FACULTY OF LAWS

UCL

HUMAN RIGHTS JOURNAL

LAWYERS WITHOUT BORDERS UCL

Lawyers Without Borders UCL
2019 - 2020 Committee

TABLE OF CONTENTS

Letter From the Editor
~Hannah Tsang~ 01

Tactical judging vs evidence-based medicine – do judges really know it all?
~Aurelia Buelens~ 03

The Rule of Law in the International Legal System
~Daria Lysyakova~ 08

Catalan Trial Leader Impugns Adherence to the Rule of Law
~Elena Kluzer~ 13

Great Oxymorons: Wicked Laws and A Duty to Disobey
~Grace Chew Min Hwei ~ 17

How the failure of the Rule of Law perpetuates the evils of Human Trafficking
~James Pragnell~ 23

Devil Wears a Skirt
~Julia Juchno~ 27

Salvaging the Rule of Law
~Kathleen Teo~ 31

Law, Politics, and the Curious Case of Impeachment
~Nicholas Ng~ 38

LETTER FROM THE EDITOR

The Lawyers Without Borders UCL Human Rights Journal is an annual multidisciplinary journal aimed at instilling amongst students a culture of avid awareness towards legal and human rights affairs worldwide. Through being aware, we remain vigilant towards the ever-evolving world. We identify problems within local communities and the wider society. We make choices and decisions as to who we want to be, and what we want to do. We could become a part of making the world a better place for everybody.

The theme of this year's journal is the 'rule of law'. In the current socio-political context, this theme becomes intrinsically intertwined with our daily lives. According to Lord Bingham in '*The Rule of Law*' (2007) 66 CLJ 67, the core principle of the rule of law is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts". The issues this journal aims to tackle includes prevalent human rights issues like human trafficking, individual studies of the rule of law in areas such as healthcare, jurisprudence and the international legal system.

I would like to take this opportunity to thank the UCL Centre for Access to Justice (CAJ), the UCL Laws Communications Team and the LWOB UCL Committee for their help and support. I would especially like to thank Ms Shiva Riahi from the CAJ and Ms Jessica Luong from the Communications Team for their guidance. Most importantly, I would like to thank the Publications Team for their efforts. This journal would not have been possible without the dedicated work of our Publications team. The submissions this year are of exceptional calibre. Due to unfortunate and unforeseen circumstances, the publication date for this journal had been pushed back. Yet, I believe this makes this journal more relevant, because the topics covered in this issue remind us of the ever-present issues in society that deserve our attention.

LWOB UCL's Human Rights Journal has entered its second year of publication. As editor-in-chief of the journal, I am proud of what we have achieved. The breadth of topics and the depth of both legal and non-legal analysis promises an interesting read. I am confident that the Human Rights Journal would only grow in the coming years.

~ Hannah Tsang, Editor-in-Chief of the LWOB UCL Human Rights Journal 2019-2020

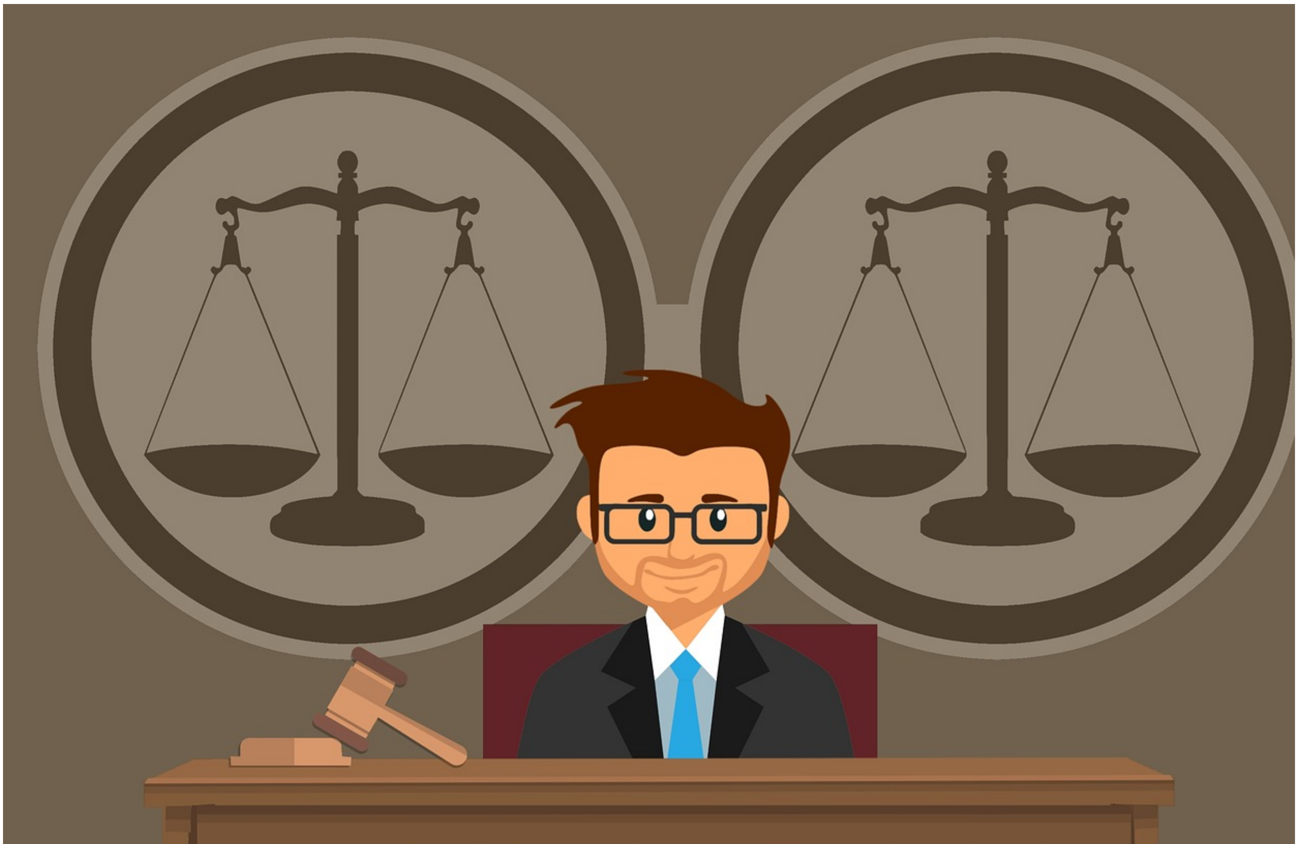
Theme: the rule of law

Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of peace, opportunity, and equity — underpinning development, accountable government, and respect for fundamental rights.

~ Rule of Law Index Report 2015, World Justice Project

the rule of law does more than ensure freedom from high-handed action by rulers. It ensures justice between man and man however humble the one and however powerful the other. A man with five dollars in the bank can call to account the corporation with five billion dollars in assets-and the two will be heard as equals before the law.

~ Dwight D. Eisenhower



TACTICAL JUDGING VS EVIDENCE-BASED MEDICINE – DO JUDGES REALLY KNOW IT ALL?

Aurelia Buelens

Do judges have the necessary knowledge and tools to determine the appropriateness of decisions made by medical professionals? A look at the Montgomery case.

The English legal system is a proud adherent of the Rule of Law – under which all are submitted equally to the law – and the fundamental principles and values it represents. Among those are notably the need for fairness, for justice to be delivered competently, ethically and impartially, with adequate resources. Whether this is truly the case in English courts is questionable when it comes to the competence of judges when dealing with the complexities of the medical profession. Given how long and arduous medical studies are, it can be difficult to comprehend how judges with no background in medicine are equipped enough to

appreciate the legality and appropriateness of the actions and decisions of professionals with years of experience. The case of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 in particular raises the issue of whether judges possess the necessary knowledge to make decisions on medical issues.

The story behind the *Montgomery* case is a tragic one. Nadine Montgomery was expecting her first child. She was of small stature, and as a diabetic, she was likely to have a large baby. She was therefore followed closely by a consultant obstetrician, Dr McLellan. During delivery, shoulder dystocia occurred and the baby was deprived of oxygen. He suffered from cerebral palsy as a result. Her case was initially brought to court on a claim of mismanagement of labour. However, when it was ultimately brought to the Supreme Court, after being rejected by the Scottish Court of Sessions and the Court of Appeal, the issue had become one of informed consent and proper antenatal counselling. While the lower courts did not find that Dr McLellan had been wrong not to advise her patient on the risk of shoulder dystocia and the adverse outcomes associated with it, the Supreme Court decided that it was incumbent on her not to discuss the risks and the alternative of a caesarean section. Out of this decision came the following legal test, 'therapeutic privilege':

"The doctor is... under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

At first glance, this legal test seems perfectly sound, and one would feel the decision was a fair and appropriate one for Mrs. Montgomery. However, the issue lies in the way the judges arrive at the decision. They took a significant step away from the orthodox position of English law, which had, until *Montgomery*, favoured clinical judgement. Indeed, in order to assess medical negligence, courts previously applied the *Bolam* test, as formulated by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582: "[A doctor] is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art."

The *Bolam* test was actually applied by the lower courts in *Montgomery*, who deemed Dr McLellan to have made the right decision based on her experience and skills as an obstetrician, based on statements and evidence they collected from the parties, witnesses and medical experts. They notably found that Nadine Montgomery was an intelligent, articulate and well-educated person, who knew that a caesarean section was an option but did not request one. Evidence showed that she was satisfied with the care provided by Dr McLellan, and that she and her mother (a general practitioner who had attended an antenatal appointment to discuss plans for delivery!) trusted her and her professional experience and skills. The informed consent claim may have been a fishing expedition, as the informed consent claim was not the first cause of action taken to claim compensation.

Curiously, however, the Supreme Court completely disregarded the evidence gathered by the lower courts. Without having even met the parties involved, they crafted a narrative with characters a far cry from the factual findings of the lower courts. In an attempt to promote patient autonomy against medical paternalism, the Supreme Court judges ironically turned Mrs Montgomery into a hypothetical and stereotypical patient, anxious and intimidated by medical professionals. Lords Kerr and Reed stated that "few patients do not feel intimidated or inhibited to some degree", painting Mrs Montgomery as a scared and spineless woman subjected to her doctor's whims. This seems difficult to accept considering Mrs Montgomery's degree in molecular biology, her job as a hospital specialist for a pharmaceutical company, and the fact that both her mother and sister were general medical practitioners. Yet the Supreme Court made her into the archetypal patient, a passive recipient of care, focusing exclusively on her anxiety regarding delivery.

In a similar fashion, the Supreme Court gave Dr McLellan characteristics which are difficult to reconcile with the findings of the lower courts. While the latter perceived her as an 'impressive witness' giving her evidence in a 'clear, coherent and consistent manner', with witness and expert evidence showing that she had delivered her services in a caring and empathetic way, the former decided that she was manipulative and motivated by her own personal moral agenda. Lady Hale made a particularly mordant statement: "Whatever Dr McLellan may have had in mind, this does not look like

a purely medical judgment. It looks like a judgment that vaginal delivery is in some way morally preferable to a caesarean section: so much so that it justifies depriving the pregnant woman of the information needed for her to make a free choice in the matter". The Supreme Court judges seemed quite eager to portray her as a doctor manipulating circumstances and withholding information to further her ideologies – a character which fits quite well within their narrative of the poor intimidated patient subjected to medical paternalism.

What's more, the Supreme Court judges' understanding of medical guidelines and evidence were flimsy at best. Lords Kerr and Lord Reed's statement that "the risk involved in caesarean section, for the mother is extremely small and for the baby virtually non-existent" particularly stands out for its erroneous understanding and over-simplification of the evidence. Guidelines issued by the National Institute for Health actually indicate, among other things, that there are higher risks of cardiac arrest or hysterectomy (surgical removal of the uterus following complications) associated with caesarean sections than with vaginal deliveries. The National Institute for Health and Care Excellence (NICE) issued clinical guidelines which states that "it is not mandatory for doctors personally to provide a surgical operation against their clinical judgement" – clearly overlooked by the Supreme Court judges. Their decision was based on the assumption that Mrs Montgomery should have been offered a caesarean section regardless of her asking for one, despite the fact that her doctor's view that it was not appropriate at the time was supported by both medical experts and medical guidelines.

This is difficult to reconcile with the law's accepted position, recently set out in the 2013 Supreme Court case of *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, that medical discretion is paramount, and that the appropriateness of offering treatment is a matter of clinical – not judicial – assessment. This decision calls into question the integrity of the judges and whether they are ill-equipped to make such medically-related decisions. With regards to the rule of law, it sits uncomfortably with the idea that issues of liability should be resolved through the exercise of the law, not the exercise of discretion. Considering that it feels like the outcome was tactically achieved in a way aimed at justifying Mrs Montgomery's claim and giving her a positive outcome, it seems that the judges only achieved the latter. They unjustifiably

overrode expert evidence, despite the fact that it was well within the limits set out in *Bolitho v City and Hackney Health Authority* [1996] 4 All ER 771 (i.e. it was given by a reasonable and responsible body of medical experts, capable of withstanding logical analysis).

Given how essential clinical freedom is, the *Montgomery* decision sets out a worrying precedent. As medical professionals are held at a higher standard of care than the average reasonable person, it is difficult to see how it would be fair and appropriate for the law to prevent them from exercising their professional judgement and providing proper care by making them worry any decision they make would be scrutinised by a group of judges with a poor grasp of medical evidence, benefits and risks. It would fail to promote both the adequate conditions in which medicine can flourish and the necessary competence and impartiality demanded by the rule of law.

THE RULE OF LAW IN THE INTERNATIONAL LEGAL SYSTEM

Daria Lysyakova

Over the past couple of decades more than thirty international courts and tribunals have come into existence and there are now around 250 international judges.[1] This reflects the growing intention of States to subject themselves to international decision- making authorities and adjudication in order to preserve an international rule of law. In discussing how the rule of law functions within the international legal system the first section of this article will focus on defining the rule of law and how this translated into the international sphere. The second section is devoted to examining the ways in which the international judiciary operates, focusing specifically on the process of election of international judges, how this interacts with their duty of independence and impartially and the implications this has for the rule of law.

The rule of law is an elusive concept which anyone would struggle to define without some degree of hesitation. We can, however, note some recurring features within various definitions of the rule of law: the law should treat its subjects equally, it should be prospective and not retrospective, it should be relatively stable, etc. In his 1977 Article "The Rule of Law and its Virtue" Joseph Raz sets out eight features the law must have in order to guide conduct within a particular society: (i) laws should be prospective and clear; (ii) laws should be relatively stable; (iii) the making of laws should be guided by clear open and stable rules; (iv) an independent judiciary must be guaranteed; (v) natural justice must be observed; (vi) courts should have powers of review; (vii) courts should be easily accessible; and (viii) the law should not be perverted for the purpose of preventing crime.[2] While Raz's approach is far from the only possible definition of the rule of law, it is one that is widely accepted and most useful for our purposes. It is clear from Raz's definition that the courts and judiciary play an essential role in upholding the rule of law.

The central position of the judiciary in preserving the rule of law is the reason behind the focus of this article on the

1. P. Sands, "*Global Governance and the International Judiciary: Choosing Our Judges*", 56 Current Legal Problems (2003), 2 .
2. J. Raz, '*The Rule of Law and its Virtue*', The authority of law: Essays on Law and Morality (1979).

development of the international judiciary. In recent decades the proliferation of international courts and tribunals seems to reflect the increased willingness of States to subject themselves to independent international decision making bodies. It is important to remind ourselves that in the international domain, the power of courts to adjudicate on disputes is subject to State consent to their jurisdiction. Without such consent, whether it is attributed on an ad hoc or standing basis, an international court or tribunal would not have the power to resolve a dispute which involves the non-consenting state - it would lack jurisdiction. By consenting to the jurisdiction of any international court or tribunal a State agrees to limit its sovereignty and puts (often highly contentious) matters in the hands of international judges as opposed to keeping them in political fora. But, who are international judges? How are they selected or elected to their roles? Where do they come from? What are their expertise? How independent and impartial are they? Are international courts just another political forum where powerful states always hold an advantage? Understanding how international judges are selected and how they resolve international disputes is essential to our understanding of the role of the rule of law in the international law system.

The decisions of international courts will impact states, corporations, individuals, and communities, therefore the question of judicial appointment is a crucial one in the establishment of an international court. The process of selection of judges will influence the efficiency of the tribunal and will also impact its perceived legitimacy.[3] Indeed, if it becomes apparent to a State that an international judicial organ does not represent its interests or values, it may seek to frustrate that body's authority. [4] The Statute of the International Court of Justice (ICJ), the principal judicial organ of the United Nations, sets out that "The Court shall be composed of a body of independent judges, elected regardless of their nationalities from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices [...]". [5] The process for the selection of judges to the ICJ is further detailed in Articles 3-13 of the same statute. Generally, States are the main or sole actors involved in the selection of judges, and while they do not have direct influence over a judge's reasoning in particular case, they will try to influence international courts in other ways, such as by selecting judges who are known to have certain political views and

3. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 8.
4. ibid.
5. ICJ Statute, Article 2.

considered likely to uphold the interests of the nominating state should that state appear in front of the court. [6] The judicial selection process is therefore inherently political.

A few examples can help demonstrate the types of factors that may influence States in the selection process. In 1960, Sir Gerald Fitzmaurice, the Legal Adviser of the United Kingdom Foreign Office, responded to an informal enquiry on a potential candidate to the ICJ, the Belgian judge M. Nisot by stating that he has "a very difficult personality" but "despite his cantankerous nature and the jaundiced view that he takes of most things, there are a number of points in his favour". [7] Here, the supposedly "difficult" character of the candidate was a factor taken into account by no less than a permanent member of the Security Council preceding the judicial selection process.

Aside from political affiliations of judges, other factors may be decisive in the judicial selection process. An International judiciary must be seen to represent the member states which submit to its jurisdiction, otherwise the legitimacy of its decisions can easily be brought into question. For example, it is essential that no judge at the ICJ has the same nationality as another judge [8] and the panel of judges as a whole must represent the principle legal systems of the world. [9] Similarly, the statutes of the International Criminal Court (ICC) and African Court of Human and Peoples Rights (ACtHPR) call for adequate gender representation to be taken into account in the judicial selection process. [10]

Any disputes arising within the sphere of international law is inherently political. For this reason, judicial selection processes in international courts are subject to increasing state and public scrutiny. It is apparent that the factors taken into account by states in the judicial selection process are not necessarily reflective of the factors fleshed out in the court's statutes, and these statutes are not treated as providing exhaustive lists of qualities an international judge must possess. This brings us to question whether international judges can ever truly be impartial? Is it not in their best interest to uphold the interests of their nominating state? [11]

This leads us to consider international judicial ethics. While judicial ethical standards are well established in national systems, their applicability in the international system is not straightforward. Notably, different member states have

6. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 10.
7. P. Sands, "*Global Governance and the International Judiciary: Choosing Our Judges*", 56 Current Legal Problems (2003), 1.
8. Statute of the ICJ, Art. 3.
9. Statute of the ICJ, Art. 9
10. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 13.
11. P. Sands, "*Global Governance and the International Judiciary: Choosing Our Judges*", 56 Current Legal Problems (2003), 8.

different judicial ethical standards. Moreover, in a system in which judges are selected by states which may later become parties to a dispute before them, ethical judicial practice takes on a different meaning.[12] Nevertheless, in order to uphold the rule of law in the international legal system, judges must uphold the principles of independence (from external influence) and impartiality (from internal predisposition).

Judge Buergenthal of the ICJ has doubted whether international judicial ethics could ever be "exhaustively defined", stating that "they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy".[13] There is, nevertheless, growing consensus amongst international judges on appropriate ethical standards. Empirical evidence attributes this to common legal education - many international judges attended the same universities.[14] In her study on international legal ethics, Shelton points out that there is a trend to adopt judicial ethical standards amongst international tribunals.[15] For example, the ICC, European Court of Human Rights, World Trade Organization and the Caribbean Court of Justice have adopted codes of ethics.[16]

Judges' exercise of independence does not always go unchallenged. Certain African courts have experienced a backlash against their decisions from state parties who deemed that the courts were impeding on their national interests. In 2009, the Gambia sought to restrict the power of the West African court ECOWAS to review human rights complaints after it upheld opposition journalists' allegations of torture. It was unsuccessful.[17] However, following its 2008 ruling in favour of white farmers in disputes concerning land seizures in Zimbabwe,[18] SADC (a Court in Southern African) experienced significant political backlash which led to the adoption of a new protocol, which removed the right of private litigants to bring cases before the court and permitted its members to withdraw from the Tribunal's jurisdiction by giving 12 months of notice.[19]

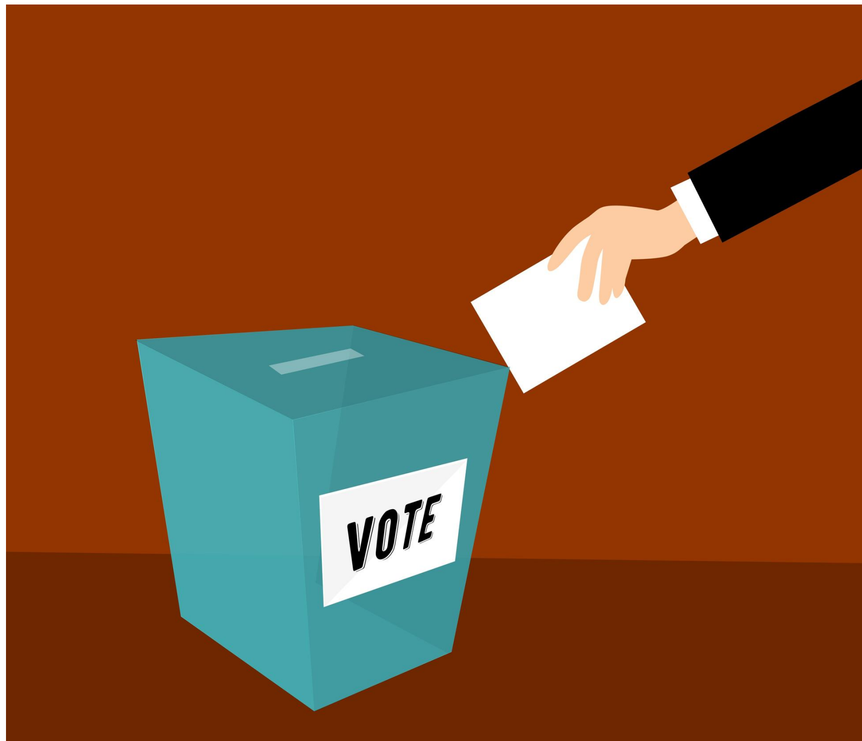
Judges in international courts are not asked to become absolutely neutral and ignore their personal backgrounds, as it is those backgrounds, legal and personal, which make them valuable members of the court.[20] They must, however, avoid bias and personal prejudice. If a judge believes that there is a reasonable possibility that they would be perceived as biased (as opposed to exercising actual bias), they must recuse themselves from the case to preserve the legitimacy of the court.[21] Appeals to decisions of

12. Seibert-Fohr, '*International Judicial Ethics*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013),1 .
13. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 3.
14. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 13.
15. D. Shelton, "*Legal Norms to Promote the Independence and Accountability of International Tribunals*", 2(1) The Law and Practice of International Courts and Tribunals (2003).
16. ibid.
17. K. Alter, J. Gathii and L. Helfer, '*Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*' (2015) iCourts Working Paper Series, No. 21, 2.
18. *Campbell and Others v. Zimbabwe (Merits)* [2008] SADCT 2.
19. D. Shelton, "*Legal Norms to Promote the Independence and Accountability of International Tribunals*", 2(1) The Law and Practice of International Courts and Tribunals (2003), 15-22.
20. Mackenzie, '*The Selection of International Judges*' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 3.
21. Mackenzie, 'The Selection of International Judges' in Romano et al (eds), The Oxford Handbook of International Adjudication (2013), 6.

international courts and tribunals have been raised on this basis. For example, President Milosevic appealed the decision in *Prosecutor v. Anto Furundzija* at the ICTY on grounds of lack of impartiality.[22] Similarly, in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Judge Elaraby's participation in the case after a controversial newspaper interview about his views on Israel was questioned, though the court did not consider this a sufficient basis to exclude him from the case.[23] Judge Buergenthal dissented, stating that the court had a duty to preclude the "appearance of bias" that a judge may not be able to consider a case impartially.[24] Conversely, in *Prosecutor v Sesay* the Special Tribunal for Sierra Leone disqualified Judge Robertson who had previously written a book calling for the prosecution of the leaders of the rebel group for crimes against humanity due to a legitimate reason to fear that he lacks impartiality.[25] If we accept that judicial independence is a necessary precept to the rule of law, ensuring that judges maintain independence in the highly political environment of international law is a vital aim.

The proliferation of international courts and tribunals signals the willingness of the international community to create an international judiciary which can issue binding decisions on disputes involving States. This is a welcomed trend which shows that the community as a whole wishes to create a stronger international legal system, achieve greater clarity and coherence in international law and create an accessible and independent judiciary, furthering the rule of law in the international system. However, States maintain a significant degree of influence over international courts. Political factors impact both the selection of international judges and their exercise of independence and impartiality as members of the court. It is therefore difficult to determine whether the international system, as it currently stands, truly adheres to the rule of law. One thing is certain; there is room for improvement.

22. ICTY, Prosecutor v. Anto Furundzija, Appeals Chamber, Judgment of 21 July 2000.
23. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for an Advisory Opinion), Order of 30 January 2004 (Composition of the Court).
24. ibid.
25. *Prosecutor v. Sesay*, Decision on defence motion, seeking the disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, Special Court for Sierra Leone.



CATALAN TRIAL LEADER IMPUGNS ADHERENCE TO THE RULE OF LAW

Elena Kluzer

On October 14th 2019, the Spanish Supreme Court found nine Catalan separatist leaders guilty of sedition and sentenced them to imprisonment between nine and thirteen years, but all nine leaders were acquitted of the most serious charge —rebellion. From the moment of arrest to sentencing, the Spanish government and judiciary have been heavily scrutinised for their handling of the matter. The arrest and trial process raised questions as to whether the employment of Spanish law in this case upheld the rule of law. The right to a fair trial and proportionality were at risk, and both principles are fundamental to the rule of law. While the Spanish authorities were working within the law and the constitution throughout the duration of the trial, one can question whether this is enough to hold true to the rule of law – is a harsh trial where politicians advocating for

independence were painted as criminals the right way forward towards political stability in Spain?

What is the rule of law?

The United Nations has deemed the rule of law a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights. It is therefore up to the separate branches of government to uphold the rule of law. Spanish laws were adhered to in the present circumstance. However, to an external observer, elements of the trial seem to have gone amiss.

The Spanish constitution

Under the Spanish constitution, it is illegal to hold an independence referendum. There is an expectation in international law to respect territorial integrity, so this is not contrary to international law and the legality of this constitutional provision is not questioned. However, the knock-on effects it has on democracy and the rule of law are alarming. By disallowing such referendums, Spain is silencing a portion of the population and denying the right to self-determination. Whilst it may be within the legislature's right to do so, it would mean that the country could be torn by political strife until some sort of compromise could be reached.

Pre-trial shenanigans

Following the attempted referendum, subsequently declared to be void, twelve separatist figures were arrested and charged with sedition and rebellion for holding the referendum. The criminal trial that followed was presented by the Spanish government as an act of justice. However, the reality of the situation was that this was a way of handling the political strife that the nation has been dealing with, with regards to the drive for Catalan independence. But was a criminal trial, rather than political negotiations, really the way to go?

Prior to commencement of the trial, the leaders were detained for almost a year. The UN working group on arbitrary detention (UNWGAD) published a report concluding that the detainment of the prisoners was arbitrary and that they should be released. It held the view that the detainment went against the Universal Declaration of Human Rights and the UN's International Covenant on Civil and Political Rights. This report was ignored by Spanish authorities, who explained their actions as being within the bounds of the criminal code, specifically Article 503. However, Ben Emmerson QC, a British barrister specialised in international law and human rights, said that Spain was

acting in violation of international law, and it would find itself struggling against international public opinion if it did not release the prisoners. Indeed, this detention was an attempt to silence the leaders and curb the separatist movement by dissuading the Catalan population from secession. While legal, it does not sit well with the right to freedom of expression afforded by the rule of law.

A politicised trial?

In the trial, the leaders faced charges of sedition and rebellion. They are grave crimes which require violence or the incitement of violence on the part of the accused. Is this a proportionate response and charge to a political dispute ongoing for decades? And did the involvement of a political party really have a place in this trial?

An ex-Supreme Court judge of Spain claimed that the leaders should not have even been brought to a criminal court, as what they did was not a crime – it may have been considered public disorder, but not a crime as serious as rebellion or sedition. However, these were the charges presented. Nevertheless, footage of the referendum, however contrary to the Spanish constitution, shows that it was the Spanish police using excessive force and deploying anti-riot equipment in the face of civilians, rather than violence, or incitement of it, on part of those arrested. The lack of proportionality, which is a requirement of the rule of law, in bringing these charges suggests that there was a political drive behind the trial, affecting its fairness.

The political nature of the trial was mostly evident through the involvement of the opposing far-right Spanish party, Vox, which was made part of the prosecution team. There is a provision of Spanish law that allows citizens and organisations to act as people's prosecutors, which was introduced to add legitimacy to a system that used to be corrupt. However, in modern-day Spain, the involvement of the political party does not have that effect. Indeed, it serves to highlight the political tensions that are present in the country. Vox's demand for a much longer sentence than the public prosecution was not heeded by the judiciary. Nonetheless, there is arguably a conflict of interest, which undermines the right to a fair trial, one of the cornerstones of the rule of law.

This criminal trial puts the Catalan issue in the spotlight. Spain tackled the issue of the independence referendum with the full force of its legal system. While the government observed the law, international opinion was

opposed to the situation, which arguably called for political talks. Elements of the trial seemed to contradict the rule of law, with an aim of boycotting the independence movement. If this was an attempt to deal with the political tensions in Spain, this criminal trial is certainly not the end of the story. If anything, it is the beginning of a new chapter.

GREAT OXYMORONS: WICKED LAWS AND A DUTY TO DISOBEY

Grace Chew Min Hwei

Like peanut butter and jelly or rock and roll, law and morality are two things that are commonly associated with one another. Morals play a critical role in the formation of laws, as lawmakers utilise their moral compasses to determine which laws should be enacted in order to reflect the morality of society. On the other hand, the law of a society encourages, incentivizes and pricks at the moral conscience of citizens in an effort to inculcate principled, moral behaviour in their daily living. Thus, law and morality play a salient role in shaping and defining society and the conduct of its citizens. However, it is crucial not to conflate the two, and while it is true that law and morality often overlap and coexist, this is not invariably so.

The existence of "wicked" legal systems is a testament to this. What are wicked legal systems? As David Dyzenhaus's "Hard Cases in Wicked Legal Systems: Pathologies of Legality" states, a wicked legal system is one where the "soundest theory of law is composed of repugnant moral principles".

Such a legal system is made up of wicked laws, which are laws deemed to be unscrupulous and immoral. Textbook examples of such systems include the Apartheid legislation of South Africa and the legal system in Nazi Germany. In these legal systems, laws were enacted with the clear motive of disempowering specific groups via tyrannical means, such as authorising extreme violence and prosecution. These laws clearly were wicked: they were im-moral.

Should law and morality be separated?

The phenomenon of wicked legal systems demonstrates a dichotomy between law and morality which challenges the view of natural lawyers. Natural lawyers are proponents of the view that law and morality should not be separated, one of their reasons being that this separation would be politically dangerous because it would weaken resistance towards state tyranny. On the contrary, positivists believe that the separation of law and morality is a central tenet of the utilitarian tradition, which

involves the distinction between what law is and what law ought to be. This disagreement is fertile ground for the discussion of the central question: should law and morality be separated?

Personally, I favour the positivist's view and believe that a distinction should be made between law and morality, i.e. they should be kept separate. For one, the belief that law and morality are a single unit fails to explain the existence of wicked legal systems as aforementioned, as they diametrically contradict and disprove this view. In response to this, natural lawyers argue that wicked legal systems are not legal systems at all. To them, a law that is morally corrupt is not a law and cannot be one, because of the necessary connection between law and morality. At the very least, even if it is in theory deemed a "law", the natural lawyer would argue that it was not a law in the full-bloodied sense, and that it was not really a law.

But this is a weak response and my reasoning is simple. How can a legal system not be a legal system, and a law not be a law? To claim otherwise would be to split hairs and stand contrary to common understanding. By stating that immoral laws are not laws, the choice is made to avoid dealing with these very laws - they are instead brushed under the carpet, and it remains ambiguous how the public at large should deal with them. The fact is that the natural lawyer's view is unable to explain wicked legal systems, and that is problematic.

The draw of the natural lawyer's view is that it places great emphasis on the notion that all laws should be moral, and thus it appeals greatly to our own sense of morality. In comparison, the positivist's view thus prima facie appears to suggest the opposite. But this could not be more wrong. Positivists are merely saying that a separation and distinction should be made between law and morality, they are not abandoning morality (alas, it would be absurd to think of all positivists as depraved, evil-loving individuals). They, in fact, do the opposite. By separating law and morality, positivists acknowledge that wicked laws are indeed laws, but continue by stating that individuals should not follow such laws, for the very reason that they are wicked and immoral. With such a distinction in place, individuals are able to make clear moral judgments and criticisms about the law. This prevents the risk of an overly reactionary culture from developing, which is a disadvantage of the natural lawyer's point of view. According to the natural lawyer's reasoning, people would

think "because x is the law, it must be moral". Such a reactionary attitude would be harmful to society, especially if x were a law that were clearly immoral. Positivists avoid such difficulties, and instead support a more nuanced approach, upholding that "if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience" (H.L.A. Hart, "Positivism and the Separation of Law and Morals").

The worry that the separation of law and morality could lead to anarchy is unlikely to be one of big concern, as 'immoral' laws are likely to be a small minority in societies. Moreover, it is inaccurate to make a blanket statement that law and morality are always connected, because this is not necessarily so. For instance, a state may enact certain laws which are extremely technical in nature - such as the property law statute that "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed." (s.52, LPA 1925). In this enactment of law, there is no necessary connection with morality. Rather, such a law is concerned with the formalities of a conveyance of land, namely that it has to be done via deed. Therefore, law and morality are not always connected.

Back to basics: The Rule of Law

How does all this tie in with the rule of law? A key aspect of the rule of law involves the existence of laws which are just. As defined by the World Justice Project, just laws refer to laws which are "clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights." Therefore, the connection and 'togetherness' of law and morality seems intrinsic. It is thus easy to see why the separation of law and morality might appear to contravene the rule of law. However, as earlier clarified, the separation of the two does not amount to the removal of any one.

Instead, whether the rule of law is broken is not determined by the existence of a separation of law and morality per se. Rather, it is determined when the very element of morality is *absent* from the picture. For such immoral laws, the violation of the rule of law makes them bad laws, which justifies withholding obedience to them. The rule of law thus continues to be an integral standard to factor in during the creation of new laws, and reinforces that morality should play a critical part in the

creation of just laws.

A duty to disobey 'wicked' laws?

Acknowledging that laws have the potential to be wicked, the subsequent duty to disobey is also a fragile matter to handle. In an age of activism and increasing rebellion, it has become greatly important for a society to strike the delicate balance of allowing citizens to voice their dissent about certain laws, while at the same time keeping anarchy at bay. As upheld by positivists, disobedience is needed when citizens are faced with laws that are 'wicked'. Such disobedience is specifically known as civil disobedience. With an emphasis on it being "civil", this form of disobedience functions for a legitimate reason of sparking social change. It is defined in Joseph Raz's "The Authority of Law" as being "a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or a public policy."

The voice of Muhammad Ali in light of the 1955-1975 Vietnam War and the draft evasion remains a prominent example of the role and impact of civil disobedience in society. In that case, Ali (along with many others) publicly refused to comply with the military draft law which made conscription to the military compulsory for them, as he believed it was unconstitutional. Such civil disobedience is not a phenomenon of bygone times. Today, civil disobedience continues to prevail through society, all around us. We see this from the impassioned hearts of Extinction Rebellion protestors, who believe they have no choice but to be civilly disobedient because of the government's lack of action toward climate change - even if it means being chained to buildings or wilfully arrested for their cause. We see this in the Indians who believe that civil disobedience can empower India against the Bharatiya Janata Party's display of malice when it seems to act in contrary to constitutional principles. We see this in the ongoing George Floyd protests from millions around the globe, who have rallied together to denounce systemic racism and police brutality in the United States. We see this in them, and others who believe that the laws they are supposed to follow are unconstitutional, and plainly, wicked.

But how does one define a wicked law? When does this duty to disobey step in? We must be careful in analysing whether a law is or is not wicked, and should be slow to be civilly disobedient. In society today, there are

generally only a small number of laws which can be considered to be which are wicked and subjectively immoral. Controversial laws exist, yes, but they are not synonymous with wicked laws. With controversial laws, many polarising views arise due to the contradiction of strong opinions , and the very point is that no singular moral principle can be concluded. These are difficult and complex situations, and one must look at the reasoning behind such laws and consider all views. There is almost certainly going to be a party which does not get what it wants after the state conducts a cost-benefit analysis of the situation and makes a judgment call. However, the existence of a law which does not cohere with our opinion does not justify civil disobedience. There is a great difference between obstinately needing to get one's way on one hand and on the other hand, making a statement about a law which corrupts morality at large. In the case of controversial laws, there is bound to be a give and take, where citizens might be required to follow the law even if it is not what they particularly think is best.

Context is thus king. When dealing with dissent, it is crucial for us to step back and ask: what should we tolerate? Are the dissenters being foolhardy? Are they motivated by their own subjective, personal reasons? Or do their reasons stem from a genuine belief that the law is immoral and damaging to society? As Dworkin suggests, an example of a relevant principle for determining whether or not to accommodate dissent would be to balance leniency with the policy pursued. Here, one would have to look at the damage the individual's behaviour does, and balance it with the policy they are pursuing. Where the law did not uphold moral rights, it would be a powerful argument in support of tolerating the violation of that law. Moreover, in Dworkin's 1977 book, "Taking Rights Seriously", he highlights two other key factors: the impact of an act of civil disobedience on others, and the risk of that act leading to general disobedience. Therefore, such factors have to be carefully accounted for in order to ascertain whether an act of civil disobedience should be accommodated.

I personally believe that when an act of civil disobedience is clearly thought through and justified, it should not be prosecuted. This is because the disobedience is, at its core, civil. It is purposed to affect social change that is for the greater good of the society. As long as the act of civil disobedience does not result

in the breaking of unrelated laws (e.g. extreme violence or the commission of other crimes), I believe that the advantages that civil disobedience bring to a society do have value. Ultimately, it remains centrally important for lawmakers to honour and revere the rule of law, and to nip the problem in the bud by enacting laws which reflect the morality of its citizens as closely as possible. However, if there is one thing that the great oxymorons of wicked laws and the duty to disobey have taught us, it is that things are hardly as straightforward as they seem, and it is very possible for laws to fall foul of the rule of law. Nonetheless, all hope is not lost. When we find ourselves in the grey area of a potentially wicked laws, I believe that it crucial for us to be clear-thinking, reasoned and kind in the way we move forward, even if we are on the path of strong dissent.

Rena Schild / Shutterstock.com

HOW THE FAILURE OF THE RULE OF LAW PERPETUATES THE EVILS OF HUMAN TRAFFICKING

James Pragnell

The billion-dollar industry of Human trafficking is one of the most severe yet unresolved worldwide human rights issues today. Vulnerable persons are deprived of basic freedom and self-determination. The International Labour Organization estimates that there are 40.3 million victims of human trafficking globally, 25% of which are children. Conflicts, inequality, poverty and violence drive vulnerable people looking for employment and safety into the hands of international traffickers where they risk being coerced into forced labour or sexual exploitation.

Sexual exploitation forms the majority of reported human trafficking cases, largely involving forced marriages or involuntary prostitution. In 2017, an estimated 1 out of 7 endangered runaways reported to the National Center for Missing and Exploited Children were likely child sex trafficking victims. Only 1% of victims are ever rescued from trafficking.

Whilst, human trafficking still exists in every

country, almost two-thirds of modern-day slavery occurs in Asia. Although many factors contribute to this, one thing above all prevents the combating of this evil, the lack of adherence to the rule of law.

So why discuss this now? The Essex lorry deaths in October 2019 where the bodies of 39 Vietnamese nationals were found in the trailer of a refrigerator lorry shocked many. They, are thought to have been the result of global human trafficking ring. This has reignited discussions
within the UK over what developed countries can do to further combat modern day slavery originating outside their own borders.

Beyond this, the dangers of human trafficking have never been higher. Thailand reported a record number of human trafficking cases last year at three times the amount of 2018. Clearly, pressure is on to identify long term solutions to trafficking.

When determining how to improve the combating of trafficking, we must consider why human trafficking isn't currently being effectively prevented. The rule of law issue arises where poor law enforcement, inadequate legal protections and corruptions within the courts means that the presence or absence of anti-trafficking laws is worth little. Laws that exist to prevent trafficking simply are not enforced.

This can be seen through the falling conviction rates for trafficking related crimes. A report conducted by the UN found that only 762 people were convicted for European related trafficking offences in 2017, over 5 years the conviction rate had fallen 25% despite the ever-rising numbers of victims. In 2017, Thailand prosecuted merely 62 defendants, including nine Thai government officials, for human trafficking, which is only two-thirds of the number apprehended.

The Burmese Rohingya is an ethnic Muslim minority group extremely vulnerable to exploitation. The Rohingya are not recognised as citizens of Burma by the government, therefore they are denied the basic and fundamental protections of the law.

Burmese armed forces (Tatmadaw) operations in several areas of the country continue to dislocate thousands of Rohingya and members of other ethnic groups. Traffickers connected to the junta are not prosecuted by the government. Between 2012 and 2015, an estimated 170,000 Rohingya

people have been the victims of trafficking.

Similar exclusion from the protections of the rule of law is faced by citizens of North Korea and China. Defectors fleeing the North Korean regime risk fell into slavery when dealing with smugglers. Many were sold "like fish" to be forced brides for Chinese men.

The suffering does not end there, the Chinese government does not consider these people to be refugees or asylum-seekers, resulting in caught defectors being deported back to North Korea where they face imprisonment in cruel slave labour camps. An estimated 200,000 men, women and children are currently being held by the North Korean Government in these camps.

The Chinese government also fails to suppress many types of trafficking as legislation only considers human trafficking to exist where there is abduction; forced labour undertaken to repay debts and sexual exploitation remains unrecognised as slavery.

However, we cannot ignore the major accomplishments and advancements made in ensuring the evil of human trafficking is successfully combatted with the rule of law.

The '2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' is the standard of human trafficking prevention, it has the effect of harmonizing and ratifying international definitions and method of fighting slavery. Unfortunately, many countries, such as Thailand, have failed to ratify the protocol's commitments to anti-trafficking despite being signatories. Many more have not signed the protocol at all.

Governmental cooperation with anti-trafficking and victim support charities such as Polaris has been successful in improving rule of law standards. For example, rule of law improvements in the Philippines has been positive where the Aquino administration was able to channel additional resources toward its domestic anti-trafficking body, the Inter-Agency Council Against Trafficking, over tripling the convictions of traffickers and quadrupling the number of victims rescued working with the Visayan Forum Foundation.

When considering efforts made by other nations, we must realise the mere existence of trafficking laws does not mean they are enforced, further attention must be brought to law enforcement and the conviction rates

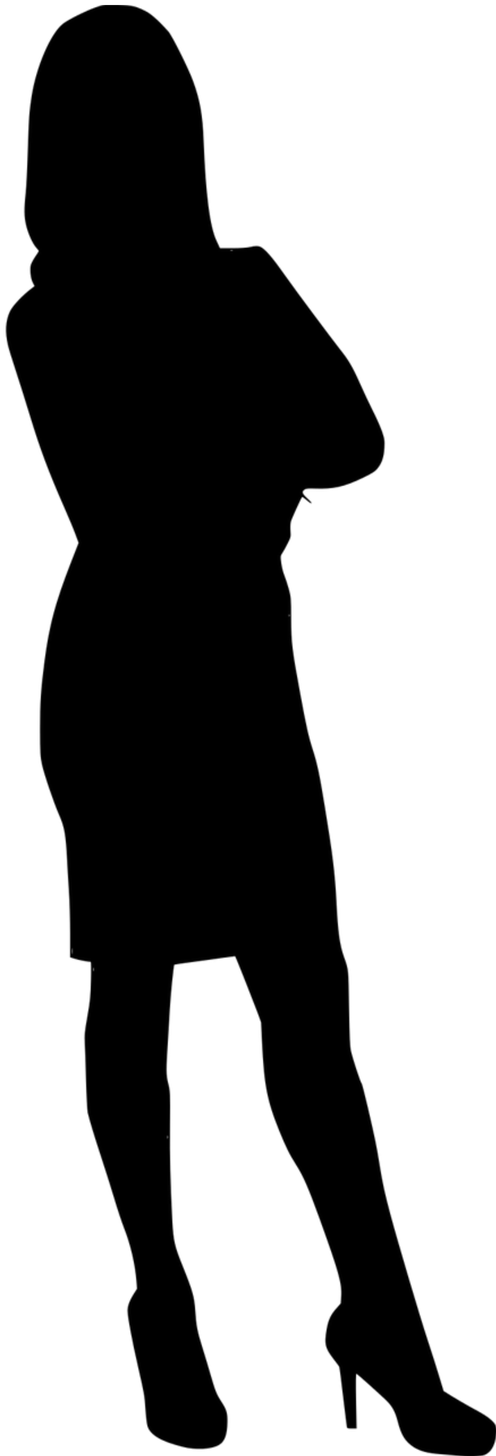
of apprehended traffickers.

Responsibility is on Europe and other developed nations to assist in battling trafficking overseas. This is perhaps best achieved through setting legal conditions before trafficking aid is provided to combat rule of law deficiencies. Funding to rescue victims is wasted if their attackers are never brought to justice. Benchmark conditions such as ensuring adherence to the rule of law by improving judicial protections for refugees, increasing the prosecution rates of apprehended traffickers and offering no tolerance for governments that knowingly permit and assist in slavery must be implemented prior to financial aid.

More work still is required to end to evils of human trafficking, meaningful and impactful solutions are possible, but will require concerted international efforts.

DEVIL WEARS A SKIRT

Julia Juchno



How gender stereotypes and the perception of female offenders in society translate to differential treatment within criminal justice system

According to the Ministry of Justice, in 2017 in the United Kingdom 74% of defendants prosecuted were male, and 26% were female. However, the conviction ratio in 2017 for female offenders equalled 88%, compared to 86% for male offenders, a trend that remains consistent over the past decade.[1]

There is an ongoing scholarly debate about how male and female offenders are perceived by both the public in general and the representatives of the justice system and how this influences criminal justice response. Stereotypes and social norms undoubtedly affect most of the defendants facing the trial to a certain extent. What do we, as a society, tend to have in mind when confronted with feminine crimes? Are there any specific presumptions about the female offenders that lead to actual differential treatment in courts?

1. Statistics on Women and the Criminal Justice System 2017. A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991, p. 35.

JUROR'S STEREOTYPES FOR FEMALE OFFENDERS AND THEIR ROLE

It has been demonstrated by various researchers that in general, the defendants which are congruent with jurors' stereotypes for a particular social group, race or gender, are more likely to face harsher response of the criminal justice system. According to the study conducted in 2004 by Forsterlee, Fox, Forsterlee and Ho, females committing crimes such as fatally wounding their work colleagues received significantly lower[2] sentences than their male counterparts. Moreover, prosecutors are less likely to file charges against [3]females committing drug-related offences. This has been explained in terms of the general stereotypical perception of women as physically weaker, less dangerous and lacking[4] the ability to inflict harm on others. The existence of the presumption that it is the male gender that tends to possess traits congruent with the criminal stereotype affects the severity of justice system's response. However, does it influence the strengthening and reinforcement of the traditional, stereotypical female traits? Is it not true that it can encourage society to label men as belonging to the dominant culture, which pushes them to evil acts, and women as serene, good-natured and passive?

FEMALE OFFENDERS – CRIMINAL DEVIANTS?

Helena Kennedy, who acted as junior counsel for a child murderer Myra Hindley, explains that such label is, indeed, present and that is why the offenders who are not perceived as a part of the dominant culture are more likely to be mythologised as wicked creatures representing everything that is "unnatural" for women.[5] The consequences for females who indulge in criminal offences are enormous.

There is evidence to support the claim that defendants who are incongruent with offender stereotypes sometimes in fact face much more severe charges that their congruent counterparts. It has been found that women committing sexual harassment were far more likely to be found guilty than males charged with this offence.[6] This finding depicts how the existence of gender-related presumptions influence criminal justice response in another way than previously discussed. Barbara Cowen argued that female offenders receive longer jail sentences when convicted of murder for the reason that their conduct deviates from deeply rooted social

2. Forsterlee, L., Fox, G. B., Forsterlee, R., & Ho, R. (2004),*The effects of a victim impact statement and gender on juror information process- ing in a criminal trial: Does the punishment fit the crime?* , Australian Psychologist, 39(1), 57-67.
3. Saulters-Tubbs, C. (1993), *Prosecutorial and judicial treatment of female offenders*. Federal Probation, 57(2), 37-43.
4. Mann, C. (1984), *Female crime and delinquency*, Alabama: The University of Alabama Press.
5. Helena Kennedy, T*he myth of the she-devil: why we judge female criminals more harshly*,The Guardian [Internet]. 2018 Oct 2 [cited 2020 Jan 6]. Available from: https://www.theguardian.com/uk-news/2018/oct/02/the-myth-of-the-she-devil-why-we-judge-female-criminals-more-harshly
6. Wayne, J. H., Riordan, C. M., & Thomas, K. M. (2001), *Is all sexual harassment viewed the same? Mock juror decisions in same- and cross-gender cases*, Journal of Applied Social Psychology, 86(2), 179, 187.

expectations for the role of female gender and feminine nature.[7] She also underlines the fact that female criminality is usually attributed to the inherent nature of women, who are perceived as "victims of their own biology", which steers the society towards mythologization of female offenders aforementioned.[8]

THE MOORS MURDERER AND OTHER "SHE-DEVILS"

In order to visualise how it works in reality, an example of Myra Hindley herself can be used. Hindley participated in carrying out murders of five children aged between 10 and 17 and sexually assaulted four of them together with her partner, Ian Brady. Hindley was at first sentenced to 25 years in prison before being considered for parole, however this was prolonged to 30 years by the Home Secretary in 1985. Between December 1997 and March 2000 she repeatedly appealed for parole, however successive Home Secretaries refused her appeals, prompted by the response of the outraged public, even when Hindley was dying of cancer.

There is no doubt the felony she has committed was callous. However, Helena Kennedy points out that Hindley's long incarceration is a symbol of something else – the society's fear of something as unnatural and primitive as feminine violence. The fear of a monster who has divested oneself of all the traits ascribed to the nurturing sex. Hence, is it also not a symbol of justice system's response to society's expectations related to the treatment of female offenders?

A more recent example is the case of Amanda Knox, initially convicted of murdering her housemate Meredith Kercher in Italian province Perugia in 2007.[9] Her convictions were quashed in 2015, but she remained a proof of what the power perception has over the reality. The actual murderer, a man named Rudy Guede, received almost no media attention, while (not always veracious) details of Knox's private life have been laid before the public unhesitatingly. She was labelled as lacking morality, unnatural beast, especially after her diary, in which she recorded details of her sex life, was captured by a journalist. The reason she decided to keep such diary was that she was falsely told by the Italian prison authority that she was HIV positive and therefore she recorded her sexual relationships. As the alleged motive for killing her housemate, the prosecution has quoted her "lack of morality".[10]

7. Cowen, B. (1995), *Women and Crime*, In L. Adler & F. L. Denmark (Eds.), Violence and the prevention of violence (pp. 157-168). Westport, USA: Praeger Publishers.
8. ibid.
9. Helena Kennedy, *The myth of the she-devil: why we judge female criminals more harshly*, The Guardian [Internet]. 2018 Oct 2 [cited 2020 Jan 6]. Available from: https://www.theguardian.com/uk-news/2018/oct/02/the-myth-of-the-she-devil-why-we-judge-female-criminals-more-harshly
10. Angela Giuffrida. Amanda Knox says media depicted her as man-eating murderer. The Guardian [Internet]. 2019 Jun 15 [cited 2020 Jan 6]. Available from: https://www.theguardian.com/us-news/2019/jun/15/amanda-knox-accuses-media-of-depicting-her-as-maneating-murderer

CRIME IS NOT A MAN'S THING

In his non-experimental study, Nagel has found that females charged with offences inconsistent with the traditional female roles, such as physical assault, murder or drug-related offences, face more severe treatment than their male counterparts.[11] However, jurors categorising defendants before making statements about their guilt is one thing. Another is the society considering female offenders virtually mythologic evil beings, deprived of their femininity. Both of them play significant role in the response to female offenders.

Women are just as capable of committing unimaginably brutal crimes as men. The world of crime is not, and has never been, solely a man's world. However, it is worth thinking how differently human beings respond to the wrongdoings of the representatives of different genders, specially bearing in mind one of the primary roles of the criminal justice system being to promote equality before the law.

11. Nagel, I. H. (1981), *Sex differences in the process- ing of criminal defendants*, In A. Morris & Gelsthorpe (Eds.), Women and crime: Papers presented to the Cropwood round-Table conference (pp. 104- 124). Cambridge: University of Cambridge Institute of Criminology.

SALVAGING THE RULE OF LAW

Kathleen Teo

The rule of law is a constitutional principle that the law applies to every person and that every person has equal status under the law. It aids democracy by ensuring that the will of the people, in the form of the law, is upheld. Nevertheless, institutions across the world seem to have forgotten the importance of such a principle by allowing individuals capable of yielding much political power to trump the law. This puts societies and the world at risk of destruction and chaos without the law to ensure peace, equality, and order in society. The rule of law must be salvaged if we want society to progress. I strive to examine the reasons behind its deterioration before addressing ways in which the rule of law can be salvaged.

Three factors drive the deterioration of the rule of law in the 21st Century: capitalism, the politicisation of the judiciary, and a rise in the rule of individuals.

1. **Capitalism**

To understand the role that capitalism plays in the deterioration of the rule of law, one

must examine its roots and its growing significance in society. The Great Industrial Revolution that set the scene for the emergence of capitalism and individualism saw a fundamental change in the way people identified themselves; people begun to identify themselves as an individual rather than the village or county they came from.[1] People began to believe that they were deserving of individual rights and that everyone is to be treated equally and fairly, regardless of their socio-economic circumstances.[2] This led to the popularisation of the rule of law and equality under the law by the 19th Century.[3] A.V. Dicey's enthusiastic endorsement of the rule of law and the principle of legal equality is a reflection of the zeitgeist at the time, which handed the law a degree of sovereignty and made it functionally and ideologically separated from political influences.[4] A by-product of such a revelation was the popularisation of the ideology of a free market.[5] As people were now seen as individuals capable of making their own free choices and of entering any economic transaction they so desired in a free market, the law changed to accommodate and facilitate commerce. Such laws ensured that parties entering and performing transactions can be held accountable by the law, giving parties greater equality under the law.

However, as capitalism began to mature over the next century, so did the reality of social inequality. Such inequality began to take precedence over the ideology of a free market and made the law increasingly irrational. Under the rule of law, legal advice should be readily accessible, but it had become more costly instead.[6] This eclipsed those that do not reap the benefits of capitalism from access to professional legal advice. The rule of law as a concept is diminished, as only the wealthy bureaucratic strata of society can afford justice. Not everyone can be held accountable under the law if most people do not have the financial means to protect and enforce their legal rights.

2. Politicisation of the Jury

Another aspect of the rule of law states that the law is to be separate from politics; the courts do not have a say in matters concerning the legislative and executive. Montesquieu identifies this aspect early on with his insistence on the separation of powers, and that the judiciary's sole duty is to interpret and apply the legislation passed by the legislative to cases it hears.[7] However, in recent times, the law has turned into a

1.'Individualism And The Industrial Revolution | Ludwig Von Mises' (Mises Institute, 2019) <https://mises.org/library/individualism-and-industrial-revolution> accessed 15 December 2019.
2. ibid.
3. The Rule Of Law (Stanford Encyclopedia Of Philosophy)' (Plato.stanford.edu, 2019) <https://plato.stanford.edu/entries/rule-of-law/#JohnLock> accessed 15 December 2019.
4. ibid.
5. David Barnhizer, Political Economy, Capitalism And The Rule Of Law (CLEVELAND-MARSHALL COLLEGE OF LAW 2019) <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1832&context=fac_articles> accessed 15 December 2019.
6. Owen Bowcott, 'Top Judge Says Justice System Is Now Unaffordable To Most' The Guardian (2019) <https://www.theguardian.com/law/2016/jan/13/uk-most-senior-judge-says-justice-has-become-unaffordable-to-most> accessed 15 December 2019.
7. 'Montesquieu: The Spirit Of Laws: Book 11' (Constitution.org, 2019) <https://www.constitution.org/cm/sol_11.htm> accessed 15 December 2019.

legitimised domination of political groups in the executive over the courts, the market, and bureaucratic organisations that have significant political influence. Politics is engraved in every level of law, and this is evident from the recent politicisation of the judiciary in many countries.[8] A classic example is that of China, where the judiciary must always be ready to submit themselves to the desires of the Central Party.[9] The chief justice, who is appointed by the National People's Congress (NPC) – China's legislature, nominates judges before the NPC's Standing Committee approves them.[10] The fact that judges must be approved before the country's legislature is telling of China's politicisation of the judiciary, as it puts much pressure on the judges to rule in favour of the Central Party.[11] Sri Lanka is no exception; the country now has politicised courts that favour the government following an internal "purge" within the Judicial Service Commission, ridding the judiciary of judges that did not favour the government.[12] Such a phenomenon is also present in countries that seem to have a relatively stable democratic system of government. Malaysian Prime Minister Mahathir's arrest of Najib Razak's lawyer to prevent former Prime Minister Najib from receiving a fair trial over the illegal financing of the 1 Malaysia Development Berhad (1MDB) state fund, has been interpreted to be an attempt to politicise the Malaysian judiciary via intimidation.[13] It is evident from these examples that the rule of law is no longer distinguishable from the rule of those that have political power in the executive and legislature. The law is merely used as a catalyst for governments to achieve their agendas.

3. Rule of Individuals

The same can be said for individuals in high positions of power who trump the law and rule by law, effectively undermining the rule of law and contributing to its decline. This is evident from the growth of benevolent dictatorships and military dictatorships in different regions of the world.

Southeast Asia has seen the Philippines become subjected to an authoritarian-like rule under President Rodrigo Duterte. In 2018, the Supreme Court of the Philippines ruled to oust their Chief Justice, Maria Lourdes Sereno, deemed an enemy to President Duterte.[14] Her expulsion, in conjunction with the President's self-proclaimed "War on Drugs," signifies a rapid decline in the rule of law through his unlawful persecution of those that do not

8. Cameron Stewart, 'THE RULE OF LAW AND THE TINKERBELL EFFECT: THEORETICAL CONSIDERATIONS, CRITICISMS AND JUSTIFICATIONS FOR THE RULE OF LAW - [2004] Mqlj 7; (2004) 4 Macquarie Law Journal 135' (Macquarie Law Journal, 2019) <http://www5.austlii.edu.au/au/journals/MqLJ/2004/7.html> accessed 15 December 2019.
9. 'A Looming Crisis For China'S Legal System' (ChinaFile, 2016) <http://www.chinafile.com/reporting-opinion/viewpoint/looming-crisis-chinas-legal-system> accessed 15 December 2019.
10. ibid.
11. ibid.
12. 'Sri Lanka'S Judiciary: Politicised Courts, Compromised Rights' (International Crisis Group, 2011) <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-judiciary-politicised-courts-compromised-rights> accessed 15 December 2019.
13. Jon Connars, '*Rule Of Law Is Deteriorating Across Southeast Asia*' (Asiatimes.com, 2018) <https://www.asiatimes.com/2018/09/opinion/rule-of-law-is-deteriorating-across-southeast-asia/> accessed 15 December 2019.
14. Jessica Trisko Darden, 'Https://Www.Aei.Org/Foreign-And-Defense-Policy/Asia/Rule-Of-Law-Is-Fading-Fast-In-The-Philippines/' <https://www.aei.org/foreign-and-defense-policy/asia/rule-of-law-is-fading-fast-in-the-philippines/> accessed 15 December 2019.

support his cause.[15]

Latin America has also witnessed a complete collapse of the rule of law in Venezuela under the government of Nicolás Maduro. Maduro had allies on the Supreme Court, dissolved the Venezuelan Parliament and orchestrated for the government to assume legislative making powers.[16] The rule of law in Venezuela has turned into a rule by Maduro.[17] The judiciary is now being used as one of Maduro's many political weapons to establish his leadership.

Much less needs to be said about the deterioration of the rule of law in Pakistan. Mass corruption which allows citizens to bypass the law through monetary bribes plagues the country.[18] This explicitly trumps the principle of equality under the law by allowing some to escape accountability through monetary means. The Assembly has also been passing laid down procedures of passing bills.[19] The procedure would allow bills to be passed without giving due consideration.[20] This also does little to ensure the rule of law by failing to hold the executive – the Pakistani government, accountable to the law for the bills they lay down.

Even less need be said about how President Trump's behaviour undermines the rule of law in the USA. He has implicated several federal laws in various ways - he and his administration have stymied the House's ongoing investigation into his impeachment by refusing to participate in it.[21] In so doing, the President is stopping himself from being held accountable to the law, effectively obstructing justice. His usage of government agencies and employees as part of his campaign to pressure Ukraine to interfere in the 2020 upcoming mid-term Presidential election in particular demonstrates his defiance of the rule of law and his disrespect for the system of democracy upon which the USA operates.[22] Nothing, however, beats the President's recent order to kill Iranian General Qasem Soleimani on 3rd January 2020.[23] Whether or not this order is deemed lawful is dependent on more investigation and clarification on the case.[24] Nonetheless, it is clear that President Trump's actions have contributed to its downfall and shows that the rule of law can fail to operate in first-world nations like the USA.

It is without a doubt that many in societies across the world have lost faith in the justice system due to an increasing rise in the rule of individuals. Their respect for the rule of law

15. ibid.
16. Pedro Rosas, 'How Venezuela'S Supreme Court Triggered One Of The Biggest Political Crises In The Country'S History' (Vox, 2017) <https://www.vox.com/world/2017/5/1/15408828/venezuela-protests-maduro-parliament-supreme-court-crisis> accessed 15 December 2019.
17. ibid.
18. Dr. Khalil-ur-Rahman Shaikh, 'Poor Rule Of Law: Causes And Remedies' (Daily Times, 2019) <https://dailytimes.com.pk/213048/poor-rule-of-law-causes-and-remedies/> accessed 15 December 2019.
19. ibid.
20. ibid.
21. Maggie Jo Buchanan, William Roberts and Michael Sozan, 'Trump's Impeachable Conduct Strikes At The Heart Of The Rule Of Law: Part 2 - Center For American Progress' (Center for American Progress, 2019) <https://www.americanprogress.org/issues/democracy/news/2019/10/18/476129/trumps-conduct-strikes-heart-rule-law-pt2/> accessed 15 December 2019.
22. ibid.
23. Merrit Kennedy and Jackie Northam, 'Was It Legal For The U.S. To Kill A Top Iranian Military Leader?' (Npr.org, 2020) <https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader?t=1578522791366> accessed 8 January 2020.
24. ibid.

is diminished, and so is the importance of holding people that have acted unlawfully accountable for their actions. This is a grave issue that must be addressed by judiciaries around the world, as the rule of law is needed to maintain an orderly manner of life in society.

In the words of Gross LJ, “justice must not only be done; it must be seen to be done”.[25] For the rule of law to be salvaged, jurisdictions must foster a culture of open justice and cooperation between the three branches of state.

1. **Open Justice and Accessibility to Justice:** Making the delivery of justice transparent to the public will take society one step closer to salvaging the rule of law. This should be done by having effective public and media access to proceedings to promote a fair process.[26] Doing so would promote public education of not only what is being done in the courts, but also promote knowledge about the rights of an individual and an understanding of why the courts arrive at a particular judgment in the cases they hear. Having and fostering a culture of open justice would, therefore, promote the rule of law by allowing the public to see how relevant the law is in maintaining peace and stability in society.

However, this would be meaningless if jurisdictions do not have a fully-functioning justice system that can provide access to the courts. Effective, readily available, legal advice and representation must be available, and justice systems should create institutions and systems that can provide for this.[27] People often do not seek justice and equality under the law due to inefficiency in dealing with cases, making the long and drawn-out process of waiting for trials more harrowing for victims. It is paramount, therefore, that legal advice is readily available and that justice systems are efficient in dealing with cases. Secondly, the courts must ensure that the costs of attaining legal advice must not be prohibitive. As examined above, the operation of market forces means legal advice is often expensive and only accessible by those able to afford it. Therefore, the judiciary must take proper steps to ensure that court rules, practices, and procedures do not increase the costs of litigation, which would help foster a culture of open justice and make justice more accessible. This, together with a culture of open justice, will help to uphold the rule of law by allowing the public to see how the law can bring about justice.

25. 'How Can Judges Strengthen The Rule Of Law?' (2018) <https://www.judiciary.uk/wp-content/uploads/2018/10/speech-by-lj-gross-J20-conference-sept18.pdf> accessed 15 December 2019.
26. ibid.
27. ibid.

2. Cooperation between the three branches of state:

The judiciary itself cannot operate on its own and work to ensure that justice is open and accessible without support from the legislative and executive.[28] We, as a society, submit ourselves to the law in exchange by obeying it, respecting it, and by making an effort to act lawfully. In exchange, we are given equality under the law through the rule of law and can enjoy a relatively peaceful life. The same goes for the legislature and executive. They must respect the judiciary by allowing themselves to be held accountable by the law, in exchange for peaceful and uninterrupted law-making processes. However, none of this will be possible if the legislative and executive do not respect the powers of the judiciary.

There must be proper recognition of the role of judges in the judiciary itself, and a constitutional understanding the importance of having an independent judiciary. An independent judiciary will ensure that the executive and legislature are held accountable for their actions and that they do not abuse their power to trump the rule of law. Only then will the other branches of state respect the separation of powers and not undermine the powers of the judiciary by politicising it. Having his allies in the Supreme Court of Venezuela disband Venezuela's Parliament is a clear example of Maduro's lack of respect for an independent judiciary and the rule of law, as he is effectively putting himself his government "above" the law, a place where his rulings and policies cannot be held accountable by the law.[29]

This is not to say that the judiciary is the most powerful branch of state out of the three. Similarly, the judiciary must respect its boundaries and recognise that it cannot enter the political nor the legislating arena. Politicised judiciaries, akin to those in China, Malaysia, and Sri Lanka, would be viewed by the public to be biased and unfair, as judgments will be based on the judges' varying political allegiances, rather than the law itself. This would undermine the public's confidence in the rule of law, and therefore, it is paramount that the three branches have mutual respect for one another to strengthen the rule of law.[30]

It is time for institutions around the world to see the value in the rule of law and its fundamental role in promoting social development, the maintenance of order, and

28. Select Committee on the Constitution, Relations between the executive, judiciary and Parliament (HL 2006-7, 151- VI).
29. Pedro Rosas, 'How Venezuela'S Supreme Court Triggered One Of The Biggest Political Crises In The Country'S History' (Vox, 2017) <https://www.vox.com/world/2017/5/1/15408828/venezuela-protests-maduro-parliament-supreme-court-crisis> accessed 15 December 2019.
30. Merrit Kennedy and Jackie Northam, 'Was It Legal For The U.S. To Kill A Top Iranian Military Leader?' (Npr.org, 2020) <https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader?t=1578522791366> accessed 8 January 2020.

the preservation of society. Efforts, therefore, must be taken not only by the judiciary but also by the other branches of state, to salvage the rule of law and to stop democratic societies around the world from allowing themselves to be ruled by the law.

LAW, POLITICS, AND THE CURIOUS CASE OF IMPEACHMENT

Nicholas Ng

It would be no radical statement to say that Donald Trump's presidency has been marred with controversy. From the chaos caused by his travel ban, accusations of collusion with the Russian government, to heightening tensions with China through a trade war. Trump has shown a willingness to push the envelope of acceptable presidential action and behaviour, for better or for worse. Among the most recent exhibits, the most recent and potentially the most damning would be his actions which led to impeachment proceedings being brought against him. Many are of the mind that impeachment is a last resort to remove a President that in some way seriously violates the Rule of Law. In reality though, while this may be ideal, it is not the case.

To begin to understand the process of federal impeachment and its role, we can look at the United States Constitution, from which it is derived. The Constitution provides that only the House of Representatives may have the power to impeach, with only the Senate then able to try said impeachments. The Constitution also lays out the requirements and consequences of a successful impeachment, being that the "President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours". The last point, on "other high Crimes and Misdemeanours",[1] presents an area of uncertainty. The Constitution does not define what these may include. Congress has also been hesitant to provide its own definition, though it has provided three non-exhaustive grounds for impeachment, being:

(1) improperly exceeding or abusing the powers of the office;

(2) behaviour incompatible with the function and purpose of the office;

(3) misusing the office for an improper purpose or for personal gain .[2]

With this in mind, one might garner the idea that impeachment is a legal tool to protect the Rule of Law, used to defend against corrupt and overreaching actors within the

1. https://www.archives.gov/founding-docs/constitution-transcript.
2. Jared P. Cole and Todd Garvey, *Impeachment and Removal* (2015).

executive. This is not quite the case. Recall that once an individual is impeached, they are to be tried by the Senate, a decidedly political body, rather than a legal one such as the Supreme Court. Why is this the case?

A clearer understanding of what might constitute an impeachable offence may be gained by looking at what acts Congress have deemed to not be impeachable. Leading up to the impeachment proceedings against former US President Richard Nixon, the House Judiciary Committee had rejected an article of impeachment alleging that Nixon had committed tax fraud on the basis that it was "related to the President's private conduct, not to an abuse of his authority as President".[3] From this, it can be understood that the process of impeachment serves to safeguard specifically against abuse of executive power, not necessarily to punish an actor for crimes committed. Furthermore, abuses of power are not necessarily limited to crimes. Founding Father and "Father of the Constitution" James Madison had stated that the "wanton removal of meritorious officers" would be sufficient grounds for impeachment.[4] This would not quite be a crime, but would be a case of maladministration, undermining the government's ability to function, and potentially shaking the public's trust in it. In fact, the first individual to be impeached in the US, John Pickering, was impeached for "loose morals and intemperate habits".[5] In other words, impeachment serves primarily as a remedy for political, rather than legal offences.

Still, the role of impeachment in safeguarding the Rule of Law should not be discounted, specifically in the case of Presidential impeachment. There exist only three ways for a US president to be removed from office: resignation, impeachment, and through the invocation of the 25th Amendment. Noting that resignation must be at least somewhat voluntary on the President's behalf, and that the 25th Amendment has only been used when a President was physically incapacitated through surgery,[6] impeachment generally remains the only method by which a malicious President might be forcibly removed. This has created the uncomfortable situation where what might be seen as the ultimate threat to the Rule of Law may only be dealt with by political means.

In the Federalist Papers, a series of essays that promoted the ratification of the US Constitution, Founding Father Alexander Hamilton stated his fear that the political nature of impeachment would mean that the

3. https://constitution.congress.gov/browse/essay/artII_S4_2_3_5/
4. James Madison, Removal Power of the President (1789).
5. https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3-20.pdf
6. https://www.businessinsider.com/25th-amendment-colon-trump-reagan-bush-unfit-president-2017-10?r=US&IR=T

Senate's decision regarding the impeachment trial would "be regulated more by comparative strength of parties, than by the real demonstrations of innocence or guilt".[7] Unfortunately, it seems that this fear had become a reality. During the impeachment of Bill Clinton, the Senate vote on whether to convict tracked very closely to party lines, with only 10 out of 55 Republican senators and 0 out of 45 Democratic senators voting against their party on the article for perjury, along with only 5 out of 55 Republican senators and 0 out of 45 Democratic senators voting against their party on the article for obstruction of justice.[8]

At this point, it should be stated that no president has been removed from office as a result of an impeachment trial in both the case of Andrew Johnson[9] and Bill Clinton, the senate vote had failed to secure a 67% majority for conviction. The closest the Senate might have come to convicting was in Richard Nixon's case, in which he was accused of covering up a break-in into the Democratic National Committee headquarters at the Watergate complex. In this case, Nixon had resigned before the House impeachment vote could begin, amongst plummeting approval ratings, and the assurances of his advisors that his Presidency would not survive impeachment.[10]

It should be concerning, then that the ultimate check against highest office of power within the nation can be effectively nullified so long as the President can remain in control of their party. Doubly so when one considers the ever-increasing levels of partisanship within the Senate.

Now, Trump stands impeached by the House, accused of coercing the Ukrainian government into investigating a political rival, an accusation easily as grave as that levelled at Nixon. Uniquely however, House speaker Nancy Pelosi has continued to decline to pass the House's impeachment articles onto the Senate for trial until such a time where she feels that the Senate would grant the impeachment articles a proper trial.[11] Whether one agrees with Pelosi that the Republican-controlled Senate cannot be fully trusted to conduct a trial against one of their own, or agree with Senate Majority Leader Mitch McConnell that the Democratic is merely stalling to prevent potential acquittal and a clearing of name, one cannot ignore the possibility that this event may herald the gross mutation of impeachment as a too to protect the public into a tool to advance partisan interests.

During Republican-led impeachment

7. Alexander Hamilton, Federalist No. 65 (1788).
8. https://edition.cnn.com/ALLPOLITICS/stories/1999/02/12/senate.vote/
9. https://www.nps.gov/anjo/learn/historyculture/impeachment.htm
10. https://www.nytimes.com/2019/12/20/opinion/sunday/impeachment-trump-nixon.html
11. https://www.vox.com/2019/12/18/21029266/pelosi-impeachment-articles-senate

proceedings against Bill Clinton, his approval rate increased as the public generally felt that the charges brought against him were nowhere near bad enough for impeachment and removal from office to be necessary. This had resulted in a catastrophic blow to the Republican party. While the opposing party tends to gain seats during the off-year elections of a President's second term, Clinton's impeachment had galvanized public support for him and his party, preventing the Republicans from gaining any seats in the Senate, and even losing them five seats in the House.[12] During this, the Democrats had repeatedly called out the impeachment proceedings as a "witch hunt", a term oft-repeated by Trump and his supporters. Particularly during the Mueller investigation, Trump had repeatedly attempted to discredit the special counsel, mirroring Clinton's attack on the independent counsel charged with his investigation.[13] While Trump has not seen the same level of success as the former president, it remains to be seen whether future administrations might be tempted to see impeachment not as a threat, but as a gambit to accrue support and discredit the opposition.

Whether one sees Trump a bold leader, unchained by politics and willing to push boundaries, or as a conniving threat to the nation, his presidency has revealed that the ultimate remedy in the American system of government against an abusive President is flawed and ripe for partisan appropriation. Perhaps the Founding Fathers were mistaken to hope that the Senate might be able to defend against partisanship and stand as a rational, uninfluenced body. Regardless, it is imperative that the future role of impeachment be seriously considered. To allow for checks against power to be so easily eroded is to invite forces of malicious intent.

12. https://millercenter.org/the-presidency/impeachment/clinton-impeachment-and-its-fallout
13. https://www.newsweek.com/trump-bill-clinton-lewinsky-mueller-851607

Meet the LWOB UCL PublicationsTeam 2019~2020

EDITORS-IN-CHIEF:

Hannah Tsang (Journal)

Nicole Pearson (Blog)

WRITERS:

Lealu Elliott

James Pragnell

Nahiyan Helal

Aurelia Buelens

Athina Tsalikidou

Daria Lysyakova

Grace Chew Min Hwei

Kathleen Teo

Julia Juchno

Nicholas Ng

Michael Chung

@UCLLWOB

@UCL_LWOB

@lwobucl

https://lawyerswithoutbordersucl.wordpress.com/

© Copyright owned by Lawyers Without Borders UCL

Photos by mohamed hassan