JUDICIAL INDEPENDENCE AND LIBERAL DEMOCRACY

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Observations following presentation by Judge Jose Matos, President of the Court of Appeal Court of Porto, Portugal and President of the International Association of Judges to the Australian Academy of Law, 22 August 2022

Introduction

1. Thank you, Judge Matos, for creating such a vivid picture of challenges to judicial independence internationally, and for explaining how the International Association of Judges is working to safeguard judicial independence around the world. We are extremely fortunate to have the benefit of your experience and knowledge on this topic, as President of the IAJ, at a time when judicial independence is not merely of academic or theoretical interest.

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* Justice of the High Court of Australia. I gratefully acknowledge the significant assistance of my associates, Jamie Blaker and Olivia Ronan, in the preparation of these observations.

2. By the time of the Australian Constitutional Conventions of the late 19th century, the concept of judicial independence was well formed in the minds of British lawyers (noting that Australia was then a part of the British Empire). The importance of an independent judiciary was stated by Sir Josiah Symon – the chair of the 1897-8 Australasian Federal Convention's judiciary committee – when he said in 1897 that an independent judiciary, under the Constitution, was a desire which should properly be held by "everyone who has the interests of the Constitution at heart"[1].

3. Nearly one hundred years later, Sir Gerard Brennan maintained that a judiciary of "unquestioned independence" is essential to give effect to the enduring values of a free and democratic society, which values inform the development of the common law and help to mould the meaning of statutes[2]. Judicial independence, Sir Gerard noted on another occasion, "exists to serve and protect not the governors but the governed" and is "the priceless possession of any country under the rule of law"[3].

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1 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897 at 950-951. See also *South Australia v Totani* (2010) 242 CLR 1 at 43-44 [63].

2 Brennan, "Courts, Democracy and the Law", paper delivered at the Blackburn Lecture, Canberra, 7 August 1990. See also Brennan, "Courts, Democracy and the Law" (1991) 65(1) *Australian Law Journal* 32 at 40.

3 Brennan, "Judicial independence", paper delivered at the Australian Judicial Conference, Canberra, 2 November 1996.

4. In the present century, it has been said that the importance of judicial independence in Australia is "clear and uncontested"[4]. Indeed, Judge Matos' presentation arguably reinforces the extent to which judicial independence has come to be assumed and accepted in Australia.

5. While judicial independence has come to be an idea that may convey "different shades of meaning to different minds"[5], the core idea is that Australian judges operate within an institutional framework that enables the impartial discharge of their roles, deciding all cases brought before the courts "without fear or favour, affection or ill-will"[6]. On a day to day basis, the community does not rely upon judicial impartiality for protection or maintenance of democratic processes, although it expects that courts will adjudicate disputes that may arise in relation to the conduct of free and fair government elections. Rather, there is a day to day community assumption about judicial impartiality in support of the individual

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4 Ananian-Welsh and Williams, "Judicial Independence from the Executive: A First-Principles Review of the Australian Cases" (2014) 40 *Monash University Law Review* 593 at 595.

5 Stephen, *Sir Owen Dixon — A Celebration* (Melbourne University Press, 1986) 6.

6 As Lady Hale said in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 at [25]: "impartiality is the tribunal's approach to deciding cases before it ..., [while] [i]ndependence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public" (cited in Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) at 67).

freedoms that are the goal of liberal democracy. Most Australians assume that an Australian judge would not hesitate to find against the government or a government agency if the law requires that result.

6. Although many Australians might not stop to consider why this assumption of judicial independence prevails, and although it may seem self-serving for judges to promote the need for judicial independence, its importance requires regular explanation and reinforcement[7]. Reasons for justifying judicial independence include the substantial powers exercised by judges, particularly when exercised against elected governments or when affecting the liberty of the subject; the substantial financial cost to the community of maintaining the Australian court systems; and the apparently privileged situation of Australian judges.

7. In Australia, key aspects of judicial independence have been identified as security of tenure and financial security; decisional independence, including the power of courts to determine their own jurisdiction and competence according to law; the operational independence of the courts, which includes adequate resourcing by

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7 See e.g. Lord Hodge, 'Preserving Judicial Independence in an Age of Populism', speech delivered to the North Strathclyde Sheriffdom Conference, 23 November 2018; Brennan, "Judicial independence", paper delivered at the Australian Judicial Conference, Canberra, 2 November 1996; see also r 3(a)(i) of the Australian Judicial Officers Association Rules, available at <https://www.ajoa.asn.au/wp-content/uploads/2022/05/G01_02_26-Rules-as-at-March-2021.pdf>.

the Executive government; and personal independence, which includes judicial immunity from suit or retribution for judicial acts[8].

8. In contrast with what might be the case in other countries, based on Judge Matos' account, Australians who thought about it would probably assume that Australian judges discharge their role without fear for their personal safety, particularly at the hands of powerful members of the community or at the hands of the government. This could be understood as an aspect of a judge's personal independence, although I wonder whether many Australians would think that a judge is in a different position from any other Australian in terms of expecting to go about their daily business safely. In fact, occasionally, the personal safety of an Australian judge is threatened although, so far as I know, such threats have emanated exclusively from individual litigants. Australian judges do not fear imprisonment, let alone mistreatment during imprisonment or deportation.

9. From time to time, complaints are made about judicial misconduct or underperformance, particularly in relation to delay. In the federal sphere, this has led most recently to calls for independent

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8 Ananian-Welsh and Williams, "Judicial Independence from the Executive: A First-Principles Review of the Australian Cases" (2014) 40 *Monash University Law Review* 593 at 593-4, 598-602.

oversight of complaints about judges[9]. However, it has never seriously been suggested in Australia that judges ought not to have the benefit of security of tenure which, for Federal judges and judges in New South Wales, is protected by constitutional provisions amendable only by a process involving a referendum[10], and for judges in a number of other States is protected by constitutional provisions the subject of other, less stringent kinds of entrenched manner and form requirements[11]. Consequently, Australian judges do not have reason to fear mass dismissal or sanctions based upon their decisions.

10. This does not mean that there is no need for discussion about judicial independence in Australia. To the contrary, the recent Australian Law Reform Commission Report into judicial impartiality[12] recommended that accessible public resources should be made

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9 See, most recently, Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) at 310 [9.25]ff (addressing recommendation 5). See also Law Council of Australia, *Principles underpinning a Federal Judicial Commission* (2020) available at <https://www.lawcouncil.asn.au/publicassets/96b2f0e1-de70-eb11-9439-005056be13b5/Principles%20underpinning%20a%20Federal%20Judicial%20Commission.pdf>

10 *Constitution Act 1902* (NSW), s 7B(1)(a) and Pt 9; *Australian Constitution*, ss 72, 128.

11 See e.g. *Constitution Act* 1975 (Vic) ss 18(2)(fb), 87AAB; *Constitution Act* 1934 (SA), ss 8, 74, 75.

12 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021).

available that would explain the processes and structures in place to support the independence and impartiality of judges and the mechanisms in place to ensure judicial accountability[13].

11. It is also significant that judicial independence may also be compromised in less direct ways than those described by Judge Matos. There are claims that public criticism of the English judiciary, including from government ministers, may have in recent years affected judicial decisions[14]. The mere suggestion challenges perceptions of judicial independence, to the potential detriment of the courts' legitimacy. In South Africa, there has been the case of Judge President Hlophe, of the Western Cape Division of the High Court of South Africa, who was found by South Africa's Judicial Service Commission to have attempted to influence two members of the South African Constitutional Court in their consideration of a case concerning Jacob Zuma, before his election as President of South Africa[15]. There is probably no good reason to think that Australian judges would not be as vulnerable as English or South African judges to pressure from public criticism or to pressure from

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13 Australian Law Reform Commission, Without Fear or Favour: Judicial Impartiality and the Law on Bias (Report No 138, December 2021) at 497.

14 All Party Parliamentary Group on Democracy and the Constitution, *An Independent Judiciary - Challenges Since 2016: An Inquiry into the Impact of the Actions and Rhetoric of the Executive since 2016 on the Constitutional Role of the Judiciary* (8 June, 2022) at 3, 7-8.

15 *Hlophe v Judicial Service Commission & Ors* [2022] ZAGPJHC 276 at [4]-[6].

their own judicial colleagues, were such pressure ever to come to bear here.

Judicial independence amid the global democratic recession

12. In Australia, disputes about judicial independence have been litigated only rarely.

13. In 1920, the Privy Council overturned the High Court's decision in *McCawley v The King*, affirming that the Queensland legislature had power to appoint a Supreme Court judge for a term of seven years, corresponding with his appointment as a judge of the Court of Industrial Arbitration[16]. The question of judicial independence was not addressed in the Privy Council's judgment.

14. In the 1980s, in *Attorney-General (NSW) v Quin*[17], and in *Macrae v Attorney-General (NSW)*[18], the abolition of the Courts of Petty Sessions in New South Wales, and an executive decision not to reappoint some of the abolished Courts' members to the newly constituted Local Court, led to judicial review proceedings. As Deane J framed the argument in *Quin*, the contest was between two considerations of relevance to judicial independence, namely, the extent of the former stipendiary magistrates' security of tenure and

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16 *McCawley v The King* (1920) 28 CLR 106; [1920] AC 691.

17 (1990) 170 CLR 1.

18 (1987) 9 NSWLR 268.

the scope of the Executive power to determine merit-based processes for judicial appointment[19]. Mason CJ noted that judicial review of an appointment process might be available where the reorganisation of a court is not a "genuine" exercise, and is instead a sham to effect the improper removal of a sitting judge[20].

15. In 2005, in *Fingleton v The Queen*[21], the doctrine of judicial immunity for criminal suit fell to be interpreted and applied by reference to what, in that case, was identified as the doctrine's underlying rationale: "the protection of judicial independence in the public interest"[22]. That public interest was said to "require[] security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions"[23]. The Chief Magistrate of Queensland was found to be immune from criminal prosecution in connection with conduct relating to an administrative review of her decision to transfer a magistrate to a different location[24].

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19 *Quin* (1990) 170 CLR 1 at 42-43.

20 *Quin* (1990) 170 CLR 1 at 19.

21 (2005) 227 CLR 166.

22 *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38].

23 *Fingleton* (2005) 227 CLR 166 at 186 [39].

24 *Fingleton* (2005) 227 CLR 166 at 192 [55], 192-193 [59], 211 [123], 225 [171].

16. In 2006, in *Forge v Australian Securities and Investments Commission*[25], a six member majority of the High Court found that a power to appoint acting judges to the Supreme Court of New South Wales was constitutionally valid. However, the majority recognised that a power to appoint temporary judges, if abused, might lead to appointments affecting the character of the relevant court as a court, for example, so that the court no longer appeared to be impartial[26].

17. These Australian cases reveal points where, within our general constitutional structure, friction can arise as between the arms of government. Doctrines applied or raised in these cases serve (at least functionally) to anticipate, and quell, points of friction. But the incidence of that kind of friction, in our own history, is quite different to purposeful assaults upon the independence of courts in connection with a process of democratic backsliding. What we find in our own history is plainly more benign.

18. The Australian cases I have mentioned occurred in the decades bookending the turn of the 20th century. Those decades presented a very different context. In those decades, liberal democracy had triumphed in successive wars, including (as was then a recent memory) the Cold War. The growth of liberal democracy had at that stage occurred in a series of waves, the latest of which was known

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25 (2006) 228 CLR 45.

26 *Forge* (2006) 228 CLR 45 at 69 [46], 86 [93].

to political scientists as the "third wave", bringing into the growing camp of liberal democracies a large number of Eastern European, and South American countries[27]. In the academic literature, there emerged the language of "consolidated democracies". That language, which is still used today, reflected "a growing consensus in the literature"[28] that once a democracy has become economically developed and has changed governments on multiple occasions through a free electoral process, the democracy becomes consolidated in the sense that the democracy can (as two leading political scientists of the time said) "expect to last forever"[29]. So long as established democracies were understood to be "consolidated" in that permanent sense, pressures upon judicial independence within those democracies could not be expected to appear as a grave threat to the democracies' foundations.

19. But now, challenges to judicial independence occur in a different global context. The notion that democracies can be treated as consolidated in a strong sense has proven wrong[30]. The "third

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27 Huntington, "Democracy's Third Wave" (1991) 2 *Journal of Democracy* 12.

28 Mounk, "The End of History Revisited" (2020) 31 *Journal of Democracy* 22 at 27.

29 Przeworski and Limongi, “Modernization: Theories and Facts” (1997) 49 World Politics 155 at 165; Mounk, "The End of History Revisited" (2020) 31 *Journal of Democracy* 22 at 27.

30 Diamond, "Democracy's Arc: From Resurgent to Imperilled", January 2022, available at <https://www.journalofdemocracy.org/articles/democracys-arc-from-resurgent-to-imperiled-expanded-edition/> ("It is a... fallacy to view consolidation as a one-time, irreversible process").

wave" of democracy has been followed by what Professor Larry Diamond has termed a democratic recession[31].

20. In a survey of 16 countries that, with the exception of Russia, were identified as commencing a process of democratic backsliding during the democratic recession of the last 16 years, the political scientists Stephan Haggard and Robert Kaufman have described attacks upon the judiciary as generally forming part of a broader attempt, by governments of the 16 countries, to "collapse... the separation of powers"[32].

21. Given our legal and political origins in Britain, it is hard to ignore concerns about loss of judicial independence in the United Kingdom. We will all remember the infamous Daily Mail headline "Enemies of the People" in November 2016, with large photographs of three judges of the High Court of England and Wales who had ruled that the UK government required parliamentary consent to give notice to the European Union of Brexit[33].

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31 Diamond, "Facing Up to the Democratic Recession" (2015) 26 *Journal of Democracy* 141.

32 Haggard and Kaufman, "The Anatomy of Democratic Backsliding" (2021) 32 *Journal of Democracy* 27 at 36.

33 See Rozenberg, *Enemies of the People? How Judges Shape Society* (2021, Bristol University Press).

22. A 2020 survey of judicial attitudes in the UK[34] was answered by nearly all salaried judges in the United Kingdom[35]. The answers given by the judges of England and Wales Courts and UK Tribunals (which were broadly consistent with the separately reported answers of the Scottish and Northern Irish judges) indicated high and elevated concerns since 2016 about changes in the judiciary germane to judicial independence. Particular concerns were in the area of operational independence, including: 97% of those surveyed were somewhat or extremely concerned about staff reductions; 92% about fiscal constraints; 82% about loss of experienced judges; 81% about court closures; 79% about inability to attract the best people into the judiciary and 74% about reduction in face to face hearings[36]. Personal safety for judges was a matter of some or extreme concern for 61% of judges in England and Wales[37]; 50% of

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34 University College London Judicial Institute, 2020 UK *Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* (2021) ("England and Wales Judicial Attitudes Survey"); University College London Judicial Institute, 2020 *UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in Scotland* (2021) ("Scotland Judicial Attitudes Survey"); University College London Judicial Institute, 2020 *UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in Northern Ireland* (2021) ("Northern Ireland Judicial Attitudes Survey").

35 The website on which the report is published states that the survey was completed by "99% of judges": https://www.ucl.ac.uk/judicial-institute/research/judicial-attitude-survey .

36 England and Wales Judicial Attitudes Survey at 66.

37 England and Wales Judicial Attitudes Survey at 66.

judges in Scotland[38]; and, notably, 84% of judges in Northern Ireland[39].

23. In June 2022, the UK All Party Parliamentary Group on Democracy and the Constitution released a report following '[a]n inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary'[40]. The report found that "[i]n recent years ministers have reacted to losing cases by accusing judges of bias or incompetence"[41]. It further found "evidence of one direct attempt by a minister to influence a particular judicial decision"[42], as well as instances of ministers (to quote the report)[43]:

> "making public statements which misrepresent judicial decisions, launching ad-hominem attacks on judges who decide against them, responding to adverse decisions with threats to "reform" the judiciary (including to bring it under political control), and conflating "decisions with political consequences" with "political decisions", thereby giving the misleading impression that judges are stepping outside their constitutional bounds."

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38 Scotland Judicial Attitudes Survey at 34.

39 Northern Ireland Judicial Attitudes Survey at 27.

40 All Party Parliamentary Group on Democracy and the Constitution, *An Independent Judiciary - Challenges Since 2016: An Inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary* (8 June 2022) ("APPGD Report").

41 APPGD Report at 7 [2].

42 APPGD Report at 7 [5].

43 APPGD Report at 7-8 [5].

24. The result, it was found, was that "[j]udges may be subject to a context of soft pressure, in which the constant threat of political reform hangs over them if they decide against the executive"[44]. A possible, though the report stresses, not established, indicator of this soft pressure was said to be that "seven decisions [of the UK Supreme Court] were identified, since 2020, in which the Supreme Court has departed from its previous authority and assumed a position more palatable to the executive"[45].

25. Shortly after the APPGD report was published, *The Guardian* reported that the proportion of successful civil applications for judicial review excluding immigration case in England and Wales in 2021 had fallen significantly "against a background of criticism by Ministers" as compared to 2020[46]. A Queens Counsel and director of the Good Law Project was quoted as saying that "[t]he data suggests a collapse in judicial scrutiny of the government". Another Queens Counsel, and a professor of human rights, was also quoted as follows:

> It is hard to avoid the thought that the background noise of hostility to the judges and the courts, being generated relentlessly not only by ministers but even by the attorney general herself, has had an effect

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44 APPGD Report at 8 [6].

45 APPGD Report at 8 [7].

46 Siddique, "Dramatic fall in successful high court challenges to government policy", *The Guardian*, 24 June 2022.

26. An interesting development, which I only have time to mention, concerns efforts in member states of the European Union to invoke Article 2 of the Treaty of the European Union (which states, among other things, the foundation of the Union on the rule of law)[47] in order to challenge whether governmental action reflects judicial independence as understood in EU law. These challenges have led to the development of EU jurisprudence on judicial independence by the Court of Justice of the European Union[48].

Conclusion

27. An obvious lesson for Australian lawyers concerns vigilance for the maintenance of appropriate standards of judicial independence. In its relation to liberal democracy, judicial independence serves to maintain the legitimacy of courts as protectors of democratic processes and liberal freedoms. Those protections are achieved not merely by the actual determination of individual cases but by the prophylactic presence of independent judges who are available to decide a case falling within their jurisdiction if asked.

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47 *Treaty of the European Union*, Art 2 ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.")

48 Bard, "In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law" (2022) *European Law Journal* 1.

28. We can expect Australians to look overseas and draw their own conclusions, for better or for worse, about events that are harmful to judicial independence. Recent history says that liberal political cultures may decline in the face of illiberal populist movements and or a multiplicity of other circumstances such as economic inequality and social discontent or states of emergency. There is no reason to suppose that Australia is immune from the risk of democratic backsliding.

29. A final lesson concerns the importance of explaining and justifying appropriate standards of judicial independence. It would be foolhardy to rely upon community assumptions and unreflective acceptance in the face of real challenges to liberal democracy. As the judiciary is expected to satisfy a wider range of contemporary values such as diversity, efficiency and accountability, in addition to the traditional values of impartiality and reasoned judgments, there is greater complexity around the proper scope of judicial independence. Public education and informed debate will be important contributors to respect for judicial independence and community confidence in judicial impartiality. In this regard, I note that Professor Wojciech Sadurski, Challis Professor in Jurisprudence at the University of

Sydney, has written extensively about the situation of judges in Poland[49].

49 Sadurski, *Poland's Constitutional Breakdown* (2019, OUP); Gliszczynska-Grabias and Sadurski, "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)" (2021) 17 *European Constitutional Law Review* 130; Sadurski, "Constitutional Design: Lessons from Poland's Democratic Backsliding" (2020) 6 *Constitutional Studies* 59; Sadurski, "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler" (2019) 11 *Hague Journal on the Rule of Law* 63.