

---

## CONTENTS

---

### Introduction

*Michael Palmer* . . . . . **329**

### Articles

‘AI Theory of Justice’: Using  
Rawlsian Approaches to Legislate  
Better on Machine Learning in  
Government

*Jamie Grace and Roxanne Bamford*  
. . . . . **338**

Domestic Abuse during the UK’s  
COVID-19 Lockdown: From Normal  
to New Normal and What Survivors’  
Experiences Might Teach Us

*Amy Kellam* . . . . . **361**

Homeless Applicants with  
Dissatisfactory Decisions,  
Appropriate Dispute Processing and  
Access to Justice

*Patricia Ng* . . . . . **379**

Judicial Experiments in Caseflow  
Management 1920-1970

*Michael Reynolds* . . . . . **389**

Assessing the Efficiency of the  
District Courts of Pakistan—Why is  
Better Evaluation Needed?

*Muhammad Saeed* . . . . . **418**

Two Dimensions of the Rule of Law:  
A Reminder from Hong Kong

*Cho Kiu Chiang* . . . . . **439**

### Review Article

Jonathan Sumption, *Trials of the  
State: Law and the Decline of Politics*

*Patrick Birkinshaw* . . . . . **459**

### Notes

Making Law for Children in Scotland:  
Turning Commitment into Reality

*Lesley-Anne Barnes Macfarlane*  
. . . . . **476**

Judicial Early Neutral Evaluation

*Victoria McCloud* . . . . . **487**

*Telecom Centre (UK) v Thomas*

*Sanderson (Early Neutral  
Evaluation): Full Text* . . . . . **496**

British Association of Comparative  
Law

*Yseult Marique* . . . . . **501**

Corporate Liability for Breaches of  
Fundamental Human Rights in  
Canadian Law: *Nevsun Resources  
Limited v Araya* (2020)

*Peter Muchlinski* . . . . . **505**

*R (Hans Husson) v Secretary of State  
for the Home Department* (2020)

*Russell Wilcox* . . . . . **532**

### Book Reviews

Patrick Birkinshaw—*European  
Public Law: The Achievement and the  
Brexit Challenge*

*Yseult Marique* . . . . . **542**

Katie Benson, Colin King, Clive  
Walker (eds)—*Assets, Crimes and  
the State: Innovation in 21st Century  
Legal Responses*

*Umut Turksen* . . . . . **547**

### News and Events

COVID-19 Response . . . . . **554**

Results of the 2020 IALS Library  
Reader Satisfaction Survey . . . . **555**

Launch of New Research Centre **557**

Building Transformation Project  
Update . . . . . **558**

Events, Podcasts and Short Courses  
. . . . . **558**

Profiles of Contributors to Articles,  
Review Article and Notes . . . . . **560**

Visual Law

*Maria Federica Moscati* . . . . . **564**

## INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

Welcome to the third issue of the first volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for the progress that the relaunched journal has enjoyed.

In this issue a number of contributions address broad issues in access to justice, legal reform and rule of law. Jamie Grace and Roxanne Bamford's essay concerns the question of how to achieve clear ethical and democratic standards in the regulation of algorithmic justice. The authors argue that these standards are best established through implementing the ideals of John Rawls as expressed in his seminal study, *A Theory of Justice*. They note the potential issues in policy and regulation that may arise from the increasing use of

big data analysis. These include data bias, unfairness, threats to privacy, equality, and human rights standards, and lack of transparency and accountability. These worries need to be borne in mind in developing new legislation in order to meet the emerging challenges of algorithmic justice in data-driven governance. They argue that a regulatory framework for governing the processes by which data and technology are used, including the use of artificial intelligence in our criminal justice system and in other public agencies, needs to reflect Rawls' principles of equality of basic liberties and rights, and fair distribution of all social goods.<sup>1</sup>

Amy Kellam's essay on the question of domestic abuse during the UK's COVID-19 lockdown

### *Amicus Curiae* Contacts

Editor: Professor Michael Palmer,  
SOAS and IALS, University of  
London

Production Editor: Marie Selwood

Email address for all enquiries:  
[amicus.curiae@sas.ac.uk](mailto:amicus.curiae@sas.ac.uk)

By post: Eliza Boudier, *Amicus Curiae*,  
Charles Clore House, 17 Russell  
Square, London WC1B 5DR

If you would like to contribute an  
Article or short Note to a future issue,  
please visit the *Amicus Curiae* webpages  
to view the Style Guide and  
submission information.

<sup>1</sup> See also the essay in *Amicus Curiae* 1-1 by Adam Harkens (2019) 'Fairness in Algorithmic Decision-Making: Trade-offs, Policy Choices, and Procedural Protections'.

explores the significance of the information which is increasingly available on domestic abuse during the lockdown commencing spring 2020. It does so with particular reference to the proposed Domestic Abuse Bill (2019-2021) and against the wider socio-economic background. A central concern is the manner in which domestic abuse is characterized in popular culture and especially in the media, and how this characterization impacts on our perceptions of the necessity of, and proposals for, legal reform in order to deal better with the problem of domestic abuse.

Patricia Ng's contribution looks at the issue of homeless persons and their negative experiences in the handling of their applications to local government in England for temporary accommodation. It explores concerns in the decision-making process, and in the realistic availability and suitability of remedies, in what is often a situation of power imbalances in the relationship between, on the one hand, the applicants—especially those whose vulnerability triggered an application in the first place—and, on the other, local government officers. The applicants often fail to challenge negative decisions which they perceive to be wrong and unfair, and the essay draws on socio-legal analysis to show

why this is so. Briefly stated, their 'grievance apathy' is best explained as a combination of factors operating in a context of restricted access to legal advice, assistance and representation. Among these factors is a lack of legal consciousness on the part of many applicants, so that grievances do not easily become transformed into challenges or appeals.

The article by Cho Kiu Chiang (William Chiang) looks at issues in the rule of law in the context of Hong Kong and the protests ongoing there. His essay focuses on the meaning and conceptual boundaries of 'rule of' and 'law', and relevant jurisprudential perspectives on the rule of law are also considered. The analysis leads the author to conclude that the phrase 'rule of law' needs to be understood as binding the hands of those who invoke it—in particular, governments should not see themselves free to exploit the term for ulterior purposes, and the words in the term themselves require some basic obligations on the part of those who rule and govern. If a government does not want to fulfil those obligations—to keep its promise of the rule of law—then it should not engage in rule of law rhetoric.

In an extended assessment of Lord Sumption's *Trials of the State: Law and the Decline of Politics*, Patrick Birkinshaw

considers, in relation to arguments put forward in that book, issues of law in public life. Of these issues, the most pressing in the contemporary UK for Sumption is the impact of the growth of judicial law, weakening both legislation and political process (including active citizenship). While agreeing with Sumption on a number of key issues—in particular, the inadvisability of public decision-making by referenda, the need for electoral and other political reforms, and greater citizenship involvement—Birkinshaw challenges the analysis offered in *Trials of the State*. He does so, among other things, by pointing to a lack of clear conceptualization in Sumption's analysis of the apparently distinctive realms of law and of politics, and of the boundaries between them, as well as by leaving open the question of who decides what the law is.

Moreover, suggests Birkinshaw, what *Trials of State* views as primarily the consequences of judicial (more rigorous, adjudicative) activism—in particular, the growth of administrative law as developed since the 1960s, and changing ideas of parliamentary supremacy—need to be more firmly understood in terms of their roots in fundamental principles of the common law. These common law values took on a new dimension as government came to

assume greater social responsibilities and to become more interventionist. But, at the same time, argues Birkinshaw, historical origins and contemporary functions should not be conflated, with reference in particular to Article 8 of the European Convention on Human Rights (ECHR) and the judicial activism of the European Court of Human Rights. Birkinshaw holds that original intentions to protect individuals against Nazi and Communist authoritarianism and abuse do not necessarily preclude a more activist and imaginative use of Article 8 by the courts to create innovative rights such as that of personal autonomy in more recent times. Historical origins and contemporary functions may differ significantly, and, as Birkinshaw stresses, 'it is a weak argument to suggest that the [anti-authoritarian] context in which the ECHR was formed has no relevance to novel manifestations of rights today'.

While acknowledging that judges in their decision-making are embedded in a normative structure which is suffused with systemic bias, Birkinshaw rejects the call for a less robust judiciary and instead falls firmly on the side of judicial activism. And he raises the question: when parliamentary sovereignty is abused what should be the appropriate judicial response? To which he himself

replies, that it is for the judge, exercising her or his conscience and offering reasoned judgment. For it is the responsibility of judges not only to uphold the law but also the rule of law on which the law is built. This is all the more important when democracy is threatened by pervasive digital exploitation utilized primarily by those able to fund such efforts. Moreover, a very important function that judges have fulfilled in recent times, namely plugging the holes left by deficiencies in the political process, should not be overlooked, and the underlying issues need to be fully addressed.

The note contributed by Russell Wilcox examines the case of *R (Hans Husson) v Secretary of State for the Home Department* [2020] EWCA Civ in which the Court of Appeal considered the question of damages for delays in the immigration system. Problems in this case arose from a failure promptly to issue the appellant with a biometric residence permit (BRP). Such permits are necessary in the UK for purposes of securing employment once leave to remain has been granted. The court found it arguable that this delay effectively deprived the appellant of the ability to work such that its impact was a sufficiently serious

interference in his private and family life to engage Article 8(1) of the ECHR<sup>2</sup> and justify damages for consequential loss. It also found it arguable that the delay gave rise to a claim in negligence on the basis of a prior assumption of responsibility.

Peter Muchlinski's essay 'Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*' looks at a recently decided case in the Canadian Supreme Court. It analyses issues of corporate liability for violations of fundamental human rights, and argues that the judicial activism of the majority of justices in this case represents an important step forward in this area of international law. In the *Nevsun* case, the Supreme Court of Canada held the claims of human rights abuses bought by Eritrean claimants are admissible. The allegations were that the plaintiffs had been conscripted to work for the subsidiary of a Canadian multinational mining company and subjected to systematic abuse. In considering the case, the court examined issues of act of state,<sup>3</sup> the reception of customary international law into Canadian domestic law, and developments in Canadian tort law. The

<sup>2</sup> See also the comments on the ECHR in Patrick Birkinshaw's contribution to this issue.

<sup>3</sup> See also the essay by Justice Mary Newbury (2019) 'Foreign Act of State—A Practical Guide from *Buttes Gas to Belhaj*', in *Amicus Curiae* 1-1.



supportive majority decision was accompanied by dissenting judgments which may yet assume significant importance in future litigation. The majority in the instant case held that foreign claimants have the right to bring claims against a Canadian parent company on the grounds of alleged violations by its overseas subsidiary of fundamental human rights. The author argues that such judicial activism is important for the development of international law, and that such activism also encourages progress in domestic law in the same direction. The outcome also encourages Canadian corporations to be much more cautious in matters of human rights protection in their overseas operations, especially in jurisdictions which lack robust legal and administrative frameworks and institutions.

Further contributions focus on issues of judicial reform and developments in civil justice. Thus, Dr Victoria McCloud explores the innovative hybrid process of 'early neutral evaluation' (ENE) in her contribution entitled 'Judicial Early Neutral Evaluation'. She considers the value and potential of judicial ENE for enhancing civil justice in the context of UK proceedings (particularly in England and Wales). She invokes continuing fear of spiralling costs

for the parties, as illustrated so powerfully in the Dickensian tale of *Bleak House*, and suggests that early judicial intervention in the form of ENE now offers the parties a process by means of which they may limit their legal costs and avoid the difficulties arising from entrenched position-taking, while also receiving sound, informed, judicial views on the merits of their case. The emerging norm in English case law is that the court may make an order for ENE regardless of whether the parties make such a request. Master McCloud (a Master of the High Court Queen's Bench Division) reiterates the observations of the distinguished scholar of alternative dispute resolution, Californian judge Wayne Brazil, which offer guidance on issues that may usefully be considered when ENE is contemplated. These include, for example, the helpfulness or otherwise of having a judge indicate likely outcome when the case is adjudicated (by another judge), contemplating whether or not ENE will save financial resources, enhancing a sense of realism in the parties, and creating space for parties to make concessions without serious loss of face. Moreover, given the rapid developments in legal e-technology and the online core proposals offered by Briggs LJ, this note encourages a sense of potential for the evolving

e-technology to assist by enhancing the quality and consistency of ENE-encouraged outcomes.<sup>4</sup>

Michael Reynolds' article builds on his earlier contribution (featured in *Amicus Curiae* 1-2), which identified the macro-level challenges the Judicature Commissioners faced in the late nineteenth century in reforming the structure and procedures of the court system of England and Wales. The essay in this issue examines an innovation arising out of the 1872 Judicature Commission, namely, a pioneering form of case management that emerged more than 70 years before its formal introduction in the courts under the Civil Procedure Rules in the late 1990s. The contribution explores the manner in which Sir Frances Newbolt took the opportunity to conduct experiments in chambers with the aim of realizing the Commissioners' objectives of creating a more effective and efficient system, while avoiding unnecessary costs. The essay contends that the approach adopted by Newbolt and others encouraged resolution by means of informal judicial promotion of

settlement at an early interlocutory stage. Newbolt's Scheme is also assessed in terms of 'quality of outcome', as characterized by Marc Galanter, and the essay also points to the relevance of its findings for the work of the late Simon Roberts, and his analysis of the rise of structured negotiation within the civil courts.

Muhammad Saeed, a former judge in the district judiciary of Pakistan, provides an essay that points to the serious problems of inefficiency, and difficulties in the assessment of inefficiency, in the district courts of Pakistan. Delay, vexatious litigation and abuse of court process are serious concerns, but the nature and magnitude of these issues require empirical evaluation. There is an urgent need for more effective performance appraisal through greater use of empirical research to identify specific problems and solutions. This is all the more pressing given contextualizing issues of limited judicial accountability by democratic institutions, weaknesses in official appraisal processes, and a dearth of assessing the impact of reform initiatives. The court service in

---

<sup>4</sup> See also the essay by Jamie Grace and Roxanne Bamford in this volume, entitled "AI Theory of Justice": Using Rawlsian Approaches to Better Legislate on Machine Learning in Government', and the paper by Michael Reynolds on 'Newbolt's Scheme', a pioneering form of judicial case management that emerged many decades before the Woolf civil justice reforms. On the value or otherwise of e-technology in some forms of dispute resolution, see Carrie Menkel-Meadow (2016) 'Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, the Hague, the Netherlands, 22-23 May 2016' 3(1) *International Journal of Online Dispute Resolution* 4-7.

Pakistan needs to remove the barriers that undermine the system and limit user trust in the system, and the most important initial steps to be taken in the process of reform include, in particular, the introduction of institutionalized and empirically based scrutiny of judicial performance.

Important legislative developments in the law of Scotland in relation to the rights of children are explained and analyzed in the note by Lesley-Anne Barnes Macfarlane entitled ‘Making Law for Children in Scotland: Turning Commitment into Reality’. (An extended analysis is also available as a report commissioned by the Scottish Parliament Justice Committee, *Balancing the Rights of Parents and Children* [Barnes Macfarlane 2019]). The essay argues that these changes are likely to give greater practical support in the law for supporting children’s rights. First, the Children (Scotland) Bill is in the process of reforming legislation on a number of specific issues. The proposed reforms in part are related to the absence in Scotland of family courts, so that it is procedural rules of court that provide the detailed framework for dealing with different sorts of

family case. The Bill, *inter alia*, looks to provide better support for children involved where parents are in dispute over such matters as care and upbringing of their children, and to quicken decision-making so as to avoid delay and expense. It will also remove the increasingly controversial statutory capacity presumption regarding the expression of views by children, so that children under 12 years of age would henceforth have the right to offer their opinion on matters affecting them. In addition, the Bill will likely introduce a statutory checklist of factors that the courts need to take into account in making decisions where abuse or risk of abuse is involved, in deciding about parental upbringing of their child or children, and in considering the likely impact of court decisions on the important relationships which the child shares within the family such as, for example, with grandparents (although Barnes Macfarlane notes that, disappointingly, siblings are not specifically mentioned in the amendments proposed to Part 1 of the Bill).<sup>5</sup> The court would have a duty to explain its decisions affecting children unless, for example, such explanation is

---

<sup>5</sup> Of course, since the Bill is still ‘live’ it may be subject to change in terms of final shape and content. It may well be that some of the children’s groups table amendments for consideration in the immediate future on, for example, the position regarding siblings so that they are specifically mentioned in Part 1. A link to the [Bill page](#) for the Justice Committee—the committee at the Scottish Parliament considering the Bill—provides information on the Bill’s progress.



considered not to be in the best interests of the child. Another responsibility placed on the court in the Bill is a duty to investigate any failure to obey a contact/residence order. While overall many of the Bill's reforming provisions are to be welcomed, Barnes Macfarlane suggests that there are legitimate concerns that its effectiveness will be limited by the somewhat overcomplicated nature of the framework of provisions that it offers. A second significant development relates to the UN Convention on the Rights of the Child (CRC). Reform of child law is buttressed by Scotland's decision to incorporate fully the CRC into Scottish domestic law. This development would help to ensure that children's rights are properly taken into account when courts and other bodies make decisions impacting on children's interests and rights. Taken together these two developments offer significant advances in respecting the rights of children.

Yseult Marique provides a note on the work of the British Association of Comparative Law (BACL), created in 1950. The Association fosters comparative legal research and teaching throughout the UK and has three main functions. One is a PhD workshop held annually in the spring every year in order to provide early career researchers

an opportunity to present their doctoral research and receive supportive feedback from colleagues. In addition, BACL holds a seminar at the Society of Legal Scholars' Conference in September every year. Thirdly, the national committee is responsible for coordinating reports for UK law schools for the International Academy of Comparative Law, which organizes a world congress in comparative law every four years. The next congress will be held in 2022 in Asunción, Paraguay. BACL has recently launched a call for blog contributions entitled 'COVID-19 in comparative perspective'. See (1) the [BACL website](#) and (2) the [BACL Blog](#).

The Editor thanks contributors, and also Amy Kellam, Patricia Ng, Maria Federica Moscati, and Marie Selwood, for their kind efforts in making this issue possible.

## Visual Law

Readers of *Amicus Curiae* are encouraged to submit photographs taken by them, along with a short (200 words maximum) description of the theme of each picture. Submissions may illustrate any topic of legal interest and should be compelling, both intellectually and visually. They may be single pictures, or they may be a series of pictures—in the latter case, descriptions of the series may be

up to 1,000 words in length. The final page(s) of each issue of *Amicus Curiae*, assuming there is sufficient interest, will feature the photo(s) and explanatory caption(s). Contributors should confirm that they hold the copyright in the pictures submitted for publication.

In this issue, Dr Maria Federica Moscati has kindly contributed a picture taken during London Pride in 2018, and which speaks to the restrictions that the Italian legal system places on the protection of LGBTI people.

## In memory of Dr Aonghus Cheevers

Finally, we should like to pay tribute to the life and work of Aonghus Cheevers whose essay on mediation in Ireland was published earlier this year in *Amicus Curiae* 1-2: 143-64. Aonghus sadly passed away at an early stage of his career in April this year. We cherish the memory of Aonghus and extend all our sympathies to his family and many friends. A brief profile of Aonghus is also available at *Amicus Curiae* 1-2: 322