

Rule of law and judicial independence

Justice Susan Glazebrook¹

Introduction

Tēnā koutou, tēnā koutou, tēnā tatou katoa

As is customary in my country I have greeted you in te reo Māori, the language of the indigenous people of Aotearoa/New Zealand.

I thank our hosts for inviting me and for organising what I am sure will be a most successful conference. I also congratulate LAWASIA for its work in the region supporting and promoting the rule of law. As the United Nations website says, the rule of law is fundamental to relations between states, as well as for their internal development.

The World Justice Project has for the last 15 years monitored the rule of law around the world. It defines the rule of law in terms of four universal principles, the fourth being accessible and impartial justice.² By this they mean justice that is delivered in a timely fashion by competent, ethical, and independent judicial officers “who are accessible, have adequate resources, and reflect the makeup of the communities they serve”.³

¹ Judge of Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand and immediate past president of the International Association of Women Judges (IAWJ). This paper was presented at the 37th LAWASIA (Law Association for Asia and the Pacific) Conference in Kuala Lumpur, Malaysia on 13 October 2024. I thank my clerk, Florence Oakley, for her assistance with footnoting.

² World Justice Project *World Justice Project Rule of Law Index 2023 Insights* (2023) at 11. Since this paper was presented, the 2024 Rule of Law Index has been published: World Justice Project *World Justice Project Rule of Law Index 2024* (2024).

³ At 11.

This aligns well with the Beijing Statement on judicial independence.⁴ The fact that 32 Chief Justices in the region have now signed the Beijing Statement is strong evidence of the commitment to judicial independence and to the rule of law in our region.

Rule of law trends

There are, however, worrying global trends. In the seven years from 2016 to 2023, the rule of law has weakened in almost 80 per cent of countries studied in the World Justice Project Rule of Law Index. The three biggest contributors to the overall decline were declines in the factors measuring constraints on government powers, fundamental rights and criminal justice.⁵

I have had personal (although of course second-hand) experience of one of the most devastating instances of the breakdown of the rule of law, human rights and judicial independence during my time as President of the International Association of Women Judges (IAWJ).⁶

The fall of Kabul to the Taliban in August 2021 placed the women judges of Afghanistan in mortal danger,⁷ both from the Taliban and from the criminals the Taliban released from the prisons.⁸ The IAWJ had had a long

⁴ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (19 August 1995) [the Beijing Statement]. The Beijing Statement can be found at <<https://lawasia.asn.au/sites/default/files/2018-05/Beijing-Statement-19Aug1995.pdf>>.

⁵ *World Justice Project Rule of Law Index 2023 Insights*, above n 2, at 40.

⁶ I was President of the IAWJ from May 2021–May 2023. For more information on the IAWJ see <www.iawj.org>. In short, the IAWJ supports the rule of law, gender equality and access to justice for all. It also encourages the formation of women judges' associations around the world and provides support and education to our members and others in the justice sector.

⁷ The idea of women judges does not fit with the Taliban world view and former judges (including male judges) were also seen as hostile agents of the western agenda.

⁸ They were also at risk from disaffected litigants more generally and especially in criminal, terrorism and family law cases.

association with the Afghan women judges and we would not have been true to our values if we had abandoned them. We have therefore been working for the last three years to rescue them from Afghanistan and I am pleased to report with some measure of success.⁹

At the same time, we have watched with increasing horror the rights of women and girls in Afghanistan being eroded, to the extent that women have effectively been eliminated from public life. There is no right to education for girls above primary-school level and major restrictions have been imposed on women's freedom of movement,¹⁰ the right to work, and the right to seek medical attention. According to the latest edict, women must not even be heard to speak in public.¹¹

In terms of the effect on the justice system, the Taliban annulled all preceding laws and regulations that aligned with Afghanistan's international human rights commitments and that upheld the independence of the judiciary.¹² The current judges are all male and are primarily madrassah-educated Taliban members who have no formal legal training. Most cases are resolved swiftly, with no independent prosecutors and essentially with no appeal rights.

⁹ For more information on the rescue effort and the situation of Afghanistan generally, particularly for women and girls see: Susan Glazebrook (2024) "Rescuing the Afghan Women Judges" 34 (2024) Cth Lawyer 43. We now have some 200 judges in final destination countries. These include Canada, Aotearoa/New Zealand, the United Kingdom, Germany, Spain, Ireland, Australia and the United States. We still have some 15 judges and their families in transit destinations including in Pakistan. There are also around 35 judges left in Afghanistan still awaiting transfer to safety.

¹⁰ Meryl Streep recently commented that: "Today in Kabul a female cat has more freedom than a woman.": Meryl Streep (remarks given at the United Nations, New York City, 23 September 2024). For a link to a video of her remarks visit: <https://www.youtube.com/watch?v=p_v1dE0Yqrw>.

¹¹ Yogita Limaye "If we can't speak, why live?" - BBC meets women after new Taliban law" (12 September 2024) BBC <www.bbc.com>.

¹² Akmal Dawi "Taliban Undertake Speedy Overhaul of Afghanistan's Justice System" (28 September 2023) Voice of America News <www.voanews.com>.

The Taliban interpretation of Sharia law has also resulted in serious human rights violations including indefinite detention, torture and extrajudicial killings, as well as the return of public whippings and stonings. It is not surprising, in light of all this, that Afghanistan was one of three countries with the lowest overall rule of law scores in the 2023 World Justice Project Rule of Law Index.¹³

Need for vigilance

Afghanistan is obviously an extreme example of the breakdown of the rule of law and the independence of the judiciary, but it is also an object lesson. The breakdown can be sudden and devastating, as in Afghanistan, but it can also operate by stealth and by stages which, left unchecked, can have similar results. The whole of the justice sector needs to be ever vigilant and take proactive steps to promote and defend the rule of law and judicial independence.

This is an appropriate time to mention an initiative of the International Association of Judges to have January 11 named as the International Day of Judicial Independence.¹⁴ January 11 was chosen because it was on that date in 2020 where judges from all over Europe joined Polish judges and the public in Warsaw at what was dubbed the “1000 Robes March”, where

¹³ The other two jurisdictions with the lowest scores were Cambodia and Venezuela: *World Justice Project Rule of Law Index 2023 Insights*, above n 2, at 18.

¹⁴ “Proposition to name January 11th “International Day of Judicial Independence – 1000 Robes March”” (27 March 2023) International Association of Judges <www.iaj-uim.org>. This initiative has also been endorsed by Professor Margaret Satterthwaite, the UN Special Rapporteur on the Independence of Judges and Lawyers: International Association of Judges “UN Special Rapporteur’s post on IAJ’s initiative about the “International Day of Judicial Independence”” (26 June 2024) International Association of Judges <www.iaj-uim.org>.

more than 30,000 people marched in solidarity with the Polish judiciary protesting measures that gravely compromised judicial independence.¹⁵

It is a heartening sign of the value placed on judicial independence that Poland has not been alone in having public protests in support of the autonomy of the judiciary. Recent protests in Israel and Mexico over government overhauls to the judiciary are similar examples of the public rallying behind judges to support judicial independence.¹⁶

Access to justice

I intend now to discuss two of the elements necessary for judicial independence but, before doing this, it is worth stressing that the vision of a world that respects the rule of law, human rights and judicial independence is impossible to achieve if there is not meaningful access to justice.

According to the World Justice Project Index, between 2022 and 2023 civil justice scores around the world fell in two out of three countries due to longer delays, weaker enforcement and declining access and affordability.¹⁷ Criminal justice systems deteriorated in over half of the countries in the index including in terms of timely and effective

¹⁵ “Thousands protest against Poland’s plan to discipline judges” (12 January 2020) Reuters <www.reuters.com>. For discussion of the events which brought about the protests see Fryderyk Zoll and Leah Wortham “Weaponizing judicial discipline: Poland” in Richard Devlin and Sheila Wildeman (eds) *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing, Cheltenham (UK), 2021) 278.

¹⁶ For Israel see for example Ohad Zwigenberg “Protests against Israel’s judicial overhaul kick off at Supreme Court a day before crucial hearing” (12 September 2023) Associated Press <<https://apnews.com/>>. For Mexico see for example Vanessa Buschschlüter “Protests in Mexico as controversial judicial reform passed” (12 September 2024) BBC <www.bbc.com>. I am not to be taken as commenting on whether or not any of the underlying substantive reforms in those jurisdictions are warranted.

¹⁷ “WJP Rule of Law Index | Insights” World Justice Project <<https://worldjusticeproject.org/>>.

adjudication and due process of law.¹⁸ Justice delays are increasing in a majority of countries, both in civil and criminal justice systems.¹⁹

And there are a huge percentage of people around the world who have no meaningful access to justice at all.

In 2019, a high-level taskforce estimated that 5.1 billion people — two-thirds of the world's population — lack meaningful access to justice.²⁰

While up-to-date figures are not available, it seems likely that, if anything, the numbers have increased as a result of the COVID-19 pandemic. People in all countries are affected, but the justice gap is not evenly distributed. Women and children find it hardest to access justice, as do other vulnerable groups, such as those living in poverty, people with disabilities, and people from minority ethnic communities. And many of these groups are also still subject to unequal laws and practices.

We cannot pretend to have a society committed to the rule of law and the independence of the judiciary while a justice gap of this magnitude exists.

Facets of judicial independence

I now intend to make some comments on two aspects of the Beijing Statement: impartiality and appointment processes.²¹

I start with impartiality which is arguably the most important facet of judicial independence. At its core, impartiality means the ability of judges

¹⁸ *World Justice Project Rule of Law Index 2023 Insights*, above n 2, at 37.

¹⁹ At 33.

²⁰ *Justice for All: The Task Force on Justice* (Center on International Cooperation, 2019) at 18. See also World Justice Project *A People-Centered Assessment of Unmet Justice Needs Around the World* (2019).

²¹ On impartiality, see arts 3–9. On appointment processes, see arts 11–17.

to decide cases (as it is rather quaintly put in the judicial oath of my jurisdiction): “without fear or favour, affection or ill will”.²² Or, as the Beijing Statement puts it: that the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.²³

I would argue, however, that to be truly impartial it is necessary for judges to understand and be part of the society in which they judge. In the past (at least in the common law world) it was thought that, to be independent and impartial, judges had to separate themselves from society and be “insulated from the controversies of the day”.²⁴

In practice insulation from society often meant that, as part of the “establishment”, judges of the past judged accordingly. No doubt they were absolutely convinced they were being impartial and abiding by their oath of office.

But, just to take one example, nineteenth century courts in the common law world consistently interpreted the phrase “any person” to exclude women, reflecting their view of the proper place of women in society.²⁵ This interpretation was used to deprive women of the right to vote, to be elected

²² Oaths and Declarations Act 1957, s 18.

²³ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, above n 4, art 3.

²⁴ This remark was made by Lord Kilmuir of the United Kingdom in 1955 and became known as the “Kilmuir Rules”. These “unofficial” rules were officially abandoned in the United Kingdom in 1987, although it is generally agreed that the Kilmuir Rules merely recommended restraint and that public discourse to some extent continued. See Katherine Sanders “Away from the Familiar – Judges in Public Debate and as Commissioners” in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 226–228.

²⁵ See, for example, *Bebb v Law Society* [1914] 1 Ch 286 (CA); *Hall v Society of Law Agents* (1901) 38 SLR 776; and *Incorporated Law Society v Wookey* [1912] AD 623.

to office and to become a member of the professions, including the legal profession.²⁶

While we might laugh now at the idea of courts holding that women are not persons, (even the Taliban do not go so far – at least not yet), we will have our own modern biases which could well appear just as quaint to future generations.²⁷ Bias is, by definition, the antithesis of impartiality and we must do our best to try and recognise and counter bias in the system and in ourselves.

We must also recognise that what has traditionally been done will not always be the best way to do things. The law and the courts are there, not for judges, lawyers and others in the justice system, but for the people. One of the major shifts suggested by many commentators for dealing with access to justice issues is that justice should become more “people-centred”.

The World Justice Project suggests that this shift should begin with a mapping of people’s justice needs, the ways in which they solve their justice problems, and the obstacles they face in doing so.²⁸ Generally, judges and lawyers must be open to innovative ideas and new ways of doing things to make justice truly just and inclusive for all in society.

Public confidence in the courts and the judiciary is also essential, both for the maintenance of the rule of law and the independence of the judiciary.

²⁶ See further Susan Glazebrook “Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century” (2015) 14 Otago LR 61 at 88, where I discuss similar issues.

²⁷ Jeffrey J Rachlinski and others “Does Unconscious Racial Bias Affect Trial Judges?” (2009) 84 Notre Dame L Rev 1195.

²⁸ Elizabeth Andersen, Executive Director of the World Justice Project “What is People Centered Justice” (remarks given at the American Bar Association’s “Putting People first: People-Centered Justice at Home and Abroad” Washington DC, 16 May 2023) available at <<https://worldjusticeproject.org/>>.

There is currently a global mistrust of institutions.²⁹ Social media has meant global connectivity, improved access to information and the ability for everyone with internet access to communicate with each other. It has also brought cyberbullying and fake news.

Judges have not been immune. They have been subject to online attacks from disgruntled litigants and from others who have taken exception to particular judgments or who are just more generally disaffected. These attacks often impugn the integrity of the judge and are frequently based on misinformation.³⁰

Persistent spreading of misinformation is particularly pernicious.³¹ One way of diminishing but not eliminating the risk of misinformation is for judges to do their best to ensure that their actions are fully explained in terms those not familiar with the law can understand and that all parties feel that they have had a truly fair hearing. Lawyers also need to take an active role to ensure that their role, and that of the courts, is understood and respected by the public. Outreach programs by the courts can also increase public understanding and confidence.

Appointment

Moving to appointment processes, I want to speak to one aspect of the World Justice Project's definition of the rule of law, which is to have judges who "reflect the makeup of the communities they serve".³²

²⁹ See for example Edelman Trust Institute *2024 Edelman Trust Barometer: Global Report* (2024).

³⁰ For more information see: Glazebrook "Beneath the blindfold: responsive to society or caving to pressure" (speech given at the Constitutional Law Forum at the 65th annual conference of the International Association of Judges, Taipei, 18 September 2023) at 2–5.

³¹ The dangers of misinformation and its threat to democracy are all too real: European Commission "Disinformation: A threat to democracy – Brochure" (9 April 2021) <digital-strategy.ec.europa.eu>.

³² *World Justice Project Rule of Law Index 2023 Insights*, above n 2, at 11.

A diverse and inclusive judiciary is vital to ensure the legitimacy of the courts. The public will have greater confidence in a system that is seen to reflect society, rather than just a privileged minority. Having a judiciary that reflects the society it serves also shows a commitment to equality.³³ Symbolically, as the institution administering justice, the composition of judiciaries should embody equality and fairness.

There are also important access to justice implications. Where people see themselves reflected in decision-makers, they are more likely to trust and seek the assistance of the courts.³⁴ Individuals from minority backgrounds may be less willing to turn to the courts if courts are perceived as only representing and reflecting the majority.³⁵

There is debate among commentators as to how the goal of achieving a judiciary that reflects society intersects with the requirement contained in art 11 of the Beijing Statement, “that judges be chosen on the basis of proven competence”.

There is no doubt that those selected to be judges should be highly qualified and capable.³⁶ This is because the decisions that judges make have

³³ Rosemary Hunter “More than Just a Different Face? Judicial Diversity and Decision-Making” (2015) 68 CLP 119 at 123–124.

³⁴ Beverly McLachlin, the former Chief Justice of Canada, has said that people, especially women, will be more sceptical of a legal system composed predominantly of “middle-aged men in pinstriped trousers” without much representation from women and minorities. Former Chief Justice Elias, has said that having women in the judiciary “enhances public confidence” in the legal system: International Association of Women Judges *The IAWJ: Twenty Five Years of Judging for Equality* (2016) at 5–8. Lady Hale, former President of the United Kingdom Supreme Court, has also said that a diverse judiciary gives the courts “democratic legitimacy” because people see that the courts serve the whole community, not just the “privileged elite”: Brenda Hale, “Judges, Power and Accountability: Constitutional Implications of Judicial Selection” (speech to the Constitutional Law Summer School, Belfast, 11 August 2017).

³⁵ See ESCWA *Policy Brief Women in the Judiciary: a Stepping Stone Towards Gender Justice* (September 2018), at 5; and Rosemary Hunter, above n 33, at 123.

³⁶ For more on judicial diversity see Susan Glazebrook “Women Delivering Justice: A Call for Diverse Thinking – Address at the 65th Session of the Commission on the Status of Women” [2021] NZWLJ 114.

significant consequences for society, not to mention very personal consequences for the parties.

But the judiciary also needs to be representative (and hence inclusive and diverse) in order to understand and serve the public – for the reasons of legitimacy I have already outlined. Diversity in judicial appointments should therefore be seen as an element of the merit requirements for judges.

Having diverse perspectives improves the quality of debate, means that minority views, that otherwise may not have been obvious to the majority, are considered and plays a role in countering unconscious bias.

Women and minorities, including those with disabilities and from different ethnic and socio-economic groups, bring different life experiences and perspectives to their roles on the bench. By approaching the law with their unique lens, they can contribute to a richer, more informed application and development of the law.

I would therefore go further. Like beauty, merit is in the eye of the beholder. It is not an objective standard. The criteria to assess merit have traditionally been defined by the already predominantly male group. Rather than being a fair and transparent process, a merit-based system can exclude women and other groups on the basis that they lack “merit” but only as this is defined by those currently involved in selection processes.³⁷

³⁷ See for example Michael McHugh, “Women Justices for the High Court” (speech to the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004): “[Women] are at a disadvantage in competing on merit, as that term has been defined and understood in a male-dominated profession.”

Progress is being made. In Europe and the Americas there are a roughly equal proportions of women judges to men.³⁸ In other regions, including the Asia-Pacific region, this proportion is closer to a third.³⁹ But, even in regions with greater numbers of women judges, women still “tend to be clustered in social rather than commercial courts and are underrepresented in the higher courts and in management roles”.⁴⁰ As such, there is still some way to go on in terms of having judiciaries that reflect society, an important aspect of the rule of law.

But women judges do now have their own official United Nations day on 10 March each year. The UN resolution designating the day received widespread support; it was co-sponsored by 72 states and adopted by consensus.⁴¹ It has huge symbolic significance in recognising the unique talents, perspectives and life experiences women bring to their roles on the bench.

Conclusion

I finish by stressing, as I did at the beginning of this talk, that we cannot take judicial independence and the rule of law for granted. Once judicial independence is weakened or lost, recovery is hard. The conventions and norms needed to sustain an independent judiciary benefit from having deep roots. Gatherings like these are a reminder of our shared commitment to the rule of law and of the need to be very protective of the institutions vital

³⁸ *Independence of judges and lawyers note by the Secretary-General* UN Doc A/76/142 (25 July 2021) at 22–23.

³⁹ At 22–26.

⁴⁰ Margaret Satterthwaite *Report of the Special Rapporteur on the independence of judges and lawyers* UN Doc A/HRC/53/31 (13 April 2023) at 35. For the most recent annual report of the Special Rapporteur, see Margaret Satterthwaite *Report of the Special Rapporteur on the independence of judges and lawyers* UN DOC A/HRC/56/62 (21 June 2024).

⁴¹ Susan Glazebrook “The International Day of Women Judges” (10 March 2022) Konrad Adenauer Stiftung <www.kas.de>; and see also “International Day of Women Judges” United Nations <www.un.org>.

to maintaining and sustaining it.