

Judicial independence: the Nazi or the Australian way?

[Ian Cunliffe](https://johnmenadue.com/judicial-independence-the-nazi-or-the-australian-way/) John Menadue's "Pearls and Irritations" - [25 August 2020](#)
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In an age when the Parliament nearly always does the bidding of the elected government and in a country which, uniquely amongst democratic nations, has no Bill of Rights, the courts are vitally important as a protection against arbitrary power.

Whatever your views about Clive Palmer, the battle in Western Australia over his claim for compensation for being prevented to exploit an iron ore deposit demonstrates the point splendidly. Opponents to a Bill of Rights use the argument that the courts, the common law and the good sense of elected representatives protect us. That argument was prominent in the debates of the Founding Fathers who decided not to adopt an American style Bill of Rights. At the time of those debates, of course, party leaders did not tyrannise the Parliament as has been the case virtually ever since. The rigid party system of politics which we know today was yet to emerge.

Worryingly, today we see governmental assaults on the independence of the courts and tribunals.

Judicial independence is a cornerstone of Australia's system of government and law, and is an essential component of the Rule of Law. The Rule of Law requires that the judicial system is open and transparent, and that independent judges, rather than the executive government or the Parliament, decide legal cases.

Over the last few decades, governments from both sides have passed laws which try to prevent the courts from reviewing the lawfulness of migration decisions. The courts have largely responded by interpreting those laws as, for technical reasons, not applying to the particular migration cases before them.

The courts have shown less resistance to the efforts of governments across Australia to tell the judges what sentences they are to give to offenders – so-called mandatory sentencing.

The present federal government has stacked the Administrative Appeals Tribunal with literally dozens of people with ties to the Liberal Party, despite many of them having no legal qualifications. In September last year, Crikey reported that 65 AAT members are former Liberal Party staffers, former Liberal or National politicians, party donors, members, unsuccessful Liberal candidates or Liberal government employees; and 24 of those have no legal qualifications. This politicization of the AAT under the present Federal Government is unprecedented.

The federal Attorney-General Christian Porter has been up to his neck in the stacking. For example, he appointed the head of a Perth bus company with no law or tertiary qualifications to the AAT after the man allegedly lent buses to Porter which were used by him as travelling billboards during last year's federal election. According to Crikey, only after there was publicity did the Liberal Party agree to pay for the buses.

Another Liberal appointee, Michael Cooke, who was appointed by Porter's predecessor, campaigned very actively for Tony Abbott in the last federal election while being a full-time senior member of the AAT. According to Crikey, on at least 10 different days around the election, in the Facebook discussion pages of the local paper Cooke described Abbott's opponent, Zali Steggall and her behaviour as "total fraud" ... "crap" ... "false" ... "cult queen" ... "fake climate warrior" ... "weird". Cooke is not legally qualified. Cooke works in the tribunal's migration and refugee division – poor refugees; poor us. Rake had the clever subtitle: "The bar has been lowered". The AAT bench has also been let down – mightily. Christian Porter and his predecessor have seen to that.

In an important analysis of the way in which Hitler's Nazi regime dealt with Germany's judges, leading German academic, Professor Doctor Hans Petter Graver published by Cambridge University Press and in the German Law Journal reaches some surprising conclusions: while Hitler hated judges, he prohibited the Nazi Party putting pressure on judges or interfering in any way with the independence of the judiciary in deciding individual cases.

Yet, starting in 1933 with a country which was deeply embedded in the Western legal tradition of emphasis on law as an autonomous institution with an independent judiciary, very quickly most German judges became compliant servants of the regime: "A compliant judiciary resulted without substantial interference with the operation of the courts and largely without applying disciplinary measures on judges." A truly independent judiciary is a delicate flower, as well as being a most precious one.

It is fair to say that Australian governments have been less coy than Hitler was, particularly in relation to matters such as those the subject of the prosecutions of ACT lawyer, Bernard Collaery and his client, Witness K. The K case is nearly entirely invisible to us. We know slightly more about Collaery's.

One troubling aspect of both cases is the extent to which – at the behest of the Federal Government – both matters have been conducted in secret, with only the barest details emerging. In the aftermath of 9/11, in the name of combatting terrorism, great swathes of legislation have been rammed through our Parliaments, trampling on rights and freedoms to extents which would have been unthinkable on 8 September 2001. The hard-nosed authoritarians are in charge.

In K and Collaery's cases, these laws have been used to trample on the protections traditionally afforded to people charged with serious offences. K and Collaery are not terrorists. Indeed, what they are accused of doing is exposing a major criminal conspiracy by senior ministers and officials of the Australian Government. The criminal conspiracy involved a major distraction of the Australian Secret Intelligence Service (ASIS).

ASIS mounted what must have been a massive and very expensive logistical effort of commercial espionage for Woodside Petroleum against Timor-Leste. Instead, under its statutory charter, it should surely have been tracking the terrorists who bombed the Australian Embassy in Djakarta at precisely the same time (September 2004). Ten people died in Djakarta and 200 were wounded. Focusing on terrorism might also have prevented the Bali bombing of October 2005.

The Nazis did not put pressure on judges or interfere in any way with their independence in deciding individual cases, and without substantial interference with the operation of the courts. That cannot be said of the Australian Government in relation to K and Collaery.

Legislation recently passed by the Australian Parliament which was central to the decision for secrecy in Collaery's case requires the courts to "give greatest weight" to the opinion of Porter that a trial should be secret over consideration of [substantial adverse effect](#) on the [defendant](#)'s right to receive a fair hearing, or any other matter.

In Collaery's case, there has been very heavy security at the Palace of Justice in Canberra whenever the case has been listed for some sort of hearing. Often the public is entirely excluded. Photographs show a Collaery support group of well-dressed, mostly middle aged and older people. On at least one occasion, security guards confiscated telephones from those who were permitted to enter the court.

It is not clear who engaged the security guards. To his credit, Justice Mossop countermanded their actions. Justice Mossop handed down his judgment on proceedings being held largely in secret to the parties on 24 June in court. Collaery and his legal team were handed a copy and took it to an adjoining room to read it.

They were abruptly interrupted by lawyers from the Attorney-General's Department who asked for the judgement back saying that it needed to be redacted as publication may breach existing orders. They advised that if further orders were necessary they would be sought from the Attorney-General. They were not to see it again for a couple of weeks until naughty bits had been redacted. Earlier in the case, Justice Mossop had been warned by the Commonwealth that he and his assistants would be subject to possible ten year gaol sentences if they did not abide by the security rules imposed by the Commonwealth.

The indictment against Collaery does not identify in any way what information he is alleged to have wrongfully disclosed. The alleged thief or murderer is at least given the details of what they allegedly stole or who they killed. It is not just pedantry to know precisely the charge against you. The detail could be vital.

The ACT Supreme Court has only four judges who are resident in the ACT. That is a very small court. Apart from Justice Mossop, Justice John Burns is another such. He has been at the centre of even more intense security pressure in relation to the Witness J and Witness K cases. In such a small court, the pressure of these events must be intense, and difficult to resist. Mostly, hearings involving K have not even been listed in the court list. No judgments are public. The public is entirely excluded. In J's case, the man was long since imprisoned before even the Attorney-General of the ACT knew that he existed. These were not the Nazi's tactics.

There was a time when the Commonwealth Attorney-General spoke up for his courts and judges, defending them from attacks, knowing that they were hampered from making statements that might be interpreted as political. That was also a time when Attorneys saw themselves as standing apart from the cut and thrust of daily political life – Bob Ellicott's resignation as Attorney in 1977 from the Fraser Government is an example. There is a massive gulf between Bob Ellicott and Christian Porter, and the Australian democracy is the poorer for it.