
EDITOR'S INTRODUCTION

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Welcome to the first issue of the fourth volume of the new series of *Amicus Curiae*. We are grateful to contributors, readers and others for supporting the progress that the new series of the journal is making.

In 2004, the New Zealand Government discontinued the right to appeal to the Privy Council. It established the Supreme Court as New Zealand's highest court and severed all formal links to the Privy Council. In his contributed essay, 'Reflections on the Roles of Apex and Intermediate Courts

in New Zealand', Justice Forrie Miller (IALS-SAS Inns of Court Research Fellow in the first quarter of 2022) examines and reflects on developments following the Supreme Court of New Zealand's replacement of the Privy Council as the last stop in the judicial system. The reform gave the Supreme Court a broad jurisdiction, offered an accessible location, and it was anticipated that, as a final appellate court, the Court would function effectively. The Court has been successful in shaping and adapting law appropriate for the conditions

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of New Zealand. However, its output has been lower than expected, and Justice Miller explains that is attributable to appellate structures and pathways that constrain demand for its services. He examines the impact this has had on longstanding appellate norms and the distribution of responsibility for law development between the Supreme Court and Court of Appeal. He offers insightful suggestions for reform, focusing on the approach that appellate courts ought to take to leave and to precedent, adhering closely to the common law case-by-case tradition. Justice Miller suggests dialogue about possible reforms is needed.

Geoffrey Samuel's contribution entitled 'Can Doctrinal Legal Scholarship be Defended?' reflects on the nature of such scholarship and considers the arguments put forward by Mátyás Bódig,¹ in a recent major study defending the doctrinal approach to understanding law. Professor Samuel offers a careful characterization of the manner in which doctrinal legal scholarship developed and is defined in civil and common law traditions, noting its much later emergence in the common law world, and how the influence of Realism tends to make many American legal scholars more accepting of perspectives from other

disciplines. While emphasizing that he sees the value of much doctrinal scholarship for the courts and the legal profession, and that in its creation impressive legal minds are at work, he doubts that it is capable of generating, in itself, new knowledge. He finds unconvincing the defence of doctrinal scholarship offered by Professor Bódig and based on an epistemological approach characterized as the 'rational reconstruction of the law'. This approach justifies legal doctrinal research from an entirely internal position. It gives little attention to the possibilities offered by interdisciplinarity, and to examining how ideas from other disciplines might facilitate better doctrinal legal scholarship. Dworkin's interpretive analysis has more to offer as, for example, it accepts that the judge's search for structural fit cannot be considered in isolation either of political theory or of social goals and the actual method is best explained through reference to, or analogy with, literary criticism. Doctrinal legal scholarship has significant value for judges, lawyers and other sections of the legal community. However, Professor Samuel argues, it is found wanting when it comes to establishing general truths about society, or generating new ideas.

¹ Mátyás Bódig (2021) *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Elgar Studies in Legal Research Methods) Cheltenham: Edward Elgar.

Martin Kwan's essay explores the debate that surfaces from time to time in Hong Kong about the freedom of courts in the Special Administrative Region freely to refer to foreign authorities. There is a lack of agreement in legal and judicial circles on this matter. The contribution argues that, for three important reasons, such freedom should be allowed and encouraged. First, constitutional considerations are less constraining in the Hong Kong case. Secondly, the professionalism of the courts in Hong Kong means that such freedom will be used responsibly. Thirdly, Hong Kong has a fairly small case pool, so the practical and doctrinal insights from foreign authorities are very useful. The author takes a positive view of the broader approach, pushing the courts in Hong Kong to reach out more to the jurisprudence of foreign authorities, and to exercise less self-restraint.

There follow several contributions that are part of a larger study on issues and developments in alternative dispute resolution, with other essays to be published in the next issue (4.2): Francis Boorman 'Developments in the History of Arbitration: A Past for the Present?', Bryan Clark 'Mandatory Mediation in England and Wales: Much Ado About Nothing?', Debbie De Girolamo & Dominic Spenser Underhill 'Alternative Dispute Resolution and the Civil Courts: A Very British Type of Justice—

The Legacy of the Woolf Reforms in 2022', Nicholas Gould & Olivia Liang 'Conflict Avoidance and Alternative Dispute Resolution in the UK Construction Industry', and Matthew Vickers 'Civil Justice Reform: An Ombudsman Perspective'.

In the UK and elsewhere, there have sometimes been quite prominent and interesting cases in which a judge has been convicted, or accused, of a crime. This contribution to the Notes section by Barrie Nathan entitled 'Judges in the Dock' looks at judges who have themselves fallen foul of the law while still serving as a judge, or prior to their appointment, or post-retirement. He observes that the most obvious criminal offence of which judges are accused or guilty is bribery. Other offences which have come to light include smuggling, murder, perjury, perverting the course of justice, and passing sentences too heavy or too light. The essay examines the ways in which such judges have been dealt with and points to the disparities of sentence that follow conviction.

The Notes section continues with Dr Samia Bano's review of a new study by Anna Marotta entitled *A Geo-Legal Approach to the English Sharia Courts*. This study by Professor Marotta uses a 'law in context' perspective to examine the emergence and development of Muslim communities in Britain

(and Europe), the issues of pluralist legal orders that have emerged as a result, and debates about identity formation in relation to legal and non-legal Muslim family law decision-making. The study addresses persisting and critically important issues of the manner in which Muslim religious systems of dispute resolution operate in the western legal orders of Europe and the United Kingdom, the lived experience of Muslims in minority diasporic British communities in respect of their practice and understanding of Islamic family law, and, more fundamentally, asks how do western legal systems accommodate religious and cultural difference? One of the strengths of the book is the analysis of the ways in which case law has emerged and been interpreted in English courts, and difficulties with notions of 'rights' that fail to encapsulate Muslim identity. The 'geo-legal' analysis illustrates how official and unofficial legal rules are used by various actors to defend their ideas of law and to implement their values and strategies. Dr Bano recommends the volume to us as a significant synthesizing and interdisciplinary contribution to the study of law and Muslim legal pluralism.

'Putting a Social and Cultural Framework on the Evidence Act: Recent New Zealand Supreme Court Guidance' is a contribution that includes two seminar presentations, one by Justice

Goddard (New Zealand Court of Appeal) and the other by counsel Mai Chen (Public Law Toolbox Chambers, and Superdiversity Institute for Law, Policy and Business). These addressed certain aspects of the New Zealand Supreme Court decision in *Deng v Zheng* [2022] NZSC 76. Justice Goddard was the presiding judge in *Zheng v Deng* [2020] NZCA 614, the Court of Appeal judgment appealed to the Supreme Court. Mai Chen appeared with two other lawyers on behalf of the intervenor, the New Zealand Law Society. Their presentations discuss issues relating to guidance on bringing relevant social and cultural information to the attention of the court. The central concern of the case was whether the parties, who were Chinese and conducted their business relationship in Putonghua, had entered into a legal partnership, despite an absence of formal documentation. If such a partnership was found to exist, an account would need to be taken to divide the assets and liabilities of the partnership following its dissolution. Two issues arose relating to the culture of the parties. First, whether the meaning to be ascribed to the Chinese term 公司 (*gongsi*), often translated into English as 'company', bore a meaning broader than that of 'company', so that it could be extended to include 'firm' or 'enterprise'. In particular, different translators used different terms in

their English translations of the expression 公司 (*gongsì*), without explaining why.

Secondly, to understand the significance of the term 关系 (*guanxi*), often translated into English as ‘relationships’ or ‘connections’. The Supreme Court determined that a partnership between the parties clearly did exist, documentary evidence showing a shared understanding as to the nature of the business relationship. In addition, the Court offered brief comments on how, where relevant, the social and cultural framework within which one or more of the protagonists may operate might be brought to the attention of the court, including through expert evidence and court-appointed experts to establish adjudicative facts. This is important, as New Zealand becomes a more culturally pluralistic superdiverse society on a bicultural (with Indigenous Maori) base. What are commonly accepted social and cultural facts in the country will increasingly be located in the practices of those first and subsequent generations of ethnic groups in New Zealand. Increased scope for judicial notice to be taken of such facts will likely evolve, and what are reliable published documents.

Barnaby Hone’s contribution ‘Professor of Practice: A Note on How to Make the Role Work, and How Practitioners and Academics Can Work Together in a Better Way’

reflects on his experiences during his nearly two-year appointment recently at the IALS as the Professor of Practice for Financial Regulation (FinReg). He offers his thoughts about the role of ‘Professor of Legal Practice’ and how it might be used in other institutions. He concludes that such appointments work best where the institution has specific strengths in the practitioner’s own professional areas, which in this case was asset recovery and money laundering. In addition, the dual nature of the role means that mutually agreed and well-planned arrangements and events should be in place. Finally, the person appointed should attempt to immerse themselves in the academic world they have joined, despite the continuing pressures of professional work.

In his review of the study edited by Felice Batlan and Marianne Vasara-Aaltonen (2021) under the title *Histories of Legal Aid: A Comparative and International Perspective*, Daniel Newman sees much value in a work that brings together case studies from a range of jurisdictions of legal aid and its development, and which contributes to the growing scholarship on legal aid and the role it plays in helping the socially and economically disadvantaged to secure access to justice and legal services. It offers analysis of legal aid in Belgium, Chile, China, Finland, France, Germany, Russia and the United States.

Newman points out how the legal aid situation in the book under review is considered in greater historical depth than many other contributions to the discourses of legal aid—which tend to focus on the contemporary situation—offering understanding of the cultural and political forces that have shaped the legal aid system in each of the eight countries studied in the book. Newman points to important aspects of the development of legal aid that emerge from the book, including the increasing need to tackle the problems faced by poor people in rapidly changing societies—which includes the role of philanthropy to fill the gaps in the state—and how distinctive political considerations of particular jurisdictions have been important in shaping legal aid developments worldwide since the Industrial Revolution. Transplantation of ideas and practices of legal aid has been important too. Another significant influence has been the manner in which the legal profession has grown in various societies, helping to shape legal aid into particular forms. Newman concludes by suggesting that studies such as the book under review show how sociolegal studies can be meaningfully enhanced by drawing upon the insights offered by comparative legal studies.

In their Note ‘Sleep-Facilitated Sexual Assault: An Analysis of Case Data Featuring Female and Male Victims of Rape’, Phil Rumney and

Duncan McPhee consider issues in a hitherto under-researched but long-standing form of rape in the United Kingdom (UK), namely the rape of victims who are asleep at the time that offence occurred, and in which the perpetrator is a male. They call for better understanding of the rape of those who are sleeping and in the criminal justice and police response to this problem. Their analysis draws on police rape investigation files for empirical data and concludes that the evidence and its analysis reveal a form of sleep-facilitated victimization that often involves the targeting of female victims. More research is needed on the frequency of this form of offending (especially as victims are sometimes unaware that they have been assaulted), its treatment by criminal justice professionals (especially where there is a previous history of domestic violence), scepticism in cases involving repeat offending, the use of offers of shared accommodation as a lure, and so on so that we gain better understanding of the manner in which sex offenders target sleeping victims and the means by which they perpetrate their crimes.

This issue of *Amicus Curiae* also contains a special remembrance, authored by Dr Amy Kellam, for James Crawford—international judge, lawyer and scholar—who passed away on 31 May 2021. We find cause to remember one of Crawford’s many achievements at this time, for the current 77th

session of the United Nations General Assembly (UNGA) is scheduled to consider the possibility of an international convention on the Responsibility of States for Internationally Wrongful Acts. Crawford's work was instrumental in the creation of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which were adopted by the UNGA in 2001. The law of state responsibility has its origins in the 19th century, but it has undergone significant development in recent years. This is due in no small part to Crawford's systematic distillation of the general principles of state responsibility into a set of rules for determining when a state is responsible for wrongful acts, as well as what consequences flow from that responsibility. The Articles are now considered to be the authoritative statement on the law of state responsibility. Crawford's work has had a lasting impact on the development of international law. He will be remembered for his dedication to the law, his good humour and his commitment to legal scholarship.

While this issue was in production, we received the sad news of the death on 4 September 2022 of Phil Rumney (joint author of the above-mentioned Note on 'Sleep-Facilitated Sexual Assault'). Phil's co-author in this issue, Duncan McPhee, has contributed

a short celebration of Phil's life and work which we are pleased to be able to include.

The issue concludes with Francis Boorman's Visual Law essay entitled 'Sporting Arbitrations: 18th-Century Rules for Boxing'. This provides an illustrated and succinct account of 18th-century sporting arbitration. At that time, boxing was becoming increasingly professionalized and commercialized, and the site of extensive gambling. The arbitrators were accorded wide-ranging powers of decision-making. Dr Boorman's insightful contribution shows a set of rules for pugilistic bouts held in a major Tottenham Court Road venue. The rules reflect the processes ordinarily found in 18th-century commercial arbitration. Each party chose an arbitrator, and the two selected then in turn nominated an umpire who would decide matters on which the arbitrators failed to agree.