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Judicial Independence and Accountability in the 21st Century: Challenges and Opportunities

Introduction

1. It is my great pleasure and privilege to be back in Malawi to visit your judiciary and to join you to deliver the fifth lecture in the Nzunda memorial lecture series.

2. My focus this afternoon is judicial independence and accountability in the 21st century. What challenges are faced by judges across the Commonwealth? What opportunities are generated by robust and responsible judiciaries?

3. My starting point is a description of that much celebrated but notoriously elusive concept: the Rule of Law. For some this constitutional lodestar is but an empty slogan. For others it is the "preeminent legitimating political ideal in the world today", even if it lacks "agreement upon precisely what it means".[1] Its essence is illustrated by a story told by the great eighteenth-century jurist William Blackstone. The tale concerns the Russian ambassador to London of Peter the Great. One morning the ambassador was pulled from his

[1] For a detailed examination see, Brian Tamanaha, *On the Rule of Law* (CUP, 2004).

coach and arrested for an unpaid debt. The Czar, Blackstone tells us,

> "resented [this] very highly, and demanded that the officers who made the arrest should be punished with death. But the Queen directed her minister to inform him, 'that the law of England had not yet protected embassadors from the payment of their lawful debts; that therefore the arrest was no offence by the laws; and that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land'."[2]

4. In this steadfast retort we find the crux of the Rule of Law—two key tenets which, like the poles of a magnet or sides of a coin, oppose and yet depend on one another. First, no one is above the law. Second, no one is punishable except in accordance with the law.[3]

5. This basic constitutional foundation is forever being built upon. A decade ago Lord Bingham described eight features of the Rule of Law.[4] More recently Lord Hodge has identified ten pillars to support a fair and effective legal system.[5] At the heart of both accounts is the ideal of judicial independence

[2] William Blackstone, *Commentaries on the Laws of England*, Book I, edited by Wilfrid Prest (OUP, 2016) 165.
[3] These two principles capture the essence of the Rule of Law as A.V. Dicey saw it: *The Law of the Constitution*, edited by J.W.F. Allison (OUP, 2013).
[4] Lord Bingham, *The Rule of Law* (Penguin, 2011). See Jack Beatson, *The Rule of Law and The Separation of Powers* (Hart, 2021) for another penetrating account.
[5] Lord Hodge, Judicial Independence (7 November 2016) <https://www.supremecourt.uk/docs/speech-161107.pdf>.

which is enshrined in the fourth Latimer House Principle and in section 103 of Malawi's Constitution.

Judicial independence and accountability

6. For the purposes of analysing that constitutional ideal, I shall restrict myself today to seven key principles. Together they help to answer two questions which must be asked of all judicial institutions. How can judges be insulated from improper influences? How can they gain and retain the public's trust?

7. The first principle is that the appointment of judges should, so far as possible, be free from political influence. In countries where independent bodies appoint judges, transparent criteria should be published to foster confidence in the judiciary as individuals and as an institution. In countries whose constitutions involve the executive in judicial appointments, an understanding that such decisions should be made on merit must prevail. Little can be expected in the way of intellectual independence from judges who are installed on nakedly political grounds.

8. The second principle is that judicial training should also be independent of political control. Although often overlooked in discussions of the Rule of Law, I suspect that the importance of accessible, free-thinking, and high-quality legal

training needs little elaboration here at Malawi's oldest and only public law school.

9. A third principle is that the judiciary must be adequately funded. Judges must be remunerated properly if their quality and impartiality are to be maintained. Crucially, this depends on the support and co-operation of government and parliament. Once secured, that funding must be protected to avoid salary changes being wielded as a tool for manipulating judicial decision-making. Judges must be in nobody's grip or pocket.

10. My fourth and fifth principles can be dealt with together. They are security of tenure and judicial immunity from suit. It is not difficult to come by examples—historical and present—of judges being removed from office for acting with integrity or being sued for failing to decide cases in the "right" way. In Britain in 1686 King James II sought to sway a case in his favour by threatening the judges with dismissal. Sir Thomas Jones, Chief Justice of the Common Pleas, was unwavering in his response. "For my place," he said,

> "I care little. I am old and worn out in the service of the Crown. But I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give…Your Majesty may

find twelve judges of your mind, but hardly twelve lawyers."[6]

11. Unbiased and unflinching judges like Sir Thomas are the natural foes of "would-be-dictators".[7] And in the stand-off between them, security of tenure and immunity from suit are the strongest of judicial shields. Without these protections, judges would depend on maintaining favour with those in power. Put simply, precarious judges are pliant judges.

12. That is not to say that judges should be answerable to no one. Indeed, my sixth principle is accountability—albeit accountability of an independent kind. The most obvious such mechanism is appellate review, by which judges are accountable for their decisions. Appeals drive up judicial standards and help to mitigate public resentment against apparently "wrong" decisions. Judges should also be accountable for their conduct. They should be subject to ordinary disciplinary action, including dismissal if necessary. Were judges able to act in ways that brought the judiciary into disrepute without fear of redress or sanction, public confidence in the institution would soon wane. But discipline must, at least largely, be in the hands of judges.

[6] This story is memorably recounted by Stephen Sedley in *Lions under the Throne: Essays on the History of English Public Law* (CUP, 2015) at 131 and by John Baker in *An Introduction to English Legal History* (OUP, 2019) at 179. The case was *Godden v Hales* (1686) 11 St Tr 1166.

[7] A point made in broader terms by Steven Levitsky & Daniel Ziblatt, *How democracies die* (Viking, 2018), 78ff.

13. That brings me to my seventh and final principle, which is closely connected with accountability. It is the principle of open justice. Through publishing and explaining decisions, through engaging with civil society, and through allowing access to the courts—in person or by broadcast—judges must always strive to make their work transparent.

Jeremy Bentham described this endeavour as the "keenest spur to exertion and the surest of all guards against improbity".[8] It is essential to public confidence in the law, which, in turn, is essential to the moral authority of judges.

Opportunities

14. Judicial institutions shaped by these seven principles are sure to be independent and robust. And societies with such judiciaries are well equipped to withstand exploitation by powerful actors such as governments, corporations, and trade unions. That is why the separation of powers was so central to the constitutional philosophies of Locke,[9] Montesquieu,[10] and the Founding Fathers of the United States of America.[11] Expressing this ideal in more straightforward terms, a British politician once defined a constitution as "whatever government can get away with"; and nobody wants to live in

[8] Jeremy Bentham, 'Draught for the Organization of Judicial Establishment' in *The Works of Jeremy Bentham*, edited by Bowring (William Tait, 1843), volume IV, 316.
[9] John Locke, *Two Treatise of Government* (1690) (CUP, 1994).
[10] Charles Montesquieu, *De L'Esprit des Lois* (1748) (CUP, 1989), Book XI, 6.
[11] Alexander Hamilton, James Madison & John Jay, *Federalist Papers* (Signet, 2003), Nos 47, 48 and 78.

a country where government can get away with whatever it likes.[12]

15. Judicial independence, however, is not just about restraining power. Quite the opposite. For history has shown that an independent judiciary is a potent engine for prosperity, a boon to economic enterprise.[13] Academics have cogently argued that a commitment to the Rule of Law overseen by an independent judiciary has underpinned the economic growth of societies across the world for the last three hundred years.[14] One need only compare the rival histories of East and West Germany after the Second World War, or of North and South Korea, to feel the force of this point. No wonder the United Nations has named good governance and the Rule of Law as one of its sustainable development goals.[15]

16. Where judges deliver accessible, impartial, and high-quality dispute resolution, businesses will flock. Where litigation is difficult, expensive, or vulnerable to external influences, they will flee. A survey conducted by the Bingham Centre for the Rule of Law and Hogan Lovells found that 95%

[12] Austin Mitchell, former MP for Great Grimsby, cited by David Allen Green, "The British constitution is whatever government can(not) get away with", *Law and Policy Blog* (18 August 2021), <https://davidallengreen.com/2021/08/the-british-constitution-is-whatever-government-cannot-get-away-with/>.

[13] A theme Lord Hodge has recently explored with a particular focus on the English and Welsh jurisdiction: 'The Rule of Law, the Courts and the British Economy, <https://www.supremecourt.uk/docs/the-rule-of-law-the-courts-and-the-british-economy.pdf>.

[14] Daron Acemoglu and James A. Robinson, *Why Nations Fail* (Profile, 2013) at 44 and passim.

[15] UN General Assembly Resolution 70/1, of 25 September 2015 <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

of businesses identified a lack of corruption as an essential or very important factor in whether they would do business in a jurisdiction.[16]

17. The economic benefits of a legal system overseen by an independent judiciary extend far beyond the courtroom. For there is a hidden value to the Rule of Law which corresponds to what is sometimes called the "shadow of the law".[17] More often than not, the knowledge that disputes can be resolved in a fair, efficient, and predictable manner enables individuals and business to avoid those disputes in the first place. Parties are more likely to contract if they have a common understanding of the law and know that judicial remedies are readily available. They are more likely to abide by their agreements if they know the consequences of breach. In this way, an independent judiciary provides a stable launchpad for confident investment and economic growth.[18]

18. For all this, the value of an independent and accountable judiciary is not just instrumental. As I have said before, no one would propose that the worth of an education system could be calculated purely by adding up its monetary contribution to society.[19] An educated society becomes more prosperous.

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[16] Bingham Centre and Hogan Lovells, Risk and Return: Foreign Direct Investment and the Rule of Law, (2015) <https://binghamcentre.biicl.org/documents/49_risk_and_return_fdi_and_the_rol_compressed.pdf> at 6.

[17] For a discussion of this concept, see Lord Reed in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] ICR 1037 at [66]-[68].

[18] As has been shown by the Oxera report *Economic Value of English Law*, (2021) <https://legaluk.org/wp-content/uploads/2021/09/The-value-of-English-law-to-the-UK-economy.pdf>.

[19] '(Virtual) Legal Wales Conference' (9 October 2020), <https://www.judiciary.uk/wp-content/uploads/2020/10/20201009-Legal-Wales-2020-For-publication-1.pdf>.

The same, I suggest, should apply to our legal institutions. To reduce an independent judiciary to its economic value is to miss its true worth.

Indeed, as St Augustine provocatively asked: What is the difference between a kingdom and a band of robbers? Both are rule-bound, money-making enterprises after all.

19. For St Augustine and his commentators, the difference is that, in the ideal kingdom at least, the rules are intended to secure "good" or "just" outcomes.[20] But there is another, more fundamental distinction to be made. In a band of robbers, the rules are simply a means to an end: their sole purpose is to tell the robbers how to divvy up their loot. But in a society where the Rule of Law is overseen by an independent and accountable judiciary, the rules have an intrinsic moral value. They embody individual citizens' right to be free from arbitrary control and to have a fair opportunity to be heard. In this way, their very existence respects the basic dignity of all.[21] For this reason alone, the courts should not be regarded as any ordinary public service.[22]

[20] See David McIlroy, *The End of Law: How Law's Claims Relate to Law's Aims* (Elgar, 2019), 1-2. As McIlroy's discussion shows, St Augustine's question raises the controversial debate, which I avoid here, about whether the Rule of Law is content-neutral (or "thin") or whether it must be substantively fair (or "thick").

[21] On the intrinsic, rather than instrumental, value of the Rule of Law, see Alon Harel, *Why Law Matters* (OUP, 2014).

[22] A point I have made before: 'The hidden value of the Rule of Law and English law', Blackstone Lecture 2022 at Pembroke College, Oxford, <https://www.judiciary.uk/wp-content/uploads/2022/02/Blackstone-Lecture-2022-final2-1.pdf>.

Challenges

20. The value of judicial independence, then, cannot be overstated. Nor can its durability in the twenty-first century be taken for granted. It depends on the continuing existence of healthy cultural norms. Citizens must understand and support the role of the courts, which is why the principle of open justice is so important. The political institutions of government and parliament must accept, often to their frustration, that respect for the Rule of Law means recognising limits on their own powers. As Sir Jeffrey Jowell has described, they must abide by a self-imposed "institutional morality".[23]

21. This delicate constitutional balance came under scrutiny not long ago in Malawi when in 2020 the courts overturned the so-called "Tipp-Ex" election result. For obvious reasons, I make no comment on the cause or outcome of that decision. But I do remark upon the significance of its subject matter. For in that case so many of today's themes were on display: the right to challenge decisions of public importance under a constitutional framework that respects the separation of

[23] Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell, Dawn Oliver, and Colm O'Cinneide (eds), *The Changing Constitution*, 9th edn (OUP, 2019), 17

powers; the mechanism of appellate review; and the principle of open justice. (I understand that the Supreme Court hearing was broadcast on no fewer than four radio stations!)[24]

But to appreciate perhaps the most significant aspect of the case we must look beyond the courtroom. To my mind, what is most remarkable about cases of this kind is not that judges are willing to confront difficult constitutional questions but that their answers are respected by the parties and the public.

22. Loser's consent is a crucial but often overlooked aspect of the Rule of Law. It is a direct product of judicial independence and accountability. Only when parties feel that they have had a fair opportunity to be heard, and only when they regard the court's view as impartial and authoritative, will they be willing to live with decisions that go against them.

23. Importantly, the moral authority of judges depends on their recognising that institutional independence is not a one-way street.[25] Just as ministers and legislators must stay within their constitutional provinces, so it is with judges. It is trite to say that the court's jurisdiction goes no further than the law. But what that means in practice is that judges must develop an allergy to politics upon assuming office.

[24] Peter Jegwa, 'Malawi election: Court orders new vote after May 2019 result annulled', *BBC* (3 February 2020), <https://www.bbc.co.uk/news/world-africa-51324241>.

[25] I theme I previously explored in the Lionel Cohen Lecture at the Hebrew University Of Jerusalem 'Institutional Independence and Accountability of the Judiciary' (20 May 2022), <https://www.judiciary.uk/wp-content/uploads/2022/07/Cohen-Lecture-300522-1.pdf>.

24. To feel the force of this point again we need look no further than the 2020 election judgment. As the Supreme Court recognised in that case, flawed decisions are susceptible to judicial control, but fair and proper election results are "consecrated even before courts of law."[26] To observe the limits of judicial power in this way is to gain more authority, not less. In the words of the late Sir John Laws, "public confidence in the courts would not be enhanced by a diminished judicial respect for the authority of the ballot-box."[27]

25. What emerges, then, is an important responsibility. With judicial power must come judicial restraint. Judges who do not observe the proper boundaries of their constitutional role will soon lose their authority and then their independence. That is the constitutional balance judges of the twenty-first century must eternally strive to uphold.

26. There is one final challenge which I wish to confront. It is one that concerns individual judges as opposed to institutional judiciaries. Judges must not only be independent and accountable; they must also be brave. As one of my predecessors Lord Judge observed,

[26] *Mutharika & Anor v Chilima & Anor (MSCA Constitutional Appeal 1 of 2020)* [2020] MWSC 1, 5.
[27] John Laws, *The Constitutional Balance* (Hart, 2021), 94.

> "Judges must have moral courage…to make decisions that will be unpopular whether with politicians or the media, or indeed the public, and perhaps most important of all, to defend the right to equality and fair treatment before the law of those who are unpopular at any given time, indeed particularly those who for any reason are unpopular."[28]

27. I began today with Blackstone's tale of Peter the Great calling for the heads of those who arrested his ambassador. As we have seen, it is a story at its heart about the Rule of Law. But it is also a story about moral courage—the moral courage of individuals charged with carrying out the law's demands in the face of powerful threats. It is this same moral courage which was shown by Sir Thomas Jones when he refused to bend to James II's will, and by the Supreme Court justices of this country when they came to hear the 2020 election case under military escort.[29]

28. Blackstone's story shows us what is at stake when individuals bravely step forward to uphold the Rule of Law. Despite the Queen's defence of constitutional principle, some

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[28] Igor Judge, Diversity Conference Speech (London) (March 2009), <http://webarchive.nationalarchives.gov.uk/20131203072734/http:/www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-diversity-conf.pdf>, at 2.

[29] Peter Jegwa, 'Malawi election: Court orders new vote after May 2019 result annulled', *BBC* (3 February 2020), <https://www.bbc.co.uk/news/world-africa-51324241>.

of the arresting officers were imprisoned for their impudence.[30] Sir Thomas lost his job for defying the King.[31]

The independence and security of judges may be much improved in many countries today. But even in the twenty-first century there can be no complacency about the weight of this judicial burden.

Conclusion

29. In order for judges to stand alone, judiciaries must stand together—both within and across their respective jurisdictions. Judicial independence requires judicial interdependence.[32] Judges in positions of leadership must set the tone by cultivating a judicial culture which encourages independence, fosters collegiality, and supports individual resilience. Judiciaries across the world must continue to engage in dialogue and exchange, sharing with and learning from one another.

30. Commonwealth judiciaries are well-placed to engage in such exchange, sharing as we do a close legal heritage through the traditions of the Common Law. Never has this been more apparent than when our judiciaries, through the Commonwealth Magistrates and Judges Association, played

[30] William Blackstone, *Commentaries on the Laws of England*, Book I, edited by Wilfrid Prest (OUP, 2016) 165.
[31] John Baker in *An Introduction to English Legal History* (OUP, 2019) at 179.
[32] A theme I have previously explored: 'Becoming Stronger Together', Commonwealth Judges and Magistrates' Association Annual Conference 2018 (Brisbane, Australia) (10 September 2018), <https://www.judiciary.uk/wp-content/uploads/2018/09/lcj-speech-brisbane-lecture-20180910.pdf>.

a crucial role in the development of the Latimer House Principles to provide a common framework for understanding judicial independence.[33]

Through that collegial dialogue, and through that common understanding, we can continue to support each other to maintain our independence and to uphold the Rule of Law. It is in that spirit that I thank you for inviting me here today.

[33] See < http://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf>.