

# NINIAN MARTIN STEPHEN KG AK GCMG GCVO KBE FAHA

1923–2017

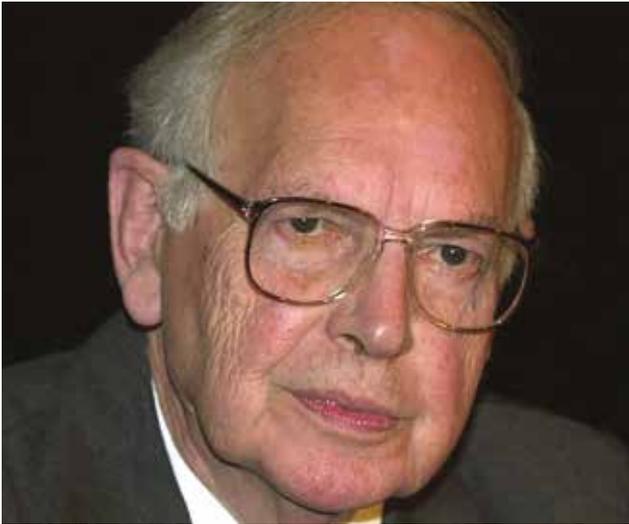


PHOTO: COURTESY OF THE STEPHEN FAMILY COLLECTION

**S**oldier, barrister, High Court judge, Governor-General, mediator in Northern Ireland, founding member of the first war crimes tribunal since Nuremberg and Tokyo, head of UN and Commonwealth missions to crisis zones from Bangladesh to Cambodia to Burma, Sir Ninian Stephen's career was marked by extraordinary depth and diversity. He would not like the claim that he is the most honoured Australian to date, though in terms of his five knighthoods including the Garter and two 'Gs', he is. And yet, because so much of his work was undertaken far from Australia, it is not widely known by the average Australian.

Born of Scottish parents on 15 June 1923 at Nettlebed near Henley-on-Thames, he was just three weeks old when his father deserted to Canada. Ninian was brought up by his mother and the woman she was paid to accompany, Nina Mylne, who lived on wool cheques from a vast Queensland run. The three of them drifted from one Continental spa town to the next, putting up at the best hotels. It was Miss Mylne's money that saw him through a series of elite schools: the Edinburgh Academy, St Paul's in London (Milton's school), and Chillon College above Montreux. It was Miss Mylne who paid for his holidays in France, took him to the 1938 Nuremberg Rally and in 1940 to Melbourne, where he matriculated that year at Scotch College.

After a year doing part-time Law at the University of Melbourne alongside work as a law clerk at Arthur

Robinson's, he enlisted and spent the years from 1942 to 1945 on military service with the 2nd AIF (Artillery and Water Transport) in Australia and the South Pacific, rising to the rank of lieutenant. He married Valery Sinclair soon after his discharge, and from then on she was a crucial factor in his successful career, along with their five daughters, who grew up in a home that radiated warmth and culture.

Much in life simply came his way. He told me that, aside from a failed application to enter the diplomatic service following completion of his law course, he never applied for a thing. Having by chance entered the law, by the late 1960s his analytical intelligence had made him one of the two or three leaders of the Victorian commercial bar (QC 1966). That led to his being offered a seat on the Supreme Court of Victoria (1970–72), and soon afterwards on the High Court of Australia (1972–82). His work there led Malcolm Fraser to offer him the position of Governor-General (1982–89), and his evident skills in that role led to the numerous diplomatic and mediatory positions that followed.

Despite his success as a barrister, many of his colleagues, such as Bill Ormiston (who told me this), 'thought Ninian had no serious interest in the law'. According to his associate Ross Robson, on their trips together Stephen talked history, never law. 'Disinterested' best describes his attitude to the law. W. B. Yeats thought people who were 'full of passionate intensity' were 'the worst'; Stephen, with his essential serenity and disinterested mind, was free of the distortions that go with passionate intensity. A cold analysis of his years at the Victorian Bar, together with the observations of those who knew him then, suggests a level of forensic skill and success close but perhaps not quite equal to that of Keith Aickin and (at his best) S.E.K. Hulme. He could see, very quickly and apparently without much effort, through the myriad complexities of a difficult case to the key issues and a solution.

He was also free of partisanship. During his ten years on the High Court he showed an independence of mind allied with respect for precedent and for the Constitution as written and understood by its authors. Within the shifting parameters of circumstance and necessity he balanced in a cautious and conscientious manner the conflicting demands of Canberra and the states, the individual and government, generally opposing what he

saw as threats to the federal structure of the nation and to freedoms enshrined in the Constitution, freedoms to which he was personally wedded by background and conviction. He was certainly among the best on the High Court during the 1970s and would have made a good Chief Justice of that Court, where his judgments are frequently cited (and in lower courts, too). He lacked the intellectual force of an Owen Dixon to steer the Court down new and distinctive paths of interpretation, although in a number of important cases he led the way in defining and affirming relevant principles of judicial reasoning. A plausible criticism is that he tried too hard to be balanced and that he sat too much on the political and constitutional fence, offending nobody on either side.

In his farewell address at the High Court in 1982 he summed up what he conceived to be the proper judicial role of a Justice on that Court: 'As an unelected, unrepresentative and substantially irremovable appointee, it is no bad thing that his prime function is not intended to be to legislate at large but instead to adjudicate between parties according to the law as it stands, making new law only incidentally, piecemeal as and when the determining of cases before him requires it.' In other words he was neither a judicial activist nor a black-letter judge.

The most significant of his contributions to the office of Australian Governor-General was this: for the first time in Australia's history the *de facto* head of state entered the international world of politics on a frequent basis. In his discussions not only with other heads of state but with the political leaders too (Thatcher, Mitterand, Turkey's Evren, China's Hu Yaobang, Malaysia's Mahathir, Singapore's Lee Kuan Yew, the list goes on), and in his subsequent reports to the Australian prime minister, he took his office beyond the merely ceremonial and into the world of diplomacy, influencing his nation's perceptions of (and potentially actions in) the wider world. Some of these discussions took on a pseudo-political aspect previously unknown within the office. It is this development, initiated in several instances by Stephen himself rather than by Fraser or Hawke, that constitutes the more important of his two major contributions to the developing conventions of his office.

The other contribution—more controversial, and criticised as an expansionary exercise of authority by many observers including Malcolm Fraser ('He shouldn't have done that')—was his resuscitation of a power many constitutional lawyers had believed to be obsolete, by way of his insistence on 3 February 1983 on being properly informed and persuaded by his prime minister before acceding to his request for a double dissolution of Parliament. That he felt compelled, after several hours, to finally concede the double dissolution on the basis of what he knew to be dubious advice was in Stephen's mind secondary. He was not prepared to precipitate a constitutional crisis. In his view the rightness of his initial

refusal was proven by the misrepresentation he saw in the delayed advice he received four hours after throwing it back at Fraser.

It was the view of Sir Paul Hasluck that retired governors-general should take on no further office, as anything else would represent a decline in status. In particular they should never accept a commission from a government and work as a public servant for the state they had headed, taking instructions from ministers, departmental heads and others who had previously served them. 'An apex is the wrong shape to be a stepping stone', as Hasluck put it. There were many who agreed with him. Their views have a strong logic. Stephen was about to ignore them over and over again, and work not just on behalf of the Australian Government but also the British Government, the Commonwealth Secretariat and the United Nations. The most dramatic and interesting experiences of his life were in front of him.

Prime Minister Hawke had extended the period of Sir Ninian's tenure as Governor-General to 1989 so that he could serve through the Bicentenary celebrations. Following his retirement from the post in early 1989, Hawke asked him to be Australia's Ambassador for the Environment, the first of his several *ad hoc* diplomatic appointments. There followed his appointment by the British Government to the post of chairman of the Northern Ireland peace talks, in the course of which he brought the feuding political parties into extended negotiations and the first moves towards reconciliation, a process culminating, in other hands, in the Good Friday Agreement of 1998; his appointment as foundation judge on the International Criminal Tribunal for the former Yugoslavia (ICTY); his appointment by the Commonwealth Secretariat in London as mediator between Government and Opposition in Bangladesh, in a situation fraught with violence and the threat of civil war or *coup d'état*; his appointment by the United Nations as leader of a UN delegation to Cambodia to establish a tribunal to try former Khmer Rouge leaders; and his appointments as leader of two UN missions to Burma, the most recent in 2005, to explore the extent of forced labour in its hinterland.

These were just the most significant of his many international appointments following retirement as Governor-General. From the same position Hasluck went home, Sir John Kerr into exile, Sir Zelman Cowen back to his old Oxford College, Oriel. An academic post would have meant little to Stephen, whose principal interests had always been history and diplomacy. Fortune threw him multiple opportunities to revenge his rejected 1949 application to enter the diplomatic world. Applications were no longer required.

His international judicial work at The Hague on the International Criminal Tribunal for the former Yugoslavia was high in quality. He was the key player in

formulating the ICTY's rules and procedures and would have been the judges' choice as President of the Tribunal, had there not been opposition (prompted by timidity) from Australia. The judgments he wrote while at The Hague are exemplary in their reasoning and fairness.

The international diplomatic work is highly interesting, but its results were mixed. Who, in 1992, could have sealed a peace accord between the Protestants and Catholics of Ulster? Not Stephen, and not (as Ian Paisley made amply clear to me) anybody else. It was premature, but it was a start. The Bangladesh mediation was another mission impossible—the timing was wrong, and he misjudged the personalities and self-interest of the women who led the warring political parties there. Stephen's report to the UN on the options for a Cambodian war crimes tribunal contributed significantly to an ultimately successful result. The Burma missions, intended to pressure a reluctant military government to eradicate militarily enforced conscripted labour in remote conflict zones, were too mixed up with the exigencies of an ethnically unstable state, as well as age-old practices, to promise much success.

Stephen's final years were marked by the happy discovery of half-siblings in Canada, where his father, it turned out, had bigamously remarried. It had always been thought,

certainly by Stephen himself, that his father had died in 1923 of some war-related illness, not that he had deserted wife and infant son to start again across the Atlantic. There were get-togethers with the 'new' relations.

He was immensely charming, with a brilliantly quick wit he retained to the end. Tall and slim, he looked elegant even in the most casual of clothes. Everything seemed effortless. Fluent in French from childhood, he was a Commandeur of the Légion d'honneur from 1983, and entirely at home in the regions of France, where the culture is at its most vigorous and where he preferred to spend overseas vacations. Through to his ninetieth birthday and beyond, he kept up his many patronages and memberships and continued to accept occasional speaking engagements, including at the opening of Ninian Stephen Chambers in Melbourne in 2011. Almost to the last he was still going in to his office at 4 Treasury Place each week to deal with semi-official correspondence, and to restaurants and shops around South Yarra. Fortunate to the end, he died at home, sitting alongside his wife, untroubled and without a sound.

#### PHILIP AYRES FRHistS FAHA

Material in this obituary is referenced in the author's biography of the subject, *Fortunate Voyager: The Worlds of Ninian Stephen* (Carlton, Vic.: Miegunyah Press/Melbourne University Publishing, 2013).