The courts and public opinion

The following address was delivered by the Hon Sir Anthony Mason AC KBE, at the National Institute of Government and Law's inaugural public lecture on 'The Courts and Public Opinion'. The lecture was held at Parliament House, Canberra, on 20 March 2002.

Introduction

There are two sides to this topic. The first is what account, if at all, do the courts take of public opinion? The second is what opinion does the public have of the courts? My remarks are directed to the first rather than the second aspect of this interaction. It is not possible, however, to segregate the two aspects because, as will appear, the public's perception of the courts and what the courts do are matters which are, in some respects, not entirely unrelated to the making of judicial decisions and the factors which judges consider in making their decisions. Because the courts are concerned with maintaining public confidence in the administration of justice, judges cannot dismiss public opinion as having no relevance at all to the work of the courts.

Judges accept that the rule of law in our community depends upon the maintenance of public confidence in the administration of justice

Judicial attitudes to public opinion

As with other aspects of the law, the relationship between the courts and public opinion is undefined. Because it is undefined, it is not well understood, not only by lay people but also by lawyers and politicians.

a. The law is the law is the law

The traditional judicial view of the relationship between the law and public opinion was summed up in the line 'The law is the law is the law'. This line expresses the notion that the law is an autonomous set of rules to be applied according to their terms irrespective of community views and opinion. In other words, the law must be applied even if it is contrary to public opinion.

So to take an example: If we were to assume that a majority of people in NSW thought that smoking cannabis should be legalised, the judges would say, quite rightly, that the community view would not justify them in refusing to enforce a law which prohibits the smoking of cannabis.

Only four years ago in the famous Massachusetts homicide trial of Louise Woodward, the British child-minder, Judge Zobel re-stated this view of the judge's duty when he said:

> The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inexorable to the cries of the defendant; 'deaf as an adder to the clamours of the populace'. His words would ring true 227 years later. ...
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> Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, panelists and talk shows. In this country we do not administer justice by plebiscite. A judge, in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to the prevalent demands.1

That statement is, as we shall see, not the entire story.

b. Judges recognise that the rule of law rests on the existence of public confidence in the courts

It is not the entire story because the courts act at their peril if, by their actions and decisions, they set at risk public confidence in the courts. Judges accept that the rule of law in our community depends upon the maintenance of public confidence in the administration of justice and that means maintenance of public confidence in the courts. Absence of public confidence in the administration of justice would bring unwanted and untold consequences in its train. It would result in non-compliance with the court orders and greater difficulty in enforcing them. It would lead us down a path away from the peaceful settlement of legal disputes into a world in which people would be inclined to take the law into their own hands. It would take us back to an earlier stage in the development of civilised society when disputes were resolved by brute force.

The rule of law in our community is underpinned by the apparatus and infrastructure of the State. The orders of a court are executed and enforced by the agents and officers of the State. But that underpinning in turn rests on the public acceptance of the courts and the public sentiment that the courts are so deserving of support that their decisions should be enforced. Without that public acceptance and sentiment, the State might not provide the apparatus and infrastructure which reinforces the authority of the courts. Indeed, the State might itself decide not to respect decisions which were adverse to its interests.

Of course, prevailing public sentiment reflects a general approval of our system of administering justice rather than an approval of particular decisions delivered by the system. Rarely does the public know enough about, or take a sufficient interest in, a particular decision to form a worthwhile judgment about its correctness or desirability. Naturally, that does not preclude the uninformed from expressing their opinions about a particular case.

There may be court decisions of which the public disapproves without our being aware of the reasons for that disapproval. It may be that people disapprove of the legal rule that the court applies in the particular case, whether it be based in statute law or common law, or that, alternatively, while agreeing with the legal rule, they may think that the court was wrong about the facts so that the rule should not have been applied to the case.

The point is that the public, even if it thinks that the courts do get it wrong from time to time – as may well be the case – nevertheless supports the court system generally. I emphasise the word 'generally' because the public may have strong criticisms to make of aspects of the system – delay and expense, to mention two of the principal subjects of recent complaint. Even if public support is less than enthusiastic and is qualified, the public recognises at least that the system should be supported because it is better than any other alternative which has been offered.

Judges associate public confidence in the administration of justice with the independence of the judiciary and impartial enforcement of the law.[2] That may well be right, though, in the absence of proof, it necessarily rests on an assumption. Whether the public appreciates the concept of judicial independence and values it highly may be questionable.

Judicial independence is the feature of the system which is most prized by the judges themselves. They see it as the cornerstone of the rule of law. And, if the importance of judicial independence be conceded, as it must be, it can serve as a justification for other principles and conventions which shore up judicial independence and impartiality.

Protecting independence, impartiality and confidence in the courts

Thus, the common law of contempt of court was formulated by the judges in order to deter criticisms which would impair public confidence in the courts and judicial independence. The judges frowned upon any attempt to influence judicial deliberations, whether by politicians or the media. Judges naturally prefer to decide a case on the arguments presented in court on behalf of the parties, without being exposed to the pressure that comes from political and media discussion. That discussion, particularly distorted media discussion, as we know all too well, often emphasises the sensational and, by so doing, threatens objective consideration of the factual and legal issues which arise for decision.

In earlier times, insistence on absence of comment on pending litigation led to the making of broad judicial statements asserting that comment on a pending case was punishable as contempt of court. Thus, it was said:

> A publication referring to pending litigation is a technical contempt if it is one having a *tendency* to influence the result – this gives the court jurisdiction to interfere; the court will not exercise its summary power of interference at the instance of a party unless, besides the tendency, the publication is *likely* to influence the result [3]

That statement went a very long way. A persuasive, well-reasoned article on a pending case would have a tendency to, and might well, influence the result. Although it is not to be supposed that, these days, the publication of such an article would be held to constitute a contempt, the statement indicates how far the courts were prepared to go to discourage comment on court cases. The courts were, of course, more lenient with comments which might affect judicial deliberations than with comments on evidence or issues which would affect jury deliberations. Judges have a capacity to resist the influence that such comments might have; a jury would be more susceptible to influence.

Judges are also conscious of the authority of the courts, the need to protect that authority and the spirit of obedience to the law. It is on that footing that the courts have punished for contempt of court publications which unfairly criticised a court so as to undermine public confidence in the administration of justice.[4] The exercise of the contempt power in that class of case has been squarely based on the necessity for maintaining public confidence in the administration of the law. Yet it has been recognised that the courts must be open to free criticism and that protection of public confidence in the court system can come at too high a price.[5] So a reconciliation between these two principles is involved.

This reconciliation has resulted in some adjustment since the world acknowledged that freedom of expression is a fundamental freedom and that freedom to criticise public institutions is a fundamental element of modern democratic government. Recognising the strong public interest in free discussion of a matter of public importance, the courts have been increasingly reluctant to use the contempt power simply to protect judges from criticism. Statements criticising judges for their decisions do not attract an exercise of the contempt power, at least when the criticism is fair and honest.

Photo: Michael Amendolia / News Image Archive

The media pack waiting for the arrival of Ivan Milat as he returns to court for the verdict, 26 July 1996.

The courts are vulnerable to criticism

The inutility, if not the unavailability, of the contempt power has left the courts vulnerable and exposed to criticism, not all of it being of a responsible kind. The decline of the contempt power has naturally been accompanied by an erosion of the convention that comment will not be made on matters which are *sub judice*, because the convention rested on the possibility that the contempt power would be exercised and on the possibility that proceedings for defamation might be brought.

These days, another factor is the unwillingness of the Federal Attorney-General to defend the courts against criticism. This is not the occasion to rehearse my disagreement with the

Photo: Michael Jones/News Image Archive

The Hon Daryl Williams AM QC MP
13 March 2002.

Attorney-General on this point. All I need to say is that there comes a time when political and media criticism of the courts or a court decision reaches a point when it threatens to undermine public confidence in the courts and at that point the Attorney-General should assert himself to protect the courts from irresponsible criticism.

I think that the Attorney now recognises that this is so. So our disagreement may have descended to the point where our disagreement is about when such a threat exists. Our disagreement about the Attorney's failure to defend the High Court in the *Wik Case* illustrates the point.

I do not suggest that the Attorney-General should defend the courts on all occasions. Far from it. Indeed, I agree with the Attorney that there is a case for the judges, through appropriate channels, speaking for themselves. But that is not a substitute for a defence of the courts by the Attorney-General who, as the responsible minister representing the Government, will secure more media coverage and attention than a judge. In any event, as the *Mabo (No. 2)* and *Wik* cases demonstrate, it is difficult, it not impossible, for the relevant judges to speak without running the risk of seeming to favour one side or the other in a controversy over a court decision which becomes a party political controversy. I do not accept that an Attorney-General is unable to defend the courts or a judge simply because he is a politician. Attorneys-General have succeeded in doing so in the past.

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The point here is that the courts are at considerable risk if politicians or the media venture on a campaign of criticism of judges for political or other expedient advantage. In other words, it is a matter of great importance that the courts as a fundamental national institution should not be made a target of irresponsible criticism. Public confidence, which is vital to the well-being of the administration of justice, once lost or damaged, is not easily restored. This fact should be recognised by other institutions of government, particularly by participants in the political process who, whether operating under parliamentary privilege or not, have a capacity to do very considerable harm to the public standing of the courts.

I had not intended to speak about the very recent controversy relating to Justice Kirby. But I wish to mention aspects of that controversy which undermine the Attorney-General's conception of his role. First, the controversy rapidly developed into a party political controversy with the result that the Judge could only defend himself in the public debate by running the risk of participating in a party political dispute. Secondly, when Chief Justice Nicholson of the Family Court sought to defend the Judge in a public speech, he was rebuked by the Prime Minister for speaking out of turn. So, in the playing out of this controversy, we saw how the Williams' theory of the sufficiency of judicial self-defence fell apart. It simply resulted in a rebuke for the Judge who sought to rally to Justice Kirby's defence.

Otherwise, I would simply draw attention to two articles in this morning's newspapers which you may have read. One in the *Sydney Morning Herald* by Mr Gordon Samuels; the other in *The Australian* by Professor George Williams. The authors make some interesting and important points which bear on this aspect of my talk.

The judge as the voice of the community

The other side of the coin is the notion – which is quite misleading – that the judge is the representative of the community. Initially, the judge was the agent or delegate of the King in administering justice. At that time, the jury, rather than the judge, was the voice of the community. In deciding a case, the jury brought to bear its knowledge of the community. It was in a position to interpret community views and identify and apply community standards, practices and expectations. This was one of the attractions of trial by jury. Over time, however, the judge came to inherit the role of the jury in civil cases as pressure to reduce the time taken in, and the expense of, civil cases resulted in the judge supplanting the jury as the tribunal of fact.

Today, the judge, in civil cases, has largely assumed the role of the jury in deciding issues of fact. In this respect, the modern judge represents the professionalisation of the decision-making process, professional decision-making displacing what in much earlier times was popular decision-making, when the jury's verdict might have been thought to represent the community view of the case.

At no stage was the judge regarded as representing the views of the community in exercising his judicial duties and deciding cases. And as the law became more sophisticated, the judge came to be seen as an independent and impartial adjudicator who acted only on the evidence presented in court and was free from outside influences.

It is important to underline this point. The court must arrive at its own decision on the facts as well as the law. And that proposition applies to the modern jury as well as to the judge. The jury must arrive at its own decision on the facts and should dismiss from its mind the opinions of others on the issue before them. Justice, as we see it today, is best achieved by the decision-maker deciding the case for itself by having regard only to matters established in evidence and advanced in argument in open court, instead of drawing on knowledge and information which is not part of the public record. Openness, transparency and accountability have played a part in defining the decision-making function in this respect.

To the extent that the judge has inherited the role of the jury, the judge is called upon from time to time to apply community standards and expectations. In so doing, the judge must identify and interpret those standards and expectations. In that restricted sense, the judge is the voice of the community but otherwise the judge is not the voice of the community in any meaningful sense.

The judge does not personify the people in the way that the jury does. The judge does not have the same pedigree. He or she is a professional legal specialist without the knowledge of the community that we attribute, rightly or wrongly, to the jurors. Yet, subject to those handicaps, the judge performs the jury's old

function and applies community standards and expectations, though the judge will not reflect the community's view, if it has one, about the outcome of the case. It would be improper for the judge to do so. It would be a dereliction of judicial duty.

The judge and the world outside the court-room

It follows that the judge does not turn a blind eye to the world outside the courtroom. The judge is part of that world; the litigants and the witnesses are part of that world and in the transactions and events to which the court case relates were part of that world. So, the judge in evaluating the truth and the reliability of the witnesses and, in deciding the case, draws on knowledge of the outside world. In assessing the explanations given by a witness for what he did or said on a particular occasion, the judge will bring to bear his knowledge of people, how they behave, how they respond or are likely to respond to particular situations. The judge's knowledge of the world, perhaps more than anything else, perhaps more than any impression formed from the witness's appearance in the witness box, assists the judge in deciding whether the events which the witness claimed to happen are likely to have happened.

The judge draws not only on personal experience but on knowledge gained from other cases. In this respect, the judge has a unique window on the world. If you read the transcript of a trial or an appeal book you will begin to understand just how valuable that window is. It gives you a perspective on how people behave, seen through their eyes and the eyes of bystanders. Once you compare the transcript of a trial or an appeal book with a departmental file with its absence of detailed information about individuals, you will appreciate that the judge is better informed about people and the way they behave in particular circumstances than the administrator and even perhaps the politician.

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The judge and community standards

I have referred to the judge's role in applying community standards. The standard of what is 'reasonable' is a common feature of our law. The obligation to take reasonable care to avoid damage or injury to others is the central element in the law of negligence. What is 'reasonable' is a standard to be assessed by reference to community practices and expectations. As the High Court has said:

> What is considered to be reasonable in the circumstances of the case must be influenced by current community standards. In so far as legislative requirements touching industrial safety have become more demanding upon employers. This must have its impact on community expectations of the reasonably prudent employer.[6]

In most, but not all, cases, community standards will be proved by evidence.

The standard of what is reasonable applies in many branches of the law, not least of them criminal law e.g. 'reasonable belief', 'reasonable excuse', 'reasonably foreseeable'. In these various contexts, the relevant standard is ascertained against a background of community practices and expectations.

There are four points to be made in relation to judicial ascertainment of community standards. First, the diffidence of judges in discussing how community standards are ascertained and determining what are community standards; secondly, the difficulty of taking judicial notice of matters that are controversial (as community standards generally are); thirdly, the difficulty of determining community standards in the absence of evidence; and, finally, the magnitude of the undertaking if evidence were to be required.

Photo: Craig Greenhill / News Image Archive

South Sydney fan announces the Supreme Court decision to the media, 8 July 2001.

The way in which the courts apply the law necessarily takes account of the community's standards of behaviour and expectation. But this does not mean that the courts automatically give effect to community behaviour or expectations or, for that matter, the community's moral values or attitudes.

The judge and enduring moral values

On those exceptional occasions when the courts adopt a moral value or principle as the basis of a legal concept or principle, the courts look to an enduring moral value or principle rather than one which is merely current or transient.

Perhaps the most notable example of this proposition is the most famous of the tort cases, *Donoghue v Stevenson*.[7] The case concerned the snail in the bottle of ginger beer where the plaintiff consumer recovered damages from the manufacturer for the manufacturer's negligence. That case articulated the 'neighbour' principle as the criterion for recognising the existence of a common law duty of care owed by one person to another.

According to that principle, a person comes under a duty of care to another when it can reasonably be foreseen that one's acts or omissions are likely to injure that other person, that person being one who is so closely and directly affected by the act or omission that he ought reasonably to be in contemplation when the act or omission takes place. The principle is both a legal and a moral principle; in other words, the legal principle takes as its foundation a moral value. It is an instance of the formulation by the courts of a legal principle by reference to an enduring moral value.

The reasoning in the judgment of Brennan J in *Mabo v Queensland (No. 2)*[8] is another example, though it is not such a striking example. There his Honour rejected the fiction by which the rights and interests in land of the indigenous inhabitants were disregarded. He did so for various reasons, one of which was that the doctrine was inconsistent with 'the contemporary values of the

Australian people'. The expression 'contemporary values of the Australian people' is to be understood as referring to contemporary values of an enduring kind.

Donoghue v Stevenson and *Mabo (No. 2)* demonstrate that when the judges make use of moral principles or values to shape or inform legal principles, they do not tie themselves to the current opinions, views and attitudes of society. Those opinions, views and attitudes may be fleeting or transient; they may be ill-informed or motivated by shallow self-interest. The judges look to a higher principle, one which can be regarded through the ages as expressing an acceptable approach to human action.

A particular instance of resort to values in the formulation of legal principle is the use of consequentialist reasoning by judges. Judges use consequentialist reasoning when they take into account the impact on community conduct of introducing a particular principle. In one case the question arose whether a former employer who gives to an intending employer a reference relating to an employee is under a duty of care to the employee in relation to the giving of the reference.[9] The answer given was that the reference giver was under a duty of care.

One factor taken into account was the possibility that, if such a duty was imposed, persons would be deterred from giving references or from giving accurate references. On this question, judicial opinion was divided.[10] There was, of course, no evidence of what the likely consequence would be. Here we see an instance of judges predicting how the community will react to the introduction of a particular legal rule.

Judges have come to appreciate that the public no longer uncritically accepts judicial decisions.

Interpretation of statutes

Statutes cannot be interpreted in a vacuum. In interpreting statutes and giving them an operation, judges will, where appropriate, take into account community standards and values. Examples are statutory provisions, Federal and State, which confer jurisdiction on courts to grant relief in relation to contracts the operation of which is unconscionable, harsh, oppressive or unfair or which have been procured by conduct of that description. Although judges are called upon in various ways to identify community standards, expectations, practices and values, they do not represent or speak on behalf of the community or, for that matter, give effect to community views about the particular case.

Public confidence in the administration of justice as a factor in judicial decision-making

On the other hand, judges now have regard to public confidence in the administration of justice as a factor which may be relevant in some cases. Modern courts are more concerned to take account of public confidence in the administration of justice as an element in judicial decision-making than courts were in the past. This change in attitude has come about as the judges have come to appreciate that the public no longer uncritically accepts judicial decisions. Deference to authority has given way to a disposition to question, indeed to criticise, the decisions of authoritative institutions such as the courts. In the face of this new attitude, the judges regard public confidence in the court system as a relevant consideration in some aspects of judicial decision-making.

In a number of cases, the High Court has used the factor of maintaining public confidence in the administration of justice as an element in articulating legal principle and in interpreting and applying the provisions of the Constitution.[11] In these cases, the High Court has been concerned with adverse impressions of the courts, especially courts exercising federal jurisdiction, that the public might form from the way cases are dealt with by the courts and from administrative functions that judges might be called upon to perform. In particular, the Court has been concerned that the independence of the judges and the integrity of the judicial process might be seen to be compromised. Whether the High Court is right in attributing to the public these adverse or possibly adverse impressions of the courts in such situations is beside the point. What is important is that the Court has arrived at decisions after taking into account the public confidence factor. I hasten to say these are not cases in which the Court has said 'We come to this decision because the public would have no confidence in us if we decided the case the other way.' So there is no inconsistency between these High Court cases and the remarks of Judge Zobel in the *Woodward Case* which I quoted at the beginning of this Lecture, before making the comment that Judge Zobel's remarks were not the entire story.

Sentencing and public opinion

That statement brings me to the relationship between the judge's function in imposing a sentence on a convicted person and public opinion. The media is quick to seize upon lenient punishment of offenders and use it as a basis of criticism of the judges. Politicians do not lag far behind if a 'law and order' political campaign offers prospect of electoral advantage. In a community that is anxious about any perceived upsurge in the incidence of violent crime, lenient punishment is naturally regarded as an indication that the judiciary is 'soft' on crime. In England, as well as Australia, the judiciary has been criticised from time to time on this score. So sentencing, like judicial review of migration decisions, is an area in which there is a potentiality for conflict between the courts on the one hand and political, media and public opinion on the other hand, with possible consequences for public confidence in the courts.

People feel very strongly about violent crime. They also have a belief, not generally supported by expert opinion, that heavy punishment is a strong and effective deterrent. And because sentencing seems to be less complex than many other judicial decisions, people feel that *they* understand the issue and are confident in the view they form, even if they are unaware of all the relevant circumstances. Another factor is that these days the media gives prominence to interviews with the victims or relatives of the victims of crime when they express their dissatisfaction with lenient punishment. Consequently, controversy about sentencing decisions, even a particular sentencing decision, has a greater potential to erode public confidence in the administration of justice than other cases. Controversy about the alleged leniency of sentences in high profile cases has led to a political response which results in pressure on a Director of Public Prosecutions to appeal and to seek a longer sentence.

So, critical to the sentencing process is the question whether the judge is either bound or permitted to have regard to public opinion and, if so, by what means does the judge ascertain what that public opinion is. As sometimes proves to be the case, the answer to this critical legal question is not as clear as it might be.

Although the common law has developed a body of principles governing the ascertainment of an appropriate sentence, these

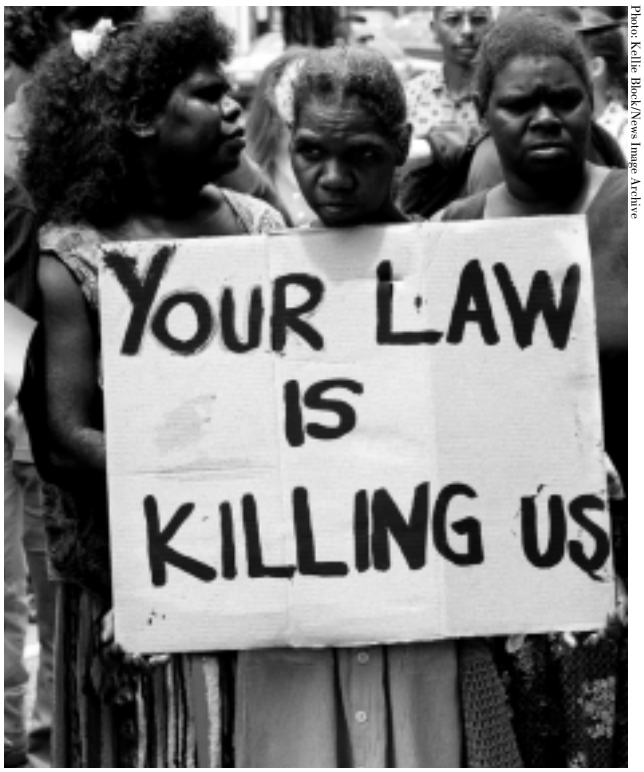

Photo: Kellie Block/News Image Archive

Protest over mandatory sentencing outside Darwin's Magistrates Court.

principles do not refer to public opinion. They are consistent with the proposition implicitly stated by Judge Zobel that the judge must do his or her judicial duty in accordance with principle without giving way to popular urgings or public opinion polls. That is not to say, however, that the judge cannot take account of community views on sentencing generally as distinct from community views on the sentence which should be imposed in the particular case.

There are powerful reasons why it is not helpful for the judge to have regard to public opinion about the sentence to be imposed in the particular case. For one thing, how does one ascertain what that opinion is? For another thing, how could the judge be satisfied that the opinion was an informed opinion, based on relevant sentencing principles and reflecting knowledge of all relevant circumstances of the case? And thirdly, there is the risk that opinion about the particular case may represent an emotional reaction to one or more aspects of the crime.

The English view

On the other hand, the cardinal principle of sentencing law that the punishment must be proportionate to the gravity of the circumstances of the offence[12] allows the judge to take into consideration the public perception of the gravity of the kind of offence which was committed. The second is that there is ground for thinking that the judge is entitled to take account of general considerations relevant to 'public confidence in the criminal justice system'.[13] On this view, the judge can take account of the public concern that crimes of violence should be severely punished. Indeed, there is ground for thinking that the judge *should*, in assessing the gravity of the offence, at least *consider* the relevance of the public view of offences of that kind. Indeed, it is very likely that the judge is *required* to take account of that view, so long as it is identified in an acceptable form, a matter which I shall address a little later.

What I have just said reflects, subject to some qualifications, the discussion by the House of Lords judges, in particular Lord Steyn, in the case involving the sentencing of the English child murderers of James Bulger, a boy aged two.[14] I shall not go into the facts of that case because the English statutory régime governing sentencing in murder cases has no Australian counterpart. In the case of the two children, that régime required the imposition of a mandatory sentence – detention at Her Majesty's pleasure. But the statutory régime left with the Minister (the Home Secretary) the determination of the period which the children should serve in custody. In setting the tariff period in the *Bulger Case*, the Minister had been influenced by a public opinion poll in *The Sun* newspaper, relying upon 21,281 coupons which had been filled in by readers. The Minister's approach was found to be flawed by a majority of the English judges. And when the case was taken to the European Court of Human Rights, the statutory régime was found to contravene article 5(4) of the European Convention for the Protection of Fundamental Rights and Freedoms because the minimum period of detention was set by the Executive, not by a court.

The *Bulger Case* and its aftermath make a fascinating story. But time does not permit us to explore it on this occasion.

The Australian view

In New South Wales, in 1998, the Court of Criminal Appeal introduced a régime of sentencing guidelines along the same lines as the régime which existed and exists in England. The object of the régime was, according to the judgment of Chief Justice Spigelman, in *Jurisic*,[15] 'to reinforce public confidence in the integrity of the process of sentencing'. The Chief Justice continued: 'Guideline judgments …may assist in diverting unjustifiable criticism of the sentences imposed in particular cases.'[16]

The idea was that an appropriate balance should exist between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency of sentencing and the maintenance of public confidence in sentences actually imposed and the judiciary as a whole, on the other.[17]

Spigelman CJ expressed his agreement with a statement by Lord Bingham LCJ to the effect that when differences of opinion arise on issues of sentencing between judges and 'an identifiable body of public opinion', the judges are bound to consider who is right. This is because a significant disparity between public opinion and judicial sentencing conduct will eventually lead to a reduction in the perceived legitimacy of the legal system.

The critical question here is what is meant by the expression 'an identifiable body of public opinion'. The body of public opinion that Spigelman CJ identified in *Jurisic* related to the offence of occasioning death or serious injury by dangerous driving. He did so largely, if not wholly, by reference to the legislative prescription of sentences for that offence and statements made by the Attorney-General as to the seriousness of the offence, when introducing the legislation. This, along with a history of successful prosecution appeals against lenient sentences, enabled the Court of Criminal Appeal to conclude that the judges had 'not reflected in their sentences the seriousness with which society regards the offence'.[18]

In November 2001, however, the High Court of Australia criticised the New South Wales guidelines on the ground that their effect is to constrain the sentencing discretion conferred by statute on the sentencing judge.[19] In that decision, the High Court was dealing with a case relating to sentences imposed for being knowingly concerned in heroin importation. The High Court did not discuss the rationale advanced by the Court of Criminal Appeal for

the introduction of guideline sentencing.

Future directions

What can we take from this increased judicial emphasis on the importance of maintaining public confidence in the administration of justice and its linkage with the relevance of public opinion in sentencing offenders? In an area of the law which is undergoing rapid development, one can only look to apparent trends. Not without some diffidence, I make the following comments.

First, although the distinction between public clamour about the particular case and more generalised public opinion about the severity or lack of severity of sentences applicable to particular classes of offence is not easy to make, it offers a way forward. Secondly, for reasons already discussed, it is unthinkable that the courts will simply impose sentences by reference to public opinion of what is the appropriate outcome in a particular case. Thirdly, it is more likely that the courts will regard more generalised and 'identifiable' public opinion as a tangential factor to be taken into account.

This brings me to several more fundamental questions. One is how does the judge ascertain relevant public opinion? Although there are difficulties in saying that a judge can take judicial notice of public opinion, to require proof by evidence scarcely seems sensible. No doubt the judge can have regard to any relevant pattern of legislative history and statements made by the responsible minister. The judge may also be entitled to have regard to responsible expressions of opinion in the Parliament so long as it appears that they reflect a broad consensus of opinion.

There is no basis on which the courts can take account of and give effect to public sentiment of what is the appropriate outcome in a particular case.

Can the judge go further and look also to informed writings and to the elements of public and political debate and distil from them what are matters of public concern? This is an approach which seems to involve a substantial degree of subjective evaluation. To that extent, it may be thought to be questionable, though in some instances it may be possible to identify matters of public concern with some confidence.

Another fundamental question is whether there is a place in this scheme of things for a dialogue between the judges and the executive government. We know that the Premier of New South Wales has communicated views to the Chief Justice of New South Wales who had at an earlier time received representations from the Opposition as to aspects of law and order. We do not have a record of the discussions and we do not know what the precise terms of the Chief Justice's response was. No doubt the discussions were in general terms and did not relate to any particular case that was pending in the Supreme Court.

The prospect of a dialogue, particularly a continuing dialogue, between the judiciary and the executive government about sentencing would represent a new development and, like all new developments, it would involve some imponderables. There is a risk of a perception that the judges would be seen as compromising judicial independence and exposing themselves to political influence. That risk might have consequences for public confidence in the administration of justice. On the other hand, potential avenues for better informing the judges in relation to aspects of their work should be explored. If any such dialogue is to take place, it should be properly structured and recorded. Publication of an appropriate summary record would help to lessen potential misunderstandings.

The final question is: what are the consequences for taking into account public opinion in other areas of the law? One area of the law that springs to mind is judicial review of administrative decisions, especially in migration and deportation cases. This is an area of the law where there is considerable scope for disputation and controversy. Without venturing into details, I mention the criticism made several years ago by Mr Ruddock, as Minister for Immigration, of certain Federal Court immigration decisions, one of which was *Eshetu*, a decision which was subsequently overruled by the High Court.[20]

Going back even further there was Government criticism of court decisions in migration and deportation cases. Although judicial decisions on these matters may lend themselves to controversy because people have strong views on such topics, the legal issues at stake are quite different from the legal issues which arise in sentencing decisions. The legal issues in migration cases are generally discrete and there is no scope for taking account of generalised public opinion on the legal issues which do arise.

So, in conclusion, the approach of the courts in sentencing cases is unlikely to migrate to other areas of the law, except in so far as the courts may find it necessary in relation to some particular issues to look to community perceptions. But there is no basis on which the courts can take account of and give effect to public sentiment of what is the appropriate outcome in a particular case.

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1 *Commonwealth v Louise Woodward*, Memorandum and Order, 19 November 1997; see S. Shute, 'The place of public opinion in sentencing law' [1998] Crim LR 465.

2 See, for example, Sir Gerard Brennan, 'Courts for the people – not people's courts' (1995) 2 *Deakin Law Review* 1 at 6-7

3 *Bell v Stewart* (1920) 28 CLR 419 at 432 per Isaacs and Rich JJ

4 *The King v Dunbabin* (1935) 53 CLR 434 at 447 per Dixon J

5 ibid at 448.

6 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309 per Mason, Wilson and Dawson JJ

7 (1932) AC 562

8 (1992) 175 CLR 1

9 *Spring v Guardian Assurance* [1995] 2 AC 296

10 Lord Goff of Chieveley thought that the duty would have little impact; Lord Slynn thought it would have no impact. Lord Woolf thought that some referees would be more timid but that there was little likelihood of no reference being given.

11 *Jago v District Court (NSW)* (1989) 168 CLR 23; *Wilson v Minister for Aboriginal Affairs and Torres Strait Islanders* (1996) 189 CLR 1; Kable v DPP (NSW) (1996) 189 CLR 51

12 *Chester v The Queen* (1988) 165 CLR 611 at 618

13 *R v Secretary of State for the Home Department ex parte Venables* [1997] 3 All ER

14 ibid.

15 [1998] 101 A Crim R 259 at 266

16 ibid.

17 ibid.

18 ibid at 269-270

19 *Wong v The Queen* [2001] HCA 64 (15 November 2001)

20 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611