# ORDER

# The Unravelling of the Rule of Law

by Shawnelle A. Martineaux

## Introduction

During my first undergraduate year, we studied law and legal systems. We explored the nature of law itself, compared legal systems, and dove deep into the workings of common law and civil law systems, with the objective of appreciating their similarities, differences, strengths, and weaknesses. Subsequently, courses in jurisprudence, constitutional law, and human rights law supplemented these teachings, solidifying my passion for public law as a field. The best lecturers could not be more politically different from me or from each other, but they were guardians of the academic process. They valued rationales more than stances, and fostered a climate of free inquiry within and outside of the lecture halls. Not every student appreciated that at the time. Questions would pop into my head, and much to my colleagues' chagrin, my hand would raise instantaneously, commencing yet another interesting, but time-consuming tangent. That

foundational year, with its robust debates and rapid intellectual growth, was the best part of my becoming a lawyer. I fell in love with the common law, and that love was surpassed only by the awe I felt after my brief exposure to the fundamentals of economics, in a previous course. It would never wane.

Predictably, as with most foundational university courses, the true importance of the subject matter would only become apparent to me after graduation. Even then, it did not fully crystallise in my mind until after I was called to the bar in 2021, that I was given an intimate view of just how fickle western liberal democracies are. Since then, I have come to appreciate just how essential collectively respected ideas are to human freedom and thriving. It is this appreciation that I intend to share with as many people as would listen. I know that my beloved liberal, democratic, common law tradition must be maintained, bolstered, and where necessary, improved. This is because it has lifted more humans out from the grips of oppression and death than any other sociopolitical or legal system. And, while that knowledge has ascended to the level of self-evidence for me, my certainty that there are scores of fellow humans who either do not know, or

do not agree is there. As such, it is my intention to convince you, dear reader, of my position.

To do so, I will give a brief overview of the workings of the common law system, with which I have the most experience. Then, I will highlight what I think are the systemic missteps that governments take which continue to undermine this system, giving appropriate examples, where necessary. I hope to persuade you of the inherent value of defending equality, liberty, and the rule of law. I will end with general statements on how we can return to our fundamental values, to preserve this dear tradition for future generations.

**The Basics of Common Law Government**

In a common law constitutional system, three institutions known as the legislature, executive, and judiciary, perform discrete roles of government. The legislature is composed of elected and appointed representatives who make statutory laws. The executive implements and enforces the laws passed by the legislature and sets policy, while the judiciary interprets laws and oversees the actions and decisions of the entire government, judging them against constitutionally set standards. In such a system, it is the constitution, which is supreme.

The notable exception is the United Kingdom, where Parliamentary supremacy is the standard, due to their lack of a written constitution.

The specialised roles set for these three governmental branches determine which governmental bodies are permitted to do certain things, and more importantly, which governmental bodies are forbidden from doing certain things. These discrete roles exist to ensure that the power of the government is never concentrated in one set of hands for too long, and are collectively known as the doctrine of the separation of powers. Under it, the law is King, and all individuals within a state's jurisdiction, as well as all state entities are subject to it, no matter what. The roles of government complement each other, helping to ensure a healthy government, under which the rule of law, and not of any one person, obtains.[16] Within this tripartite system, lawmakers pass substantive laws and procedural laws. Substantive laws give the details of rights and obligations. Procedural laws set out the legal engineering that allows substantive rights and

[16] "The Rule of Law," by The Rt. Hon Lord Bingham of Cornhill KG, House of Lords https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law

obligations to be exercised, by dictating how matters must proceed through the legal system.

The Privy Council case of *Jaroo v Attorney General of Trinidad and Tobago [2002] UKPC 5*[17] is most illustrative of this distinction. There, a claimant attempted to use the constitutional court to avoid the delay of civil litigation and have an impounded car returned. Under Trinidad and Tobago law, the constitutional court procedure is only available to claimants who have no adequate alternative source of relief. The court acknowledged that Jaroo had a substantive right to the car, but refused to countenance his claim on the basis that it was an abuse of process. He had intentionally applied for relief using the wrong kind of application when other avenues for relief, such as a conversion or private larceny claim, were available to him. This was procedurally illegal. Just as individuals are not allowed to misuse court procedure for personal gain, the state cannot do so. The state's agents are obligated to follow both the substance and procedure of the law, and the use of the formality of the law to avoid substantive rights is also an abuse of process in most instances. The legal requirement

[17] https://vlex.co.uk/vid/jaroo-v-attorney-general-805312093

to adhere to preset procedures further entrenches legitimacy. The obligation to follow constitutionally set standards, and for these standards to apply to all persons subject to the state's jurisdiction is the rule of law.

When any of the branches of the government is dysfunctional, trouble ensues. Dysfunction, of course, can take on various forms, and each form comes with its attendant ills. I will now turn to the kinds of dysfunction that I think have been responsible for undermining common law liberal democracies and undoing the rule of law.

**Inter-branch Encroachment**

As outlined above, the purpose of the separation of powers is to prevent the concentration of governmental power in one set of hands for too long. Naturally, when the boundaries between the branches of government become unclear, the legality of actions taken by state actors also gets muddied. Executive overstep into both legislative and judicial functions can happen, with the former being mostly inconsequential if there is significant overlap between members of both branches, and the latter being a crime known as the perversion of the course of justice. The most popular iteration of

inter-branch encroachments occur between the judiciary and the legislature, because these two branches are responsible for developing the law in different ways.

*Judicial Activism*

The different treatments by the Caribbean Court of Justice (The CCJ) and the Privy Council (The UKPC) of the mandatory death penalty in Barbados and Trinidad and Tobago are a prime example of judicial overstep into the legislative role. This flavour of overstep is known as judicial activism, and it has become more ubiquitous throughout common law jurisdictions over time.

In *Nervais v The Queen [2018] CCJ 19 (AJ)*[18] the Caribbean Court of Justice held that the mandatory death penalty in Barbados was unconstitutional, because it encroached on fundamental human rights. The Barbadian constitution contains what is known as a "savings law clause" which preserves pre-independence laws, the most notable of which was the mandatory death penalty for murder. This clause was not repealed by the Barbadian

18 https://caribbean.vlex.com/vid/jabari-sensimania-nervais-v-804919965

legislature, and decades of jurisprudence had (in my view, rightly) held that the mandatory death penalty was cruel and unusual punishment, but that repealing it could only be done legislatively, and not merely by constitutional motion and judicial opinion. Nevertheless, The CCJ said stare decisis to the wind! What was the change which allowed this to happen? Barbados changed from having The UKPC as its final appellate tribunal to having The CCJ as its final appellate tribunal, and The CCJ, competent as the judges may be, are intoxicated by the idea of "original jurisprudence."

In contrast, Trinidad and Tobago, which has a similarly worded savings law clause, has not yet adopted the appellate jurisdiction of The CCJ. Instead, it has retained The UKPC. In *Chandler v The State [2022] UKPC 19*,[19] what was fundamentally the same case, went before The UKPC for consideration, and that tribunal upheld the savings law clause, affirming that it was the legislature's and not the judiciary's role to repeal constitutional and statutory provisions in accordance with the preset constitutional procedures. They did not do it because they liked

[19] https://www.jcpc.uk/cases/jcpc-2020-0051.html

the death penalty. In fact, the death penalty has been repealed in the United Kingdom for quite some time. What they did was respect the fundamental principles of the rule of law under the doctrine of constitutional supremacy, because the system is more important than judges' personal opinions.

To be clear, I have no issue with the idea that regions should govern themselves, or that courts should develop their own jurisprudence which suits the cultural needs of the citizens for which they adjudicate. Justice must be sensible and law must be accepted for it to be legitimate. Where I take issue is that there has been a consistent injection of anti-colonial and decolonial ideology into the law, at the expense of stability of our system of government. As a detestor of the death penalty, and especially the mandatory death penalty, I wanted to be happy about Nervais and to be disappointed by Chandler, but I could only find myself being grateful that Trinidad and Tobago had not yet accepted The CCJ's as its court of final appeal. Nervais was judicial activism and not judicial creativity. The UKPC's advice was the application of law.

I am disappointed, not by the substance of the judgement, which is sound, but by the fact that my country has managed to survive without truly governing itself since 1962. There is no reason why these constitutional and statutory provisions should still be in their original form, yet they remain there, tempting many judges into legislating, because Parliament refuses to do its job. As The CCJ rightly stated in Nervais, the purpose of the Court is not simply to rubber-stamp Parliament. However, the purpose of the Court is also not to do Parliament's job. Parliament is composed of elected officials who can be changed. The judiciary is populated by unelected officials with security of tenure, who have no real accountability to electors, provided that they remain of sound psychological and physical health. Judicial activism is tyranny dressed up in fancy clothes, and masquerading in an air of legitimacy.

In the US, the farce of appointing judges to the Supreme Court also illustrates my point. It is absurd that the politics of benchers determine constitutionality. It took a "Conservative Bench" to overturn *Roe v Wade*,[20] and a "Democrat Bench" to

[20] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

find that gays had a right to a private life, including marriage.[21] The judges on the bench determined how *Loving v Virginia* swung.[22] There is no pretence that the rule of law obtains. This is not at all good! This trend is allowed to persist because the judiciary has become a god onto itself, and is essentially an unelected ruling class.

Some have argued that it is bills of rights, whether statutory or constitutional, which are centralising documents and, by default, give rise to judicial activism.[23] They state that having codified rights means that the onus will always fall upon judges to interpret the depth and breadth of these rights, and thus, bills of rights simply delegate the determination of rights to a management class. I see some merit in that argument, however I do not think that the documents alone can be impeached. Instead, I think that individuals have lost the plot, and have allowed governments to make laws where

[21] https://casetext.com/case/obergefell-v-hodges
[22] https://casetext.com/case/loving-v-commonwealth-of-virginia?q=loving%20v%20virginia&sort=relevance&p=1&type=case
[23] see James Allan, "Bills of Rights as Centralising Instruments," *Adelaide Law Review*, 2006 https://www.austlii.edu.au/au/journals/AdelLawRw/2006/3.pdf

none should exist. People are at fault for not understanding tyranny and appreciating the need to actively resist it, mostly because of decadence. This has transformed the common law into something more akin to the rigid civil law system of most of Western Europe, which is known for being less business friendly, and more akin to a command-economy If we start from the premise that individuals are free, and remember that constitutions are meant to tell governments what they cannot ever do to individuals, the risk of judicial activism is greatly diminished. This is because governments themselves will be smaller, and have significantly less responsibilities to manage on others' behalf. It is the diffused nature of common law which makes it strong and useful.

*Legislative Authoritarianism*

Now, I must turn to parliamentary encroachment on the judicial role which takes on an even more authoritarian form. It involves the abuse of emergency constitutional procedures and, in the case of Trinidad and Tobago, our section 13 excepted legislation provisions, which allows the legislature to pass laws which derogate from constitutional rights if they can establish that they

are "reasonably justifiable" in a state which recognises fundamental human rights. See: *Northern Construction Limited v The Attorney General of Trinidad and Tobago HCA 733/2002*.[24] Emergencies and other "reasonable justifications" are scapegoats for unconstitutionality which are used to strip away individual rights. By using them, legislatures escape judicial and therefore constitutional oversight.

In all fairness, a somewhat objective standard is applied in Trinidad and Tobago when determining what is reasonably justifiable, but even this lends itself to subjectivity based on the premise that elected officials are, ostensibly, exercising the will of the populace.

For example, during the Covid-19 era, states of emergency were imposed to keep people indoors, close businesses, and wreak social and economic havoc, all on the basis that it was for the greater good. The worst aspect of these laws took on the form of mandatory vaccinations, which created different castes of citizens based on who would let

[24] https://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2009/archie/HC_733_02DD27Feb09.pdf

the state dictate what substances should and should not go into their bodies. What's more, information was suppressed, health outcomes were hidden—I can attest to this personally, since my vaccine symptoms were reported, but never acknowledged—and individuals' concerns were mocked and brushed off. In 2024, AstraZeneca withdrew its vaccine from the EU market and it admitted that these blood lots were possible (although rare). There has been no apology by any state to date.

Like judicial activism, legislative authoritarianism injects arbitrariness to the lawmaking process by imposing the will of politicians on the general citizenry. Sometimes, such decisions can yield substantively positive results, however the stability of a legal and political system should never depend solely or heavily on the morality of the lawmakers and politicians at its helm. Changes from liberal to authoritarian regimes will swiftly disabuse individuals of the notion that any government is there to seek the majority's interest. Personal morality must be kept out of government. Similarly, well-meaning "equality" legislation is touted as being protective of minorities, but in reality, these laws are used to take rights away from

individuals, rewrite reality, and punish people for non-compliance. Here in Trinidad and Tobago, our *Equal Opportunities Act, Chapter 22:03* should state, quite clearly, that it is excepted legislation under section 13 of our Constitution, but it does not. In the UK, race, sex, gender, and an ever expanding list of "protected" traits have been statutorily imposed, creating some who are more equal than others.[25] There, the statute functions as the bill of rights.

This kind of legislation forces individuals to associate with persons and organisations with whom they do not wish to have relations, by threat of state sanction. By acknowledging and circumventing, or by flouting enshrined individual rights for the purported greater good, governments encroach on the social and economic lives of individuals, normalising authoritarianism, and creating what is fundamentally an oligarchy dressed in democratic garb. The rule of law, then, becomes a rule by fiat.

[25] see Njoya: "A Critique of Equality Legislation in Liberal Market Democracies" in the *Journal of Libertarian Studies* 25(1), 2021 https://jls.mises.org/article/30786

## Government Encroachment on Social and Economic Life

Individuals are not stupid. For elitists, the idea that the hoi polloi are ignorant about how to meet their own needs is seductive, but misguided. It is hubris which causes the few to think that they know what is best for the many, yet governments do this every day by implementing counterproductive, harmful policies which make people feel good while marching themselves to the gallows.

Take for instance minimum wage legislation. Evidence has been clear that the implementation of a minimum wage prices low-skilled, usually poor workers out of the labour market, increasing unemployment as a result.[26] Like all price controls, the people left holding the ball are usually the ones legislators initially set out claiming they want to help. You see, in addition to governance—and I daresay this is the main motivation—politicians are interested in remaining in power. If it takes lies that feel good in the short term to secure that power, they will do it, and most citizens are too busy

[26] "Minimum Wages and Compliance: The Case of Trinidad and Tobago," Strobl and Walsh, 2001 https://www.nottingham.ac.uk/credit/documents/papers/01-12.pdf

surviving to pay attention to the illogic of implemented policy.

A similar thing happens on the international stage with labour and migration laws. It truly does take a government to make the claim that a country has a labour shortage, while simultaneously making it extremely difficult for foreigners to be hired by people who want to hire them. I have personal experience on this front, where the Canadian government was parrotting that it needed workers, but refused to loosen the regulations which would have allowed the Ontario law firm that wanted to hire me to do so at a fair price that we were both amenable to. It takes a government to claim that economic migrants and refugees are a socioeconomic burden, while refusing to allow them to be gainfully employed in a labour market with a labour shortage, while taxpayers fund their hotel stays and complain about the economic burden of doing so. Anybody who thinks that governments are here to solve problems is sorely misguided!

But, not only do governments have no intentions of solving problems in most instances. They are here to take choices away from individuals, and to create

additional problems. Trinidad and Tobago has had an influx of Venezuelan economic migrants in the last few years. They have come here illegally, and work unhindered by regulations. As such, many of them have been able to work, pool resources, start businesses, and prosper. Labour laws dictate that Trinidad and Tobago citizens are not allowed to hire them unless they have been registered, but the informal labour market pays this requirement no mind. Instead, reliance on privity of contract and the individual's right to bind himself by terms which he finds favourable, have allowed Venezuelans to work as they please and make lives for themselves. There are locals who do the same. This is also true of undocumented migrants in developed countries, who are able to survive mostly because there are people who see value in what they can contribute, who are willing to work with them. The regulations making such arrangements illegal undermine the constitutionally protected right to freedom of association under the guise of national security, and "protecting the jobs" for locals, despite jobs being the business of the parties involved and not the government.

The "greater good" justification for government encroachment into socioeconomic life has led to the

paternalistic criminalisation of alcohol during the prohibition period, which led to the expansion of a black market with attendant gang violence.[27] The subsequent criminalisation and eventual illegality of cannabis, which only came about because former prohibition bureaucrat turned Federal Bureau of Narcotics head, Harry Anslinger, wanted to keep himself employed, demonise blacks and latinos, target Billie Holliday[28], and, arguably help his oil and vehicle baron associates who feared the utility of hemp, has caused a similar black market, with several dead bodies in its wake. The Nordic Model of criminalising the sex buyer arguably makes day-to-day life more unsafe for the sex workers[29] the legislation purports to be protecting. Bans on

[27] see David Crary's report on this https://www.pbs.org/newshour/arts/100-years-later-prohibitions-legacy-remains

[28] see "The man behind the marijuana ban for all the wrong reasons" by Cydney Adams https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/

[29] see "Criminalising the sex buyer: what must policymakers learn from the 'Nordic model'?" by Niina Vuolajärvi https://www.lse.ac.uk/research/research-for-the-world/politics/criminalising-the-sex-buyer

abortion are expected to lead to increased maternal mortality.[30]

Over and over, governments attempt to make decisions for people, and to force the reversal of demand and supply. Over and over, they not only fail to mitigate the problems they claim to want to solve, but they exacerbate them. I think it is safe to say that the rule of thumb should be that governments should not concern themselves with dictating to individuals whom they can associate with, and with the exception of true rights, such as the right to life, liberty, and so on, should not dictate to individuals what consideration they ought to accept, what vices they should or should not participate in, and what work they should or should not do. Politicians do not have the insider knowledge necessary to make ground-level socioeconomic decisions, and they should never try to make them on behalf of the regular people who do.

[30] see "Abortion Bans Will Result in More Women Dying," by Spitzer, Weitz, and Buchanan: https://www.americanprogress.org/article/abortion-bans-will-result-in-more-women-dying/

**Voluntarily Ties Hands and a Lack of Oversight**

Ironically, governments also choose not to do what they are supposed to do under constitutions. The final nail in the rule of law's coffin is the performative ineptitude of the governmental branches when it is convenient for them to pretend that they cannot do their jobs. This choice to tie their own hands is deliberate. In the case of *Canada (Minister of Citizenship and Immigration) v Vavilov 2019 SCC 65 (CanLii)*[31], the Supreme Court of Canada said that courts should "defer to administrative bodies" because they are "subject-matter experts" when deciding on public law cases, and should only find decisions to be administratively and constitutionally unsound if they are not "reasonable." In that context, reasonable was held to mean internally logical. It did not depend on inherent legality, or obvious overstep, but on it being possible for the decision to make logical sense. If you're thinking this is a delegation of the court's administrative oversight responsibility to the very bodies which it is supposed to oversee, you would be correct.

31 https://www.canlii.org/en/ca/scc/doc/2019/2019scc65/2019scc65.html

Similarly, as when incumbent Supreme Court Justice Ketanji Brown-Jackson said she could not explain what a woman was, despite being interrogated about her fitness to interpret laws as an experienced judge, the ability of state actors to adopt and encourage the absurd is limitless. New sex definitions are stripping away women's rights to private spaces, safe prisons, and sports leagues. New definitions of racism are exempting blacks and other non-whites from the consequences of their bad behaviour. New definitions of sexism and sexual assault are elevating women's regrets to the criminal status, and so on. The result is always a concentration of power in the executive, legislative, or judicial branch due to their purported expertise, further facilitated by a later refusal to participate in actual governance. It always ends in tyranny.

On the ground, these executive and administrative bodies now have the power to tell individuals what to say and what they are allowed to think and express. These bodies can now target members on political grounds, make decisions based on unsubstantiated claims, and hound individuals socially, economically, and reputationally until they comply. While I am of the view that the constitutionality of "reasonableness" test in Vavilov

should be challenged—and I am in good company in thinking so[32]—we should not even have been put into the position of having to have this discussion. The very existence of administrative law dictates that substantive oversight of decisions is necessary, because how a decision is made matters just as much as the decision made. Courts are supposed to oversee.

**Conclusion**

Considering all of the above, it is clear that government is not something we must delegate, then ignore, lest the rule of law be done away with in its entirety. When the branches of government encroach on each other, a normative culture of power centralisation analogous to slowly boiling a frog comes about. If we get comfortable with blurred procedural lines, we remain at the behest of bad actors. This emboldens lawmakers to encroach on our individual lives in the same manner, justifying their actions through the corruption of the representative process, until they do not even bother

[32] "Jordan Peterson ruling empowers woke bodies everywhere to discipline members who express unpopular opinions," by Howard Levitt in the *Financial Post*, August 25, 2023 https://financialpost.com/fp-work/jordan-peterson-ruling-empowers-woke-bodies-to-discipline-members

to feign deference to the democratic will or the notion of public service. Finally, when these encroachments become the new normal, governmental bodies can pretend to forget what their actual roles are, allowing those at the top of the hierarchy to set the tone for what is supposed to be our liberal lives and livelihoods.

To counteract these trends, individuals must be educated on government as an institution, and on freedom. Laws which are inconsistent with liberal ideals should be repealed. Government should be relegated to the limited capacities for which it was created, and individual rights and responsibilities should be emphasised as a systemic inoculation against authoritarian creep. The bastardization of the rule of law incentivises the worst aspects of human nature. We must be vigilant, we may open our eyes one day and have no protected rights.

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