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In Conversation with Stephen Gageler, Chief Justice of the High Court of Australia

BY STEPHEN GAGELER AND DAVID COLLINS

On November 6, 2023, **Stephen Gageler** became the 14th Chief Justice of the High Court of Australia. At his swearing-in ceremony, he described the challenges facing Australia’s judiciary, saying that the public’s faith in and perception of the judiciary can no longer be taken for granted or treated “as the sole concern of the political branches of government.” The Chief Justice further remarked that “[t]he essential qualities of the Australian judiciary must be promoted and projected from within the Australian judiciary itself.” ([Click here](#) to read the full transcript of Chief Justice Gageler’s remarks.)

In January 2024, **David Collins**, justice of the Court of Appeal of New Zealand and chair of the *Judicature International* editorial board, spoke with Chief Justice Gageler about how he sees his new role and potential solutions to these and other complex — and often global — problems facing the Australian judiciary.

The following transcript of their conversation has been edited for length and clarity.

Justice David Collins: Can we start by asking, what do you see as being the biggest rule of law challenges in your country today?

Chief Justice Stephen Gageler: I don’t think that we have any unique rule of law challenges in Australia. I think that we are continuing to grapple with those issues that have plagued the adversarial system as long as it has existed. Essentially, they are problems of cost and delay. I fear these are problems that are simply inherent in the system of law in my country and in others that have followed the common law tradition. I tend to see *Bleak House* not entirely as a work of fiction, but as reflecting the Court of Chancery in the early part of the 19th century. And the *Bleak House* problems are problems that have persisted despite numerous attempts at reforming court systems in many countries, including my own. We aspire here according to the rules of practice of most of the Australian superior courts to be delivering justice in a form that is just, quick, and cheap. Getting that balance right is something that we are continuously seeking to achieve. It is that kind of legal service delivery challenge that our system

faces. It is exacerbated by the complexity of the system. We have six states, two territories, and a federal courts system. If we were more coordinated and streamlined like New Zealand, it may be that we could address some of these problems in a much more efficient way. Part of my aim as chief justice is to attempt to bring about some rationalization in how these issues are addressed at the national level.

Collins: Well, I wish you the best of luck. I can only observe that the problems that you’ve described are equally relevant to us. And despite our small size and our relatively streamlined systems, we are also beset by the cost and the delays of litigation. I was recently looking at some older court of appeal judgments and reflecting on how only 20 years ago the length of a judgment in this court might be eight or nine pages and be very succinct and very well presented. Today, I suspect the average length of a judgment is at least 30, maybe 40 pages.

Gageler: It is exactly the same here. The length of judgments has increased. The time between the conclusion of the hearing and the delivery of judg-

ment has increased. The time between the commencement of proceedings and the hearing in almost every court in Australia — and I suspect around the world — has also increased. And in many ways, technology, so far, seems only to have exacerbated that problem.

Collins: Yes, it is a universal problem, at least in the common-law world. Stephen, what are the threats confronting judicial independence in Australia?

Gageler: Again, I don't think we face any unique threats in Australia. The threats we face are a mild reflection of global trends. What I see happening globally is a polarization of politics, resulting in almost all social problems being at some level characterized as political issues, and increasingly demanding an ideological solution rather than an evidence-based solution. Associated with that, I see a rise of populism leading to a diminution in mechanisms of political control — particularly political control by the legislative arm of government over the executive arm of government. And I see, associated with that, a phenomenon that's been occurring since the 1950s. That is the "judicialization" of what were previously political issues. Part of the reason for that has been the formal adoption of bills of rights or charters of rights in many jurisdictions, including some Australian jurisdictions. A greater part of the reason is because, at some level, every social issue can become a judicial issue, at least in the sense that anything can be brought before a court. The court then at the very least needs to determine whether it has jurisdiction to address the issue before it. So, I think it has led to, or is leading to, a global perception of the politicization of the judiciary.

In some countries, we can see this manifesting in overt challenges to judicial authority. In others and perhaps in some of the same countries, it is manifested in changes to the way members of the judiciary are chosen. This leads in some cases to a diminution in the quality of the judiciary, and sometimes in overtly ideological appointments or perhaps more extreme ideological appointments that have generally been considered to be unacceptable in the past. Domestically, we have escaped the extremes of the political forces that have driven those problems in other countries.

We need to be vigilant, however, about maintaining the level of competence of our judiciary and in being seen as within the acceptable middle of ideological positioning and not at an extreme. We also need to be very careful in this increasingly polarized political climate to be seen to uphold ethical and professional standards. The tendency of the mainstream media to criticize individual judges who are seen to fall short — even in their personal lives — of maintaining community standards, has increased. I could point to two or three examples of individual judges who have been criticized publicly in Australia in the last few months. This would not have occurred previously, and if it had occurred it would have been of little moment. But increasingly, I am concerned that attacks on individual judges — usually by reference to a failing of ethical, professional, or community standards — will reflect on the judiciary as a whole.

Collins: You have always had a global outlook, if I may say so. Do you think that supporting the rule of law in Australia will be enhanced through a global approach to these sorts of

problems? That is to say, a global community of judges working together to understand each jurisdiction's perspectives?

Gageler: To an extent. Over the years, I have engaged with the judiciary in the United States to an extensive degree. I have participated in global seminars with other judges. I have done what I can to connect with the judiciary in our region. There is a great deal to learn from each other because those of us who have inherited the common law tradition face the kinds of issues that I outlined at the beginning of our discussion. By virtue of similarity of our systems, we can benefit from each other's experience. There is a great benefit from sharing approaches to dealing with common issues. On the other hand, we have to recognize and respect that real differences in institutional arrangements mean that the same solution may not be either politically acceptable or practically workable from one country to another.

Collins: Do you think the ordinary Australian understands the role of the courts in Australia?

Gageler: Not very well, David. There is certainly an understanding that the courts are meant to be neutral arbiters, including neutral arbiters of very serious political disputes. We have a federal system. We have judicial review of both legislative and executive action. Our federal system has been in existence since the beginning of the last century. Over the past 120 years, my court has played a central role in the resolution of very large political issues. For example, the Communist Party Dissolution Act passed by the Federal Parliament during the McCarthy era of the 1950s was struck down by my

court as unconstitutional. Another much more recent example during my time on the court was when we held the Deputy Prime Minister to be disqualified from holding office by virtue of his New Zealand citizenship. He was one of about a dozen politicians who we held to be disqualified.

Those kinds of decisions have obviously been highly controversial. There is always some questioning of the correctness of the decision at the time of the decision. But never, in my experience, has there been questioning of the authority of the court to make it. The grumpiness about the outcome tends to subside relatively quickly. So, overall, I think there is a fairly high level of acceptance of the role. That said, I do not think there is a great deal of understanding of the way in which we go about discharging our judicial function.

Collins: Are there any judicially led efforts being made to educate people in Australia about the role of the court?

Gageler: Not very much, David. In the High Court in Canberra we have an Australian Constitution Centre. It is an interactive learning experience aimed basically at late primary school and early high school students to educate them about the role of the court. COVID-19, of course, affected visits, but there has been a practice over about a decade which I think is now being renewed where students visit the national institutions. They visit our court and sit in on its sessions. That is about as far as the education that is contributed to by my court goes. I am not sure how I feel about judges getting involved in educating the public about what they do. I know that there are other jurisdictions where chief justices will hold the equivalent of press

conferences or town hall meetings where they explain their role and the way they go about discharging it. I tend to think that my job is to keep the judiciary to the highest standards and to be direct to the extent that we are communicating as judges with the public. We achieve that through well-written and well-reasoned judgments.

Collins: Do you televise your hearings?

Gageler: We publish recordings of some full court hearings on our website as well as the transcript after the end of the hearing. Some hearings are live-streamed. We do not get a lot of “hits” — it is not riveting viewing.

Collins: Although some cases would be very riveting as the experience of the UK Supreme Court has demonstrated.

Gageler: Yes, occasionally but not necessarily for the kinds of reasons that you might be thinking of. Cases about tennis players, for example, will get more “hits” than others.

Collins: Where have you looked for inspiration during your judicial career?

Gageler: I was very fortunate to have a number of role models whom I worked with. I started off my legal career as an associate to Sir Anthony Mason who was then a judge of this court. He had before that been Commonwealth solicitor-general and ultimately became chief justice of this Court. I have stayed in touch with him over the years. He will be 99 in April. He, for me, was, and is, a role model. He demonstrated to me what it is to be a judge and what it is really is to be a judge of this court.

I had great teachers whom I kept in

touch with over the years. One was Leslie Zines. The name may mean little to you, but he was the doyen of constitutional scholars in Australia. I studied with him at The Australia National University. Another person I studied with at ANU and with whom I remained friends until his death just last year was Paul Finn, a wonderful scholar, a very deep and creative thinker. He went on from academia to become a Judge of the Federal Court of Australia. At the bar where I practiced for nearly 20 years, Sir Maurice Byers was a very big influence on me. He had also been Commonwealth solicitor-general. He never became a judge but was certainly the best barrister I have ever seen. There was something about his humanity that I sought to absorb; he was a very large presence. He had a very large vision of the national polity, and he had a wonderful “Churchillian” command of both historical knowledge and the English language. He was the complete package when it came to constitutional advocacy. Historically, I think I would say Matthew Hale, Benjamin Cardozo, and Robert Jackson would be the people to whom, for various reasons, I would look to as model judges. So far as chief justices are concerned, I’ve got two and they are both American. One is John Marshall. The other is William Howard Taft; a much-underrated chief justice, I think.

Collins: And it is a hundred years ago that he was chief justice after having been president.

Gageler: Yes, that is correct.

Collins: Extraordinary.

Gageler: He introduced some major reforms that are still in place and have

really shaped the nature of the work of the Supreme Court in the last hundred years.

Collins: Yes. I got to know Paul Finn by sheer coincidence. We both had a sabbatical at Cambridge at the same time in 2011, and I got along very well with him. I'm not surprised that he was such a mentor to you. I only met Anthony Mason once, and I was thoroughly impressed by him. I think his mother's father was a Solicitor-General of New Zealand. I think you might have been at the same meeting where I sat next to Sir Anthony at a lunch at Bond University.

Gageler: I was at a meeting with you at Bond, but I cannot remember him being there.

Collins: Yes. After lunch at that meeting, I asked him how he copes with stress. He looked at me as if I was from a different planet, and he said, "I just inflict it on other people."

Gageler: Well, yes. There is a line that I am sure is apocryphal. It is attributed to Murray Gleeson, who was Chief Justice in the early part of this century here. And the line is, "Stress is not something you get. Stress is something you give."

Collins: It must be something about Australian chief justices. When you retire, what would you like your legacy to be?

Gageler: I sometimes answer this sort of question with a metaphor. So forgive me if I take a little while to explain

it. When I was a well-remunerated barrister, I collected a little bit of art, and I collected one piece of antiquity. It is a Tang Dynasty porcelain camel; about 1,200 years old. I worked out that this is a little bit older than the common law itself. Although I purchased it and nominally own it, I don't see myself as doing anything other than having custody of it for a short time. It's my job to get the camel through the next few years and hand it over to someone who will care for it into the future. So, my true ambition is a very modest one. It is metaphorically to pass the camel intact onto my successor in office.

Collins: I am sure you will achieve that and much, much more. Stephen, thank you so much.

Gageler: Great. Thank you, David.