

## EDITOR'S INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

HKU and CUHK, Hong Kong

Welcome to the second issue of the third volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for supporting the progress that the relaunched journal is making.

In this issue, contributions by Inger Andersen (Under-Secretary-General of the United Nations and Executive Director of the UN Environment Programme), and the Rt Hon Lord Carnwath of Notting Hill examine the role of law reform in addressing the issues of climate change. Their contributions were first presented at the Bar Council's Annual Law Reform Lecture,<sup>1</sup> 'Exploring the Role of Law Reform in the Context of Climate Change', held on Tuesday 30 November 2021. This event took place shortly after COP26, the climate conference held in Glasgow. In her contribution, Under-Secretary General Andersen acknowledges the value of important undertakings in the COP26 final agreement, and elsewhere in the summit, on

critical issues, but points also to limitations in a number of areas including the need to work more effectively so as meet the 1.5°C goal of the Paris Agreement 2015, a culture of promises made but not acted upon, a failure to interconnect climate problems with biodiversity loss, pollution and waste problems even though these issues are often driven by the same unsustainable practices. Instead, with the axiomatic goal of enhancing the 'welfare of the people', effective development, implementation

### *Amicus Curiae* Calendar 2022-2023

#### **New Series Volume 3**

**3.3** (spring): submission  
25 April 2022; publication  
27 June 2022

#### **New Series Volume 4**

**4.1** (autumn): submission  
5 September 2022; publication  
7 November 2022

**4.2** (winter): submission  
3 January 2023; publication  
6 March 2023

**4.3** (spring): submission  
24 April 2023; publication  
26 June 2023

#### **New Series Volume 5**

**5.1** (autumn): submission  
4 September 2023; publication  
6 November 2023

<sup>1</sup> We thank the authors and the Bar Council for agreeing to publication of the presentations in *Amicus Curiae*. On the lecture series generally, and for earlier presentations, see the [Bar Council's website](#).

and enforcement of domestic and international legal reforms promoting the environmental rule of law are needed in a range of areas. These include, but are not limited to taxation, company regulation, securities, trade commerce, energy, use and planning of land and transportation—‘you name virtually any law, and countries likely need to climate-proof it’. And in the climate-proofing process, international co-operation and co-ordination, as well as greater social responsibility by a wide range of actors and institutions, are essential.

Lord Carnwath, in his contribution, examines the manner in which the law has in fact been drawn on in response to the challenges of climate change, both before and after the Paris Agreement 2015. He observes that legal responses have been varied, but one common theme has been the impact of campaigning groups across many jurisdictions. He highlights important recent (and sometimes still ongoing) cases especially—but not exclusively—in the USA and in Europe. Taken together, these show the growing willingness of the courts to rule against government and business when they fail to implement effective policies and practices that would otherwise counteract climate change and promote environmental welfare. But while such positive experiences show that the courts can and should fill important gaps,

Lord Carnwath also concludes that judicial action alone is insufficient. Initiatives which offer specialized legislation for reform in the context of climate change, and that contribute a coherent framework for the enforcement of climate obligations, are also essential. He points to the importance of the UK’s Climate Change Act 2008, the 2021 World Bank’s Reference Guide to Climate Change Framework Legislation, and the European Union’s (EU) 2021 Climate Law. It might be added here that reforms in the People’s Republic of China (PRC) will also be crucial, as its energy sector is heavily dependent on fossil fuels and it is the largest emitter of carbon dioxide. The PRC aspires to ‘carbon neutral’ by 2060 even though its emissions are still rising, and its enforcement of law a long-standing problem.

In addition, four contributions to the issue comprise the second of two special sections which feature in this and in the previous issue (3-1) of the journal, guest edited by Professor Carl Stychin, and addressing questions of ‘Law, Public Policy and the Covid Crisis’. Based on a series of IALS remote seminars held in the academic year 2020–2021, the essays that have been contributed to this collection offer important analysis of various aspects of the impact of Covid-19. Professor Stychin’s introduction contextualizes the second special section in the emerging discourses

on the nature of the legal changes often made in response to the pandemic, and broader issues such as social justice and the debate about the use of public health for purposes of (sometimes manifest, sometimes latent) enhanced state control at the expense of individual liberties. The essays in this section show that the assertion that Covid-19 is a universal experience is not plausible. Rather, through the contributions' analysis of issues of population movements, gender and cultural dimensions of death respectively, it has a disproportionate and discriminatory impact on the lives of many people around the world.

Justice Anthony J Besanko's contributed essay 'Legal Unreasonableness After *Li*—A Place for Proportionality' considers the issue of substantive legal unreasonableness in the context of administrative law, especially judicial review of the exercise of an administrative discretionary power, following the 2013 case *Minister for Immigration and Citizenship v Li*. In this case the High Court of Australia expanded the ground of legal unreasonableness beyond Lord Greene's *Wednesbury* unreasonableness when assessing the exercise of an administrative discretionary power, so that 'if reduced to a single question, it is now whether, both as to outcome and process, a reasonable decision-maker could reach the decision under challenge, or could reach

the decision under challenge by the process adopted'. Justice Besanko concludes that the concept of proportionality 'has a role to play in the judicial review of the exercise of administrative discretionary powers in circumstances where, because of the nature of the power and the circumstances of the case, means and ends are at the forefront of the analysis. In such cases, it may provide a ready explanation of the reason the exercise of power is legally unreasonable'.

In his essay, 'What is the Role of a Legal Academic? A Response to Lord Burrows', Professor Geoffrey Samuel examines and challenges the arguments recently put forward by Lord Burrows that academics and judges (and other legal professionals) should play a complementary role, and that this role is being undermined by a trend in legal studies scholarship away from distinctively practical and doctrinal issues towards approaches more informed by 'deep theory' and interdisciplinarity. Without seeking to detract from the value of doctrinal analysis, Professor Samuel questions any characterization of the role of legal academics as one in which scholars of law function primarily as servants of legal practice in its various forms. Such a depiction is particularly problematic when legal scholars are expected to advance knowledge about law more generally by meeting the needs of 'good research, adequate

methodologies and epistemological sensitivity' in their academic work. The essay also argues for both a better understanding of the place of theory (especially 'grand theory') in legal scholarship, and greater recognition of the fact that doctrinal law is infused by theory (albeit often implicitly so). For Professor Samuel, doctrinal methodology contains an important diversity that tends to be overlooked even by doctrinalists themselves. A more fruitful approach which could be developed lies in examination of the relationship between the 'reasoning strategies and techniques used by judges and the methods and schemes of intelligibility employed by those working in other social science and humanities disciplines'.

In his contribution, 'Possible Solutions for Protectionist Anti-Dumping Procedures', Dr Abdulkadir Yilmazcan examines international trade negotiations on anti-dumping. These began some two decades or so ago, but the three main groups involved have different interests and take different positions in the Anti-Dumping Agreement negotiations, hindering progress towards a comprehensive agreement. The first group, Friends of Anti-dumping Negotiations, consists of several World Trade Organization members pushing for more transparency, due process and clearer rules. Another group consists of developed countries, such as the USA, and aims to maintain existing rules. A third

group, comprising PRC, Egypt and India, calls for developing country concerns to be taken into consideration in revisions to the Anti-Dumping Agreement. PRC has submitted relatively few proposals, although it is the most affected member as it is the top anti-dumping target. In addition, the EU, Canada and Australia agree on the need for reform but have difficulty in amending their domestic laws. The author takes a pessimistic view of the prospects for successful reform, but suggests that prioritizing procedural issues over substantive questions, thereby enhancing procedural justice in anti-dumping processes, may be the best way forward.

In the contribution by Professor Christopher Waters, entitled 'The Role of Border Cities in International Law', and based on his presentation at the Institute of Advanced Legal Studies Director's Seminar Series on 4 November 2021, two fields of study are brought together, namely: cities as actors in international law and international boundaries. This analytical melding provides the basis for examining the place of border cities in international law and diplomacy, with the urban borderland straddling the Canada-United States border of Windsor, Ontario, and Detroit, Michigan, as a case study. The author points to the fact that cities have become important in respect of a number of legal issues often not anticipated in constitutions or municipal

legislation, including climate change (especially post-COP26), migration and sanctuary, human rights, and human development. In addition, the interdisciplinary field of borderland studies throws light on such issues as economic and political development, social welfare, cultural identity and conflict, discrimination and human rights. Analysis of the Windsor–Detroit relationship shows economic, cultural and interpersonal integration, yet formal governance ties between the two cities appear to be limited. In reality, however, there is substantial governmental cooperation through public authorities responsible for such matters as transport, housing, emergency services, policing, sports and recreation, conservation, education and public utilities, so that we may speak of ‘binational city governance’. This substantive cooperation is often facilitated by ‘boundary spanners’—individuals and non-governmental organizations who function as important points of cross-border contact and conversation. But there remains significant room for more effective borderland governance so that this ‘border city diplomacy’ would be able to deal better with the pressing issues that face the local populations.

In the Notes section, several examinations of recent law publications are offered. Barrie Nathan considers Jeffrey Hill’s study, *The Practical Guide to*

*Mooting*; Nicola Monaghan evaluates *Electronic Evidence and Electronic Signatures* by Stephen Mason and Daniel Seng (eds) (5th edn); and Professor Jaakko Husa assesses the study by Simone Glanert, Alexandra Mercescu and Geoffrey Samuel entitled *Rethinking Comparative Law*.

‘A Visual Autoethnography of a PhD Journey’ by Dr Clare Williams is this issue’s Visual Law article, and uses a Mountains of Metaphor interactive web-based game as an autoethnographically-inspired account of a doctoral studies journey in law as a part-time researcher with disability. Referring to theories of metaphor and the importance of framing, both of research and of research processes, this contribution encourages us to consider how and why we might approach our research practices with kindness and self-compassion. Finally, by drawing attention to the ways in which we do, talk and think about our approaches to research, this piece hopes to contribute to ongoing discourses about knowledge and understanding within the law school.

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