Judicial Independence and the Separation of Powers

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Introduction

1. It is fundamental to a democratic nation governed by the rule of law that it has a judiciary that is independent and appears to be independent. This means that judges and the judiciary as a whole must be, and must appear to be, independent of all external pressures and influences, whether exerted by the other branches of government, other judges, individual litigants, the media, the public or otherwise. Judges must also be independent of their own internal influences.

2. An independent judiciary is indispensable to building public confidence in the judiciary and the administration of justice; that the public can be confident that judges will decide cases in accordance with the law.[1] As the former Chief Justice of Australia, Sir Gerard Brennan AC KBE KC, aptly described, judicial independence "does not exist to serve the judiciary; nor to serve the interests of the other branches of government [the legislature and executive]" or the "governors". Instead, it "exists to serve and protect…the governed".[2] That is, it protects citizens.

[1] The Honourable Murray Gleeson AC, "The Role of the Judge and Becoming a Judge" (National Judicial Orientation Programme, Sydney, 16 August 1988).
[2] The Hon Sir Gerard Brennan AC, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).

3. What it means to be an independent judiciary is not a matter of precise science, there being no uniform or agreed definition of judicial independence.[3] However, there are at least theoretical elements or features of a legal system that have been identified as enabling the judiciary to be independent. As I seek to explore in this paper, these elements or features include:

    a. promoting the separation of powers;

    b. adopting a transparent and merits-based approach to the appointment of judges who reflect the composition of society; and

    c. ensuring security of tenure for judges, as opposed to – for example – short term contracts with the prospect of reappointment.

4. Ultimately, this paper concludes that having an independent judiciary, which is supportive and reflective of the separation of powers, is essential to ensuring that citizens' rights are protected, societal order and peace, and good government.[4] It "leads to more democratic governments".[5]

Judicial independence

5. Broadly, the concept of judicial independence requires judges to decide a case free from any influence or interference that may seek to reduce his or her objectivity or impartiality and thus, affect his or her capacity to decide a case strictly on the basis of its legal merits.[6] Put another way, judges have a duty to administer justice according to law impartially based on the merits of the case,

[3] Kristy Richardson, "A Definition of Judicial Independence" (2005) 2 *University of New England Law Journal* 75, 77.
[4] See, for example: the Honourable Justice Logan RFD, "The Relationship between Parliament, the Judiciary and the Executive ("The Latimer House Principles")" (27th Commonwealth Parliamentary Seminar, Brisbane, 9 June 2016).
[5] Douglas M Gibler and Kirk A Randazzo, "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding" (2011) 55 *American Journal of Political Science* 696, 696.
[6] The Honourable Susan Kiefel AC, "Judicial independence – from what and to what end" (Tenth Austin Asche Oration in Law and Governance, Darwin, 27 March 2021); The Honourable Michael Kirby AC, "Independence of the Legal Profession: Global and Regional Challenges" (Law Council of Australia, Presidents of Law Associations in Asia Conference, Broadbeach, 20 March 2005).

regardless of their popularity or approval ratings, and without fear of punishment, favour or hope of reward.[7]

6. Judicial independence also requires that judges be *perceived* to be independent.[8] Without that perception, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it".[9]

7. The concept of judicial independence is recognised in the international context, as well as in many domestic contexts. In the international context, the *UN Basic Principles on the Independence of the Judiciary*[10] sets out as its first two principles the following:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

8. Similarly, by way of example, Article 10 of the *Universal Declaration of Human Rights* provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal…".

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[7] The Honourable Murray Gleeson AC, "The Role of a Judge in a Representative Democracy" (Judiciary of the Commonwealth of the Bahamas, 4 January 2008); The Honourable Murray Gleeson AC, "The Role of the Judge and Becoming a Judge" (National Judicial Orientation Programme, Sydney, 16 August 1988); Rachel Davis and George Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819, 820; Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 306.

[8] Chief Judge Dr John Lowndes, "Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary" (Northern Territory Bar Association Conference, Dili, East Timor, July 2016), 3.

[9] *Ell v Alberta* [2003] 1 SCR 857, [23].

[10] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan (26 August 1985 to 6 September 1985). See General Assembly Resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985).

9. In the Australian constitutional context, it is "fundamental to the Australian judicial system" and the "common law system of adversarial trial" more generally that a trial be "conducted by an independent and impartial tribunal".[11] This has been traced to the *Magna Carta* with its declaration that the right and justice shall not be sold ("To no one will we sell, to no one deny or delay right or justice")[12] and the *Act of Settlement 1700* (England) that aimed to promote judicial independence in England by providing that judges were to hold office on good conduct as opposed to at Royal pleasure.[13]

10. In the United Kingdom, there exists a constitutional convention aimed at enabling judicial independence by requiring ministers to refrain from criticising judicial decisions.[14] Section 3 of the *Constitutional Reform Act 2005* (UK) provides for various provisions designed to "[g]uarantee" judicial independence, including:

    a. that "the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary" (s 3(1));

    b. that "the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary" (s 3(5)); and

    c. that the Lord Chancellor must have regard to, *inter alia*, the need to defend judicial independence (s 3(7)).

[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [3].
[12] Ibid.
[13] Royal, "The Act of Settlement" <https://www.royal.uk/act-settlement-0>.
[14] Institute for Constitutional and Democratic Research, "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" (Report, 8 June 2022), [3], [33]-[34], [45].

11. Judicial independence remains an ideal for every legal system and nation striving to be a liberal democracy governed by the rule of law. It is "the lifeblood of constitutionalism in democratic societies".[15]

12. The concept of judicial independence can be seen through two different prisms – (i) institutional independence; and (ii) individual or performance-based independence.[16]

Institutional conception of judicial independence

13. The institutional definition is premised on the judiciary, as an institution, being independent from the other branches of government – that is, the legislature and executive. It focuses on the political structure of the State and the judiciary's position in that structure relative to other powers of the State as manifested in the two other branches of government. It focuses on "the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government".[17]

14. The institutional definition, therefore, links to the doctrine of the separation of powers. In this respect, the current Chief Justice of Australia, Kiefel CJ, observes that judicial independence "reflect[s]" the separation of powers, but notes that countries that do not reflect a strict separation of powers are "unlikely to ascribe the same meaning to judicial independence", particularly when regard is had to the constitutional role assigned to courts in a particular country and the socio-political conditions in which those courts operate.

<u>Separation of powers</u>

15. The constitutional doctrine of the separation of powers has been a topic of significant interest including amongst constitutional theorists and political

[15] *Beauregard v Canada*, [1986] 2 S.C.R. 56, 70 (Dickson CJ).
[16] Brian K Landsberg, "The Role of Judicial Independence" (2007) 19 *Pacific McGeorge Global Business & Development Law Journal* 331, 331-332.
[17] *Ell v Alberta* [2003] 1 SCR 857, [22].

scientists.[18] The separation of powers contemplates the distribution of power of government between three branches:[19]

a. the legislature or parliament comprised of elected members;

b. the executive, which is comprised of ministers responsible to the legislature; and

c. the judiciary.

16. All constitutional democracies rest on some form of division of power.[20] This distribution or division of power ameliorates the concentration of power in the hands of any one person, group or agency and, therefore, helps shield citizens or particular groups of people against the misuse of power. It acts as a restraint on the power of the State.[21]

17. Montesquieu famously wrote in the seminal text, *The Spirit of the Laws*, in 1748 that "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty" because "one can fear that the same monarch or senate that makes tyrannical laws will executive them tyrannically". Nor can there be:

> "liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator".

[18] See, for example: John F Manning, "Separation of Powers as Ordinary Interpretation" (2011) 124 *Harvard Law Review* 1939; Jeremy Waldron, "Separation of Powers in Thought and Practice" (2013) 54 *Boston College Law Review* 433.
[19] The Honourable Justice Logan RFD, "The Relationship between Parliament, the Judiciary and the Executive ("The Latimer House Principles")" (27th Commonwealth Parliamentary Seminar, Brisbane, 9 June 2016).
[20] Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, 2016) 221, 221.
[21] Nicholas W Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59, 60, citing Maurice Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967).

18. One of the Fathers of the Constitution in the United States and the fourth President, James Madison, referred to Montesquieu and wrote in *Federalist Papers No. 47* that:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny…it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct".

19. Similarly, Alexander Hamilton, another Father of the Constitution in the United States, opined that the judiciary "has no influence over either the sword [the executive] or the purse [the legislature]" and that it has "neither force nor will, but merely judgment" and is, therefore, "beyond comparison the weakest of the three departments of power".

20. In *Evans v Gore* (1920) 253 U.S. 245, the Supreme Court of the United States reinforced – citing Alexander Hamilton – the importance of the separation of powers in terms of "liberty and justice" (at 249-250):

> "The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers -- the legislative, the executive, and the judicial -- in separate departments, each relatively independent of the others, and it was recognized that, without this independence -- if it was not made both real and enduring -- the separation would fail of its purpose".

21. It is therefore a running theme and clear that judicial independence from the other arms of government is critical to protecting citizens.

22. On a strict or "pure" conception of the separation of powers, none of the branches may exercise the power of the other. Nor can a person be a member of more than one branch. There is a separation of institutions, a separation of

functions, and a separation of personnel.[22] This is encapsulated by Maurice Vile:[23]

> "Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch".

23. However, in practice, many States do not aim for a strict or pure separation of powers but one that involves some shared function between the different branches, which James Madison acknowledged.[24] For example, in the United Kingdom and Australia, the executive and the legislature are "closely connected" with the principal officers of the executive (being the ministers).[25] It is also impractical to adopt a strict separation of powers because one institution, namely the legislature, usually "gains ascendancy over the other two" institutions.[26]

24. As such, States generally aim for a "partial" version of the separation of powers, which focuses on the checks and balances within the constitution.[27] Each branch has some power over the others such that there is an overlap that promotes a friction. The separation of power provides the "blueprint for, and generates tension between the three arms of government".[28] That tension or friction ensures that no one branch has absolute autonomy or power[29] that

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[22] Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, 2016) 221, 225.
[23] Maurice Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967), 13.
[24] Richard Benwell and Oonagh Gay, "The Separation of Powers" (Parliament and Constitution Centre).
[25] Sir Harry Gibbs, "The Separation of Powers – a Comparison" (1987) *Federal Law Review* 151, 152.
[26] Nicholas W Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59, 60.
[27] E Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599.
[28] The Honourable Justice McHugh ACJ, "Tensions Between the Executive and the Judiciary" (Australian Bar Association Conference, Paris, 10 July 2002) (who is of the view that this tension is not indicative of a "health, well-oiled government" and is not a "public good").
[29] Nicholas W Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59, 61.

makes state action more difficult.[30] In practice, this manifests as the checks and balances by the judiciary of legislative and executive power.

25. Therefore, for example, in various countries, such as the United States and Australia, the judiciary has the power to review decisions and actions of the executive.[31] The judiciary can decide on the constitutionality of a legislative provision, and construe legislation in a legally-principled manner. The former Chief Justice of New South Wales, the Honourable Tom Bathurst AC KC observed that:[32]

> "the reality of separation of powers in Australia is not and has never been that the courts operate entirely independently of the Executive and Parliament…It is up to the courts to independently and objectively determine the intention of Parliament, rather than simply agreeing with what a particular minister thinks, or perhaps more accurately hopes, the relevant statute means at a particular time".

26. An example of this, in Australia, was in the High Court decision of *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (also known as the *Communist Party Case*) where the Court decided upon the constitutionality of a piece of Commonwealth legislation, the *Communist Party Dissolution Act 1950* (Cth). That Act sought, *inter alia*, to abolish the Australian Communist Party under the auspices of the defence power contained in s 51(xxxix) of the Commonwealth *Constitution*. The recitals to the Act recited that the Act was "necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth".

27. Six of the seven justices ruled that the Act was constitutionally invalid, finding that the legislature could not "recite itself" into power and, famously, referring to the metaphor that a "stream cannot rise higher than its source" (Fullagar J at 258). That is, Parliament or the legislature cannot empower itself determine the

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[30] E Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599.
[31] *Marbury v Madison* 5 U.S. 137 (1803); *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 (based on Ch III of the *Constitution* (Australia)).
[32] The Honourable T F Bathurst, "Separation of Powers: Reality or Desirable Fiction?" (JCA Colloquium, Sydney, 11 October 2013), [11].

very facts upon which the existence of its power depends. Fullagar J observed (at 258):

> "The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse".

28. The decision is a seminal constitutional case in Australia. It stamped the judiciary's role as the ultimate arbiter of constitutional matters and its role to check the (mis)exercise of power by the legislature and executive.

29. In the United States, the role of the separation of powers in protecting citizens also runs through its jurisprudence. Justice Brandeis in *Myers v U.S.* (1926) 272 U.S. 52 (at 293) stated that the purpose of the separation of powers "[w]as not to avoid friction, but by means of inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy". Similarly, in *Evans v Gore* (1920) 253 U.S. 245 (at 249), the Supreme Court held that:

> "All agreed that restraints and checks must be imposed to secure the requisite measure of independence, for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative".

30. These checks and balances ensure that the other branches of government are held to account for their actions, guard against any misuse, arbitrary, capricious or abuse of power and therefore, protects the liberty and rights of individuals.[33] Judicial independence has been posted as the "indispensable link in the

[33] E Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599.

machinery for securing individual protection against states' human rights abuses".[34] As Logan J (a Judge of the Federal Court of Australia), observed extra-judicially:[35]

> "The experience of the ages is that this distribution and separation of the powers of government best achieves national peace, order and good government, including the promotion and protection of human rights".

31. However, it must be noted that these checks and balances – at least in many countries – do not confer on the judiciary a licence to make law (other than case law on an incremental basis), develop national policy, or have general administration over legislation (which are the functions of legislature and executive).[36]

32. The community "looks to the courts for the protection of minorities and individuals against the overreaching of their legal interests by the political branches of government".[37] In contemporary society, judicial independence is particularly important given that many legal disputes are between citizens and government actors (the executive and legislature) or even between different governments in the Federal structure. These matters involve disputes concerning rights and liabilities arising in matters such as crime, tax, migration and administrative law.[38] Courts should be able to "review legislation and government decisions under the rubric of constitutionality".[39]

33. Furthermore, in some legal systems such as Canada which has constitutionally entrenched the *Charter of Rights and Freedoms* (*Constitution Act 1982*

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[34] Linda Camp Keith, "Judicial Independence and Human Rights Protection Around the World" (2002) 85 *Judicature* 195, 195.
[35] The Honourable Justice Logan RFD, "The Relationship between Parliament, the Judiciary and the Executive ("The Latimer House Principles")" (27th Commonwealth Parliamentary Seminar, Brisbane, 9 June 2016).
[36] Ibid.
[37] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).
[38] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996); The Honourable T F Bathurst, "Separation of Powers: Reality or Desirable Fiction?" (JCA Colloquium, Sydney, 11 October 2013), [7].
[39] Erik S Herron and Kirk A Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts" (2003) 65 *The Journal of Politics* 422, 422.

(Canada)), their courts have jurisdiction on matters concerning citizens' rights. Those courts are "expected to protect minority and individual rights in situations that were once not thought to be justiciable".[40]

34. Given the critical role of the judiciary, it is therefore imperative that the judiciary be independent – free to decide matters applying the law and without any external pressure or influence from the other branches of government. This can include political reprisals, or even the *fear* of political reprisals, or some sort of retaliation measure by another branch of government.[41]

35. Judges must not be "a servant of the political process or subject to the whims and prejudices of the moment".[42] They must be above the politics and must also be seen to be above the politics. This is a "necessary component for the development of democracy".[43] In newly independent countries, a strong and independent judiciary "helps the state break with its authoritarian past and develop a constitutional culture that teaches state actors that the legal system cannot be transgressed for political gain".[44] It also protects democracy against automatic reversals or "democratic backsliding".[45]

Other external pressures

36. Not all external pressure, however, is exerted from the other branches of government. There are a myriad of external pressures from the public – to name a few: the media, social media or even particular individuals or groups or associations of persons, particularly where a case is controversial.[46]

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[40] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).
[41] Matias Iaryczower, Pablo T Spiller and Mariano Tommasi, "Judicial Independence in Unstable Environments, Argentina 1935-1998" (2002) 46 *American Journal of Political Science* 699, 699.
[42] John D Feerick, "Judicial Independence and the Impartial Administration of Justice" (1996) 51 *The Record New York City Bar Association* 233, 236.
[43] Kirk A Randazzo, Douglas M Gibler and Rebecca Reid, "Examining the Development of Judicial Independence" (2016) 69 *Political Research Quarterly* 583, 583.
[44] Erik S Herron and Kirk A Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts" (2003) 65 *The Journal of Politics* 422.
[45] Douglas M Gibler and Kirk A Randazzo, "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding" (2011) 55 *American Journal of Political Science* 696.
[46] The Honourable Susan Kiefel AC, "Judicial independence – from what and to what end" (Tenth Austin Asche Oration in Law and Governance, Darwin, 27 March 2021).

37. That pressure may also be exerted by other judges. Judicial independence requires that judges perform their judicial function independently from other members of the judiciary.[47] In *Re Colina; Ex parte Torney* (1999) 200 CLR 396, Gleeson CJ and Gummow J (at [29]) held that "it is frequently overlooked that the independence of the judiciary includes independence of judges from one another".

38. Judges must be cognisant of not feeling compelled to "go along with" other judges, particularly those who are more senior or have stronger personalities, or thinking in a group-think or "herd-like mentality". Kiefel CJ opines that, whilst each judge must maintain independence of thought, this does not prevent them from listening to other colleague's views or challenging another colleague's views.[48]

39. Finally, there can be more extreme and sinister types of pressure or influence such as killing, torture, extortion and unlawful removal of judges from office. It is obvious that any such acts be stamped out of any nation, particularly one that aims to be governed by the rule of law and aims to have good peace and order in its society.

Individual or performance-based conception of judicial independence

40. Another conception of judicial independence is individual or performance-based independence. That conception is a "function of a judge's behaviour" – that, judges "act neutral and base their actions on laws and facts".[49] That is a manifestation of the rule of law which:[50]

[47] The Honourable Michael Kirby AC, "Independence of the Judiciary – Basic Principle, New Challenges" (International Bar Association, Human Rights Institute Conference, Hong Kong, 12-14 June 1998).
[48] The Honourable Susan Kiefel AC, "Judicial independence – from what and to what end" (Tenth Austin Asche Oration in Law and Governance, Darwin, 27 March 2021).
[49] Brian K Landsberg, "The Role of Judicial Independence" (2007) 19 *Pacific McGeorge Global Business & Development Law Journal* 331, 332.
[50] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 *Georgia Law Review* 1, 6. See also: Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz (ed), *The Authority of Law: Essay on Law and Morality* (Oxford, 1979).

> "gives central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong".

41. Judges must decide cases without any influence that is *internal* to themselves. Specifically, judicial independence requires "distancing one's self from one's own prejudices and ideology" as far as it is humanly possible.[51] Judges are human beings and, naturally, have their own personal preferences, opinions, views and beliefs on a wide array of matters that range from race, religion, politics, gender and lifestyle. Thus, there is always a risk that a judge will be unconsciously affected by his or her "cast of mind".[52]

42. On the more extreme end, judicial independence can be compromised by corruption of judicial officers. Corruption can decrease public confidence in the judiciary and curtails the capacity of the judiciary to guarantee the protection of human rights.[53] It also "undermines democracy and the rule of law, leads to violation of human rights…erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish".[54]

Appointment of judges

43. The process of appointing judges is a key feature of a legal system that impacts the actual and perceived independence of the judge appointed and the judiciary as a whole.

44. Judicial appointments are critical to maintaining public confidence in the judiciary[55] which is, in turn, essential to an "ordered, stable and civilised society"

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[51] The Honourable Susan Kiefel AC, "Judicial independence – from what and to what end" (Tenth Austin Asche Oration in Law and Governance, Darwin, 27 March 2021).
[52] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).
[53] United Nations Office on Drugs and Crime (Diego García-Sayán) "Corruption, Human Rights, and Judicial Independence" <https://www.unodc.org/dohadeclaration/en/news/2018/04/corruption--human-rights--and-judicial-independence.html>.
[54] Foreword to the *United Nations Convention Against Corruption*.
[55] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, 2019), [13.43].

and a functioning democracy.[56] Public confidence in the judiciary is also essential to ensuring judicial legitimacy – that citizens will accept judicial authority and decisions as binding on them.[57]

45. One way of instilling public confidence and thus, judicial legitimacy, is to ensure, in the words of Rares J (a judge of the Federal Court of Australia), that there is a "quality judiciary" comprised of judges who have – amongst other things – "core values" of being competent, impartial and independent. Those core values "transcend any particular legal system" and "reflect a fundamental aspect of human rights – the right of every person to be protected by the rule of law".[58]

46. It necessarily follows that the process of appointing judges and who are appointed are crucial. Judicial decisions have the real capacity to affect citizens' rights, powers, rights and liabilities vis-à-vis other citizens, institutions and the apparatus of the State.

47. In most countries, it is the government (or the executive branch of the government such as in Australia[59] and in the US) who appoints judges.[60] A judicial appointment obviously made for the "wrong reasons will tend to shake public confidence in the bench".[61]

48. It is noteworthy that the issue of appointing federal judges in Australia is currently the subject of review by the Commonwealth Government. Recently, in December 2021, the Australian Law Reform Commission published a report titled *Without Fear or Favour: Judicial Impartiality and the Law of Bias* (Report No 138) that recommended "The Australian Government…develop a more transparent process for appointing federal judicial officers on merit, involving:

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[56] Sir Harry Gibbs, "The Appointment and Removal of Judges" (1987) 17 *Federal Law Review* 141, 141.
[57] Murray Gleeson, "Judicial legitimacy", *Australian Bar Association Conference* (2 July 2000).
[58] Justice Rares, "What is a Quality Judiciary?" (2010) *Federal Judicial Scholarship* 44.
[59] *Constitution* s 72(i); *High Court of Australia Act 1979* (Cth) s 5; *Federal Court of Australia Act 1976* (Cth) s 6(1)(a).
[60] The Hon Robert McClelland MP, "Judicial Appointments Forum" (Speech, 17 February 2008), [13].
[61] Sir Harry Gibbs, "The Appointment and Removal of Judges" (1987) 17 *Federal Law Review* 141, 145.

Publication of criteria for appointment;

Public calls for expressions of interest; and

A commitment to promoting diversity in the judiciary."

49. The Australian Commonwealth Government is, as of today, looking to introduce – "as a priority" – a new appointments process for the federal judiciary that is "transparent, accountable [and] merits-based".[62]

50. In my opinion, in order to ensure public confidence in the judiciary, judges should be appointed in a transparent manner based on merit. The process should include:

a. broad consultation with members of the profession and judges to identify persons who are suitable for appointment;

b. notices seeking expressions of interest and nominations for judicial positions;

c. notification of appointment or selection criteria to ensure that appointees are of the highest possible calibre and suitable to be judges;

d. appointing advisory panels to assess expressions of interest and nominations against the appointment or selection criteria to develop a shortlist of highly suitable candidates. Those panels should be comprised of the President of the Law Council of Australia and the President of the Australian Bar Association;

e. ensuring that there are no barriers preventing groups such as women and ethnic minorities from being considered as candidates; and

[62] The Hon Mark Dreyfus KC MP, *Release of the Government response to the Australian Law Reform Commission Report 138: Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Speech, 29 September 2022), <https://ministers.ag.gov.au/media-centre/speeches/release-government-response-australian-law-reform-commission-report-138-without-fear-or-favour-judicial-impartiality-and-law-bias-29-09-2022>.

f. ensuring that the executive has the final say or word on who to appoint as judges.

51. Such measures aim to increase confidence in the appointment process, ensure quality appointments and diversify the judiciary. And they do so in seven ways.

52. *First*, whilst the appointment of judges is – as a matter of general principle – inherently political, the processes help guard against concerns that political considerations have impermissibly driven an appointment, and perceptions of patronage and politically-motivated appointments.[63] The appointment of judges must not be used to serve a government's short-term political interests.[64] This is essential to ensuring the independence of the judiciary from the other branches of government.

53. *Secondly*, the publication of appointment or selection criteria is likely to ameliorate the subjective construct of "merit" – what makes a judge good at judging? It also guards against subjective or inherent biases in the selection process as to who a judge should be or look like and, instead, promotes the identification of persons from diverse backgrounds who may constitute candidates suitable for judicial appointment by reference to the selection criteria.[65] To the best extent possible, the criteria should articulate the qualities, skills and experience *required* of a judge.[66]

54. *Thirdly*, selection criteria and calls for expressions of interest also direct attention towards candidates whose abilities or credentials are otherwise not

[63] Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin, "Contemporary Challenges Facing the Australian Judiciary: an Empirical Interruption" (2019) 42 *Melbourne University Law Review* 299, 312; Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37 *Sydney Law Review* 187, 187-188.
[64] Justice Bruce McPherson, "Judicial Appointments and Education: Response from the JCA" (1999) 73 *Law Institute Journal* 23, 25.
[65] Christopher N Kendall, "Appointing Judges: Australian Judicial Reform Proposals in light of Recent North American Experience" (1997) 9 *Bond Law Review* 175, 178.
[66] Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37 *Sydney Law Review* 187, 201; Rachel Davis and George Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819, 836-837.

readily observed by, or apparent to, the persons involved in the appointment process. They encourage interest from persons who may be less known to decision-makers but who nonetheless may be suitable for judicial appointments.[67] The selection criteria also provide a yardstick to guide decision-making and can be used as a "meaningful public justification" for a particular appointment.[68]

55. *Fourthly*, the selection criteria and calls for expressions of interest ultimately increase transparency and, therefore, public confidence in the process. For example, it helps mitigate against any perception that irrelevant factors may have been taken into account in deciding who to appoint or that relevant factors have been omitted.[69]

56. *Fifthly,* instilling public confidence in the judiciary also requires appointing judges that *reflect* the composition of society. This is different to appointing judges to *represent* any group or constituency, because judges are "independent of and unresponsive to political pressure".[70]

57. The judiciary should be a "fair reflection" of society.[71] A court that is "socially and culturally homogenous" is "less likely to command public confidence in the impartiality of the institution" and will lose the confidence of the public upon which its authority ultimately rests.[72] Similarly, Sir Anthony Mason (the former Chief Justice of Australia) has stated:[73]

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[67] Justice Ronald Sackville, "The judicial appointments process in Australia: towards independence and accountability" (2006) *Federal Judicial Scholarship* 27.
[68] Elizabeth Handsley and Andrew Lynch, "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13" (2015) 37 *Sydney Law Review* 187, 200.
[69] Rachel Davis and George Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819, 834.
[70] ; Simon Evans and John Williams, *Appointing Australian Judges: a New Model* (JCA Colloquium, 7-9 October 2006), 8-9; Rachel Davis and George Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819, 844.
[71] Harry Hobbs, "Finding a Fair Reflection on the High Court of Australia" (2015) 40 *Alternative Law Journal* 13, 13.
[72] Michael McHugh, "Women Justices for the High Court" (27 October 2004), Speech High Court Dinner (Western Australia Law Society).
[73] Anthony Mason, "The Appointment and Removal of Judges" in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997, Judicial Commission of NSW) 1, 7.

> "There is a risk…that an unrepresentative judiciary may result in a loss of confidence in the system, all the more so when the judges are called upon to apply community standards as part and parcel of their daily work".

58. *Sixthly*, broad consultation across different stakeholders including members of the legal profession helps promote public confidence in the judicial appointment process. The members of the legal profession know best as to who the competent and hardworking lawyers are, as well as those who have the temperament to serve as judicial officers. Furthermore, it also helps promote judicial independence or, in the words of Daniel M Brinks and Abby Blass, "*ex ante* autonomy". Those authors opine that the:[74]

> "presence of multiple veto players in the appointment process should tend to narrow and center the range of possible outcomes, eliminating unqualified, out-of-the-mainstream or transparently biased candidates and leaving only those who fit broadly share definitions of what it means to be an acceptable justice with acceptable preferences".

59. In contrast, "justices appointed by executive decree, for example" are "more likely to faithfully reflect the executive's preferences, to be unconditional allies, and thus to articulate views that are less distinct from those of the executive".[75] In other words, there is a greater risk that judges appointed by one person – rather than involvement of a range of stakeholders – may not at least be perceived as independent from the person who appointed the judge (usually the executive), thus impinging judicial independence.

60. *Finally*, the Executive must have the final say or word on deciding who is to be appointed as a judge. The Executive (or the Attorney-General) must retain a discretion to reject the recommendations of a selection panel. This is because

[74] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 306.
[75] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 306.

it will always has some insight as to the values, background and integrity of the person who it is responsible for appointing to judicial office. More fundamentally, however, this is because judges are unelected and so their legitimacy depends on public confidence which, in turn, rests on their appointments being made by the Executive who are representatives of the community through election by the community. Ultimately, the Executive is responsible to the community for its choices of judicial appointments.

Security of tenure

61. The length of judicial tenure (which Brinks and Blass describe as "*ex post* autonomy")[76] is another important feature of a legal system that affects judicial independence.

62. Kiefel CJ describes that one form of influence or pressure from the executive can be manifested through security of tenure and that the "independence of the judiciary would be set at nought if judges did not have security of tenure".[77] This is because, unless judges have a long-term appointment or security of tenure, they may be susceptible to undue pressure from the body or person (generally, the government) responsible for re-appointing or renewing their position. Where a judge capitulates to such pressure, judicial independence is compromised.

63. This principle has also been adopted in the international context, with the *UN Basic Principles on the Independence of the Judiciary*:

> "11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

[76] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 310.
[77] The Honourable Susan Kiefel AC, "Judicial independence – from what and to what end" (Tenth Austin Asche Oration in Law and Governance, Darwin, 27 March 2021).

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

64. In Australia, Gleeson CJ held in *North Australian Aboriginal Legal Aid Service Inc v Bradby* (2004) 218 CLR 146 (at [3]):

> "Within the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration. All those arrangements are relevant to independence. The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements".

65. In a study conducted by Linda Camp Keith (2002),[78] the author found that a "formal guarantee of judges' tenure in office, which can protect a judge from dictatorial executive or an overzealous legislature, produces the strongest impact" on human rights. Keith measured the impact on human rights based on internationally-recognised human rights such as equality of rights without discrimination, protection against slavery, and protection from arbitrary arrest and detention.

66. Life terms (as in the US),[79] or at least long terms until a mandatory retirement age (as in Australia where federal court judges must retire by 70 years old)[80] are frequently considered necessary for judicial independence or autonomy because "they free judges from the need to curry favour with outside actors".[81] As Alexander Hamilton wrote in *Federal Paper No 78*:

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[78] Linda Camp Keith, "Judicial Independence and Human Rights Protection Around the World" (2002) 85 *Judicature* 195, 200.
[79] US Constitution, art. III, § 1: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour".
[80] *Constitution* (Australia) s 72.
[81] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 310.

> "According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State…The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government…And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

67. Judicial appointments can also be based on short-term contracts (judges who are appointed for a number of years) or provisional appointments (judges who can be freely removed or suspended). Whilst such forms of appointment may avoid some physical or mental incapacity issues arising from age because judges only serve for a limited period of time as opposed to for life,[82] it runs the risk of a judge succumbing to the "loyalty effect" – that is, "justices voting in a way that favours the president [or government] who appointed them".[83] Indeed, some commentators view short term contracts with reappointment as "most substantially decreasing autonomy, because they encourage judges to curry favour with the politicians who could reappoint them".[84]

68. Short-term contracts with the prospect of reappointment amplifies the risk that judges will not decide cases based on the facts and the law. Instead, judges are more likely to reach outcomes in cases that align or appease the government or body that appointed the judge. All semblance of judicial independence, or at least the appearance of it, will be lost.

69. It is troubling that in Fiji, a majority of Judges on the High Court of Fiji have been appointed pursuant to short term contracts with no apparent transparency as to how these Judges were selected for their appointments by the previous

[82] David J Garrow, "Mental Decrepitude on the U.S. Supreme Court: the Historical Case for a 28th Amendment" (2000) 67 *The University of Chicago Law Review* 995, 1006.
[83] Lee Epstein and Eric A Posner, "Supreme Court Justices' Loyalty to the President" (2016) 45 *Journal of Legal Studies* 401, 403.
[84] Daniel M Brinks and Abby Blass, "Rethinking Judicial Empowerment: the new Foundations of Constitutional Justice" (2017) 15 *International Journal of Constitutional Law* 296, 310.

Government of Fiji. The majority of these Judges are expatriates from Sri Lanka who were appointed to serve on the High Court of Fiji.

70. Without in any way seeking to impugn the integrity of these Judges, the fact that they were appointed pursuant to short term contracts and have not been appointed from the profession of Fiji, but rather recruited externally, means that ultimately the rule of law is eroded and the citizens of Fiji suffer.

71. Firstly, the appointment on short term contracts necessarily impacts on judicial independence. The loss of independence will mean the erosion of the rule of law and impinge on the court's ability to protect individuals against the overreach by the political branches of government.[85] In this respect, it is to be noted that the High Court of Fiji has unlimited original jurisdiction to hear and determine any civil or criminal proceedings. It is the Court which deals with significant matters which impact upon the rights of Fijian citizens and the power of the Fijian Government.

72. Secondly, the appointment of Judges who are expatriates of another country and have not been long time residents of Fiji, necessarily means that judicial officers were being appointed which are not representative of the community they serve. This also has the tendency to undermine public confidence in the Court.

Conclusion

73. Judicial independence is the "priceless possession of any country under the rule of law". It cannot be "picked up with the judicial gown".[86] It is "indispensable in the attainment of a civilised society" and is fundamental to guarding against violations of human rights and freedoms[87] and building a stronger democratic government. Some features of a legal system that promote judicial independence include ensuring that the judiciary's role in checking and

[85] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).
[86] The Hon Sir Gerard Brennan, AC KBE, "Judicial Independence" (Australian Judicial Conference, Canberra, 2 November 1996).
[87] The Honourable Michael Kirby AC, "Independence of the Legal Profession: Global and Regional Challenges" (Law Council of Australia, Presidents of Law Associations in Asia Conference, Broadbeach, 20 March 2005).

balancing the power of the legislature and executive is maintained, as well implementing a transparent, merits-based appointment of judges who has security of tenure.

74. Judicial independence is also key to promoting public confidence and in turn, judicial legitimacy. This is particularly the case where the modern judicial is now potentially exposed to greater sources of external influences not only from the other branches of government, but by social media and the media with the advance of technology. *A fortiori*, there is a "naïve cynicism" amongst parts of the (Australian) population towards the judiciary that has manifested in, for example, a public perception that judges are "hopelessly out of touch with community standards and removed from the problems of everyday life".[88] It does not stretch the imagination to think that that sentiment is also not shared by the public in other jurisdictions.

75. Accordingly, judicial independence and public confidence remain important, as encapsulated by the Hon Justice R.E. McGarvie (a former Judge of the Supreme Court of Victoria):[89]

> "In a democratic government…the law stands above and controls them all. The law is the mortar that holds the components of government together and keeps them in their proper places. The judiciary of a democracy is not responsible to any governmental power. Its responsibility, owed to the whole community, is to apply the law and to apply it impartially….It is obvious that this system can only work effectively if those against whom the law is applied have confidence in the impartiality, fairness and ability of the judges in making their decisions".

[88] Justice Ronald Sackville, "The judicial appointments process in Australia: towards independence and accountability" (2006) *Federal Judicial Scholarship* 27.
[89] Justice RE McGarvie, "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *Journal of Judicial Administration* 3, 4.