

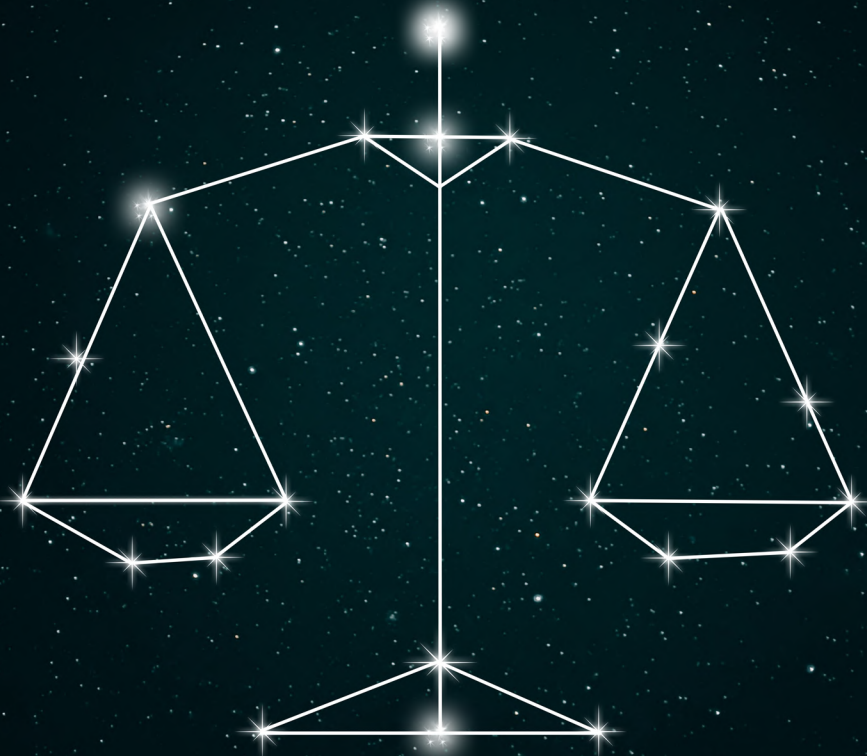
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Law and Science

BY LORD NEUBERGER



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It is with much excitement that we present to you the Sixth Edition of The YLJ.

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.

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.

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

Kindest Regards,

Matti Brooks
David Edwardes-Ker
Anish Rajpal
Cher Yi Tan



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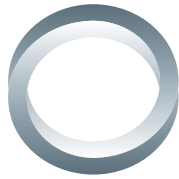
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Law and Science



The Rt Hon Lord Neuberger

Served as President of the United Kingdom Supreme Court from 2012 to 2017. He had previously been appointed Master of the Rolls in 2009. In 2018, he started practising as an arbitrator and legal expert from One Essex Court. Since 2010, he has been a Non-Permanent Judge of the Hong Kong Court of Final Appeal and, since 2018, a judge of the Singapore International Commercial Court. He was Treasurer of Lincoln's Inn in 2017.

After I left school, I spent three years studying chemistry at University, and a fourth year doing research into proteins. During that fourth year, I realised that I would never be a very good scientist, and that I should try another area of work for which I might be better suited. After a couple of years, I found the law, but I never lost my interest in science. Perhaps inevitably, this has led me to think a little about the

differences and similarities between scientific and legal thinking.

Most scientific problems have objectively verifiable solutions, which are independent of time or location, whereas any legal issue is relatively subjective, and is very much time- and location-dependent.

The laws of thermodynamics were true 10,000 years ago in Europe and will be true in 10,000 years' time on Alpha Centauri, whereas

many human rights which we take for granted today would have seemed strange only 500 years ago in England and would not be recognised even today in China.

The decision of the Supreme Court (even by a bare majority) will conclusively determine a point of law, but it is not hard to imagine a first year law student writing an excellent essay disagreeing with such a decision. By contrast, even an eminent Professor would rarely

find it possible to write a half-way decent paper challenging a conclusively determined scientific point in their field of expertise.

And science will often come up with apparently confusing answers or even no answers to problems. For instance: Does light consist of waves or particles? Well, both actually. What is the precise location and the precise velocity of an electron? Thanks to Heisenberg, we can never know. By contrast, the law always will ultimately come up with clear and definite answers. So, however strong the arguments each way on a legal issue may be, a court of law has to decide one way or the other.

Thus, faced with many of the pressing contemporary scientific problems, the most eminent scientists will normally say that they do not know the answer, and very few scientists will say that they are sure of the answer. "I don't know" or "maybe" are respectable and common answers in the scientific world. They are not answers open to a judge faced with a legal problem, and they are pretty unusual answers for an academic lawyer to give.

Similarly, judges faced with a dispute of fact have to determine it on a binary, yes/no basis, even if it seems very finely balanced, whereas no scientists worth their salt would be heard expressing confidence about an

uncertainty. So, however unclear it is which witness is telling the truth, a court of law must resolve the question one way or the other. A scientist may snort at the idea that 51% = 100%, but that is what the balance of probabilities can be said to entail. I suppose that the law's notion of a judge resolving a conflict of fact as to what happened in the past has an element of Schrodinger's wretched cat about it: nobody can know as a fact what happened in the past when there is a conflict of evidence, but as soon as the judge decides who is telling the truth, the fact is established.

While it may seem incongruous that the law almost always gives firm



answers to problems whereas science often does not, given that science is more rigorous than law, rigour is in fact more likely to demand an admission of uncertainty or ignorance. That point may demonstrate a truth about human nature, namely that there is at best no relationship between the firmness and the correctness of an opinion: indeed, it may well be that, save where the objective evidence is pretty conclusive, the more firmly an opinion is held the less reliable it may be.

While the relative rigour and objectivity of science as against law cannot be doubted as a general proposition, it is not wholly accurate. There have been many examples over the past 350 years of previously accepted scientific "facts" turning out to be wrong – much of classic Newtonian physics which had been effectively undoubted for 200 years was upended by Max Planck and Albert Einstein. And there are some underlying threads of principle which apply to at any rate most legal systems over the years and across the world, although I doubt that there are any

truly timeless and universal legal principles.

The notion that science and law are different is also far from the complete story in a much wider sense. Scientists and lawyers are both engaged in trying to impose order on chaos, to find laws of relatively general application which work. And in the process they both employ – or should employ – rigorous and logical thinking, and they both engage in deductive and inductive reasoning.

But, even in the thinking process there are large differences. Common sense is much prized by lawyers, particularly common lawyers, and is sometimes invoked by judges to justify a decision which is admittedly inconsistent with strict logic. Indeed, in an oft-quoted statement, the US Judge Oliver Wendell Holmes said that "the life of the law has not been

logic; it has been experience". As the early 20th century, with its discovery of quantum mechanics and relativity (Planck and Einstein again), taught us, common sense is a positively dangerous guide to scientific truth. The role of morality in legal thinking is also quite a contrast with science. When called upon to decide whether a law criminalising the assistance of a suicide in any circumstances, however understandable, infringed human rights, it is almost inevitable that a judge will be influenced by his or her view as to the morality of assisting someone to kill themselves. Such thinking would be off-limits for a scientist.

Having said that, the notion of the wholly dispassionate scientist is also something of a myth. One only has to listen to scientists debating climate change or string theory to

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realise that human prejudices can play as large a part in some aspects of scientists' thinking as they can do when it comes to lawyers' thinking. And, given that lawyers and scientists are both humans, this should not cause surprise. But it highlights the danger of politicians glibly saying that they are "following the science". The scientists whose views they tend to follow are either those who tell them what they want to hear or those who shout loudest.

In this age of specialisation and complication, it must be almost impossible for a person to be both a prominent scientist and a prominent lawyer, but that does not mean that the same brain cannot

achieve both scientific and legal mastery. Indeed, this country boasts a number of people who strode on both stages. Francis Bacon was a very inquisitive scientist and a highly successful lawyer 400 years ago, and in addition he wrote timelessly brilliant essays – although unfortunately, he had to resign as Lord Chancellor for accepting bribes.

More recently, John Fletcher Moulton, having been elected to the Royal Society for his work on gaseous electricity in 1880, subsequently turned to the law, became a QC, a judge and a Law Lord, and then master-minded the UK's First World War effort on explosives and (although he disapproved

of it) poison gas.

Poison gas would be a sad topic on which to end this little note, but it embodies another aspect of the subject: the fact that law and science often march together and can inform each other. There are domestic and international laws about the manufacture and use of poison gas, which is itself a matter for scientists. And in a world which is increasingly influenced by and conscious of technological advances – climate change, AI, disease control are three obvious examples – law and science are increasingly entangled. They should complement each other and lawyers and scientists should learn from each other.



“Uber” Uber: *the far-reaching implications of the Supreme Court’s decision in Uber BV & Ors v Aslam & Farrar*



Sheryn Omeri

Junior counsel for Messrs Aslam and Farrar in the landmark Uber judgment. She specialises in all aspects of employment and discrimination law as well as clinical negligence, public law & human rights, and international criminal law – having worked at the International Criminal Court in The Hague. She was judicial assistant to the former President of the NSW Court of Appeal who is currently 39th Governor of the State of NSW.

On 19 February 2021, in a unanimous judgment, the UK's Supreme Court dismissed Uber's final appeal against the decision of the London Central Employment Tribunal made following a preliminary hearing, that the Claimant drivers fall within the definition of “worker” set out in s.230(3)(b) of the Employment Rights Act 1996 (“ERA”). In doing so, the Supreme Court upheld the Tribunal's finding that the Claimants

worked under an implied contract with Uber London pursuant to which they undertook personally to provide transportation services for Uber, which is neither a client nor customer of any profession or business undertaking carried on by the Claimants.

There had been no written contract between Uber London and the drivers. Uber London held the private hire vehicle (“PHV”) operator's licence in respect of Uber's London

operations. As a result, Uber London, and not the drivers themselves, nor Uber BV, the Dutch parent company with which the Claimants *did* have written contracts, bore the statutory responsibilities of accepting and fulfilling PHV bookings, and ensuring that any vehicle provided by it for carrying out such booking is a vehicle for which a PHV licence is in force, driven by a person holding a PHV licence. In view of that regulatory context, personal service had never been in dispute;

Uber did not permit drivers to share driver accounts on its app, which would, no doubt, have made it difficult for Uber London to ensure that it complied with *its* statutory responsibilities.

Hence the employment status aspect of the case turned entirely upon the question of whether the Claimant drivers had undertaken to provide transportation services “for” Uber London or whether, as Uber contended, Uber London acted as a booking agent for them, assisting them to conclude separate contracts with each of their passengers.

This question meant that the Supreme Court had to consider whether and how the ordinary principles of contract law and agency law apply to the world of work, and to apply the common law tests for employee status, particularly the tests of control and integration, but with an understanding that “*The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might*

nevertheless do so as workers” (Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667 at [17]). There has been no determination that Uber drivers do not achieve the ‘higher passmark’; Messrs Aslam and Farrar had simply not pleaded this.

The Supreme Court’s dismissal of Uber’s contentions in relation to these matters has implications far beyond the lives of the Claimants, and indeed the lives of Uber drivers more generally.

In relation to the ordinary principles of contract law, what was fatal to Uber’s argument (based on its own circumstances) was the absence of a written agreement between Uber London and drivers. This left the Employment Tribunal to determine the nature of the relationship between the two, by inference from the parties’ conduct, considered in its relevant factual and legal context. The Supreme

Court concluded, at paragraph 49, that there was no factual basis for Uber’s contention that Uber London acts as the drivers’ agent when accepting private hire bookings. In addition, without expressing a concluded view, the Supreme Court held, at paragraph 48, that an agency arrangement would not be compatible with the PHV licensing regime. The latter must surely have implications for all PHV operators who have heretofore treated their drivers as principals in and agency relationship with them (see *Addison Lee v Lange & Ors* [2019] ICR 63); licensing law may prevent this.

Of even greater significance was what the Supreme Court said about the relevance of the ordinary principles of contract to the world of work more generally. Uber had argued for primacy to be accorded to the written agreements such that the question

“ The Supreme Court’s dismissal of Uber’s contentions in relation to these matters has implications far beyond the lives of the Claimants, and indeed the lives of Uber drivers more generally.

of whether a person is a “worker” is approached by interpreting the terms of any applicable written agreements, at least as the starting point. Uber argued that this was the principle for which the case of *Autoclenz v Belcher* [2011] ICR 1157 was authority, and if not, it should be overruled.

In rejecting Uber’s argument, the Supreme Court not only affirmed its decision in *Autoclenz*; it went even further than it had in that case.

From paragraph 69 of its judgment, the Supreme Court explained the inherent illogicality of applying ordinary principles of contract law, unvarnished by the fact of legislative intervention, to the world of work. It said that doing so would give employers a free hand to contract out of statutory employment protections, a matter which had not been canvassed in *Autoclenz*; that case had instead focussed on inequality of bargaining power as the means by which traditional contract law could be side-stepped in the employment context in order to avoid injustice. But of *Autoclenz*, the Supreme Court in Uber

said, “...the task for the tribunals and the courts was not...to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage... It was to determine whether the claimants fell within the definition of a ‘worker’ in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short it was a question of statutory interpretation, and not contractual interpretation.” Statutory interpretation required consideration of the statutory purpose which, in the case of the statutes relied upon by Messrs Aslam and Farrar, was “...to protect vulnerable workers from being paid too little...required to work excessive hours or subjected to other forms of unfair treatment...” ([71]) and that:

“Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the

definition of a ‘worker’. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection...” ([76]).

If the question were not one of statutory interpretation, the law would in effect be according Uber “power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers” ([77]).

This is the truly revolutionary portion of the Supreme Court’s judgment. Though it has long been understood that the label which the parties give (or more commonly, the more powerful party gives) to the relationship is not determinative, it is now not even the starting point. Contrary to Uber’s contentions, it (and related written terms) is to be accorded no greater primacy, than any other aspects of the working relationship.

More specifically to Uber itself, the Supreme Court held (at [93] *et seq.*) that five aspects of the relationship between Uber London and drivers particularly highlight the substantial control Uber exercises over drivers, which demonstrates that the drivers are in fact working “for” Uber, within s.230(3)(b) of the ERA. These are that:

- (i) the remuneration paid to drivers is fixed by Uber;
- (ii) the contractual terms on which drivers perform their work are dictated by Uber;
- (iii) while never *required* to log on to the drivers’ app, once they are logged on, drivers’ choice about whether to accept

requests for rides is constrained by Uber; Uber controls information provided to the driver in advance of accepting a ride and Uber monitors drivers’ rates of acceptance of ride requests;

(iv) Uber exercises a significant degree of control over the way drivers perform their services including by vetting the types of cars drivers may use, directing them to passengers’ pick-up locations and from there to their destinations and using its rating system as an internal performance management tool;

(v) Uber restricts communication between drivers and passengers to the minimum required to

perform any given trip.

As a result, the transportation provided by drivers is designed and organised in order to provide a standardised service from which *Uber*, and not individual drivers, obtains the benefit of customer loyalty and goodwill ([101]). That point exemplifies the significance of the Supreme Court’s judgment to the “gig economy” as a whole; how can any gig economy enterprise attract and maintain customer loyalty to its product or service other than through such standardisation? In turn, how can such service be provided without controlling the way workers undertake their work just as Uber was found to do?



The UK Constitutional Framework: Twists and Turns



The Rt Hon Dominic Grieve QC

As an MP for over 20 years, he served as Shadow Home Secretary, Attorney General for England and Wales and Chair of the Intelligence and Security Committee. He was a leading figure on Brexit, proposing amendments to draft bills and supporting a second referendum. He was appointed to the Privy Council in 2010 and awarded the Legion of Honour in 2016.

The United Kingdom is unusual in having no constitution set out in a single document. But the history of the last hundred years of near universal suffrage has not suggested that this has been an impediment to the operation of a successful parliamentary democracy and calls for change in this area, although frequent, have given rise to little visible public support. Yet our constitution has certainly not been static in this

period. Both devolution to Scotland, Wales and Northern Ireland and our membership of the EU - as well as our departure from it - have all given rise to significant constitutional change.

Underpinning our system are largely unwritten rules of conduct for the executive and Parliament that create the trust which is essential for a political community to function and for minorities to accept majority decisions. This is a process of debate

and legislation conducted within ground rules that ensure that all sides will feel that a matter of importance has been properly considered, with divergent views taken into account. It also provides a framework that conditions the use of executive power when the government enjoys a parliamentary majority, preventing abuse and supporting the right to opposition. When it is working, it has been one of our country's defining strengths; both in the

flexibility it gives government and in identifying us as a political community united by the way we govern ourselves.

But there are, to my mind, worrying signs that this framework is in danger of being abandoned. Recent events have created a number of instances where the government has departed dramatically from these standards.

The first example is the attempt at proroguing Parliament by the PM in September 2019. As a royal prerogative power to be exercised on the advice of the PM, it should have been obvious that it should not be used to silence Parliament at a time of national crisis, however convenient it might have been to the government to avoid parliamentary scrutiny when it was mired in a crisis with the EU on the terms of our departure. Yet not only did the government proceed with prorogation, but it also did not tell the truth about its plans to do so and was unable, when challenged in court, to provide a valid constitutional basis for it, relying in reality on an argument that the power

to prorogue was a naked political power that was non-justiciable.

A similar slide from acceptable constitutional practice can be seen in the November decision to amend the Internal Market Bill in a way that was in clear breach of our international legal obligations under the Northern Ireland Protocol of the Withdrawal Agreement. There was of course nothing legally to prevent the government acting in this way. Under our dualist system, an international legal obligation is unenforceable in our courts without domestic legislation and the government was going to repeal that legislation. But to deliberately break international law in this way was unprecedented by a UK government. It also required the PM to ignore his own Ministerial Code that included a requirement for ministers to respect the rule of law – which previous UK

governments had argued in court included international law as well. Notably, participation in drafting the legislation was in breach of the Code of Conduct for Civil Servants for the same reason. But the Cabinet Secretary instructed them to ignore its terms to conform to the PM's instructions.

When I was Attorney General, it was a part of the Attorney's role not just to advise on the law but also to seek to ensure that a government behaved with propriety. It was part of the Attorney's remit to do this because it was the policy of successive governments that they should be seen at all times to be doing so. In the case of the Internal Markets Bill, the present Attorney not only provided a "legal" justification for breaching international law that fell well outside the range of what was reasonably arguable, but also reinterpreted the Ministerial Code in contradiction of the

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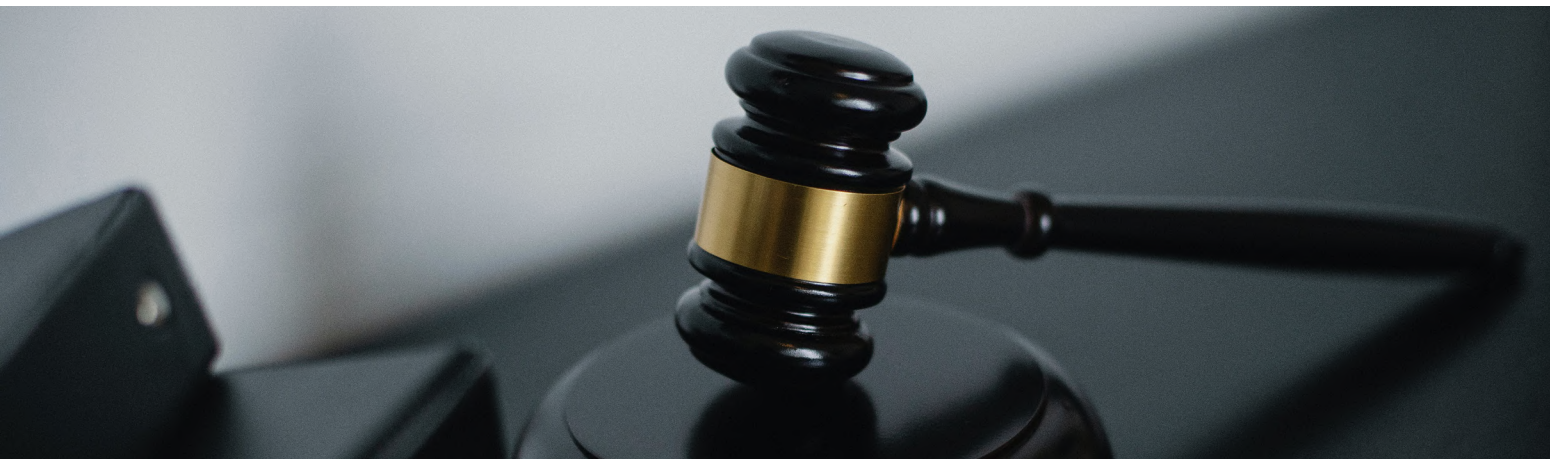
government's previous position, thus avoiding the embarrassment of the PM having to rewrite the Code first.

It may be hoped that these examples are a reflection of the extraordinary pressures that the government was under during the Brexit process. But such cavalier disregard for both the rule of law and constitutional convention has the potential for long-term effects. The handling of the Covid-19 crisis has seen an astonishing abandonment of ordinary rules of legislative propriety. Helped by a largely complaisant House of Commons, the Government has been enabled to enact and exploit loosely worded legislation giving it the power to regulate and penalise individuals by creating serious criminal offences by decree, without even the need for

advance parliamentary approval. Not surprisingly, some of the rules have been so broad as to give rise to arbitrary enforcement and injustice. Of course, some of this may have been excusable by the nature of the current emergency, but none of it was an inevitable necessity. Rather, the measures were simply short-cuts taken for the sake of convenience. Again it was noticeable that when the Secretary of State for Health came out with dire and frankly ridiculous threats of ten year sentences for forgery for providing misleading information on a health information form, it did not look as if the Law Officers had been consulted about this policy statement at all.

Fortunately for us, these failings in our democratic processes are not at present fatal to its continuance. The

Supreme Court stepped in to check the capricious abuse of the power of prorogation by the PM by interpreting the law, and the House of Lords fulfilled its remit as a revising chamber by removing the offending clauses of the Internal Markets Bill which had domestic and international opinion mobilised against them. But that is not the same as good and quiet governance to which wise governments should seek to aspire. As we head towards the next big crisis (probably with Scotland) and see the headlines filled with stories of internecine feuds within a Downing Street "Court", we should not be complacent and assume that politics is all about the chaotic exercise of power moderated only by General Elections. We have in the past enjoyed, and are entitled to, better.



We need an honest conversation about the legal profession and race



Professor Leslie Thomas QC

Human rights/civil liberties barrister and former Joint Head of Garden Court Chambers. In 2020 he became Professor of Law at Gresham College and visiting Professor of Law at Goldsmiths Law School. He has appeared in many leading cases and is currently representing many Grenfell Fire survivors and victims. He also sits on the Equality Diversity and Inclusion sub-committee for the Inner Temple and is a member of the Bar Standards Board and its Race Equality Taskforce. In 2020 he received the award for Outstanding Contribution to D&I in the UK Chambers Bar Awards.

“ As I entered court, I had to pass through security; there was a queue. I got into line. I had my robes under my arm and my wig on top of my papers which were tied with the traditional pink ribbon, the badge of recognition of the jobbing barrister. I was dressed in a smart dark suit. Many of the people entering the courtroom and waiting in line looked like me. We shared the same skin pigmentation, Black. However, it was clear to me that these people

were not lawyers, but more likely court users or members of the public - either witnesses, defendants, friends or family. There were white faces too. Some members of the public, others lawyers. The lawyers had the same unmistakable dress code as me. Many of the white barristers were called upon by the security staff and ushered through. They put their bags on the table, these were not even properly looked through, or they were simply waved

through by the security guards. No security guard called me to the front like my white counterparts. I was made to stand in line like everyone else. Eventually I got to the front of the line. I was asked by the security guard, what my business was at court. I explained the case I was appearing in. I was nevertheless given a solid pat down search, despite the fact the security scanner had not gone off. My bag was thoroughly searched. I was made to open my files. It was clear

that my treatment was different and this was just the start of my day."

There was an important event in 2020. During the pandemic the murder of George Floyd was captured on video and streamed into our homes. This led us all to ask questions about race, discrimination, racism and how to be anti-racist and live and work in truly anti-racist ways.

My story at the beginning of this article is not unique. Many Black colleagues have similar stories. If I can be treated in this way and I am a barrister, it takes very little imagination to think how Black defendants are treated. Differential treatment of Black and brown people occurs at all levels in the legal system.

The 2017 Lammy Review analysed the disproportionate treatment of BAME people in the criminal justice system. It makes depressing reading. Some of the statistics will come as no surprise to anyone who has been following the news, such as the fact that Black people are six times more likely to be

stopped and searched by the police than white people. But it is not just the police that have a race problem. It is the judiciary. The Review showed that BAME defendants were 240% more likely to be given a prison sentence for a drug offence than white defendants. Black people make up 3% of the general population, but make up 12% of prisoners and 21% of children in custody. Every single one of those Black prisoners, including those Black children, was sent to prison by a judge. Interestingly, the Review also found, by contrast, that there is no evidence of racial bias in juries' decisions to convict or acquit – suggesting that our judges have a bigger race problem than our juries do.

Nor is it just criminal courts that have a race problem. In the immigration system – a system which traces its modern roots to the profoundly racist Commonwealth Immigrants Acts 1962 and

1968 and Immigration Act 1971 – judges sit in judgment on BAME people every day. Sadly, if not surprisingly, the attitudes of the people who administer this system today can at times be as racist and colonialist as those of the people who created it in the 1960s and 1970s. One immigration barrister told me that a white immigration judge, having heard an appeal by a Somali appellant, commented on how refreshing it was to see a Somali family working. The same barrister, who is herself Black, was told by a different judge that it was nice to see her "sitting on this side of the table", pointing to the side of the table where Counsel sit.

There is a real problem in getting this message across to the profession. The legal profession, particularly the senior parts of the profession, lack meaningful racial diversity.

The recent Diversity at the Bar statistics published

“ If I can be treated in this way and I am a barrister, it takes very little imagination to think how Black defendants are treated.

in November 2020 make uncomfortable reading. Income figures relating to gender and race at the Bar are deeply concerning. It has long been well known that there is an under-representation of people of colour in the Chancery and commercial bar and in other specialist sectors. Let's be specific about this: there are so few Black barristers. Why?

There is still a gross under-representation of Black judges in the senior judiciary. In 2021 there are still no Black male High Court judges. We had one full time Black woman High Court judge in recent

times who has since retired (Dame Linda Dobbs QC DBE). There are no Black Court of Appeal or Supreme Court judges.

It is difficult to change the status quo from the outside. There must be a willingness to change from within. Racism has to be understood as a system, not merely an event. None of us are exempt from its forces.

It is a flawed and outdated view on racism to believe that the racist is an individual who consciously does not like people based on race and is intentionally mean to them. Racial injustice and racism isn't a simple

binary question. The racist needn't simply be bad, ignorant, bigoted, prejudiced or old. This discussion goes well beyond this.

The law isn't 'colour-blind' and treats everyone the same. 'Colour blindness' does not work in a system where everyone at the top of judicial power is white, everyone in the 'best' chambers is white, and the two 'best' universities in the country have a lack of Black entrants.

I am glad we are now having that discussion. I am so sad it took the horrific murder of a Black man to be the catalyst for that discussion.



Can you find justice when the world is watching?



Abi Silver

Lawyer and an author of the Burton & Lamb legal thriller series. She is an alumnus of Girton College, Cambridge.

I knew I wanted to be a lawyer from around the age of 13; there were no lawyers in my family, my school's careers department consisted of a few flimsy pamphlets on engineering and, although I was the youngest of three sisters, my older siblings had chosen science degrees. And, of course, this was the pre-internet age, when information on most unknown topics had to be sleuthed out by long-winded processes like letter writing and visiting in

person.

So how did my burning desire to become a lawyer originate? I am not ashamed to say that it was television which led me there: an irresistible cocktail of Petrocelli (an Italian-American defence lawyer who was forever building a new home, whilst living in a trailer. His trademark was to find some otherwise overlooked key piece of evidence at the eleventh hour, which saved the day); *Rumpole of the*

Bailey (the sublime Leo McKern speaking John Mortimer's words, defending an array of career criminals with his staunch belief in Blackstone's formulation – 'it is better that ten guilty persons escape than that one innocent person suffer'); *LA Law* (an ensemble cast, plus some famous cameos, covering a range of hot topics, which launched the career of a number of its actors) and the 'pièce de résistance' – *Crown Court*. Ah. Forgive me whilst I

salivate.

Crown Court was an ITV Granada show set entirely in a courtroom. No convenient flashbacks or handy confessions. Just brilliant script-writing and acting and fabulous characterisation, as the prosecution and defence each ploughed their furrow, across three afternoon sessions. And the fictional jury, permitted each week to reach its own verdict, was drawn from the general public.

I admit, with a modicum of shame, that it has taken me a few years to find my way back to the criminal law (a career in the City proved enticing and, ultimately, rewarding), but, given my love of televised legal dramas, it is perhaps no surprise that my latest novel, *The Rapunzel Act*, focuses on the power of TV, this time on what impact filming trials might have on our justice system.

In 2017, Lord Pannick QC, writing in *The Times*, advocated allowing cameras into our courts, on the basis that '*open justice should be open to the cameras*'. This was in the aftermath of his successful representation

of business woman Gina Miller, in her case against the British Government over its authority to implement Brexit without Parliamentary approval; the trial was live streamed, generating considerable public interest in the case and court process. Filming has been possible in the Court of Appeal since 2013 and in the Supreme Court since 2009.

In fact, a three month pilot scheme to film our courts had already taken place during 2016. This was inspired by Sir Keir Starmer QC's statement to Sky News back in 2011 (when he was DPP) that '*there has been a long-standing principle that courts are open to the public, but the public cannot get there.*' Since then, other senior figures have lent their support. In 2018, Geoffrey Robertson QC opined that public trials would be both fascinating and could help dispel conspiracy theories, like the one which took hold in the aftermath of Tommy Robinson's

prosecution. Moreover, the Victims' Commissioner, Baroness Newlove, has argued that this might change the behaviour of some 'aggressive barristers'.

Perhaps it was unsurprising then, when, in June 2020, and with little fanfare (understandably, we all had other things to worry about), the Crown Court (Recording and Broadcasting) Order 2020 was passed. This allows the filming and broadcasting of the judge's sentencing remarks (but nothing more), in high-profile or serious criminal cases. The laudable motivation for this monumental shift was a combination of educating the public and providing greater transparency within the criminal justice system. And whilst its supporters were keen to reassure against more fundamental changes in the future, we are all aware of the shenanigans which can often follow once the genie is out of the bottle.

“ The laudable motivation for this monumental shift was a combination of educating the public and providing greater transparency within the criminal justice system.

This, then, is the premise of *The Rapunzel Act*, where the trial of Debbie Mallard, accused of the violent murder of her former spouse, Breakfast TV host, Rosie Harper, is not only filmed for public viewing but analysed, in great detail, via a dedicated Court TV channel, hungry journalists and bloggers too. Interest is heightened by Debbie's past and private life; until only two years before, she had been living as international football star Danny 'walks on water' Mallard. And readers will appreciate the large nod to the OJ Simpson trial, a process which turned some of its participants into celebrities, but left many others broken, and

from which advocates for ringing the changes on this side of the pond were keen to distance themselves.

As with my previous three books, each of which covers a contemporary and controversial theme, and features quirky and diverse characters, Debbie is defended by the highly experienced, acid-tongued criminal barrister, Judith Burton and the more circumspect, but equally determined solicitor, Constance Lamb, finally allowing me to live out my criminal law aspirations vicariously and with full control over the outcome. My legal duo, although not without flaws, and opposites in terms of

the practical aspects of their work (Judith always prefers pen and blue Counsel notebook, whilst Constance is familiar with every digital tool and app), are consistently upbeat, but this latest case leaves them wondering whether you can truly find justice when the world is watching.

The Rapunzel Act is published by Eye and Lightning Books in paperback original on 15 April 2021 and available in digital version here: <http://amzn.to/3axesuL> and for pre-order here: *The Rapunzel Act* by Abi Silver | Eye Books (eye-books.com)



Technology in the Law



Professor Richard Susskind OBE

President of the Society for Computers and Law, Chair of the Advisory Board of the Oxford Internet Institute and, since 1998, Technology Adviser to the Lord Chief Justice of England and Wales. He has written 10 books and is the world's most cited author on the future of legal services.

Law graduates of the early 2020s are joining a legal world that is in the early stages of technological transformation.

To put this transformation in context, the first 60 years of legal technology were devoted to automating and streamlining the past working practices of law firms and courts. Technology was used to make the existing legal system more efficient. In contrast, the technologies

being contemplated and designed for the coming decade are disruptive – they will irreversibly change the business of law and the administration of justice. Perhaps the two most important developments will be the introduction of online courts and the wider use of artificial intelligence.

Despite the remarkable advances of the past year, we are still in the foothills in our exploration of online courts. It is true that great numbers of hearings have been held remotely in

many jurisdictions during the Covid period – the website, Remote Courts Worldwide (www.remotecourts.org), records the activities of around 60 jurisdictions. In the main, however, what we saw during 2020 was not a transformation in court service but the use of video hearings as a substitute for physical hearings. In my view, dropping hearings into Zoom or the like is not of itself a revolution. It is a new way of accessing the old system. And that old system has significant

problems – it is too costly, time-consuming and combative, and it is intelligible only to lawyers. And these are problems in justice systems that we regard as ‘advanced’. The worldwide picture is lamentable. According to the OECD, only 46% of people on our planet live under the protection of the law. The widespread deployment of video hearings is unlikely to increase that figure greatly. We need new ways to help people understand and enforce their entitlements.

My answer to this global access to justice problem, laid out in my book, *Online Courts and the Future of Justice* (OUP, 2019), is the introduction of online courts, which I define in a specific way. Online courts, on my model, have two components – online judging and extended court facilities.

In the first generation of online courts, online judging involves fully qualified human judges handling cases not in hearings, physical or by video; nor by hearing oral evidence. Instead, parties submit their evidence and arguments to the judge electronically; there

follows some debate and discussion, again online, not unlike an exchange of emails; and the judge will deliver a binding decision in the same form. In this way, the court proceedings become asynchronous rather than synchronous (the judge and parties do not need to be available at the same time to participate). This is clearly not appropriate for all cases but the hypothesis is that it works well for most of the low value, high volume cases that often are the bottleneck of our court systems around the world. Online judging is generally less costly and more convenient than conventional court service – parties, for example, do not need to take time off work to pursue or defend claims.

The second component is the extended court facilities. The idea here is to empower non-lawyers to navigate the court system without the need for lawyers. The main driver is not any desire to eliminate lawyers but, rather, to make the law accessible to the many who cannot afford legal advisers. The facilities I have in mind include those that can help parties to understand their legal

positions and the options available to them, tools to help them organise their evidence and structure their arguments, and online techniques that support non-judicial settlement, such as negotiation and mediation, not as a private sector alternative to the courts but as an extension to the services currently offered by the state.

The online court is not a work of fiction. Look at the Civil Resolution Tribunal in British Columbia, Canada. It is the best practical example of these techniques in action, and enjoys very high levels of user satisfaction – <https://civilresolutionbc.ca/>.

As for artificial intelligence, although this will play a role in online courts of the future, this set of technologies may have greater impact in the 2020s on the work of law firms. The technological details of AI are not so important in grasping what lies ahead. The big trend to notice here is that our machines are becoming increasingly capable, often taking on tasks and activities that were thought not long ago to be the exclusive province of human beings, including

lawyers. While these increasingly capable systems are steadily coming into law firms, the change will not be as swift as some commentators suppose.

I wrote my doctorate at Oxford on AI and law in the mid-80s and the subject has been a lifelong interest. And so I am able to say with some confidence that most of the short-term claims currently being made about AI in law hugely *overstate* its likely impact. However, and crucially, most of the long-term claims hugely *understate* its impact. Will AI transform law firms over the next few years? Absolutely not. By 2030? Very probably. Already we are seeing AI systems being used for document review in litigation, in due diligence exercises on large transactions, for the drafting of documents, and for the prediction of the outcomes of courts. Incrementally over time, rather than in one big bang, AI systems will steadily encroach on the work of lawyers.

A common response to this claim is that these systems will never be creative or empathetic,

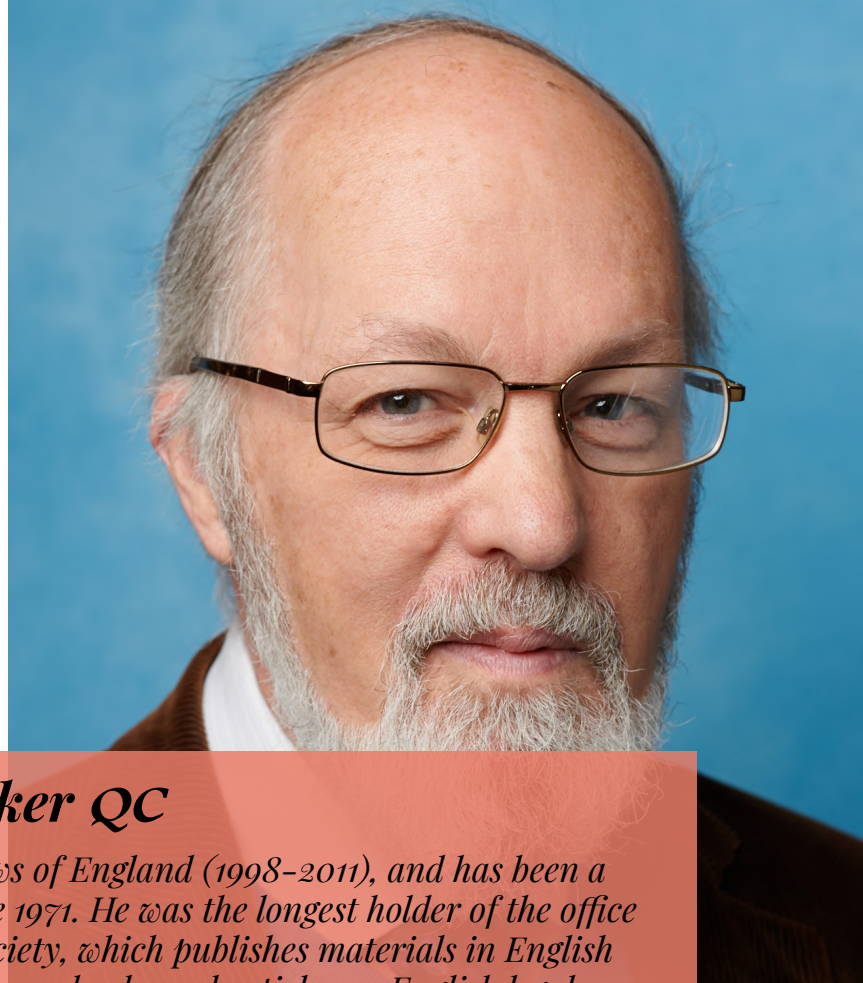
characteristics necessary for most successful lawyers. To argue this way, however, is to commit what I call the 'AI Fallacy' – the mistaken assumption that AI systems will outperform human lawyers by copying how we work. This is too anthropocentric a view. Instead, these systems will deliver the outcomes that clients want by using their own distinctive capabilities. A medical analogy might help. Patients do not actually want doctors. They want health. Health is the outcome they seek. Likewise, clients do not want creative, empathetic lawyers. Indeed, they do not want lawyers at all. They want the outcomes that lawyers deliver (for example a dispute avoided rather than a dispute resolved) and if AI systems can deliver these outcomes more quickly, conveniently and at lower cost, the market will shift to the AI-based alternative.

Where do these major changes to the legal world leave law graduates, who

are planning their careers? I have written about this at length in my book, *Tomorrow's Lawyers* (2nd ed., OUP, 2017). One option is to disregard the new technologies and hope there is enough traditional legal work to do. Over time, this will be an increasingly risky strategy and unsustainable, I suspect, in the 2030s. In any event, I look at this era differently. Young and aspiring lawyers of today have an opportunity that arises once every few generations – not simply to join a profession and embrace its longstanding methods, but to change it. The systems I envisage will help many more people around the world to understand and enforce their legal entitlements. They will integrate the law more fully into business life. They will elevate the law, making it much more affordable. And so another option is to dedicate your legal career, at least in part, to building the systems that will replace our outmoded and inaccessible practices.

“ Incrementally over time, rather than in one big bang, AI systems will steadily encroach on the work of lawyers.

Does English Legal History Change?



Professor Sir John Baker QC

*He was Downing Professor of the Laws of England (1998–2011), and has been a Fellow of St Catharine's College since 1971. He was the longest holder of the office of Literary Director of the Selden Society, which publishes materials in English legal history. He has published numerous books and articles on English legal history, most recently *English Law under Two Elizabeths* (2021). In 2003 he was knighted for services to legal history.*

I hope I may be allowed to answer this question by way of some personal reminiscences. I taught legal history (amongst other things) for forty years at Cambridge, and it is getting on for sixty years since I attended my first lectures on the subject in London. (That, incidentally, is about ten percent of the time back to the death of Henry V in 1422.) The lectures were given by Professor S. F. C. Milsom (1923–2016), and they turned out to alter the

course of my professional life; but that is another story. Legal history syllabuses were focused on land law, contract, and trespass. Constitutional history of a kind was taught in History faculties, still using the textbook of F. W. Maitland (1850–1906), but it had dropped out of sight in Law faculties. Only social historians were interested in crime. Since the modern subjects I taught were still heavily steeped in Victorian case-law, and since eighteenth-century law

was a dark hole, legal history seemed to most of us to end in 1689, if not in 1649. In practice, most of it was medieval. The Selden Society, founded in 1887, had been publishing annual editions of medieval law reports and other texts, but few scholars had looked at later manuscript law reports or plea rolls (which contain the official records of cases). Sir William Holdsworth's monumental *History of English Law* (1903–66) – new volumes of which

went on appearing for years after his death in 1944 – hardly ever mentioned a manuscript source.

But this was beginning to change. Dr Albert Kiralfy's *The Action on the Case* (1951) showed how basic questions could be answered by delving into manuscript reports and records, and Professor Milsom's own work was deeply rooted in the plea rolls. Professor S. E. Thorne (1907-94) of Harvard, before switching to *Bracton*, had begun to explore the huge store of unpublished lectures and moots from the Inns of Court. And Mr A. W. B. Simpson (1931-2011), then at Oxford, made some discoveries in Tudor manuscripts which greatly excited me. His modest note on the reports of Sir John Spelman (d. 1546) in the *Law Quarterly Review* for 1957 inspired me to obtain a British Museum reader's ticket while I was still an undergraduate, so that I could look through the manuscript (which I was later to edit for the Selden Society). It was the allure of making discoveries in these largely untapped sources which led me away from a projected career at the

Bar towards a life in legal history. Research was carried out in the Public Record Office, then in Chancery Lane, and in libraries on both sides of the Atlantic, pencil in hand, converting Latin hieroglyphics into a scribble of my own. (Photography was expensive, and reserved for material needing extensive study.) There were, and are, no indexes to the plea rolls or to the manuscript law reports. There were not even adequate catalogues of the latter; a legal historian had to compile his own. Serendipity ruled.

Since those days there have been three major changes in English legal history. Most obviously, there has been the impact of the new technology. I obtained my first word-processor in 1987, and could hardly believe how much easier it became to rearrange thoughts, let alone to prepare editions with collated texts: it seemed

amazing then that a machine could even renumber footnotes automatically. Then, more importantly, came digital photography and the internet. Photographs of most books printed before 1800 can now be found online. (Like other legal historians, I had found it necessary to buy shelves of black-letter books. Wildy's charged £3 a volume for all pre-1700 law reports, and £1 a volume thereafter. Oddly, their value has increased as their usefulness has declined.) Through the industry of Professor R. B. Palmer, almost all the plea rolls from the twelfth century to the reign of James I have now been photographed and made freely available on the internet. Digitisation of law reports is taking longer, though the Harvard Law School has made a good start. We can also make our own photographs. Record offices were the first to allow this, to gratify the genealogical lobby rather than the scholar, but eventually libraries

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It was the allure of making discoveries in these largely untapped sources which led me away from a projected career at the Bar towards a life in legal history.

followed suit, and by about 2015 almost all libraries – even the moribund British Library – allowed readers to photograph manuscripts themselves. The scholar can therefore build up a useful store of images to be transcribed or studied at leisure. Moreover, the iPhone can read in dim lighting what aged readers can no longer manage unaided.

The second change has been in the periods of study. Partly as a result of the decline in the study of Latin (and even French) in schools, students are deterred by sources written in ‘dead’ languages. Since Law French was used for

almost all law reports until the mid-seventeenth century, and Latin for records until 1731, there has been a surge of interest in the eighteenth and nineteenth centuries – which are, of course, just as interesting in their own way as the thirteenth century; and (well into a new century) they are beginning to seem longer ago.

The third development has been in the fields of research, partly as a result of the second change. Although controversy still rages over traditional topics such as medieval land law, most younger legal historians – at any rate in Law faculties – are not medievalists. There is,

however, a widespread interest these days in later subjects, such as equity and commercial law. And there is still unexplored territory in earlier periods. In my own case, a stream of requests to give lectures on Magna Carta in 2015 increased my interest in the history of public law. I had written on it before, but on delving through the manuscripts I found there were new stories to be written. I hope that in the next generation the history of public law will become as mainstream as the history of land law. Far from standing still, therefore, research in legal history is continuing to find much hidden treasure to reveal.



A Femtech Boom – Putting Women First



Nicole Junkermann

International entrepreneur and investor. She is the founder of N3F Holdings, an international investment company with interests in venture capital, private equity and real estate. Through N3F's venture capital arm (N3F Capital), she oversees a portfolio across Europe and the US similar in size to a small venture fund, including in healthcare, fintech, and deep tech.

A market anomaly

Historically, investment in health issues that exclusively or disproportionately impact women has been scarce. Only 4% of global healthcare R&D funding has been allocated to women's health, even though it represents an economic burden of \$500 Billion – and women are 51% of the world's population.

At the root of this disparity, there is an educational gap about women's health, as well as a pervasive lack of women in top leadership

roles. This lack of representation – and therefore decision-making power – spans across research institutions, venture capital firms, corporate boardrooms and politics.

The rise of Femtech

Over the last decade, the number of women leaders and start-up founders, especially in tech, innovation and science, has been steadily growing. This growth goes hand-in-hand with their increasing purchasing power, which has fuelled the rise of 'Femtech': a new market in which technology is used

to put women's health needs at the top of the global agenda.

The word "Femtech" was coined in 2015 by Ida Tin, CEO and Founder of period tracking app Clue, to label a market which originated at the intersection of three trends: the growth and consolidation of the tech industry, advances in the feminist movement, and a shifting healthcare landscape, with individuals starting to behave more like consumers than patients. Tech innovation, equal rights movements and changes in consumer

practice have converged to meet women's health needs. This emerging technological field includes medical devices, digital platforms, and tech-enabled products focusing on fertility, pregnancy, maternal and hormonal health, parenting support, menopause, and cancer prevention – as well as sexual and reproductive health and pleasure.

Economic activity and awareness have been steadily growing over the past ten years. Across the globe, female founders have put their heads down to question, innovate and redesign: they have improved and tended to the physical, financial and emotional journey of women who seek fertility treatment; they have democratised access to maternal care; they have built software tools to help women track and understand their hormonal cycles; and they have created software solutions aimed at making parenting and work-life management more seamless.

However, only when Femtech was estimated to become a \$50 Billion category by 2025 did the world really start to listen. Within the last 12 months,

funding allocated to Femtech start-ups reached \$1 Billion in total. There were also several early successes. Feminine hygiene start-ups 'This is L' and 'Sustain Products' were acquired by P&G and Grove Collaborative respectively. Last Autumn, fertility benefits company Progyny had a successful IPO. Finally, in early 2020, maternal health telemedicine and benefits platform Maven hit a record when it announced its \$45 Million Series C, the largest round ever raised by a female founder in Femtech – a round that boasted celebrity investors (and public advocates of the gender equality movement) like Mindy Kaling and Reese Witherspoon.

In the UK alone, Elvie, the start-up behind the pelvic floor trainer and innovative wearable breast pump device, raised \$42 Million in a Series B. Additionally, CVC Capital Partners acquired over 20 speciality women's health assets from Teva Pharmaceutical Industries Ltd, a US \$703 Million deal that culminated

in the establishment of global speciality pharmaceutical Theramex, a company solely committed to supporting the health needs of women. Headquartered in London, the company markets a broad range of innovative, branded and non-branded generic products across 50 countries around the world. The company's women's health portfolio focuses on contraception, fertility, menopause and osteoporosis and includes key brands such as Ovaleap®, Zoely®, Seasonique®, Actonel®, Estreva® and Lutenyl®.

The activity generated by Femtech's start-ups and businesses has spawned an entire economic ecosystem. For instance, Johnson and Johnson has been co-sponsoring innovation summits with a focus on women's health, and P&G Ventures, having expressed strong interest in menopause and the "ageing well" segment, has recently partnered with Vinetta project to source its next billion-dollar women's brand from the community of entrepreneurs.



[O]nly when Femtech was estimated to become a \$50 Billion category by 2025 did the world really start to listen.

What next for Femtech?

Throughout 2020, investors, thought leaders and founders have sought to tap into Femtech's full growth potential. Rather than continuing to focus on the female reproductive journey (and related health concerns), the sector can provide the lens through which we further appreciate how disease impacts women differently.

For example, symptoms of heart disease in women are different from those of men and are more likely to be misdiagnosed. Depression is more common in women (1/4) than in men (1/10). Also, women are seven times more vulnerable to autoimmune diseases and are two to four times more likely to experience chronic fatigue.

There's a market for educational resources to depart from the current approach of separating and isolating health problems. Instead, user-friendly holistic treatment options that treat the individual as a functional system can facilitate diagnosis and manage symptoms, enhancing the general quality of life.

Additionally, there is a tremendous opportunity to develop tech solutions aimed at increasing treatment access in rural areas and developing countries. The Femtech movement is progressing into a more intersectional territory, where it seeks to understand how to make healthcare services and therapeutics more attuned to the specific needs of the female physiology.

Investing in a Fairer Healthcare System

Women's health has traditionally been considered a niche market, despite the fact that women make up half the population, manage the majority of household income, and handle a good portion of the healthcare needs of their families. Some have explained this anomaly as the result of gender biases, with a predominantly male investment community struggling to understand the value proposition, empathize with the problems, or make an accurate assessment of how much women would pay for solutions.

Education and awareness continue to be instrumental in Femtech's growth. However, companies in

the space find fundraising challenging, not least because educating investors about women's healthcare and its market potential is one of the leading causes of deal cycle friction. This highlights the glaring gap in our education system in areas of women's sexual and reproductive health.

While highly lucrative deals remain within familiar circles, a shift in the wider investment community is occurring, driven by female and diverse funders who early on identified the value in the sector and are putting their money to work. The same women who drive demand for these products – those who seek a more personalized, more convenient, and more effective healthcare experience – are increasingly willing to invest their money towards a better future for women's health.

Whilst the impact of the pandemic on health-tech innovation and investment remains to be seen, one thing is certain: this 'niche' sector has established itself as one of the most disruptive health-tech markets of the decade.

Tackling Non-Tariff Barriers: African Continental Free Trade Area (AfCFTA) | Trading in East Africa Region



Lilian Olivia Orero

Global Peace Ambassador, Lawyer and an Award-Winning Writer & Researcher from Kenya. She represents youth voices in national, regional and international conferences and forums. Furthermore, she mobilises youth from different backgrounds sensitising them on Sustainable Development Goals. Her philosophy is to inspire her fellow youth by mobilising and empowering transformative young leaders to make a positive change in their community.

“ Tearing down these trade walls is key to regional integration in the continent.”

-Ms. Pamela Coke-Hamilton.

Traders within the East Africa region should be elated with the African Continental Free Trade Area (AfCFTA), which came into force in January 2021. Prior to the commencement of the AfCFTA, many traders had difficulties engaging in cross-border trade within the region due to non-tariff

barriers. For example, dealing with roadblocks and hectic custom procedures, restrictive licensing processes, certification challenges, uncoordinated transport related regulations and corruption. Understandably, non-tariff barriers (NTBs) are construed to mean restrictions that are put in place that make importation and exportation of products really costly. It is worth noting that NTBs often arise from laws, regulations, policies, private sector business practices and

they are used to protect domestic industries from competition.

In order for East African traders to fully enjoy the benefits of AfCFTA, it is imperative that NTBs are eliminated. All hope is not lost as there is a groundbreaking online mechanism of eliminating NTBs. Notably, African Union in collaboration with UNCTAD came up with a simple and user-friendly website which allows traders to report NTBs they encounter when trading within Africa. As a result,

governments are required to respond and eliminate the said barriers. It is against this backdrop that this paper seeks to analyse how to tackle non-tariff barriers in the wake of AfCFTA trading. Further, it seeks to provide recommendations to the massive challenge that NTBs pose on intra-African trade and integration.

AfCFTA Protocol on Trade in Goods

Annex 5 of the AfCFTA Protocol on Trade in Goods provides for mechanisms of identifying NTBs, institutional structures for their progressive elimination within the AfCFTA and reporting and monitoring tools for NTBs. This begs the question: What obligations do AfCFTA state parties have with respect to ensuring elimination of NTBs?

Annex 5 to the Protocol establishes a reporting, monitoring and elimination mechanism where private sectors can file complaints on specific trade obstacles. The complaint is then forwarded to the responsible state party to give its feedback on the complaint and resolve it expeditiously. Additionally,

through the reported NTBs, improvements are made to the national and regional trade policies.

Government Obligations

State parties are required to appoint national NTB focal points to help resolve NTBs. The NTB focal points are thereafter trained in using the online tool, how to receive NTB complaints in real time and how to resolve the barriers within the set deadlines. Notably, the focal points will receive email alerts whenever a trader lodges a new complaint or a government comments on an ongoing case.

Goodwill from governments is an essential ingredient for successful elimination of NTBs since the AfCFTA mechanism is built on stronger foundations. In addition to the national focal points and public-private National Monitoring Committees, an NTB Coordination Unit will be created in the newly established AfCFTA Secretariat in Accra, Ghana. The NTB Coordination unit will monitor barriers and progress towards their resolution. Furthermore, state parties will be required

to ensure that an NTB sub-committee meets regularly to assess progress and challenges.

Creating Awareness in the Private Sector

State parties need to create awareness about the online platform to the private sector. This is owing to the fact that the NTB mechanism is available to all and sundry: micro, small and medium-sized companies, informal traders, and youth and women business operators. Through the AfCFTA NTB mechanism, all stakeholders have equal voices since the platform is transparent. Additionally, internet connectivity should be available at smaller border crossings so that informal traders do not face any obstacles while trying to make NTB complaints through the platform. Worth mentioning is that in places where there is no internet access, an offline short-messaging-service (SMS) feature will also be rolled out in the medium term.

Procedure for Elimination of Non-Tariff Barriers

State parties must exhaust

the existing online notification NTBs channels before escalating a complaint or trade concern to the AfCFTA level. However, there are additional procedures in resolving disputes. For instance, where a state party fails to resolve an NTB after a factual report has been issued and a mutually agreed solution has been reached, then the AfCFTA Secretariat and an appointed Facilitator will recommend dispute settlement.

Appendix 2 of the NTB Annex outlines mandatory processes and deadlines. For instance, an NTB complaint must receive an initial response within a period of 20 days. Moreover, if no resolution has been found after 60 days, then the parties should request for an independent facilitator to be appointed. If coming to a resolution is proving difficult, then parties can take the matter for dispute settlement.

Despite these deadlines and procedures being crucial, small traders could

be in need of a quick solution to the NTB on the ground. Looking at the Tripartite region online mechanism and the speed at which NTBs have been resolved, traders should have faith that they will receive swift assistance.

Language (non-tariff) barriers

Different traders speak different languages and for instance a Swahili-speaking truck driver from Tanzania may want to lodge a complaint about the number of import documents required when delivering cotton fabric to Rwanda. That complaint would then need to be sent to French-speaking Rwandese officials, raising a possible language barrier.

The NTB online tool mitigates potential language difficulties with a plugin that automatically translates complaints from English, French, Arabic, Portuguese, Swahili and 12 other African languages into the official language of the receiving country.

Conclusion

As East African traders envisage the end of the COVID-19 pandemic or at least its receding soon, their hope is that AfCFTA will be an encouraging stimulus for Africa's development. The groundbreaking online AfCFTA NTB mechanism is a good starting point. Suffice it to say, it will need considerable improvement before a rules-based, expeditious and binding arrangement will be in place. The absence of private complaints to a judicial forum remains a deficit. This is owing to the fact that complaints are dealt with on an ad hoc basis. This will not bring about permanent and systemic solutions. Instead, it will provide legal certainty, further predictability and establish binding precedents. The AfCFTA NTB mechanism is ahead of the curve globally. It is an innovation the world will want to watch closely to see what it can learn from Africa and the AfCFTA.



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