

# Tokyo Trials: Bad Apple or Bad Barrel?



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## Introduction

*“Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially”* (Socrates, 399 BC)

The impartiality and independence of the judiciary is an age-old discussion, yet the parameters remain indistinct. What is indisputable is that a considerable degree of impartiality is required to administer justice.<sup>1</sup> Today, it is widely accepted that “it seems to be a chimera to pursue *absolute* impartiality”<sup>2</sup> since “judges are but men, and are swayed like other men by vehement prejudices.”<sup>3</sup> If “imperfect impartiality” is accepted, the question then becomes: “How much partiality can be tolerated before rule of law objectives are thwarted to an unacceptable degree?”<sup>4</sup>

This paper will attempt to answer the above, drawing on the decision of the International Military Tribunal of the Far East (IMTFE) in the Tokyo Trials (Tokyo Trials or Trial). Part I of this paper will briefly discuss the concept of impartiality and the types of impartiality and bias that subsist in judicial decision-making. Part II of this paper will review the decision-making process during the Tokyo Trials, alongside the impact of other external influences – before and during the trial – to determine whether any partiality or bias was at play, and if so to what extent. This examination will reconcile the above discussion in attempt to provide a conclusion on which judges in the Tokyo Trial were irremediably partial. This is relevant as the Tokyo Trials are most-often remembered for the controversial dissent of Justice Pal, riddled with assertions that he should have recused himself given his bias. However, upon examination, this review will demonstrate that, in fact, several justices suffered from insidious and incurable prejudices that clearly prevented them from properly administering justice. Was the Trial plagued by a bad apple or was the majority of the barrel contaminated?

## What Is Impartiality?

*“That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked”* (Tom Bingham, *The Rule of Law*, Penguin, 2010).

For the purpose of this paper, impartial, bias, and prejudice will be understood to denote similar concepts where the judge has an *interest* or *preconception* that affects his partiality.

It is often stated that “the fundamental value in judicial ethics is

impartiality.”<sup>5</sup> It is crucial to clarify that when the law *requires* impartiality from the judiciary, it does so cognizant of the inherent partiality that exists in all humans.<sup>6</sup> The task of judges is not to have “complete absence of bias or prejudice” but that they should be impartial *enough* to enable them “to perform their duties of office fairly, impartially, and diligently”.<sup>7</sup> Put another way, imperfect impartiality requires judges to set aside their bias whenever they don the robes.

## In practice: types of impartiality or bias

The presence of certain types of interest are definitive in concluding that a judge is no longer “untouched by avarice” and is therefore unable to impartially discharge his duty.<sup>8</sup> In cases where the judge has “a material of financial interest” in the case, whether it is through a bribe or a future gain, it is settled law that he should recuse himself.<sup>9</sup> Similarly, a relational interest typically refers to a judge’s pre-existing relationship with a party, and is often considered a factor that would unfairly influence the determination of a case.<sup>10</sup> Ideally, the law expects judges to show “equal grace to friend, foe, [and] kinsman”; however, the perils of a judge deciding a case improperly in favour of a social acquaintance are well-known and generally also form grounds for recusal. Importantly, a political bias covers both an external interest “that [is] situated at the intersection between judicial impartiality and judicial independence”, and an internal interest that “relates to ideological zeal”.<sup>11</sup>

Whilst internal political interests are easier to set aside, impartiality is quite easily compromised in cases involving an external political interest. Especially when the future of a judge’s reputation or career can be jeopardized by others that have an interest in the case. This is principally relevant since the *independence* of the judiciary, disconnected from influence or manipulation from any other body or person, is sacrosanct and should not be compromised under any circumstances. Political bias is significantly amplified in an international setting, where the *national bias* among members of an international court would often yield unjust results.<sup>12</sup> This view continues to be held today, with critics arguing that strictures imposed on judges by the rules of international law are never able to completely overcome the national prejudice that domestic judges carry with them to an international bench.<sup>13</sup> During and after World War II, especially at the time of the Tokyo Trials, similar concerns subsisted, namely “that international judges would be inclined to determine cases according to the wishes of the government of which they were nationals, or according to

what they perceived to be *their* country's political interests" (discussed further below).<sup>14</sup>

### Imperfect impartiality: what is *impartial enough*?

*"That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard. That I suffer not myself to be prepossessed with any judgement at all, till the whole business and both parties be heard."*<sup>15</sup>

It is plain that certain types of partiality are typically *incurable*, and are thereby grounds for recusal for a judge *because* they prevent him from properly administering justice. These include having a financial interest, a sufficiently close relational interest, or an *external political interest*, which challenges both the impartiality and the independence of the judiciary. The most unacceptable, unpalatable, and unjust form of partiality remains the "premature formation of a concluded view", which is often coupled with one of the other interests.

The cornerstone of the rule of law is to reserve judgment till a trial is concluded.<sup>16</sup> The formation of a predetermined view on the outcome of a case *before or during* the course of a trial is unacceptable. Premature adjudication crosses the line between tolerable and impermissible, consequently resulting in the immediate disqualification of a judge.<sup>17</sup>

## The Role of a Judge: Tokyo Trials

### The IMTFE

In 1946, General Douglas MacArthur, the supreme commander of the allied powers, ordered the creation of the IMTFE (Tokyo Tribunal or Tribunal) in which all judges would ascribe to the authority of the IMTFE Charter (Charter). The Tokyo Tribunal consisted of 11 jurists, mostly representing the Allied nations. The Tribunal comprised Justice William Webb, Australia (President); Justice William Donald Patrick, United Kingdom; Justice Myron Cady Cramer, United States of America (who replaced Justice John Patrick Higgins); Justice Mei Ju-ao, China; Justice Ivan Michyevich Zaryanov, Soviet Union; Justice Radhabinod Pal, India; Justice Bert Röling, Netherlands; Justice Edward Stuart McDougall, Canada; Justice Henri Bernard, France; Justice Erima Harvey Northcroft, New Zealand; Justice Delfin Jaranilla, Philippine Islands (the Justices). The decision that was finally pronounced in December 1948 included a majority decision supported by Justices from the US, the UK, Canada, China, Philippines, the USSR and New Zealand (the Majority), the independent decision of Justice Webb, and the independent dissents of Justice Bernard, Justice Pal, and Justice Röling (partial dissent).

### Which types of impartiality or bias were at play in the Tokyo Trials?

The Tokyo Trials were riddled with irregularities; not only did it lack *due process* as we understand it today, its outcome was predetermined.<sup>18</sup> Even if the outcome was not decided *before* the Trial began, which remains plausible, there was certainly premature

adjudication *during* the Trial that resulted in a dubious and questionable verdict.<sup>19</sup> Resultantly, the Majority decision in the Tokyo Trial typifies the most unacceptable form of partiality or prejudice – working backwards from a predetermined outcome.<sup>20</sup> The Tribunal was clearly more concerned with preserving the 'Nuremberg position' and preventing any stultification of the Nuremberg judgments, as opposed to upholding the rule of law.<sup>21</sup> The entire concept of a fair trial is eroded if the judges have already decided how the case will finally be decided.<sup>22</sup> The seminal rule that "justice should not only be done, but should manifestly and undoubtedly be seen as done" is premised first on *justice being done*; it is nugatory and contrary to the rule of law for justice merely to be *seen as done*.<sup>23</sup> Underpinning the predetermination of this Trial were:

(a) lapses in procedure, evidence, other forms of due process, questioning the legitimacy of the Trial;

(b) the involvement of *external* views and pressure on the *necessary* convictions, compromising the independence of the judiciary; and

(c) the presence of various forms of bias, including political and relational, jeopardizing the impartiality and authenticity of the Tribunal.

It is indisputable that the proper administration of justice was irreparably eroded. The discussion below will examine various procedural and legal lapses that underpinned the Tokyo Trials.

### Prior to the Tokyo Trials

The Potsdam Declaration of 1946 stated, "we do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but *stern justice* shall be meted out to all war criminals, including those who have *visited cruelties upon our prisoners*."<sup>24</sup> The subsequent Moscow Conference decided "to vest complete authority" over the Tribunal in the hands of MacArthur, the Supreme Commander for the Allied Powers. This paved way for the establishment of the IMTFE and the contentious Charter, which ostensibly provided an exhaustive set of governing rules. This was problematic for many reasons, but mainly because (a) it lacked several formal and procedural rules required for a fair trial; and (b) it disallowed consideration of settled legal principles, including the rule of law, if inconsistent with the Charter.<sup>25</sup> Moreover, none of the Justices had any previous experience adjudicating matters concerning international law; when objections were raised to this, they were rapidly rejected without due consideration (much like most concerns or evidence raised by the defense). In *Some Reflections on the Future of War Crimes*, K. Takayanagi consistently objected to the fact that the "bench included no one known to the profession of international law, with the solitary exception of Justice Pal of India, who is a member of the International Law Association."<sup>26</sup>

### During the Trial

Due Process. There are various procedural aspects of the Trial that raised suspicion concerning the authenticity of the IMTFE, including

the treatment of evidence, the rules of procedure, and the blatant disregard for any contrary opinions across the bench.<sup>27</sup> In hindsight, three key elements highlight the pre-existing prejudice towards the guilt of the accused and the predetermined outcome of the Trial.

Article 13 of the Charter sets out comparably *vague* rules on the admissibility of evidence, if compared with current evidentiary standards (both domestic and international). However, while one must account for the standards of the time, certain principles are so fundamental to the proper discharge of law, and the administration of justice, that they should not be dismantled.<sup>28</sup> Critics argue that “it was the *duty* of the IMTFE to provide a reasoned account of how it reached its decisions” that is “based upon a careful analysis and weighing of the evidence presented by the prosecution and the defence, leading to *factual findings* on *all* of the elements of *all* of the charges.”<sup>29</sup> The Charter (Article 13) states, “the tribunal shall not be bound by technical rules of evidence” and “shall admit any evidence which it deems to have probative value” whilst adopting “expeditious and non-technical procedure”. In relation to *relevance* it states, “the Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.”

Regrettably, this – in practice – translated into: *most* of the defense’s evidence was rejected as inadmissible for lack of relevance; the prosecution was allowed to present any and all *complementary* evidence to establish their claim (albeit hearsay); and the defense was disallowed the opportunity to submit any rebuttal evidence. For example, “the Tribunal refused to admit a large portion of documentary evidence” submitted by the defense to justify the position of Japan during the war and denied Kiyose Ichiro, counsel for the defense, the right to read significant portions of his opening statement.<sup>30</sup> Even Justice Northcroft acknowledged the absurdity with which the prosecution would deny the defense any opportunity to present their case, recording that the prosecuting lawyers “behaved in the most unseemly fashion, being constantly on their feet with the most unmeritorious, technical, and for the most part stupid, objections and protests to almost every word that was said.”<sup>31</sup> Justice Webb, the presiding judge, “had full discretion to reject documentary evidence on the pretext that it was irrelevant, which he used *all the time*.”<sup>32</sup> In his decision he acknowledged this by writing, “much of the evidence tendered, *especially by the defence*, was rejected, principally because it had too little or no probative value or because it was not helpful as being not at all or only very remotely relevant.”<sup>33</sup> Conversely, the prosecution was permitted to admit and use much evidence, including hearsay, to support their argument. Justice Pal notes, “following these provisions of the Charter, we admitted much material which normally would have been discarded as *hearsay evidence*”, which is typically excluded given the “possible infirmities” that cannot be addressed without cross-examination.<sup>34</sup> As was raised in the defense’s appeal, “the Tribunal established rules of procedure for the prosecution, changed them and made them more strict when the defence was being presented, and changed them back again when the

prosecution’s evidence in rebuttal was offered.” It is unsurprising that “the verdict has been plainly stated by some judges of the Tribunal not to have been based on evidence” and consequently the trial “unfair”.<sup>35</sup>

A large part of the dissenting opinions also emphasize the unjust treatment of evidence.<sup>36</sup> Justice Bernard, for example, in his dissent, clearly states “though I am of the opinion that the Charter permitted granting to the accused guarantees sufficient for their defence, I think that *actually these were not granted to them*.” He emphasized fundamental lapses in due process by stating that “essential principles, violation of which would rest in most *civilized nations* in the nullity of the entire procedure, and the right for the Tribunal to *dismiss the case against the accused*, were not respected.”<sup>37</sup> In relation to evidence, he euphemistically stated that he was unable to confirm or deny “that all the evidence and *only the evidence* produced *during* the course of the trial was taken into consideration”. Justice Bernard believed external information and pressure guided this process, and that the Majority had failed to meet standards required of a judge in relation to independence and the treatment of evidence.<sup>38</sup> Also, Justice Bernard found the prejudiced preclusion of the Emperor, “a principal author who escaped all prosecution”, to be a regrettable exercise of sovereignty “in an unequal and unjustified way”.<sup>39</sup> It is manifest why he Justice Bernard concludes that “a verdict reached by a Tribunal after a *defective* procedure cannot be a valid one.”

Justice Röling, the Dutch judge, criticized the duplicity of the Tribunal by stating that “the majority judgment, moreover, has, though stating that it was bound by the Charter, disregarded its provisions where *it saw fit to do*.”<sup>40</sup> At times, he asserts, there was often little evidence supporting the Majority decision. For example, in relation to charges against Hata Shunroku after the capture of Hankow, Justice Röling reveals that there was little authentic evidence and any evidence furnished was unable “to prove that Hata was there on that day, or that he knew what was occurring, or that he could have prevented the events”. Another example concerns Shigemitsu and his role as a statesman “for peace rather than war”. Justice Röling disagreed with any determination of guilt in this respect given “the decisive element” in a crime against peace is “intention of aggression” and where a man has “occupied a position for the sake of promoting peace, one cannot be accused of aggressive intent”.<sup>41</sup> The defense in their appeal alluded to Justice Röling’s dissent, asserting that he “points out instance after instance in which the Tribunal has unfairly construed evidence, or even ignored it or made findings in the teeth of it.”<sup>42</sup>

Justice Pal devoted over 70 pages in his dissent “to the demonstration of the exact way in which the Tribunal’s method of procedure and rulings crippled the defense.”<sup>43</sup> Throughout his expansive dissent, Justice Pal identified examples where the prosecution had been unfair in their treatment of evidence, even prohibiting the defense to proceed with cross-examination where it should have been allowed. A specific instance of hypocrisy relates to

a denial by the Tribunal premised on the fact that “a document could not be used unless served on the prosecution twenty-four hours in advance.” Conversely, when the prosecution attempted the same method in relation to the cross-examination of a defense witness, they “departed from this rule and announced that the rule as to processing and serving a copy of the document in advance did not apply to such cases.” In so far as fairness of procedure and Trial was concerned, Justice Pal maintains that “as a judicial tribunal, we *cannot* behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance.”<sup>44</sup>

### Independence of Judiciary or lack thereof

The independence of the judiciary is at the crux of judicial ethics.<sup>45</sup> That said, it is unsurprising that other indiscernible forces can agitate the process in a case with a predetermined outcome. Justice Bernard was honest in stating that he could *not* confirm that “points of law and findings of facts adopted by the majority were done so *outside of all assistance of persons other than judges*.”<sup>46</sup> Today, there is a plethora of evidence available in support of the assertion that, in fact, external influence manipulated and guided this “independent proceeding”. It is apparent that the “Nuremberg position” could not be compromised as it would undermine the validity of that precedent.<sup>47</sup> The Tribunal was implicitly bound to both follow the Charter and to reach a finding akin to that in Nuremberg.

The first crucial point is that judges were *communicating* with their respective governments on confidential matters relating to the case and the views of the bench. In March 1947 when differences in opinion were beginning to plague the Tribunal, “three commonwealth judges – Patrick, McDougall and Northcroft – wrote letters to their respective governments to explain the divisions and propose suitable actions.”<sup>48</sup> In a letter to the Lord President, one suggested course of action proposed that the United Kingdom should “stick with the trial to the end *even though the outcome would be regrettable*”.<sup>49</sup> It is hard to interpret that statement to mean anything other than that a *desired* outcome had already been decided by those communicating. This in itself is contrary to the required independence of a judiciary and sufficient bias to necessitate recusal.

The next crucial point is that judges were *being influenced* by their respective governments. Assistant Under-Secretary Esler Denning, who became the first post-war British ambassador to Japan, expressed distress at the possibility of eroding the “prestige of the prosecuting powers” and asserted that “here we have a predominantly Western tribunal sitting in the Far East to try Japanese war criminals [and] if the tribunal fails *to fulfil its task*, Western Justice will become the laughing-stock not only of Japan but of the Far East in General.”<sup>50</sup> Again, it is hard to understand “*fulfil its task*” as meaning anything other than delivering the desired decision, namely convictions for the accused. These facts illustrate a sufficient prejudice that makes clear that the Tribunal (or at least parts of it)

were partial and not independent.<sup>51</sup>

Justice Patrick was improperly influenced by his government. The UK government, “paying scant heed to the principle of judicial independence” prepared recommendations on how best to “iron out the differences between the judges”, and going further, to “emphasize to General MacArthur the dangers of a verdict being given which would stultify the Nuremberg judgments”.<sup>52</sup> It is noteworthy that Justice Patrick refused to directly contact General MacArthur and advised the UK to only do so informally, condemning any overt interference such as sending over Lord Robert Alderson Wright as improper. His concerns were founded, not on valid principles of judicial ethics but on fears that the judges “would greatly resent the intrusion as being influenced by outside sources” and may “blow off the handle”.<sup>53</sup> This was evident in his proposal that he would “further campaign to *convert* his colleagues to the *vital necessity* of their pronouncing judgment on the basis of Nuremberg.” In sum, Justice Patrick was incapable of being sufficiently impartial and, in taking cognizance of the *extent and impropriety of interference*, should consequently have recused himself.

The determination on Justice McDougall is less straightforward. Similar to the link between the Foreign Office and Justice Patrick, the Dominions Office proposed to “*get* the Canadian government to instruct the Canadian judge to back up Lord Patrick’s campaign”.<sup>54</sup> Fortunately, the Canadian government objected, stating it would need to study the matter more.<sup>55</sup> Compared with the UK’s complete disregard of judicial ethics, the Canadian position appears refreshing. However, the fact the Dominions Office stated the matter needed further review instead of rejecting it to preserve impartiality, coupled with Justice McDougall’s ongoing communication with his government, seems sufficient to deem his involvement as insufficiently impartial or independent, thereby requiring his recusal.

Justice Röling, who eventually did dissent, is an ideal illustration of the degree of external influence this Trial witnessed and the unjust predetermination that enveloped the proceedings. When the Dutch heard rumors of Justice Röling’s potential dissent, Jonkheer van Vrendenburch, assistant under secretary at the Dutch Foreign Office, communicated to the UK that “there was a commission of four ‘jurists’ responsible for *controlling* the activities of the Dutch judge in Tokyo” and that “they were unlikely to *allow* the Dutch judge to challenge” the Charter.<sup>56</sup> The use of words like “controlling the activities of the Dutch judge” and “unlikely to allow” is more than sufficient to establish further undue interference with the proceedings in Tokyo.

The involvement of the UK, Canadian, and Dutch governments in the proceedings and their influence on the outcome of the Trial is apparent. This was sufficient evidence to *require* a mistrial as the independence of the judiciary was clearly compromised. Regardless of whether the trial was predetermined before commencement, it was incontestable that the matter stood adjudged *during* the Trial. Given such premature adjudication, it is not disproportionate to



conclude that the Trial was irretrievably tainted and should not have proceeded. Moreover, the fact that some judges were willing to conspire and influence their fellow members, instead of giving due regard to legitimate legal questions raised, underscores the illegitimacy and inauthenticity of the entire Trial.

### Personal partiality and bias

Alongside the absence of due process, judicial impartiality, and judicial independence, the clear subsistence of premature adjudication rendered the Trial contrary to the rules of law. However, the discussion would be incomplete without also considering the presence of the other types of impartiality and bias.

Together with the prejudice of premature adjudication is the striking presence of an *external* political or national interest. The fear of legal scholars that “international judges would be inclined to determine cases according to the wishes of the government of which they were nationals, or according to what they perceived to be ‘their’ country’s political interests” is well-founded.<sup>57</sup> The precise fear comes to fruition in the Tokyo Trials. As is illustrated above, the *pressure* from respective governments and the *control* on their judges is a clear form of national interest that erodes impartiality. The clearest example of this is the account relating to Justice Røling: “A nervous Dutch foreign ministry spent over a year desperately talking Røling off the ledge. In October 1947, the Minister of Foreign Affairs asked Røling to desist, insisting that *Voting against [the Majority] would be very undesirable on political grounds.*”<sup>58</sup> Also, the UK’s influence on Justice Patrick and Justice MacDougall, along with their assertion of authority to remove Justice Webb (albeit temporarily). It is apparent that the exertion of political interests compromised the independence of the IMTFF.

This is distinct from an *internal* political interest, which is more remediable. It is notable that Justice Pal harboured strong political views on Western imperialism and their imposition of “victor’s justice”. As Justice Pal noted, “A victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing the victor cannot give the vanquished is justice.”<sup>59</sup> However, he seemed capable of setting aside his personal political views when approaching his role as a judge, which is common for many judges. It is unlikely on the basis of his anti-colonial views that an objective informed observer would conclude that Justice Pal was biased and unable to appropriately discharge his functions as an impartial adjudicator. As discussed above, personal political views, whilst they lend to partiality, are rarely so fundamental that they disallow a judge from discharging his duties properly. Regardless, the partiality that Justice Pal is often accused of, namely questioning the legitimacy of the Charter, is incorrect as such a challenge is not a form of partiality or prejudice, but is rather the duty of a judge.

Along with an *external* political interest, there was also a strong relational interest, which prevented certain judges from treating alike *both friend and foe*. For example, Justice Webb was personally infuriated by defense attorney Kiyose, who on the commencement of

the trial raised a request for the recusal of Justice Webb (and others who remain unnamed) as unfit to serve on the IMTFF. Kiyose argued that Justice Webb “had been assigned by the Australian government to investigate Japanese violations” and had prepared a report that would undoubtedly form part of this Trial. He consequently concluded that Justice Webb must recuse himself given the blatant conflict of interest in him acting both as prosecutor and judge.<sup>60</sup> The recusal request was refused but further cast suspicion on the ability of Justice Webb to discharge his duties with sufficient impartiality, given both the identified conflict of interest, and his antagonism towards the defense. His prejudice appeared consistently through the course of the Trial. Including in his baseless rejections of the defense at every turn and, in his commentary, where he clearly reveals knowing that his rulings are bringing the defense’s case “to a standstill”.<sup>61</sup> Justice Webb should also have recused himself given his compromised position.

Similarly, the defense raised objections concerning Justice Jaranilla’s ability to maintain objectivity. Jaranilla had previously been captured by the Japanese, and had been a part of the Bataan Death March in April 1942, during which the Japanese military forcibly transferred over 70,000 Filipino and American POWs. Given his strong affiliations with the US, including his post in the American colonial insular government, he was also questioned for being an “eastern puppet” of the Americans.<sup>62</sup> Importantly, most of the Allied powers harbored some desire to seek revenge against “those who visited cruelties upon [their] prisoners”, which clearly contributed to their prejudice of conviction.<sup>63</sup> In light of his multifaceted interests, and perhaps a subconscious desire for revenge, Justice Jaranilla should also likely have recused himself.

Lastly, it is evident that the IMTFF proceedings were clearly subject to confirmation bias, particularly regarding the treatment of evidence. Given the predetermined view on conviction and the stated need to follow Nuremberg, the Tokyo Trials presented a case in which “judges might be biased in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions” and are often unwilling to accept any alternative.<sup>64</sup> Since confirmation bias results in “interpreting information in a manner consistent with their assumptions” it results in inconspicuously biased decisions that are often unapparent to most.<sup>65</sup> Apparent in the Tribunal’s treatment of evidence, it is patent that such a bias was also at play in Tokyo.

Tokyo proceedings were also influenced by the conjunctive fallacy, in which “people erroneously believe that events described in more detail are more probable than those described in less detail” and start to believe they are true.<sup>66</sup> The ideal example of this is the prosecutions presentation of the ‘Rape of Nanking’, which “spanned a period of eight months”, during which the “defence counsel was prohibited from submitting any rebuttal evidence”.<sup>67</sup> The fact that the prosecution’s account of Nanking was incomparably more detailed, and lasted nearly as long as the time taken to present the *entire* defense, raises serious concerns that judges were unduly influenced

by conjunctive fallacy.

Another relevant consideration is the impact of inadmissible evidence on the mind. A study conducted confirmed that “experienced judges were not different from inexperienced jurors in reacting to inadmissible evidence” and that they are unable to completely disregard information once they *know* it.<sup>68</sup> This is pertinent to Tokyo because, as was confirmed by Justice Bernard, the judges were aware of extrajudicial information and had evidence collected *outside* of the Trial, which, they were clearly unable to fully disregard.

It is evident that there was a medley of prejudices at play. As noted above, a certain degree of impartiality is inherent and accepted in most trials insofar as justice can still be properly administered. However, from the above discussion, it is manifest that the Tribunal was insufficiently impartial and would be seen by any objective standard (and most subjective standards) as biased and unable to properly perform its functions. If the litmus test is “impartial enough” then, at a minimum, half the Tribunal should have recused themselves.

### Questioning the Charter

Justice Pal has been widely criticized for his questions on the legitimacy of the Charter. In fact, he was even asked during the Trial to recuse himself if he was unable to accept the authority of the Charter.<sup>69</sup> It is unsurprising that members of foreign governments, especially the UK, found such challenges *inconvenient* to their objectives; Justice Patrick felt that “members [who] ha[ve] accepted office and were now questioning the Charter were neither legally nor morally defensible” and that such a challenge “involved *rank dishonesty*”.<sup>70</sup> This view was shared by Justice Northcroft who felt the Charter declared the law, and the Tribunal was a mere fact-finding body “not empowered to review it”; he stated that, “if any of us had disagreed with the law of the Charter we should have declined to accept office under it.”<sup>71</sup>

By contrast, Justice Pal held a strong belief that a judge is duty-bound to question the law. Reflecting upon the enormity of the Trial, in terms of both its scope and the punishment that would result from the Tribunal’s findings, Justice Pal wrote that “I for myself find great difficulty in accepting and acting upon evidence of this character in a trial in which the life and liberty of so many persons are involved.”<sup>72</sup> Justice Pal is correct in stating that Justices must be *more* judicious in determining jurisdiction and justiciability, for the resulting impact of such adjudication is grave. Pal was not wholly alone in his concerns. Justice Bernard writes that any rule barring Justices from questioning the Charter would “jeopardize any proper administration of justice”, arguing that the Tribunal “was obliged to scrutinize the substantive provisions of the Charter” and “if it found them to be beyond the competence of their author, to refuse to apply them”.<sup>73</sup> Yet despite the merits of Justice Pal’s caution, his position was condemned.

## Conclusion

It is clear that a certain degree of partiality is present in *all* judges. It is equally clear that not all prejudices justify the recusal of a judge. Insofar as a judge is able to discharge his duties relating to the proper administration of justice and intrinsically uphold the rule of law, he may continue to adjudicate a case. In reviewing the Tokyo Trials through this lens of sufficient impartiality, it is patent that the proceeding irrefutably undermines judicial impartiality and independence to an unacceptable extent. The subsistence of bias manifested itself in various aspects of the Trial resulting in cumulatively subverting the sanctity of the Tribunal, and, crucially, casting doubt on the legitimacy of the convictions. From the above discussion it is evident that, at least five Justices (Webb, Patrick, Jaranilla, MacDougal, and Northcroft) should have recused themselves. What bearing this determination should have on the legacy of the Tokyo Trials, only history may decide.

## Reference

- 1 Shlom, A., 2020, “Moving Towards an Impartial Judiciary: Recommendations to Prevent and Discipline Judicial Bias”, *Widener Commonwealth Law Review*, 29(1): 145.
- 2 Gordan, E., Burton, S., Falk, R. and Franck, T., 1989, “The Independence and Impartiality of International Judges”, *American Society of International Law*, 83: 508-529.
- 3 Field, D. D., 1872, “A Few Words on Judicial Integrity”, *Albany Law Journal*, 6: 265.
- 4 Charles, G. G., 2014, “The Dimensions of Judicial Impartiality”, *Florida Law Review*, 62(2): 493-551.
- 5 Wendel, B., 2008, “Impartiality in Judicial Ethics: A Jurisprudential Analysis”, *Cornell Law Faculty Publications*, 22(2): 305-323.
- 6 UN Human Rights Council, 2020, *Independence and Impartiality of the Judiciary*, preamble.
- 7 *Code of Conduct for Justices of the Supreme Court* (November, 2023), Canon 3. [https://www.supremecourt.gov/about/code-of-conduct-for-justices\\_november\\_13\\_2023.pdf](https://www.supremecourt.gov/about/code-of-conduct-for-justices_november_13_2023.pdf).
- 8 Shudraka, 2009, *The Little Clay Cart*, Harvard Oriental Series.
- 9 28 US Code § 455 (b)(4). <https://www.law.cornell.edu/uscode/text/28/455>.
- 10 Same as Reference 2.
- 11 Same as Reference 4.
- 12 Same as Reference 2; same as Reference 4.
- 13 Same as Reference 2.
- 14 Same as Reference 2.
- 15 Campbell, J., 1881, *The Lives of the Chief Justices of England*, F. D. Linn & Co.
- 16 Bingham T., 2011, *Rule of Law*, Penguin.
- 17 [2007] EWCA Civ 625; [2007] EWCA Civ 625; [2014] EWCA Civ 918.

- 18 Minear, R., 1971, *Victor's Justice: The Tokyo War Crimes Trial*, Princeton University Press.
- 19 *Dissenting Judgment of Justice Bernard*, 18.
- 20 Keiichiro, K., 2003, *The Tokyo Trials: The Unheard Defense*, Tokyo University.
- 21 NA, FO 371/66552: FO to Gascoigne, 16/5/47.
- 22 Same as Reference 5.
- 23 *R v Sussex Justices (ex p McCarthy)* [1924] 1 KB 256.
- 24 US, China, UK, 1945, *Potsdam Declaration*, Article 10: Proclamation by the Heads of Governments.
- 25 Sellars, K., 2011, "William Patrick and 'Crimes Against Peace' at the Tokyo Tribunal, 1946-1948", *Edinburgh Law Review*, 15(2): 166-196. [https://www.law.cuhk.edu.hk/userfiles/people/kirstensellars/2\\_Journal\\_K\\_Sellars\\_William\\_Patrick\\_ELR.pdf](https://www.law.cuhk.edu.hk/userfiles/people/kirstensellars/2_Journal_K_Sellars_William_Patrick_ELR.pdf).
- 26 Takayanagi, K., *Some Reflections on the Future of War Crimes*, Appendix to Appeal of Defendant Suzuki.
- 27 Same as Reference 20.
- 28 Henkin, L. and Cleveland, S., 2009, *Human Rights*, Foundation Press.
- 29 Daqun, L. and Binxin, Z., 2016, *Historical War Crimes Trials in Asia*, Torkel Opsahl Academic ePublisher.
- 30 Same as Reference 20.
- 31 Cohen, D. and Totani, Y., 2018, *The Tokyo War Crimes Tribunal: Law, History and Jurisprudence*, Cambridge University Press.
- 32 Same as Reference 20.
- 33 IMTFF, *Proceedings*, Opinion of Justice Webb.
- 34 IMTFF, *Dissenting Judgment of Justice Pal*.
- 35 Defense Appeal to General MacArthur, 1948.
- 36 Tokyo Tribunal (Dissents of Justice Röling, Justice Pal, and Justice Bernard).
- 37 IMTFF, *Dissenting Judgment of Justice Bernard*.
- 38 Cohen, D., 2016, *Dissent at Tokyo: The Opinion of Henri Bernard at the IMTFF*, Historical War Crimes Trials in Asia.
- 39 Schoepfel, A., 2018, "Defending French National Interests? The Quai d'Orsay, Ambassador Zinovy Peshkoff, Justice Henri Bernard and the Tokyo Trial", *Transcultural Justice at the Tokyo Tribunal*, Brill Academic Publishers.
- 40 IMTFF, *Dissenting Judgment of Justice Röling*.
- 41 IMTFF, *Dissenting Judgment of Justice Röling*.
- 42 Defense Appeal to General MacArthur, 1948.
- 43 Same as Reference 18.
- 44 IMTFF, *Dissenting Judgment of Justice Pal*.
- 45 Same as Reference 2.
- 46 IMTFF, *Dissenting Judgment of Justice Bernard*.
- 47 Same as Reference 25.
- 48 Same as Reference 25.
- 49 Same as Reference 25.
- 50 NA, FO 371/66552: Denying to Sargent, 30/4/47; NA, FO 371/66553: Garner, 20/5/47.
- 51 Same as Reference 2.
- 52 Same as Reference 25.; NA, FO 371/66552: FO to Gascoigne, 16/5/47.
- 53 NA, LCO 2/2992: Gascoigne to FO, No. 703, 19/5/47.
- 54 NA, FO 371/66553: Gamer, 11/6/47.
- 55 Same as Reference 25.
- 56 NA, FO 371/66553: Denying, 21/5/47.
- 57 Same as Reference 2.
- 58 Sedgwick, J. B., 2012, "The trial within: negotiating justice at the International Military Tribunal for the Far East, 1946-1948", *University of British Columbia*.
- 59 IMTFF, *Dissenting Judgment of Justice Pal*.
- 60 Same as Reference 20.
- 61 Same as Reference 32.
- 62 Republic of the Philippines, Office of the Solicitor General, *Hon. Delfin J. Jaranilla, Attorney General, 1927-1932*; Boister, N. and Cryer, R., 2008, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments*, Oxford University Press.
- 63 Same as Reference 20.
- 64 Rassin, E., Eerland, A. and Kuijpers, I., 2010, "Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations", *Journal of Investigative Psychology*, 7(3): 231-246.
- 65 Plous, S., 1993, *The Psychology of Judgment and Decision Making*, McGraw-Hill Humanities Social.
- 66 Kahneman, D., and Tversky, A., 1972, "Subjective Probability: A Judgment of Representativeness", *Cognitive Psychology*, 3(3): 430-454.
- 67 Same as Reference 20.
- 68 Landsman, S., and Rakos, R.F., 1994, "A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation", *Behavioral Sciences & Law*, 12(2): 113-126.
- 69 *Porter v Magill* [2002] 2 AC 357.
- 70 N A, LCO2/2992: Patrick to Normand, c. January 1947.
- 71 National Archives of New Zealand, Wellington: AAOM 7130 ACC W4676 Box 1: Northcroft to O'Leary, 18/3/47.
- 72 IMTFF, *Dissenting Judgment of Justice Pal*.
- 73 IMTFF, *The Tokyo Major War Crimes Trial*, Vol. 105, Bernard.

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