

EDITOR'S INTRODUCTION

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Welcome to the second 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—now approaching its Fifth Birthday—of the journal is making.

The contribution by Gary Meggitt entitled “A British Bundesrat? The Brown Commission and the Future of the House of Lords” addresses issues relating to the reform of the House of Lords in the United Kingdom. There have been many such proposals over the past century or more, and this latest effort at reform is headed by Lord Brown, the former Labour Prime Minister. The essence of these recommendations is that instead of creating an elected Assembly, reformers should focus on making the current House of Lords more representative and better able to perform its functions. The author recommends a combination of primary and secondary elections, weighted for population size, to ensure that each nation and region is represented in proportion to its

population. It is argued that this would not only address existing problems of underrepresentation but also bring about a fresh approach to policymaking by ensuring greater involvement from those outside London and south-east England. Furthermore, such a reformed House of Lords could be empowered with additional responsibilities including improved scrutiny and oversight over government policies. All in all, it is believed that these changes would make the House better equipped to serve as an effective check on executive power and contribute to a more balanced decision-making process. The author concludes that an elected Assembly of the Nations and Regions is not the answer for reform. Rather, it is an effectively reformed House of Lords which should be pursued.

The article contributed by Dr Lin entitled “E-Commerce and Online Dispute Resolution in Hong Kong: The Case of eBram” looks at the rise in Hong Kong of online dispute resolution (ODR). It shines a particular spotlight

on a system popularly known as eBRAM, (Electronic Business Related Arbitration and Mediation System) which is run by the eBRAM International Online Dispute Resolution Centre (an independent, not-for-profit organization). The eBRAM system is a focused platform for resolving disputes between micro, small and medium-sized enterprises. The essay assesses eBRAM's potential effect on local firms, other existing dispute resolution services and local legal professionals and services. In so doing, it also considers Hong Kong's role as an international business and dispute resolution centre.

Zia Akhtar's essay, entitled "Montesquieu's Theory of the Separation of Powers, Legislative Flexibility and Judicial Restraint in an Unwritten Constitution", explores issues in constitutional situations where in addition to the formal constitution there are also additional unwritten conventions which maintain balance between these branches via judicial restraint and deference to the executive. The aim of this contribution is to consider such questions as how much power should be given to the executive for state-related matters versus those of the judiciary in such "fused" constitutional circumstances. More specifically, drawing on Montesquieu's insights, the paper examines the question of the extent to which the executive can override the judicial powers in matters of state.

In a Special Section on "Cultural Expertise and the Law", edited and introduced by Mai Chen (Barrister, Public Law Toolbox Chambers, President, New Zealand Asian Lawyers), the issues inherent in the Māori concept of and belief in "tikanga" and its place in the common-law based legal system of New Zealand are considered. Readers may recall that in the previous issue ([Amicus Curiae 4\(2\): 287-305](#)) the contribution by Hon Dame Justice Susan Glazebrook introduced us to questions of Māori culture in which the courts examined dimensions of indigenous law and culture and gave guidance on questions of diversity of culture. Although tikanga is a normative system embedded in Māori society and culture, New Zealand courts have come to accept that tikanga was the first law of New Zealand. But the courts are not yet certain on the question of at what point does such an indigenous cultural facet become jural, and recognizable as such by the courts.

In this issue of *Amicus Curiae*, based on a meeting in early May 2023, in addition to the contribution by Mai Chen, we welcome thoughtful essays authored by Justice Joe Williams, Supreme Court of New Zealand, Justice Christian Whata, High Court of New Zealand, Justice Grant Powell, High Court of New Zealand, Chief Judge Heemi Taumaunu, Chief Judge of the District Court of New Zealand, Acting Chief Judge Fox,

Māori Land Court of New Zealand, and Judge Michael Doogan, Māori Land Court and alternate Judge of the Environment Court of New Zealand. To these is added a contribution by Justice Emilios Kyrou, Victorian Court of Appeal, Australia. Here the general theme is how to best develop an “intuition” about tikanga—which as noted is the first law of New Zealand—just as jurists have an intuition about more familiar subjects such as contract, crime, intellectual property and property law. Some of the key issues are highlighted and commented on succinctly by Mai Chen in her introductory essay and in the more substantive piece: “The Increasing need for Cultural Experts in New Zealand Courts”.

In the Special Section: ADR—Issues and Developments (Part 3), Oliver Marsden, Joshua Kelly and Caspar Everett contribute an essay entitled “Summary Dismissal in Arbitration: A Need for Reform to the Arbitration Act 1996?” in which they examine the Law Commission’s proposed amendment to the Arbitration Act 1996, which seeks to grant arbitral tribunals the power to summarily dismiss meritless claims/defences. In light of existing summary dismissal procedures in English courts and relevant institutional rules, their article argues that such an amendment to the 1996 Act would be a beneficial development given its potential to promote efficiency in London-seated arbitration, thereby further

strengthening London’s standing as a preferred venue for international arbitration.

In the Special Section: AI and its Regulation (Part 1), the essay contributed by Ryan Abbott & Brinson S. Elliott entitled “Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules” asserts that the emerging regulatory and governance landscape for artificial intelligence (AI) will have a considerable influence on alternative dispute resolution (ADR). Recent developments in AI regulation have seen jurisdictions engaging in a competitive race to devise appropriate regulations. As existing ADR regulatory frameworks affect the utilization of AI in ADR, so too will new AI regulations influence ADR development. This is in part due to the fact that ADR is already using AI and is likely to do so even more widely in the future. As a result, it can be argued that appropriate AI regulations should have a beneficial effect on ADR, especially as both fields share similar aims and principles such as an emphasis on trustworthiness.

In their essay “The European Parliament’s AI Regulation: Should We Call It Progress?” Meeri Haataja and Joanna J. Bryson consider the impact of the European Commission’s proposed Artificial Intelligence (AI) Act. This document has become a major influence in regard to the law on

AI in many jurisdictions, with adaptations being implemented in countries such as Brazil, China, and even the United States. The authors published an earlier paper (Meeri Haataja, & Joanna Bryson. “Reflections on the EU’s AI Act and How We Could Make It Even Better,” *TechREG™ Chronicle*, March 2022) analysing the core concepts of this Act, its advantages and disadvantages, providing input to policymakers and those affected by it. The European Parliament has recently taken its first round of legislative action with regards to modifying the AI Act. The authors of this paper examine the consequent changes to this legislation and evaluate the significance of such changes in terms of the law’s efficacy in ensuring the continued scalability of AI-enabled products within the European Union and its ability to effectively address potential violations by actors *post hoc*. The paper further outlines the authors’ recommendations as a result of their evaluation. In addition, consideration is given to how these modifications might impact upon the current legal framework surrounding AI-related activities throughout Europe. Finally, an assessment is provided as to whether or not this legislation can serve as an adequate deterrent against malpractice in relation to such activities.

This analysis is followed by a review article contributed by Geoffrey Samuel. The contribution

focuses on a recent book—Simon Deakin & Christopher Markou, eds. *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Hart 2020)—that poses the question of whether law is computable. The article also considers the implications of AI and law research, specifically whether legal knowledge is regressing as a result. In his examination of this edited collection, Professor Samuel assesses several major epistemological issues confronting those who develop AI-based legal reasoning programs, ultimately concluding that some of these programs are based upon outdated and discredited legal knowledge. However, the article does not envision a future in which robot judges will completely replace human decision-makers; rather, any such shift would likely only be feasible in societies transitioning from liberal democracy to authoritarianism.

The Note by Neels Killian concerns issues in insurance law in South Africa and focuses on *Swanepoel v Brolink (et Hollard Insurance)* s638/18f, a dispute involving the Ombudsman for Short-Term Insurance and decided in 2019. A common way to acquire insurance in South Africa is for the prospective insured or policyholder to provide answers to an underwriting questionnaire. This is done in order to determine if they are low or high risk. To obtain a low-risk status, the individual must answer the

questions truthfully and make full disclosure of all risks involved. If it is found that incorrect information has been given or a risk factor undisclosed, then the insurer may not accept liability. This practice is subject to the reasonable person test which assesses what a reasonable person would state on their insurance proposal. The questions posed by insurers can range from requiring direct “yes” or “no” answers, to more unspecific queries such as “Is there any reason why the insurer should not accept the proposal for insurance?” Or “Has all the relevant information been disclosed truthfully and accurately?” Applying a reasonable person test to insurance contracts (that is, policies) to ascertain whether disclosures are needed by the prospective policyholder is acceptable under South African law. However, both insurers and insureds may well have difficulty in understanding and correctly applying this test. What should be considered reasonable disclosures when submitting insurance applications? The concept of reasonable disclosure is a difficult one, as it often requires an interpretation of the specific circumstances and does not benefit from the same rules of evidence that are applied in formal proceedings. Reasonable disclosure is viewed on a flexible basis in which a “reasonable person” could make honest mistakes that are relevant to disclosures. It is therefore important

for insurers to create effective underwriting questionnaires, containing specific questions requiring specific answers. Such questionnaires should contain no unspecific requests such as asking for “all information”, as this can render the questionnaire unreasonable and open up insurers to potential disputes with policyholders. Ultimately, ADR bodies and courts should take note of the decision in *Ristorante Limited (Ristorante Limited t/a Bar Massimo v Zurich Insurance plc* (2021), which could be viewed as a very good example for the South African judiciary and ADR bodies of why little or no emphasis should be placed on unspecific underwriting questions—such as to disclose “all of the information” to the insurer—and that such questions should be rejected by ADR bodies and courts on the basis of unreasonableness. Furthermore, any clause in the insurance agreement that renders it null and void if an “all of the information” requirement is not met should be considered void for uncertainty as per *Ristorante Limited*.

Dr Ling ZHOU then reviews *More Disputes and Differences: Essays on the History of Arbitration and its Continuing Relevance* by Derek Roebuck (edited by Susanna Hoe; published by the Arbitration Press (Holo Books)). This collection of essays, many of which have already been published, was planned by Derek Roebuck. However,

following Professor Roebuck's ill health, Susannah Hoe, his long-time collaborator and wife, brought together the essays for publication on his behalf. The essays focus on the nature and role of arbitration from a variety of angles, some concentrating on general issues in the arbitration process, others looking at specific aspects such as the history and development of arbitration in England, particularly London. Additionally, there are comparative pieces examining Scotland, Egypt, Malta and the American colonies. Further topics include language, law and arbitration. This anthology is firmly embedded in legal history. Although it deals with themes related to ADR and comparative legal studies, these disciplines are not significantly engaged with in the book. Nevertheless, Dr Zhou argues, for scholars and practitioners working in these fields, and especially for those concerned more specifically with arbitration, this is a very helpful collection of essays.

Finally, in the section "Visual Law", Dr Patricia Ng (and Michael Palmer) draws on their research on Chinese legal modernization to discuss the implications of Shen Jiaben's legacy for efforts in China to reform a legal system so that it is both modern and consistent with prevailing international standards, and at the same time reflective of local legal cultures. In her discussion she points to how Shen proposed legal reforms in response to international pressures but also how such reforms shape and are shaped by them. Dr Ng's observations on Shen offer an interesting reflection on the role of law in shaping political and economic reforms and development, past, present and future.

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