judges, identifiable because of their sex, race or other minority considerations, attacking them by over-simplified and often inaccurate generalisations, panders to public prejudice. It reinforces stereotypes about the judiciary. Such conduct is unworthy of countries that claim to uphold fundamental rights and the rule of law.

WHAT CAN BE DONE?

1. *Unacceptable responses:* In the face of the barrage, and under fire, there are a few strategies available to the judiciary. It is worth listing them. Some of them can be put out of account as unworthy or impossible of attainment. Unworthy would be a judicial response to just

85 Bright, above n 51, at 172.

86 See Bright, above n 51, at 172.

87 [1996] NZLJ 361 at 362 a reference to Dame Sylvia Cartwright of the High Court of New Zealand.

88 J Stone, "There's no such thing as an unpolitical game", *Australian Financial Review*, 15 October 1997 referring to Justice Mary Gaudron of the High Court of Australia.

cave in to the pressure and to do exactly what the politicians, editorialists or other powerful interests want. This would be a complete abdication of the judicial function. It would be out of line with constitutional and legal requirements and with our traditions. Although other judicial models exist, those countries, like Australia and the United States, which have chosen the path of a strict separation of the judicial power assert that the judiciary, and not the legislature, is the ultimate arbiter on political power. For judges of this tradition, caving in is out of the question.

So is ignoring the barrage in the hope that it will diminish or go away. There are limits to what the judiciary itself can do to respond to its critics. Within those limits, judges should certainly try to correct misapprehensions and insist upon the truth. Collectively and individually they have an ultimate duty to protect the integrity and independence of the judicial institution. Because they spend their days hearing both sides of conflict and searching for the rational resolution of difficult problems, judges and other lawyers tend to feel specially uncomfortable in simply putting up with false criticism and mis-information⁸⁹. Yet putting

89 Bellacosa, above n 64, at 2383.

one's head above the ramparts can be risky. An interesting article on law review publications by judges of the United States Court of Appeals compares the pattern before and after the Senate confirmation hearings concerning Judge Robert Bork's nomination to the Supreme Court of the United States⁹⁰. The analysis concludes that publishing by such judges declined significantly following the Bork hearings. Judges with established reputations, particularly, appear to have observed and learned. This may not necessarily be a desirable result. Is it better to appoint a silent and unproductive nominee whose value system is completely unknown rather than one who has contributed to intellectual debate, exposed his or her ideas and demonstrated courage in sharing jurisprudential opinions with the legal profession and beyond? Driving candidates for judicial preferment into complete silence may simply promise more uncomfortable surprises when the Pandora's box of judicial appointment or promotion is reached along a silent road.

90 S S Gaille, "Publishing by US Court of Appeals Judges: Before and After the Bork Hearings" (1997) 26 *J Legal Studies* at 371.

2. *Court defences:* One solution, increasingly used in Australia and New Zealand, is the recruitment of media and public affairs officers to the service of the courts. They can help journalists, often working to strict deadlines, to report accurately important court decisions and to correct factual or legal mistakes where they occur. They can promote more accurate media commentary about the law and its personnel. In short, they can become informed. There are dangers in playing the media's game. Its mission will never be the same as that of the judges. Courts have no business cultivating political or public favour. They would always lose in a competition with the political branches which inevitably enjoy greater experience and resources. Courts would be diminished if they felt obliged to defend their decisions beyond their published reasons by employing media "spin doctors" for that purpose⁹¹. But it must be admitted that those reasons are often obscure and highly technical. Perhaps, by failing to provide user friendly and public friendly summaries and by insufficient attention to the necessities of communications in the age of informatics, judges have brought on themselves some of

91 "No court of knaves", *Canberra Times*, 23 September 1997 at 8.

the confusion which they criticise so readily in others⁹².

3. *CJ's response:* It seems now to be an accepted obligation of Chief Justices and other senior judges to respond, on behalf of their courts, to attack on the courts, their judgments, their personnel or the administration of justice itself. Chief Justice Rehnquist did so during the last United States presidential campaign⁹³. Justice Stevens did so at the American Bar Association meeting in August, 1996. Such statements may quieten the barrage for a time. Chief Justice Brennan has done so in Australia, joined from time to time by Sir Anthony Mason, his distinguished predecessor. But judges are generally too busy. They usually lack the skills to mix it with political or other critics. They typically share a concern that an endeavour to do so would diminish them and their office. This concern is not misplaced. Reticence in public debate and controversy is what citizens generally expect of their judges.

4. *The Bar:* It therefore rests increasingly on the organised legal professional to defend the judiciary, to correct blatant

⁹² S B Smith, "The Constitution of Jurisprudence", 66-67.

⁹³ Bright, above n 51, at 172.

misinformation and to remind politicians, the media and others of the precious heritage of judicial neutrality and independence which we have enjoyed until now⁹⁴. For the United Nations, I have worked in a number of countries where independence and incorruptibility are not ordinary features of the judiciary. It is important that institutional protection for those features should be maintained. Political attempts to undermine them should be rebuffed. Where necessary, the Bar should move for the disqualification or non-appointment of persons with committed positions on issues likely to come before the courts. Leaders of the legal profession, whatever their own general political persuasion, should speak up where judges are unfairly criticised by politicians and others for doing their independent duty. The Attorney-General, as the traditional leader of the legal profession, should do so in appropriate cases. In Australia, at least in part, the Federal Attorney-General has lately evidenced a willingness to return to this traditional role and even to criticise his

94 American Bar Association, *An Independent Judiciary*, 1997 above n 1 at 59. There are a number of relevant recommendations, including that steps be taken to inform the Bar and the public of regular ways of handling complaints against and disciplining judges under the *Judicial Conduct and Disability Act* of 1980 (US).

Ministerial colleagues in the process⁹⁵. In the United States, somewhat belatedly, Attorney-General Janet Reno expressed her concern at "the increasingly heated rhetoric surrounding the debate" about so-called judicial activism⁹⁶. Attorney-General Reno acknowledged that judges today "must have thick skins". She condemned the way recent debates had not sought to argue "the rightness of an issue but to undermine the very credibility of the judiciary". The temperature of the debate elicited "alarm" on her part. The word is not too strong. She noted delays by the Senate in considering the large number of judicial nominations awaiting confirmation. Those delays appear to have become caught up in partisan political issues. So perhaps has the related question of maintaining judicial remuneration.

5. *Political mutual respect:* Statements of this kind from a leading political figure such as the Attorney-General are to be welcomed. But generalities given voice months after an

⁹⁵ See reports, *The Age*, 1 March 1997, A5 "Attorney pleads for peace in court row"; *West Australian*, 11 August 1997 at 7; *Australian Financial Review*, 23 September 1997 at 6.

⁹⁶ Attorney-General Reno's remarks addressing the ABA House of Delegates, 5 August 1997, unpublished. Cf B Galligan, "Do we want activist courts?", IPAA (Victoria) Government Law Series, Unpublished paper, 11 November 1997 at 2.

attack are no substitute for specific defence of particular judges when they are under political or personal attack for performing no more than their judicial duties. It is then that strong political leadership of a principled kind is required. The increasingly adversarial and combative nature of our societies should not become endemic to the damage of the relationship of the judiciary with the other branches of government. Legislators, members of the Executive Government and the judiciary should all realise that each branch has its own part to play, without which constitutional government would be impossible⁹⁷. But what the political branches of government have to understand (as formerly, I believe, their members generally did) is that it would be an abdication of their constitutional functions for judges to court popular opinion for preconceived views applicable to cases in the courts or to swing abjectly in the wind of the latest popular mood. It was out of recognition of that danger that, when the people of England banished King James II from the Kingdom in 1688, they only invited his successors, William and Mary, to take up the Crown upon conditions. One of the conditions was judicial tenure and independence.

97 Galligan, above n 96, at 17.

When this principle, accepted for Britain, was not extended equally to the English colonies, the colonists and settlers complained and, in America, rose in revolution. They instituted, at least in the federal judiciary of the United States, a firm guarantee of tenure and independence for the judiciary. We in Australia are the happy beneficiaries of these two revolutions of 1688 and 1776. But it is necessary for judges and lawyers to remind their fellow citizens of the causes of those revolutions, the importance of maintaining the principles which were thereby secured and the dangers involved in expecting judges to decide cases on whether their decisions will be popular or not.

6. *Education in civics:* Sadly, papers such as this and occasional judicial speeches at law conferences will not repair the mischief that years of concerted attack on the judicial institution and individual judges can cause. Such attack often portrays a fundamental lack of understanding of what judges do, what they do not do and even why they exist in our kind of society. Such basic misapprehensions may not be curable in mature adults. The remedy should start in the schools and through the media. It should not be confined to law faculties and

learned institutes. A renewal in the teaching of civics for all citizens would be timely⁹⁸. Let it be a goal of the coming millennium that we re-teach the lessons of our constitutions and engender an informed appreciation of the judges and of their vital importance for the peaceful government of us all. Not blind or uncritical faith. Not confidence extracted by the ever present threat of legal enforcement⁹⁹. Not appreciation won by clever public relations and media hype. But a deserved evaluation of faithful and honest service in a difficult profession, the alternative to which is anarchy and the power of guns.

98 M. D. Kirby, "Teaching Australians Civics", Address in Brisbane 1997 reproduced *Sydney Morning Herald*, 16 August 1997 at 10. This is also a suggestion of Judge Sarokin, above n 82, at 25.

99 cf Thio Li-ann, "An "i" for an "I"?" Singapore's Communitarian Model of Constitutional Adjudication (1997) HKLJ 153 at 181-185 referring to contempt and defamation proceedings in Singapore.