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THE HIDDEN VALUE OF THE RULE OF LAW AND ENGLISH LAW

BLACKSTONE LECTURE 2021

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1. It is a real pleasure to return to Pembroke College to deliver this year's Blackstone lecture with memories of attending my first as an undergraduate.

2. My focus is the rule of law and English law, and their value to the United Kingdom. The rule of law underpins all economic and social activity in this country and, independently, English law and the Common Law bring substantial economic benefits. Both are taken for granted and their contributions undervalued by many.

3. I must start by identifying what I mean by the rule of law. It is a term that is much repeated but not always clearly understood. For some it is a slogan.[1] For others it is the '*preeminent legitimating political ideal in the world today*', even if it is one that lacks '*agreement upon precisely what it means.*' It has been a central feature of our constitutional arrangements since at least the end of the 1600s even if it was only first explicitly acknowledged as such in legislation in 2005 in the Constitutional Reform Act. That Act states that it is an existing constitutional principle, without defining what exactly it means[2]. The courts have yet to be called upon to offer a definition or determine any of its components.

[1] For a detailed examination see, B. Tamanaha, *On the Rule of Law*, (CUP, 2004).
[2] Constitutional Reform Act 2005, s.1.

4. For the purposes of today's lecture, I will start from the approach taken by Lord Bingham. In his short and brilliant book, *The Rule of Law*[3], he defined it by reference to eight features. They are that:

- the law must be accessible, intelligible, clear and predictable;
- questions of legal rights and liability should ordinarily be resolved by the exercise of the law rather than by discretion;
- laws should apply equally to all, except where differential treatment is justified objectively;
- Ministers and public officials must exercise the powers conferred reasonably, in good faith, fairly, within the powers and for the purposes for which they were conferred;
- the law must afford adequate protection of fundamental Human Rights;
- the State must provide a way of resolving disputes which the parties cannot themselves resolve;
- adjudicative procedures provided by the State should be fair;
- the State should comply with its international law obligations.

5. His central premise was, '*. . . 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.*'[4] The rule of law contrasts with rule by laws. The latter is the hallmark of tyrannies and authoritarians

[3] Lord Bingham, *The Rule of Law*, (Penguin, 2011). Also see World Justice Project at https://worldjusticeproject.org/about-us/overview/what-rule-law.
[4] Lord Bingham, *ibid*, at 8.

down the ages. I would add one elucidation to Lord Bingham's list, although it is implicit. The rule of law depends upon an independent judiciary with individual independence in their decision making and institutional independence. That is vital to ensure an effective system of adjudication and to ensure that the powerful – for example governments, large corporations, trade unions – have no advantage in the courts.

6. Within the term "English law" I include the whole of English and Welsh civil, family and criminal law both statute and common law. You will understand that I cannot hope to traverse all of that this evening but will focus on specific areas, most notably English contract and commercial law together and touch on some aspects of family law.

7. What then is the value to the United Kingdom of the rule of law and English Law? What is its hidden value?

8. The most obvious way to approach the question of value is to consider the financial value of the legal sector. The figures here are large. In 2019 the total revenue to the United Kingdom from legal activities was £36.8 billion. In the first half of 2020, notwithstanding the start of the Covid-19 pandemic, it had already secured £17.8 billion in revenue.[5] In the same year, legal activities accounted for the employment of 365,000 people across the United Kingdom, with two-thirds of that employment outside London. The sector thus plays an important role in providing employment not just for those who work in the legal sector but also for support services.

[5] TheCityUK, '*Legal Excellence: internationally renowned*' (2021) at 6 <https://www.thecityuk.com/assets/2021/Reports/709bf01df5/Legal-excellence-internationally-renowned-UK-legal-services-2021.pdf>.

9. We can see this economic value, and it must also be said social value through employment and the State's ability to invest in public funding via taxation, in other ways. Our legal sector secures 7% of global legal services fee revenue. That is 7% of US$713 billion in revenue. After the United States, it is the second largest legal services market in the world; and the largest in Europe where it accounts for a third of all Western European legal services fee revenue.[6] It should be no surprise that five of the world's largest law firms have their main base in the United Kingdom and that four of the top twenty revenue generating law firms are based here.[7]

10. Focusing for a moment on dispute resolution, the United Kingdom remains, as Lord Denning MR famously said, a '*good forum to shop in*'[8]. As such our courts and arbitration centres play a key role in the legal sector's economic value and revenue generation. CityUK recently agreed,

> '*London's reputation as a leading global centre for international dispute resolution through the courts is underlined by the fact that the Business and Property Courts continue to attract high numbers of international users, most notably in the Commercial Court and Financial List. In 2021, 100% of cases in the Financial List were international in nature and to the end of June, more than two-thirds of cases in the Commercial Court were international in nature.*
>
> *London is also seen as the world's preferred centre for arbitration. The number of [international] civil disputes resolved through arbitration, mediation and adjudication in the UK exceeded 43,000 in 2020*.'[9]

[6] Ibid at 7.
[7] Ibid at 7.
[8] *The Atlantic Star* [1973] QB 364 at 381 – 382, '*No one who comes to these courts asking for justice should come in vain. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service*.'
[9] TheCityUK, '*Legal Excellence: internationally renowned*' (2021) at 7.

11. That London is a preferred centre for arbitration is a consequence both of the fact that it is a centre of legal excellence and the fact that English law is the law of choice that governs 40% of all global corporate arbitrations.[10] We should all remember that international commercial disputes are mobile.[11] The parties can choose the law governing their agreements. They can choose the jurisdiction in which they wish disputes to be adjudicated or arbitrated. That they continue to choose English law, English arbitration and the Commercial Court is testament to the strength of the three and to their value to the United Kingdom.

12. I want to return to this point in a moment. Before doing so, it is also helpful to look at figures provided by a study conducted by Oxera[12], which was published last year. The study focuses specifically on English law's economic value to the UK. It highlights a number of features and benefits of English law. For instance, it draws attention to the fact that in 2020 at least US$11.6 trillion worth of global commodities trading was governed by English law. That figure, however, pales by comparison to the amount related to international swaps and derivatives trading. The figures for that stem from 2018, where at least €661.5 trillion of global over the counter derivatives trading was governed by English law. Moving from the trillions to the billions, it also notes how the United Kingdom maritime sector contributes an estimated £17 billion to the United Kingdom economy annually. The

[10] Ibid.
[11] Mr Justice Blair, *Contemporary Trends in the Resolution of International Commercial and Financial Disputes*, (2016) at 3 <https://www.judiciary.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>.
[12] Oxera, *Economic Value of English Law*, (2021) <https://legaluk.org/wp-content/uploads/2021/09/The-value-of-English-law-to-the-UK-economy.pdf>.

majority of its contracts are governed by English law. The total value of global mergers and acquisitions governed by English law in 2019 was approximately £250 billion.[13]

13. The Oxera report demonstrates that English law underpins hundreds of trillions of pounds worth of global trade. It provides a global platform for trading, financial and commercial contracts on which global business relies. In deploying English law, businesses enjoy an advantage over businesses governed by other legal systems, such as lower transaction costs. English law therefore lends the United Kingdom considerable soft power in its commercial and diplomatic relations with other countries and is well placed to set the global standard in new areas of commercial activity.

14. The full value of English law, as a national asset, has barely been recognised until now. But like all important assets it needs investment to sustain it. The transactions discussed in the Oxera report are international and mobile. There is no necessary reason why English law should govern them. There is thus a risk to the economy of the United Kingdom, which the report highlighted, if there were a shift away from the use of English law. It notes potential competition from New York law as well as risks to London as a leading centre for international dispute resolution through the Commercial Court and London arbitration.[14] In respect of the former, it is one thing to note that the Commercial Court is "*arguably . . . the most successful Commercial Court in the world*"[15], as Chief Justice Michael Hwang of the Dubai International Financial Centre Courts concluded in 2015. It is another to maintain that position, just as it is to maintain the strength and attractiveness – and hence

[13] Ibid at 16-17.
[14] Ibid at 25-26.
[15] M. Hwang, *Commercial courts and international arbitration—competitors or partners?*, Arbitration International, 2015, 31, 193 at 197.

value – of English law. In this regard the Oxera Report is circumspect in its conclusion. Notwithstanding the positive value to the economy it highlights, its overall position is that English law is not sufficiently valued. It put it this way,

> '*English law is an underappreciated national asset that underpins various forms of economic activity in the UK. It is also part of what makes the UK an attractive place to do business for internationally mobile activity.*'[16]

15. I would go further than this. Our commitment to the rule of law is also an underappreciated national asset that underpins our economic activity, stability and social cohesion. The rule of law and English law have a hidden value going well beyond the value of the legal services or the legal sector, enormous though that is.

16. I have observed elsewhere[17] that nobody would calculate the value of education to society by adding up the purely monetary and employment contributions of the various parts of the educational sector. All would readily recognise the vital importance to the economic and wider well-being of the nation of having a well-educated population. The analogy with the rule of law is not exact but nonetheless valid.

17. Let me widen the lens slightly for the moment to focus on developments outside the United Kingdom. I do so because it is perhaps easier that way to identify the full extent of the value of the rule of law and English law.

[16] Oxera, *Economic Value of English Law*, (2021) at 35.
[17] https://www.judiciary.uk/wp-content/uploads/2020/10/20201009-Legal-Wales-2020-For-publication-1.pdf

18. I start with a look at Singapore. Its remarkable economic transformation in the 60 or so years since it became an independent state is well known. There were many factors that underpinned this transformation. The Singaporean government focused policy on the expansion of maritime trade and related sources of trade. It promoted technological and other forms of innovation; and it adopted a meritocratic approach to education and training, not least to provide its public institutions – government and civil service, Parliament, the courts and judiciary with the best available candidates, for example through matching public sector pay with that of the private sector.

19. Singapore's spectacular growth, whether looked at in economic or social terms, was not simply a consequence of these factors, important as they were and are. Underpinning it was a commitment to good government and government according to the rule of law.[18] [19]

20. The enduring lesson is that good governance and the rule of law enhance prosperity and well-being.

21. The contribution that well-regarded courts can make to a country's prosperity is illustrated by the creation of the International Commercial Court in Singapore. It was established in 2015 with the explicit aim of growing '*the legal services sector and to expand the scope for the internationalisation and export of Singapore law*'.[20] In other words to help increase the use of Singaporean law and use of its legal services sector, including arbitrations and

[18] Ibid a 350.
[19] M. Ewing-Chow, J. Losari & M. Slade, *The facilitation of trade by the rule of law: the cases of Singapore and ASEAN*, in Connecting to Global Market (Geneva: WTO Publications, 2014) (M. Jansen, M.S. Jailab & M. Smeets (eds)) at 129 <https://www.wto.org/english/res_e/booksp_e/cmark_chap9_e.pdf>.
[20] See <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>

its courts. The economic value generated by the sector had already grown by 71.5% between 2008 and 2013, when the court's creation was first mooted. Its establishment as a means to further that expansion was understood to '*be a natural move to make*'.[21] Its creation was, in fact, part of an explicit strategy to ensure that Singapore became a '*premium dispute resolution hub*'.[22] The other two parts of the strategy were the development of Singapore's international arbitration centre and its international mediation centre. Singapore has not been alone.

22. Dubai and Qatar provide examples of such international courts. They illustrate another example of the value of English law and the rule of law in England. Former English judges are appointed to these courts and are sought after to conduct international arbitrations. Our lawyers and other professionals act in cases before them. The appointment of retired judges is a consequence of an appreciation of the independence, impartiality and high quality of the judiciary which itself reflects our country's commitment to the rule of law. More broadly, we can see this as demonstrating an understanding of one of the reasons why England is itself a leading, if not the leading, dispute resolution centre globally.

23. The importance of this factor was highlighted in 2015 by the British Institute of International and Comparative Law. In a study carried out for the Ministry of Justice, it concluded that there were two key factors that influenced the use of English courts by international parties. One was that English law governed the contract at the heart of the

[21] M. Yip, *The Singapore International Commercial Court: The Future of Litigation?* in X.E. Kramer & J. Sorabji, *International Business Courts – A European and Global Perspective* (Eleven Publishing, 2019) at 131.
[22] Ibid at 131.

dispute, straightforwardly demonstrating the value of English law. The other was the reputation or experience of English judges.[23] Reputation and experience are both consequences of the meritocratic basis for appointment from amongst the most experienced practitioners from the Bar and solicitors' firms. It is a reflection of the independence of mind that comes from that initial practice-based background. It reinforces and is reinforced by our commitment to judicial independence.

24. The importance of good governance through a commitment to the rule of law is widely recognised as underpinning prosperity. It has been persuasively argued by two American academics, Daron Acemoglu and James Robinson, that a commitment to the rule of law along with pluralistic government has underpinned the economic growth of societies across the world for the last three hundred years.[24] It is a point implicit in the United Nations' commitment to the promotion of good governance and the rule of law as one of its sustainable development goals.[25] Those countries committed to good and pluralistic governance and the rule of law are those that have not only developed institutions that have been best at encouraging the development of their economies but those that have been best able to provide for the welfare of their citizens.

25. The world abounds with examples of the difference, often in adjoining polities: East and West Germany; North and South Korea; Eastern and Western Europe before the advent of democracy and the nourishment of the rule of law in the last 30 years. A glance at the

[23] E. Lein et al, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts*, (London 15 January 2015) Ministry of Justice Analytical Series, at 15 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf>.
[24] D. Acemoglu & J. A. Robinson, *Why Nations Fail* (Profile, 2013) at 44 and passim.
[25] UN General Assembly Resolution 70/1, of 25 September 2015 <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

situation of many countries around the globe illustrates the proposition that ineffective government, by design of the rulers or through instability, and absence of the rule of law impoverishes their populations.

26. The Oxera Report highlights the importance of reduced transaction costs flowing from use of English law as an important factor in its widespread adoption. The lower the costs of trading – of entering into transactions – the greater the degree to which the volume of transactions, and their complexity, increases.[26] If we increase transaction costs the converse occurs, and economic growth is impeded. As the Report puts it '*Law is therefore a critical platform on which other economic activity rests*.'[27] More specifically, the rule of law and specific laws are that critical platform.

27. In Singapore, by lowering transaction costs through creating good governance and an adherence to the rule of law investors and businesses found it a more attractive forum in which to do business.[28] Through that commitment it provided confidence to investors, traders and businesses in general that it was a safe place in which to invest.[29] Commitment to the rule of law reassures investors that they can engage in safe long-term investment. It provides them with confidence, for instance, that their investment will not be expropriated by the State. It provides security of property rights and confidence that the investment will not be subject to corruption on the part of officials.

[26] Oxera, *Economic Value of English Law*, (2021) at 1.
[27] Ibid.
[28] M. Ewing-Chow, J. Losari & M. Slade at 133ff.
[29] M. Ewing-Chow, J. Losari & M. Slade at 133ff.

28. Where, however, there is a fear that corruption is rife, investment falters. As noted in a major study by the Bingham Centre for the Rule of Law and Hogan Lovells, 95% of businesses surveyed identified a lack of corruption as either an essential or very important factor in whether they would do business in a jurisdiction.[30] In such jurisdictions where corruption is prevalent, or is perceived to be, there will be fewer transactions and those undertaken will have high transaction costs. That contributes to low economic growth.

29. Equally, where there is a fear that the courts will not dispense impartial and fair justice, that will be factored into the cost of doing business to the same effect. It is unsurprising then that the British Institute of International and Comparative Law study also highlighted the importance to businesses of the impartiality or neutrality of the United Kingdom courts along with procedural effectiveness as important factors in attracting businesses to use English law.[31] Put shortly, countries where powerful local interests, especially the government, are seen to have a home advantage in their courts, find it harder to secure inward investment. This point was also underscored by the Bingham Centre/Hogan Lovells' study, which noted that a firm commitment to the rule of law was a crucial factor in whether a company would choose to do business in a jurisdiction.

30. The United Kingdom has a longstanding commitment to the rule of law. Specific features of the rule of law include easy access to the courts, the quality of justice delivered, and predictability and stability in the law. Businesses factor in these features when considering the suitability of a particular jurisdiction for investment. If it is difficult, time-consuming

[30] Bingham Centre and Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law*, (2015) at 6 <https://binghamcentre.biicl.org/documents/49_risk_and_return_fdi_and_the_rol_compressed.pdf>.
[31] BICCL at 15.

or disproportionately expensive to access the courts – a rule of law problem – that will be factored into the cost of doing business. If the quality of justice is poor, a function of both the quality of the legal profession and of the judiciary, that too will be a factor.

31. It is therefore unsurprising that countries around the world are engaged in the development of international business courts, not just to attract international disputes to their jurisdiction, but also as a means to promote improvements in the operation of their domestic courts.[32] They are doing so to foster confidence from the business community and encourage domestic and international investment.

32. If the law is unstable or unpredictable either because of legislative change or through a lack of predictability and consistency in judicial decision-making, that too will be a factor. In this respect, it is important to bear in mind that one of the central advantages to the business of English contract and commercial law over the centuries, and of English law generally, has been its certainty, stability and, also, its nimbleness to adapt to changing circumstances. The latter has enabled it to move with the times, to keep pace with financial developments as today it is doing in respect of cryptoassets. However, this flexibility is underpinned by a commitment to introducing certainty and clarity into a rapidly evolving legal space.

33. It is worth pausing to consider why new technologies such as blockchain and smart contracts make English law and the jurisdictions of the United Kingdom so critical to our economy. It is inevitable that the use of cryptoassets will grow as will the use of smart

[32] See, for instance, S. Ramani Garimella & M. Z. Ashraful, *Commercial Courts in India – All for Ease of Doing Business* in X. E. Kramer and J. Sorabji (eds), ibid.

contracts in the coming years. It is uncontroversial that these relatively new ways of doing business provide enormous opportunity to economies that place themselves at the forefront of their development and support. That includes their legal underpinning.

34. Fortunately, the legal community in general and the judiciary of England and Wales have not stood still waiting for others to act. Lawtech UK was established in 2018. Its UK Jurisdiction Taskforce (with two English judges on board) has published two well-respected documents intended to promote market confidence in the ability of English law to govern smart contracts and on-chain transactions more generally.

35. First, the Taskforce produced its Legal Statement on the status of cryptoassets and smart contracts in November 2019.[33] It expressed an authoritative view that cryptoassets were properly to be regarded in English law as property and that smart contracts were legally enforceable contracts. Whilst that may not sound earth shattering, in fact it was, because of the significant uncertainty that previously existed. Moreover, since then, a number of courts in England & Wales, Singapore and New Zealand have quoted the Legal Statement with approval.[34]

36. Secondly, the Taskforce published its Digital Dispute Resolution Rules in April 2021,[35] providing for arbitral or expert dispute resolution in very short periods for digital and on-

[33] The Law Tech Delivery Panel, *Legal Statement on Cryptoassets and Smart Contracts*, (2019) <https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf>.
[34] E.g. *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch); *AA v Persons Unknown* [2019] EWHC 3556 (Comm).
[35] The Law Tech UK Jurisdiction Taskforce, *Digital Dispute Resolution Rules* (2021) <https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf>.

chain disputes. These rules allow for arbitrators or experts to implement decisions directly on-chain using a private key, and for the optional anonymity of the parties.

37. Thirdly, the Taskforce is about to publish its report on Smarter Contracts demonstrating how widely blockchain is already being used across industrial, financial and consumer sectors.

38. The Law Commission is also working to make sure that English law is fit for purpose in the crypto space. In November 2021, the Law Commission laid its advice on Smart Contracts before Parliament. On 1 February 2022, the Lord Chancellor's Industry Working Group on Electronic Signatures published its report on the adoption of digital signing.[36] In May 2022, the Law Commission's report and draft Bill on electronic transferrable trade documents will be published. Later this year, it will publish a major report and draft Bill on digital assets, non-fungible tokens and cryptocurrencies.

39. The point here is that blockchain technology is not ephemeral. It is borderless and is likely to be as ubiquitous as the internet. Its usage is likely to grow exponentially in the coming years, across all economic sectors. English law and our Business and Property Courts are demonstrating that they are ready and willing to provide the necessary legal infrastructure to allow these technologies to enter mainstream financial and commercial life.

40. English law and our courts in England and Wales have quietly provided the backbone to our economy for many years.

[36] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051451/electronic-execution-documents-industry-working-group

41. The law and our courts are reputable, predictable and dependable and attract the widespread confidence of international investors. As a result of the English courts introducing legal certainty into the crypto sphere, parties to smart contracts and on-chain transactions, here and abroad, will be able to choose English law and our jurisdiction to govern their relationships. The use of English law to govern such transactions in every conceivable sector will benefit the United Kingdom economy in the future just as English law governing traditional sectors did in the past.

42. The rapid response of English law to these technological developments demonstrates the flexibility of the Common Law. Flexibility marches hand in hand with the doctrine of precedent, one key feature of which is that it develops incrementally – hence it is, as I mentioned a moment ago, stable and predictable.[37] Businesses and individuals can make effective long-term plans in the knowledge that those plans will not be set aside by rapid or mercurial changes in the law. In this way a commitment to the rule of law, and its application in respect of the development of specific aspects of the law, provides a firm basis for economic development. It also, and we should not underestimate this point, provides a firm basis for individuals to plan their lives, to buy their homes, to enter into building contracts, to engage in pension planning, to invest in their children and so on. If I can borrow from Joseph Raz,

> '*If (the law) is frequently changed people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was . . . People need to know the law not only for short-term decisions . . . but also for long-term planning*.'[38]

[37] Lord Bingham, *The Judge as Lawmaker*, in *The Business of Judging*, Vol. 1 (OUP) (2000) at 25ff.
[38] J. Raz, *The Rule of Law and its virtue*, at 214 cited in J. Waldron, *The Rule of Law and the Measure of Property* (Cambridge) (2012) at 52.

43. It is with that thought that I turn back to the role of our courts domestically. The protection of legal rights is most obviously provided by our courts and tribunals through determining the disputes that come before them that do not resolve consensually. It is a fundamental means by which disputes about civil rights and obligations, public law disputes, criminal cases, family cases and administrative disputes with the Government may be resolved. The doctrine of precedent ensures that cases are consistently determined applying well-understood and accessible legal principles. Perhaps more importantly, the predictability of outcomes means that very large numbers of disputes do not find their way to the courts because, with or without the assistance of lawyers, those involved resolve them first. Many disputes come to nothing because all know that the coercive judicial power of the State is available if needed. The very existence of an effective court system acts as a brake on inappropriate behaviour in all areas of activity and helps prevent disputes arising in the first place. The courts are not a service only for those who find themselves needing them.

44. The importance of this point was underlined in the *UNISON* case in the Supreme Court[39]. The case concerned a challenge to increased fees in the Employment Tribunal. Lord Reed identified key features of the rule of law in his judgment. He highlighted something which in academic circles is described as the shadow of the law.[40] That is the effect that court judgments and the overall legal framework, the legal profession, access to the courts and an independent judiciary, has on socio-economic behaviour. The key point he made was this:

> *'. . . the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand,*

[39] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037 at [66]ff.
[40] Mnookin & Kornhauser, *Bargaining in the shadow of the law*, 88 Yale L.J. 950 1978-1979.

> *that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.'*[41]

45. Clear guidance on the law from the courts and ready access to legal advice and the courts, when it is needed, provide a clear basis to influence behaviour. Parties are more likely to contract if they have a common understanding of the law and know that judicial remedies are readily available. They are more likely to abide by their agreements if they know the consequences of breach. Individuals are less likely to engage in tortious behaviour if they understand the ambit of the law as it applies to them. The same can be said for all other areas of the law. Clear guidance and ease of access to advice and the courts not only promote law-abiding behaviour, they help to prevent disputes developing. In that way they help to promote social and economic activity, while minimising litigation costs as well as defensive behaviour.

46. Over and above these benefits, the framework provided by precedent and judgments, access to lawyers and the courts also plays a key role in promoting social welfare. One of the reasons why mediation and collaborative law have been heavily promoted in family disputes both here and in other countries is the promotion of family welfare. Litigation is, with the best will in the world and the most streamlined of procedures, always going to be emotionally fraught, time consuming and perhaps damaging to those involved. The economic cost of such litigation to families all too often makes significant in-roads into

[41] *R (UNISON) v Lord Chancellor* ibid at [68].

their finances, and the damage done to children in the short-term and long-term is visible all around us.[42] As Professor Diacoff, in a study carried out in the United States in 2007 noted, the use of collaborative law, a specific form of lawyer and party-led negotiation, reduced the cost and time of resolving family disputes significantly. That in turn helped eliminate one of the main adverse effects on children after family breakdown: poor parenting.[43] It helped to promote family, and thus social, welfare. An increased focus on resolving family disputes in this jurisdiction through mediation is the common goal of the judiciary and the Government.

47. Where does this leave us? At the outset I identified some of the ways in which the legal sector provides economic value to the United Kingdom. The law is big business. It generates vast revenues and taxes and employs hundreds of thousands of people. But that is not even the half of it. Without the rule of law economic activity would wither and the societal implications would be unimaginable. For many the rule of law is nothing more than a comfort blanket, a given, if thought about at all. But for business and investment the rule of law is one of the important factors which informs their actions. English law and the common law are a feature of the rule of law and play their part in supporting activity here. But, importantly, English law, especially in the commercial sphere, is a transnational global commodity which underpins a disproportionate quantity of the world's contracts and financial transactions.

[42] See, for instance, Diacoff, Collaborative law: a new tool for the lawyer's toolkit, University of Florida Journal of Law & Public Policy (2009) Vol. 20, 113 on the cost-savings of collaborative law, and particularly the benefit to children of its process and the reduction in wastage of family resources on resolving disputes.
[43] Ibid at 130-131

48. They also provide the basis on which disputes can be decided in court, but perhaps more importantly provide a framework for avoiding disputes or if not avoided, resolved speedily and cost-effectively without recourse to the courts. That is true not only for purely domestic disputes but also for those internationally governed by our law.

49. It is critical that our laws remain up to date and capable of responding quickly and nimbly to new developments. The work of the Taskforce on blockchain and cryptoassets is a pre-eminent example. I see an echo in this current work of the astonishing creation of English mercantile law in the late 18th century which helped place the country in such a strong international mercantile position. This is one of the greatest abilities of the common law: to react quickly to the new whilst providing stability and predictability.

50. It is our courts which develop the law in this way. Our courts, perhaps most tellingly in the context of this lecture the Commercial Court and the Financial List, must continue to be seen as beacons of excellence the world over. They must be properly funded in a way that leaves behind the notion that they are no more than an ordinary public service; and there must be eternal vigilance to attract the best practitioners to salaried judicial office. Our legal profession and all the professions that are vital to giving advice about transactions and disputes must also continue to sit at the apex of the international legal community. Those professions invest to sustain their positions. I have suggested that competition is no bad thing. It is a good thing. Yet the exceptional place of English Law in the international commercial field and London's place in international dispute resolution should not be taken for granted. There are many seeking to supplant both. English law is a real asset to the United Kingdom and should be nurtured by Government in the same

way that Government seeks to nurture other business sectors and industries that are seen as key to the future prosperity of the nation.

51. The real difficulty, expressed with clarity earlier this month by a former Lord Chancellor, is that English Law suffers from the "free-rider problem".[44] Anyone can use it but does not have to pay for it with the result that its value is difficult to quantify and its promotion is unfocused. Legal UK, established by my predecessor and which commissioned the Oxera report, is working to remedy that lack of focus and has the support of major players in the legal profession. LawTech, with some Government support, is working to keep the United Kingdom in the vanguard of legal change to keep pace with technological developments in business. But the promotion of legal business is different from the promotion of English law.

52. For three centuries we have reaped the benefits of a commitment to the rule of law and the strengths of English law. Both remain as essential and valuable as ever, but their value is not widely appreciated. There is a growing sense that the United Kingdom is not deriving the economic benefits from English Law that could be achieved for want of a coherent strategy. The Government needs to bring together the relevant departments, the Ministry of Justice, the Department for Business, Energy and Industrial Strategy, and the Treasury alongside Lawtech UK, Legal UK, the Law Commission and the regulators to ensure that our law is well-placed to embrace future changes in business practice. The whole must be dedicated to a proper understanding of the value of the rule of law and English law and

[44] The Rt Hon David Gauke: English Law boosts our economy, so let's promote it abroad – The Times 3 Feb 2022

the promotion of English law abroad. It will require the active support of the legal profession. The judiciary, quietly but effectively, will continue our contribution. Together our goal must be to make sure that the country benefits to the full extent from these valuable features of our legal heritage.

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