ADVANCING JUDICIAL LEGITIMACY:
THE STAKES AND THE MEANS

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Introduction

1. We begin with independence and impartiality: fundamental qualities of the Australian judge[1]. Those qualities ensure that justice is not only done, but is seen to be done[2]. Judicial life starts with an oath or affirmation to do "right to all manner of people according to law without fear or favour, affection or ill-will". A judge is disqualified from hearing a case, not only where they are affected by actual bias but also where bias is apprehended, that is, if a fair-minded lay observer might reasonably apprehend that the judge might not bring

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* Justice of the High Court of Australia. I gratefully acknowledge the research and assistance of my associate, Jamie Blaker, in the preparation of this speech.

1 *Ebner v Official Trustee in Bankruptcy* (2000)205 CLR 337 at [3]; *South Australia v Totani* (2010) 242 CLR 1 at [3]; Sir Ninian Stephen, 'Judicial Independence', Blackburn Lecture, reported *sub nom* "Judicial Independence Depends on Standards On and Off the Bench" (1989) 14 *Australian Law News* 12.

2 *Ebner* (2000) 205 CLR 337 at [6]; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

an impartial mind to the resolution of the question the judge is required to decide[3]. Thankfully, instances of apprehended bias, let alone actual bias, are rare.

2. Independence and impartiality might make for a lonely life. Judges accept a degree of isolation as the necessary price for discharging a role which is intellectually and, quite often, emotionally demanding, but in the performance of which most judges feel a great deal of pride and satisfaction. And any sense of judicial isolation may be tempered by considering the interconnectedness of our respective situations. Australian judges exercise judicial power as an aspect of governmental power that also comprises legislative and executive power, in a system of checks and balances. They apply a body of laws and procedures, mostly with the benefit of precedents written by their judicial predecessors. Each judge is a member of a court that forms part of one or more court systems, depending upon whether it is a State or Federal Court. Appellate judges hear appeals with their judicial colleagues, debating issues and determining whether and to what extent they can reach consensus in a given case.

3. More personally, judges mostly work in cities where they occupy chambers with administrative staff and associates or tipstaves; with judicial colleagues and their respective staff in chambers next door

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3 *Ebner* (2000) 205 CLR 337 at [6]; *Charisteas v Charisteas* [2021] HCA 29.

or nearby, and with Registry staff with whom they have varying degrees of interaction. In some courts, a new judge is assigned a judicial mentor. Often, judges form court committees to manage or improve the operations of the relevant court as a whole. Many judges participate in academic or professional development by giving lectures or speeches in a variety of settings, or by assisting with judicial formation through bodies such as the National Judicial College of Australia.

4. Court rooms require intensive human interaction, albeit within a framework of legal processes, with advocates, litigants, witnesses and court staff. The vast majority of court proceedings are conducted in "open court" so that the judge's conduct may also be observed by journalists, members of the public and, of course, juries. Court rooms and courts more generally are now recognised as workplaces for advocates, instructing solicitors and court staff, raising issues about the impact of judges on occupational health and safety.

5. The interconnectedness of our respective situations means that each judge, in the performance of the judicial role and, quite often, in their personal conduct, is in a position to affect confidence in and respect for the Australian judicial system or, in other words, judicial legitimacy. The concept of "judicial legitimacy" is a helpful one, not least because it joins the area of inquiry with a broader enquiry, in political philosophy, as to the nature and sources of political

legitimacy.[4] In 2020, Justice Stephen Breyer of the Supreme Court of the United States spoke of "the general tendency of the public to respect and follow judicial decisions, a habit developed over the course of…history"[5]. This tendency may be understood as a product of judicial legitimacy. It is not complete proof of judicial legitimacy (because a judiciary might be well regarded, and its decisions accepted, although it is lacking moral or legal legitimacy)[6] but it is a useful proxy for judicial legitimacy for the purposes of this discussion.

6. My aim this evening is to contextualise the Australian judge and to offer some thoughts about how each of us should or might respond to that context in the interests of judicial legitimacy, always having due regard to preserving our necessary and fundamental independence and impartiality. The question "Who judges the judges" has been asked many times over the years.[7] To my mind, an

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4 As to which see, e.g., Peter, 'Political Legitimacy', The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>.

5 Breyer, *The Authority of the Court and the Peril of Politics* (2021, HUP) at 29.

6 Fallon Jr, *Law and Legitimacy in the Supreme Court* (2018, Harvard University Press) 21.

7 See e.g. Bathurst, 'Who Judges the Judges, and How Should They Be Judged?' The Judicial Review cited at (2019) 14 *The Judicial Review* 19; Cappelletti, "Who Watches the Watchmen?" (1983) 31 American Journal of Comparative Law 1.

equally pertinent question is "Who is not judging the judges?" How can a judge maintain a sense of legitimacy while being scrutinised and challenged by appellate courts, practitioners, media, academics, court staff, not to mention family and friends? The challenges sometimes concern the legal content of judgments but also relate to questions of identity, efficiency and workplace management. The wider context in which we work offers inspiration. High quality judicial decision making, applying the judicial method, demonstrates a commitment to legality and robust fact finding in a world of false narratives and encourages tolerance of the inevitable complexity of the human condition. Good judicial temperament may provide an antidote to what has been aptly described as the "contentious, cantankerous nature of modern discourse"[8]. Conversely, judicial legitimacy will be eroded without a thoughtful response to the power imbalances that affect many of our daily interactions.

Judicial legitimacy

7. Thankfully, most discussions of judicial legitimacy in Australia have a prophylactic, rather than a defensive tenor[9]. As in the United States,

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8 Applebaum, *The Twilight of Democracy: The Failure of Politics and The Parting of Friends* (2021, Penguin Random House) 109.

9 Gordon, 'The Integrity of Court: Political Culture and a Culture of Politics' (2020) 44(3) *Melbourne University Law Review* 863; See also Krebs, Nielsen and Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) *Melbourne University Law Review* 43, 605.

Australians habitually respect the decisions of Australian courts even when they consider those decisions to be wrong. Justice Breyer described a similar attitude in his own country as "so normal that hardly anyone notices it". He added "[a]s the air around us, also unnoticed, allows us to breathe, so too this habit allows the rule of law to persist and flourish"[10].

8. In Australia, the exercise of judicial power in civil litigation is generally taken to settle for the future "a question as to the existence of a right or obligation", creating "a new charter by which that question is in the future to be decided"[11]. Australians mostly adopt and act on those judge-made charters without any need for enforcement, even when they are the disappointed party.

9. This attitude of acceptance permeates, not only the general public, but also the executive and legislative arms of the State and Commonwealth governments. For example, the High Court handed down its judgment in *Love & Thoms*[12] on the morning of 11 February 2020. Prior to the decision, Mr Love and Mr Thoms were in immigration detention. The judgment bore upon the lawfulness of

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10 Breyer, *The Authority of the Court and the Peril of Politics* (2021, HUP) 28.

11 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361 at 374.

12 *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (2020) 270 CLR 152.

the Commonwealth's detention of Mr Thoms, who was accepted to be an Australian aboriginal. The judgment was communicated to the detention centre at about 11:15 am and Mr Thoms was released from detention little more than 30 minutes later.

10. In recent years, the High Court has found invalid, for example, a decision of a delegate of the Minister for Home Affairs to refuse to issue a protection visa[13], a warrant executed by the Australian Federal Police[14], and a Commonwealth funded school chaplaincy program[15]. The High Court has invalidated, among other laws, Commonwealth cross-vesting legislation[16], New South Wales electoral funding legislation[17] and certain provisions of the *Workplaces (Protection from Protesters) Act 2014* (Tas)[18]. None of these decisions have been defied, or otherwise led to any discernible challenge to judicial independence. It is fair to say that, without widespread public respect for the courts' legitimacy, the legislative and executive arms of government would have the strongest of temptations to seek to strengthen their power by diminishing judicial

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13 *Plaintiff M7/2021 v Minister for Home Affairs* (2021) 95 ALJR 404; (2021) 389 ALR 1.

14 *Smethurst v Commissioner of Police* (2020) 94 ALJR 502; (2020) 376 ALR 575.

15 *Williams v Commonwealth of Australia* (2012) 248 CLR 156.

16 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

17 *Unions NSW v New South Wales* (2019) 264 CLR 595.

18 *Brown v Tasmania* (2017) 261 CLR 328.

power, whether by ignoring judicial decisions that they considered wrong or inconvenient or in some other fashion.

11. Acceptance of the exercise of judicial power is the product of a fund of judicial legitimacy built over time[19]. The public response of Prime Minister Sir Robert Menzies to the High Court's decision in the *Communist Party Case*[20] is a powerful illustration of judicial legitimacy. Four days after the Court held the *Communist Party Dissolution Act* invalid, Menzies said in Parliament that he had "no legal criticisms to make" of the High Court although his view was that the Court's decision caused "grave concern... to some millions" of Australians[21]. The Commonwealth government then sought to obtain constitutional support for its invalidated legislative scheme, at first through a reference of power from the States, and later through the conduct of a Constitutional referendum. Those initiatives, which ended in failure, were further expressions of executive acceptance of the Court's decision. Among Australian citizens, the perceived justice of the Court's decision meant that the Court's reputation was

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19 Chilton and Versteeg, "Courts' Limited Ability to Protect Constitutional Rights" (2018) 85 *The University of Chicago Law Journal* 293, 301, referring to empirical findings 'that building [judicial] legitimacy requires gaining support among successive, nonoverlapping constituencies'.

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

21 Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1951, 365.

"never higher"[22]. In that way, although a test of the Court's authority, the decision almost certainly grew that authority.

Democratic backsliding

12. It is worth broadening our horizons by considering the role of an authoritative and independent judiciary in supporting democracy and democratic values. Professor Aharon Barak, former President of the Supreme Court of Israel and author of "The Judge in a Democracy" named protection of the constitution and democracy as one of two major tasks of the judge in a democratic society[23]. He argued:[24]

> The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy and proper elections, and substantive democracy, as expressed in the concepts of separation of power, the rule of law, fundamental principles, independence of the judiciary, and human rights.

13. Many will accept that judicial independence is "the life blood of constitutionalism in democratic societies"[25]. A 2011 study of 163

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22 Winterton, 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630 at 653.

23 The other task was described as "bridging the gap between law and society". Barak, *The Judge in a Democracy* (2006, Princeton University Press) at xviii.

24 Barak, *The Judge in a Democracy* (2006, Princeton University Press) at xviii.

25 Barak *The Judge in a Democracy* (Princeton University Press 2006) at 76-77 quoting here Lamer CJ of the Supreme Court of Canada in *Beanregand v Canada* [1986] 2 SCR 56 at 70.

countries across 41 years (1960-2000) found that established independent judiciaries prevent regime change toward authoritarianism across all types of states[26]. In 2017, the American authors of the study affirmed their view that judicial independence is of structural importance for democracy. They argued that judicial independence requires public belief that courts are legitimate; political elites' respect for judicial authority and healthy political competition within the relevant nation.[27]

14. However, since the beginning of this century, judicial legitimacy has been tested in many democratic societies, not least the United States, the United Kingdom and some member states of the European Union. In the United Kingdom, the discussion has grown out of an older discourse concerning the proper relationship between British parliamentary sovereignty and the rule of law[28].

Compare Chilton and Versteeg, "Courts' Limited Ability to Protect Constitutional Rights" (2018) 85 *The University of Chicago Law Journal* 293; Huq, Ginsburg and Versteeg, 'The Coming Demise of Liberal Constitutionalism' (2018) 85 *University of Chicago Law Review* 253.

26 Gibler and Randazzo, 'Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding' (2011) 55 *American Journal of Political Science* 696.

27 Gibler and Randazzo, 'Can the Courts Protect Democracy? Yes, but they Need these Three Supports', *Washington Post* (17 February 2017).

28 For relatively earlier contributions to that discussion, which transverses judiciary and academy, see: Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2003); Goldsworthy, *Parliamentary Sovereignty: Contemporary*

15. In the United States, discussion about judicial legitimacy appears to be largely focussed on the Supreme Court and processes of judicial appointment to that Court[29], although the legitimacy of courts lower in the judicial hierarchy has also attracted discussion[30]. In one instance, in 2017, a judicial ruling halted enforcement of an executive order issued by President Trump[31] to suspend entry into the United States for persons who came from seven primarily Muslim countries.[32] President Trump responded to an initial adverse

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Debates (CUP, 2010); *Jackson v Attorney General* [2006] 1 AC 262 at [102], per Lord Steyn and at [104]-[105], per Lord Hope; Cf that discussion in its current vein: Ekins, 'Its Time to Take Back Control from our Judges', The Spectator (26 October 2021) (accessible at: https://www.spectator.co.uk/article/it-s-time-to-take-back-control-from-our-judges).

29 Fallon Jr, *Law and Legitimacy in the Supreme Court* (2018, Harvard University Press); Epps and Sitaram, 'How to Save the Supreme Court' (2019) 129 *Yale Law Journal* 148; Ackerman, 'Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court' L.A. TIMES (Dec. 20, 2018) (accessible at: https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html) some focus has also been laid on the legitimacy of lower American courts: Grove, 'Sacrificing Legitimacy in a Hierarchical Judiciary' (2021) 121 *Columbia Law Review* 1555.

30 Grove, 'Sacrificing Legitimacy in a Hierarchical Judiciary' (2021) 121 *Columbia Law Review* 1555.

31 The executive order was entitled "Protecting the Nation from Foreign Terrorist Entry into the United States.

32 *State of Washington, et al., Plaintiffs v Donald J Trump, et al., Defendants,* Case No. C17-0141JLR (W.D. Wash. Feb. 3, 2017).

interlocutory ruling by denouncing the judicial officer on Twitter in the following terms:[33]

> The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!

Significantly, then Supreme Court nominee, Neil Gorsuch, asserted his and the U.S judiciary's independence by saying that it was "demoralizing" and "disheartening" that the president had tweeted criticism of the relevant court[34].

16. The subject of judicial legitimacy has been made salient by political events: Brexit in the United Kingdom[35], and political polarisation in the United States[36]. Following the decision of the High Court of

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33 Politico Staff, 'Trump Lashes Out at the 'so-called Judge'' Who Rebuked his Travel Ban, *Politico* (2 April 2017, accessible at https://www.politico.com/story/2017/02/trump-judge-james-robart-234645)'.

34 Jacob, 'Supreme Court Nominee Neil Gorsuch Calls Trumps Judge Attacks "Demoralizing"', *The Guardian* (9 February 2017, accessible at: https://www.theguardian.com/law/2017/feb/08/neil-gorsuch-donald-trump-tweet-federal-judge).

35 See, e.g., Ekins, 'Protecting the Constitution: How and Why Parliament Should Limit Judicial Power' (2019, Policy Exchange paper) 12-14; the current setting in the UK has been described as 'one of criticism, and by some condemnation, of the courts': Galligan (ed), *The Court and the People: Friend or Foe?: The Putney Debates* (2019, Hart) 1.

36 Epps and Sitaram, 'How to Save the Supreme Court' (2019) 129 *Yale Law Journal* 148 at 152, 169-170.

England and Wales in the *Miller* litigation, which concerned the need for British parliamentary approval for Brexit[37], the Daily Mail notoriously published an article titled "ENEMIES OF THE PEOPLE", implying that the judges who gave that decision were motivated by political rather than legal considerations. It is now commonplace for commentators to refer to United States Supreme Court justices as "Democratic" or "Republican" judges.

17. Worryingly, there appears to be an association between challenges to judicial independence and "democratic backsliding", an expression which has been explained as "the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy"[38]. And the broad consensus of political scientists is that "[l]iberal democracy …is under greater threat today than at any time since the Second World War"[39].

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37 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

38 Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5, 5.

39 Plattner, 'Democracy Embattled' (2020) 31 *Journal of Democracy* 5, 5. The state of the consensus as between political scientists is also addressed by Plattner on that page; see also: Diamond, 'Democracy's Arc: From Resurgent to Imperilled' (2022) 33 *Journal of Democracy* 163, 168-9 ('Every annual global assessment now warns of a serious downward spiral, as in the titles of the most recent Freedom House survey, “Democracy Under Siege”').

18. Many countries that were democratised around the end of the Cold War, as a part of democracy's so-called "third wave"[40], have regressed from positions of democratic consolidation to intermediate positions described in the academy as "illiberal democracy"[41] and "competitive authoritarianism"[42]. Democracies that were previously "illiberal" or otherwise weak have now "broken down".[43] At the beginning of 2022, Stanford Professor Larry Diamond, surveying 32 years as co-editor of the *Journal of Democracy*, described an accelerating democratic recession in which even some of the "leading liberal democracies", including the United States, have been "on a glide path toward polarization and decay"[44]. Standing back from all this, Professor Diamond has assessed the present moment

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

41 Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30 *Journal of Democracy* 5; cf Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22.

42 Diamond, 'Democracy's Arc: From Resurgent to Imperilled' (2022) 33 *Journal of Democracy* 163, 168-9.; The seminal discussion of the phenomenon is: Levitsky and Way, 'Elections Without Democracy: the Rise of Competitive Authoritarianism' (2002) 13 *Journal of Democracy* 51.

43 Diamond, 'Democracy's Arc: From Resurgent to Imperilled' (2022) 33 *Journal of Democracy* 163, 168.

44 Ibid.

as "the darkest moment for freedom in half a century".[45] Recent events in Ukraine have surely made the moment even darker[46].

19. The path of democratic backsliding has not been the same everywhere. But it has, with exceptions, been similar everywhere—and certainly in the way it has affected judges. Where backsliding has occurred, it has been typified by certain stages and processes[47]. These have involved an initial stage of diminishing public trust in government institutions, consequent growth (or appearance through metamorphosis) of populist, anti-system political parties, and then success for those parties in free and fair elections. Where these political parties have then managed to achieve effective control of the executive and legislative arms of government, the most powerful officials within the parties have used majoritarian rhetoric to justify assaults on the existing liberal constitutional constraints on government power[48].

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45 Ibid 176.

46 Professor Diamond described a "worrisome possibility that Russia will unleash more overt and massive military force to bring Ukraine to heel" and identified Ukraine and Taiwan as "the front lines of the struggle to defend freedom in the world: Ibid 174.

47 See Haggard and Kaufman, 'The Anatomy of Democratic Backsliding' (2021) 32 *Journal of Democracy* 27; Levitsky and Ziblatt, *How Democracies Die: What History Reveals About Our Future* (2019, Penguin) 4-5.

48 Haggard and Kaufman, 'The Anatomy of Democratic Backsliding' (2021) 32 *Journal of Democracy* 27.

20. Almost inevitably, those assaults fall heavily upon the independence of the judiciary, and also upon the judiciary's composition and legitimacy. A study of democratic backsliding, as it has been occurring in 16 countries, was recently published in the *Journal of Democracy*. Based on the study's observations of those 16 countries, the study found that "curtailing the independence of the judiciary is a key element of the backsliding process"[49]. The study further found that "[e]ither verbal assaults on the judiciary or actual meddling, particularly through control of appointments, were clearly visible in twelve of the sixteen backsliding cases"[50].

21. In 2017, the Judicial Conference of Australia (JCA) expressed concerns about developments in Poland affecting the independence of its judges[51]. In 2019, the experience of the Polish judiciary was considered by Professor Wojciech Sadurski, a member of the law faculty at the University of Sydney in a book entitled *Poland's Constitutional Breakdown*[52]. Prior to two crucial elections in 2015, Poland was considered a consolidated democracy[53]. It showed

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49 Ibid 36.

50 Ibid 36-7.

51 Australian Judicial Officers Association, 'Serious Concerns About Threat to Independence of Poland's Judges: 21 July 2017' (statement dated 22 July 2022, accessible at: https://www.ajoa.asn.au/serious-concerns-about-threat-to-independence-of-polands-judges/)

52 Sadurski, *Poland's Constitutional Breakdown* (2019, OUP).

53 Freedom House, for example, rated Poland as a consolidated democracy in its 2015 'Nations in Transit' report in 2015

"exemplary characteristics of democratic alternation of power", with the government having "changed hands six times since 1990"[54]. In 2015, however, Poland's Law and Justice party had narrow victories in both the presidential and parliamentary elections of that year. Sadurski claims that this precipitated "a fundamental authoritarian transformation [in Poland]: the abandonment of dogmas of liberal democracy, constitutionalism, and the rule of law that had been so far taken for granted."[55]

22. The JCA's 2017 statement noted several changes to Polish laws affecting that country's legal system, including the laws giving politicians full control over the appointment and promotion of judges; a law which gave the Minister of Justice significant influence over the presidents heading the work of the courts and another law affecting the Polish Supreme Court, by providing for the early retirement of all Supreme Court judges, allowing for the further appointment of judges chosen by the Minister of Justice. Then JCA President, Justice Robert Beech-Jones, said: "[t]hese changes to the law directly affect the independence of the judiciary in Poland and would appear to violate the Polish Constitution".

(accessible at: https://freedomhouse.org/country/poland/nations-transit/2015). By 2020, that rating was downgraded to 'semi-consolidated democracy' (accessible at: https://freedomhouse.org/country/poland/nations-transit/2020);

54 Sadurski, *Poland's Constitutional Breakdown* (2019, OUP) 2.

55 Ibid 3.

23. Hong Kong presents another, albeit quite different example. In recent days, two Justices of the United Kingdom Supreme Court — Lord Reed and Lord Hodge — have resigned as non-permanent judges of the Hong Kong Court of Final Appeal. In doing so, they cited the Hong Kong national security law enacted in 2020.[56] These resignations follow the departure, on a similar basis, of Justice James Spigelman from his position as a non-permanent judge of the same Hong Kong court. Conversely, former Australian High Court Chief Justices Gleeson and French, and former High Court Justice Gummow stated their intention to remain on the Hong Kong Court and to support the judges of that court "in their commitment to judicial independence". Former Canadian Chief Justice McLachlin also stated her intention to remain on the court saying "The court is operating as an independent, judicial branch of government - perhaps the last surviving strong institution of democracy".The case of the Hong Kong Court of Final Appeal illustrates that it is possible to disagree profoundly about how judicial legitimacy may be advanced in a particular case.

24. Of course, Hong Kong and Poland are distant from Australia, both in terms of geography and, more significantly, experience. Australia, like every country, has its own distinctive political culture and

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56 'Role of UK judges on the Hong Kong Court of Final Appeal'(Statement from the President of the UK Supreme Court, The Right Hon Lord Reed of Allermuir, 17 July 2020, accessible at: https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal.html)

geopolitical position in the world. Certainly compared to Poland, Australia is an older democracy. What is more, the crucial catalyst for democratic backsliding as it occurred in Poland—political polarisation and distrust—is apparently not present in Australia in anywhere near the degree seen in countries that have regressed along the liberal or democratic spectrums. As to that, in 2015 an American political scientist, Professor Thad Kousser, used his own jurisdiction as a yardstick. Professor Kousser observed that "Australia is polarised..., but it is now where the US was in the 70's or 80's, about halfway down [the United States'] journey to political polarisation"[57].

25. International events provide cause for vigilance. But even within Australia, there has been a concerning decline in the public's trust in government institutions. The results of the Australian National University's Australian Election Study, conducted in 2019, suggest that trust in Australian government has fallen to its lowest level since the study's inception in 1969[58]. The study also found, on the

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57 Kousser, 'Polarization vs. Polarisation: Comparing Party Divergence in the US and Australia' (Fullbright Flinders University Lecture Series 5, delivered 18 June, Flinders City Campus) 15.

58 Cameron and McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Australian National University, December 2019) 15; Cf Sadurski, *Poland's Constitutional Breakdown* (2019, OUP) 9 (writing that a 'strong rejection of institutional politics creates a favourable social ground for anti-constitutional populism: when institutions matter so little, it is no wonder that the institutions that are there turn out not to be resilient in the face of a resolute and energetic assault').

basis of voter responses, that satisfaction with democracy in Australia is at its lowest level (59%) since the constitutional crisis of the 1970's. This figure put Australia only one place above Poland in a ranking of OECD countries' satisfaction with democracy[59]. As former New South Wales Chief Justice Bathurst said last year, "[t]he judiciary must take this decline in public trust seriously"[60].

26. I do not mean to overstate the role of judges in a liberal democracy. It would be a mistake to think that the endurance of any democracy could be made to rest on judges' shoulders. The mistake in that thought was identified by the American jurist, Learned Hand, when he wrote that "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it"[61]. Those poetics correspond with the data. A recent American empirical study has concluded that the "the presence of independent courts alone might not be enough to stop a government determined to curb its citizens' rights".[62]

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59 Cameron and McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Australian National University, December 2019)15.

60 Bathurst, 'Trust in the Judiciary' (2021 Opening of Law Term Address, 3 February 2021) 2.

61 Hand, 'The Spirit of Liberty' in I Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1952), 189-190.

62 Chilton and Versteeg, "Courts' Limited Ability to Protect Constitutional Rights" (2018) 85 *The University of Chicago Law Journal* 293, 297

27. It must further be kept in mind that judges must not stray beyond the judicial function, even where motivated to anticipate and foil perceived threats to liberty. That itself would be undermining of democracy. As Ben Chifley cautioned: "never is liberty more easily lost than when we think we are defending it"[63]. It is no surprise that, at her recent Senate confirmation hearings, Judge Ketanji Brown Jackson affirmed:

> I know that my role as a judge is a limited one. That the Constitution empowers me only to decide cases and controversies that are properly presented. And I know my judicial role is further constrained by careful adherence to precedent[64].

Advancing judicial legitimacy

28. How then might an Australian judge, without exceeding the boundaries of their judicial function, contribute to judicial legitimacy during this period of declining public trust, in a global context of receding democracy and advancing authoritarianism?

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63 Quoted in Winterton, 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630, 636

64 As reported in Thrush, 'Jackson vows in her opening remarks to be an independent judge who knows her 'limited role', *The New York Times, 21 March 2022, accessible at:* https://www.nytimes.com/2022/03/21/us/politics/ketanji-brownjackson-hea ring-opening-statement.html .

Judicial method

29. Fidelity to judicial method is surely crucial[65]. The Australian judicial method, as described by Justice Dixon in his 1955 lecture entitled "Concerning Judicial Method", involves an attitude in direct contrast to that of the so-called "legal realists", whose views Dixon challenged in his lecture. Legal realism was a school of thought that, at the time of the lecture, had significant influence over American law[66]. According to the legal realists, the process of judicial decision-making is an application of the judge's personal psychology and political values. In the words of one leading realist, a judge "decides by feeling, and not by judgment; by 'hunching' and not by ratiocination".[67] According to legal realism, when writing reasons, whether consciously or unconsciously, judges cherry-pick legal

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65 Gleeson, "Judicial Legitimacy" (2000) 20 *Australian Bar Review* 4, 11: "The quality which sustains judicial legitimacy is ... fidelity"; Hayne, "Letting Justice Be Done Without the Heavens Falling" (2001) *Monash University Law Review* 12, 17: "Faithful application of precedent is at the heart of the judicial task. The justice which a judge must do, is justice *according to law*." (original emphasis), cited in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 72 [127].

66 The theory has not been discarded. See, for example, Patrick, Legal Realism and Australian Constitutional Law (January 26, 2022), accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018056

67 Hutcheson, 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) 14 *Cornell Law Quarterly* 274, 278.

principles to justify their political and moral intuitions, which are in truth controlling of the decision.[68]

30. The judicial method described by Justice Dixon refutes the excesses of sceptical realism. Its essence, as Dixon described it, is that "courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard."[69] Or as Justice Dixon put the proposition a few years later in another lecture:[70]

> "The courts in their way seek truth only upon some narrow or restricted question defined in advance by the law, a question which is submitted to them because it supplies the standard of decision between the parties."

31. More broadly, the judicial method exemplifies transparent, rational and cogent decision-making. Findings of fact are made on the basis of admissible evidence. Preparation of reasons, especially written reasons, cultivates a habit of critical reflection as the judge attends to the careful identification of the issues for determination, the elements of the cause or causes of action, the principles governing

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68 Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1998) 29 *University of Baltimore Law Forum* 5, 5.

69 Dixon, 'Concerning Judicial Method', in Crennan and Gummow (eds), *Jesting Pilate* , And Other Papers and Addresses, 3rd ed (2019) 116.

70 Dixon, 'Jesting Pilate', in Crennan and Gummow (eds), *Jesting Pilate* , And Other Papers and Addresses, 3rd ed (2019) 75.

determination of the relevant issues and the application of the principles to the facts as found. This painstaking approach is readily contrasted with a perceived worldwide "epistemic crisis"[71] in which lies are normalised, dissent and minor misdeeds (whether real or imagined) are cancelled with about as much fairness as medieval trial by ordeal, and social media provides a noisy, global platform, not only for the good, but also the mad, the sad and the bad[72]. Some criticism of overly long judgments may be warranted but, mostly, judgments reflect the complexity of the factual and legal issues presented and are carefully responsive to individual expectations of justice that, in turn, reflect the expectations of the wider community.

32. Dixon's version of the judicial method is not some philosophical commitment, among most judges, to the idea that the law bearing on any given case will always, upon a purely logical analysis, dictate the decision, as if legally informed minds could not disagree. Rather, the fundamental working assumption of judges in the common law tradition is that cases are to be decided by application of external legal standards properly understood. Whatever its philosophical merits, that working assumption is itself undoubtedly real. Its adoption by Australian judges is all that could explain the forms of

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71 Rauch, *The Constitution of Knowledge* (2021, Brookings Institution Press).

72 Ronson*, So You've Been Publicly Shamed* (2015, Riverhead Books).

legal argument and judicial reasons, as well as the substance of most judicial decisions. For trial courts, honest fact finding on the basis of evidence presented to the court and recorded in reasons is a core aspect of demonstrated legitimacy.

33. The conduct of judicial proceedings in accordance with that fundamental assumption is a hallmark of Australia's traditions of judicial practice.[73] Its tendency is to build and conserve judicial legitimacy. Judicial proceedings, when conducted upon that assumption, take on their familiar character as a process of identifying and then applying the law, where the law is treated as a "definite system of accepted knowledge",[74] however intellectually difficult may be the correct identification of the relevant law. To the extent that judicial proceedings have that character, in the end result their determination cannot be attributed to the judge's own political preferences, or the judge's own conceptions of justice.

34. The objective quality thereby achieved allows individual decisions, and the work of the courts more generally, to be understood as directed to upholding the rule of law. Even where a litigant loses, if they lose by a process that they can identify with the rule of law,

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73 Cf Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 7-8.

74 Dixon, 'Concerning Judicial Method', in Crennan and Gummow (eds), *Jesting Pilate* , And Other Papers and Addresses, 3rd ed (2019) 115.

then although they may think the result unfair, they might nonetheless accept it as the result of a just and socially necessary process, conducted to achieve the rule of law, an ideal venerated in our public culture. To the extent that the judicial process cannot be identified with the rule of law, the position is different. The judicial process must to that extent devolve, in both the litigant's perception and in reality, into an "exercise ... [of] unregulated authority over the fate of men [and women] and their affairs" - or so Justice Dixon suggested in his lecture.[75]

35. Fidelity to the judicial method, and the resulting affinity between the judicial process and the rule of law, builds the courts' legitimacy. But it also conserves the courts' legitimacy. It is worth noting, in that regard, sceptical realism would be seen to reappear throughout the 20th century in "repeated bouts" that were "often linked to [periods of] heightened social and political turmoil".[76] As to that, Professor Tamanaha has written that these bouts were, in realism's American heartland, "prompted by deep unhappiness about law or judges, with critics time and again deploying already-at-hand sceptical arguments as a weapon".[77]

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75 Ibid 123.

76 Tamanaha, 'Understanding Legal Realism' (2009) 87 Texas Law Review 731, 783.

77 Ibid at 784.

Judicial temperament

36. Judicial temperament is a significant matter because public confidence is likely to be affected by individual experiences of judges, whether that experience is direct (say by attending a court room) or indirect (say by reading a judgment or a report of a judgment, or a media report, or by hearing someone's account of an interaction with a judge. Professor Barak proposed the following judicial traits that would tend to support public confidence in judges, and they seem uncontroversial: (1) awareness of the judge's power and the limits of that power; (2) recognition and acknowledgement of error; and (3) in both writing and thinking, a display of modesty and an absence of arrogance.[78]

37. While the quality of a judge may be assessed, to a significant degree, from the body of the judge's work as recorded in judgments or on transcripts, judges' interactions with individuals can make a lasting impression for better or for worse. To give a quotidian example, the High Court justices are religiously punctual, in meetings with each other, but more significantly in the court room. I hope that this practice conveys respect for litigants and their representatives, for each other, and for the legal system.

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78 Barak, *The Judge in a Democracy* (Princeton University Press 2006) at 111-112.

38. As a barrister, I experienced a wide variety of judges and magistrates. Unfortunately, I do recall instances of judicial officers who humiliated lawyers and litigants; who seemed indifferent to anxiety of persons who were somehow involved in the case at hand or even just an independent witness; who were pompous or scathing. No doubt there may have been explanations or even excuses for their unfortunate behaviour. My much more general recollections are positive. They are of judges and magistrates who managed long court lists calmly and courteously, delivering even handed and compassionately expressed ex tempore sentencing judgments one after another, well-prepared and knowledgeable judges who treated advocate and litigants in person with firm dignity and clients who came away from their day in court expressing confidence that they had received a fair hearing. These recollections are an important reason why I was honoured and proud to become a judge. I understood that I was joining a community of people for whom I had, and still have, enormous respect.

39. Judicial temperament is expressed in the way that a judge manages the atmosphere of the court room. The New South Wales Judicial Commission's Handbook for Judicial Officers notes that bad behaviour in the courtroom can involve a number of relationships: lawyer v lawyer; lawyer v client; lawyer v witness; lawyer v judge and judge v any of the foregoing[79]. As a trial judge, I experienced

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79 Phillips, 'Judicial Bullying' in *Handbook for Judicial Officers* (accessible at:

almost no truly bad behaviour in the court room but I did experience inappropriate behaviour calculated to upset litigants seeking to vindicate their claims or defences in the face of that conduct. There were also instances when the solemnity of the court was compromised and needed to be addressed immediately, although it can also be a matter for judgment whether solemnity is promoted or compromised by addressing inappropriate conduct when it occurs. We have probably all had to consider whether to reproach the litigant who declines to show respect for the court by, for example, declining to stand for the judge. How should we respond when a helpful person tries to close the door of the court to block noise outside, not appreciating the importance of open justice? Does it matter if a public servant turns up to court in rolled up shirt sleeves, without a shirt or tie. Or if a young solicitor (left alone without the senior partner) repeatedly scoffs at a witness's evidence? A lack of sense of occasion can be hard to achieve when hearings are conducted online, as had occurred during the Covid pandemic. Unintended indignities include participants talking over each other, dropping off the line, knocking over their computers, shooing away barking dogs and chattering small children. In one instance, I had opposing counsel addressing each other by their first names while the court was in session, which must have been dismaying for their respective clients. My conclusion is that judges cannot assume that

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https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judicial_bullying.html)

people who attend court (whether in person or online) will behave correctly. It follows that judges do need to be ready to manage the atmosphere of their courtroom to demonstrate and advance judicial legitimacy.

40. The question of temperament also extends to judicial writing. Many trial judges experience the pain of reversal on appeal, in the language of "plainly wrong", "glaringly improbable" or "manifestly inadequate". At an intellectual level, we recognise the necessity of applying tests that are expressed in these harsh terms and we may agree or disagree with the appellate court's conclusion. However, this form of criticism serves as a reminder that adverse findings and assessments can be harmful as well as unpleasant. Again, social media offers illustrations of criticism that ranges from devastating and life destroying through to simply ugly and gratuitous. Some harmful commentary is likely the product of the ease of publication. The requirement for judges to give reasons should allow ample opportunity for reflection. Unnecessarily harsh words can mostly be saved overnight for deletion in the morning. This applies not only to written assessments of litigants, witnesses and counsel, but also to written assessments of trial judges by appellate courts. In particular, appellate courts harm their legitimacy in the eyes of courts lower in the judicial hierarchy if they use language that conveys a sense of superiority over their judicial colleagues.

Courts as workplaces

41. I wish to raise the troubling subject of judicial workplace misconduct because of its obvious capacity for impairing judicial legitimacy. Beyond judicial temperament as a matter affecting the dignity and solemnity of the courts, judicial misconduct in the form of courtroom bullying is recognised to be unacceptable[80]. As former High Court Justice Michael Kirby has observed in connection with courtroom bullying, serious bullying by judicial officers should be regarded as an abuse of public office[81].

42. In January 2018, the NSW Bar Association conducted a Quality of Working Life survey which indicated that 66% of respondents had experienced judicial bullying.[82] A Victorian Bar Association survey

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80 Bathurst, 'Judicial bullying? Not in my courts', The Australian 7 June 2013; G Martin, 'Bullying in the courtroom' (2013) 4 *Workplace Review* 16 at 16-17; cf. P Young, "Judicial Bullying" (2013) 87 ALJ 371. The New South Wales Judicial Commission's Handbook for Judicial Officers notes that there is no universal definition of bullying, but refers, non-exclusively, to"a threat to another's professional status (eg belittling opinion, public professional humiliation, accusation regarding lack of effort); threat to personal standing (eg name calling, insults, intimidation, devaluing with reference to age)…overwork (eg undue pressure, impossible deadlines, unnecessary disruptions)"

81 Kirby, 'Judicial Stress and Judicial Bullying' (2014) 14 *QUT Law Review* 1, 12.

82 Moses, 'Judicial bullying can't be tolerated', The Australian, 10 May 2018.

has yielded similar results.[83] In 2013, then Professor Anthony Foley said:[84]

> Power is at the heart of bullying in the workplace, and for lawyers the workplace includes the courtroom. The relationship between the Bench and the lawyer appearing in court is not an equal one. Judicial officers, if they are bullies, are no different from any other bully. They pick the weak and the vulnerable, and the young lawyer is perhaps their easiest target.

43. Of course, it is important to remember that the individual experiences of the surveyed practitioners may not, on detailed scrutiny, reveal as troubling a picture as appears at face value. But let us proceed upon the basis that many practitioners have experienced what they regarded as judicial bullying in our courts. On that premise, courtroom bullying has been endured not only by the direct victims of the misconduct but also by the other embarrassed folk who were required to observe it. Most probably, this will have included anxious litigants, court officers and junior practitioners. Sadly, the bad impression caused by one single instance of misconduct tends to be magnified, including by reflecting adversely upon judges as a group. We should consider whether our individual behaviour could be harmful and whether we can do more to ensure that courtrooms are not feared as venues for bullying conduct.

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83 Victorian Bar, Quality of Working Life Survey, *Final Report and Analysis*, October 2018. See also K Nomchong, "Judicial bullying: the view from the bar…

84 Foley, 'The effect of courtroom behaviour on the well-being of lawyers new to practice' (2013) 4 *Workplace Review* 19, 21.

44. The problem of judicial misconduct tarnishing the wider community of judges extends to misconduct outside the courtroom. In the last year or two, most courts have developed policies directed to addressing misconduct in judges' chambers. One of the peculiar characteristics of judges' chambers is the combination of disparity of power between judges and court staff, particularly young associates and tipstaves, and the seclusion of chambers. That combination makes court staff vulnerable to mistreatment, particularly in the forms of excessive work demands, bullying and harassment. While I believe that the vast majority of relationships between judges and their staff are mutually rewarding, enjoyable and endure well after an associate or tipstaff leaves the court, we know only too well that associates in our courts have been mistreated by their judges. One of the painful legacies of that mistreatment is a deterioration in the levels of trust between judges and their court staff. In my view, as judges, we will need to be particularly sensitive to the understandable anxieties of court staff, especially chambers staff, while we, as a group, rebuild their confidence and, in turn, public confidence that has been eroded as a result of widespread media coverage of instances of judicial misconduct. We need to ensure that we are fully educated about contemporary standards for occupational health and safety that affect the workplaces in which we find ourselves.

Conclusion

45. When I attended this course in 2014, I was excited by the number of experienced judges who attended and who were so plainly committed to assisting in the formation of the Australian judiciary. I can't remember them all, but I particularly remember Glenn Martin[85] and Ann Ainslie-Wallace[86], who are here again this evening. Your participating in the National Judicial Orientation Program is an important step in maintaining and advancing Australian judicial legitimacy. I hope and expect that you will come away from the week feeling motivated, encouraged and more skilful, as well as proud and recommitted to your life in the law.

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85 Judge of the Supreme Court of Queensland.

86 Judge of the District Court of New South Wales and former judge of the Family Court of Australia.