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EDITORIAL

THE RULE OF LAW IN INTERESTING TIMES

The ironic phrase ‘May you live in interesting times’ has been in circulation the world over for several decades. Often mischaracterised as an ancient Chinese curse, the phrase is neither ancient nor of Chinese origin. That it is a curse, however, seems to be beyond doubt. ‘Interesting times’ of the kind contemplated by the phrase are marked by tumult, uncertainty and crisis.

Opinion is divided (of course), but it is likely that the saying first appeared in a letter written in 1939 by British statesman Sir Austen Chamberlain to an obscure American politician called Frederic Coudert. The months that immediately preceded the commencement of WWII in September 1939 (and the writing of the letter) were, unquestionably, ‘interesting times’ in the ironic sense. And though Sir Austen’s half-brother Neville had returned from Munich in September 1938 to announce that he had reached an accord with Hitler that assured ‘peace for our time’, Hitler’s assurance proved to be nothing more than a naked and duplicitous falsehood. It took an heroic multilateral effort, and much loss of life on the part of the Allies, to repel first the Axis forces, then those of Imperial Japan, to restore the times to a less ‘interesting’ condition by 1945.

‘Interesting times’ as captured by the catchphrase—that is, times of tumult, uncertainty and crisis—are certainly upon us again. Indeed, they were already upon us in the summer/autumn of 2019 when, perhaps presciently and without doubt cheekily, the organisers of the 58th Venice Biennale chose ‘May You Live in Interesting Times’ as the exhibition’s title. But who could have anticipated, in 2019, the further upending and dislocating effects of the coronavirus pandemic that would grip the world in 2020? ‘Tumult, uncertainty and crisis’ hardly begin to capture it.

The pandemic itself raises a host of new challenges to peace, order and good government in democratic states, both within the Commonwealth and outside it. But we must recognise that those challenges represent just a further category of peril (albeit a deeply worrisome one) to be added to the growing list of existential threats to the rule of law in many nations. To take some of the attention away from the pandemic, if only briefly, we have chosen here to examine some of the others.

Those who are most explicitly entrusted with the task of promoting and upholding the rule of law in true democratic states are the members of the judiciary. And in our modern era, one must acknowledge with regret that judges are being called upon with increasing frequency both across the Commonwealth (and outside it) to make rulings and determinations that frustrate state action that is judicially determined to be adverse to the rule of law. Such rulings and determinations are, naturally, unpopular with the state actors in authority whose initiatives are brought under judicial scrutiny and then found wanting. Sadly, it is not uncommon for judges themselves then to become the targets of campaigns aimed at limiting their powers and effectiveness if not removing them from office altogether. Yet, judges do soldier on, as they must, fearless in their dedication to the democratic institutions which they have been sworn to uphold.
A somewhat older example of a serious threat to the rule of law, and three rather more recent ones (in each case by way of very brief summaries only), will serve to illustrate.

Pakistan

In 2007, General Pervez Musharraf faced growing controversy surrounding his re-election as President of Pakistan at a time when he also held the position of Chief of Army Staff. Other controversies plagued his government. As these controversies mounted, General Musharraf eventually responded by declaring a state of emergency and purporting to suspend Pakistan’s Constitution. When the Chief Justice of the Supreme Court of Pakistan in turn swiftly struck a panel of seven justices to review the General’s actions and issued an interim injunction and ancillary orders enjoining and countermanding those actions as being unlawful and unconstitutional, the army, acting on orders from General Musharraf, placed the Chief Justice and several other justices under arrest. The General’s actions were in due course ruled unlawful and unconstitutional and the justices were ultimately freed and restored to office after demonstrations by lawyers and others.

South Sudan

In 2017, some 14 South Sudanese judges were dismissed from office by South Sudan’s President in the wake of a dispute regarding their incomes and working conditions. The dismissals were neither compliant with South Sudan’s Constitution nor with a statutory obligation binding upon the President to take guidance from the country’s Judicial Services Commission before acting to remove judges from office. The President’s actions were subsequently challenged by one of the 14 judges affected in a proceeding that he brought before the East African Court of Justice. In 2020 the court ruled that all 14 dismissals were in violation of South Sudan’s Constitution, other requirements of the law and of certain provisions of the East African Community Treaty.

Malawi

In 2020, with days remaining in his term of office before a court-ordered re-staging of a discredited election that had returned him to power, the President of Malawi directed his cabinet secretary to write letters to Malawi’s Chief Justice and several other senior members of that country’s judiciary requiring them immediately to take a forced leave of absence to be followed by forced, permanent retirement. This action by the President was challenged in proceedings taken before the High Court of Malawi at the instance of, among others, the Association of Magistrates in Malawi and the Malawi Law Society. The court ruled in that challenge that the President’s actions had no constitutional or legal basis and, thus, were of no force or effect.

Sri Lanka

A substantial part of an omnibus constitutional amendment bill that has been before the Parliament of Sri Lanka for some time was finally passed into law in late October, 2020. The part that was enacted following constitutional scrutiny by Sri Lanka’s highest court includes, surprisingly, provisions that threaten to imperil the quality, independence and impartiality of that country’s judiciary. While the government of Sri Lanka has in past formally embraced the Latimer House Principles, under the recent constitutional amendment Sri Lanka has effectively renounced some of the most fundamental content of those Principles by entrusting future judicial appointment decision-making to committees of Members of Parliament or their nominees instead of a properly constituted judicial services commission composed of judges, representatives of the legal profession and lay members representing civil society (themselves chosen through an independent appointments process). The amendment also bypasses the current national consensus approach to judicial appointments by empowering the President to put senior judges on the bench without advice from, or consultation with, the pluralistic Sri Lankan Parliamentary Council. These aspects of Sri Lanka’s constitutional reform initiative, now a fait accompli, had been vigorously opposed (as it turns out, unsuccessfully) by various national and international bodies promoting the rule of law, including the CMJA and the Commonwealth Lawyers Association.
And Then There Is Canada and the UK

It can be seen from the above that, quite apart from the pandemic, one thing that makes our modern times ‘interesting’ is the fact that the rule of law, the decision-making that surrounds the appointment of those with the greatest responsibility for upholding it, and the security of tenure of those judges once appointed, are all under increasingly heavy pressure.

But it would be a mistake to think that that pressure is applied and felt only in Commonwealth and other states that are sometimes referred to as ‘developing countries’. While the challenges to the rule of law may differ from the examples given above in kind and in degree, they are also arising in countries like Canada and Britain (for example), making life somewhat ‘interesting’ there too.

As recently as in 2019, Canada experienced what some experts termed a ‘constitutional crisis’ when Parliament’s Conflict of Interest and Ethics Commissioner made the determination that Prime Minister Justin Trudeau had contravened conflicts of interest legislation (and other constitutional norms) when he applied improper influence to then Attorney General Jody Wilson-Raybould to persuade her to overrule a decision made by Crown counsel who, exercising their prosecutorial discretion, had declined to pursue a deferred prosecution agreement and chose instead to press ahead with the prosecution of bribery and fraud charges against engineering firm SNC-Lavalin.

Similarly, in the same year (2019), the UK averted what experts almost universally agreed was a constitutional crisis when an eleven-member panel of the UK Supreme Court unanimously ruled, in Miller No 2, that the Johnson government’s decision to prorogue Parliament—potentially forcing a much-opposed no-deal Brexit upon the UK without further Parliamentary scrutiny—was a nullity and of no force or effect. Praising that decision, Prof Mark Elliott of Cambridge stated, in part:

*Government cannot be afforded an unfettered power to stop Parliament from performing its constitutional role, and... it is entirely proper for courts to step in when the executive, without adequate justification, seeks to marginalise Parliament in a way that prevents it from fulfilling its constitutional duties.*

A victory for the rule of law, one might say. But in law, as in life (and, indeed, as in some now notorious presidential elections), it’s never over until it’s over. Reversals such as that experienced in Miller No 2 have markedly diminished the appetite of some in UK government circles for judicial review of administrative action. Among other things, this may have led to the formation of Britain’s now up-and-running Independent Review of Administrative Law panel. The questions that panel will address include:

- Whether the terms of judicial review should be written into law;
- Whether certain executive decisions should be decided on by judges; and
- Which grounds and remedies should be available in claims brought against the government.

In submissions recently made to the panel and reported in *The Guardian*, the president of the Law Society of England and Wales emphasised the bedrock importance of preserving a robust mechanism for judicial review in the UK, stating in part:

*There is an imbalance of power between individuals and the state, which judicial review bridges—but it must be effective and accessible to all. The availability of this test drives good governance. It also enhances trust in state institutions and public decision-making.*


And We Mustn’t Forget Hong Kong

While the belief that the ironic expression ‘May you live in interesting times’ has Chinese origins may be apocryphal, there is little room for doubt that Hong Kong citizens are living at present in ‘interesting times’ and that a
defining moment for democratic rights and freedoms and, indeed, the rule of law generally is now looming ominously in the former colony. At the time of writing, following a forced removal of four pro-democracy Hong Kong representatives from the legislature for ‘endangering national security’, all of the remaining pro-democracy opposition members resigned en masse.

Expressing concern about the broad parameters of Hong Kong’s new, Beijing-imposed National Security Law, commentators earlier this year told the Reuters news agency that:

Some in the city’s legal establishment are now bracing for the possibility that China will begin to meddle in the appointment of new judges, following objections by some pro-Beijing lawmakers in Hong Kong to two recent appointments on the top court.

The fact that Lord Hodge, Deputy President of the UK Supreme Court, filled one of the empty seats on the Hong Kong Court of Final Appeal in October 2020 does give some hope and comfort, not to mention the fact that a number of former judges of the UK Supreme Court as well as former Chief Justices of Australia and Canada are still members. Still…

‘Interesting times’ indeed.

WHAT AWAITS YOU IN THIS ISSUE

A not insignificant proportion of the content in this December issue of the CJJ directly engages some of the concerns covered in this editorial, viz:

• Justice Professor Oagile Dingake reviews and analyses the recent ruling under which courts in Malawi annulled the re-election of President Peter Mutharika in May 2019;
• Dr Anna Dziedzic examines the implications of the new National Security Law for foreign judges sitting on Hong Kong’s Court of Final Appeal;
• Dr Adam Harkens et al. examine the risks and dangers associated with excessive reliance upon AI in justice system applications;
• Justice Malcolm Rowe provides guidance as to how judges can comport themselves outside their courtrooms without running afoul of their ethical obligations; and
• HH Nic Madge describes how enhanced consistency in the approach to criminal sentencing can contribute to the law’s coherence and to citizens’ respect for it.

The December issue is rounded out with:

• a lucid outline of Wales’s somewhat unique legal institutions by Judge Milwyn Jarman QC (an article that is no less interesting or informative for the fact that the Cardiff Conference did not ultimately proceed); and
• summaries of important decisions that have come down recently from the courts in several Commonwealth jurisdiction.

CMJA TRIENNIAL CONFERENCE IN ACCRA, GHANA

While the state of the global pandemic in ten months’ time cannot be predicted with any certainty, current planning is proceeding on the assumption that the CMJA’s Triennial Conference in Accra, Ghana, will occur, in person, from 12-17 September 2021. So, do mark your calendars. And, as well, why not consider submitting a paper for possible presentation (and possible publication in these pages)?

ENVOI

Happy reading. And, do stay safe and well.
CALL FOR SUBMISSIONS

The Commonwealth Judicial Journal (the ‘CJJ’) is the flagship publication of the Commonwealth Magistrates’ and Judges’ Association (the ‘CMJA’) and has a readership of judges, magistrates and other legal practitioners from the Commonwealth and beyond. The CJJ invites submissions of manuscripts on various aspects of the law, in particular manuscripts focusing on the judicial function at the domestic, regional and/or international level. Essays, book reviews and related contributions are also encouraged.

Please read the following instructions carefully before submitting a manuscript or contribution.

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Manuscripts sent by email, as a Word document, are particularly encouraged. These should be sent to: info@cmja.org. Alternatively, manuscripts may be sent by post to: CMJA, Uganda House, 58–59 Trafalgar Square, London WC2N 5DX, United Kingdom.

INFORMATION FOR AUTHORS

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Please note that the CMJA retains the copyright of any articles once these are published in the Journal but in the interests of the widest dissemination, the CMJA may authorise publication of the articles in other appropriate publications.
THE JUDICIAL ANNULMENT OF THE 2019 PRESIDENTIAL ELECTION IN MALAWI: A DISCUSSION AND ANALYSIS

Justice Professor Oagile Bethuel Key Dingake. Justice Professor Dingake is justice of the Supreme and National Courts of Papua New Guinea, a judge of the Residual Special Court of Sierra Leone and a Professor of Law at the University of Cape Town, South Africa and James Cook University, Australia

Abstract: The author offers his personal reflections and analysis regarding the significance of the decision of Malawi’s Constitutional Court (upheld on appeal by the country’s Supreme Court) to annul the result of Malawi’s 2019 presidential election. Evidence of widespread irregularities undermining the legitimacy of the election required that its outcome be invalidated and that a new election be held. The task of assessing those irregularities and ordering a remedy fell to the judiciary in Malawi and, as did their judicial colleagues in Kenya in similar circumstances in 2017, they showed themselves equal to that important task. While being called upon to rule on the question of whether elections are credible, free and fair unavoidably drives judges into politically sensitive territory, it is essential that they approach such cases with strength and resolve. Nothing less is required in order to uphold state Constitutions and protect credible, free and fair elections as foundational elements of every functioning democracy.

Keywords: elections – ‘credible, free and fair’ – judicial adjudication of election disputes – judicial independence – judicial action affecting the political arena – ‘qualitative’ vs ‘quantitative’ tests for adjudicating challenges to electoral outcomes

INTRODUCTION

In February 2020, the Constitutional Court of Malawi, in a monumental 500-page judgment, annulled the country’s May 2019 presidential election and ordered a re-run within 150 days, citing widespread polling irregularities, including the unlawful use of correction products on ballot papers: Chilima and Another v Mutharika and Another (Constitutional Reference No. 1 of 2019) [2020] MWHC 2. The court also found that only about a quarter of the results sheets were verified and concluded that such conduct amounted to ‘serious malpractice that undermined the elections’. On appeal, the Supreme Court of Malawi upheld the decision of the Constitutional Court: Mutharika and Another v Chilima and Another (MSCA Constitutional Appeal No. 1 of 2020) [2020] MWSC 1.

Consistent with the court order, the election was held again and the incumbent President Professor Mutharika was defeated.

Both the court decisions and the implementation of the orders of the courts involved in the election challenge in Malawi must count as triumphs of democracy in a continent where quite often the might of the sword triumphs over that of the pen. As a result of the annulment decision, Malawi became the first country in Africa where an election re-run led to the defeat of an incumbent.

The path toward the delivery of the historic judgment included extraordinary scenes beamed through the nation’s televisions in which judges, escorted by the military, came sporting bulletproof jackets to deliver their judgment in February, 2020. This would forever be etched in memories as an unprecedented occasion in a continent where

— Willy Mutunga, Chief Justice of Kenya (as he then was) presiding over the swearing-in of members of Kenya’s Electoral Commission (14 November 2011)
the military has often sided with the ruling class rather than with the legitimate wielders of sovereign power—the people—such that they were disenfranchised and their voices muffled due to grave electoral malpractice.

THE NECESSITY OF CREDIBLE, FREE AND FAIR ELECTIONS

In the preamble to the judgment at first instance, Potani J poignantly remarked that ‘Credible, free and fair elections form a solid foundation to democracy’.

The preamble of the learned judge resonates with the Southern African Development Community Parliamentary Forum (the ‘SADC PF’) Model Law whose main purpose is to facilitate free, fair and credible elections by upholding the rule of law, the right to vote, equality before the law and the need for independent and credible courts to adjudicate electoral disputes.

Many in Africa would testify to the fact that winning presidential election petitions and or elections in Africa is like attempting to drive the proverbial camel through the eye of a needle. This is due to a number of factors, top amongst which is the ‘quantitative test’ borrowed from the United Kingdom and the ease with which technicalities can trump substance.

Malawi was the second country, following Kenya, to nullify presidential elections. In 2017, Kenya’s Supreme Court nullified that country’s August 2017 presidential elections and ordered a new vote after opposition leader Raila Odinga claimed that the electronic system was hacked and/or rigged in favour of the governing party.

As Potani J pointed out in the case in Malawi, elections are an important pillar of democracy and the right to vote is sacred and should not be taken lightly by anyone. The duty to protect the vote and not to unduly disenfranchise the voters is absolutely essential. The struggle for political pluralism and democracy in Africa was premised on giving the people a choice as to who should govern them. Such a choice must be made in a free and fair manner. The philosophical reasoning underpinning support of multi-party democracy is that such an arrangement will result in better democratic outcomes. But this assumption was based on the twin expectations of an informed citizenry and an electoral process that is free, fair and credible. Unfortunately, Africa has experienced a strong scorched-earth culture in which illicitly obtained funds together with electoral manipulation have combined to undermine the sacred nature of the right to vote. The result has been that the franchise has effectively been wrested away from the people by those with wealth and influence.

Elections in most multi-party democracies in Africa are organised by supposedly independent electoral commissions. The African Union (the ‘AU’), other sub-regional bodies and non-governmental organisations interested in democracy often send electoral observer missions to monitor these elections and report on their findings and recommendations, relative to the requirement that such elections be ‘free, fair and credible’.

QUANTITATIVE AND QUALITATIVE TESTS FOR EVALUATING ELECTORAL INTEGRITY

Election disputes are inherent in many elections and often end up before courts for determination. For many years in Africa, for an aggrieved petitioner to succeed in an election petition, he or she had to prove that an alleged irregularity affected the result of an election. Failure to prove that the irregularity affected the result is usually fatal. This test is often called the quantitative test.

The quantitative test was established by the British decision of Morgan v Simpson 1975 OB 151. In that case the petitioner Morgan and others contested election results as invalid after establishing that 44 ballot papers were not counted because they had not been stamped by election officers. Had they been included the rival would have won by a margin of seven votes. The Divisional Court held that the elections were conducted substantially in accordance with the law and the errors committed by election officials were not sufficient to nullify the results. On appeal, the Court of Appeal held that because the error affected the results of the elections could not be permitted to stand and, accordingly, nullified the same.
The quantitative test is used as a measure in determining the accuracy of the results. The number of votes that the winner received relative to what the petitioner obtained is critical, measured against how many votes the irregularities could have cost the petitioner.

An alternative to the quantitative test, hitherto not embraced by African judiciaries until recently, is known as the ‘qualitative test’. The qualitative test looks at the integrity of the electoral process. If, for instance, the electoral process was afflicted by violence, intimidation, improper influence and corruption at a scale that renders the election, viewed objectively, a sham, then such an election may be invalidated, even if the margin between the winner and the loser may still be large. The requirement that an electoral process must be transparent and administered in an impartial, neutral and efficient manner is a qualitative feature of fair elections. Assessments of elections on qualitative criteria consider whether an election has been conducted in an environment that is free, fair and credible.

In the Kenyan case of Raila Odinga and another v Independent Electoral Boundaries Commission and Two Others, [2017] eKLR, a majority of the Supreme Court of Kenya agreed with the petitioners that the respondents did not organise the elections in accordance with the law and nullified the same. They applied the qualitative test.


The quantitative test was said to be the most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire electoral process is questioned and the court has to determine whether or not the election was free and fair.

In the Malawian nullification case, both the quantitative and qualitative test were used. However, it appears that the qualitative test had the upper hand because the court found that the Malawi Electoral Commission (the ‘MEC’) fundamentally departed from the dictates of the Constitution and electoral laws governing the conduct and management of elections and that there was no way the outcome, quantitatively, could be seen as being anything other than a result of massive irregularities that were committed.

The qualitative test remains a contested terrain. Although the increasing adoption of the qualitative test by our courts is a progressive development, it can also be problematic given the absence or difficulty of objective measurement of the test. As this author once posed the question to his judicial colleagues in Entebbe in 2017, soon after the decision of the Supreme Court in Kenya: How do we assess the degree of irregularities that would be sufficient to nullify an election based on the qualitative test? Scholars, judges and jurists need to unpack and concretise this test.

THE IRREGULARITIES: A BROAD OVERVIEW

It would seem from a reading of the Supreme Court decision regarding the Malawi election that the MEC appeared to have taken liberties with the requirement that it strictly follow procedures set by law in conducting elections.

The law required that result tally sheets, once compiled at a polling station, must mandatorily be signed by the returning officer and polling staff. The court found that the MEC in tallying the national result, inter alia, used tally sheets that had not been so signed. When tally sheets leave a polling station they are supposed to be guarded against any form of tampering or interference. They are supposed to go to the District Commissioner’s office for a compilation of a District result before being sent, under conditions of security, to the National Tally Centre. The MEC ignored this. Without following a formally sanctioned procedure, it created Constituency Tally Centres where massive alterations were made to the tally sheets that were supposed not to be tampered with.

The court also found that some original tally sheets were inexplicably replaced with duplicate tally sheets with the originals not being kept for verification. Other tally sheets had Tipp-Ex (a correction product) used to hide what was originally written on them and then overwritten with new figures.
The court further found that in some instances improper tally sheets and reserve tally sheets were used but they were nevertheless accepted and used by the MEC in compiling the national result.

All of this was not permissible under law; it was done in the absence of those who had witnessed the vote counting and without verification from the counted ballots which were then sealed and only to be opened at the National Tally Centre.

At the National Tally Centre before compilation of the national results the MEC was supposed to resolve all outstanding disputes, but it left a large number unattended. It also came to light that for those disputes it claimed it had resolved, the MEC had largely abandoned its quasi-judicial functions by delegating that task to the Chief Elections Officer and staff. The MEC then proceeded to announce the national result before fully complying with all the precondition that must precede the taking of that step. The MEC even signed the national result after they had already declared it. The Constitutional Court found the violations to be grave and as constituting a clear demonstration of the MEC's incompetence. The Supreme Court agreed with these findings and conclusions.

MALAWI COURT DECISIONS CONSTITUTE A ‘MASTER STROKE OF PURE BRILLIANCE’

The Constitutional Court’s decision (upheld on appeal) is a triumph for the rule of law and for democracy. It is a master stroke of pure brilliance in terms of the constitutional reasoning adopted, findings of fact and conclusions reached; and, in the author’s view, if possible it should be made an annex to the country’s constitution and compulsory reading for all constitutional law students in Malawi and the rest of Africa.

Malawi’s 1994 Constitution as subsequently amended has resulted in an expansion of the democratic space generally, and also created courts that are by design more independent than those inherited at independence.

The new Constitution, on a proper reading of both its spirit and provisions, has created a judiciary that is bound to be interventionist in character. In Malawi it seems the guardians of the Constitution are independent and fearless: bold spirits as Lord Denning would describe them. The judiciary in Malawi and indeed Kenya must be commended for restoring the confidence of their peoples in the judiciary as the fearless guardian of the Constitution. Public confidence is the life blood of an independent and impartial judiciary.

Electoral disputes lie at the intersection of law and politics and, once they are framed as legal disputes, they catapult members of the judiciary into the status of political actors. Electoral litigation is *sui generis* in nature and does not strictly fall within the ambit of conventional civil law amenable to ordinary civil law procedure. This is because such cases determine the very legitimacy of government. If there ever was a time when electoral disputes were considered political in nature and therefore non justiciable such a time now belongs to the dustbin of history.

The increasing judicialisation of electoral politics in Africa is bound to grow, making judiciaries institutional political actors in Africa’s politics and affirming judiciaries as a co-equal of government and a custodian of Africa’s constitutionalism. Our courts, in presiding over electoral disputes, must favour justice over formal legalism (where an insignificant procedural slip, viewed in the context of a larger scheme of things, and the interests of the country, is fatal). Our courts must err, if at all, in favour of an approach that affirms the interests and rights of the people, as gleaned from the evidence; they must not yield unlawfully to the ruling elites. They must deliver decisions that are based on law and evidence without fear or favor, or however displeased the political class may be.

As Willy Mutunga, the former CJ of Kenya and an indisputable luminary of the legal fraternity in Africa, correctly observed:

> And the faithful and fair determination of presidential election petition requires judicial courage from the bench, a courage and integrity grounded on the oath of office that should see courts staring down at partisan interests, including the executive, the corporate sector, civil society actors, international actors and the media. Judges
must remain committed to determinations firmly rooted in the Constitution, law and evidence presented before the courts.

**WHAT ARE THE BROAD LESSONS TO BE LEARNED FROM THE ELECTION ANNULMENT DECISION IN MALAWI?**

The main lesson coming from Malawi since the 2019 presidential election was annulled is that elections are an important pillar of democracy and that they must be protected as such. Equally important in this regard is an independent judiciary, ready to protect the right to vote at all costs. The other lesson is that electoral management bodies must be independent and conduct elections according to law. The elections management bodies, being creations of the law, must comply with the law fully, and not make the law as they go.

It is also instructive to note that the re-run of the presidential election in Malawi was conducted by the MEC under a new chair, Justice Chifundo Kachale, who came with unassailable independence and impartiality credentials. He is also credited with having persuaded the government to release funds to allow elections to go ahead (and to make sure that there were no more questions about Tipp-Ex in the tallying process!).

**WHAT ARE THE JUDGMENT’S IMPLICATIONS FOR ELECTION OBSERVER MISSIONS?**

Election observer missions earlier pronounced the impugned, and eventually annulled, presidential elections in Malawi free and fair. It seems that what the election observers said did not feature as central in the presentation of evidence in the case. It also did not feature in the appeal.

However, in the *Raila* case, cited earlier, at paragraph 302, the court stated:

*In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.*

It is a sad reality of our times that quite often election observers in Africa appear too quick to endorse elections as free and fair; they appear careful not to offend African governments. In a number of cases, observer missions personnel are invariably governments’ appointees and politically compromised. What is required going forward is a professional body, such as Africa’s Judges and Jurists Forum, to do the observations.

**CONCLUSIONS**

Recent developments in Malawi surrounding the 2019 elections demonstrate why it is often said that the independence of the judiciary is an indispensable element of democracy and the rule of law. Coming about two years after a similarly ground-breaking decision of the Supreme Court of Kenya in 2017, the election annulment decisions of the Constitutional and Supreme Courts of Malawi gives reason to be optimistic about Africa’s future in so far as electoral justice is concerned.

There is an emerging and regrettable trend in some African countries in terms of which the results of elections are determined by manipulated electoral management bodies or even politically compromised or captured courts which are too quick to embrace technicalities at the slightest excuse to shield incumbent governments. This should not continue. Elections are the basis of the authority of any legitimate democratic government, and a petition that is not frivolous in nature should not be determined on technicalities without interrogating the substance of the complaint. If it is otherwise, people may be led to believe that their choices do not matter. Such an approach is a recipe for instability. In Africa, we are witnessing a toxic and unholy alliance of illicit money, manipulation of electoral management bodies and the deployment of questionable technology in an attempt to subvert the will of the people and secure the triumph of moneyed interest and their political associates.

Ordinarily the primary duty to determine who should govern lies with the people, not the courts or security agencies. Their choices
must be facilitated by independent electoral management bodies who must competently and fairly manage the electoral process in order to avoid elections that may turn out to be shams. Our democracies could be in peril if our electoral management bodies are incompetent, biased or aid and abet the commission of fraud or seem unbothered by allegations of impropriety in the electoral process. They cannot be a law unto themselves.

In conclusion, it is worth repeating that the phenomena of judicialisation of politics is a reality of our time. As the courts continue to assert their authority as the ultimate guardian of the Constitution, there is bound to be tension. Such tensions is not necessarily a bad thing; it functions to keep each arm of government operating only within its own lane in terms of constitutional functions and obligations.

In many ways, the tension that arise when the courts assert their authority as custodians of the Constitution is axiomatic to the constitutional order that espouses democracy, human rights and the rule of law. In the last two decades, the judicialisation of politics has extended to well beyond the now ‘standard’ judicialisation of policy making, to encompass questions of pure politics such as electoral process and outcomes, regime legitimacy and executive prerogatives. These developments reflect the demise of ‘the political question’ doctrine and mark a transition to what has been termed ‘juristocracy’.

The era of juristocracy carries with it certain obligations for the judiciary. It calls for the avoidance of judicial adventurism. It also calls for judges to be knowledgeable and skilled, and for them to know when, and when not, to intervene in the actions of the other branches of government (bearing in mind that the last thing that any judiciary would want to do is undermine its legitimacy by eroding public confidence in the courts as the independent and impartial arbiters of the nation).

Ed. note: In October 2020, well after this article was written but just as it was about to go to press, the five justices of the Malawi Constitutional Court who ruled in favour of annulment of Malawi's 2019 presidential election were awarded the 2020 Chatham House Prize in recognition of their ‘courage and independence in the defence of democracy’.
Judge Milwyn Jarman, QC, Specialist Chancery Judge for Wales and a Judge of the High Court, Queen’s Bench Division. This article was prepared in connection with the CMJA’s Annual Conference which was scheduled to proceed in Cardiff in September 2020 but was cancelled due to the COVID-19 pandemic

Abstract: The key features of Welsh legal structures and systems are introduced and outlined. The history of increasing devolution of legislative and administrative powers by Britain to Wales is reviewed and areas of increasing divergence between Welsh and English law are noted and discussed.

Keywords: Wales – Britain – devolution of legislative powers – devolution of administrative powers – Welsh language and the law

INTRODUCTION

Prior to the enactment by Henry VIII of the Acts relating to the Administration of Justice in Wales between 1535 and 1543 (now usually referred to collectively as the Acts of Union) the systems of law in Wales differed from those in England. Under those Acts a unified system of law became applicable to Wales and to England. Some distinctly Welsh courts, known as the Courts of Great Sessions, operated until they were abolished in 1830. It was not until 1964 that executive functions and subordinate law-making powers were transferred to the newly created Secretary of State for Wales in such fields as housing, public health and agriculture.

However, the Welsh Secretary was directly accountable to the UK Parliament rather than to the people of Wales, and it was primarily this lack of domestic accountability which led to a referendum in Wales on the question of whether the nation should have its own assembly. The result in 1997 was in favour, albeit by a narrow margin. The subsequent Government of Wales Act 1998 created the National Assembly for Wales as a body corporate with legislative and executive functions. The former functions were limited to subordinate legislation. At the same time, the Scottish Parliament was created, but in contrast to the position in Wales, it was given primary law-making powers and an executive which was separate from the legislature.

The Welsh model came to be seen as unsatisfactory compared to the Parliaments of UK and Scotland. The Government of Wales Act 2007 created a separate executive called the Welsh Assembly Government and paved the way for the Assembly to be given primary law-making powers with approval in a second referendum. Such approval was obtained in 2011. The result was that the Assembly could pass primary legislation on listed subjects which generally followed those in respect of which subordinate law-making powers had been devolved. Such a conferred-powers model differed from that in Scotland, where the reserved-powers model allowed the Scottish Parliament to legislate on any subject not expressly reserved to the UK Parliament. Accordingly, The Wales Act 2017 was passed to implement the move to a reserved-power model. The list of reserved powers is set out in Schedule 7A to that statute.

ADMINISTRATION OF JUSTICE IN WALES

Although the administration of justice as such in Wales was not and is not devolved, it was recognised by senior judiciary in London that devolution brought with it an expectation of change in the way that justice is administered in Wales. In 1999 Lord Bingham, the then Lord Chief Justice of England and Wales, and Presidents of the divisions of the High Court, gave directions for the hearing of devolution issues in Wales, and for proceedings for judicial review involving Welsh public bodies to be issued in Cardiff, and not just in London as had previously been the case.

In 1999, the Administrative Court in Wales was set up, with an office in Cardiff. However, while at this time claims could be lodged in Cardiff, they would be sent to the Administrative Court Office in London to process. The public interest in challenges to the decisions of public authorities is such that it is desirable that such challenges be heard locally. This was recognised, and some judicial review
cases and other challenges to the decisions of public authorities (such as local planning authorities) were listed for hearing at court venues in Wales. However, this was rather piecemeal and some cases with a great deal of public interest in Wales continued to be heard in London.

In 2000 a Mercantile Court was opened at Cardiff by Lord Bingham CJ. In doing so he said:

This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of the citizens here. This court is another step towards recognising Wales as a very proud, distinctive and successful nation.

By now, each of the specialist courts in Wales—that is, the Chancery Division, the Administrative Court, the Mercantile Court (now known as the Circuit Commercial Court), and the Technology and Construction Court—was headed by a supervising or liaison High Court judge based in London. However, each had judges based in Wales appointed under section 9 of the Senior Courts Act 1981 to sit as High Court judges in those courts. Nevertheless, such specialist cases from Wales could still be, and some were, issued and heard in London.

The Constitutional Reform Act 2005 brought major reforms to the courts of England and Wales. The office of Lord Chancellor was modified. The House of Lords was abolished as the final appeal court and in its place the Supreme Court was set up. The Supreme Court has twice considered a reference by the Attorney General as to whether proposed legislation was within the competence of the National Assembly and on each occasion decided that it was. The appointment of judges, formerly a function of the Lord Chancellor, was transferred to a new body independent of the Crown called the Judicial Appointments Commission.

Despite the creation of specialist courts in Wales, some such cases emanating from Wales continued to be issued and heard in London. To an extent this continued to be the experience in the English regions. This began to change from 2007 after judicial comments that judicial review challenges against Welsh public bodies should be heard in Wales unless there are good reasons for their being heard elsewhere. Procedural rules and practice directions dealing with judicial review claims were amended so that the general expectation now is that such proceedings will be administered and heard where the claimant has the closest connection.

In 2017, specialist courts in England and Wales were brought under the umbrella of Business and Property Courts. The Business and Property Courts in Wales, although based in Cardiff, will hear cases in other venues in Wales when appropriate and practical. The section 9 judges based in Wales, and district judges in the North West and South Wales, have been appointed as judges of the court. In addition, High Court judges are deployed to hear cases in Wales, as well as the English Regions, when needed.

Pursuant to the Tribunal, Courts and Enforcement Act 2007, a Senior President of Tribunals was appointed. A two-tier structure of tribunals was set up in which decisions of First-tier Tribunals may be brought, with leave, before Upper Tribunals. Each is made up of several chambers, and the head of each chamber is a High Court judge. There are a few exceptions to this type of structure, such as the Employment Tribunal and the Employment Appeal Tribunal. Prior to 2011, the administration of the court and tribunal system remained distinct. In that year Her Majesty’s Courts and Tribunal Service Wales was created, which operates on the basis of a partnership between the Lord Chancellor and the Lord Chief Justice. Judges based in Wales are appointed to hear cases in both tiers of tribunals at various venues throughout Wales.

A number of matters in which tribunals operate are now devolved matters, which means that the responsibility for devolved tribunals rests not with the Ministry of Justice, but with the Welsh Ministers. These are administered through the Welsh Tribunals Unit, which presently has responsibility for eight tribunals, including The Mental Health Review Tribunal for Wales, the Residential Property Tribunal for Wales, the Special Educational Needs Tribunal for Wales and the Welsh Language Tribunal. The Wales
Act 2017 provided for the appointment of a Senior President of Welsh Tribunals.

The Welsh Language Tribunal was set up under primary legislation passed by the National Assembly of Wales, namely the Welsh Language (Wales) Measure 2011. Thus, this is the first tribunal to be set up by the Assembly. The Measure (as primary legislation by the Assembly was then known—such enactments are now known as Acts) set up the office of the Welsh Language Commissioner with the power to set standards relating to the use of the Welsh Language. Parties dissatisfied with such standards may appeal to the Welsh Language Tribunal, whose chair is legally qualified.

Apart from the appointment of specialist section 9 judges, there has been no significant change in the structure of the judiciary since devolution, and judges of the High Court and the appellate courts remain based in London. However, there have been changes in judicial attitudes and deployment to reflect the process of devolution. This was in large part led by successive heads of the judiciary who took a keen interest in the administration of justice in Wales post-devolution. Lord Bingham was the Lord Chief Justice in 1998. He added the words ‘and Wales’ to the full title of the office which he held. Previously, the title had been ‘Lord Chief Justice of England.’

High Court judges are appointed to be presiding judges, one senior and one junior, on a four-year cycle. The practice has grown of appointing such judges on the Wales Circuit who have some connection with or knowledge of Wales. Each of these judges spend about half of his or her judicial time in Wales. In addition, as has been noted, specialist High Court judges now readily hear cases in Wales when needed, which is more in line with what occurs with their colleagues in family, civil and crime. A practice has also grown up under which both divisions of the Court of Appeal (civil and criminal) will sit to hear cases in Wales, usually twice a year for one week. In July 2019, the Supreme Court, which usually sits in London, sat for one week in Wales for the first time.

The Judicial Appointments Commission is now also responsible for the appointments of tribunal members. The Commission, with the approval of the Lord Chancellor, has adopted an additional requirement of candidates for judicial posts in Wales. Such candidates must have an understanding, or the ability to acquire the understanding, of the administration of justice in Wales, including legislation applicable to Wales and Welsh devolution arrangements.

The particular position of the judiciary in post-devolution Wales was recognised by the setting up of the Association of Judges of Wales in 2008, which has members from every tier of salaried judges, from Supreme Court Justices to district judges and tribunal judges, including those of the devolved tribunals. Membership is open to all judges who hear, or who have heard, cases in Wales.

Another example is the Legal Wales Foundation Board. This has its origins in the Legal Wales Standing Committee set up in 2002 by the first Counsel General for Wales appointed following devolution. The phrase ‘Legal Wales’ was coined to reflect the growing sense of identity and confidence in legal communities in Wales in the wake of devolution. The Committee inaugurated a Legal Wales conference, which has now become an annual event and is held at venues throughout Wales. The Committee evolved into the Board which is now independent of the Welsh Government. Its members now include judges. Speakers at its conferences include The Lord Chief Justice, Supreme Court Justices, and other members of the senior judiciary from London and other jurisdictions such as Scotland, Ireland and Europe.

**The Welsh Language in the Justice System**

The latest figures published by the Welsh government show that almost a third of the Welsh population of three million can speak Welsh. In many parts of Wales, particularly in the North and the West, Welsh is the everyday language. Legal proceedings tend to be stressful experiences where the nuances of language may be important, and it is a matter of justice that a citizen should be able to engage in them in his or her first language. The basis of equality of the Welsh language with the English language in Wales was established by the Welsh Language (Wales) Measure 2011. The Lord Chancellor has set up a Welsh...
Language Standing Committee and two judges in Wales act as Welsh language liaison judges. The principle of equality is now embodied in procedural rules for criminal, civil and family cases.

About a third of the circuit and district judges in Wales speak Welsh. HMCTS Wales and the judiciary identify where the Welsh language is essential or desirable and the Judicial Appointments Commission take this into account in making appointments. The Judicial College now hold seminars every two years for judges who wish to practice or improve Welsh language skills in the court or tribunal room.

The number of cases heard in the Welsh language is increasing and for 2017-2018 rose to 795. This now includes cases in the higher courts as well. A murder trial held in 2005 in North Wales was conducted in the Welsh language. In 2014, the first Administrative Court case to be conducted in both languages was heard in Cardiff. It concerned a decision of an agency of the UK Treasury to cease using the Welsh language. This was challenged by the Welsh Language Commissioner. The parties’ lawyers used each language as a matter of choice, and the written judgments were handed down in both languages. When the Supreme Court sat in Wales for the first time in Cardiff, that court also handed down judgments in both languages.

DIVERGENCE OF LAWS

The National Assembly has passed over 4,600 pieces of secondary legislation since devolution, and over 60 primary pieces of legislation since the power to do so was conferred upon it in 2007. Although much of that is similar to that passed by the UK Parliament as applicable only to England, there is increasing divergence between the law applicable in Wales and that applicable in England, particularly at present in the fields of social care and housing.

The principal enactment on the rights of children is the Rights of Children and Young Persons (Wales) Measure 2011, which incorporates certain obligations in the United Nations Convention on the Rights of the Child into Welsh government decision-making. The Social Services and Well-being (Wales) Act 2014 contains a similar requirement of exercising functions under that Act in relation to children. The result is that the UNCRC has effect in Wales which it does not have elsewhere in the United Kingdom.

The first major piece of housing legislation to be passed by the National Assembly was the Housing (Wales) Act 2014. This provided for a system of registration of rented homes and landlords in Wales and of licencing of landlords and their agents. The second piece is the Renting Homes (Wales) Act 2016, which implements in Wales the Law Commission of England and Wales Report on Renting Homes, by providing only two types of residential tenancy, one for individual landlords and the other for social landlords. It is expected that this will be brought into force next year. The recommendation was not accepted by the UK Government in respect of England and so the law relating to renting homes will differ substantially between the two countries.

This divergence is set to increase, which raises questions about the training of judges who sit in Wales. A Wales Strategy Group of judges has been set up to assist in this task, and judicial seminars on various aspect of Welsh Law are now being held.

THE FORM AND ACCESSIBILITY OF WELSH LAW

The fact that law-making in Wales since devolution is still relatively new provides an opportunity to streamline and simplify the law. In 2016, the Law Commission published a report on the Form and Accessibility of the Law Applicable in Wales which contained detailed recommendations for consolidation and codification of Welsh Law. The Welsh Government agreed that it was necessary to ensure that the Laws in Wales are easily accessible.

In October 2018, the present Counsel General, Jeremy Miles AM, announced at the Legal Wales conference the introduction of a bill to promote accessibility and the Legislation (Wales) Act 2019 was enacted the following year. This provides for a programme of activity to improve accessibility of Welsh law and to make provision for consolidation and codification. This led the present chair of the Commission, Sir Nicholas Green, to comment
that ‘Wales is one of the first jurisdictions worldwide to enshrine the public importance of legislative commitment to ensuring the accessibility of laws to individuals.’

Welsh planning law was the subject of another Law Commission report in 2017. Its detailed recommendations included a new planning code which should be comprehensive yet simplified. Again, this was welcomed by the Welsh Government, who indicated there is already a bill in progress which implements many of the recommendations.

The Future

Wales remains in a position which obtains nowhere else in the world. Then Counsel General, Carwyn Jones AM, observed in the annual Law Society lecture at the National Eisteddfod at Cardiff in 2008 that he was not aware of anywhere else in the world where a legislature has primary law-making powers but no associated territorial jurisdiction. It was he who, as First Minister, set up in 2107 the Commission on Justice in Wales, chaired by Lord Thomas, to review the operation of the justice system in Wales. The Commission received evidence over two years from all stakeholders and published its report in November 2019.

The report of the Commission has made 78 detailed recommendations to improve justice in Wales. The overarching recommendation is that the administration of justice should be devolved to Wales to align with health, education, housing and other social policies. The recommendations ranged from enabling better access to justice through joining up legal aid and third sector provision, encouraging innovation in the legal sector and law schools in Wales, and increasing leadership skills in relation to matters affecting justice. Whilst some of these changes need legislation other do not. One of its recommendations was that claims against Welsh public bodies challenging the lawfulness of their decisions should be issued and heard in Wales. The Civil Procedure Rules Committee implemented this recommendation by a change in the rules with effect from 1 October 2020.

The final recommendation was that the Welsh government should begin the process of reform by listing the recommendations it will seek to implement whilst devolution continues, and the Assembly should monitor and review the process of reform. The National Assembly for Wales debated the report in February 2020 and resolved to support ‘the devolution of justice and policing, and full funding for each as a way of properly aligning the operation of the justice system with the wider policy objectives for Wales agreed by this Assembly’.

As a result of evidence already given to the Commission and drawing on a lecture entitled ‘Developing Legal Wales’, by Lord Lloyd-Jones at the 2017 Legal Wales Conference, the Commission at the following year’s conference launched a discussion and consultation paper responding to the demand in Wales for greater cooperation and coordination in the field of law. The proposal suggests a Law Council of Wales, which is not dependent upon further constitutional change in the justice system in Wales. The proposed council would be an independent advisory forum which promotes knowledge and skills, best practice and innovation in the field of law.
THE RISE OF AI-BASED DECISION-MAKING TOOLS IN CRIMINAL JUSTICE: IMPLICATIONS FOR JUDICIAL INTEGRITY

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Abstract: Computational decision support tools that utilise machine learning (‘ML’) are increasingly being used to inform decisions about the treatment of individuals within criminal justice systems, including decisions about the pre-trial process, sentencing and parole. Supporters of these tools variously claim that they offer the potential to improve the criminal justice system by fostering ‘smarter’, more timely and more efficient decisions while promoting more ‘just’ decision-making in the form of more consistent, ‘neutral’ and ‘objective’ decisions which avoid problems of human bias and error. The validity of these claims, and the successful delivery of these benefits into criminal justice practice is, however, deeply questionable. Moreover, when applied to criminal justice decision-making, automated decision-making (‘ADM’) systems may threaten core principles of judicial integrity such as independence, impartiality, integrity, propriety, equality, competence and diligence and may threaten the fair treatment of persons. This article provides an accessible explanation of how ML-based decision support tools work and how they are being used for criminal justice purposes. It draws attention to a number of dangers associated with their use which judges and other criminal justice decision-makers must be careful to avoid in order to ensure that high standards of judicial integrity are upheld.

Keywords: Artificial intelligence – machine learning – criminal justice – sentencing – judicial integrity

INTRODUCTION

Data-driven decision support tools (hereinafter ‘Machine Decision Tools’) are now increasingly deployed in many jurisdictions to support the decisions of public officials in carrying out their statutory duties. They are used in a variety of contexts, ranging from welfare provision and fraud detection to the granting of visas and licences (among many others). Within the criminal justice context, these tools have hitherto taken several forms, ranging from simple digital automation systems (which automate tasks previously undertaken by humans), to more advanced data-driven systems that incorporate ML techniques. Examples of the latter include:

- geospatial mapping tools intended to inform police resource allocation by purporting to predict crime ‘hotspots’ so that police patrols can then be deployed to those locations (e.g. PredPol);
- biometric identification tools such as live facial recognition systems deployed by law enforcement authorities that are intended to identify specific individuals in large crowds who are considered candidates of...
interest (e.g. NeoFace Watch, the use of which by South Wales Police was ruled unlawful);

- policing systems that draw upon digital databases to help identify and evaluate individuals for the purposes of criminal investigation (e.g. the London Metropolitan Police Service’s Gangs Matrix); and

- individual risk assessment tools which seek to predict an individual’s riskiness or dangerousness and inform custody and sentencing decisions in turn (e.g. HART in the UK and COMPAS in the United States).

This article focuses largely on Machine Decision Tools used to inform individual risk assessments carried out within criminal justice systems. At present, these tools are not fully automated. Instead, they offer recommendations to support a human decision-maker, such as a public official who has discretionary power over how, and whether to, incorporate a recommendation into a decision concerning an individual. Machine Decision Tools have been used with great success in the realm of business and online commerce for some time, where automatically generated predictions are particularly powerful and useful for organisations seeking to provide targeted and personalised informational content, including advertisements and product recommendations. Their continued migration from the private sector into the public sector domain raises, however, a number of important questions, including concerns regarding the need for safeguards against errors and inappropriate use given that the public sector contexts in which they are deployed differ very substantially from commercial environments and, thus, are subject to very different objectives and values. Consider, for example, on-line product recommendation systems such as that used by Amazon, which automatically generate product recommendations for users, based on the analysis of individuals’ purchasing and browsing history (and those of other users). For a targeted individual, the failure of the product recommendation to correctly match products to his or her particular tastes and preferences is of little consequence. In contrast, however, mistaken decisions in the criminal justice context may have profound consequences for the rights and interests of individuals, including the imposition of penal sanctions for violating the law which may include serious deprivations of liberty, often in pursuit of various—sometimes conflicting—policy goals such as the preservation of public order, the rehabilitation of offenders, ‘doing justice’ in individual cases, supporting victims and fostering the efficient administration of justice.

In short, the use of Machine Decision Tools in the criminal justice domain, particularly to inform decisions affecting the treatment of individuals, must be approached with great care. While their supporters claim that these tools offer many benefits, their design and deployment may pose serious threats to principles of judicial integrity, including the judicial values of independence, impartiality, integrity, propriety, equality, competence and diligence. Accordingly, the design and practical implementation of Machine Decision Tools (including the data upon which they rely) warrant rigorous investigation. This requires critical evaluation of their claimed benefits and close attention to the ways in which they affect the lives of individuals, including adverse impacts upon the rights, interests and wider values that are foundational to the fair administration of justice.

This article is written for a non-specialist audience. It seeks to provide an accessible explanation of Machine Decision Tools and their use for the purposes of supporting the decisions of criminal justice officials (including front-line police, custody officers and judges). As noted, it focuses primarily on ML tools used for individual risk assessment. It is co-written by an interdisciplinary team of academics from law, psychology, political science and computer science who are members of the FATAL4JUSTICE? project funded by VW Stiftung to investigate the use of Machine Decision Tools in the criminal justice system.

In our view, interdisciplinary research is vital if we are to (a) properly understand and evaluate these tools, including their technical design and implementation in specific contexts, and (b) acquire an holistic understanding of their significance for judicial systems in particular, and for society more generally. Accordingly, this article offers a brief account of Machine Decision Tools viewed through several
disciplinary lenses, including their technical, political and psychological significance. It examines such tools within the criminal justice environment in order to highlight how their current use poses significant threats to principles of judicial integrity. The article begins with a brief overview of the historical and contemporary use of Machine Decision Tools in criminal justice, noting some of the main political and scientific motivations driving their uptake. Next, it provides a technical explanation of what these tools are, how they function, and why particular features of their design and configuration have important (and potentially adverse) legal implications. Finally, the article highlights ways in which Machine Decision Tools threaten foundational principles including respect for the rule of law, individualised justice, open justice, and due process.

**Decision Support Tools in the Criminal Justice Context**

Although discussions about artificial intelligence (‘AI’) generally, and its legal applications particularly, have become rather fashionable—with talk of ‘robot lawyers’ and ‘robot judges’ for example—the use of data-driven decision-support systems in criminal justice contexts is not new. Statistical tools have long been used for the purposes of individual risk assessment in the criminal justice system. Those tools provide quantitative insights, by inference, about an individual’s expected behaviour. For example, statistical tools are often used to assist in evaluating whether a convicted individual poses a danger to the public if released from custody. In the USA they have been used in this way since the 1930s. A statistical decision-support tool, called OASys (for Offender Assessment System), is widely used by the probation and prison services in the UK to inform supervision and sentencing plans to provide assessments of individuals’ recidivism risks. What, then, is distinctive about Machine Decision Tools that make use of ML techniques that has attracted so much excitement? We suggest that the novelty lies in the configuration of these tools solely for the purposes of generating accurate predictions on the basis of existing data through the use of powerful algorithmic techniques, making them an attractive technology that might be harnessed to support the goal of crime prevention. The following discussion focuses on the experience of adoption in the United States as the pioneers of these technologies, where they are being embraced with the greatest enthusiasm relative to other jurisdictions.

ML techniques can be used to generate predictions concerning future events by applying computational algorithms to large data sets in order to find patterns in the data and then build a general model to generate predictions regarding new data. Though similar to statistical tools (in that they rely upon quantitative analysis to infer patterns or correlations between data points rather than determining causal relationships), ML techniques do so primarily for the purpose of generating an accurate prediction, rather than seeking to learn anything about the underlying character of the phenomenon of interest or the nature of the relationship between variables. Unlike statistical models, ML techniques require no *a priori* specification of functional relationships between variables. Computational systems that utilise ML should also be distinguished from ‘expert systems’ which rely upon conventional programming rules (*i.e.* if *x*, then *y*) to generate given output, because ML rules are ‘learned’ via the analytic process; that is, essentially, they learn by searching for patterns in the data. Hence, ML rules are not specified in advance, and human decision-makers do not need to understand why the ML algorithm generates a particular outcome, so long as it serves its purpose effectively. So, for example, the creators of Amazon’s product recommendation system are unlikely to know why users who buy shampoo X also like hairspray Y—all that matters is that this pattern of purchasing behaviour frequently recurs in practice, so that a person who has purchased shampoo X can be recognised to also be likely to be receptive to a recommendation to buy hairspray Y. Thus, for proponents of Machine Decision Tools, a successful tool is one that produces an accurate prediction in pursuit of a particular pre-specified goal. In the context of individual risk assessment in criminal justice, this means generating accurate predictions to help classify individuals as belonging to specified categories (*e.g.* risk of re-offending tends to be defined through the categories of high, medium or low).
Why Turn to Machine Decision Tools in Criminal Justice?

In the United States, the motives driving the uptake of Machine Decision Tools in criminal justice are both political and ‘scientific’.

Political motives

Individual risk assessments have been used in the US criminal justice system since the 1930s. In the 1970s, clinical judgment (meaning the diagnostic assessment of an individual’s behaviour, based on knowledge deriving from the medical and mental health professions, using long-form unstructured interviews and manual human review of any relevant personal records) was increasingly complemented, or replaced, by actuarial risk assessments which relied upon statistical analysis to predict either an individual’s risk of recidivism (i.e. re-offending), flight risk before trial, or both, using a statistical model based on data concerning static risk factors such as an individual’s criminal history. These tools have been developed over time into more comprehensive instruments for assessing individual risks and needs, by incorporating additional data regarding, for example, an individual’s proclivity towards certain behaviours (often self-reported), or his or her socio-economic and familial circumstances. In recent years, the diffusion of Machine Decision Tools in US criminal justice has rapidly accelerated as part of a broader trend of justice reform promoting the use of more evidence-based practices. Evidence-based risk assessments are intended to better identify those individuals who can ‘safely’ be released, thereby supporting the goal of reducing pressures from mass incarceration whilst also claiming to protect the public from dangerous individuals. Although the goals of rehabilitation, greater objectivity and fairness have also informed the adoption of algorithmic risk assessment tools, prison overcrowding and budgetary considerations predominate. Accordingly, Machine Decision Tools used in the USA now lie at the centre of a very difficult—potentially impossible—balancing act aimed at rationally sorting individuals into defined categories of risk to reduce resource pressures. Plainly there are potentially serious adverse consequences when individuals are misclassified; thus, describing these tools as ‘smart’ seems unwarranted in the absence of evidence concerning their ability to effectively and correctly profile and classify individuals.

In contrast, the turn towards Machine Decision Tools in the UK criminal justice context has been less concerned with reducing the size of prison populations. Instead, it has been driven by over a decade of severe cutbacks to public service budgets under the rubric of austerity, including swingeing cuts to police and legal aid funding. To meet the resulting ‘more for less challenge’, the public sector has turned to automation in an effort to reduce the size of the labour force and associated salary costs. At the same time, however, successive British governments have actively promoted a broader digital transformation agenda, reflected in the establishment of a multi-million-pound Police Transformation Fund to support the development of Machine Decision Tools by local police forces.

‘Scientific’ motives

An important benefit which advocates of these tools emphasise, and which transcends national political agendas, rests in their allegedly ‘scientific’ foundations, claiming to offer more objective and consistent decisions that avoid the many problems associated with human decision making due to unavoidable human frailty. This argument is not without some merit. Humans, including judges, are vulnerable to making decisions on the basis of arbitrary judgments, rather than consistently following pre-specified decision rules. They may sometimes even rely upon personal intuition. For example, judges may make use of heuristics (cognitive shortcuts for decision-making), whereby their decisions can become too heavily anchored and reliant upon the first piece of information received before making a decision. In the context of a criminal justice case, this may be witnessed in a situation where (to illustrate) the very stringent demands of a prosecutor—seeking the maximum sentence available for a convicted individual—may lead a judge consequently to hand down a more severe sentence than he or she otherwise would have, purely because the initial demands had anchored any subsequent negotiations and arguments and, thus, had set the focal point for discussion. Humans are further susceptible to hindsight bias,
which is linked to the concept of learning through reinforcement. That is, if a judge has a positive feeling about a legal decision made in a previous case (e.g., a sentencing outcome on a robbery case), this can unconsciously reinforce a tendency to make the same decision (i.e., the same sentence) in similar cases, rather than assessing the new cases on their own merits. Finally, judges may also be influenced by confirmation bias, meaning that they will favour information or evidence that support their prior preconceptions or hypotheses. This can result in ethnically discriminatory and socio-economically biased criminal justice outcomes in certain contexts and jurisdictions.

Machine Decision Tools appear to avoid the weaknesses of human decision-making, offering consistency and greater objectivity that can be traced to the underlying data upon which they rely. Yet these tools also generate new problems, potentially exacerbating and magnifying human biases which can become ‘baked into’ algorithmic systems. One well-known investigation by ProPublica into the COMPAS tool (which is used to assist with pre-trial, probation and sentencing decisions in the United States) demonstrated how ML models can produce racially biased outputs. Following the study, ProPublica concluded that, using the tool, Black defendants were 77% more likely than their white counterparts to be classified as being at a higher risk for committing violent crime, and 63% more likely to be classified as being at a higher risk for general recidivism. This discrepancy remains when looking at misclassifications or errors in risk calculation. Here, Black defendants who did not continue to offend were almost twice as likely to be misclassified as higher risk (45% compared with 23% of white defendants), and white defendants who did continue to reoffend were almost twice as likely to be labelled low risk (48% compared with 28% of Black defendants).

What are ML-based Machine Decision Tools?

Having set out the broader context in which Machine Decision Tools are being taken up in the criminal justice domain, we now consider their technical design. Unless we can understand how these systems actually work, we cannot fully and accurately grasp their implications for judicial integrity. As we shall see, the role of data is critical. ML-based tools are designed around the idea that historical data points can be used to automatically identify correlations and patterns between disparate data points, which can then be used to generate decision rules, capable of offering predictions regarding future phenomena, when presented with new previously unseen data. In ML models, each data point consists of several pieces of information, which are often called ‘characteristics’. The kinds of Machine Decision Tools with which we are most concerned, and which are most common in criminal justice contexts, are those which make use of supervised learning, meaning that the system is trained on a body of labelled data in order to learn how to identify a pre-specified feature. The ML model can then be used to analyse a given data set so as to identify those characteristics that are most closely correlated with this distinguishing feature. For example, this could be the probability that a previously convicted individual will re-offend on release from custody (i.e. recidivism).

A supervised learning problem consists of three things:

1. A set of data points, known as training data, each consisting of a set of quantitative or categorical characteristics.
2. A distinguishing feature to be learned, known for all data points of the data set (e.g. probability of recidivism).
3. A quality measure that quantifies how well predictions have performed, and how they fit with the ML model. In general, the quality measure must be maximised in order to indicate a good decision.

To help demonstrate and visualise how a model like this can function, we have provided an example in Figure 1. In this example, the ML model has access to a specific training data set, consisting of: (a) the blood concentrations for the hypothetical hormones ‘criminogen’ and ‘innocentine’ in a known number of persons, and (b) data confirming which of these persons are repeat offenders.
With this training data available, it is then possible to apply ML methods in order to inform custody decisions. In this case, the ML methods in question are statistical methods aimed at determining which of the features is best suited to predict whether a person will continue to offend. From this, they create decision rules that are stored in a statistical model. Any new data point can be introduced to this statistical model in order to create a prediction. One basic method of ML (of which there are many) is the so-called support vector machine (‘SVM’). To put it simply, the computer tries to separate the training data into recidivists and non-recidivists by a straight line. While it is unusual, take out a ruler and a pencil and try to separate the data in Figure 1 with only one straight line. The line drawn is now the decision structure of the SVM. When the SVM is to be queried for a new suspect, one can simply fill in the hormone levels on the matrix and, depending on whether the suspect is included above or below the drawn line, the prediction of the machine will be either (a) recidivist, or (b) not a recidivist.

Figure 1 demonstrates that SVM models, like other ML techniques, are fallible and prone to error, much like humans, though in a different way. This means that in this example, incorrect predictions have been made about four people: two who have been wrongly classified as criminals, and two who have wrongly classified as innocent. The SVM in Figure 2 weights both types of error equally (i.e. a malicious criminal who remains undetected vs. an innocent citizen who is considered a criminal). However, it is up to the tool designer to determine how these two types of error should be dealt with by the tool. Because ML models are inherently probabilistic, their predictions are inevitably prone to error because it is impossible to generate outputs that can predict a future event with 100% certainty. Wherever these systems are implemented, careful consideration must be given to the treatment of error, including decisions about how the burdens of such errors should be distributed, at both the group and individual level.

To design and implement a Machine Decision Tool for use within a legal system which knowingly allowed innocent individuals to be labelled as criminals and treated as such without providing adequate mechanisms of oversight and appeal to enable the identification and correction of such mistakes, would foster grave injustice. Although a failure to convict a guilty person is deeply regrettable, the wrongful
conviction of an innocent person produces a far more serious wrong, and explains the underlying foundations of Blackstone’s famous claim that ‘it is better that ten guilty persons escape than that one innocent suffer.’ We can see from this example that the treatment of errors within any given ML model, and thus the outputs produced by any decision support tool that relies on such a model, are determined by choices made by human decision-makers in the construction of the tool. This alone demonstrates that human subjectivity and value judgments will always be involved in the configuration and operation of these decision tools, no matter how sophisticated the ML models used, so that claims that such systems provide purely scientific and objective outputs are completely unfounded.

Machine Decision Tools and Potential Risks to Judicial Integrity

Finally, we consider the potential threats to judicial integrity that arise from the implementation and use of ML models in criminal justice settings. Those threats are ever-present from the moment a decision is made to use data-driven support tools. The following discussion identifies a number of foundational principles that are threatened by the use of Machine Decision Tools in criminal justice decisions-making. However, it is important to bear in mind that identifying precisely how these values are implicated by any given tool will require close attention to the organisational and jurisdictional contexts of their implementation as well as the design and configuration of the tool itself and the data upon which it is trained. Because of the seriousness of the consequences of decisions yielded by the criminal justice system, and the complexity of the technical functions of ML tools, it is of paramount importance that safeguards are in place to protect the foundational principles set out below.

The rule of law and the principle of legality

The rule of law requires, among other things, that government must be ruled by law. This means that all governmental actions and decisions must be authorised by law and that the exercise of public decision-making authority—particularly in the context of the criminal justice system—must be explained and justified by reference to legal rules and not to an individual’s whim or say so (or that of a machine). In addition, respect for the rule of law requires that laws themselves must be clear, consistent, predictable. Yet, in the case of ML tools, there is often a mismatch between what the tools should do (and what they have been developed for the purpose of doing) and what they actually do in practice. Consider for example the SVM above. Let us imagine that such a tool is used to assist in decisions about who must decide whether a particular individual currently held in custody should be released, for example, on bail and awaiting trial (or to assist in deciding which probation conditions should be ordered). Let us also assume that some form of risk assessment, whether qualitative or quantitative, can legitimately be applied to inform these decisions within the criminal justice system. It does not follow that any kind of risk assessment method will do. For example, it does not follow that individuals could be lawfully and justifiably held in state custody based on the analysis of hypothetical hormone levels by a probabilistic system which we know is prone to error, that produces predictions without any demonstrable causal relationship between hormone levels and the likelihood of recidivism. Accordingly, it is suggested here that the use of these tools in the criminal justice context should not be permissible unless their use is explicitly authorised by law and subject to appropriate safeguards and limits concerning their use to secure the values of impartiality, equality, diligence and fair treatment, thereby significantly limiting the possibility for arbitrary and unjustified decisions.

Individualised justice

The method employed by ML tools to categorise individuals for the purposes of making a prediction may also threaten the principle of individualised justice. As discussed above in relation to the SVM example, ML tools generate predictions after having ‘learned’ rules about particular phenomena by standardising large sets of training data. They do so by searching for patterns and correlations at the group level and then sorting individuals into categories based on risk (a process of profiling). Any prediction that is
made about an individual is relevant only so far as it is attributed to an individual as part of that group. This methodological approach is directly at odds with the principle of individualised justice, which demands that each and every individual case is treated on its own merits, and that every person (assuming threshold levels of mental capacity) are treated as responsible moral agents, capable of and responsible for their own choices as independent authors of their own actions. The way in which the principle of individualised justice is adhered to requires that judges be endowed with discretionary power in deciding individual cases, enabling them to evaluate the merits of each particular case according to law and guided by the demands of justice. ML tools, however, can only provide predictions based upon purely technical functions and are reliant on quantifiable data alone. Accordingly, we must ensure that the use of data-driven support systems are strictly limited and subject to proper human oversight in order to avoid compromising principles of judicial independence, integrity and fair treatment.

Open justice

The principle of open justice primarily refers to the need for legal decisions affecting the rights and interests of individuals to be transparent and accompanied by a reasoned explanation to the affected individual in terms that he or she can understand, and that is open to public scrutiny. This principle is often flouted where the underlying algorithms of a Machine Decision Tool are designed by private software developers who refuse to disclose them in order to protect their intellectual property rights. This was a central issue in Loomis v. Wisconsin, 881 N.W. 2d 749 (Wis. 2016), the first case of its kind, brought before the Wisconsin Supreme Court. In Loomis it was claimed that the software developer’s refusal to make available the underlying algorithm used in the ML tool (COMPAS) violated a defendant’s due process rights. Regrettably, the court refused to order disclosure, content to preserve the ‘black box’ nature of ML tools and in our view, failing to uphold the principle of open justice.

The open justice principle requires that ‘justice must not only be done, but must also be seen to be done’. Machine Decision Tools built on ML methods challenge this important principle. Most notably, many such tools are limited in their capacity to enable full and precise accounts of both the factors producing their calculative output and the weighting of relevant characteristics derived from training data. This hinders the ability to provide functional explanations concerning how an output has been generated. While considerable research is being devoted towards the development of ‘explainable AI’, it is important to recognise that even if functional explanations can be provided, these do not necessarily demonstrate that the output itself is justified by and in accordance with law. In our view, if the decision-maker cannot explain how and why an output was generated, and how and why it was used to inform a decision about the rights of an individual so that it can be understood as justified by law, then such a decision should be struck down as unlawful. If we cannot explain to a condemned person the reasons why she or he should be lawfully condemned, then that decision cannot stand, however sophisticated or accurate the Machine Decision Tool upon which the decision relies is claimed to be. Not only does such a decision violate the principle of open justice; it fails the basic requirement that and every individual must be treated with dignity and respect. To condone such decisions would fatally undermine public confidence in the fair and impartial administration of justice.

Due process

The principle of open justice is closely related to the requirements of due process (sometimes referred to as procedural fairness). Due process demands that decisions made by public authorities are free from bias and that those whose rights and interests are affected by a decision are offered the right to participate in that decision (often described as the ‘right to a fair hearing’). This latter right includes, in the criminal justice context, a right to receive notice of the charge, the right to contest the decision and the right to receive a reasoned explanation for the decision. These requirements are rooted in respect for the dignity of individuals, recognising that a person’s rights, liberties and interests cannot justly be adversely affected without giving that person an opportunity to participate in the decision-making process and guaranteeing him or her an impartial adjudicator. Although proponents of Machine
Decision Tools claim they generate outputs that are free from human error and biases, we have already demonstrated how such claims cannot withstand critical scrutiny. While human decision-making is fraught with potential vulnerabilities, including the possibility of bias, we should apply standards of at least equivalent rigour in requiring impartiality in the construction and design of Machine Decision Tools. The need for due process protections is directly related to the principle of open justice, referred to above, which emphasises the need for transparency in judicial decision making, including the need to provide those affected with reasons for decisions which affect them and which can then be subject to scrutiny and challenge. Applied to ML-based Machine Decision Tools, this means that individuals should be entitled to know how the resulting outputs were generated and be able to contest the correctness of decisions, including possible errors arising from the design of the system, the underlying training data, the handling of errors, and challenges relating to implementation in concrete contexts.

CONCLUSIONS

Machine Decision Tools are being implemented in the public sector in many jurisdictions. These tools take a variety of forms, but those used in the criminal justice which make use of ML methods raise particular concerns. We have seen that implementation has been driven by two primary sets of motivations:

- firstly, political claims that ML support tools can enhance efficiency by enabling more timely decisions at lower cost, thus reducing budgetary and organisational pressure; and
- secondly, claims that Machine Decision Tools render decisions that are more ‘scientific’ in that they are made more objective, consistent and free from problems of human bias and fallibility.

- However, as we have sought to demonstrate, these claims do not withstand critical scrutiny. Their application to criminal justice decision-making poses serious threats to core principles of judicial integrity. It is therefore of crucial importance that safeguards be put in place to guard against their inappropriate and unsafe use, and that those holding judicial office be particularly attentive to these dangers whenever they encounter them so as to ensure that they continue to uphold the rule of law and the fair and impartial administration of justice.

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FOREIGN JUDGES AND HONG KONG’S NEW NATIONAL SECURITY LAW

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Abstract: Foreign judges have had a longstanding role on Hong Kong’s Court of Final Appeal. In 2020, this tradition faced significant challenges as the People’s Republic of China enacted a new National Security Law for Hong Kong. This article examines the implications of the new law for the foreign judges on Hong Kong’s Court of Final Appeal. It tracks the debates about the potential exclusion of foreign judges from hearing national security cases and the difficult question of judicial resignations. The article explains how these issues take on greater significance because of the distinctive rationale for the use of foreign judges in Hong Kong, where foreign judges are understood to signify the distinctiveness of Hong Kong’s legal system as well as its quality.

Key words: Hong Kong – Court of Final Appeal – foreign judges – rationales for appointing foreign judges – Hong Kong National Security Law – judicial reputations in the foreign state – judicial reputations in the home state – resignations of foreign judges

INTRODUCTION

Foreign judges have had a longstanding role in post-colonial Hong Kong. Since the handover of sovereignty in 1997, Hong Kong’s Court of Final Appeal has drawn from a panel of distinguished foreign judges from other common law jurisdictions to hear appellate matters. Foreign judges have thus had an influence on the decisions of Hong Kong’s highest court in all areas of law.

In 2020, this tradition faces significant challenges. Over the second half of 2019, Hong Kong experienced massive street protests. The trigger was a proposal, by the government of the Hong Kong Special Administrative Region, to amend extradition laws that would permit the extradition of Hong Kong residents to mainland China. The proposal was eventually withdrawn, but the protests continued and their focus evolved into a more general call for democratic reform and greater accountability of government. While initially peaceful, protests became increasingly violent as the government refused to acknowledge protesters’ concerns and police deployed a harsh law-and-order response to the unrest. By early 2020, the COVID-19 pandemic had dampened the protest movement. However, in a move widely seen as a response to the protests and perceived political interference by foreign entities, in June 2020 the National People’s Congress (NPC) unilaterally enacted a National Security Law for Hong Kong, criminalising forms of dissent and increasing surveillance and law enforcement powers in Hong Kong.

This article examines the implications of the National Security Law for the foreign judges on Hong Kong’s Court of Final Appeal. It tracks the debate about the potential exclusion of foreign judges from hearing national security cases and the difficult question of judicial resignations. In both cases, the issues are shaped by the distinctive rationale for the use of foreign judges in Hong Kong, in which foreign judges are understood to signify the distinctiveness of Hong Kong’s common law legal system as well as its quality.

FOREIGN JUDGING IN HONG KONG

The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1997) (the ‘Basic Law’)—which serves as Hong Kong’s ‘mini-constitution’—provides that the Court of Final Appeal may, as required, recruit judges from other common law jurisdictions. The Hong Kong Court of Final Appeal Ordinance c. 484 (1995) provides that to hear appeals the court must comprise five judges, including one Hong Kong or overseas non-permanent judge. In effect, this means that only one foreign judge may join the five-member bench, and that it is possible for the bench to not include a foreign judge at all. However, the first Chief Justice, Andrew Li, established the convention that, in most appeals, the bench would include a visiting foreign judge. Foreign judges sit only on
Foreign judges, along with permanent judges and non-permanent local judges, are appointed by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission, an independent commission chaired by the Chief Justice. Appointments are endorsed by the Hong Kong Legislative Council. Foreign judges must be judges or retired judges of a court of unlimited civil or criminal jurisdiction in a common law legal system and ordinarily resident outside of Hong Kong.

The 27 foreign judges who have served on the Court of Final Appeal have held or currently hold high judicial office in Australia, Canada, New Zealand or the United Kingdom. Under an agreement made in 1997, the House of Lords, now the United Kingdom Supreme Court, provides two serving Law Lords to sit on the Hong Kong Court of Final Appeal. Most other foreign judges have been retired judges in their home jurisdictions. The only two women appointed to the Court of Final Appeal, Beverley McLachlin and Baroness Hale, are foreign judges.

Foreign judges are appointed for a term of three years, which can be extended an unlimited number of times by the Chief Executive on the recommendation of the Chief Justice. Judges are allocated to sittings of the court by the Chief Justice, based on the judge’s availability, and in some cases, his or her expertise in an area of law relevant to the cases arising before the court.

‘CANARIES IN THE COAL MINE’

Foreign judges have been a feature of Hong Kong’s Court of Final Appeal since its establishment. The inclusion of foreign judges was negotiated in the course of the transfer of sovereignty over Hong Kong from the United Kingdom to the People’s Republic of China. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (adopted 19 December 1984) 1399 UNTS 61 (the ‘Joint Declaration’), provided that Hong Kong would be vested with ‘independent judicial power, including that of final jurisdiction’ and that the current laws of Hong Kong would continue in force. The Joint Declaration anticipated the creation of a court of final appeal with the ‘power of final judgment’, on which judges from other common law jurisdictions might sit.

Global experience suggests three rationales for the use of foreign judges. In many small Commonwealth states, foreign judges are recruited to provide judicial services that would otherwise be unavailable due to limited numbers of qualified local candidates for judicial appointment. While at the time of handover there were some concerns that Hong Kong’s local legal profession was perhaps too small to provide sufficient local judges, that concern no longer applies. The inclusion of foreign judges on Hong Kong’s Court of Final Appeal is therefore not a matter of filling ‘gaps’ in the capacity of the court. A second rationale draws on the perception that foreign judges, as outsiders, are—or are perceived to be—impartial or neutral in a way that local judges are not. The constitutional requirement in Bosnia-Herzegovina, a state with deeply entrenched ethnic divisions, that the Constitutional Court include three foreign judges is one example of this kind. Another example is where a foreign judge is appointed to hear a particular case that local judges are unable to hear because of the rule against real or perceived bias. An example of this kind arose in Vanuatu recently, when a judge from New Zealand was appointed to hear a defamation case brought by a former magistrate against the Chief Justice and Chief Magistrate. Again, this rationale does not fit the case of Hong Kong, which has a diverse and highly respected senior judiciary and sufficient capacity to replace judges who must recuse.

The use of foreign judges in Hong Kong best fits a third rationale, in which foreign judges are understood to enhance the prestige and reputation of the Court. The transfer of sovereignty over Hong Kong from the United Kingdom to China was predicated on the maintenance of Hong Kong’s market economy and its differentiation from China’s civilian socialist system, encapsulated in the principle ‘one country, two systems’. Hong Kong’s common law system was regarded as an essential component of Hong Kong’s
continued economic prosperity, which was to the advantage of both China and United Kingdom at the time. Foreign judges provided expertise and international connections to develop Hong Kong’s common law, the mark of Hong Kong’s distinctive legal system, and so provided reassurance to the people of Hong Kong and to external actors involved in the global economic hub. The inclusion of foreign judges was also seen as a way of ensuring that the Court of Final Appeal would have a similar degree of prestige to the Privy Council, which it replaced as the ultimate appeal court for Hong Kong.

In addition, and perhaps because they were understood in this way, foreign judges have also come to be seen as providing an external validation of Hong Kong’s legal system. This conception of foreign judges as a mark of the strength of the Hong Kong courts and legal system is illustrated by the analogy of foreign judges to ‘canaries in the coalmine’. Justice Joseph Fok, a Permanent Judge of the Hong Kong Court of Final Appeal, wrote in volume 23(1) of the Commonwealth Judicial Journal that ‘it is perfectly reasonable to ask, “Would so many eminent serving and retired judges have sat, and continue to sit, in a court in Hong Kong if any of them thought the system was subject to improper interference from outside agencies?”’. The implication is that, if judicial independence and the rule of law were damaged in Hong Kong, the foreign judges would withdraw their services and in doing so sound a serious alarm.

The rationale for the use of foreign judges in Hong Kong therefore has two, related, dimensions: first as one way in which Hong Kong’s common law legal system is differentiated from the legal system of mainland China; and second as a sign, and perhaps even a guarantor, of the quality of Hong Kong’s legal system. Both dimensions are significant for understanding how and why foreign judges have been implicated in debates over the controversial National Security Law.

The National Security Law

Article 23 of the Basic Law provides that the Hong Kong Special Administrative Region shall enact a national security law. An attempt by the Hong Kong government to do so in 2003 was abandoned after half a million people took to the streets to voice their opposition. However, on 28 May 2020, in response to months of protests in Hong Kong, the NPC announced its intention to legislate a National Security Law for Hong Kong. This law, listed in an annex to the Basic Law and locally applied by promulgation, creates new offences of secession, subversion, terrorism and collusion with foreign elements (including accompanying inchoate offences); gives police new surveillance and law enforcement powers; and creates a new National Security Office in Hong Kong subject to the law and oversight of mainland China. The National Security Law has been criticised for the breadth and vagueness of the new offences and policing powers it creates, and for removing critical legislative and judicial oversight of executive decision-making and control. The law was drafted with little to no consultation with the Hong Kong people and the provisions were made public for the first time only hours after the law came into effect on 30 June 2020.

After the NPC’s intention to legislate was announced but before the provisions of the new law were made public there was a great deal of speculation that the National Security Law would prohibit foreign judges from hearing national security related cases. Macau, which like Hong Kong is a Special Administrative Region of China, also uses foreign judges on its Court of Final Appeal. However, its law was amended in 2018 to provide that only judges who are Chinese citizens may adjudicate national security offences. In the end, the National Security Law for Hong Kong did not follow the Macau precedent. It instead provides that the Chief Executive shall designate judges from the existing judiciary to handle national security-related cases. Foreign judges are not excluded, but it is not yet known whether any foreign judges have been designated as national security judges.

Although an explicit prohibition on foreign judges did not eventuate, the debate about their exclusion illuminates important assumptions about who is a foreign judge in Hong Kong and the role of foreign judges in Hong Kong’s legal system.

First, while it is reasonably clear that the overseas Non-Permanent Judges of the Court
of Final Appeal are citizens of foreign states, the citizenship status of many Hong Kong judges is not so clear. A small but significant number of Hong Kong judges are likely to hold foreign passports and not hold Chinese citizenship, although they are permanent residents of Hong Kong. Any prohibition on non-citizen judges hearing national security cases would therefore exclude more judges than the foreign non-permanent judges serving on the Court of Final Appeal. For this reason, foreign judges in Hong Kong tend to be defined as such not by their citizenship, but by residence and judicial service in a foreign jurisdiction.

Secondly, arguments in favour of the exclusion of foreign judges from hearing national security cases cannot be easily dismissed, at least on principle. In discussing the proposed law, some officials suggested that foreign judges, as citizens of another country, have ‘dual allegiance’ and would face a conflict of interest in adjudicating national security cases. The suggestion is that judges who are citizens are more ‘patriotic’ (a term with special significance in the Chinese context) and better able to appreciate the particular circumstances of Hong Kong. The rebuttal of such claims rests on the impartiality of the judicial role. All judges take an oath to bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China and uphold the law. On this view, nationality is irrelevant to the task of judging. Lord Neuberger, a foreign judge of the Court of Final Appeal from the United Kingdom, discussed this issue in relation to a white paper prepared by Beijing in 2014 which called on all judges to be ‘patriotic’. Lord Neuberger’s response, reported in the South China Morning Post on 26 August 2014, was that ‘the way in which judges demonstrate their patriotism is by an irrevocable and undiluted commitment to the rule of law’. While this response resonates with understandings of the judge as guided by, and representative of, the law, rather than his or her national allegiance, it is not uncommon for states to permit only citizens to be judges, especially on their highest courts. Indeed, in more than one hundred states, constitutional or statutory laws require judges of the highest court to be citizens, while article 10 of the Basic Principles on the Independence of the Judiciary (New York: United Nations, Department of Public Information, 1988), endorsed by the UN General Assembly in 1985, expressly states that citizenship is not a prohibited ground of discrimination in appointment to judicial office. Given that there is no global standard on the citizenship of judges, why did the thought that foreign judges might be excluded from national security cases generate such concern? The answer lies in the special rationale for the use of foreign judges in Hong Kong, where foreign judges are understood to signify Hong Kong’s distinctive common law legal system and the independence of the courts. A prohibition on foreign judges hearing national security cases might reflect a sense that the National Security Law is a product of, and gives priority to, the Chinese socialist legal system over the common law, inconsistent with the principle of ‘one country, two systems’. Further, any direction from the other branches of government about the kinds of cases that foreign judges can or cannot hear would undermine judicial independence.

THE DILEMMA OF RESIGNATION

After the National Security Law came into effect in mid 2020, there was speculation, within and outside Hong Kong, on how the foreign judges on the Court of Final Appeal might react. Media reports in Australia, Canada and the United Kingdom drew attention to the fact that ‘their’ judges sat on the Hong Kong Court of Final Appeal and might soon face a dilemma. Would there come a time when foreign judges should not, in good conscience, continue to serve in Hong Kong, either because they would be called upon to enforce an objectionable law, or because their very presence as judges would lend legitimacy to a legal system in which the rule of law and judicial independence were undermined? The issue came to the fore in September 2020, when James Spigelman, a retired Australian judge who had served on the Court of Final Appeal for seven years, resigned his commission, a decision he said was ‘related to the content of the national security laws’.

Resignation from judicial office is generally acknowledged to be a matter of conscience. As such, individual judges may, and often do, reach different conclusions on the best response to an objectionable law, an unjust legal system, or illegal break in the constitutional order. There are arguments both for and against resignation. On one hand, some judges might
think that the degree of interference in judicial independence and the rule of law means that they can no longer maintain their judicial oath to uphold the law and administer justice. On the other hand, other judges might think that their presence on the court can mitigate the worst effects of an objectionable law, or, despite unfavourable political conditions, help to uphold the rule of law and ensure access to justice for the people.

These considerations arise for foreign and local judges alike. However, foreign judges face different pressures and must weigh different considerations when contemplating resignation. For a foreign judge, resignation might be made easier by their personal situation: a foreign judge will generally have a secure livelihood in his or her home state, which might not always be the case for local judges who resign. The ties of membership and belonging may also lead local judges to a different conclusion on resignation: they might have a deeper commitment to the people of the jurisdiction and their constitution and feel an obligation to see a political or constitutional crisis through. Putting aside these kinds of personal considerations, which will of course vary between individuals, the debate in Hong Kong illustrates structural features of foreign judging that make the issue of resignation different for foreign judges. These features derive from the sense that foreign judges have dual constituencies, one in their home state and another in the state in which they serve as judges.

Generally, a foreign judge will have no problems in meeting the expectations of both constituencies. Concerns that foreign judges ‘serve two masters’ may be dismissed by reference to the independence and impartiality of judicial office. However, where circumstances are such that a foreign judge is considering resignation on grounds of conscience, it may not be possible to take refuge in a conception of the judicial role in which judges impartially apply the law and in which political considerations are irrelevant. Judicial office is, after all, a public office in the service of the state and its constitution.

This places foreign judges who are serving judges in their home jurisdiction in a different position to retired judges. In Hong Kong at present, only one foreign judge, Lord Reed, is also a serving judge of the United Kingdom Supreme Court; all others are retired judges. A serving judge is generally able to reconcile holding judicial office in more than one jurisdiction because the judicial function is understood to be the same everywhere (at least in the common law world) and the protections of judicial independence are seen to apply across national borders. It is possible to imagine a case in which the judicial office in a foreign jurisdiction was so degraded as to be incompatible with judicial office in the judge’s home jurisdiction. A serving judge in such a jurisdiction might be forced to choose one or the other, a choice that may not arise as sharply for retired judges.

The issue of resignation is more likely to come down to issues of reputation—of the foreign judge and his or her home jurisdiction—and this applies to serving and retired judges alike. Judicial reputation is based on perceptions of how well a judge or court exhibits the various qualities that constitute judicial office. It is subjective, dependent on access to information, and likely to vary across different audiences. (For example, a judge might have a reputation before his or her judicial colleagues and the legal profession that differs from his or her reputation before the general public.) For foreign judges, reputation is also likely to vary across audiences in their home state and the state in which they serve as foreign judges.

Concerns about the continued service of foreign judges in Hong Kong have been framed as a question of ‘reputational risk’. Sometimes, the concern is for the reputation of the individual judge, but other times it is for the reputation of judge’s home state. In November 2019, the Foreign Affairs Committee of the UK Parliament House of Commons published a report entitled A Cautious Embrace: Defending Democracy in an Age of Autocracies. The report expressed the committee’s concerns about the political situation in Hong Kong, as street protests and violent policing escalated, and made the following statement:

As one of the judiciaries represented in the Hong Kong Court of Final Appeal (CFA), we believe that there could be a reputational risk to the UK if the Government
inadvertently appears complicit in supporting and participating in a system that is undermining the rule of law. In August, we wrote to our counterparts in the parliaments of Australia, Canada and New Zealand, also represented on the CFA, to urge our governments to assess the impact of continued participation in the CFA if current trends continue.

The Foreign Affairs Committee’s remarks suggest an understanding of foreign judges as performing a representational role that is in some ways akin to diplomacy. On this view, the provision of foreign judges seems to be understood as the United Kingdom bestowing prestige and recognition on Hong Kong, a privilege which it might withdraw. This, after all, is implied by the ‘external validation’ rationale for the use of foreign judges in Hong Kong. This conception of the foreign judge is, however, controversial. The United Kingdom is not ‘represented’ on the Hong Kong judiciary. Foreign judges serving in Hong Kong are appointed by Hong Kong authorities and take their oath as Hong Kong judges. Judicial office is fundamentally different to diplomatic service and blending the two is likely to be resisted by judges themselves. A further question arises as to how Australia, Canada or the United Kingdom might enforce a decision to withdraw ‘their’ judges from Hong Kong, and how any such action could be compatible with judicial independence. Although problematic for these reasons, it is perhaps inevitable that foreign judges will be perceived by some as ‘representing’ their home countries, at least in an informal sense. Whether they like it or not, foreign judges are called upon to balance the demands of different actors within two constituencies—Hong Kong and their home states—each of which might have very different understandings of the judges’ role in Hong Kong’s legal system.

In contexts where there are objections to a law or legal system or incursions on judicial independence, a judge’s resignation is often understood as a statement of concern, even if it is not intended as such. The statement of concern might be (or be understood to be) related to the conduct of political actors or other judges on the court, features of the legal system, or a combination of such factors. In Hong Kong, Justice Spigelman said that his resignation was connected to the National Security Law, while the foreign judges who issued statements that they do not intend to resign expressly noted their confidence in the independence and integrity of Hong Kong’s judiciary and its capacity to uphold the law.

Again, however, the fact that a judge is a foreign judge means that the resignation speaks to audiences in both constituencies, in potentially different ways. The internal audience is the people in the jurisdiction in which the foreign judge sits. The resignation of any judge—local or foreign—might serve to bring home to the people the seriousness of the incursions on the rule of law and judicial independence, raising awareness of the issues and spurring others to action. However, foreign judges can also speak directly to an external or international audience—first and foremost in their home country, but potentially beyond it. The resignation of a foreign judge might therefore garner international attention in circumstances where the resignation of a local judge would not. It might dissuade fellow and prospective foreign judges from serving in that jurisdiction.

In Hong Kong, the force of the message sent by a foreign judge’s resignation derives not from one or other audience, but from the combination of the two. Foreign judges are valued in Hong Kong’s legal system because they represent the continuance of the common law and a legal system defined by values that are fundamentally different from those of mainland China. This representative function is understood to reassure not only the people of Hong Kong that their legal system is not the socialist Chinese legal system, but also the foreign actors who use Hong Kong as an international economic centre. In this way, the resignation of a foreign judge is as symbolic as his or her appointment in the first place: where the presence of foreign judges is understood, rightly or wrongly, as a vote of confidence in the integrity of Hong Kong’s legal system, the resignation of a foreign judge is bound to be interpreted as a withdrawal of confidence.
CONCLUSION

The National Security Law presents challenges for all members of the legal community in Hong Kong, which will be worked through as the law is implemented in the coming years. It is clear, however, that foreign judges will be cast in a central role, whether they would wish to be or not. This is because foreign judges in Hong Kong have come to signify not only the distinctiveness of Hong Kong’s legal system, but its quality as well. This is perhaps an unfair burden to place on foreign judges, made all the more difficult because it deals in matters of perception and reputation in both Hong Kong and the judges’ home states, matters which go beyond the core judicial function of the impartial determination of disputes according to law.

The exclusion of non-citizens from judicial office is not unusual in global practice, but in Hong Kong the de facto or express prohibition on foreign judges hearing national security-related cases has implications for the entire legal system because foreign judges represent Hong Kong’s common law. Resignation is ultimately a personal decision for each individual judge, but the signaling effect of a decision to resign—or to not resign—means that this decision will inevitably be interpreted as a statement on the quality of Hong Kong’s legal system. Such conclusions would not necessarily follow for all foreign judges in all places. Rather, they derive from the distinctive rationale for the use of foreign judges in Hong Kong as it has developed over time.

PLEASE DON’T FORGET TO PAY YOUR MEMBERSHIP DUES ON TIME.

Arrears in Membership dues adversely affects the work that the CMJA can undertake on behalf of its membership and the work that the CMJA does on promoting and protecting judicial independence across the Commonwealth. We would urge all Member Associations and Individual Members to pay their Membership on time.
GOOD JUDGMENT: JUDICIAL INVOLVEMENT IN THE COMMUNITY

Mr. Justice Malcolm Rowe, a Justice of the Supreme Court of Canada. This article is based upon a paper presented by Justice Rowe at the CMJA Conference, Port Moresby, PNG, September 2019. A different version appeared in October 2020 in the University of New Brunswick Law Journal under the title ‘To Participate or Not to Participate: Judicial Involvement in the Community’.

Abstract: An essential tension exists between (on the one hand), the need and expectation that judges not be isolated from the communities they serve and (on the other), the need and expectation that any kinds of community involvement that judges do choose to undertake not adversely affect either the judiciary or the judge personally. In Canada, a combination of legislative and regulatory provisions, administered and enforced by judicial councils and the courts, seek to give definition to the limits and constraints that govern community involvement by judges and adjudicate cases in which judges’ community involvement has been made the subject of complaint or challenge. This article discusses that legislative/regulatory regime and addresses the clearer cases involving outright bans on certain kinds of community activity by judges in Canada. It also discusses the subtleties in some of the less perfectly defined limitations as they have arisen in certain, recent cases. The discussion touches particularly upon judges’ constrained political activity, civic and charitable activity, fundraising, membership on boards, engagement with matters of political controversy and engagement with social media.

Keywords: judges, involvement in the community of – necessity of a degree of community engagement – judicial misconduct – jurisdiction to sanction judges for inappropriate judicial involvement in community matters – best practices

INTRODUCTION

Judges have long had to grapple with the limits of their community involvement. Few professionals would ask themselves whether they are to ‘behave like a monk [or] be a eunuch [or] live in silent solitude [or] embark...to live on a planet other than the earth’ (Rifkind at 62). Yet, for many years, we as judges have, in effect, been asking such questions of ourselves. Often, judges are chosen for appointment in recognition of their significant contributions to their communities. Yet, upon appointment, many of us have been concerned with whether continuing to make these same contributions would call into question our impartiality, our independence, and even our integrity.

In considering the proper limits of our involvement in the community, I will not focus on a judge’s public behaviour. That is simple; we should never undermine the offices we hold by our behaviour in public. Instead, this paper examines the degree to which judges should engage, if at all, in voluntary associations, in political organisations, in matters of public controversy, and in advocating their private interests. Guidance is available, usually in written codes of conduct put in place by bodies overseeing judicial conduct. As well, there is the less formal but quite important guidance provided by one’s chief judge. But, much is left to our own good judgment. Judges have much to offer their communities, but a “line”... however difficult it is to draw... exists between acceptable and unacceptable community involvement. This line is “not capable of mathematical determination” (Rifkind at 66), yet each judge must take care not to cross it.

I will proceed in three stages, beginning with a brief overview of the appointment and removal processes for Canadian judges. Next, I describe key elements of the ethical principles established by the Canadian Judicial Council (the ‘CJC’). Finally, I will illustrate various types of community involvement through case studies. Being common law judges, we want case studies.

APPOINTMENT AND REMOVAL OF CANADIAN JUDGES

For the sake of simplicity, I will focus on superior courts. These courts are referenced in s. 96 of the Canadian Constitution. They hear serious criminal cases and civil matters.
However, the discussion applies with slight modifications to other courts, notably provincial courts, which deal with less serious criminal matters and civil matters. In the 1970s, provincial courts replaced magistrates’ courts. In Canada, by far the majority of cases, and particularly criminal cases, are heard by provincial courts.

Judges of the superior courts are appointed by the federal Cabinet (Constitution Act, 1867, s. 96). Judges of the provincial courts are appointed by the Cabinet in each of the ten provinces (s. 92(14)). At both levels, appointments are made very largely on the recommendation of the Attorney General, who draws on lists of candidates prepared by independent advisory committees comprised of judges, lawyers, and laypersons.

In Canada, as in many countries throughout the Commonwealth, judges have security of tenure. This has a long history, dating back to the Act of Settlement, 1701 and the Commissions and Salaries of Judges Act, 1760. These English statutes established that judges would remain in office ‘during good behaviour,’ rather than at the pleasure of the monarch, and that judges would continue to hold office notwithstanding the death of the monarch (van Zyl Smit at 59–60; Shetreet at 10–11). As we all understand, security of tenure allows judges to decide cases independently, notwithstanding government or public disapproval (Friedland, A Place Apart at 41).

In Canada, superior court judges can be removed only by a vote of both Houses of Parliament, the Senate and the Commons (Constitution Act, 1867, s. 99(1)). No judge since 1867 has been removed by this process, albeit a few have resigned in the face of this eventuality (Friedland, ‘Appointment, Discipline and Removal of Judges in Canada’ at 58–59).

In recent decades, Parliament has made clear that it will act only on the recommendation of the CJC. This body is comprised of chief justices from the superior courts in all the provinces and is chaired by the Chief Justice of Canada (Judges Act, s. 59(1)). Through a committee structure, the CJC investigates complaints made against federally appointed judges; such complaints can be made by a member of the public or by the Attorney General (s. 63). Most complaints are ill-founded and are speedily dismissed. Those that warrant investigation trigger procedures aimed at ensuring fairness to the judge. In serious cases, the committee can recommend to the CJC that a judge be removed for reasons of (a) infirmity; (b) misconduct; (c) failing to undertake his or her duties; or (d) otherwise having been placed in a position incompatible with the due execution of his or her office (s. 65(2)). As is set out at pages 18-19 of its publication, Review of the Judicial Conduct Process, the CJC has interpreted its task as involving two steps:

1. Determining if the judge has become ‘incapacitated or disabled from the due execution of their office’; and
2. Determining if public confidence in the judge’s ability to discharge the duties of his or her office has been undermined to such an extent that a recommendation for removal is warranted.

The test at the second step, described at page 19, is the following:

Is the conduct so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

Given the stringency of that test, it is difficult to imagine how a judge’s involvement in a community organisation or the like could warrant a recommendation for removal.

While the Judges Act does not contemplate lesser sanctions, in practice such sanctions are imposed. These can be quite mild, in effect words of guidance or caution set out in correspondence from the CJC. The Council may call for counselling or additional training. In more serious circumstances, a reprimand may issue. In almost all instances, the goal is to restore the judge to the proper conduct of his or her role. The approach is strongly oriented to be supportive and remedial, while at the same time providing clear guidance as to conduct.
Of course, the vast majority of situations where conduct may be questioned never get to the CJC. They are dealt with informally by the Chief Judge. But, if more formal measures appear warranted, they are undertaken by the CJC as a group and not by the individual Chief Judge.

ETHICAL GUIDELINES AND PRINCIPLES

Guidance for federally appointed judges is provided in the Judges Act and in a set of principles developed by the CJC called Ethical Principles for Judges (the ‘Principles’). Provincial judicial councils operate in a parallel way for provincially appointed judges; they have adopted similar principles to guide conduct (e.g., Ontario Court of Justice, Principles of Judicial Office; Provincial Court of British Columbia, Code of Judicial Ethics).

The Judges Act contains, at s. 55, an overarching rule:

No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

The Act also creates the CJC, authorises it to investigate complaints, and empowers it to recommend removal (Judges Act, ss. 59–70). The CJC has authority over more than 1,100 federally appointed judges (CJC, ‘Mandate and Powers’). The CJC’s Principles are advisory: they are not a list of prohibited behaviours (Principles, Pr. 1(2)). However, they are a ‘useful touchstone of generally accepted ethical standards in the judicial community guiding judges in how they should act on and off the Bench’ and set out a general framework that is relevant to assessing allegations of improper conduct (CJC, Matlow Report, Majority Reasons at paras. 95, 99).

The limitations set out in the Judges Act and the Principles stem from the twin requirements of independence and impartiality. As a former Chief Justice of Canada put it, judicial independence is not a privilege that appertains to the holder of a judicial office; rather, it is a guarantee to citizens that there is an impartial adjudicator to resolve their disputes or hear their challenges to abuse of authority (Fauteux at 4). The limitations on judicial conduct call for a higher standard than is expected from other citizens. A judge’s conduct must be ‘free from impropriety or the suggestion of impropriety; it should be, as far as is humanly possible, beyond reproach’ (Wilson at 4). Judges are expected to tolerate restrictions on the rights of the individual that other citizens do not (Principles, Pr. 3, Comm. 5). However, judges are entitled to expect as few restrictions on their freedoms as is possible and consistent with proper conduct, given their office (CJC, Commentaries on Judicial Conduct at 8).

THE TENSION UNDERLYING COMMUNITY INVOLVEMENT

Regarding community involvement by judges, two competing considerations are at play. On the one hand, a judge should not be isolated from his or her community. On the other, community involvement must be modulated so as to avoid negatively affecting the standing of the judge and the judiciary. What amounts to the right balance is somewhat contextual.

In 2015, in the context of an allegation of judicial bias, the Supreme Court of Canada wrote in the Yukon Francophone School Board case that judges can and should participate in their communities:

Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. [at para. 61]

The Supreme Court recognised the value of such experiences, stating (at para. 34):

A judge’s identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand ‘life’ — their own and those whose lives reflect different realities.

Withdrawal from the community can hinder a judge’s ability to carry out his or her duties. Judges are called on to make decisions being
mindful of the standards of the community; thus, to render decisions regarding fundamental freedoms requires an understanding of societal attitudes and competing interests (CJC, Commentaries on Judicial Conduct at 8–9). Assessing damages, sentencing offenders and giving effect to the ‘public interest’ all require knowledge of the community (Thomas at 93). A judge who is withdrawn from the community would undertake all these tasks with less understanding. Put another way, isolation can result in ‘judicial short-sightedness and unresponsiveness to the changing needs of society’ (Shetreet at 324).

Community involvement has other positive effects. First, it fulfils the public’s expectation that professionals should be active members of their communities. Second, it ‘personalise[s]’ judges as sincere and caring family members, volunteers, and community leaders.’ Finally, it contributes to a judge’s well-being and consequently to improved judicial demeanour and performance (McKoski at 4–6).

Nonetheless, inappropriate involvement can be detrimental. The abiding concern is to ensure an independent and impartial judiciary. The range of issues that can come before the courts is as diverse as is life itself; judges must be careful not to indicate predispositions on potential controversies. As a result, involvement in causes or organisations likely to be involved in litigation is to be avoided (Principles, Pr. 6(C)(1)). Similarly, judges should avoid groups whose purposes include exerting pressure on government or attempting to effect social change (Wilson at 8; Thomas at 97). Community involvement also runs the risk of causing frequent recusals by judges (McKoski at 46–47; Principles, Pr. 6, Comm. C.3). Additionally, it may lead to improper use of the prestige of the judge’s office (McKoski at 48).

In practice, how does one decide which activities are acceptable and which are not? The case studies that follow illustrate inherent difficulties in this demarcation; they demonstrate that new and unforeseen situations continue to arise. As jurists, we know that the genius of the law is experience. As is life, the law is ever changing.

**The CJC’s Principles and Case Studies**

The CJC’s overarching guidance on extrajudicial activity is this: subject to limitations imposed by the Judges Act and the nature of the office, judges can participate in activities that do not detract from the performance of their duties (Principles, Pr. 4, Comm. 2). The Principles then provide advice on various types of community involvement.

**Political Activity**

The most definitive of the principles relates to political activity: *it is prohibited*. Judges must not: be members of political parties; engage in political fundraising; attend political events; make contributions to political parties or campaigns; or sign petitions to influence political decisions (Principles, Pr. 6(D)(3)). This is an *absolute ban*; judges can have no association with any political group nor can they publicly express any political opinions (Wilson at 7).

This prohibition stems from concerns relating to the separation of powers between the three arms of the state: the legislature, the executive, and the judiciary. The judiciary ‘provide[s] an impartial check to other powers at work in the rule of law’ (Soeharno at 94). The recurring concerns of impartiality and independence are in play. A judge who engages in partisan political activity or makes out-of-court statements on issues of public controversy is ‘by definition…choosing one side of a debate over another’ (Principles, Pr. 6, Comm. D.2). Moreover, if the judge’s activities attract criticism and/or rebuttal, judicial independence is undermined (*ibid*).

Political activity of any kind is to be avoided.

**Civic and Charitable Activities**

The *Principles* authorise involvement in civic and charitable activities, with certain limitations. That is, judges are free to participate in civic, charitable and religious activities subject to the following considerations. As is set out in the *Principles* at Pr. 6(C)(1):

a. Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the
performance of judicial duties.

b. Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.

c. Judges should avoid involvement in causes or organisations that are likely to be engaged in litigation.

d. Judges should not give legal or investment advice.

This guidance provides useful parameters within which judges can organise their affairs. Yet, it is not always clear, as the cases of Justice Ted Matlow and Judge Donald McLeod demonstrate.

Justice Matlow

Justice Matlow was a judge of the Ontario Superior Court. In 1999, he became involved in a public controversy relating to a municipal development project (the ‘Thelma Road Project’) near his home in Toronto. Justice Matlow and his neighbours formed a neighbourhood community group called The Friends of the Village (the ‘Friends’); their purpose was to oppose the project. Justice Matlow became one of the group’s leaders. He sought standing in a hearing before an administrative tribunal, the Ontario Municipal Board, with respect to the legality of the proposed development. He also engaged in email correspondence and meetings with elected officials and city employees. He made comments to the media setting out his reasons for opposing the project; in these, he expressed his views on legal issues relating to the project. His correspondence indicated he was a judge. His language could be considered inflammatory.

Justice Matlow continued these activities for several years. In 2005, a development project was being contemplated elsewhere in Toronto relating to streetcars (the ‘St. Clair Project’). The project was controversial; a community organisation called SOS-Save Our St. Clair Inc. (‘SOS’) formed in opposition to it. SOS applied to the Divisional Court (a division of the Superior Court in which panels of three Superior Court judges hear judicial review applications) for a declaration that the project breached municipal planning laws and failed to accord with environmental assessments. Justice Matlow was assigned to the panel hearing the application. The panel unanimously granted the application, in effect stopping the project. The City of Toronto became aware of Justice Matlow’s involvement in the Thelma Road Project, which was quite similar to the St. Clair Project. The city brought a motion requesting that Justice Matlow recuse himself and that there be a new hearing. The court granted the motion, with Justice Matlow dissenting. The city then made a complaint to the CJC.

An inquiry committee of the CJC found that Justice Matlow had placed himself in a position incompatible with the office of judge, that he was guilty of misconduct, and that he had failed in the due execution of his office. It found that, taken together, Justice Matlow’s actions had rendered him incapable of executing his judicial office and recommended his removal (CJC, Matlow Report, Majority Reasons at para 45).

The report of the inquiry committee was considered by the full CJC. The majority of the CJC found that Justice Matlow’s involvement in the Friends, his meetings with officials on behalf of the Friends, and his interactions with the media were not problematic on their own (CJC, Matlow Report, Majority Reasons at paras 107–14). However, the manner in which he carried out these activities was problematic. The majority of the CJC concluded, at para. 123:

In summary, while judges who have personal interests, such as home ownership, that can be affected by government action have the right, in their private capacity, to contest, as do other Canadians, decisions that affect those interests as do other Canadians, there are limits as to what a judge might do. A judge is not entitled to use the prestige of judicial office to advance his or her private interests. Nor should a judge use intemperate language where others would likely know, or could be expected to know, that he or she was a judge. And under no circumstances is a judge entitled to act as a legal advisor for individuals opposing government action.

The majority of the CJC found that some of Justice Matlow’s actions constituted judicial
misconduct and placed him in a position incompatible with the due execution of his office (CJC, Matlow Report, Majority Reasons at para 176). However, it found that removal was not warranted given his expressions of regret, his 27-year career on the bench without other incidents, and the fact that the misconduct did not occur during the performance of his judicial duties (at paras. 179–84). The majority did, however, strongly disapprove of his actions and set out three directions: apologising to specified individuals, attending a judicial ethics seminar, and obtaining prior approval should he wish to participate in a public debate in future (ibid at para 186).

A minority of the CJC found that the conduct was sufficiently serious to undermine public confidence and, accordingly, would have recommended Justice Matlow’s removal (CJC, Matlow Report, Minority Reasons at para 9).

Justice Matlow’s situation is interesting in that he was advocating for his property rights. His involvement in a community organisation was not per se to contribute to the community but rather to advocate for his interests and those of his neighbours. The majority’s view concludes, implicitly, that judges should be able to advocate for their own interests as private citizens—but they must truly do so as private citizens, without identifying themselves as judges or providing any kind of legal advice. Moreover, and as was stated explicitly, a judge should act in line with the dignity of his or her office, avoiding intemperate language.

Judge McLeod

A recent case before the Ontario Judicial Council (the ‘OJC’) illustrates the difficult distinction between community involvement that is educational and that which is advocacy. Judge Donald McLeod is a judge of the Ontario provincial court. As a Black judge who grew up in subsidised housing and with limited resources, he sought to assist others in overcoming similar barriers; he wished to be a leader for Black youth. Before his appointment, he was involved in community initiatives relating to education and mentorship of Black youth. One can readily conclude that this commendable commitment was a factor favouring his appointment. After his appointment, he sought to create a national organisation called the Federation of Black Canadians (the ‘FBC’) with a mandate to advance the social, economic, political and cultural interests of Canadians of African descent. He became the chair of the FBC’s Interim Steering Committee. Was this compatible with his new role as a judge?

The Associate Chief Judge of the Ontario Court of Justice expressed concerns. Judge McLeod and the Associate Chief Judge agreed to consult the Court’s Judicial Ethics Committee. The Committee approved his involvement with limitations: notably, he was not to be involved in fundraising or lobbying. However, after a time, the FBC began to engage in activities in which members, including Judge McLeod, would meet with politicians and government officials. Critiques started to emerge in the media about his participation, and a complaint was made to the OJC. Judge McLeod ultimately stepped down from his position at the FBC.

The OJC found that his conduct had been incompatible with judicial office, but it did not amount to judicial misconduct. It recognised, at para. 73 of its report, that the FBC’s goals and Judge McLeod’s motivations were laudable:

Justice McLeod is rightly seen as a leader in his community. As a racialized judge, he has a moral obligation as a leader and role model in the Black community. As he noted in his response to the complaint, his community involvement was an important factor when he was appointed. There is no reason why it should have entirely ended when he assumed judicial office. He is to be commended for leaving his court room and judicial chambers from time to time in order to present to the public a positive and inspiring vision of what young Black Canadians can aspire to.

However, his activities had crossed the line into advocacy on public policy. In his meeting with government officials and politicians, he ‘not only provided information but also advocated specific policy changes and the allocation of government resources to achieve those policy changes’ (OJC, McLeod Report at para, 75). He was also publicly identified as a judge. These activities were not, the OJC
found, ‘merely educative or intended to inform politicians of the difficulties facing Black Canadians’ (at para. 76). The OJC emphasised that [i]t is incompatible with the separation of powers for a judge to enter the fray and ask political actors for policy changes and the allocation of resources, however worthwhile the judge's motivating cause’ (at para 84). His actions were therefore incompatible with judicial office. The OJC did note, however, that Judge McLeod likely would not have crossed the line ‘had he restricted his efforts to educating members of the public about these issues’ (ibid at para 88).

While Judge McLeod’s actions were incompatible with judicial office, the OJC concluded that they did not amount to misconduct (OJC, McLeod Report at para. 94). The OJC noted there was no evidence that Judge McLeod had been involved in partisan political activity or fundraising. He had also contacted his court’s Ethics Committee and spoken with his Associate Chief Judge (OJC, McLeod Report at paras. 95–100). Overall, he had been motivated to promote public confidence in the judicial system, which was ‘relevant precisely because the aim of judicial misconduct proceedings is to maintain public confidence in judicial institutions’ (at para 103).

Judge McLeod’s situation illustrates that judges inevitably sacrifice certain aspects of full citizenship. However, the OJC made clear that a judge need not be a recluse. Rather, judges can contribute to their communities in many ways, including education as to policy issues. The OJC’s decision is notable in that it explicitly evaluated Judge McLeod’s conduct in light of the racial dynamics in Ontario (OJC, McLeod Report at para. 102). It noted that many Black people mistrust the criminal justice system, that they are overrepresented in that system, and that they are disproportionately arrested and searched by police. Judge McLeod’s life experiences, the OJC held, made him uniquely aware of these issues, and his presence on the bench promotes the public’s confidence in the administration of justice (at paras 102–103).

This explicit acknowledgment by the OJC of the context of the complaint recognises the legitimate and important role that judges can play in addressing inequities. It must be acknowledged as a postscript here that, subsequent to the date of the conference at which the paper upon which this article is based was presented, a further complaint has been made against Judge McLeod. A new hearing for him is thus pending before the OJC in which as yet unproven allegations—some of which concern the quality of the evidence he gave at his first hearing before that body—will be considered.

**Fundraising**

The Principles are clear that fundraising should be avoided by judges. They prohibit judges from soliciting funds ‘except from judicial colleagues or for appropriate judicial purposes’ (Principles, Pr. 6(C)(1)(b)). Judges are also not to lend the prestige of their office to such solicitations.

Fundraising is different from other forms of community involvement: ‘It moves beyond one’s own individual support to the active seeking out of expressions of support from others. It encompasses an advocacy function, championing the cause and seeking to rally others to it’ (Pitel & Malecki at p 530). Fundraising also raises a real risk that the public will consider a judge to be affected by contributions made in response to their solicitation (at p 531). The perceived effects on the impartiality and independence of the judge require a complete ban.

**Membership on Boards**

Judges are prohibited from serving on the boards of commercial enterprises (Principles, Pr. 6, Comm. C.7). They are also discouraged from membership on boards of bodies such as universities, dioceses, schools, hospitals, and charitable foundations (Principles, Pr. 6, Comm. C.9; Wilson at 8). While such positions may seem harmless, it is not uncommon for such bodies to be involved in litigation, as well as in matters of public controversy. Being on such a board could disqualify a judge from sitting; in addition, it can raise concerns about impartiality.

Justice Georgina Jackson has provided a helpful set of questions that judges can ask themselves when considering whether to be a member of a board:
1. Would association with this board reflect adversely on the judge’s impartiality?
2. Would this activity interfere with the performance of his or her judicial duties?
3. Is the judge being asked to join this board to lend the prestige of the judicial office to fund-raising?
4. Is this board likely to be involved in litigation?
5. Is the judge being asked to play a role in the expectation that he or she will give legal or investment advice? (at p 9)

These questions provide a useful framework. However, as we will see, this too is an area where judges can find themselves uncertain as to what is appropriate.

In the Yukon Francophone School Board case referred to above, the Supreme Court of Canada addressed a bias claim against a judge. The judge had heard a case in which the school board sued the territorial government for deficiencies in the provision of minority language education. The judge ruled in the school board’s favour on most issues. The Court of Appeal found a reasonable apprehension of bias based on (1) incidents at trial and (2) the judge’s involvement as governor of a philanthropic Francophone community organisation.

The Supreme Court upheld the bias findings based on the incidents at trial, but it set aside the findings relating to the judge’s position in the philanthropic organisation. The Court explained, at para. 33):

*Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.*

As this case did not arise in the context of a complaint to the CJC, it is unclear what the CJC’s views would be. However, the Principles seem to suggest that the main considerations would be whether the Foundation was likely to be involved in litigation or in matters of public controversy, both of which arose here. The case presents an interesting perspective on the interaction of the law of reasonable apprehension of bias with the ethical principles established by the CJC.

This kind of participation has recently been the subject of a case that is currently before the courts. Justice Patrick Smith of the Ontario Superior Court was asked to serve as the interim dean of the law faculty at Lakehead University in Ontario. That faculty has, as an important part of its mandate, the study of Aboriginal and Indigenous Law (Lakehead University, ‘Bora Laskin Faculty of Law’). The law school cited Justice Smith’s experience with Indigenous communities and publications on Aboriginal law as its reasons for asking him to take the position on an interim basis, as the dean had left her position unexpectedly.

Justice Smith spoke to his Chief Justice about the invitation to serve as interim dean. They both sought approval from the federal Attorney General for a six-month leave of absence, noting that Justice Smith’s responsibilities would be confined to academic leadership, that he would delegate administrative responsibilities to other personnel, and that he would not be remunerated (beyond his judge’s salary). The Minister, who was herself Indigenous, granted the leave of absence. Nonetheless, the CJC had concerns about the appointment and initiated an inquiry, ultimately finding Justice Smith should not have accepted it, as doing so was in contravention of the Judges Act. However, the CJC found the actions were not serious enough to warrant removal (CJC, Smith Report at paras 76–78). Justice Smith is currently challenging the CJC’s decision before the Federal Court of Canada. Accordingly, I will make no further comment.

Matters of Public Controversy

The Principles refer to the need to avoid involvement in matters of public controversy as a reason not to become involved in organisations or causes likely to be drawn into such controversies. The oft-cited case of Justice Thomas Berger provides a prime example of what can happen when a judge does become involved in such matters.
Justice Berger was a judge of the Supreme Court of British Columbia. Before his appointment, he was a leading lawyer in Aboriginal law and represented Indigenous people in landmark cases. In 1981, he made a speech and wrote an article in a newspaper criticising proposed constitutional changes for their failure to protect Aboriginal and treaty rights. He also criticised the absence of a veto by the province of Quebec on future constitutional changes, a matter of intense controversy.

Prime Minister Pierre Elliott Trudeau stated that it was improper for a sitting judge to make such comments. A judge of the Federal Court made a complaint to the CJC, and an inquiry panel was formed. The panel discussed the independence of the judiciary in detail, noting:

\begin{quote}
The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judge must be free from political interference, but that politicians must be free from judicial intermeddling in political activities. This carries with it the important and necessary concomitant result – public confidence in the impartiality of judges – both in fact and appearance. [Robinette, Berger Case Report at p 389]
\end{quote}

The inquiry panel found Justice Berger had ‘intervened in a matter of serious political concern and division when that division or controversy was at its height’ (Robinette, Berger Case Report at 389). It rejected Justice Berger’s argument that his remarks related to matters of conscience rather than politics. The panel suggested that he should resign as a judge if he wanted to comment on such matters (at pages 390–92). It concluded, at p 391:

\begin{quote}
Judges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem.
\end{quote}

However, the inquiry panel refrained from recommending that Justice Berger be removed, as this was the first situation of this kind to come before the CJC (Robinette, Berger Case Report at 392).

Other members of the CJC were less critical than the inquiry committee. They concluded that Justice Berger’s actions were ‘indiscreet,’ but did not warrant removal. The CJC did, however, state that judges should not take part in controversial political discussions, except as they relate to the operations of the courts (Robinette, Berger Case Report at p 379).

The Chief Justice of Canada, Bora Laskin, made the following comments about Justice Berger in a speech:

\begin{quote}
[U]nbelievably, some members of the press and some in public office in this country, seem to think that freedom of speech for the judges gave them the full scope of participation and comment on current political controversies, on current social, and political issues. Was there ever such ignorance of history or principle? [As quoted in Roach at 179]
\end{quote}

Chief Justice Laskin further stated that any judge wanting to comment on political issues should resign from the bench (Roach at 179). Both Chief Justice Laskin’s comments and the views expressed by the CJC have been commented on unfavourably by academics (Roach at 179–80). However, it is the judges, not the academics, that have the last word.

Social Media

The \textit{Principles} are currently under review. One topic is the use of social media. Most lawyers have an online presence before appointment to the bench. After appointment, is an online presence comparable to involvement in a community group or organisation? As social media use increases, this is an important area for the CJC to provide guidance.

CONCLUSION

In summary, in Canada the key ethical considerations for judges regarding involvement in the community are:

\begin{itemize}
\item Judges must weigh the benefits of community involvement against the potential risks to impartiality and independence;
\item Judges must not engage in political activity of any kind;
\end{itemize}
• Judges may engage in civic and charitable activities, provided they do not reflect adversely on their impartiality or interfere with the performance of their judicial duties;

• Judges should be wary of involvement in organisations or causes that are likely to be engaged in litigation or matters of public controversy;

• Judges may advocate for their own private interests, provided they do not use the prestige of their office inappropriately;

• Judges must not engage in fundraising;

• Judges should avoid membership on boards of schools, charitable foundations, and the like, as they are increasingly involved in litigation and matters of controversy; and

• Judges should refrain from commenting on matters of public controversy.

I expect that in all our jurisdictions, the situation is broadly similar. There may well be differences in how these ethical standards are given effect, for example regarding the role of chief judges. In any case, this is an overview of how things work in Canada.

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A MORE CONSISTENT APPROACH TO SENTENCING

His Honour Nic Madge, until recently an English circuit judge and a senior trainer with the Judicial College, has delivered judicial training on many topics in different jurisdictions. (See https://www.nicmadge.co.uk/.) This article is an expanded version of a paper given at a symposium organised by the Judiciary of Tanzania and the Slynn Foundation which was held in February 2020 at the Julius Nyerere International Convention Centre in Dar Es Salaam. The theme of the symposium was ‘The Challenge of Judging in the 21st Century’.

Abstract: Disparities in sentencing undermine public confidence in the justice system. When handing down sentences, the aim should be consistency of approach, not consistency of sentence. Whereas sentencing guidelines may provide route maps which assist judges without interfering with judicial independence, mandatory minimum sentences may prevent the imposition of just and proportionate sentences unless there is a mechanism for judges to depart from the minima. This article considers the purpose of sentencing and steps taken to achieve consistency of approach by legislatures, sentencing councils and the judiciary in England and Wales and in several other Commonwealth countries.


THE BACKGROUND IN ENGLAND AND WALES

Traditionally, in the common law world, there has been a wide judicial discretion as to the length and nature of sentences. This was subject only to statutory minima and maxima and to binding appeal court decisions.

However, a wide judicial discretion can lead to disparity of sentence. Disparity of sentence in seemingly similar circumstances causes feelings of injustice. It also undermines public confidence in the judiciary and the justice system. In the UK, defence advocates tried to persuade court staff to list cases before judges who have a reputation for being more lenient sentencers.

The courts appreciated the importance of a consistent approach to sentencing. In England and Wales, from the 1980s, the Court of Appeal adopted the practice of issuing sentencing guidelines for particular offences. Guidelines would be given in individual appeals, or several appeals against sentence involving similar issues would be heard together: see, for example, R v McInerney [2002] EWCA Crim 3003 on burglary; R v Millberry [2002] EWCA Crim 2891 on rape; and R v Povey [2008] EWCA Crim 1261 on knife crime. In 1980, Lane LCJ said that the aim was not ‘uniformity of sentence’ but ‘uniformity of approach’ (R v Bibi (1980) 71 Cr App R 360).

SENTENCING COUNCILS

Parliament also intervened. The Crime and Disorder Act 1998 created the Sentencing Advisory Panel. That Panel was established to draft and consult on proposals for guidelines and to refer them to the Court of Appeal for their consideration.

Then, section 142 of the Criminal Justice Act 2003 listed the purposes of sentencing. It provided that:

\[\text{...any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—\}

\[\text{(a) the punishment of offenders,}\]

\[\text{(b) the reduction of crime (including its reduction by deterrence),}\]

\[\text{(c) the reform and rehabilitation of offenders,}\]

\[\text{(d) the protection of the public, and}\]

\[\text{(e) the making of reparation by offenders to persons affected by their offences.}\]

Section 143 sets out two basic factors to be taken into account by judges and magistrates when determining the seriousness of an
offence, namely the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused.

A Sentencing Guidelines Council was established by the Criminal Justice Act 2003. The Sentencing Guidelines Council published a Case Compendium of Guideline Judgments and issued nineteen definitive guidelines for offences such as burglary, sexual offences, robbery, fraud, and the like. In 2010, the Sentencing Guidelines Council was abolished and replaced by the Sentencing Council.

The Sentencing Council was established by section 118(1) of the Coroners and Justice Act 2009. It is an independent, non-departmental public body—one of the Ministry of Justice’s family of arm’s-length bodies. Its current members are the Lord Chief Justice (its President), two Lord Justices of Appeal, two High Court Judges, two Circuit Judges, one District Judge, the Director of Public Prosecutions, a barrister, an academic, the chief officer of Victim Support and a civil servant who has worked with prisons and probation. All judicial appointments to the Sentencing Council are made by the Lord Chief Justice with the agreement of the Lord Chancellor whilst non-judicial appointments are made by the Lord Chancellor with the agreement of the Lord Chief Justice following open competition.

The Sentencing Council’s aim is to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. It has responsibility for developing sentencing guidelines, monitoring their use and assessing the impact of guidelines on sentencing practice. It may also be required to consider the impact of policy and legislative proposals relating to sentencing, promote awareness amongst the public regarding the realities of sentencing, and publish information regarding sentencing practice in Magistrates’ Courts and the Crown Court. In addition to those functions, the Council must consider the impact of sentencing decisions on victims and play a part in promoting understanding of, and increasing public confidence in, sentencing and the criminal justice system.

Section 120 of the 2009 Act states that the Council must prepare guidelines on the reduction of sentence for guilty pleas and on the application of the totality principle; it also authorises it to prepare guidelines about any other sentencing matters. In exercising its functions, the Council must have regard to:

- current sentencing practice;
- the need for consistency;
- the impact of sentencing decisions on victims;
- the need to promote public confidence in the criminal justice system;
- the cost and effectiveness of different sentences; and
- the results of its monitoring of its own guidelines.

SENTENCING GUIDELINES IN ENGLAND AND WALES

The Sentencing Council has published 27 Definitive Guidelines. Some cover specific offences, such as manslaughter, attempted murder, terrorism, assault, robbery, theft, fraud, bribery and money laundering offences, sexual offences, drug offences, burglary, child cruelty offences and offences involving the use of bladed articles and offensive weapons. Others deal with more general principles of sentencing, such as reduction in sentence for a guilty plea, sentencing children and young people and domestic abuse.

Section 125(1) of the Coroners and Justice Act 2009 provides that in sentencing offenders, courts must follow any relevant sentencing guideline unless ‘satisfied that it would be contrary to the interests of justice to do so’.

All the Guidelines set out an approach to sentencing and ranges of sentences for particular types of offences. For example, in relation to sentences for rape, there are eight steps, namely:

i. determining the offence category;
ii. deciding the starting point and category range;
iii. considering any factors which indicate a reduction in sentence (e.g. assistance to the prosecution);
iv. reduction for guilty pleas;

v. an assessment of dangerousness. (The court should consider whether it would be appropriate to award a life sentence or an extended sentence);

vi. the totality principle. (If sentencing an offender for more than one offence, the judge should consider whether the total sentence is just and proportionate to the offending behaviour);

vii. the making of ancillary orders; and

viii. the giving of reasons for the sentence.

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, all sentences. Judges who sentence outside the relevant guidelines must give reasons for departing from it: *R v Datsun and Razak* [2013] EWCA Crim 964.

There are comparable sentencing guidelines in many states in the USA. Many are more prescriptive than the English and Welsh guidelines. For example, the 2019 Washington State Adult Sentencing Guidelines Manual (which is easily accessible online) is 497 pages long. It summarises sentencing case law and provides detailed guidelines on how judges should determine felony classes, felony seriousness and offender scores based upon offenders’ criminal histories. There are sentencing grids for many specific offences and standard grids covering many different offences. One of the standard grids (Sentencing Grid D—For Crimes Committed After July 24, 1999) contains 16 different levels of seriousness of offence, ten different offender scores and over 150 different starting points and ranges of sentence. They vary from 0-60 days to 548 months and life imprisonment. Judges may depart from the standard sentence ranges which are presumed to be appropriate for typical felony cases if they find that ‘there are substantial and compelling reasons justifying an exceptional sentence’. (Sentencing Reform Act of 1981, per Chapter RCW 9.94A.535).

The response of English and Welsh judges to the guidelines in their countries has been overwhelmingly positive. It is recognised that Parliament, whether directly through legislation or indirectly through the Sentencing Council, can lawfully prescribe sentencing parameters, but the Guidelines—developed with strong judicial influence—largely reflect existing best sentencing practice. Judges do not consider that the Guidelines undermine their independence. They contain sufficient flexibility to enable the imposition of just sentences tailored to the particular circumstances of offenders and the crimes they have committed. Indeed, the guidelines are seen as assisting the sentencing process, rather than constricting it. In a word, they prescribe a roadmap as opposed to a straitjacket.

**Mandatory Minimum Sentences**

Mandatory minimum sentences present a different picture entirely. By their very nature:

...they have the potential to depart from the principle of proportionality in sentencing. ... They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing. *R. v. Nur* 2015 SCC 15 at para. 44 (Supreme Court of Canada)

In England and Wales, there are relatively few mandatory minimum sentences. Politically, that may be because the desire of most British politicians to be seen to be ‘tough on crime’ is generally outweighed by their reluctance to spend the money required to house the resulting larger prison population. Examples of mandatory sentences that do exist in England and Wales include a minimum of seven years imprisonment for a third Class A (i.e. hard) drug trafficking offence, a minimum of three years for a third domestic burglary and a minimum of five years for certain firearms offences. (See Powers of Criminal Courts (Sentencing) Act 2000, ss. 110 and 111 and Firearms Act 1968 s. 51A.)

Where minimum sentences apply, the
legislation generally allows judges to impose lesser sentences where there are ‘particular circumstances, which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances’ (e.g. s. 111 above). Although inevitably there have been appeals in which offenders have argued that first instance judges were wrong in failing to find that there were ‘particular circumstances’ justifying a sentence below the minimum, there have been no challenges to the legislation prescribing such minimum sentences. That is in contrast to the position in, say, Canada, where, by 2012, there were more than one hundred mandatory minimum sentences in existence. They prompted court challenges on the ground that they unduly prevented judges from independently carrying out sentencing as an individualised process. In Canada, some statutory minimum sentences have since been struck down on constitutional grounds because they require judges to impose sentences which are grossly disproportionate to fit and proportionate sentences: Nur above, para. 46. (See also R v Smith (Edward Dewey), [1987] 1 SCR 1045; R v Lloyd 2016 SCC 13; R v Adamo 2013 MBQB 225; R. v J.L.M., [2017] B.C.J. No. 1357 (CA); R. v. Robertson [2020] B.C.J. No. 280 (CA); and R. v Ahmed [2019] O.J. No. 4808 (SCJ)). The outcome of these challenges would almost certainly have been different if the Canadian Criminal Code had allowed exemptions (a ‘safety valve’) from the statutory minima. (See S. Chaster, ‘Cruel, Unusual and Constitutionally Infirm: Mandatory Minimum Sentences in Canada’ (2018), 23 Appeal 89.)

It is also worth noting that there is substantial Commonwealth jurisprudence which has established in most jurisdictions that a mandatory death penalty is unlawful. In this regard, see, for example, J. Middleton and A. Clift-Matthews with E. Fitzgerald QC, Sentencing in Capital Cases (The Death Penalty Project, 2018).

**GENERAL PRINCIPLES AND SENTENCING GUIDELINES IN OTHER COUNTRIES**

There are many other examples of steps taken in other countries by judges and legislatures to achieve a consistent approach to sentencing.

**Ghana**

In Kwashie v the Republic [1971] 1 GLR 488-496, the Ghanaian Supreme Court has stated that:

*In determining the length of sentence, the factors which the trial judge is entitled to consider are: (1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular locality where the offence took place; or in the country generally; (5) the sudden increase in the incidence of the particular crime; and (6) mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed.*

**Zimbabwe**

In Zimbabwe, sentences should be shaped and determined by a number of factors, including; (1) the degree of premeditation by the offender; (2) the circumstances surrounding the conviction of the accused; (3) the gravity of the crime committed (in some instances the maximum punishment provided by statute is an indication); (4) the attitude of the offender after the commission of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant; (5) the previous criminal record, if any, of the offender; (6) the age, mode of life, climate and personality of the offender; (7) any recommendation presented to the court as a pre-sentencing report from an official designated to assist in assessing the accused; and case authorities in relation to similar offences: Moyo & Ors v S, HB-114-06, summarised in section 9 of the Criminal Defenders Handbook available online via the ZimLII website).

However, as well as defining the objects of sentencing and the principal factors to be taken into account when sentencing, increasingly over the last few years, other jurisdictions (especially in the Commonwealth) have been introducing sentencing guidelines, often with assistance from the UK.
Ethiopia

In Ethiopia, the primary purpose of criminal sentencing, according to the Penal Code, is to ensure the order, peace and the security of the state, its people and inhabitants for the public good and the prevention of crimes. The Ethiopian Federal Supreme Court issued its first comprehensive guidelines scheme in 2010. It has been amended since. The Ethiopian Guidelines divide offences into several levels or categories of seriousness. Each level is then linked to a proportionate sentence range. They contain detailed instructions as to how offence seriousness categories should be selected. The Guidelines set out a number of steps to be followed in the sentencing process once the offence seriousness category has been decided. Those steps are similar to those in the English and Welsh Guidelines.

Ethiopian courts are allowed to depart from either Guideline-specified offence categories or from the Guideline’s method of calculating a sentence if the court finds that the sentence levels specified in the Guideline do not adequately reflect the circumstances of the offence or if the court believes that a sentence that would be imposed by applying the Guideline sentence would not achieve the goals of punishment recognised by the law. If courts depart from the Guidelines, they are required to send a copy of the file to the Federal Supreme Court. (See K.M. Yilma and J.V. Roberts, ‘Out of Africa: Exploring the Ethiopian Sentencing Guidelines’ (2019) 30 Crim L.F. 309.)

Uganda

In Uganda, general sentencing principles are contained in The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. They provide that when sentencing offenders every court shall take into account: (a) the gravity of the offence, including the degree of culpability of the offender; (b) the nature of the offence; (c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances; (d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement; (e) the offender’s personal, family, community, or cultural background; (f) any outcomes of restorative justice processes that have occurred, or are likely to occur; (g) the circumstances prevailing at the time the offence was committed up to the time of sentencing; (h) any previous convictions of the offender; and (i) any other circumstances the court considers relevant.

The Directions also set out ranges of sentence for specific offences such as capital offences, manslaughter, robbery, defilement, criminal trespass, corruption and theft. In relation to defilement (i.e., having or attempting to have sexual intercourse with a girl under the age of 18), there are four categories;

- Simple defilement. Maximum sentence: imprisonment for life. Starting point: 15 years. Range: after taking into account aggravating and mitigating factors, from three years up to imprisonment for life.
- Attempted defilement. Maximum sentence: 18 years of imprisonment. Starting point: nine years. Range: from one year up to 18 years.
- Defilement of idiots or imbeciles. Maximum sentence: 14 years of imprisonment. Starting point: seven years. Range: from eight months up to 14 years. (In England and Wales, the specific targeting of a particularly vulnerable victim is an aggravating feature which would make the category of offence more serious. Sexual activity with a person with a mental disorder impeding choice is a serious offence, with sentences comparable with those for sexual activity with a child.)
- Permitting defilement. Maximum sentence five years of imprisonment. Starting point: two and a half years. Range: from three months up to five years.

These directions were developed by a 25-member task force of the Justice Law and Order Sector established by the Chief Justice.

New, expanded guidelines covering Magistrates Courts have been drafted with the assistance of Role UK. The intention is that guidelines will cover all criminal offences. However, the statutory instrument introducing them has not yet been signed due to the COVID-19
lockdown. (See, as well, Principles and Purposes of Sentencing, a paper presented by Hon Justice Mwangusya Eldad, JSC at the 20th Ugandan Annual Judges’ Conference held 21-25 January 2018. This paper is accessible online.)

Tanzania and The Gambia

In Tanzania, following detailed discussions between members of the local judiciary and the British High Commission and Crown Prosecution Service, a detailed Sentencing Manual for Judicial Officers (accessible online) has been prepared and approved by the Chief Justice, Prof. Justice I. H. Juma. The professed aim of the Manual is to ‘assist the courts at every level to adopt sentences which are consistent, proportionate, fair and just’. It provides guidance based upon existing law as enacted by Parliament and interpreted by the courts and ‘seeks to ensure that the sentencing of offenders is based on fairness and justice, not the wealth or poverty of the offender’.

The Manual describes general principles for sentencing and provides specific guidance on sentencing for manslaughter, grievous harm, assaults causing actual bodily harm, corrupt transactions, drug trafficking offences and offences involving possession of small quantities of drugs and the use of drugs. When sentencing for offences which have specific guidelines, judicial officers ‘shall comply with the guidelines. If they consider that the facts of a particular case are exceptional and merit them deviating from the guidance, they must expressly provide reasons and record this’. (Manual, page 48) The Manual also summarises judicial guidance on different forms of punishment, including imprisonment, fines, bonds for good behaviour, community service and corporal punishment. An annex covers the sentencing of children. It also includes a Sentencing Process Flow Chart and a Sentencing Form.

Progress towards sentencing guidelines is also being made in The Gambia. In January 2019, a CMJA/Judicial College of England and Wales joint delegation spent five days providing technical assistance and training on case management, judicial ethics, judgment writing and sentencing guidelines to Gambian Magistrates. During that programme, at the request of Chief Justice Jallow, a sentencing guideline for theft was drafted – the first of its kind in The Gambia. As is discussed in detail on the Role UK and Gambian Judiciary websites, implementation is awaited and the CMJA is continuing to assist with the development of guidelines.

TRAINING

Training of judges is vital in ensuring consistency of approach. In England and Wales, training on sentencing is part of the Judicial College’s residential induction programme for all full-time and part-time judges hearing criminal matters. The College also organises annual sentencing refreshers which all such judges must attend. These courses include lectures and small group work discussing sentences of hypothetical defendants.

Such training is becoming ubiquitous. HHJ Ah Foon Chui Yew Cheong and Professor Nicola Padfield wrote ‘A Workshop on Sentencing – Mauritian Style’ in the December 2018 issue of this journal. In Tanzania, the Slynn Foundation has devised training based on the Tanzanian Sentencing Manual. Although the aim was for training to be delivered face-to-face at the Institute of Judicial Administration in Lushoto, that has been delayed by the pandemic and may now be provided remotely, using Blackboard Collaborate and on-line sentencing polls, using the Slido platform. And in The Gambia, the CMJA continues to provide training on sentencing.

CONCLUSION

There can be no doubt that the promulgation of agreed principles and guidelines to be followed when sentencing leads to a more consistent approach and reduces unacceptable disparity. It is vital, though, that experienced judges play a role in devising such guidelines and that those guidelines are drafted in such a way that sentencers may, provided that they give reasons, depart from them when justice demands it.
LAW REPORTS

Njenga v Attorney General (Judicial Service Commission and others, interested parties)

6 February 2020
Kenya High Court (Constitutional and Human Rights Division) [2020] 2 LRC 595
Achode, Makau and Mwita JJ

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The Judicial Service Commission (‘the JSC’) was a constitutional Commission established under art 172(1) of the Constitution of Kenya 2010, whose mandate was to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. In February 2019, the Chief Justice and President of the Supreme Court of Kenya, also head of the judiciary and head of the JSC, declared vacancies in the office of Judge of the Court of Appeal, Judge of the Environment and Land Court (‘ELC’) and Judge of the Employment and Labour Relations Court (‘ELRC’). Those vacancies were advertised by the JSC. The JSC also called for applications from qualified interested persons within a set timeline. Upon the close of the period for applications, the JSC reviewed the applications and published a list of applicants shortlisted for interviews for the respective declared vacancies. The JSC conducted interviews, and on 23 July 2019, recommended 11 persons for appointment as Judges of the Court of Appeal and forwarded the names to the President of Kenya for formal appointment as required by art 166(1)(b) of the Constitution. After concluding interviews for the ELC and ELRC, on 13 August 2019, the JSC recommended for appointment as judges, 20 persons for the ELC and 10 persons for the ELRC and forwarded the names to the President for formal appointment as required by art 166(1)(b). By petition dated 18 September 2019, the petitioner, a citizen and a public interest litigant, filed a petition against the respondent Attorney General, the principal advisor and legal representative to the national government in civil matters. He joined the JSC as the first interested party, the Chief Justice as the second interested party and the Law Society of Kenya (‘the LSC’) as the third interested party. The LSC was a statutory body established under s 3(1) of the Law Society of Kenya Act 2014, with the mandate to uphold the Constitution and advance the rule of law and the administration of justice and protect and assist members of the public in matters relating to, or ancillary and incidental to the law. The petitioner averred in the petition and deposed in his supporting affidavit sworn on 18 September 2019, that the petition had been brought in recognition of his obligation to defend the Constitution and the rule of Law in Kenya. It was the petitioner’s case that the President had not appointed the persons recommended by the JSC to their positions as judges. According to the petitioner, the President had failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution. It was the petitioner’s view that a reasonable timeline for performing a constitutionally prescribed act was 14 days. He stated that failure to discharge a constitutional obligation within that period constituted unreasonable and unjustifiable delay, given the urgent need to plug the extreme deficit of judges in the superior courts. The petitioner further averred that the President’s failure to effect the first interested party’s recommendations violated his fundamental rights, those of persons designated as judges of the superior courts and the public at large to proper administration of justice; that the action violated the principles of the rule of law, social justice, good governance, equality, transparency and accountability under art 10 of the Constitution. The petitioner sought the following reliefs: (i) a declaration that the President’s failure to appoint the persons recommended for appointment as judges on 22 July and 13 August, 2019, respectively, violated arts 1, 2(1), 3(1), 10, 47, 48, 73, 131(2), 166(1)(b) and 259(8) of the Constitution; (ii) a declaration that having been duly recommended for appointment as required by the Constitution and the law, and the President having failed to appoint
them as constitutionally mandated, the persons recommended for appointment on 22 July and 13 August, 2019, respectively, were at liberty to assume office, as recommended by the JSC; and (iii) an order that the respondent and the interested parties take immediate measures and/or steps to enable the persons recommended for appointment on 22 July and 13 August, 2019, respectively, to discharge their constitutional mandate. The following issues arose for determination: (a) whether the court had jurisdiction to hear and determine the petition; (b) whether the President had mandate to review, decline or refuse to appoint persons recommended by the JSC as judges; (c) whether the delay or refusal by the President to appoint the persons recommended by the JSC as judges was unconstitutional; and (iv) what reliefs, if any, to grant.

HELD: Petition allowed.

(1) The jurisdiction of the court was derived from the Constitution and art 165(3) was clear on that. Sub-article (3)(d) stated that the court had jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. It was therefore clear from the constitutional text that one of the core mandates of the court was not only to interpret the Constitution but also to determine whether actions purportedly done under the authority of the Constitution were in accord with it. The issues that arose for determination in the petition were whether the JSC had acted in accordance with the Constitution and the law in the recruitment process and whether the President’s actions of refusal or delay to appoint persons recommended by the JSC, were in consonance with the Constitution. That, fell squarely within the mandate of the court and no other. The court was clothed with jurisdiction to safeguard, protect and defend the Constitution. The court could not, therefore, abdicate that mandate as the respondent suggested. Second, there was nothing to suggest that the issues raised in the petition were for determination by the ELRC as the respondent contended. Article 162(2) directed Parliament to establish courts of the status of the present court to deal with issues of: (a), the environment and the use and occupation of, and title to, land; and (b), employment and labour relations. Parliament was also to determine the jurisdiction of those courts. That was different from the jurisdiction of the present court to interpret the Constitution and issues of compliance with it, which was conferred by the Constitution and not statute. What was before the present court was a constitutional issue under art 165(3)(d) and nothing else. Third, no question of employee-employer relationship could be traced in the petition that would make the present matter fall within the exclusion clause in art 165(5) which barred the court from hearing matters reserved for the exclusive jurisdiction of the courts contemplated under art 162(2)(a) and (b), namely the ELC and ELRC. Accordingly, there was no merit in the respondent’s preliminary objection and consequently, it would be dismissed (see [89]–[93]); dicta in Re Interim Independent Electoral Commission (Constitutional Application No 2 of 2011) [2011] eKLR at [29] and in Macharia v Kenya Commercial Bank Ltd (Sup Ct Civil Application No 2 of 2011) [2012] eKLR considered.

(2) Once the JSC made recommendations, the President had no other option but to formalise the appointments. He could not change the list, review it or reject some names. He could not even decide who to appoint and who not to appoint. He had to appoint the persons as recommended and forwarded to him by the JSC. Paragraph 16 of the First Schedule to the Judicial Service Act was clear that even the JSC ‘shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee.’ That meant once the recommendations had been made and forwarded to the President, the JSC became functus officio and the President was bound by the Constitution and the law to appoint the persons recommended as judges. The President was responsible for the formal act of appointing the judges in Kenya. The Kenyan legal framework clearly set out the relationship between the prior selection process conducted by the JSC and the role of the President at that final stage. Under art 172(1)(a) of the Constitution one of the core mandates of the JSC was to recommend to the President persons for appointment as
judges. Thereafter, art 166(1)(b) provided in mandatory terms that, ‘the President shall appoint all other judges, in accordance with the recommendation of the Judicial Service Commission’. The understanding of the Constitution and the law was that the JSC was required to present the President with a single, binding recommendation for each vacancy. Accordingly, the President had no residual legal power to question or reject names recommended to him by the JSC for appointment as judges in accordance with the Constitution. The constitutional scheme in coming up with that new way of appointing judges was intended to avoid sliding back to the old system where appointment of judges could not be traced to any particular criteria. To accede to the position taken by the Attorney General in the petition, that the President had any powers in determining who to appoint, would amount to allowing a proposition to take the people of Kenya back to an era they had overwhelmingly discarded when they had enacted and adopted the current Constitution. That would certainly amount to the present court acting contrary to the Constitution (see [141]–[144]); Law Society of Kenya v A-G (Petition No 313 of 2014) [2016] eKLR applied.

(3) The appointment of judges by the President should be immediate and as soon as the recommendations were forwarded to him by the JSC. That was the spirit of art 259(8) of the Constitution, which demanded that actions be taken without unreasonable delay, and as often as the occasion arose. The President was only required to put in place plans to appoint the persons recommended as judges. Such plans could not take much time and, therefore, the reasonable time contemplated by the Constitution should be within 14 days from the date recommendations were received to the President. Article 259 demanded that the Constitution be interpreted in a manner that accorded with its values and principles and, therefore, all actions by state organs, state officers and public officers should be done in accordance with the Constitution. Article 259(3) commanded that every provision of the Constitution should be construed according to the doctrine of interpretation that the law was always speaking. In that regard, when the Constitution used the words ‘reasonable time’ and ‘as often as occasion arise’, any action delayed beyond 14 days could not be deemed to be within reasonable time. It followed that the delay in appointing the persons recommended by the JSC, was unreasonable and, therefore, unconstitutional. Taking into account the circumstances of the case, the petition was meritorious and succeeded. Accordingly, the following orders were appropriate: (a) a declaration that the President was constitutionally bound by the recommendation made by the JSC in accordance with art 166(1) as read with art 172(1)(a) of the Constitution on the persons to be appointed as judges; (b) a declaration that the President’s failure to appoint the persons recommended for appointment as judges violated the Constitution and the Judicial Service Act; (c) a declaration that the continued delay to appoint the persons recommended as judges violated the Constitution and the Judicial Service Act; (d) a declaration that the continued delay to appoint the persons recommended as judges of the respective courts was a violation of arts 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution (see [149]–[151], [154], [159]); Law Society of Kenya v A-G (Petition No 313 of 2014) [2016] eKLR applied; dicta in Communications Commission of Kenya v Royal Media Services [2014] eKLR and in Speaker of the Senate v A-G (Advisory Opinion Reference No 2 of 2013) [2013] eKLR at [156] considered.
The respondents, refugees and former Eritrean nationals, claimed that they had been indefinitely conscripted through their military service under the National Service Program into a forced labour regime where they were required to work at an Eritrean mine, 60 per cent of which was owned by the appellant, N, a Canadian company. The respondents brought proceedings in the Canadian courts against N seeking damages for breaches of domestic torts including conversion, battery, false imprisonment, conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. N brought a motion to strike out 67 paragraphs of the Eritrean workers’ notice of civil claim on the basis of the ‘act of state doctrine’, which precluded domestic courts from assessing the sovereign acts of a foreign government. N also argued that the claims based on customary international law should be struck out because they had no reasonable prospect of success. Both the Chambers Judge and the Court of Appeal dismissed N’s motions to strike out. N now appealed to the Supreme Court of Canada.

HELD: Appeal dismissed.

Abella J. (Wagner C.J. and Karakatsanis, Gascon and Martin JJ. concurring):

(1) In Canada the principles underlying the act of state doctrine had been completely subsumed within the development of the principles of conflict of laws and of judicial restraint. To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles had received through considered analysis by Canadian courts. The doctrine was not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence were a bar to the Eritrean workers’ claims (see [6], [26], [44]–[50], [56]–[59], [135]); dicta of Lord Millett in R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) [1999] 1 LRC 482 at 579, of Lebel J in R v Hape [2008] 1 LRC 551 at [52], of Jagor J in Habib v Commonwealth of Australia [2010] FCAFC 12 at [51], of French CJ in Moti v R [2012] 4 LRC 235 at [52], of Lord Sumption in Belhaj v Straw [2017] 3 All ER 337 at [200], Laane & Baltser v Estonian SS Line [1949] SCR 530 and Hunt v T&N plc [1993] 4 SCR 289 considered.

(2) Customary international law was the common law of the international legal system, constantly evolving based on changing practice and acceptance. There were two requirements for a norm of customary international law to be recognised as such: general but not necessarily universal practice, and opinio juris, the belief that such practice amounted to a legal obligation. Canada had long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. Unlike foreign law in conflict of laws jurisprudence, therefore, which was a question of fact requiring proof, established norms of customary international law were law, to be judicially noticed. In the instant case, taking judicial notice was appropriate since the workers claimed breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterised as jus cogens, or peremptory norms. Crimes against humanity had been described as among the ‘least controversial examples’ of violations of jus cogens. The prohibition against slavery too was seen as a peremptory norm. Compelling authority also confirmed that the prohibition against forced labour had attained the status of jus cogens. The prohibition against cruel, inhuman and degrading treatment, which had been described as an absolute right, was ratified in several international covenants and treaties. Although N argued that it was immune from the application of any customary international law norms relied on by the Eritrean workers because it was a corporation, international law had long-since evolved from the state-centric template: there
was no longer any tenable basis for restricting the application of customary international law to relations between states. It was not ‘plain and obvious’ that corporations today enjoyed a blanket exclusion from liability under customary international law. Ultimately, for the purposes of the instant appeal, it was enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers might well apply to N. In the absence of any contrary law, the customary international law norms raised by the Eritrean workers formed part of the Canadian common law and potentially applied to N. It was not ‘plain and obvious’ that Canadian courts could not develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law. Customary international law norms, like those the Eritrean workers alleged were violated, were inherently different from existing domestic torts. A pleading would only be struck out for disclosing no reasonable claim if it was ‘plain and obvious’ that the claim had no reasonable prospect of success. It was not ‘plain and obvious’ that the Eritrean workers’ claims against N based on breaches of customary international law could not succeed. Those claims should therefore be allowed to proceed (see [6], [26], [60]–[64], [69]–[133]); dicta of Lord Denning in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881 at 889, of Wilson J in *Hunt v Carey Canada Inc* [1990] 2 SCR 959 at 990–991 and of LeBel J in *R v Hape* [2008] 1 LRC 551 at [39] applied.

Brown and Rowe JJ (dissenting in part):

The question to be decided on a motion to strike out was whether the pleadings were bound to fail on all reasonable theories of the case. In the instant case they were, for the following reasons. (i) The claims ran contrary to how norms of international law became binding in Canada. According to the doctrine of adoption, courts recognised legal prohibitions that mirrored the prohibitive rules of customary international law. Courts did not convert prohibitive rules into liability rules. (ii) Changing the doctrine of adoption to do so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. (iii) Some of the claims were addressed by existing torts. (iv) The viability of other claims required changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which was the executive’s domain. Therefore the workers’ claims for damages based on breach of customary international law disclosed no reasonable cause of action and were bound to fail (see [135], [147]–[148], [151]–[153], [160]–[172], [178]–[182], [185], [188]–[189], [191], [193], [196]–[205], [208], [210]–[217], [224], [228]–[231], [237], [245]–[254], [258]–[259], [262]–[263], [266]).

Côté J in dissent, Moldaver J concurring:

Claims founded on a foreign state’s alleged breach of international law raised a unique issue of justiciability. Canadian jurisprudence led to the conclusion that some claims were not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada’s international relations. Justiciability was rooted in a commitment to the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. Although a court had the institutional capacity to consider international law questions, it was not legitimate for it to adjudicate claims between private parties which were founded on an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interfered with the conduct by the executive of Canada’s international relations. In the instant case, the issue of the legality of Eritrea’s acts under international law was central to the respondents’ claims. The respondents’ central allegation was that Eritrea’s National Service Program was an illegal system of forced labour that constituted a crime against humanity. N could be liable only if the acts of the actual alleged perpetrators—Eritrea and its agents—were unlawful as a matter of public international law. The respondents’ claims, as pleaded, required a determination that Eritrea’s acts under international law was central to the respondents’ case, the issue of the legality of Eritrea’s acts under international law was central to the respondents’ claims, as pleaded, required a determination that Eritrea had violated international law. It was therefore plain and obvious that the respondents’ claims were bound to fail, because private law claims which were founded on a foreign state’s internationally wrongful acts were not justiciable, and the respondents’ claims were dependent on a determination that Eritrea had violated its international obligations (see [267], [270]–[313]).

The extension of customary international law to corporations represented a significant departure in customary international law. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule did not presently exist to support the proposition that international human rights norms had horizontal application between individuals and corporations (see [267]–[269], [313]).
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