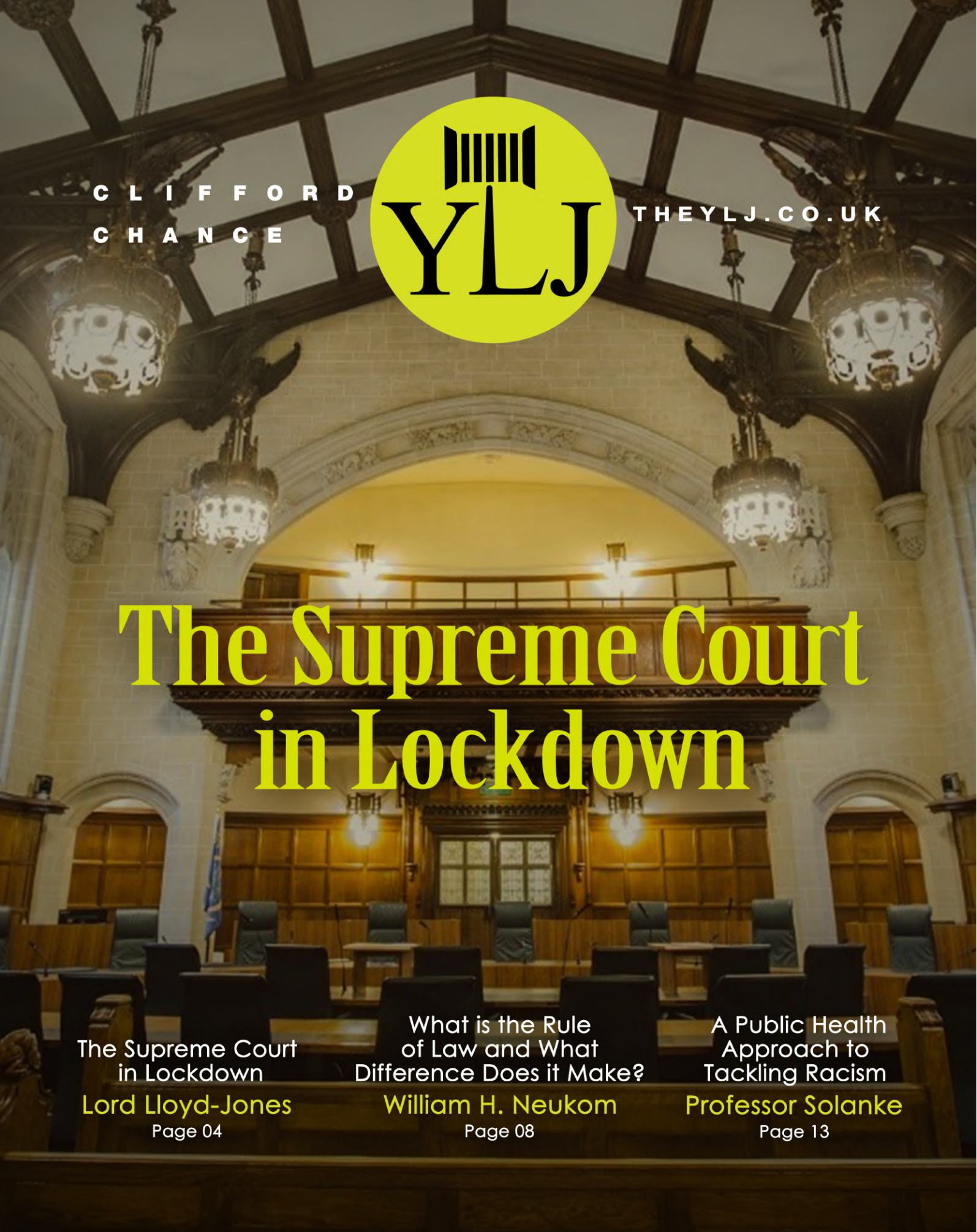

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It is with much excitement that we - the new Editors of The YLJ - present to you the fifth edition magazine.

The YLJ is a platform for students, experts and anyone in between to reflect and comment on today's key issues in and around law. We hope that through greater exposure to the opinions of others, our readers can construct and develop their own views and engage in discussions on these important subjects. This dialogue between experts and non-experts lies at the heart of The YLJ project.

In this same spirit, the articles we have gathered are written by both advanced specialists and students just embarking on their legal journey. If you enjoy flicking through the pages that follow, we highly recommend visiting TheYLJ.co.uk where you will find a similar selection of pieces as well as the online versions of our previous magazine editions.

We are a growing community and are always looking to diversify the opinions that we share. If you have something to say, let us help you spread the word. Visit our website and see how you can join our team of contributing writers under the 'Submit an Article' page.

For this edition, we would sincerely like to thank our sponsors, the graphic designer, and everyone who contributed a short piece.

As we remain in the midst of the pandemic, our final message is to wish everyone well, and keep safe.

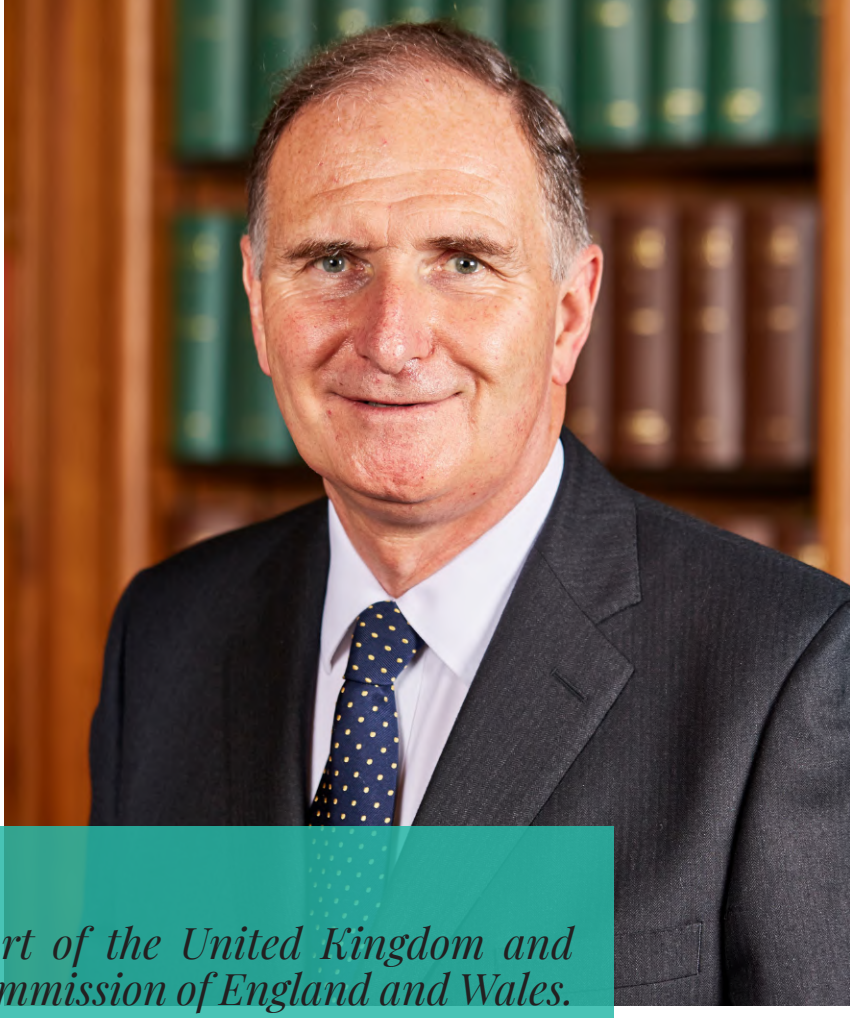
Kindest Regards,

Matti Brooks
Nathalie Edwardes-Ker
Anish Rajpal
Cher Yi Tan

Send your articles to
admin@theylj.co.uk

Write for The YLJ
Write your way on topics that you find interesting whenever it suits you

The Supreme Court in Lockdown



Lord Lloyd-Jones

A Justice of the Supreme Court of the United Kingdom and former Chairman of the Law Commission of England and Wales.

The building occupied by the Supreme Court in Parliament Square is usually a busy place. In addition to the twelve justices of the Supreme Court, who also sit as the Judicial Committee of the Privy Council, and our personal and judicial assistants, it houses the Chief Executive, the Registrar and their support staff. Its three courtrooms, two for the Supreme Court and one used more commonly for the Privy Council, are in frequent use. The building is also a major tourist attraction, welcoming 75,832 visitors in the year to March 2020, many of whom sat in the public gallery, however briefly, when hearings were taking place. In addition, all hearings are live-streamed and were viewed in the same period by an audience of 386,098.

On the afternoon of Wednesday 18 March 2020, however, at the conclusion of the second day of an appeal in the Supreme Court, the building fell silent. While the normal schedule of hearings had continued up to that point, undisturbed by the approach of the Covid-19 virus, it then became clear that we could no longer safely continue to hear appeals in the normal way. The last case in which I sat in the building was a Privy Council appeal on 17 March. As I left the Supreme Court that evening, I took a last look around, wondering how long it might be before my colleagues and I would

all assemble there once again.

The Justices and staff were determined that the Court should continue to function openly and effectively during the pandemic. Accordingly, in the days which followed, the Court's small IT team set up the technology required for the Court to operate remotely by video-conferencing. They provided training to the Justices and the relevant staff and rehearsals were held. Remarkably, as a result of the technical ability and hard work of the IT team and other support staff, the Supreme Court was able to hold its first virtual hearing on Tuesday 24 March. They were assisted by the fact that, prior to the pandemic, hearings by video link had been used on occasions in Privy Council appeals where the time zones were suitable and the technology was available locally. Although it was necessary to adjourn some Supreme Court hearings because counsel were unwell and some Privy Council hearings because of other local problems, the transition worked smoothly and with only minimal disruption to the hearing and disposal of appeals. All 34 appeals heard by the Supreme Court and the Privy Council between 24 March and 31 July 2020 were heard virtually.

In a virtual hearing the Justices take part from their homes and counsel participate from their homes or their chambers. All of these hearings are live-streamed so as to maintain public access to the hearings. As far as possible, the hearings follow the normal pattern but there are inevitably modifications. Arrangements have been made for the Justices to discuss the case in private video-conferences before, during and after the hearing. In addition to written guidance on the arrangements for a virtual hearing, the Presiding Justice will, immediately before the start of each appeal, hold a video-conference with counsel to explain how the technology will be used at the hearing. Throughout a hearing one member of the IT staff will

monitor the hearing and a second will monitor the live feed. While previously some of the Justices had used electronic bundles at hearings, others had preferred to use hard copy bundles which they could annotate. At the lockdown, however, we all adapted immediately to the use of electronic bundles accessed remotely as there was no possibility of distributing hard copy bundles. In the early days of the virtual hearings counsel were not able to see all of the members of the Court but only the Justice who was speaking at any one time. Counsel told us that this made it difficult to gauge the response of the Court and, as a result, the system was changed so that all of the members of the Court are visible to counsel throughout. From the point of view of the public, the experience is, inevitably, rather different from attending a hearing in person. There is not the same spontaneity of interaction between counsel and the members of the Court as in a "real" hearing.

The Supreme Court has also continued to hand down its judgments, although during this period this has generally involved one of the Justices pre-recording an explanation of the judgment and then streaming the recording on the Court's website. Between 24 March and 19 August 2020 27 Supreme Court judgments and 13 Privy Council judgments were delivered. There is, of course, a great deal of other work involved in operating the Court, for example processing and deciding applications for permission to appeal, and other applications to the Court that can be decided without an oral hearing. That has continued, using video-conferencing and tele-conferencing in place of face-to-face meetings between the Justices.

Since the lockdown three new Justices have been appointed to the Supreme Court: Lord Leggatt, Lord Burrows and Lord Stephens. In normal circumstances swearing in ceremonies take place in Courtroom One which is usually packed for the occasion with the full Court, the family and friends of the new Justice and senior members of the legal community. The lockdown made this impossible and, as a result, Lord Leggatt and Lord Burrows took their oaths in closed ceremonies in the presence of our President, Lord Reed, in the Library at the Supreme Court, while the other Justices all took part remotely by video-conference. When circumstances allow, a further ceremony will be held at which they will renew their oaths. In the case of Lord Stephens it was possible for the Court to convene Courtroom One for a socially distanced ceremony.

At the time of writing it is not clear when it will be possible to resume hearings in the Supreme Court building. When that happens, however, it will be a great pleasure to be able to work once again in our fine building and

> "The recent months have been a very challenging time for the Supreme Court.

to enjoy the company of our colleagues, albeit at a distance.

The recent months have been a very challenging time for the Supreme Court. That we have been able to perform our functions fully during this period has been due in large measure to the skill, diligence and enterprise of the Court's staff. They were recently paid a great compliment by Professor Richard Susskind in an article published by the Harvard Law School (The Future of Courts, The Practice, July/August 2020):

"It is to the great credit of the UK Supreme Court that it so quickly moved its entire caseload from physical to video hearings, and did so as effectively as any other Supreme Court that is noted on Remote Courts Worldwide. Indeed, I would say that the UK Supreme Court has responded more emphatically and successfully than any of its equivalents internationally. Thanks to technology, perseverance, and judicial adaptability, access to the highest court in the United Kingdom has been maintained during the crisis."

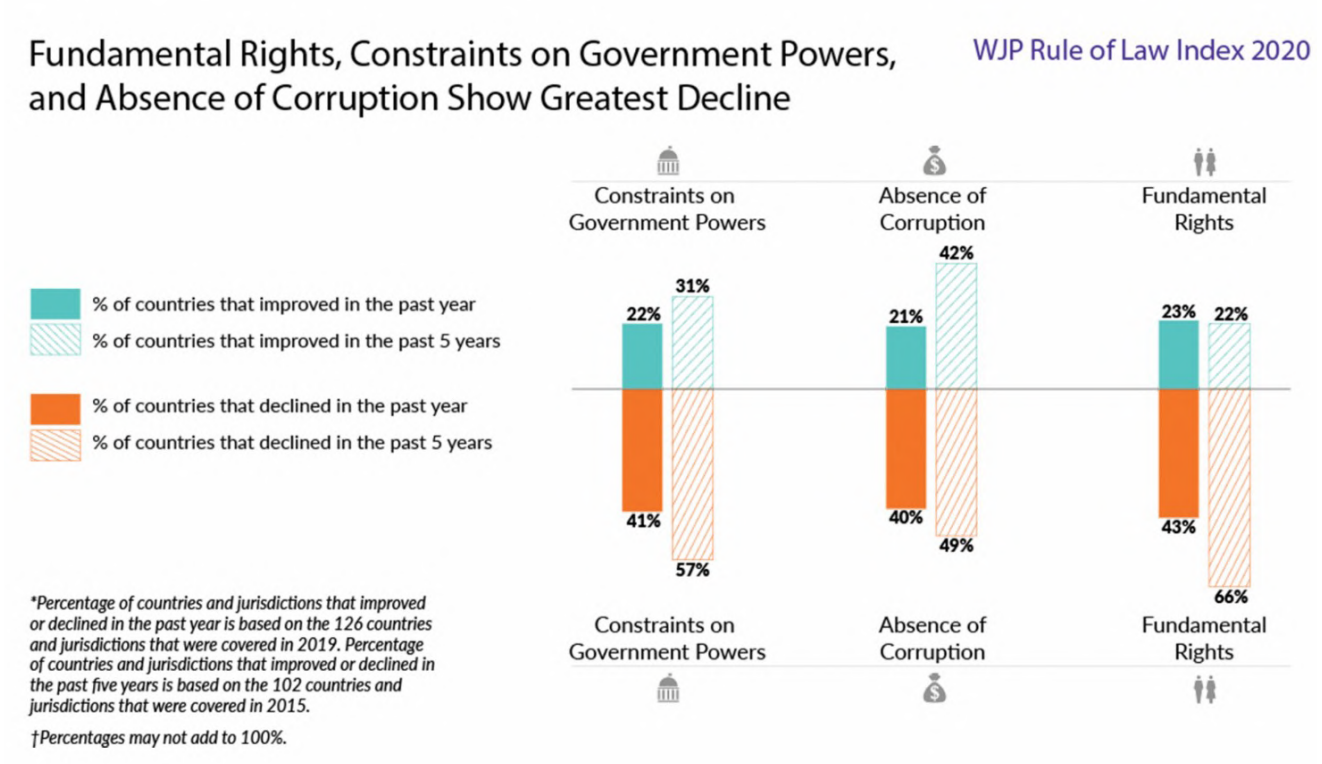
What is the Rule of Law and What Difference Does it Make?

William H. Neukom

Founder and CEO of the World Justice Project. He was Microsoft's lead lawyer for nearly 25 years, served as president of the American Bar Association (2007-2008), and is a lecturer at Stanford Law School.

No matter who we are or where we live, the rule of law affects our everyday lives. Research shows that rule of law correlates to economic growth, peace, less inequality, improved health outcomes, and higher education. Yet around the world, the concept of rule of law is being manipulated and weakened by a slew of direct and indirect pressures, including the COVID-19 pandemic.

For the third year in a row, the *World Justice Project (WJP) Rule of Law Index 2020®*--which measures the rule of law worldwide based on household and expert surveys--reported more countries' rule of law scores declining than improving. We see this trend in established democracies as well as in less free states and in every region of the world. The persistent decline is particularly pronounced in the areas of government accountability, fundamental rights, and corruption.



These trends are worrisome and should be a call to action for all of us. Indeed, a rise in protest movements throughout the world is one sign that in many countries, people have grown tired of these gaps in the rule of law. Peaceful protest is one approach to holding power to account, but it is just one among many tools in our toolbox. Young people, such as readers of the Youth Law Journal, have a particularly important role to play in picking up these tools and building a rule of law future.

What Does "The Rule of Law" Mean?

The World Justice Project (WJP) has developed a comprehensive definition of the rule of law that captures its core elements and is consistent with internationally accepted norms:

The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers:

(1) Accountability: the government as well as private actors are accountable under the law;

(2) Just laws: the laws are clear, publicized, stable and just, are applied evenly, and protect fundamental rights, including the security of

> "While the rule of law may be under growing pressure, there are many avenues through which readers of The YLJ can help uphold its fundamental pillars.

persons, contract and property rights, and certain core human rights;

(3) Open government: the processes by which the laws are enacted, administered, and enforced are accessible, fair and efficient; and

(4) Accessible justice: justice is delivered timely by competent, ethical and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve."

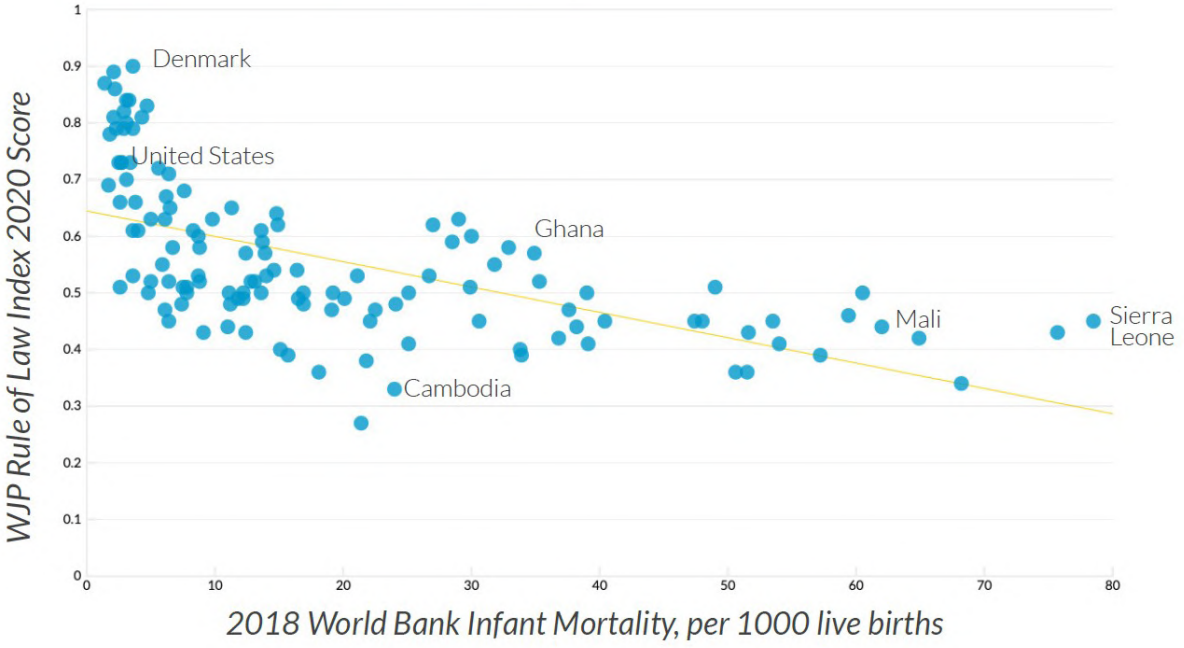
Why Does Rule of Law Matter?

Rule of law is a quintessential public good in its own right. It controls arbitrary abuse of power, upholds fair and equal treatment for all, and punishes wrongdoers through competent and independent bodies. But the rule of law also matters to a broad series of other public goods, including those related to economic, sociopolitical, and human development.

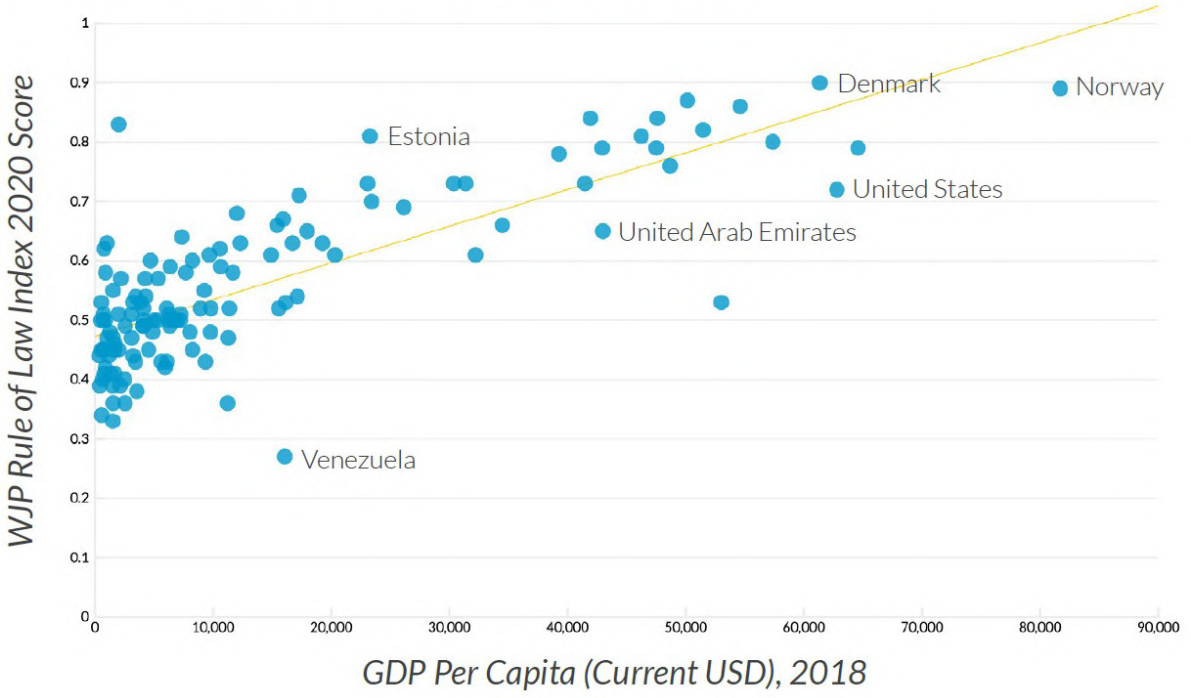
For example, evidence suggests a positive correlation between rule of law and public health – research has shown that countries with better rule of law enjoy lower rates of maternal and infant mortality, longer life expectancy, and lower incidence of chronic diseases.

Similarly, rule of law contributes to the economic development of a country and informs investor and business decisions. WJP Rule of Law Index 2019 data graphed against GDP per capita rates from 2017 show that societies with high scores on rule of law also have higher rates of economic growth, and vice versa.

Rule of Law and Health (Infant Mortality)



Rule of Law and Economic Development (GDP)



The story of Cecilia, an indigenous female activist from the state of Assam, India, illustrates well how rule of law principles of accountable governance translate into the everyday bread-and-butter means of survival and well-being for people.

Cecilia was trained as a paralegal by Nazdeek, an Indian legal empowerment organization recognized and supported by WJP through its 2019 World Justice Challenge competition. After learning that her community was entitled to receive government-subsidized food, Cecilia determined that government corruption was preventing these subsidies from reaching the intended beneficiaries. Working together with their community, she and other Nazdeek paralegals submitted a grievance form to the local authorities and demanded a community meeting. Over 100 women attended the forum with government officials and were able to submit complaints and obtain the subsidized food entitlement.

The success of Cecilia's advocacy efforts emboldened Nazdeek to identify other policy-level concerns and build their legal capacity to bring other rights violations to the attention of government officials. With each win, the community and the local government recognize citizens as leaders to be reckoned with and the rule of law becomes a reality.

A Role for All of Us

While the rule of law may be under growing pressure,

there are many avenues through which readers of The YLJ can help uphold its fundamental pillars. Reading this journal and educating oneself and others about rule of law issues is an important first step. Joining in civil society efforts to advance people's rights and hold governments accountable is another. It is important to note that upholding the rule of law is not just the work of judges and lawyers. We all have a role to play in curbing corruption, advancing integrity, and ensuring fairness in our respective fields of endeavor. Each of these individual acts lays the foundation for a rule of law culture.

The COVID-19 pandemic has laid bare significant rule of law gaps and exacerbated many of them. Our World Justice Challenge 2021 which launched in October 2020 is looking for more change-makers like Nazdeek and Cecilia who are taking on rule of law challenges posed by the pandemic. Watch WJP's Twitter feed or sign up for our newsletter for Challenge updates and to join us, share your ideas, and get inspired to build a rule of law future.

A Public Health Approach to Tackling Racism

Professor Iyiola Solanke

Chair of European Union Law and Social Justice within the University of Leeds Law School. She is a former Visiting Professor at the Harvard University School of Public Health and Fernand Braudel Fellow at the European University Institute. She is most recently author of 'Discrimination as Stigma - A Theory of Anti-Discrimination Law' (Hart 2017).

There are currently two viruses causing death and destroying lives around the world: one is coronavirus, the other is racism. There are many similarities: neither can be seen with the naked eye yet victims recognise how they sound and feel - they experience the results of the infection; both are highly infectious and can pass from one person to another rapidly, often without recipients being aware that they have been infected; and both can maim and kill: think of George Floyd in Minnesota or Mikey Powell in the Midlands, both killed through asphyxiation in police custody. Or Oury Jalloh, who mysteriously burnt to death in a German police cell. Like COVID-19, the virus of racism does not respect borders and both are deadly. Perhaps the most vivid manifestation of enduring racism is the disproportionate impact of COVID-19 on Black and minority ethnic communities, both in the UK and the USA. In the UK, the PHE Report confirms that BME communities have a disproportionately high rate of incidence and death from COVID-19.
It is clear that COVID-19 targets the weaker parts

of society in the same way that it exploits the weaker parts of the body. However, COVID-19 is a symptom rather than the cause of enduring racism – the disease and impact of emergency powers have only exacerbated and magnified that which was already present in society.

One reason for this endurance may be the mode of enforcement of anti-racial discrimination law. As set out in the ICERD, protection from racial discrimination relies overwhelmingly on individual activation – an individual claimant must have the personal and financial resources to bring litigation against an individual organisation. Tribunal data shows that success in claims of race discrimination is rare, despite the prevalence of racism. There is also the problem that even in the rare event that a claimant wins, they may lose their job and find it hard to get another *(Chagger vs. Abbey National)*.

Thinking about racism as a virus can move away from this individualistic legal approach. A strategy adopted by public health professionals to defeat a virus is to identify and break the 'chain of infection.' There are 6 key elements in the chain of infection, beginning with identification of the 'infectious agent' – the thing which causes infection and potential death. In the case of COVID-19, this is a virus. The second element is the reservoir, or the place where the infectious agent grows and develops – for COVID-19, people are the reservoir. Thirdly it is important to identify the 'portal of exit', or the way in which the infectious agent leaves the reservoir – for COVID-19, this has been identified as bodily secretions including mucus and sputum. Fourthly, the mode of transmission, or how the agent spreads, must be known – we know that COVID-19 spreads via airborne droplets. The fifth element is the 'portal of entry', or the way in which the infectious agent enters a host – as we know, COVID-19 enters through the respiratory tract. Finally, the chain of infection identifies the 'susceptible host', the individual traits that make individuals susceptible to infection and illness – in the case of COVID-19, this includes race and ethnicity, as well as age and possibly gender.

What then would these elements be in relation to racial discrimination? The infectious agent could be both words and images, both those that are included as well as those that are omitted. The reservoir - the place where the virus grows - could include locations such as educational curricula or television scheduling that contains little or no contribution from Black and minority ethnic experts or scholars. How does the infectious agent leave the reservoir? The portal of exit might be practices and policies, for example those that create racially homogenous institutions or degree awarding gaps. The modes of transmission, or the way in which racism spreads, are likely to be

> "As is clear, tackling COVID-19 is everybody's business – those unfortunate enough to contract COVID-19 are not left to heal themselves. The same should apply to discrimination.

direct and indirect: from person to person as well as via social and traditional media. The portal of entry is likely to be multiple - verbal, visual and aural - for example images that present black men as criminals rather than judges, entrepreneurs or astronauts. Finally, in thinking about a susceptible host in relation to racism, we could consider whether the lack of organisational leadership and anti-racist policies increases the likelihood of susceptibility to racist ideas.

Ultimately, in public health, success depends upon a very high level of co-ordination and co-operation with national authorities, between the public and private sectors, teaching hospitals, universities and volunteers. Interventions to reduce or remove risks in institutions and the environment are the norm rather than the exception - the public or social aspects of the epidemic must be addressed in order to break the chain of infection. As is clear, tackling COVID-19 is everybody's business – those unfortunate enough to contract COVID-19 are not left to heal themselves. The same should apply to discrimination.

To effectively tackle discrimination, it is also vital to take a broader set of actions to halt its spread. For this to happen, solidarity is required with movements such as Black Lives Matter and Rhodes Must Fall – these are not just battles over public statues and names but over institutional values resulting in the absence of black children and scholars from the curriculum and educational institutions: there are more black men in prison than at university. Just as academic solidarity is needed in gender studies, so is it needed in organisations and disciplines that centralise the interests of people of colour such as African studies and critical race studies. Study of race and law is as important as gender and the law.

The faster, more co-ordinated and more committed the reaction to a medical virus, the more effective action is. Imagine if we use this approach to tackle discrimination: a public health style intervention focusing on breaking the chain of infection could help to more effectively tackle and perhaps even eradicate it.

Why We Should Change the Way We Think About Crime

Chris Daw QC

A leading criminal defence barrister with over 25 years' experience. He is also a popular writer and commentator on topical legal issues for national publications, TV and radio, as well as presenter of the BBC series, "Crime - Are We Tough Enough?", and most recently author of "Justice on Trial" (Bloomsbury 2020).

I first stepped into a courtroom as a fully qualified barrister on 2nd January 1994.

Wearing my brand new set of robes, freshly minted white wig and an ill-fitting navy blue suit, I stood up to make an application for bail on behalf of a client, residing that day in Manchester's Strangeways Prison. To the best of my recollection, my valiant - if inexperienced - application was met with a polite refusal from the judge. My client was to remain locked away until his trial by jury, later in the year.

The next day took me to a magistrates' court in one of the outer boroughs of Greater Manchester and to my very first criminal trial. My client was charged with "shop theft" (the criminal justice system does not like to use the colloquial term "shop-lifting") and assault on a store detective. Despite an ingenious line of defence, picking apart the concept of intent and all manner of other book law, the experienced bench of magistrates duly convicted my client and sent him down for a few months.

With those inglorious beginnings, my career

began. Day after day and for client after client I plied my trade, initially in the North West of England, sometimes at different courts in the mornings and afternoons. It was a busy time. The Bar still enjoyed a virtual monopoly in the higher courts and junior barristers were instructed to conduct trials in the lower courts too, often because they were cheaper than their solicitor counterparts (I remember a fee of £10 for one hearing in a distant magistrates' court, with no expenses for petrol!).

Although I had good and recent legal knowledge from textbooks, following four years of academic training, I naturally had little practical experience in those early days. As such, I lacked the nuanced judgement, which informs courtroom tactics and decision-making following decades in the job. Nowadays the balance between book law and expert judgement is almost completely reversed, although I always have a bright junior on hand to handle the black letter legal research.

This article is not about the 26 years of continuous criminal practice, since those first tentative steps into the courtroom. My career progressed; from street crime, drug dealing, burglary and low level assaults, to some of the most serious and high profile cases ever to come before the criminal courts. From mass shootings to international drug trafficking to complex bank frauds and more, I have seen everything that comes across the desk of a criminal lawyer. I even defended a multi-national corporate client on charges relating to illegal fishing – on a huge scale – off the coast of West Africa (the instruction included a week of meetings in and around Tema, a bustling port city, just to the east of Ghana's capital, Accra).

It has been a fascinating and rewarding career. I love it. The criminal courts are home to some of the most dramatic real life events in our society. The verdict of a jury in a serious trial represents the difference between decades – or even a lifetime – behind bars and a short car ride home, followed by a celebratory night out at the client's local pub. Emotions run high as the foreman rises to his feet, ready to deliver the verdict. And not just for the defendant and his family. The tension is almost unbearable, even for those of us who have experienced that moment time and again, over a lengthy legal career.

For the first 20 years of my career, as a junior barrister, I rarely thought beyond the present; the case in front of me. I did not reflect on why I was doing what I did each day. On what the point of it all was. I had a job to do, a set of professional and legal rules to follow, and it was somebody else's responsibility to set priorities and principles for the system as a whole. I was little more than a cog in the wheel of justice.

And then a series of events happened, which caused me to question whether the job I had been doing for all that time was achieving anything at all.

> "All this reflection brought me to a very stark conclusion. Almost everything we do in our criminal justice is the wrong thing.

I was appointed to Silk (or Queen's Counsel) in early 2013. In a much more impressive set of regalia than my rough cotton gown and cheap suit, for that first hearing on 1994, I stood to take a solemn oath to Her Majesty. As Chris Daw QC, I had – perhaps improbably – risen to the highest rank of the English Bar. It was a time of new beginnings and a change of pace. No longer would I be running from court to court and case to case, looking to pack my diary with as much work as I could possibly fit in.

I suddenly had the chance to book out weeks or even months to prepare the increasingly difficult cases that my silk practice involves. I was also asked, with growing frequency, to offer expert commentary in the media on criminal justice stories making the headlines. In short, I began to think not just about *what* I had to do each day but about *why* I had to do it. And, more momentously, what the reason for it all was.

All this reflection brought me to a very stark conclusion. *Almost everything we do in our criminal justice is the wrong thing*. But also, that there are a fairly simple – even if radical - set of reforms that would begin to put things right.

I spent 2019 travelling the world, researching and writing Justice on Trial, which was published by Bloomsbury in July 2020. In the book, I advocate closing down *all* prisons in their current form, legalising and licensing the supply of *all* drugs and removing all children from the criminal justice system altogether. I also argue that the binary division of our species into "good" and "evil", justifying the harshest possible punishment of the latter in the name of the former, is an unhelpful throwback to ancient times.

Worst of all, I make the case that our criminal justice system in practice achieves the exact opposite of its stated purpose; to reduce crime on our streets and to enhance our quality of life. Our addiction to ever increasing prison sentences – moving steadily towards the US model of mass incarceration – leads to higher levels of crime, drug addiction and violence. We need to completely change the way we think about crime and punishment. In short, we need to rip up the whole broken system and start again.

Justice on Trial is published by Bloomsbury and is available on Amazon (in hardback, Kindle and audiobook editions) and at all good booksellers, online and on the high street.

Security Council Vetoes and Atrocity Crimes

Professor Jennifer Trahan

Clinical Professor at the NYU Center for Global Affairs. She is most recently author of 'Existing Legal Limits to the Security Council Veto Power in the Face of Atrocity Crimes' (CUP 2020); winner, "book of the year" award, American Branch of the International Law Association.

The UN Security Council is the primary organ of the UN System charged with maintaining "international peace and security." States are obligated to obey and carry out its resolutions, especially those that deal with threats to or breaches of the peace and acts of aggression. It is no secret, however, that the Security Council is bedeviled by political dysfunction. While the world is out of the Cold War, the voting dynamics still somewhat reflect similar tensions.

The dysfunction stems from the structure of the Security Council, with five permanent members (an anachronism in itself, as it is based on the 1945 allies of World War II—China, France, Russia, the UK, and the US) who each have "veto power." That is, any one permanent member can completely block, by a negative vote, a Security Council resolution from passing.

Changing this would require an amendment to the UN Charter, which needs the assent of all permanent members. That means, the veto isn't going away.

Let's focus on a situation where one of the permanent members uses its veto power to

block what other Council members otherwise agree to (that is, when at least nine of the 15 members have indicated their support for the resolution). Let's assume that the resolution is intended to prevent or stop the commission of atrocity crimes (genocide, crimes against humanity, or war crimes).

For example, when the Rwanda genocide began in 1994, if at least nine members of the Security Council had come up with a resolution to stop the atrocities, would it have been acceptable for one permanent member to block that resolution, as a consequence of which the genocide would continue with massive numbers of lives lost?

In my new book, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge U Press 2020), I argue, no – vetoes and veto threats in such circumstances would violate a number of obligations imposed by international law.

A critic might say – but wasn't an unlimited veto power agreed to in the UN Charter in 1945? Not exactly.

The veto power is just one provision of the UN Charter, and all provisions of the Charter have to be within the parameters of the "Purposes and Principles" of the Charter, which very clearly include respecting human rights and international law. So even in 1945, there was a requirement that every UN Member State, including the permanent members of the Security Council, act within the Charter's "Purposes and Principles."

All bodies in the International legal system are also bound by something called *"jus cogens,"* which are norms that prohibit, at the highest level of international law, the commission of genocide, war crimes and crimes against humanity.

Furthermore, almost all states, and all permanent members of the Security Council, agreed to the obligation in Article 1 of the Genocide Convention to "prevent" genocide. They also all agreed to the obligation in Common Article 1 of the 1949 Geneva Conventions to "ensure respect" for the Geneva Conventions, which, among other things, codify various war crimes.

Why then, one might ask, are we seeing vetoes and veto threats blocking the UN Security Council regardless of the crimes occurring? Let's look at some examples.

The most recent glaring example is a series of 15 votes by Russia (sometimes joined by China), blocking resolutions that, among other things, would have tried to help alleviate the commission of atrocity

> "When crimes cannot even be condemned by the Security Council, it sends a proverbial "green light" to perpetrators on the ground—in effect they have a "protector" on the Security Council, the only body that can compel the international community to bring their actions to a halt.

crimes in Syria.

We have also had veto threats by other permanent members, such as China, related to the situation in Darfur, at least one actual veto related to Myanmar, and general passivity of the Security Council related to atrocities in Sri Lanka. In each instance, this resulted in the Security Council becoming paralyzed (or doing far less than other Council members had proposed) despite massive atrocities occurring.

The UK and France have also used their veto power—although not recently (Rwanda, S. Africa), as both now voluntarily pledge not to use the veto while there is genocide, war crimes and crimes against humanity occurring. This was in response to several initiatives by UN Member States to get the permanent members to agree to "voluntarily" restrict the use of the veto when atrocity crimes are occurring. These initiatives, which are very widely supported by UN Member States, are one way we can see how unpopular this use and threat of the veto is among the international community when atrocity crimes are occurring.

The US (which freely uses the veto related to Israel) as well as Russia and China, by contrast, are making no pledge to limit the use of their vetoes, even if genocide, war crimes or crimes against humanity are occurring. This means that a voluntary scheme is unlikely to produce veto restraint even in the face of ongoing atrocity crimes.

What does this mean to people in the conflict situations? The way the veto is being used is clearly costing lives on the ground. When crimes cannot even be condemned by the Security Council, it sends a proverbial "green light" to perpetrators on the ground—in effect they have a "protector" on the Security Council, the only body that can compel the international community to bring their actions to a halt. So then why should they be deterred? Their "protector" can ensure there is no referral to the International Criminal Court (as Russia and China did vis-à-vis the Assad regime, blocking referral to the ICC). And, their "protector" can also ensure there is no international or hybrid tribunal created.

The UK is among the states that have been (rightly) outspoken in condemning the vetoes related to Syria, which have blocked condemnation of crimes, humanitarian assistance, and chemical weapons inspections:

"The Security Council has been unable to act solely because Russia has abused the power of veto to protect Syria from international scrutiny for the use of chemical weapons against the Syrian people." (Statement of the UK, S/P.V.8228, at 5–6 (Apr. 10, 2018).)

"When the Al-Assad regime deliberately ignored its obligation to stop using chemical weapons and continued to do so with careless regard for human life, Russia chose to abuse its power of veto to protect that regime." (Statement of the UK, S/P.V.8164, at 5–6 (Jan. 23, 2018).)

All international lawyers should ask themselves:

Are such vetoes in line with international law?

Is this how the UN Charter is really meant to work?

Or, as I argue in my new book, is the veto practice we see in the face of ongoing atrocity crimes, out of line with:

(1) *jus cogens* protections;

(2) the UN's Purposes and Principles, and

(3) treaty obligations such as those under the Genocide and Geneva Conventions.

I urge UN Member States to take three concrete actions: (1) invoke legal arguments whenever appropriate at the UN and other fora in opposition to the veto being used in the face of ongoing atrocity crimes; (2) for the General Assembly to consider issuing a resolution recognizing that existing law limits how the veto may be used; and/or (3) for the General Assembly to request an Advisory Opinion from the International Court of Justice on the legality of using the veto to block measures designed to alleviate the commission of genocide, war crimes, or crimes against humanity.

As readers of this publication, there are things that you can also do. Now that you are aware of what is being done in the name of "international peace and security," you can lobby your governments to support voluntary veto restraint (as the UK does). But please don't stop there. You can also urge them to pursue the three steps I recommend above. At the 75th Anniversary of the United Nations, one must ensure that the UN's highest body no longer protects those committing atrocity crimes, as has too often been the practice.

LegalTech in 2020 and Beyond

Shruti Ajitsaria

Partner and Head of Fuse, Allen & Overy's tech innovation space. Prior to starting Fuse, she was a credit derivatives lawyer in the firm's International Capital Markets practice.

Note: This article is a transcribed interview. Shruti kindly took the time to talk to us at The YLJ about LegalTech and her work at Fuse.

Q: How has LegalTech changed the work done at law firms since you started your career?

A: When I started my career, the only ways in which you could interact with people would be through email and Word documents; frankly speaking, even using Excel seemed a bit of a push. It is amazing now to see people being more ambitious about treating documents as data and trying to automate documents, or thinking about the delivery to a client and the format a client wants to see information in.

To take an example from my work at A&O, we are often asked to do multi-jurisdictional surveys so that an individual in that firm can understand what their position will be under a certain set of circumstances. Traditionally we would have created an Excel table to show that; it is nice to see lawyers within A&O moving towards a world in which they think they would be better served to be able to input their circumstances on an app and come up with a yes/no answer.

What is becoming more evident is that there are plenty of ways in which we can become more efficient that are really low hanging fruit. I think some of the longer-term things, such as the use of AI, are starting to become embedded in law firms but that will be a much longer process. What I like most about it is the cultural change: a lawyer will now think about how they might be able to do the tasks within a project more efficiently before starting to work on it.

Q: How do you see LegalTech affecting the market in the next five to ten years?

A: There will be some things that are really easy for law firms to invent. We talked earlier about the low hanging fruit and that should embed itself quite quickly, especially given the circumstances we are in today. If you look at a platform like Legatics, which replaces the need to create an Excel spreadsheet to track conditions precedent and instead gives you a real-time view of where you are in a transaction, that is an example of low hanging fruit. It is easy to swap one out for the other and there is not much cultural change involved or a change of process.

In the five-year horizon, all the low hanging fruit should be gone for most big law firms. This will then give rise to the ability to do really exciting things in the five-to-ten-year horizon. 'How do you sew all these various different things together? How do you create a document? How do you pass on knowledge from a senior lawyer to a junior lawyer when all the efficiency gains reduce the learning opportunities available?' Answers to these questions will take slightly longer to come through, but I hope that ultimately where we will land is in a profession that enables lawyers to do the bits that they really like. For me as a lawyer at least, I really loved building relationships with clients and trying to understand their businesses. LegalTech will help to create space for the 'trusted advisor' role, which I think is often lost today because lawyers are bogged down in the nitty-gritty of the role.

Q: How will the role of trainees and junior associates change as these technologies are adopted?

A: Junior associates and trainees can get involved in product development, as well as discussions on what technological solutions should look like and how they can be fit for purpose. We are trying to create efficiency from within and they are the people with experience who understand what needs to change.

Trainees and junior associates will have a real part to play in continuing to push law firms to be ambitious in their use and adoption of technology. Ultimately, if a partner tells a trainee to do a job and the trainee realises that they can spend either all night doing it manually or two hours on an automated basis, that trainee needs to be the person that says I would like to do this on an automated basis. That is the reality of how it will probably work. They will be real culture carriers and they will have a real part to play in pushing the business forward, which

is a nice change from the current hierarchical structure where as a trainee or junior associate you may sometimes feel like you don't have that much of a voice.

As the low-hanging fruit slowly disappears, I think it might free up the junior lawyers to learn more about the sorts of things you would learn about as a senior associate: the actual law and the reasons why you went to school. The structuring of a transaction or the building of a relationship will become ever more important.

Q: What new skills do you think trainees and junior associates of the future will need to develop?

A: There is a split view as to whether trainee lawyers need to know how to code. I can speak from my own experience which is that I have absolutely no technological ability. But what I do bring to the table at A&O is an ambition and a sense of trying to meld the two together.

More important going forward will be an understanding from lawyers that they need to work with the technological teams: a cultural shift towards working with others who are not the same as you and do not speak the same language as you. The ability to work in a diverse team and translate lawyer-speak into technical-speak will become even more important. Oftentimes it is the junior lawyer's responsibility to devise these innovative solutions; being able to take responsibility at an earlier stage of your career is something which will happen more and more as this plays through.

Do I think lawyers need to code? No, not really. Do I think they need to be open to understanding or trying to understand what the different technological tools do, how they operate and where the pitfalls are? Yes, I think they need to be capable of listening.

Q: What are the main benefits to Fuse's incubator structure for Allen & Overy?

A: What is really beneficial is the ability to do show-and-tells. People get to see a wide spectrum of things and ask questions to understand what is going on underneath the hood. They get to think about how the technologies might apply in their particular scenarios. Nothing created externally will ever be completely fit for purpose for a particular sector or group. The benefit of people being able to see what is available and having a team in A&O that allows them to mould the technologies to fit their use cases is invaluable.

I have always operated Fuse with an open-door policy. I think all too often as lawyers we get hung up on requirements to make appointments or to be at a certain level of seniority. A major benefit of Fuse is that it is open to everyone at all times. It does not matter who you are, which office you are from, your department or your level of seniority. People are welcome to come and see what there is and figure out whether any of it is relevant to them. If they want to try something, we will help them and send them on their way. If they want to come in one time and say that they think something is rubbish, that is also fine. I am happy to

hear that the product is rubbish. If they have had a bad experience, it is much better that we know so that we can decide that it is not the right product for A&O or figure out how to work the product better.

What really helps is having an open-door policy and a place where people feel that they can communicate openly. I think that if you do not have a central hub within a firm, all of the communication gets lost because nobody knows where to funnel it.

Q: Finally, can you tell me about some of the technologies that have passed through Fuse so far?

A: Legatics, the conditions precedent platform I mentioned earlier, has had a significant impact at A&O. It has been widely adopted in the banking department because it replaces an arduous process with an easy solution that does not require much training or technical ability on behalf of the user. Legatics is super intuitive and it enables everyone working on a transaction to see where they are and participate in real time. It was a nice win at the beginning to license Legatics because it is easy to understand and not too complicated.

Secondly, Avvoka is a document automation software we use. What is nice about Avvoka is that its ambition is to negotiate documents on the platform, to pick up data and to do useful things with the data going forward. It allows us to dip our toe in the water and familiarise ourselves in a way that is not too scary or different, and slowly we are building the blocks to become a much more forward-thinking law firm. We are getting people culturally embedded in the idea of 'first you create the document; then when you negotiate it, you do so on the platform where everyone can see what one another is doing'. The data is being collected and you can check versions any set millisecond of the time. I think significant cultural change is required to move an entire law firm along and technology like Avvoka will give us a real opportunity to build on our ambition.

Thirdly, we have just licensed a cohort member Define's 'clickable definitions' technology. I really like Define. When I saw the product for the first time I was unaware that there was a problem. I was so used to being a lawyer and doing everything the way that the last person did it; my assumption was that the only available option was to scroll up or down in a document until I was so confused that I would forget what I was originally reading. I genuinely thought that there was nothing I could do. Define takes something we were unaware of as a problem and creates a super simple solution to it. People will have more accurate documents if they use it correctly; it is not just about creating ease of navigating the document, it is also actually about being a better lawyer.

> "The structuring of a transaction or the building of a relationship will become ever more important.

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Good Faith: Evolution not Revolution

Cher Yi Tan

Law student at Downing College, Cambridge University.

It must be our starting point that 'good faith' is not exclusively Continental because it already underlies much of English contract law. This is abundantly clear when we take a step back. We know the rules contract law prescribes well enough, but do we know why they are so? Why do we have a presumption against an onerous interpretation? Why do we impose a requirement of 'legitimate interests' on parties in unrelated areas of the law? Why do we limit the free exercise of contractual discretion in accordance with the plain wording? The answer is good faith and a careful reading of the judgments like *Interfolio, MSC Shipping* (later overruled) and Braganza will tell us so. Lord Leggatt's other judgments in the areas of implication *(Yam Seng)* and rectification *(FSHC Group)* confirm the continuing relevance of good faith in English Law. But don't take my word for it. Most, if not all academics have adopted this stance. Perhaps the very first to do so, and what an achievement that was, was Raphael Powell. So it is time for us to take this as a starting point: good faith is, and has been, operating in the shadows of English Contract Law. We should not need to demonstrate it time and time again.

Thus, the differences in these two great legal traditions, civil and common, is once again over-dramatised: it is merely one of methodology, not ideology. We are both headed in the same

direction, but one of us is on the motorway and the other is rambling on through the countryside. Which is which is clear, and I leave it to others to discuss the merits of each approach.

This might seem contrary to popular wisdom. What we are taught in the Universities is that good faith is "unworkable in practice" and "inherently repugnant to the adversarial position of the parties" (Lord Ackner, *Walford v. Miles*). But the judgments clearly point the other way so we must ask why. My belief is 'good faith' is one of those intrinsic moral notions we humans have when dealing with other people. More importantly, it is what we feel *we ought* to have, hence my position that it should be explicitly incorporated into a law of contract that enforces ideals beyond the words of the contract-in-question.

Going further, I think the reason why good faith is so pervasive is that it is capable of a certain, though not rigid, definition: that is, to uphold the reasonable expectations of the other party. In proposing this, I have in mind two other important candidates that I wish to reject: firstly, good faith as subordinating one's interest entirely to the purposes of the common deal/ the other party. This, in my opinion, brings commercial contract law far too close to fiduciary duties for comfort.

Secondly, good faith as a subjective notion of honesty. Here, many distinguished others might not agree. The Canadian Supreme Court in *Bhasin v. Hrynew* was willing to impose a "general duty of honesty" as a piecemeal measure, and Leggatt J. (as he then was) seems to concur in *Yam Seng*. Cromwell J. views subjective honesty as part of the spectrum of possible meanings of good faith to be used according to the context of the contract (ie. whether it was a relational contract etc.). To borrow Vanessa Sims' metaphor, it is one of the "concentric circles" to be added on as the situation requires. With the utmost respect, I would reject this. Honesty is not simply another facet of contractual good faith because it should not be part of contract law altogether. Firstly, it is far too difficult a notion to codify, and for confirmation just look to the criminal law. Secondly, how are commercial judges expected to assess subjective states of minds when big corporations are involved? Thirdly, and most importantly, the foundations of English Contract Law are built on objectivity of contract.

To re-cap: I have tried to show that (1) good faith already works in the shadows, informing the development of contractual doctrines, and (2) this is because it can be given a definite meaning that adheres to traditional notions of contract. At this stage, a sensible critic would point out that this is not, *a priori*, an argument for *crystallising* a principle

> "It is at world's end, where certainty, by definition, cannot apply, that we most need a North Star to guide us. Good faith is that North Star.

of good faith. I completely agree. English Private Law reasons in a piecemeal fashion meaning if it works, it works. Change only comes when change is due.

When, then, is change due? We can look to the development of the Laws of Obligations for inspiration. In contract, we learn that the general remedy of *assumpsit* only developed after its constituent remedies for misfeasance, nonfeasance and debt were clearly pointing in the same direction: that is, we were enforcing a promise in itself. In tort, Lord Atkin's seminal statement in *Donoghue* was to link together previously discrete pockets of law and weave them into a general principle of negligence liability. Likewise in restitution, it was only when the piecemeal solutions via the fictions of quasi-contracts and constructive trusts were unworkable that the ground was paved for Goff & Jones' great restatement of the law in 1966 and the accompanying judicial recognition in *Lipkin Gorman*. There is a *meta-phor* at play here. One can imagine a growing boy wearing the same set of clothes for twenty years: it will, quite literally, burst at the seams. Thus fictions and piecemeal solutions are a necessary, but ultimately limited, solution. The common law will move but only when the time is right.

So the real question is all about timing. I believe that modern English contract law is bursting at the seams and I will cite two pieces of evidence. Firstly, the fact that whereas in many other areas of Law (crime comes to mind) there is great emphasis and consequently debate on what their aims are, there is no equivalent controversy in contract. Students learn, accept, and debate what doctrine is and what doctrine should be. But we do not learn why there are rules here in the first place. Why must we have a law of Contract that goes beyond the contract? Why can't we contract out of the rules on contractual discretion, duress, misrepresentation etc.? Why don't we just study how to literally interpret and enforce contracts? It is because a law of Contract is necessarily extra-contractual. But we forget this, so we stand on a rudderless ship, drifting out at sea and not knowing where we are headed. 'Commercial certainty' is a worthy ideal and for the most part, it will continue. But it is at world's end, where certainty, by definition, cannot apply, that we most need a North Star to guide us. Good faith is that North Star.

This leads to my second piece of evidence. A weak foundation will lead to a cracks in the structure, and here I argue that there is confusion at the specific doctrinal level caused by the problems stated above. I will pick two examples. Firstly, on 'lawful act' duress. Actually, the term 'lawful act' duress in itself is a misnomer for we consider a threat to breach a contract to be sufficient, and breaching a contract is not unlawful argues Oliver Wendell Holmes. The debate surrounding *Times Travel* and what is sufficient to constitute an illegitimate threat arises because we are not even sure why the doctrine of duress exists. We do not know whether we should focus on the

defendant's act or the claimant's consent. Thus we have the confusing position that for threats not to contract, some sort of subjective bad faith is required *(CTN Cash, Times Travel)* and this has led to some worthy objection.

The second doctrine that serves more to confuse than to enlighten is the idea that one cannot have no legitimate interests to affirm a contract post-repudiation *(White & Carter)*. What, if I may ask, is the difference between 'legitimate interests' and 'good faith'? Are they not both equally vague terms that purport to do the same thing: that is, to limit an unbridled right to exercise one's own self-interests? I should have thought it to be more productive to use the same terminology when we want to express this moral notion. Leggatt J. (as he then was) seems to agree in *MSC Shipping,* though he was overruled, causing more confusion. We must aim for internal rationality.

To conclude, I believe that the time has come for English Law to recognise a general organising principle of good faith, much like the Canadians did in *Bhasin*. I reject a general duty of good faith, imposed as a rule of law, because I do not believe that is an incremental step. One must learn to walk before one attempts to run. Thus, a general organising principle is most appropriate. As was said in *Bhasin*, this is an aspirational standard that the judges explicitly recognise to be the aim of English contract law. It might go something like this: English Contract Law (as opposed to English contracts) exists in order to ensure that exchanges are made in good faith. It is an ideal, not a rule. It is not a general duty. It is meant for the judges, more than anyone else, to consider all proposed developments of the Law in light of. The proper meaning of good faith is to uphold the objective reasonable expectations of both parties - my contention is if we see it in this way, we will realise that good faith has been with us all along and give it the credit it deserves.

A Runaway Decision?

Discussing and Defending R (Plan B Earth) v Secretary of State for Transport

Thomas Hibbs

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Few events have generated quite the volume and complexity of litigation as the Heathrow expansion. In *Plan B*, the Court of Appeal decided that the Secretary of State's (SoS) decision to designate a National Policy Statement (NPS) under s.5 of the Planning Act 2008—supporting plans to build a third 'north-west' runway at Heathrow—was unlawful. While environmental campaigners may hail the decision as a triumph against globally polluting mega-corporations, its real intrigue lies in its robust use of unincorporated treaties to determine the scope of domestic law obligations, and the Court's determination to provide a remedy in circumstances where the unlawful decision may have been retrospectively corrected.

I. THE FACTS

When the SoS designates an NPS (under the Planning Act 2008, s.5), planning applications must be decided in accordance with it. The SoS supported the Heathrow expansion in the UK's 'Airports National Policy Statement' (ANPS). Three grounds of appeal were made. Two concerned EU law, which failed. The third, which succeeded, challenged the SoS for failing to take into account a relevant consideration: the Paris Agreement 2016.

In making an NPS, the SoS must, under the Planning Act 2008 s.10(3), 'have regard to the desirability of… mitigating, and

adapting to, climate change' and, under s.5(8), give reasons as to how the NPS takes government policy on climate change into account. It was common ground, however, that he did not consider the Paris Agreement 2016, an unincorporated international treaty. Indeed, he had received legal advice that he was 'not permitted as a matter of law to take [the Agreement] into account' ([237]).

II. TREATY INCORPORATION

The issue that arose was whether the SoS was required to take the Paris Agreement into account as 'government policy'. In deciding that it was a relevant consideration, the Court has been accused of incorporating international law 'through the back door': that is, without the consent of Parliament. Mills (2020) sees a tension with this outcome and the principle of 'dualism' in the British Constitution, by which treaties do not form part of domestic law 'until incorporated by legislation'. Campbell (2020) also questions the desirability of requiring the Agreement to be taken into account, because the 'political substance' of the decision is left open to challenge, transgressing the Court's judicial function. I will test both criticisms in turn.

To Mills, we first must assert that the Court is not acting on its own terms, giving the Paris Agreement a life of its own. It is given a clear warrant to do so by s.5(8) of the Planning Act 2008, which requires 'government policy' on climate change to be taken into account. *If* it is correct to consider the treaty 'government policy' (our second criticism, considered later) then the conclusion is surely that the Court is requiring something 'conventional' ([230]): that the 'executive must comply with the will of Parliament' ([229]).

Furthermore, using unincorporated treaties to define the scope of statutory obligations is not a radical, controversial prospect; indeed, it is entirely conventional. For example, in R *(Al-Jedda) v Defence Secretary,* the House of Lords used several unincorporated treaties (UNSC Res 1545 and Article 103 of the UN Charter) to define the scope of rights under the Human Rights Act 1998. Several other cases follow the same example, such as Occidental Exploration v Ecuador.

To Campbell, we start with the Cambridge English Dictionary's definition of 'policy': 'a plan of what to do [that] has been agreed to [by] a government'. With this definition in mind, several factors are pointing towards the Court's decision being correct. Not only did the *Government* ratify the treaty in 2016

(making it a 'plan' that has been 'agreed to'), they actively agreed to adhere to it in several Ministerial statements ([237]). As the Court correctly states, 'policy is necessarily broader than legislation' ([224])

Moreover, a narrow definition of policy would be undesirable from the perspective of good administration. This case sets a precedent that the Government must adhere to its promises, preventing Ministers from breaking political commitments with impunity. This is not a challenge to the 'political substance' of the decision, as Campbell suggests, but the legitimate use of an unincorporated treaty, through the warrant of statute, to ensure the Government does not regress from its promises.

III. THE QUESTION OF RELIEF

The Government then argued that the court should refuse to grant a remedy. This was because, even though the SoS had not taken the Paris Agreement into account when developing the ANPS, he would still have considered it when individuals apply for specific projects related to the policy. Thus, it would be 'highly likely' that the outcome would not have been 'substantially different' if the Paris Agreement had been taken into account, per s.31 of the Senior Courts Act (SCA) 1981 ([274]).

Nevertheless, the Court granted a declaration of unlawfulness. It did not matter that the unlawfulness in the policy designation could have been rectified later: it was 'incumbent on the Government to approach the decision-making process in accordance with the law at each stage' ([275]). Furthermore, the public interest in climate change issues would have warranted the provision of a remedy in any case ([277]), per SCA 1981 s.31(2B).

It is easy to see why Campbell (2020) has criticised the case as 'insufficiently cautious' with the provision of remedies. The modification of the SCA 1981 was intended to expand the number of cases in which courts would refuse to provide a remedy from the stringent *Simplex* test. Under this old test, it was necessary to show that the decision-maker 'necessarily' would still have made the same decision. This threshold was lowered because the Government was concerned with 'busybodies' challenging, for example, planning decisions—abusing judicial review and disrupting infrastructure.

Despite this, the Court stated that 'Parliament has not altered the fundamental relationship between the courts and the executive' ([273]). This means that, even under the Act, courts should not assess the 'merits' of the decision. For this reason, it will be 'difficult' or even 'impossible' to refuse a remedy where there has been an error of law ([273]).

> "There is a paradox at the heart of this dictum. The Court seems cautious by refusing to contemplate the merits of the decision; but, in so doing, the judges are expanding, not restricting, their powers.

There is a paradox at the heart of this *dictum*. The Court seems cautious by refusing to contemplate the merits of the decision; but, in so doing, the judges are *expanding*, not restricting, their powers. Under the pretence of keeping to their proper role, they are ensuring that the rule of law is upheld to a standard not far from the original *Simplex* test. I would suggest that this is because the Court is overusing the term 'merits'. Assessing the 'merits' is asking the question: *is the decision correct?* This is not what the Court is asking by refusing to grant a remedy. It is asking: *what are the likely implications of the decision?* These questions are related, but they are not the same. Indeed, if the Court is cautious to consider the implications of a decision it is hard to see when a remedy would ever be, in reality, refused.

Nevertheless, the decision is correct on the facts. Two points should be remembered. First, the Court was especially firm because the SoS had received legal advice to the effect that the Government *was not permitted* to take the Paris Agreement into account. This was a clear 'misdirection' in law ([275]), and it is possible to see why this is—at least slightly—more significant than neglecting to consider the Agreement. Second, the Court did not quash the decision, instead merely granting a declaration of unlawfulness. I would suggest this, in fact, takes careful consideration of the seriousness of the error and the consequences of the breach.

IV. CONCLUSION

Although, at first glance, this case might look like judicial overreach, I have argued that *Plan B* enforces reasonable, robust limits on administrative discretion. The Government has decided not to appeal this decision—little wonder, given Boris Johnson's pledge to 'lie down in front of those bulldozers and stop the construction' (Carrington (2020), *The Guardian*)—but Heathrow will do. The fasten-seatbelt sign has come on: there is more turbulent legal thinking to come.

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