

# Amicus *Curiae*

*The Journal of the Society for Advanced Legal Studies*

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Calendar 2023-2024

**New Series Volume 5**

**5.1** (autumn):  
submission 1 September 2023;  
publication 1 November 2023

**5.2** (winter):  
submission 1 January 2024;  
publication 1 March 2024

**5.3** (spring):  
submission 1 May 2024;  
publication 1 July 2024

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## 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.

The Editor also thanks Elisa Boudier, Narayana Harave, Amy Kellam, Patricia Ng, Maria Federica Moscati, Simon Palmer and Marie Selwood, for their kind efforts in making this Issue possible.





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# A BRITISH BUNDESRAT? THE BROWN COMMISSION AND THE FUTURE OF THE HOUSE OF LORDS

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## **Abstract**

Reform of the House of Lords has occupied the minds of politicians, civil servants and academics for over a century. In late 2022, the Labour Party published a proposal for the replacement of the Lords with a new, democratically elected, Assembly of the Nations and Regions. This proposed Assembly resembles, at least superficially, the German Bundesrat. The author reviews the history of Lords reform, examines Labour's proposals, compares the envisioned Assembly with the Bundesrat and concludes that the former will be found wanting.

**Keywords:** United Kingdom; Germany; constitutional law; Parliament; House of Lords; Bundesrat; constitutional reform.

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## [A] INTRODUCTION

Reform of the House of Lords—together with proportional representation (PR), a written constitution and, for some, the abolition of the monarchy—is a perennial favourite of those who yearn to refashion the constitution of the United Kingdom (UK). As Morgan once put it:

On summer evenings and winter afternoons, when they have nothing else to do, people discuss how to reform the House of Lords. Schemes are taken out of cupboards and drawers and dusted off; speeches are composed, pamphlets written, letters sent to the newspapers. From time to time, the whole country becomes excited (Morgan 1981).

Despite the hint of irony in that last sentence, Morgan's observation contains much truth. Since the Parliament Act 1911, which replaced the Lords' absolute veto over legislation with a two-year power of delay,<sup>1</sup> there has been a veritable cascade of articles, conferences, books, proposals, seminars, consultations, reports, White Papers and parliamentary bills on

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<sup>1</sup> Under the 1911 Act, a money Bill (as certified by the Speaker of the Commons) became law one month after leaving the Commons, with or without the Lords' approval; non-money Bills could be delayed for two successive parliamentary sessions (ie two years) but would become law if passed by the Commons in identical form; and the maximum life of a Parliament was reduced from seven to five years. The only exceptions to the new regime on the passage of legislation were Bills commencing their readings in the Lords, Bills to extend the life of a Parliament and delegated legislation.

further reform. Few of these endeavours have, however, led to additions to the statute book.

Yet another reform proposal emerged late in 2022, within a report from the Labour Party’s “Commission on the UK’s Future” (Brown Commission 2022). This body, chaired by former Prime Minister Gordon Brown advocates “radical change” to the “relationship between our government, our communities, and the people”. This “radical change” includes the replacement of the Lords “with a new second chamber of Parliament”, to be named the Assembly of the Nations and Regions (the Assembly), which “must have electoral legitimacy, and should be markedly smaller than the present Lords, chosen on a different electoral cycle—with the precise composition and method of election matters for consultation”.

These recommendations on the Lords’ replacement by an “electorally legitimate” Assembly are accompanied by several other proposals on the latter’s composition, role and powers. The most significant of these being the proposition that “national and regional leaders” should be among the new chamber’s membership and that it should play decisive roles in “[b]ringing together the voices of the different nations and regions of the UK” and in “exercising new but precisely drawn powers to safeguard the constitution of the United Kingdom”.

When taken together, the Commission’s plans encompass the substitution of the Lords with an Assembly which, of all the other second or upper legislative chambers in the world, most resembles the German Bundesrat. Whether this similarity is intentional or accidental is unclear. Moreover, as is often the case with constitutional reforms, intentions and reality may diverge. This article begins with a brief review of the history of Lords reform before examining the Brown Commission’s proposals. It then compares the powers, role and composition of the proposed Assembly with those of the Bundesrat. It concludes that the Assembly will be a pale imitation of the Bundesrat and a poor substitute for the Lords.

## [B] A BRIEF HISTORY OF HOUSE OF LORDS REFORM

As noted above, the 1911 Act reduced the Lords’ power of veto over legislation to one of delay. The original two years’ delay was subsequently diminished to a year by the Parliament Act 1949. This legislation was prompted by the Labour Government’s concern that the Conservative majority in the Lords would use the two-year delaying power to derail its nationalization programme. It is noteworthy that, despite the preamble

to the 1911 Act stating that “it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis”, the 1949 Act did not address the Lords’ composition but only—in a limited fashion—its powers. By contrast, subsequent legislation has not been concerned with the Lords’ powers (with one exception) but with its composition, albeit not in the manner anticipated in 1911.

The Life Peerages Act 1958 sought to redress the problem that out of 800 peers, there were only “some sixty ... who may be regarded as a nucleus of regular attenders” (Bromhead 1958). The 1958 Act provided for the appointment of members for life and of women to the Lords. The consequence was a more active and authoritative Lords, with many new capable life peers in place of a thinly populated chamber occasionally patronized by “backwoodsmen”.<sup>2</sup> By contrast, the Peerages Act 1963 enabled peers to leave the chamber. This legislation was the result of a campaign by Labour politician Tony Benn, who wished to remain an MP rather than follow his father into the Lords as Viscount Stansgate. In one of history’s ironies, it also enabled the Earl of Home to disclaim his peerage and, as Sir Alec Douglas-Home, become a Conservative MP and Prime Minister.

The House of Lords Act 1999, the “first stage” of New Labour’s plans for the Lords, removed 653 hereditary peers from the chamber, leaving only 92 in place alongside the life peers, law lords and lords spiritual. The law lords were removed from the chamber and packed off, along with their judicial power, to a new UK Supreme Court by the Constitutional Reform Act 2005, which was the only post-1949 legislation to alter the Lords’ powers (Hale 2018). Finally, the House of Lords Reform Act 2014 enabled members to voluntarily retire or resign from the chamber and the House of Lords (Expulsion and Suspension) Act 2015 authorized the Lords to expel or suspend members.

Among the unsuccessful attempts at Lords reform are the Parliament (No 2) Bill of 1968, which would have cut the number of hereditary and spiritual lords and reduced the chamber’s delaying power to six months. This bill was stymied by a coalition of Conservative and Labour MPs led by Michael Foot and Enoch Powell.<sup>3</sup> Thereafter, the cause of Lords reform fell into abeyance until the late 1980s when, after a period of favouring

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<sup>2</sup> There were 47 life peers (of whom seven were women) appointed during the 1957-1963 premiership of Harold Macmillan. By the end of John Major’s term of office in 1997, 742 life peers had been appointed, including 108 women (Taylor 2021).

<sup>3</sup> [HC Deb 17 April 1969](#), vol 781, cols 1338-44.



abolition, the Labour Party advocated reform once again. As noted, the 1999 Act was intended to be the “first stage” of this reform, but the “second stage” staggered from a Royal Commission (Cabinet Office 1999) to two White Papers (HM Government 2001, 2007) and inconclusive votes in the Commons and the Lords before expiring. The last effort at comprehensive reform was the Conservative/Liberal Democrat Coalition Government’s House of Lords Reform Bill, which was withdrawn after a backbench rebellion by Conservative MPs and the Labour Party’s refusal to support a programme motion in its favour (Dorey & Garnett 2016; Atkins 2018).

Consequently, the Lords’ powers remain those determined in 1949 and its composition is that which was determined in 1999. Whilst this represents a substantial change from the chamber’s position in 1910, it is a far cry from the aspirations of reformers over the past century. Why is this? Ballinger has argued that the principal reason for the lack of substantive reform, as opposed to its “non-reform” variant, is that “no government has been united in a commitment, whether of its own volition, or of necessity—to secure reform”. He suggested, further, that “the series of non-reforms [ie the 1949 Act and the 1999 Act] have met the needs of changing constitution” (Ballinger 2011). Norton observed that “The absence of any intellectually coherent approach to constitutional change is apparent in respect of attempts to change the House of Lords”, a failing which he suggests has been fatal to the many attempts to actually produce such reform (Norton 2017). Indeed, he went so far as to state:

The history of the House of Lords is one of institutional continuity and occasional seminal and more frequent incremental change, with none of the changes resulting from a clear, considered view of the role of the House of Lords, let alone the role of Parliament, in the constitution of the United Kingdom. That appears unlikely to change.

It is into this territory of non-reforms and low expectations, which is marked by a proverbial mountain of paperwork (Raina 2011, 2013, 2014, 2015), that the Brown Commission has stepped.

## [C] THE BROWN COMMISSION PROPOSALS

The Commission, laying claim to Norton’s “intellectually coherent approach to constitutional change” (2017), seeks to redistribute economic and political power in the UK from “the centre of government” to “the people whom it serves”. The justification for this redistribution is twofold. Firstly, it will end the “hyper centralised system of government which” it alleges “is at the root of so many of our political and economic problems”. Secondly, it will prevent future occurrences of the alleged abuses of Boris

Johnson's Government, which were not deterred by the current system. The Commission's plan comprises 40 recommendations, divided into six subject areas, including "an economic growth or prosperity plan for every town and city"; greater powers for the Scottish and Welsh Governments; and the creation of a new anti-corruption commissioner "to root out criminal behaviour in British political life where it occurs".

Insofar as the Lords is concerned, the Commission's intentions are unambiguous:

Our sixth set of recommendations will clear out the indefensible House of Lords and replace it with a smaller, more representative and democratic second chamber to safeguard the new constitutional basis of the New Britain (Brown Commission 2022, 17).

To this end, recommendations 37 to 39 are:

37. The House of Lords should be replaced with a new second chamber of Parliament: an Assembly of the Nations and Regions.

38. The new second chamber should complement the House of Commons with a new role of safeguarding the UK constitution, subject to an agreed procedure that sustains the primacy of the House of Commons.

39. The new second chamber must have electoral legitimacy, and should be markedly smaller than the present Lords, chosen on a different electoral cycle—with the precise composition and method of election matters for consultation (Brown Commission 2022, 17).

The Commission discusses the Lords' defects at some length. Its ire is directed particularly at the continuing presence of 92 hereditary peers; the fact that the chamber has "swollen in recent years to around 800 peers"; and at Johnson's alleged abuses of his power of patronage. The Commission, betraying its partisan nature, also criticizes similar alleged abuses by all Conservative Prime Ministers since 2010, whilst failing to mention those by Lloyd George and Harold Wilson. The Commission recognizes, nevertheless, that the Lords carries out important tasks in both the detailed scrutiny of legislation and in the contributions of its select committees before concluding "simply abolishing the House of Lords would therefore leave a significant gap in our constitution". Hence, as noted above, it recommends replacing the Lords with an Assembly rather than putting an end to any second or upper chamber.

Creating such an Assembly is a far from novel proposal. When the Labour Party abandoned unicameralism in the late 1980s, its policy document "Meet the Challenge, Make the Change: A New Agenda for Britain" (Labour Party 1989) suggested replacing the Lords with an elected

second chamber which would have the role of safeguarding fundamental rights and scrutinizing legislation and whose members would be elected on a different basis from the Commons to “particularly reflect the interests and aspirations of the regions and nations of Britain”. The Party’s 2015 and 2019 General Election manifestos also promised to replace the Lords with an “elected Senate of the Nations and Regions”. The Brown Commission, however, differs from these earlier proposals in the fact that its Assembly will not merely have a different composition from the Lords but modified—arguably weaker—powers.

With respect to its composition, the proposed Assembly would be “three quarters smaller than the present Lords, at around 200, and more in line with second chambers elsewhere” such as those in the United States (US), France and Switzerland. Further, the Commission asserts:

If the new second chamber is to function as an Assembly of the Nations and Regions, there is a case for elected national and regional leaders to be able to participate in the second chamber to raise issues of pressing concern on which the voices of the nations of the UK, or of its different localities, should be directly heard (Brown Commission 2022, 143).

The inclusion of such “national and regional leaders” in addition to elected members marks a significant departure from previously envisaged second chambers and, for that matter, the Commons. The ramifications are discussed further below.

Turning to its role, the Commission recognizes that an elected Assembly may not, unlike the unelected Lords, be restrained by the Salisbury Convention. Therefore, in order to avoid the consequential risk of “legislative gridlock”, it identifies those roles and powers which the Assembly should and should not possess. In the latter category:

- It should have no role in the forming or sustaining governments. That, as today, must fall to the House of Commons.
- Similarly, it should have no responsibility for decisions about public spending or taxation, including National Insurance.
- It should not in general be able to reject legislation but should be able to propose amendments.
- These limitations on its powers must be set out clearly in the statute which creates the new chamber, so that there is no ambiguity about the relationship between it and the House of Commons (Brown Commission 2022, 138).

Of these “non-roles” or “non-powers”, the third is the most consequential, and shall be returned to below. As to the roles and powers or, as the



Commission puts it, functions which the Assembly should possess:

It should discharge four broad functions:

1. Constructive scrutiny of legislation and government policy, as the House of Lords at its best does today.
2. Bringing together the voices of the different nations and regions of the UK at the centre of government.
3. Monitoring adherence to standards in public life.
4. Most significant of all, exercising new but precisely drawn powers to safeguard the constitution of the United Kingdom and the distribution of power within it (Brown Commission 2022, 139).

Of the second of these functions, the Commission states that the Assembly “should oversee the effective working of the new intergovernmental Councils” which the Commission promotes. These entities, which would replace the allegedly moribund Joint Ministerial Committees, would be,

- ◇ “The Council of the Nations and Regions [which] would bring together the devolved nations but also representatives of the different parts of England, Scotland, Wales and NI”;
- ◇ “A Council of the UK, to manage relations between the Scottish, Welsh, Northern Irish and UK Governments”; and
- ◇ “A Council of England to bring together English local government and metro mayors with central government”.

These entities would each have their own “independent secretariat” and “the power to call meetings and set agendas” (Brown Commission 2022, 118-119).

Of the fourth function, the Commission explains that the Assembly “would have an explicit power to reject legislation which related to a narrow list of defined constitutional statutes”. The Commission indicates that this list would include the Parliament Acts, the Constitutional Reform Act 2005 and the Representation of the People Acts. In addition, proposed legislation to enact the “Sewel convention”, which provides that the UK Parliament will not legislate on devolved matters or the powers of the devolved assemblies without their consent, would benefit from this protection. The Commission argues that:

there should be a new, statutory, formulation of the Sewel convention, which should be legally binding. It should apply both to legislation in relation to devolved matters and, explicitly, to legislation affecting the status or powers of the devolved legislatures and executives. It should ... be binding in all circumstances (Brown Commission 2022, 102).

The Commission’s justification for this “Sewel” legislation is the Johnson Government’s alleged breaches of the convention in relation to the passage of the Internal Market Act 2020 despite objections from the devolved assemblies. The Commission adds that giving the power to accept or reject “constitutional statutes” to the Assembly, rather than giving a comparable power to the courts, “sustains the principle, at the core of much of the UK constitution, of Parliamentary Supremacy” (Brown Commission 2022, 140).

The Assembly’s power would, however, be “hedged round”. Firstly, as noted, it would apply only to a limited number of statutes, and, secondly, the Assembly (through its presiding officer) would be required to ask the UK Supreme Court “for an authoritative judgement on whether the constitutional protection powers are engaged” prior to exercising its power to reject any proposed legislation. The Commission also mentions several ways in which to resolve a legislative conflict between the Commons and the Assembly, including “a Commons ‘supermajority’, of say 2/3, [which] could overrule the decision of the second chamber” but is silent on which of these it prefers (Brown Commission 2022, 140).

## [D] ASSEMBLY VERSUS BUNDESRAT

As noted in the introduction, the composition and role of the proposed Assembly resemble—at least superficially—that of the Bundesrat. The Assembly will include “regional and national leaders”, and its powers are intended to maintain both the overall constitutional order of the UK and the relationship between the UK Parliament and UK Government and the devolved assemblies and executives. The Bundesrat’s membership is similarly comprised of Germany’s “regional leaders”, and it plays an important role in both the relationship between them and the Federal Government and in maintaining Germany’s constitutional order.<sup>4</sup> That said, as will now be seen, the proposed Assembly lacks both its compositional clarity and constitutional authority.

### Composition

The Bundesrat represents the 16 German Länder (ie states) at the federal level. As article 50 of the Basic Law 1949 states: “The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.” Unlike the second chambers of many other federal states, such as the US or

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<sup>4</sup> This article uses the terms “Germany” and “Federation” (which appears in the Basic Law 1949) as appropriate.

Australian senates, the Bundesrat's members are not elected (directly or indirectly) but are appointed by their state governments.<sup>5</sup> As article 51(1) stipulates: "The Bundesrat shall consist of members of the Länd governments, which appoint and recall them. Other members of those governments may serve as alternates." Indeed, Gunlicks (2010), citing Wehling (1989), explains that:

Germany's second chamber is unique in the world's federal systems. It is unique in that it is a federal, not a Länd, organ, in which the member states are represented by their governments (i.e., cabinets). This means it is an executive as well as a legislative body, and it means also that it is not a part of parliament, which is the Bundestag alone.<sup>6</sup>

The Bundesrat is, as Gunlicks puts it, a "constitutional organ"—along with the federal government, federal president, Bundesrat and federal constitutional court—which "makes it possible for the Länder, via their governments, to participate in the legislative process". Consequently, each state's members typically comprise its Minister President (or, as in the case of Berlin, its Mayor) and other serving senior ministers. They sit in the Bundesrat only for as long as they form (and represent) their state's government, rather than for a fixed period of time. Moreover, given that Ländtag elections do not all take place at the same time across Germany, the Bundesrat's membership is subject to constant potential changes. For example, in 2023, Bremen's election was held on 14 May, whilst Bavaria and Hesse will hold theirs on 8 October.<sup>7</sup>

There are 69 members of (or votes available to the states represented in) the Bundesrat. A state's number of members (or votes) is determined by its population, subject to a weighted voting mechanism which favours the smaller states. Each has at least three members (or votes) with a maximum representation of six so that, for example, Bavaria's 13.3 million people are represented by six members, whilst Bremen's 700,000 have three members. As provided for by article 51(3), states cast their votes *en bloc* so, theoretically, a single member (generally termed the Stimmführer or "leader of the votes", who is normally the Minister President) may cast all its votes in the Bundesrat although, generally speaking, they tend to have as many members as they have votes. Given the multi-party composition

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<sup>5</sup> It is worth noting that, prior to the 17th amendment of 1913, US Senators were chosen by their state legislatures rather than elected by the populace.

<sup>6</sup> He subsequently, and somewhat confusingly, goes on to elaborate that it is a second chamber but not an "upper house" of Parliament. Perhaps the clearest way of looking at the Bundesrat is to recognize that it is a separate entity from the Bundestag rather than them both being part of one larger whole.

<sup>7</sup> See the [Bundesrat information on Ländtag elections](#).

of many state governments and the requirement for an *en bloc* vote, their members usually abstain if a measure is particularly divisive.<sup>8</sup> Given the fact that senior ministers have many other calls on their time, states often send officials to attend many sessions of Bundesrat as “alternates”, as permitted by article 51(1).

In its composition and size, the Bundesrat resembles its predecessors of the North German Confederation, German Empire and Weimar Republic. It therefore represents a continuation of Germany’s historical constitutional framework (Gunlicks 2010; Heun 2011). By contrast, the Commission’s proposed Assembly does not represent such a continuation of the UK constitutional framework. Firstly, in terms of size, no reason is given for an Assembly of 200 members rather than, say, 300 or 400, other than the desirability of a chamber which is “markedly smaller” than the Lords. Nor, for that matter, does the Commission explain why the Assembly should be “markedly” larger than, say, the Bundesrat or US Senate. Both chambers deal with a range of complex legislative and administrative matters with far fewer than 200 members. It would seem, then, that this figure is a rather arbitrary one rather than a demonstration of an “intellectually coherent approach to constitutional change” (Norton 2017).

Secondly, the Assembly will be “elected on a different electoral cycle from the ... Commons”, but the timing of the elections, the members’ terms of office, their constituencies (if any) and mode of election are left to future “consultation”. The failure to address these questions is even more problematic than the seemingly random choice of the chamber’s size. At present, the Commons has a four to five year electoral cycle, the devolved assemblies are elected every four years and a plethora of local councils and mayors are elected each year. Where would the Assembly sit in this packed schedule? Would all its members be elected at the same time or in tranches, like the US Senate? These are not merely logistical issues but may have substantive political implications, as anyone who recalls that Theresa May’s decision to call a General Election in 2017 was triggered by her party’s performance in that year’s local elections will appreciate.

Further, whom would these members represent? Would there be 200 single-member constituencies across the UK or a smaller number of multi-member constituencies? Would each constituency, like Commons constituencies, have roughly the same number of voters or would they represent “geography” rather than population? For comparison, each

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<sup>8</sup> There was a breach of this principle in 2002 when the Brandenburg delegation was divided over the Federal Government’s immigration legislation. The vote in the Bundesrat was eventually held to be unconstitutional.



US state has two senators despite the fact that, for example, California has a population of 39 million and Wyoming has under 600,000 inhabitants. Taking the nine English regions as a model for multi-member constituencies, would London's 9 million people be represented by the same number of Assembly members as the North East's 2.67 million?<sup>9</sup> What of Scotland, Wales and Northern Ireland? Would Assembly representation be a compromise between geography and population, as in the Bundesrat? Again, these are not merely logistical issues, as anyone who is familiar with the work of the Boundary Commissions will attest. Nor is the vexed issue of the mode of election—PR or first-past-the-post? If the former, which method of PR?

Then we come to the “national and regional leaders”. Would these elevated personages participate in the Assembly as ordinary members, non-voting observers or as some form of “super-representative” (with a block vote or veto powers)? Would a “national leader” rank higher than a mere “regional leader”? Further, whilst it is fairly easy to identify a “national leader”, who is a “regional leader”? There are 333 local authorities in England, 32 in Scotland, 22 in Wales and 11 in Northern Ireland.<sup>10</sup> That amounts to 398 would-be “regional leaders” and over 20,000 councillors.<sup>11</sup> How would the leaders of Plymouth and Torbay feel if the leader of Devon County Council was admitted to the Assembly and they were not? What of the sometimes vexed relationship between borough councils and their local “metro mayors”? Finally, would these various “national and regional leaders” participate in all of the Assembly's business or merely in that which related to their own nations or regions? These are essential questions, and it is disappointing that the Commission—again—offers no solutions or even options. Again, an “intellectually coherent approach to constitutional change” is absent.

## Functions and powers

As noted above, article 50 of the Basic Law entitles the German states to participate in the legislative process of the Federation. Like the relationship between the Lords and Commons, however, the Bundesrat's role is limited when compared to that of the Bundestag. As far as legislation is concerned, article 70 of the Basic Law provides:

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<sup>9</sup> For data on the English regions, see Office for National Statistics, “[International geographies](#)”.

<sup>10</sup> See the Institute for Government briefing, “[Local government](#)”.

<sup>11</sup> To say nothing of the 10,000 parish councils in England. See the [National Association of Local Council's website](#).

- (1) The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.
- (2) The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Articles 71 to 74 set out the parameters of the Federation's exclusive legislative power and its and the states' concurrent legislative power. For example, the Federation has exclusive power over "foreign affairs and defence, including protection of the civilian population" whereas "admission to institutions of higher education and requirements for graduation in such institutions" may be legislated for by the Federation and individual states. Articles 77 and 78 go on to stipulate the process for the passage of legislation, and article 79 addresses amendments to the Basic Law 1949.

There is a clear delineation between those bills which require the Bundesrat's explicit consent, termed "consent bills", and those in respect of which it can only enter an objection, termed "objection bills".<sup>12</sup> Gunlicks estimates that consent bills make up about 55-60% of all bills (Gunlicks 2010). The Basic Law 1949 states that the following categories of legislation require the Bundesrat's explicit consent:

- ◇ legislation to amend the Basic Law—moreover, a two-thirds majority is required in the Bundesrat to pass any such legislation (article 79 (2));
- ◇ legislation which impinges on the states' finances—this includes legislation relating to taxes for which all or part of the revenue accrues to the states or local authorities (article 105(3)); and legislation which requires states to make monetary payments, provide equivalent benefits or provide comparable services to third parties (article 104a(4)); and
- ◇ legislation the enforcement of which "impinges on the organisational and administrative jurisdiction" of the states (article 84(1)).

Bills that do not fall into one of these three categories are, by default, objection bills. If the Bundesrat enters an objection to such a bill with an absolute majority, that objection may be overturned by an absolute majority in the Bundestag. By virtue of article 77(4), a two-thirds majority in the Bundestag (or at least the votes of half of all its members) is needed to overturn a Bundesrat objection by two-thirds majority of its members. Differences between the two chambers can be referred to a Mediation Committee but, ultimately, the fate of a bill—consent or objection—is

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<sup>12</sup> For a more detailed guide to the legislative process, see the Bundesrat's own [website](#).

determined by votes (Koggel 2016). Hence, the Bundesrat's power over objection bills is suspensory in nature, similar to the Lords' power to delay the passage of legislation. That said, it should be appreciated that the Bundesrat approves over 90% of the bills sent to it after approval by the Bundestag (Gunslick 2010).

Turning to the Brown Commission's proposals, the incoherence evident in relation to the Assembly's composition continues in relation to its role and powers, but with a further flaw. This flaw is the negation of the very purpose of the Commission's endeavours. Firstly, the Commission stipulates that the Assembly will "have no responsibility for decisions about public spending or taxation", whereas the Bundesrat discusses and votes upon proposals relating to the raising and spending of public money in the individual states. Clearly, the Commission's proposal, rather than redistributing economic and political power, maintains the Commons' supremacy over the Assembly (formerly the Lords) and "national and regional leaders" on matters of public finance. Albeit limited revenue-raising powers have been (and more may be) passed to the devolved assemblies, the proverbial "key to the bank" will remain in the Chancellor of the Exchequer's grip.

The second manifestation of this flaw is the intended demise of the second chamber's power over the passage of legislation. Whereas the Bundesrat has a suspensory power over objection bills and the Lords may delay any legislation, the Assembly will have no power to reject or delay "non-constitutional" legislation. Whilst the Commission offers rhetorical window-dressing to the goal of redistributing power by stressing that the Assembly may continue "to propose amendments", this ignores the fact that the Lords' role in amending and scrutinizing Bills was reinforced by the risk (albeit rarely exercised) that it might vote to delay them.<sup>13</sup> Without this risk, the government can simply ignore any of the Assembly's amendments. Again, rather than sharing political power, the Commission proposes to increase the power of the Commons and, consequentially, the power of the governments formed from and sustained by the Commons.

The proposed termination of the second chamber's power of delay has been recognized as a sop to those who fear that two elected chambers would struggle for legislative supremacy (Russell 2023). The Commission seeks, in its own words, to safeguard "the pre-eminent position of the House of Commons". Only in the Assembly's power to "safeguard the

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<sup>13</sup> The last Bill to be rejected by the Lords at its second reading was the Fraud (Trials without a Jury) Bill, which was rejected on 20 March 2007. Governments do, however, lose many votes in the Lords over specific clauses or amendments, see the University College London, Constitution Unit [website record](#).

constitution of the United Kingdom” is that pre-eminence challenged. And yet that challenge is a flaccid one. Unlike the provisions in the Basic Law, whereby bills are identified as consent or objection bills at their introduction to the Bundestag and Bundesrat, the Commission places the onus upon the Assembly’s presiding officer to determine whether or not a bill is “constitutional”. The potential for a government to obfuscate the nature of its proposed legislation and put pressure on a presiding officer to make the “right choice” is clear.

The situation is muddled—and the authority of the Assembly diluted—further by the need for a ruling by the Supreme Court on the constitutional nature of any such Bill. Whilst the pre-emptive “abstract constitutional review” of bills by the German federal constitutional court is possible (article 93(1)), this is an exception to routine practice. Moreover, it should be appreciated that this review is carried out by reference to the ultimate constitutional authority—the German Basic Law. In the UK, that ultimate constitutional authority is, or is supposed to be, Parliament. Part of that ultimate constitutional authority—the Assembly—would be required by the Commission’s proposal to defer to the authority of the Supreme Court, contradicting its own words, noted above, on parliamentary supremacy.

The Commission’s lack of genuine commitment to “safeguarding the UK constitution” is also evident in its failure to state how—and what would happen if—the Assembly rejected an “unconstitutional” Bill. The Commission mentions, in vague terms, that the Assembly’s rejection could be overturned by a two-thirds “supermajority” in the Commons; or that such a rejection itself would require a “supermajority” in the Assembly; or that the rejection could be ignored if the Bill was reintroduced following a General Election. Only the first of these suggestions would go any way towards “safeguarding the UK constitution”, whilst the others would neuter the Assembly. Moreover, the suggestion that a “unconstitutional” Bill subsequently included in a (winning) party’s General Election manifesto should be free from usual parliamentary processes is almost as asinine as the claim that a Scottish General Election should be treated as a referendum on independence. There is a clear way of ensuring that the Assembly can safeguard the UK constitution. It should, like the Bundesrat, have to pass any “constitutional” bill by a two-thirds majority. That, however, would require a reform which the Commission does not mention but which this article broaches at its conclusion.

Finally, the Assembly’s role in “Bringing together the voices of the different nations and regions of the UK” and overseeing the three intergovernmental Councils sees the disorder continue. A practical



example serves to illustrate the point. Perhaps a newly elected city council leader, acting on her voters' wishes, seeks to introduce a radical measure in her major city. The council leader has argued her case in the Council of England and in the Council of the Nations and Regions. Perhaps she received a favourable hearing in one of these Councils and a not so favourable one in the other. She speaks on the matter again, as a "regional leader" in the Assembly. Perhaps her city's "elected" Assembly members oppose her proposal. Perhaps a resolution on her plan is passed by one vote—her own. Whilst the Assembly is not a court, the principle *nemo iudex in causa sua* would seem to be relevant here, to say nothing of the administrative and political confusion created by the multiplicity of bodies and individuals with a say on the same issues. By comparison, although it is not free from authoritative critiques (Hegele 2017; Finke & Ors 2019; Souris & Müller 2022), the Bundesrat "works" because it is the principal body for addressing federal versus state issues in Germany, rather than one of three or four, and it is comprised of representatives of the state governments rather than a mélange of "leaders" and elected members.

## [E] CONCLUSIONS

The Commission asserts that its "recommendations add up to a radical change in the distribution of power in the United Kingdom". When it comes to the replacement of the Lords by an Assembly, they do indeed but not in the manner it claims. Far from "bringing political power closer to the people", they concentrate that power in the hands of Members of Parliament. The Commons', and thereby governments', control of public finances will be maintained and its power over the passage of legislation will be enhanced. As a consequence, the Assembly will be little more than a proverbial talking shop, with or without the potential confusion and conflict that may result from its jumble of elected members and "national and regional leaders".

A truly "radical change" would be a second chamber which resembled the Bundesrat in substance rather than in superficial form. Such a chamber would have the power to prevent "unconstitutional" legislation, such as that which would affect the devolved assemblies without their consent, and power over public finance, at least insofar as local authorities were concerned. Moreover, its membership could properly reflect the views of the nations and regions of the UK if it was drawn from the representatives of those nations and regions. Clearly, although a Bundesrat of 69 members has operated for decades, an Assembly comprised of 398 local authority leaders would be untenable. A chamber with such powers that is selected

or elected by and on behalf the 20,000 local authority councillors, however, would have a measure of democratic legitimacy without challenging the supremacy of the Commons;<sup>14</sup> reflect regional views whilst avoiding the confusion that would result from a chamber based on the multiplicity of districts, counties, boroughs and towns;<sup>15</sup> and maintain the sovereignty of Parliament rather than of the Commons.

That last point, however, lies at the heart of the Commission's conundrum. It espouses the sharing of power and yet is wedded to the supremacy of Parliament. In fact, its problem is greater than that. It is wedded to the supremacy of the Commons. This supremacy renders any attempt at sharing power with "national and regional leaders" ephemeral as, once a dispute arises, that supremacy will be asserted, as it was over the Scottish gender recognition legislation. That supremacy also undermines any attempt to "entrench" so-called "constitutional" legislation, as has been pointed out by Sandro (2022) and others. The protection of "constitutional" legislation by, say, a two-thirds majority in the Assembly would require the end of parliamentary sovereignty as we know it. Ultimate constitutional authority would, like that relied upon and protected by the Bundesrat in Germany, instead need to be derived from another source. A written constitution.

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*This is his first published article on the UK constitution since his prize-winning essay for the Politics Association (founded by Derek Heater and Bernard Crick in 1969) a very, very long time ago.*

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<sup>14</sup> There is nothing uniquely democratic about a directly elected legislature. According to the Inter-parliamentary Union, only 20 out of the 79 upper or second legislative chambers in existence are entirely directly elected. There are 14 second wholly indirectly elected and 15 wholly appointed second or upper legislative chambers. See IPU data, "[Compare data on Parliaments](#)".

<sup>15</sup> It should be noted that some commentators believe that upper or second chambers generally are incapable of representing regions or "territorial interests" (Palermo 2018).

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## Legislation, Regulations and Rules

*Germany*

Basic Law 1949

*United Kingdom*

Constitutional Reform Act 2005

House of Lords Act 1999

House of Lords (Expulsion and Suspension) Act 2015 (2015 Act)

House of Lords Reform Act 2014

Internal Market Act 2020

Life Peerages Act 1958

Parliament Act 1911

Parliament Act 1949

Peerages Act 1963

Representation of the People Acts



## **E-COMMERCE AND ONLINE DISPUTE RESOLUTION IN HONG KONG: THE CASE OF eBRAM**

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### **Abstract**

This article critically examines the development of online dispute resolution (ODR) in Hong Kong, focusing on the Electronic Business Related Arbitration and Mediation System International Online Dispute Resolution Centre Limited (eBRAM). As an independent, not-for-profit organization, eBRAM offers a platform for resolving disputes among micro, small and medium-sized enterprises (MSMEs). The article explores eBRAM's potential impact on local MSMEs and legal professionals, Hong Kong's position as an international business hub, and its complementarity with existing dispute resolution providers.

**Keywords:** ODR; eBram; LawTech; Hong Kong.

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### **[A] INTRODUCTION**

**H**ong Kong is a densely populated city, with over 7.5 million people residing in an 1104km-square territory. It is a cultural blend of East and West, with a strong emphasis on the rule of law and traditional Chinese values on law and governance. Despite having a robust commercial sector and stores located in convenient, accessible spots and buildings, the e-commerce industry in Hong Kong is still in its early stages. However, the Covid-19 pandemic has accelerated the development of the e-commerce industry in Hong Kong, with an expected compound annual growth rate of 7.4% between 2019 and 2023, resulting in a USD6.4bn market volume by the year 2023 (Nazim 2019).

In Hong Kong, access to justice is expressly required by the Basic Law (Neuberger 2017). As it is a common law jurisdiction, the Hong Kong authorities aim to provide effective access to justice for citizens. This means not only effective access to court justice and litigation services, but also that the administration seeks to provide effective access to alternative dispute resolution (ADR), such as mediation and arbitration services. ADR services are seen as offering quick and inexpensive ways

for parties to reach an agreement without destroying their relationship (Department of Justice nd).

ODR is also variously known as online ADR, cyber-ADR, virtual ADR and e-ADR. Online platforms that provide mediation and arbitration can handle disputes in which parties do not need to travel to meet each other and can further save the costs of resolving the disputes. However, as a leading centre for dispute resolution in the Asia-Pacific Region, Hong Kong seems hitherto to have had a rather conservative attitude towards ODR mechanisms. This is largely due to the fact that Hong Kong citizens have a strong sense of privacy protection and are very sensitive to personal data collection issues, so they have unease about using online services. A typical example of such concern is the Office of the Privacy Commissioner for Personal Data of Hong Kong, an independent statutory body set up to oversee the enforcement of the Personal Data (Privacy) Ordinance (Cap 486) that came into force on 20 December 1996. It aims to secure the protection of privacy of individuals concerning personal data through promotion, monitoring and supervision of compliance with the ordinance (PCPD nd). As a result, when compared to mainland China, Hong Kong has lagged behind in the development of e-commerce as well as ODR services provided for handling disputes over online purchases.

However, this situation has changed in recent years. The Department of Justice in Hong Kong has been working on providing an online platform to facilitate dispute resolution in legal infrastructure projects (Wong 2019). In addition, the Hong Kong Government officially supports the development of Hong Kong as a leading centre for dispute resolution in the Asia-Pacific region. The advantages of Hong Kong promoting its dispute resolution mechanisms are not difficult to find. An independent and high-quality judiciary, a strong legal profession and a common law legal culture have been brought together to provide a solid legal infrastructure. Hong Kong is an international financial, trade and shipping centre with a range of expertise in different areas including e-commerce and the information technology (IT) industry. It is located at the heart of Asia geographically and in close proximity to the Chinese Mainland. Furthermore, the use of multiple languages and considerable cultural diversity in this international city also benefit the construction of a dispute resolution platform. So, Hong Kong has tremendous potential for development as a major dispute resolution centre for the region and beyond.

Domestically, the opportunities brought about by mainland China's Belt and Road Initiative and the Greater Bay Area (GBA) Development Plan have further pushed Hong Kong to accelerate its ODR service

construction. Various international and regional organizations are taking active steps to promote and use ODR to provide a reliable and efficient platform to facilitate ADR. Several studies have already shown that there is a strong need and interest in providing ODR services. The study shows 83% reporting that effective and consistent dispute resolution was a problem. (APEC 2015). Another study reported that as many as 35% of cross-border disputes involving micro, small and medium-sized enterprises (MSMEs) remain unresolved with the average value of the dispute being some USD50,000 (or HKD390,000) (Ecorys 2012). Over 90% of Hong Kong companies are MSMEs, a similar proportion to many other economies across the region.

In the next section the author will discuss the development of ODR in Hong Kong. Although Hong Kong is famous for its professional financial and legal system, it is hard to deny that the development of the ODR system in Hong Kong is, relatively speaking, lagging behind. Therefore, the further development of ODR in Hong Kong is increasingly important.

The aim of this article is to examine the evolution and potential impact of ODR in Hong Kong, specifically focusing on the Electronic Business Related Arbitration & Mediation System International Online Dispute Resolution Centre (eBRAM), and to evaluate its role in fostering local MSME growth, enhancing Hong Kong's global business prominence and synergizing with established dispute resolution providers.

## [B] THE CASE OF eBRAM

As it describes itself, the eBRAM is an independent and not-for-profit organization established under Hong Kong law as a company limited by guarantee.<sup>1</sup> It was established in 2018 with the support of the Asian Academy of International Law,<sup>2</sup> the Hong Kong Bar Association, the Law Society of Hong Kong and Logistics and Supply Chain MultiTech R&D

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<sup>1</sup> See [website](#) for details.

<sup>2</sup> The Asian Academy of International Law Ltd (AAIL) is an independent and non-profit-making body set up in Hong Kong to further the studies, research and development of international law in Asia. The AAIL provides a platform for discussions on international law issues and to research in developing areas of international law in order to enhance and reinforce Asia's role and participation in the formulation of international law and international relations. See the AAIL [website](#).

Centre.<sup>3</sup> As an ODR service provider, the eBRAM is designed for providing a quicker and more convenient platform for resolving disputes between MSMEs, as well as within the fast-growing digital economy. The former eBRAM Centre's chairman Nick Chan has characterized the five main founding objectives of the eBRAM:

- ◇ to facilitate deal-making and cost-effectively prevent disputes involving any countries and parties (including countries and parties that are in any way relevant to mainland China's Belt and Road initiative).
- ◇ to serve as a technology-enabled international platform for deal-making and dispute resolution including through negotiation, arbitration and mediation served by amongst others Dispute Resolver and other persons as the Board may nominate that facilitates deal-making.
- ◇ to prevent disputes and dispute resolution utilizing information technology means for parties with or without a physical presence in Hong Kong or a place where any one of the parties to a deal or dispute is located.
- ◇ to protect personal data, non-personal data and confidentiality; and
- ◇ to provide domain-specific language translation technology (Chan 2018: 2).

Since its establishment in 2018, the eBRAM has actively prepared its own ODR mechanism, from attending ODR workshops and conferences, visiting internet courts, to supporting online arbitration moot competitions and proposing an ODR mechanism to the Hong Kong Legislative Council.

After two years' preparation, the eBRAM platform successfully engaged with the Covid-19 Online Dispute Resolution Scheme which aims to resolve disputes arising from or relating to Covid-19 through speedy and cost-effective ways for MSMEs in April 2020. This government-supported measure is a part of the development of dispute resolution services in Hong Kong. Residents or companies, including MSMEs, in Hong Kong may participate in the scheme if the claim value of their Covid-19-related dispute is not more than HKD500,000 (approximately GBP5000) and

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<sup>3</sup> The Logistics and Supply Chain MultiTech R&D Centre (LSCM) was founded in 2006 with funding from the Innovation and Technology Fund of the Government of the Hong Kong Special Administrative Region. Since its inception, LSCM's mission has been to foster the development of core competencies in logistics and supply chain-related technologies in Hong Kong and facilitate the adoption of these technologies by industries in Hong Kong and Mainland China. The centre is hosted by three leading universities in Hong Kong, namely the University of Hong Kong, the Chinese University of Hong Kong and the Hong Kong University of Science and Technology. The establishment of the centre marks the realization of the concerted effort and enthusiasm on the part of the government, industry, academia and research institutes. See Logistics and Supply Chain MultiTech R&D Centre, "[Overview](#)".

they have paid a HKD200 registration fee. Appointed as the ODR service provider by the Hong Kong Government, a fully web-based ODR platform with video-conferencing technology support has been provided by the eBRAM to facilitate online negotiation, online mediation and online arbitration for parties.

The draft procedural Rules for the Covid-19 ODR Scheme have been published online. It is worth noting that eBRAM has set up a termination clause in the ODR Agreement through article 4.6, which says,

Notwithstanding the submission of the ODR Agreement, and the commencement of the Proceedings under the eBRAM Platform, eBRAM shall have the absolute discretion on its own motion or a request of a party or Neutral to terminate any Proceedings on the ground that the same is: (a) Not a Covid-19 Related Dispute; (b) an abuse of process; or (c) frivolous, vexatious and scandalous. eBRAM shall not be required to give any reason to the parties in the exercise of such discretion and the decision of eBRAM shall be final and conclusive. The online registration fee shall not be refundable to the parties.

Thus, the eBRAM limits the scope of admissible cases and narrows it to disputes related to Covid-19.

In accordance with the draft eBRAM Rules for the Covid-19 ODR Scheme, the proceedings of the eBRAM ODR service could be summarized as below:

- 1 The commencement of proceedings: the parties who intended to apply for ODR service by the eBRAM under the Scheme need to enter into the ODR Agreement through the eBRAM platform online, submit a claim and response (and counterclaim and response if applicable, with three calendar days for response by the Respondent), pay the online registration fee (at the time of writing the fee is HKD200 per party).
- 2 The negotiation stage: if there is no counterclaim, negotiation via the eBRAM platform will commence upon the claimant's communication of the response and notification. If the parties have not settled the dispute by negotiation within three calendar days (or another no more than three calendar days extension), or the respondent does not communicate a response to the eBRAM, or does not participate in the negotiation, the mediation stage shall immediately commence.
- 3 The mediation stage: upon commencement of the mediation stage, a list of five names is generated by the eBRAM from which the parties select a neutral mediator within three calendar days. If the selection fails, the eBRAM shall appoint the mediator. Following the appointment, the mediator shall communicate with the parties



through the eBRAM platform to attempt to reach a settlement. If this happens, the parties will sign the electronic agreement and execute it on the eBRAM platform. If the parties have failed to reach an agreement by mediation within three calendar days of being notified of the appointment of the mediator, the arbitration stage shall commence immediately, subject to the dispute being arbitrable.

- 4 The arbitration and award stage: upon commencement of the arbitration stage, a list of five names is generated by the eBRAM from which the parties choose a neutral arbitrator within three calendar days. If the parties cannot reach an agreement on such an appointment within three calendar days of the commencement of the arbitration stage, the eBRAM shall appoint the arbitrator. Following the appointment, the arbitrator shall communicate with the parties to set up a submission deadline within one calendar month from the appointment of the arbitrator. The arbitrator shall resolve the dispute based on the information submitted by the parties and render a final and binding award within seven calendar days from the filing of the last submission by the parties.
- 5 Correction of award, settlement and costs: within five calendar days after the uploading of the award, correction of the award could be requested through the eBRAM platform if there had been any calculation, clerical or typographical error, omission, etc. The arbitrator may correct the award within two calendar days of receipt of the request. The arbitrator may also make corrections on his or her own initiative within five calendar days after uploading the award. The terms of settlement shall be uploaded to the eBRAM platform, and the proceedings shall automatically terminate. The costs consist of two parts, one is the HKD200 registration fee and the other depends on the arbitration expenses.

Based on the working design of the eBRAM Platform, the dispute resolution process has been simplified into a flowchart (see Figure 1).

The Scheme is officially supported by the Department of Justice of the Hong Kong Special Administrative Region (HKSAR), which will cover the costs for mediators and arbitrators, in order to provide a “speedy and cost-effective means to resolve disputes among parties, avoiding disputes and differences from being entrenched, thereby helping to build and reinforce a harmonious society”. The Department of Justice also wants to relieve the court’s caseload in civil claims and more generally to create more jobs for the legal and dispute resolution sector in Hong Kong. Moreover, the Scheme will “utilize an ODR platform thereby strengthening Hong Kong’s LawTech capability” (Department of Justice 2020).

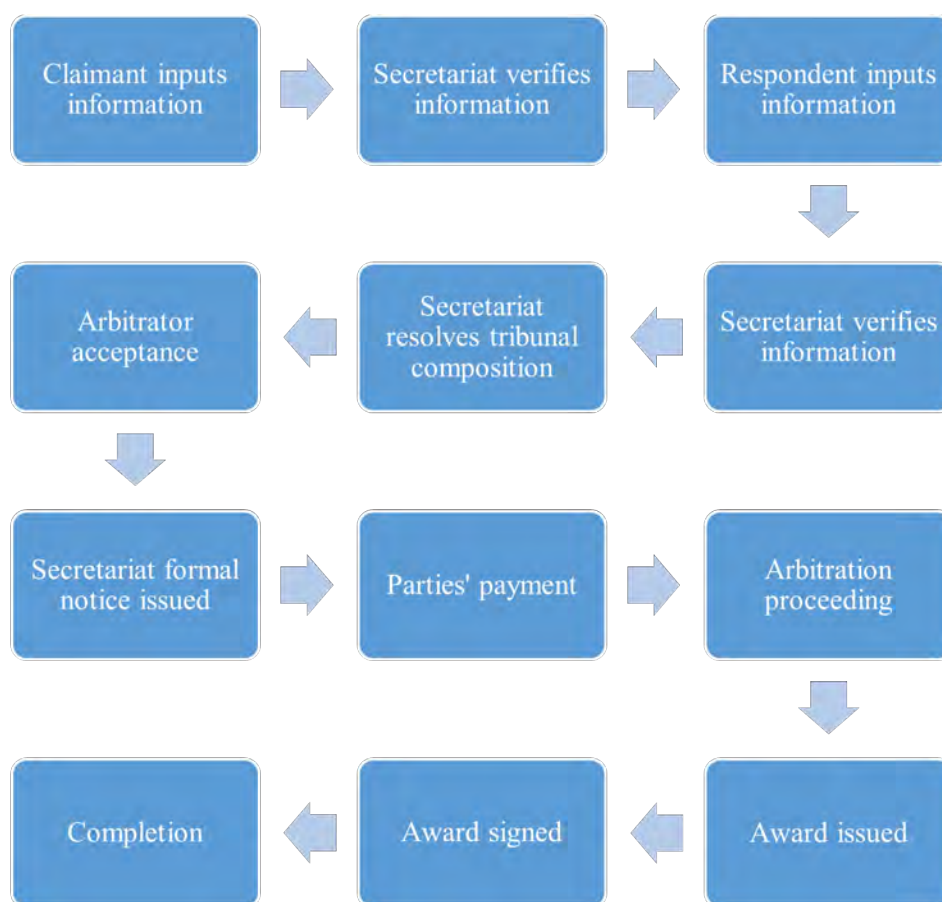


Figure 1: eBRAM's neutral-facilitated binding ODR workflow process

## [C] IMPLICATIONS OF THE eBRAM ODR MODEL

Theoretically, the establishment and further operation of the eBRAM Platform would bring Hong Kong many benefits.

Firstly, it may facilitate the development of local MSMEs and legal professionals. From a local perspective, the platform's development as proposed by the eBRAM will bring clear benefits to Hong Kong. These benefits include providing a secure, innovative and comprehensive ODR platform, which is low-cost and affordable for local MSMEs, thereby facilitating their business operation and achieving better access to justice.

Secondly, the provision of business opportunities and enhancement of training opportunities for local professionals would be created by establishing the eBRAM. The introduction of ODR in Hong Kong will promote professional education and training so that local professionals could develop capabilities in ODR and IT skills. Many of the features proposed by the eBRAM—like the application of artificial intelligence

translation in Chinese, English, Russian, Arabic and Spanish, the adoption of blockchain and secure cloud platform for transactions, and the usage of state-of-the-art data centres and robust legal framework for privacy protection—would be desirable and valuable not only to the businesses from Belt and Road jurisdictions as well as the GBA, but also to all their trading partners across the globe.

From a broader perspective, it will help enhance Hong Kong's role as an international city of business in Asia through the operation of the eBRAM as a credible, acceptable and sustainable regional dispute resolution body with its administration based in Hong Kong. In other words, it could showcase Hong Kong's unique status and capability under the "one country, two systems" constitutional arrangement in addressing the service needs of diverse legal and judicial systems in various places, using Hong Kong as the seat of arbitration and, more generally, promoting the use of various forms of ADR in Hong Kong. Hong Kong, being a cosmopolitan city, has a unique advantage in respect of the market for ODR services among Belt and Road jurisdictions and in the GBA, given that our legal and judicial system preserves the common law system, the multilingual abilities of many people in Hong Kong and our reputation as a leading international financial centre, as well as being an international legal and dispute resolution services hub in the Asia-Pacific region. Specifically, this will contribute to a further transformation of ADR to ODR in the GBA. It will enable or affect other relevant dispute resolution providers to facilitate ODR services in the GBA, with international panels of arbitrators and mediators from Hong Kong and other jurisdictions. It will also improve legal education and training so that many of those involved in dispute resolution are capable of IT skills.

Last but not least, in practice, the Hong Kong International Arbitration Centre (HKIAC) has provided a domain name dispute service in the past and continues to do so. Worries about the potential competition between the HKIAC and the eBRAM on ODR services are unnecessary. Instead, compared with the HKIAC cases and fees, the eBRAM would complement and create synergy with existing dispute resolution service providers (like HKIAC) to make the Hong Kong arbitration and mediation industry broader, more diverse, and inclusive of the latest digital technology. The eBRAM Platform can also be utilized by existing arbitration bodies, including the HKIAC and Hong Kong Maritime Arbitration Group. Such an arrangement will further enhance the synergy between the existing dispute resolution bodies and the eBRAM and elevate dispute resolution services in Hong Kong to scale new heights.

To date, data on dispute cases handled by the eBRAM have not yet been formally released by the eBRAM itself. According to the minutes of the meeting of the Legislative Council of HKSAR on 25 April 2022, the eBRAM Centre has handled a total of 23 cases under the Covid-19 ODR Scheme. Of these cases, 11 ended because the respondent did not give consent to undergo the ODR, while two cases were settled during the negotiation stage. The remaining 10 cases were still pending at that time, as obtaining consent from all parties to participate in the dispute resolution process was a significant obstacle and the main reason for the small number of ODR cases completed (Legislative Council 2022). Thus, further observations to examine how this new ODR platform works in practice in Hong Kong still need to be made.

## [D] CONCLUSIONS

The emergence and development of ODR in Hong Kong, particularly through the establishment and operation of eBRAM, holds considerable potential benefits for the city. The eBRAM platform offers a secure, innovative and comprehensive ODR platform that is both cost-effective and accessible for local MSMEs, thereby contributing to improved access to justice. Moreover, the eBRAM platform can complement and synergize with existing dispute resolution service providers, such as the HKIAC, thus broadening and diversifying the city's arbitration and mediation industry while incorporating the latest digital technology. Although the number of cases managed by eBRAM to date remains limited, further observations and research are required to evaluate the efficacy of this nascent ODR platform in practice. Ultimately, the development of ODR in Hong Kong presents a valuable opportunity for the city to fortify its position as a leading international legal and dispute resolution services centre in the Asia-Pacific region.

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# MONTESQUIEU'S THEORY OF THE SEPARATION OF POWERS, LEGISLATIVE FLEXIBILITY AND JUDICIAL RESTRAINT IN AN UNWRITTEN CONSTITUTION

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## **Abstract**

A constitution is a body of laws that is composed of various branches which exist as the legal source of its powers. These are designed to regulate by defining the role of the executive, legislature and the judiciary, which are the three organs of government that Baron Montesquieu defined as necessary in a constitution. The constitutional government can be evaluated on its capacity (i) to maintain the rule of law, (ii) to preserve an electoral mechanism for political democracy and (iii) to protect a morally and legally acceptable set of substantive rights. The conventions are the source of unwritten constitutions which preserve the balance of powers by relying on the concept of judicial restraint and deference to the executive. The contemporary relevance of Baron Montesquieu's theory is in the context of a fused system, and the question is the extent to which the executive can override the judicial powers in matters of state.

**Keywords:** separation of powers; unwritten constitution; Westminster model; constitutionalism; juridical review; "one voice" principle; administrative deference.

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## [A] INTRODUCTION

The separation of powers is essential in a democratic constitution because it provides checks and balances. Power is vested in three organs: the executive, the legislature and the judiciary. The doctrine of separation of powers was formulated in the 18th century when Baron Montesquieu devised the theory of three branches which provide the instruments of dispensing the power of the state. In the United Kingdom (UK), which has an unwritten constitution, the enactment of statutes with reference to the Magna Carta 1215, the Settlement Act 1701 and the Constitutional Reform Act 2005 has served to provide the checks on executive power. There is a need to examine the constitutional framework of the UK to undertake a comparative analysis with reference to the extent

that there is an overlap in the balance of powers and the scope of the doctrine and relevance in the modern era.

The formulation of a constitutional separation of powers by Montesquieu was significant in providing a limit to the powers of the executive and preventing its arbitrary exercise. The Enlightenment presented the dawn of a new era in European legal history when the divine right to rule by monarchs was challenged, and laws were deemed to emanate from the legislature that was elected by a mechanism of an elected assembly. Montesquieu defined three types of government:

republican, monarchical, and despotic. In the first the people is possessed of the supreme power; in a monarchy a single person governs by fixed and established laws; in a despotic government a single person directs everything by his own will and caprice (Montesquieu 1748, bk 11, ch 1).

The theory of a separation of powers has been interpreted by some jurists as reflecting the law of "Presidential systems where there is a clear separation of powers rather than a model of Westminster Parliamentary democracy" (Calabresi & Bady 2010, 17; and Hood Phillips 1977, 11). The difference being that the "Parliamentary systems were based on a fusion of powers, not a separation of powers" (Bagehot 1964, 5). This is because in a parliamentary system the executive branch is formed from the party with the most representatives in the legislature, and the executive remains dependent on the legislature for the ability to enact laws. There are several salient characteristics of constitutions which group them into separate categories. They can be divided into: written and unwritten constitutions; rigid and flexible; supreme and subordinate; federal and unitary; with separated powers and fused powers; and republican or monarchical. Despite their structure the issue is the extent of the division of powers between the executive, the legislature and the judicial branches or their integration into one consolidated power.

In this article there is an evaluation of Montesquieu's theory of the separation of powers and its application to the UK constitutions. This is with a contemporary background of the fusion of powers in the modern framework where there has been convergence of power of the three organs of state. There has to be a determination of the scope of parliamentary sovereignty and judicial review that separates the executive, legislative and judicial powers in the UK's unwritten constitution. This is an important principle of the checks and balances in an unwritten constitution which has not been formulated by design.

The road map of this article is as follows: Part B considers the scope of the constitution based on the legal theory that Montesquieu devised regarding the separation of powers and the concept of a social contract that emanated in transition to a constitution from a government based on arbitrary powers; Part C considers the UK and its unwritten constitution and is concerned with the application of the doctrine in which three organs of state are fused; Part D considers the balance of powers achieved through legal constitutionalism by distinguishing the legal and the political authority of the state in making a law and the “one voice” principle of the judiciary deferring to the executive; and Part E concerns the United States (US) constitutional doctrine which, unlike that of the UK, has adopted Montesquieu’s theory and where the administrative deference of the courts is in recognition that the horizontal power structure of the state can be maintained with checks and balances in a clear separation of powers.

## [B] INTELLECTUAL FERMENT OF THE ENLIGHTENMENT

The development of constitutions since medieval times has reflected the epochs in which they were formulated, and their composition was the result of the political will and legal scholarship of the period. The issue that concerned the legal theorists was not just absolute government but also the arbitrary powers granted to the executive to alter the framework of the hierarchy of the state. This concerned the hereditary rule which most often was symbolized by the authority of the monarch exercising their prerogative power to rule without any checks and balances, such as an elected legislature and an unfettered judiciary.

The power to rule without a corresponding legislative mandate or laws has been reflected on by philosophers who have theorized how to organize state power, in particular with respect to dividing it within government. The difference has been a historical landscape within which the nation state has evolved from the process of changes as follows:

separation of church and state, the detachment of secular power from its supposedly divine origin, the emergence of the concept of the “state”, the notion of popular sovereignty and the contrast between the constituent power of the people and the constituted power of the monarch which were invoked during the fundamental changes in the realities of political societies of the time (Tsatsos 1968, 11, 14).

The post-Renaissance period led to a ferment when the concepts devised by Grotius, Descartes, Bodin, Hobbes, Pufendorf, Locke, Kant

and J.J. Rousseau became recognized as the text for developing a polity based upon rational principles. The most prominent was the concept of the social contract that provided a radical new solution to the problem of absolute power and was premised on the legitimacy of government, popular approval and the participation of the people. This was defined as a basis for a meaningful relationship between state and society.

In England and Scotland the theory of the social contract emanated from philosophers who believed in justification for a legitimate order of government. Hobbes, who had witnessed the English Civil War, and for whom “absolute power” in a monarch was essential as symbolic of a monolithic state which would vest it with legitimacy, considered division of powers as approximate to letting the state self-destruct. He argued: “For what is it to divide the power of a commonwealth, but to dissolve it; for powers divided mutually destroy each other” (Hobbes 2004: *Leviathan*, xxix.12, cf *De Cive*, xii.5).

The more radical John Locke, who is considered an early exponent of the social contract theory, restricted the executive's powers and bound it to the legislature, and he constructed a bipolar model in his *Second Treatise of Government*, in which he ascribed it legitimacy by invoking the social contract as a necessary framework for the attainment of liberty. He argued that men consented to give up their freedom to establish a more secure way of living together in communities to protect their “lives, liberties and ... property” (Locke 1690, 123).

This was the purpose of the social contract in a polity and served to bind the ruler with the “consent of the governed by restricting the basis and the extent of the ruler's powers” (Locke 1690, 131, 134). Governmental power was never absolute, but from its inception was restricted and directed in its application, “and all the measures used for this purpose were legitimate, and those that did not have this objective were an abuse of the trust of the people” (Locke 1690, 143). The fact that human nature was “weak” made this “outcome likely” which led him to the conclusion that a “state's power needed to be divided, so that legislative and executive powers were not synonymous and should be exercised through different branches” (Locke 1690, 143,144).

In order to establish the framework for a social contract Locke distinguished four powers: “the legislative, the executive, the federative and the prerogative power” (Locke 1690, 132). The judiciary was not identified as a separate power, but only as a component of the executive power to enforce the writ of the land. The social contract also meant that original sovereignty lay with the people and was considered to be

indivisible and inalienable. The people then transferred its exercise to another entity which became the legislative, “ranking supreme among all government powers” (Locke 1690, 132, 134). This constituted legislature “could not transfer its power on to another body and neither was any other power allowed to usurp its mandate” (134). The social contract existed by electing the legislative, an act by which “the people had exercised their freedom and had provided their consent to the rules promulgated by this body. In response, the legislature upon receiving its powers had a duty to work for the public benefit through enacting law and not revert to a ‘state of nature’” (137).

However, unlike Locke the focus of Montesquieu was on the separation of powers which divided the sovereign’s powers horizontally into executive, legislative and judiciary. Like Locke, he considered the crucial purpose of this separation to be the protection of the political liberty of the people, which he defined as the power to act within the framework of the law. This, in his view, would provide a reliable justification for the institutional structure of the constitutional system. This formal concept for a normative process had a “particular concern and focus on the judiciary and their role in the separation of powers” (Tamanaha 2004, 53).

The legal theory that Montesquieu inaugurated had an overlap with political theory, and he advocated a more purposeful remedy of a constitutional system that should be designed in such a manner that it would “actively promote liberty, not just prevent abuse”. This could only be achieved by dividing up the state’s power and organizing it in a way “that required cooperation among the created institutions as well as allowed for mutual control” (Montesquieu 1748, bk 1, ch 5). He advocated that the constitutional framework had “to ensure that the various branches of the constitution were able to keep each other in check” (ibid).

The Enlightenment philosophers who proposed a radical transformation from absolute government brought with them the perspective of a social compact which was all encompassing and gained ascendancy in France at the inception of Montesquieu doctrine. This gave sustenance to the compact of an executive power which can interpret the will of the community through the formation of a mandate of the people that gave a broad discretion to the legislature to make laws in the interests of the people. Its proponent J.J. Rousseau states:

Men are thus all subject to *volonté générale* (the general will). It is not the will of all the individuals or of the majority, as even the majority may be mistaken, but it is always to public advantage and for the “greater good” (Rousseau 1763, bk 1, ch 7, 33).



This can be contrasted with the constitutional theory that emanated from the German philosopher Immanuel Kant who projected the “state” as being at the apex of its organizational structure. He emphasized the

primacy of the legislative functions of a state and the rule of law where sovereign primacy is embodied in the way that both the executive (who enforces and administers it) and the judiciary (who interprets it) are dependent on the laws set by the legislator. This in turn requires that “a people’s sovereign (legislator)” not “also be its ruler” which implies a separation of powers in order to ensure that the ruler’s will is bound by laws (Kant 1997, 6:313-314).

Without this separation “there is no rule of law, but only rule by executive ‘ordinances or decrees (not laws)’” (Kant 1997, 6:316). The state as an abstract concept was the primary concern of the German philosophers at the inception of the doctrine of separation of powers and its effect on the legal system. This was because in German public law theory there is a distinction between the *Staatsrecht* / “state law” and *Verfassungsrecht* / “constitutional law” since the “state” is a separate entity from society and emerged before the framework of constitutions in the legal system (Murkens 2008, 10-12).

Kant rejects the theory of the separation of powers as based on a balance of powers advocated by Montesquieu and advances “the notion of the concept of a separation of powers” onto the realm of “the polity’s capacity to achieve a rights based condition” (Murkens 2008, 59) This was a philosophical dilemma, and Kant enumerated the powers of various bodies as vested in the supreme power of the state.

The embodiment of the state produced the articles of the Constitution and statutory law but the former were logically no “higher” or better protected than the latter. ... State power was pre-constitutional that was only limited, and not constituted, by law. ... This explains why Imperial *Staatsrecht* had ... no theory of the primacy of the constitution (Murkens 2013, 16).

Unlike the philosophers of the period who developed his doctrine, Montesquieu was specific in his theory that consecrated into legal principles the three branches of a constitution and the need to provide a balance of powers. This was the extent of his thesis: that it was to reflect the division and the checks and balances of the constitutional government. The objective of this was not the social contract or how it was arrived at, such as present in Locke’s reasoning or the political science-based reasoning of Rousseau, nor was he concerned with the state as the embodiment of the community that Kant espoused without delving into the checks and balances and constitutional theory.

The issues that Montesquieu was not able to define were the extent of the fusion of those powers and the capacity of the constitution to either wither or mutate and move towards the overlapping of powers. This is an matter of construction, and in modern constitutions the organs of government do not have a strict division of power. They can exercise powers independently, but they are dependent on the interplay between one branch and the other two branches. The examination of the extent of the integration of the branches can be measured by contrasting the framework of a written and an unwritten constitution. This requires initially an analysis of the UK constitution and the distribution of power among its branches before evaluating the framework of a written constitution where the checks and balances have been defined by articles of the constitution, such as in the US.

## [C] SEPARATION OF POWERS IN THE UK CONSTITUTION

Unwritten constitutions are reliant on conventions, such as in the UK where there is no written document that establishes the roles of the executive, legislature or judiciary. The conventions stipulate that Parliament is sovereign, that the party which has the majority in the House of Commons forms the government and that the monarch can dissolve Parliament upon the advice of the Prime Minister. There have been several statutes that have constitutional, status such as the Magna Carta 1215, Settlement Act 1701 and the Constitutional Reform Act 2005, and together they form the constitutional framework.

Constitutions that are unwritten have been created over time and developed from conventions and established customs that may have been influenced by the exercise of the royal prerogative. A.V. Dicey described the royal prerogative as

the remaining portion of the Crown's original authority, and it is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers (Dicey 1905, 3).

The UK constitution is the prime example of this type of constitution that is based on parliamentary supremacy. It allows the legislature to enact laws, and its sovereignty as a law-making source cannot be challenged. The executive has the power to enforce laws and implement the policy of the state and has a role in shaping the state's laws within the boundaries set by the legislature and courts. The executive formulates rules governing the application of the laws.

Montesquieu's perspective was that the British constitution was the epitome of individual and political liberty. He viewed it as an advanced constitution which embodied the

principles that were here is one State in the world whose special aim, and "the direct aim of its constitution", is political liberty—and that is England. If those principles be good, liberty will appear in them as in a mirror. These principles are self evident and if one can find such principles in a constitution, there will be no need to go on looking for them—that is, through philosophical speculation (McWhinney & Ors 1953, 113).

Montesquieu contemplates viewing the "principles", and he restates that he is not interested in whether the English do at present enjoy political liberty: "It is enough for me to state that it is established by their laws and I am not looking further than that" (McWhinney & Ors 1953: 113). In his theoretical framework Montesquieu would accept "that constitutions are dependent on the climate of the country in which they have been framed".

Specifically, laws should be adapted "to the people for whom they are framed, to the nature and principle of each government, to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives ... [Laws] should have relation to the degree of liberty the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs ... [Laws] have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered (Montesquieu 1748, bk 1, ch 3).

The constitutional lawyer Viscount Bryce in an analysis of constitutions that are analogous draws a parallel between the Roman and the British constitution and argues that constitutions are a product of the customs of a country and their ancient backdrop is a consequence of a long assimilatory process. He argues that:

Constitutions are the expression of national character, as they in turn mold the character of those who use them; and the same causes which made both peoples great have made their political institutions also strong and rich, specially full of instruction for all nations in all times (Bryce 1901, 20).

Bryce draws the distinction between those laws that are based on common law *ius*, which emanates from the British parliamentary model, and those from the Roman *lex*, where statutory codes are the basic norm (Bryce 1901, 20). In Bryce's view it is necessary to have a more specific test because both past and present constitutions conform to one leading

type or another that can be distinguished by their development over a period of time. He states:

If we survey Constitutions generally, in the past as well as in the present, we find them conforming to one or other of two leading types. Some are natural growths, unsymmetrical both in their form and in their contents. They consist of a variety of specific enactments or agreements of different dates, possibly proceeding from different sources, intermixed with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority. Other Constitutions are works of conscious art, that is to say, they are the result of a deliberate effort on the part of the State to lay down once for all a body of coherent provisions under which its government shall be established and conducted (Bryce 1901, 30).

Bryce's definition can be further subdivided by the provisions under which the government shall be established. This concept may be distinguished with the ancient being the former and the later being the modern constitution, which provides a comparable test to explain their different legislative functions. In Rome in the second century BC, legal bills "were enacted by the general assembly (whether *comitia centuriata* or *comitia tributa*) that had application and force" (Pliny the Elder 1855, 15; Dionysius 1950, 75).

The *regulae iuris* is a formulation of Roman law that it is not a fixed body of rules, but rather "rules" that were "recognised or found" to be applicable in a specific case (Stein 1966, 20). In common law the constitutional statutes are frequently promulgated to declare, modify or abolish precedence and repeal legislation. The Roman laws emanated from statutes that are interpreted by judges in the civil law courts through legal precedence developed by the courts rather than legal writings, as was the custom of Roman jurists. The concept of *regulae*—general rules that emanate from cases—is that "the law may not be derived from a rule, but a rule must arise from the law as it is" (Justinian, 50.17).

The formulation of Roman law is that it is not a fixed body of rules, but rather "rules" that were "recognised or found" to be applicable in a specific case. Law was therefore not created but "discovered", which means that enacted law in Rome began as "recorded customary law" (Stein 1966, 4). Those constitutions of the latter type are those that are usually composed of one instrument which is overriding and whose "form and title" distinguish it from ordinary legal precedent (Stein 1966, 35).

The 19th-century British jurist William Bagehot stated in reference to the English constitution that there was a "hidden being" in the fusion of legislative and executive powers. This made the doctrine of separation

of powers less relevant to the UK, and he defined the function of the English constitution as dependent on two main sections of an ancient constitution which are the “dignified part and the efficient part”. The dignified parts of government he describes as those which bring it force and attract its functional power. The efficient parts apply that power, and its composition is

the efficient secret of the English constitution that may be described as the close union, the nearly complete fusion of the executive and legislative powers. According to the traditional theory, the goodness of the constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation (Bagehot 1964, 6).

The more critical approach has been adopted by M.J.C. Vile who states that the separation of powers is essential because of its application to principles underpinning the constitution. The reason why it has been misinterpreted is because

[a] major problem in an approach to the literature on the doctrine of the separation of powers is that few writers define exactly what they mean by the doctrine, what are its essential elements, and how it relates to other ideas (Vile 1967, 13).

The issue that is at the centre of debate is “power” that is described as being very ambiguous. The majority of legal scholars argue that in principle there are several separate components which are usually combined under the doctrine of the separation of powers. This is because it is contended that the idea of separation itself is not sufficient to create a viable constitutional order, and it must be complimented by other concepts, such as the theory of mixed government, the idea of balance, or the concept of checks and balances (Vile 1967, 13).

The most important elements of a constitution, in Vile's view, are the three elements that compose it and which need to develop through the interaction between its organs. The model constitution needs to set out how they are interdependent, mutually interacting and intimately related to certain values patterns. It needs to be established that the character of a constitution is determined by the “interpenetration of points of function, structure and process”, and in postulating the “development of a model that integrates all three elements Vile states that the concept of function is the most important” (Vile 1967, 72-73).

The functional aspect can be viewed in the example of Aotearoa/New Zealand which also has an unwritten constitution that is reliant on several constitutional documents that form the framework of the laws. The Treaty of Waitangi Act 1975 gave the treaty signed with the Maori minority in 1840



a constitutional status and is regarded as a “Constitutional document” that serves “to guide” the relationship between the Maori people and the New Zealand Government. The Treaty of Waitangi is a governing document which was adopted by New Zealand’s Government when it ratified the Statute of Westminster in 1931, and it was formally incorporated by the Adoption Act of 1947. In the state’s foundational laws the

constitutional arrangements are found in a range of statutes, documents, practices, conventions and institutions. They describe and create the institutions of the State, set out the constraints on the exercise of State power, and regulate the relationship between citizens and the State (New Zealand Ministry of Justice nd).

It has been argued that the term “unwritten” never meant the absence of writing; rather it implies the absence of any truly supreme law. The New Zealand Parliament is deemed to be supreme and its enactments are not susceptible to annulment by any court. The implication of this principle of a

legislative supremacy is that the common law developed by judges in light of New Zealand values serves an important updating function. In that sense common law serves to write things that remain unwritten (Rishworth 2016, 137).

In an unwritten constitution there is no estimable division of powers. Eoin Carolan argues that the tripartite concept of executive, legislature and judiciary cannot define the complexity of modern states, and in particular their administrative functions (Carolan 2009, 47). The separation of powers requires that “this delegated law-making power be exercised in a way that reflects the institutional strengths and limits of the executive branch” (Carolan 2009, 50). This notion depends on “a re-interpretation of the doctrine that stresses its dependence on the values that underpin the state”. The manner in which the demands of the separation of powers is understood is by the evaluation of the “proper objectives of the state” (Carolan 2009, 52). The current problems related to the overlap between the three organs of government are based upon the institutional organization of the state. For this reason, it might be more appropriate to evaluate the concept of identifying state institutions with specific social interests (Carolan 2009, 257).

It has also been argued that “the system of checks and balances and the idea of independence of power components stand out against each other” (Magill 2000, 1127). The theory of separation of powers is a key ingredient of constitutional government, but the theory is ambiguous and not directly relevant to the British constitution. The concept has been linked with good government, with fidelity to the governed and respect

for the checks and balances of power in a state. The inference is that constitutional government is an ingredient of the major concepts such as the rule of law, judicial review in the “new constitutional settlement” in the aftermath of the UK Constitutional Reform Act 2005. There have been attempts to define the scope, meaning and role of the constitution with separation of powers, but it is still an abstract concept because of the different functions of the branches in an unwritten constitution.

However, the doctrine of the separation of powers does form the basis for a framework on the values and principles, and there has to be a definition of the objects of constitutionalism to satisfy the public law discourse. This issue has a bearing on the meaningful application of a balance of powers even if not the “separation of powers as an ingredient of ‘constitutionalism’” which is essentially government “without an arbitrary exercise of power” (Murkens 2009, 427). In order for that to happen the reason why the separation of powers exists has to be discerned, and this can be achieved when the purpose for which the framework has institutionalized the separate organs of government has been determined.

## [D] CONSTITUTIONALISM AND THE FUSION OF POWERS

In the UK there is a nexus between the legislature and executive branches of the constitution with the political part of the government connecting the two branches together but still retaining profound differences. In English constitutional tradition there is a common law-based judicial review of administrative action that forms the framework for securing a balanced constitution. According to Dicey, judicial decision-making's purpose is for “securing certainty and maintaining a fixed legal system with strong respect for precedent, than at amending the deficiencies of the law” (Dicey 1914, 363-364). This supports the view that respect for precedent is the necessary foundation of judge-made law.

The executive branch in the UK consists not only of the head of government but also the civil servants who provide the administrative function of the state. The bureaucracy has important duties to implement the policy of the executive body, and this process has led to the principle of constitutionalism, which is inherent in both unwritten and written constitutions. Political constitutionalists argue for an increased space in the UK constitution for the judiciary by proposing that Parliament must not enact legislation that bars judicial review.

Adam Tomkins observes that Parliament should frame legislation as transparently as possible, and that the courts should review this by developing a power analogous to the “declaration of incompatibility” under the Human Rights Act 1998 (HRA) when there is doubt about the proper scope or meaning of a government power. If legislation does conflict with human rights, then the courts should have the power to strike out the ouster clauses. In effect where the court finds that a power conferred on the government does not appear to be necessary, it should refer the power back to Parliament, which should reconsider the matter, its view being final in this respect. The intervention of the judge is based on the proposition that what “Parliament intended is ambiguous; where the government has acted without parliamentary authority; and where it has acted in a manner that circumvents parliamentary scrutiny” (Tomkins 2010, 23).

It would render the statutes null and void and incompatible with the HRA as in the House of Lords ruling in *A v Secretary of State for the Home Department* (2005). Tomkins has espoused the view that there has to be a balance between “political” and the “legal” purpose within public law. The ambit of judicial review is primarily on “executive and administrative actions broadly conceived, whether undertaken by ministers, agencies, local authorities, boards, commissions, or any other organ that comprises the modern administrative state, including review of such actions under the HRA” (Tomkins 2010, 43).

In the Westminster Parliament the judicial contribution to constitutional law remains significant because the application of a precedent requires judicial intervention in specific circumstances. In *Chandler v The State (No 2)* (2022), it was stated that constitutional provisions will lead to.

Judicial latitude in applying a constitutional provision which will be considerably less in relation to those which are framed in concrete and specific terms. These are often expressed in general terms because the legal application of constitutional law is by formulating the ground-rules of the liberal democratic order and is not ordinarily a matter of containment and restraint—though the rules do that as well; it is a matter of establishing the texture of the system (Sales 2018, 691).

The conceptualization of the theory of constitutionalism implies that law should be made responsive to

social propositions, ie moral norms, policies and experiential propositions about the way the world functions and this is made possible when the rules made by courts are durable – generalizable over time as well as over persons – and therefore should not be based on policies that seem transitory (Sales 2018, 691).

The courts are not representative institutions of state, which implies that they have to proceed gradually and take precautions when being judicially active. This is because the

Legitimacy of the judicial establishment of legal rules depends in large part on the employment of a process of reasoning that begins with existing legal and social standards rather than those standards the court thinks best (Sales 2018, 691).

There is a need to distinguish the theory of political constitutionalism which has its conceptual basis the study of "representative democracy" and its obedience to Parliament and the "doctrine of parliamentary sovereignty". Legal constitutionalism "identifies the primacy of rights protection" and by stepping over the assertion of individual rights in a "democracy" it upholds the concept that:

The prescribed limitations must exist on Parliament in the manner it governs itself and the analysis is on the "role of courts and judicial review" (Delaney 2014, 545).

The spirit of legal constitutionalism transcends the framework, and its essence lies in the compromise between judicial restraint and the motion, stability and dynamic approach which is at the basis of the common law. The imperative is the need to preserve the constitutional principles embodying the framework in both a written constitution and an unwritten constitution. Judge Cardozo states:

When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them. (Cardozo 1928, 7)

The theory of constitutionalism is based on a political determination that leads to the distinction between qualified rights and absolute rights. If adopted then it could lead to the repeal of the HRA because domestic courts may be unwilling to countenance national courts who are engaged in the judicial review of qualified rights. They would not accept adjudication on precisely the same terms as the Strasbourg Court when the nature of these disputes will not alter the fundamental issue at stake. The UK "would have to repeal the HRA by denying direct adjudication of national courts over qualified rights or the proportionality review would be infringing the HRA" (Kavanagh 2012, 191).

Peter Craig comments that Parliament has managed to exert some control over areas of legislation in some limited instances despite the insertion of exclusionary clauses. He remarks:

This recognition is built on certain assumptions concerning the relationship between the legal and political branches of government, as exemplified by the generally accepted proscription on the judicial substitution of judgment for that of the administration in relation to the merits of discretionary power. It is apparent, once again, in the judicial recognition of some degree of deference, the discretionary area of judgment, or respect to be accorded to the initial decision maker under the Human Rights Act 1998, the extent of which will vary depending, in part, on the nature and extent of the initial decision maker's democratic credentials (Craig 2011, 112).

However, there is an understanding that even in relation to the initial decision-makers who possess some democratic legitimacy, such as ministers, there is the requirement of some level of judicial oversight that ensures they do not surpass the limits set down by their elected principals who occupy political office. Craig argues that this "transmission-belt theory no longer provides a convincing explanation for the entirety of administrative law" (Craig 2011, 115). The scope of excluding judicial review in such a case of group rights needs a determination of "legal authority to act" or "acting within the scope of power" that can entail the choice of values and balancing within the context of rationality and proportionality (Craig 2011, 122).

The traditional judicial review does acknowledge the relationship between political authority and the legal branch. There is support for an existing judicial recognition of a degree of deference, or respect for the decision-maker under the HRA, the extent of which will be dependent upon the delegated body's representative standing. In *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* (2003) the Home Secretary had introduced a scheme pursuant to section 32 Immigration and Asylum Act 1999, making carriers liable to a fixed penalty for every illegal entrant found in their vehicles. As a consequence, multiple claimants brought proceedings against the Home Secretary challenging the lawfulness of the scheme. The judicial review resulted in the judge stating that the scheme was incompatible with article 6 of the European Convention on Human Rights and Additional Protocol of the HRA as comprising unjust restrictions on the free movement of goods.

The Court of Appeal held that the scheme was in breach of article 6 but also stated that there was no breach of community law. Simon Brown LJ ruled:

The scheme here did impose too great a burden on drivers—such that the unfairness of it was disproportionate to the effectiveness of



the penalty regime on reducing the number of clandestine entrants (para 53).

Laws LJ in a dissenting judgment held:

The extent of any deference to be paid to the legislature depends in part on the nature and quality of the measure in question: more concretely, whether its content falls within the special responsibility of the executive ... or the special responsibility of the judiciary. A paradigm of the executive's special responsibility is the security of the state's borders. A paradigm of the judiciary's special responsibility is the doing of criminal justice (para 77).

His Lordship stated further that: "The degree of deference owed to the democratic decision-maker must depend upon where the impugned measure lies within the scheme of things" (para 77). The degree of deference to be given by a court should depend on the institutional competence of either the executive or the judiciary. This is an important ruling which implies that traditionally judicial review does acknowledge the relationship between the political and the legal checks and balances.

It implies that, while acknowledging the initial administrative decision-maker does not trespass beyond the limits accorded by the legislature, there has to be an administrative law doctrine that is binding. The political constitutionalist doctrine acknowledges the consequence which flows from the notion that there must a more radical limitation placed on judicial review because the legislature is the forum of the political action compared to the judiciary. Jon Elster states:

Constitutionalism ensures that constitutional change will be slow compared to the fast lane of parliamentary politics. The constitution should be a framework for political action not an instrument for action (Elster 2000, 100).

In *R (On the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (2)* (2008) the British Government acting through the Privy Council had enacted a law made in the interim without approval from the House of Commons and had substituted the judgment of the appeal court that had permitted the transfer of the islanders to their indigenous islands. The British Foreign Secretary argued in the case that the courts had no power to review the validity of a British Indian Ocean Territory (Constitution) Order 2004 Order in Council legislating for a colony, either because it was primary legislation having unquestionable validity comparable with that of an Act of Parliament, or because review was excluded by the Colonial Law Validity Act 1865. The Islanders had submitted an application that a right of abode was inviolable and that

only an Act of Parliament could exclude it, but this argument did not prevail with their Lordships.

The legal constitutionalists consider the scope of the prerogative power, rationality, and the legitimate expectations of the appellants. This exemplifies the value choices that are often inherent in making determinations as to the scope of power, whether statutory or, as in this instance, prerogative power. The courts have been forthright in declaring that in areas of non-justiciability such as acts of foreign states they will exercise their discretion only on the basis of the judicial deference to the executive.

In “*Maduro Board*” of the Central Bank of Venezuela (*Respondent/ Cross-Appellant*) v “*Guaidó Board*” of the Central Bank of Venezuela (2021) Lord Lloyd-Jones who gave the main ruling of the Supreme Court held that on the “recognition of foreign states, governments and heads of states it is a matter for the executive”. The courts in the UK accept statements made by the executive “as conclusive” as to whether an individual is to be regarded as a head of state (paras 63, 69). This rule is called the “one voice principle” and its rationale is “that certain matters are peculiarly within the executive’s cognizance” (para 78). The court held that it deferred to the executive in formulating its judicial rulings as to the acts of state of foreign governments which includes recognition of foreign governments and their assets which are held in the UK.

The claim was by the *de jure* government of President Maduro, which is not recognized by the UK Government, and by Eduardo Guaidó, who is recognized as *de facto* head of state not in power. Historically, the courts have drawn a “distinction between the recognition of a government *de jure* and *de facto*” (paras 83, 85). His Lordship stated that this distinction is now “unlikely to have any useful role to play before courts in this jurisdiction” (para 99).

The rationale for judicial review is that courts need to be involved in cases where there are “contentious value assumptions or difficult balancing exercises, then the premise is unsustainable, since it would destroy adjudication across private as well as public law” (Craig 2011, 113). The legal constitutionalists argue that there should be more parliamentary control over legislation and the executive’s actions based on the notion that they want to remove the parts of administrative law doctrine where the executive has overbearing powers. They argue that the separation of powers concerns have been an important reason for the growth of judicial review (Gardbaum 2014, 613).

Lord Sales in a conference speech reviewed the balance of powers in a constitution and its impact on the judiciary's role, stating:

The repair function of common law and constitutional law is made possible by the judicial contribution to that law, which allows for adjustments over time to align constitutional norms with social expectations, so that they do not drift too far apart. Application of legal norms is a constant process, which can arise in the courts at any time. This distinguishes it from legislative action, where the focus is on a specific act at a particular time to define new laws to govern in the future. The judicial application of an already existing norm binds together past, present and future in a way that a legislative act does not. A judge has to understand how the norm to be applied came to exist in the past and its meaning then and decide what meaning it should bear in the present to govern the dispute before the court and (potentially) what meaning it should carry into the future to be derived from the precedential value of the decision (Sales 2022).

The legal constitutionalists argue that the balance of powers in a constitution does require a modicum of a separation of powers in the framework and the increased role of the judges and the doctrine of precedence. The discretion to act within the scope of legal constitutionalism will increase the powers of judicial review in the UK Parliament. The administrative bodies at the lower rungs of the decision-making process implement the executive decision-making and the courts have managed to bind them to their precedent based on a public law doctrine that is inherent in the balance of powers developed over time with an evolving framework of judicial review.

## [E] SEPARATION OF POWERS AND ADMINISTRATIVE DEFERENCE

The US Constitution devised in 1787 is an example of a written constitution that has consciously adopted Montesquieu's doctrine of the separation of powers. The nexus with the theory of Montesquieu in the US Constitution is due to the Federalist Papers, which were authored by Alexander Hamilton, James Madison and John Jay and provided a preamble to the US Constitution. The intention was to integrate liberty as a principle of the Constitution and to formulate a checks-and-balances doctrine in the states and then at the federal level. This was the ideal of Montesquieu, which was given shape by the framers of the US Constitution who had experience of drafting the texts of the states' constitutions.

The constitution of Massachusetts was deemed in Madison's essay as conforming to the principle of the separation of powers because it had

a sufficient though less pointed caution in expressing this fundamental article of liberty. It declares “The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them” (Wootton 2003, 36-37).

At the inception of American independence the major challenge for the Federalists was that the revolution had swept away a large number of the foundations of the very concepts they had inherited.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Madison 1993, letter 51).

Another important theme in Madison’s conception was that federalism and the separation of powers complimented the protection of liberty against abusive government. He contends that the division of government power between different institutions has positive value because liberty is best maintained “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places” (ibid).

This provided the incentive to draft a new federal constitution and its framer Madison argued: “It goes no farther than to prohibit any one of the department’s from exercising the powers of another department” (1993, letter 47).

Madison argued that the checks and balances emanate from the judiciary’s power to annul legislation not in conformity with the US Constitution. Judicial power extends to the right to repeal any “Act of the Congress and all legislative or executive action violating the constitution, which could concern the institutional framework and any unjust laws” (1993, letter 69).

The Constitution has been interpreted to have provided a balance of powers where the legality of the executive’s action can be challenged and invalidated after application for the writ of *mandamus*. In essence, “federalism and the separation of powers have been presented as the primary institutional arrangements generating this diffusion” which is based on “the diffusion of powers among different individuals in different institutions to produce many desirable institutional goods: checks and balances, democratic accountability, and effective government” (Fontana 2018, 727).

The rule was stated by Chief Justice Marshall in *Marbury v Madison* (1803) that appointees of the federal government are capable of examining the executive actions of the government:

but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy (para 167).

Justice Marshall also ruled that it was the duty of the judicial department to state the ambit of the statute. Those who apply to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other “then the Court will decide on the operation of each” (para 169). However, the process of decentralization in a state involves a “central power possessing authority to decentralize and empower the functional and administrative responsibilities” to the lower echelons of government (para 180).

The separation of powers is an enduring concept and the judiciary has not been restrained from exercising its rights inherent in the constitution. This has led to the concept of administrative deference when the judiciary has overruled legislation that it found to be in breach of the constitutional principle of a balance of powers. The Supreme Court has been instrumental in asserting this doctrine that echoes Montesquieu's separation of powers and aligns it with the balance of powers enshrined in the US Constitution.

In *Chevron USA Inc v NRDC* (1984) a petitioner sought judicial review of a judgment from the United States Court of Appeals for the District of Columbia Circuit, which set aside a regulation issued by the Environmental Protection Agency (EPA). This gave the EPA the right to implement or permit requirements for non-attainment states under the Clean Air Act Amendments of 1977. The formulation gave the subject states the ability to treat all pollution-emitting devices within the same industrial sector as though they were in the same industry. The Court of Appeal ruling was challenged by judicial review on the grounds that it was not a reasonable interpretation of the statutory framework.

The Supreme Court held that the EPA had acted *ultra vires* because it had to address the question whether Congress has directly given it the authority to implement the regulation and

if the statute was silent or ambiguous with respect to the specific issue, the question for a court was whether the agency's action was based on a permissible construction of the statute. The Agency had to give sufficient weight to the construction of a statutory scheme

and the legislative background of the statute did reveal that the EPA's interpretation was in accordance with the principal objectives of the statute which was for the purpose of the reasonable economic growth. That in this measure the EPA's interpretation was entitled to deference to the executive (*Chevron* 1984: paras 844-845).

Justice Stevens' seminal opinion is deemed to have inaugurated the theory of administrative deference to reasonable executive branch interpretations of law.

In 1996 Congress had enacted the Line Item Veto Act, which enabled the US President to exercise authority to cancel certain spending and tax benefit measures after he had signed such measures into law. In *Clinton v City of New York* (1998), upon the exercise of presidential authority under this enactment, the procedure was questioned for its constitutionality. The District Court ruled that the Line Item Veto Act violated the Constitution because it had not conformed with the article I, section 7 of the Constitution.

The appeal was heard by the Supreme Court and the issue was whether the Line Item Veto Act was constitutional and whether the unilateral presidential action that either repeals or amends parts of duly enacted statutes is equivalent to an express prohibition. Judge Stevens, stating the opinion of the court, held that the Line Item Veto Act had no legal force or effect and had failed to satisfy the "cancellation procedures that violated the Presentment Clause" (*Clinton v City of New York* (1998): paras 436-439). The effect was not in accordance with the "finely wrought" procedure that the Framers designed", but "truncated versions of two bills that passed both Houses" (paras 436-431). The deference shown by Congress had "overstepped the powers granted to the President and in surrendering part of the traditional legislative appropriations power to the President was invalid and the legislation was revoked" (para 418).

Justice Stevens' opinion calling for judicial deference to reasonable executive branch interpretations of law in *Chevron* recognizes that quandary while his later opinions and votes limiting the scope of *Chevron* reflect the justices' desire to preserve as much of the separation of powers as possible by allowing for judicial review. The judge stated that the Act allowed the President a "unilateral power unlike the construction of previous statutes" (para 447). The case is important in the "assertiveness of the judicial branch in the separation of powers doctrine in the US constitution and the separate roles that are delineated for the executive and the legislative branch" (Calabresi 2004, 77).



## [F] CONCLUSION

Baron Montesquieu's adoption of the doctrine of separation of powers was meant for absolutist government where arbitrary rulers had established their legislative monopoly over the state. In terms of its application it has general universal relevance because there are three organs of government and each has its own department which vests the power under the constitution. The political liberty in the unwritten British constitution has of its own volition adopted constitutional statutes such as the Magna Carta 1215, Settlement Act 1701 and Constitutional Reform Act 2005, which has distributed powers and thus created a balance of powers. The judicial role of the House of Lords ended when the Supreme Court became the highest appellate court in the UK.

The implication is that the British constitution is composed of a set of rules which constitutes the state, and the inference is that the doctrine of the separation of powers should not be applied to parliamentary-style constitutions. It is argued that parliamentary systems are essentially based on a fusion of powers, not a separation of powers. This is premised in Bagehot's concept that in a parliamentary system the legislature selects the political composition of the executive branch, which then remains dependent on the legislature to enact its laws. The judiciary is vested with the power to review administrative action and has the power to invalidate legislation that is against the HRA.

The presidential-style model of a constitution, as in the US, pointedly reflects the separation of powers doctrine with the executive exercising the role of the head of state; the Congress as the legislature; and the judiciary as the final arbiter of constitutional guarantees. There is a greater incentive to fashion a separation of powers with checks and balances that reflects the constitutional dispensation according to its framers' intentions. This rule has to be set against the fact that the Constitution contains no express limits on how much federal authority can be delegated to a government agency, but does limit the authority granted within the statutes enacted by Congress. The courts have addressed the issue of the standard of review that should be applied by a court to a government agency's own interpretation of a statute when it is charged with administering a departmental project and have evolved a judicial policy of deference.

The main element of a constitution is the ability to preclude the abuse of power. Montesquieu's doctrine of the separation of powers is an essential factor of the constitution and is a necessity for the prevention of the executive exercising an overriding power. The most important aspect of

the constitution is not that it is written or unwritten but the power that is distributed among the various branches of the state. The judiciary have the duty of restraint in the exercise of their powers and to ensure its compliance with the constitution by maintaining it as an active and intervening source of the tripartite system of government.

### **About the author**

**Zia Akhtar** obtained his LLB and LLM from London University. He has also studied at the College of Law and is a member of Gray's Inn. He is a specialist in public law and his articles have been published in leading law journals. He is currently studying for a PhD at Coventry University and will complete his doctorate this year in Public International Law.

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Special Section:  
Tikanga as the First Law of New Zealand: The Need  
for a System-Wide Cognitive Shift

Ko te tikanga Māori te mana tuatahi o Aotearoa: me  
tōrua marire te au whakaaro te pūnaha ture nui  
tonu, pages 523-668

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## INTRODUCTION

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### [A] CONTRIBUTORS

- ◇ Mai Chen, Barrister and President of New Zealand Asian Lawyers
- ◇ 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
- ◇ Judge Michael Doogan, Māori Land Court and alternate Judge of the Environment Court of New Zealand
- ◇ Justice Emiliios Kyrou, Victorian Court of Appeal, Australia

### [B] OVERVIEW

The Wānanga on Tikanga and the Law held on 3 May 2023 at Buddle Findlay's Auckland office, with the support of the New Zealand Bar Association and its President Maria Dew KC, aimed to fill the gap for lawyers practising law in Aotearoa New Zealand on how to, as Justice Joe Williams said, develop an intuition about tikanga—which is the first law of New Zealand—just as they have an intuition about contract, crime, intellectual property and property law. Justice Williams is the first Māori

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\* Huge thanks to Marie Selwood who undertook the difficult task of editing this Special Section at speed so we could get its content out quickly to the many judges and lawyers who will benefit from reading about the Wānanga on Tikanga and the Law.



Judge on the highest Court in New Zealand, the Supreme Court, and stated in his presentation that:

I readily acknowledge that tikanga is a very different form of law to that in which you have been trained, but it is law nonetheless. You will not need to become instant tikanga experts any more than you must be expert in other subcategories of law with which you are unfamiliar. You just need to know enough to develop good instincts. These will help you to judge when tikanga might be relevant to your case, when you need help and, if you do, where to go to get it. You will then be able to explain to us poor judges why tikanga is relevant, how it is relevant, and, where needed, how other non-tikanga principles or considerations in the case are to be weighed, measured or reflected as the case may be. That is the cognitive shift: the development of an ability to step into the shoes of someone from the partner system of law, even if imperfectly, in order to view the conflict from their perspective. A profession with that kind of intuition will make all the difference.

There are lawyers who already have these instincts, but most (mainly non-Māori) lawyers have only just started on the journey to develop this intuition as the Treaty of Waitangi was not even taught when they studied law, let alone tikanga. The gap includes playing catch-up on New Zealand's legal history which has recognized the application of tikanga for non-Māori as well as Māori New Zealanders for some time.

The Supreme Court's relatively recent statement in *Ellis* (2022: para 19) about the broad application of tikanga as the first law of New Zealand applying to non-Māori as well as Māori has clearly signposted for all lawyers the direction of travel, which makes the need to embark on this journey inexorable even if those lawyers do not specialize in indigenous legal issues:

The Court is unanimous that Tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.

Few cases may be unaffected given this unanimous statement by the Supreme Court.

A further fundamental change is that Tikanga Māori/Māori Laws and Philosophy will be required to be taught as a new compulsory subject as well as being interwoven into the other compulsory subjects and legal ethics in the law degree from 1 January 2025. Judges in New Zealand are in the process of developing a postgraduate diploma course for

judges about tikanga and the law, which is hoped to also be available to practitioners in future, so that both judges and counsel can upskill.

Having written my Master of Laws thesis at Harvard Law School many years ago on the use of law to create Māori into an underclass and determining whether law can also be used to restore Māori, I now realise that restoration will be achieved through Tikanga as the first law of New Zealand.

This Wānanga puts a tikanga lens on the law for lawyers, who are then better placed to provide assistance to judges. The presentations that follow from six judges of the New Zealand Supreme Court, High Court, District Court, Māori Land Court and the Environment Court expound upon:

- ◇ What tikanga principles and values are, and what tikanga-enabled processes like Te Ao Marama are.
- ◇ A methodology to determine if there is a tikanga issue. How do you put a tikanga lens on cases/advice? How do you frame the issues?
- ◇ How to derive tikanga evidence, including by respecting the tikanga and building trust, so those with the expertise and knowledge will allow you to depose it.
- ◇ The best cases and most reputable secondary sources which can be used in place of, or in addition to, expert tikanga evidence. This also includes understanding the legal history of tikanga cases applying to non-Māori as well as Māori and interpreting tikanga/ Te Tiriti o Waitangi incorporated in statute, including the Resource Management Act 1991, which is written about below.
- ◇ How tikanga is best applied to substantive law and how to resolve conflicts in tikanga evidence. This includes the relevance of regional variations in tikanga throughout New Zealand and the conflict of law issues that the variations may create.
- ◇ The need for legal imagination where legislation has incorporated tikanga, and also other matters, but have not properly protected tikanga through the Act, nor in how that Act overlaps or intersects with other Acts incorporating tikanga and Te Tiriti O Waitangi references and obligations/requirements. The Marine and Coastal Area (Takutai Moana) Act 2011 is an example written about below.
- ◇ How tikanga is adaptive and flexible in accommodating new situations and developing the common law.

- ◇ A potential for friction between the cultural values that underpin the tikanga system and the western values that underpin the common law.
- ◇ How tikanga can be certain, based on shared principles and no more inherently uncertain than any other part of the law, as Justice Whata says. All law is inherently imprecise or it would be unjust, as Justice Williams states.
- ◇ And understanding the Te Reo Māori which underpins tikanga.

The need for the Wānanga became clear when I wrote the paper for the Euro-Expert Conference on Cultural Expertise in the Courts in Europe and Beyond: Special Focus on France and International Perspectives, held at the Université Paris Panthéon Sorbonne on 6-7 April 2023. That paper on “The Increasing Need for Cultural Experts in New Zealand” provides a contextual introduction to the Wānanga for those less familiar with the tikanga developments in New Zealand, followed by the presentations of the following judges:

- ◇ Justice Joe Williams, Supreme Court of New Zealand
- ◇ Justice Whata of the High Court of New Zealand
- ◇ Justice Powell of the High Court of New Zealand
- ◇ Chief Judge Taumaunu, Chief Judge of the District Court of New Zealand
- ◇ Acting Chief Judge Fox of the Māori Land Court of New Zealand
- ◇ Judge Doogan of the Māori Land Court and alternate Judge of the Environment Court of New Zealand.

All of the presentations have been edited and embellished by the judges after the Wānanga. Some judges wanted to emphasize that this is a light-handed introduction to a very complex subject matter and, importantly, only expresses one view of tikanga.

Finally, this special section rightly comes full circle in concluding with an important paper by Justice Emilios Kyrou, a Judge of the Australian Federal Court and President of the Administrative Appeals Tribunal,<sup>1</sup> on “Cultural Experts and Evidence in Australian Courts”. Justice Kyrou also presented at the Euro-Expert Conference on Cultural Expertise in the Courts at the Université Paris Panthéon Sorbonne at my suggestion to the conference organizers, as I cited his helpful article “Judging in a Multicultural Society” (2015: 226) on a mental red flag cultural alert system in the legal submissions on behalf of the New Zealand Law Society as intervener in *Deng v Zheng* (2022). (I appeared alongside Jane

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<sup>1</sup> Formerly, on the Victorian Court of Appeal, Australia.

Anderson KC, who is now a New Zealand High Court judge, and Yvonne Mortimer-Wang.) The New Zealand Supreme Court quoted him in the *Deng* judgment as follows at paragraph 78(b):

Judges should approach such cases with caution. This has been well explained by Emilios Kyrou, writing extra-judicially, in his advice to judges to develop: ... a mental red-flag cultural alert system which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it (Kyrou 2015: 226).

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## Cases

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*Ellis v R* [2022] 1 NZLR 239; [2022] NZSC 114; BC202064542

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# THE INCREASING NEED FOR CULTURAL EXPERTS IN NEW ZEALAND COURTS

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## Abstract

New Zealand's unique demography, with a large indigenous Māori population and a national population which is also increasingly superdiverse, means that New Zealand courts need more assistance from cultural experts if "the common law [is to] serve all in society", as our Chief Justice recently said in the Supreme Court (*Peter Hugh McGregor Ellis v R (Ellis) 2022*: para 174). This paper examines two recent Supreme Court decisions: *Ellis* and *Deng v Zheng (2022)*, which explain the increasing need for cultural experts in New Zealand courts to determine what tikanga (Māori customs and practices) as the first law of New Zealand is and how it applies, as well as to ensure equal access to justice despite cultural and linguistic diversity. The greatest need for cultural experts arises from the majority of the Supreme Court's acceptance that tikanga was the first law of Aotearoa/New Zealand. There has been *ad hoc* (albeit growing) incorporation of tikanga and Te Tiriti o Waitangi (Te Tiriti) in various statutes, and no entrenchment in a supreme constitution, but even without statutory incorporation, the courts have interpreted statutes to take account of tikanga values and interests and to be consistent with Te Tiriti to the extent possible. Lawyers and judges need to acquire a base level of tikanga knowledge and cultural competency to be able to identify when a deeper level of tikanga/cultural expertise is needed, and cultural experts need to be called on to provide evidence to assist the Court. This is important (not only to ensure that justice is done in particular cases) but to maintain broader constitutional legitimacy. This includes acknowledging significant cultural differences in the application and development of the common law, in relevant cases. Pluralism is an important value which may be relevant to filling the gaps in the common law created by new situations that indigenous and superdiverse cultures and languages give rise to (Chen, forthcoming 2024; see also Palmer & Ling 2023).

**Keywords:** tikanga; New Zealand; cultural experts; evidence; statutory interpretation; development of the common law.

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\* Paper delivered by Mai Chen at the Euro-Expert Conference on Cultural Expertise in the Courts in Europe and Beyond: Special Focus on France and International Perspectives, held at the Université Paris Panthéon Sorbonne on 6-7 April 2023.

## [A] SOME CONTEXT ABOUT NEW ZEALAND

New Zealand (Aotearoa) is a small and geographically isolated country in the South-West Pacific Ocean. The first settlers arrived from Polynesia between 1250 and 1300. These are the “tangata whenua” or “the people of the land”—known as Māori.

New Zealand was first “discovered” by Europeans in 1642, with the arrival of Dutch explorer Abel Tasman. He was followed in 1769 by the English Captain James Cook. European migration and settlement ensued.

In the 1830s, the British Government came under increasing pressure to curb lawlessness in New Zealand, to protect British traders and to forestall the French, who also had imperial ambitions. In 1840, the British Crown entered into Te Tiriti o Waitangi with a majority of the Māori chiefs (rangatira).

Under Te Tiriti, Māori ceded powers of government (but not sovereignty) to Britain in return for the rights of British subjects and guaranteed possession of their lands and other “treasures” (taonga). Early jurisprudence dismissed Te Tiriti o Waitangi as “a simple nullity” (*Wi Parata v The Bishop of Wellington* 1877). But, as Justice Harvey said, “since colonisation, the courts have continued to give recognition to tikanga commencing with the decisions of the Native Land Court to today” (*Te Runanga o Ngati Whatua v Kingi and Dargaville* 2023: para 30).

Subsequent waves of migration have occurred, with arrivals from the Pacific (Auckland is the biggest Pasifika city in the world), East Asia (particularly China) and South Asia (particularly India). The descendants of these people have lived in New Zealand for generations, some much longer than others. Ongoing migration flows mean that New Zealand has a large population of people born overseas who have migrated here, as well as diverse well-established (second and subsequent generation) ethnic communities who identify as New Zealanders.

## [B] WHY IS NEW ZEALAND DEMOGRAPHICALLY UNIQUE?

The context discussed above means that New Zealand is demographically unique.

First, we have a large indigenous Māori population. As at 30 June 2022, New Zealand’s estimated Māori population was 17.4% of the national



population.<sup>1</sup> That is projected to increase to 21 % by 2043.<sup>2</sup> State and legal recognition of Te Tiriti rights is leading to the restitution of land and resources and a growing Māori economy. Māori own a significant proportion of assets in the primary sectors: 50% of the fishing quota; 40% of forestry; 30% in lamb production; 30% in sheep and beef production; 10% in dairy production; and 10% in kiwifruit production.<sup>3</sup> The asset base of the Māori economy was estimated to be worth \$68.7 billion in 2018<sup>4</sup> and projected to be worth \$100 billion by 2030.<sup>5</sup>

Secondly, New Zealand is a superdiverse nation of migrants. Superdiversity means that more than 25% of the population is comprised of migrants, or more than 100 nationalities are represented (Spoonley 2013; Chen 2015). In the 2018 census, 27.4% of the usually resident New Zealand population was born overseas, following the upward trend from 22.9% in 2006 and 25.2% in 2013.<sup>6</sup> The Asian population is projected to make up 26% of the total New Zealand population by 2043, compared with 16% in 2018.<sup>7</sup> The Pacific population is projected to make up 11% of New Zealand's population by 2043 compared with 8% in 2018.<sup>8</sup> By the 200th anniversary of the signing of Te Tiriti o Waitangi in 2040, the Asian population will have overtaken the Māori population.

This confluence has pushed New Zealand Courts to the forefront of jurisprudence on culture and the law. Our Supreme Court has had much to say recently about the common law method adapting to properly protect the people it serves (*Peter Hugh McGregor Ellis v R (Ellis)* 2022: para 174, per Winkelmann CJ), and a majority has recognized tikanga as the first law of New Zealand (*Ellis*: para 22).<sup>9</sup> There has been *ad hoc* (albeit growing) incorporation of Te Tiriti o Waitangi and tikanga in various statutes, but even without statutory incorporation, the courts have interpreted statutes to take account of tikanga principles and values (*Ellis*: para 175, per Winkelmann CJ and see footnote 185). There is, however,

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<sup>1</sup> “Māori Population Estimates: At 30 June 2022”, 17 November 2022, Statistics NZ.

<sup>2</sup> “Subnational Ethnic Population Projections: 2018(base)-2043”, 29 March 2022, Statistics NZ.

<sup>3</sup> “The Māori Economy”, Ministry of Foreign Affairs and Trade.

<sup>4</sup> “Te Ōhanga Māori 2018”, 28 January 2021, BERL.

<sup>5</sup> “Māori Economy Investor Guide”, June 2017, New Zealand Trade and Enterprise.

<sup>6</sup> “2018 Census Data Allows Users to Dive Deep into New Zealand's Diversity”, 21 April 2020, Statistics NZ.

<sup>7</sup> “Subnational Ethnic Population Projections: 2018(base)-2043”, 29 March 2022, Statistics NZ.

<sup>8</sup> *Ibid.*

<sup>9</sup> See also Ellen France J on the place of the Treaty and customary interests in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (2021: paras 139-161).

no entrenchment in a supreme constitution, like the recognition and affirmation of aboriginal and treaty rights in the Canadian Constitution Act 1982.

The increasing incorporation of tikanga into statute and the recognition of tikanga as the first law of New Zealand mean that cultural experts are critical to ensuring justice is done in New Zealand courts for indigenous and culturally and linguistically diverse people in particular, but also for all people.

## [C] TIKANGA AS LAW—THE *ELLIS* CASE

This judgment was a procedural decision by the Supreme Court about whether to allow Peter Ellis’ appeal against child sex abuse convictions to continue, despite his death.

The *Ellis* case is one of New Zealand’s most enduring legal controversies (the Supreme Court described it as “a long and painful journey through the courts for the many people involved”),<sup>10</sup> which arose in the broader context of the worldwide “satanic panic” of the late 1980s/early 1990s.

The Supreme Court allowed the appeal to continue in the interests of justice, and the substantive decision quashed Mr Ellis’ convictions, finding that there were problems with the evidence of the main prosecution witness, a psychiatrist, and that the jury had not been fairly informed of the risk of contamination of the children’s evidence.

However, the significance of the procedural decision is the consideration given by the Court to the relevance of tikanga. This was not a case where tikanga arose as part of the context or subject matter of the underlying litigation. Mr Ellis was not Māori. Tikanga only became an issue after it was raised by a member of the bench (Glazebrook J), once it became clear the appeal would have to be heard posthumously (Burrows & Finn 2022).

The majority of the Supreme Court in *Ellis*, in deciding to allow the appeal to continue in the interests of justice, did not modify their test considering that tikanga concepts may be relevant (*Ellis*: para 11). The minority of Winkelmann CJ and Williams J folded tikanga considerations into the framework for deciding whether it was in the interests of justice for an appeal to continue (*Ellis*: para 10). The Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara, appended to the judgment in *Ellis*, was accepted by Glazebrook J (at para 107), Winkelmann CJ (at

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<sup>10</sup> “Media Release: Peter Hugh McGregor Ellis v the King”, 7 October 2022, Supreme Court.

para 185), Williams J (at para 247) and was referred to by O'Regan and Arnold JJ (at para 282].

So what is tikanga?

Justice Glazebrook accepted the nature of tikanga as including all the “values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct,” and that tikanga comprised both practice and principles (Tikanga Statement, appended to *Ellis*: paras 34-37).

*Ellis* builds on earlier precedent establishing that “tikanga is a body of Māori customs and practices, part of which is properly described as custom law” (*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board (Trans-Tasman)*: para 169).

The Court in *Ellis* adopted expert evidence that tikanga includes all the “values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct” (*Ellis*: para 107). The expert evidence provides further illumination:

Unlike legislation, tikanga is not compiled in a tidy collection of written books. Although there is increasing published material on tikanga, it is lived and exists as unwritten conventions.

Knowledge of tikanga is passed down through sources such as wānanga (institutions of learning), whaikōrero (oratory); karanga (call); waiata (songs); mōteatea (traditional chant or lament); whakapapa recitations (genealogy), whakatauākī (proverbial sayings) and pūrākau (stories). It is also learnt through exposure to its practice in everyday life.

The foundational notions of tikanga are widely known. However, some tikanga might be tapu (sacred) and kept confined to certain expert people. For example, certain karakia (ritual incantations) would be only used by a small group of experts who have the appropriate training, expertise and standing.

Given the nature of tikanga, being law that is comprised of principle and custom and the practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand (Tikanga Statement, appended to *Ellis*: paras 34-37).

Even though tikanga is a normative system embedded in the lived experience of Māori, the majority in *Ellis* accepted that tikanga was the first law of Aotearoa New Zealand, and that it continues to shape and regulate the lives of Māori (*Ellis*: para 22). Te Aka Matua o te Ture (the New Zealand Law Commission) will soon publish a report on tikanga and its place in Aotearoa New Zealand’s legal landscape.

Tikanga is relevant to the development of the common law “because the common law must serve all in society” (*Ellis*: para 174, per Winkelmann CJ). It does not just apply to Māori but also to non-Māori (as noted above, Mr Ellis was not Māori).

Tikanga is adaptable. As the Chief Justice said: “tikanga is not fixed, but changes and evolves across time, to meet new situations. What is ‘tika’ (right) in any situation may need to be discussed and negotiated between those expert in tikanga” (*Ellis*: para 169, per Winkelmann CJ). This is echoed by the Supreme Court’s later description of tikanga as “an adaptable framework for resolution”—after finding the lower court’s approach to be “rigid”. “Context is everything” (*Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd (Wairarapa Moana) 2022*: paras 74 and 79, per Williams J).

## [D] BREADTH OF THE APPLICATION OF TIKANGA TO STATUTE AS WELL AS COMMON LAW

Tikanga was the first law of New Zealand and may be relevant where there are issues concerning the interpretation of legislation and the exercise of discretion, as the Supreme Court said in *Ellis v R*:<sup>11</sup>

The Court is unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies (*Ellis*: para 19, footnotes omitted).

Chief Justice Winkelmann also said in *Ellis* that “[c]ertainly even without express statutory references to tikanga, the courts have interpreted statutes to take account of tikanga values and interests” (*Ellis*: para 175). In making this statement she referred (at footnote 185) to *Barton-Prescott v Director-General of Social Welfare* (1997: para 184); *Tukaki v The Commonwealth of Australia*;<sup>12</sup> *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* (2022: paras 358 and 587); and *Mercury NZ Ltd v The Waitangi Tribunal* (2021: para 104).

Justice Glazebrook said further in *Ellis* that there is a generally accepted presumption that statutes are to be interpreted consistently with Te Tiriti

<sup>11</sup> See also at para 171 and footnote 176 per Winkelmann CJ.

<sup>12</sup> *Tukaki v The Commonwealth of Australia* [2018] NZCA 324, para 38. The Supreme Court declined leave to appeal in *Tukaki v The Commonwealth of Australia* [2018] NZSC 109.

as far as possible and, as a result of the tino rangatiratanga guarantee, it has been argued that statutes should be interpreted consistently with tikanga as far as possible (*Ellis*: para 98).<sup>13</sup>

In *Trans-Tasman*, William Young and Ellen France JJ stated that: “An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear” (para 151). Justice Williams further stated that: “If Parliament intends to limit or remove the Treaty’s effect in or on an Act, this will need to be made quite clear” (*Trans-Tasman*: para 296). Both Glazebrook and Williams JJ in *Ellis* cited *Trans-Tasman* with approval in holding that the application of tikanga in the common law could only be limited or excluded by unambiguous statutory language.<sup>14</sup>

In *Trans-Tasman* (para 9), the Supreme Court confirmed that tikanga was “applicable law” in terms of section 59(2)(l) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Justice Glazebrook J in *Ellis* endorsed the comments of Williams J in *Trans-Tasman* where, in her words, “[h]e cautioned that the issue of statutory interpretation in that case regarding tikanga should not be viewed only through a Pākehā lens” (*Ellis*: para 96, referring to *Trans-Tasman*: para 297). Justice Williams in *Trans-Tasman* (para 297) pointed out that the interests of iwi with mana moana in the consent area reflected the relevant values of the interest-holder: mana, whanaungatanga and kaitiakitanga. These relational values were found to be principles of law that predated the arrival of the common law at 1840.

The Supreme Court in *Wairarapa Moana* (para 73) found that Parliament could not have intended the Waitangi Tribunal to be empowered to breach the principles of the Treaty, and thus tikanga was a very important consideration in the exercise of the Tribunal’s discretion.

## [E] SO WHAT DOES THIS MEAN FOR LAWYERS AND JUDGES IN NEW ZEALAND?

Lawyers need to put a tikanga lens on legal issues and consider whether tikanga is relevant—from a jural perspective, as well as from a different culture and language perspective.

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<sup>13</sup> And also footnote 107 regarding interpreting statutes consistently with tikanga as far as possible.

<sup>14</sup> *Ellis*: para 98 per Glazebrook J and at 265 and footnote 263 per Williams J citing *Trans-Tasman*: paras 151 and 154 per William Young and Ellen France JJ and agreed to by Glazebrook J at *Ellis*: para 237, by Williams J at 296 and by Winkelmann CJ at 332.

Is tikanga a source of rights and interests? Lawyers will need assistance from cultural experts to determine that questions and, if so, how tikanga would apply. Judges adjudicating may be equally dependent.

At a recent parliamentary event in honour of former Prime Minister Sir Geoffrey Palmer (with whom I co-founded Australasia's first boutique public law specialist firm Chen Palmer almost 30 years ago), Dr Rawinia Higgins, Chairperson of Te Taura Whiri i te reo Māori (Māori Language Commission) said she had spent her whole life learning tikanga and te reo Māori (the Māori language); that you cannot understand tikanga if you do not understand te reo Māori; and that despite learning te reo Māori her whole life, she felt she hardly understood anything about tikanga.

This is a stiff challenge to the legal profession<sup>15</sup> and the judiciary to have enough cultural capability and understanding of te reo Māori to truly understand, and therefore be able to properly adduce and apply, tikanga. This is exacerbated by the fact that many Māori clients “have become alienated from their lands, [and] culture and are [themselves] unfamiliar with tikanga”, as a consequence of “the devastating impact of colonisation” (Tikanga Statement, appended to *Ellis*: para 38).

However, the Supreme Court in *Ellis* took seriously the concerns of tikanga experts “that tikanga Māori might be misappropriated and wrongly applied in the court system” (Tikanga Statement, appended to *Ellis*: para 51). It acknowledged that “courts must not exceed their function when engaging with tikanga” (*Ellis*: para 22). It is not the role of the courts, according to the Chief Justice, “to pronounce on or develop the content of tikanga” (*Ellis*: para 181, per Winkelmann CJ). Those who are sources of tikanga or experts on it “will be external to the court” (*Ellis*: para 123, per Glazebrook J). This recognizes that Māori have rangatiratanga or sovereignty over how tikanga is interpreted.

Accordingly, there will be considerable reliance on tikanga experts. This expertise may be based on experience, rather than acquired through formal education or professional qualifications.<sup>16</sup>

Without cultural experts in tikanga to assist them, the courts would not be able to *adapt* tikanga to new circumstances confronting them, as

<sup>15</sup> The New Zealand Council of Legal Education is currently proposing to amend the Professional Examinations in Law Regulations 2008 to incorporate tikanga Māori in the New Zealand law degree from 1 January 2025. See [New Zealand Council of Legal Education](#) for more information.

<sup>16</sup> As noted Rewa (2021, 172): “Māori expertise is often drawn from those with experience, whether they have completed formal education or not.” In *Ministry of Agriculture and Fisheries v Hakaria* (1989: 290), the District Court described the expert in question as being “steeped in the lore of his people” and considered a lack of formal historical qualifications to be “irrelevant” to the determination of his expert status.



envisaged by Justice Williams when he described tikanga as “an adaptable framework for resolution” (*Wairarapa Moana*: para 79, per Williams J). Many of the issues that arise for the Court’s determination will “inhabit the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance” (*Wairarapa Moana*: para 84, per Williams J).

According to *Ellis*, the appropriate method of ascertaining tikanga (where relevant) will depend on the circumstances of the particular case (*Ellis*: para 23), including the significance of tikanga to the case and matters of accessibility and cost (*Ellis*: para 125, per Glazebrook J). Options range from submissions to deal with simple cases using reputable secondary sources and reports of the Waitangi Tribunal (*Ellis*: para 273, per Williams J, and footnote 266), to expert statements and to the appointment of independent expert witnesses (pūkenga) with knowledge and experience of tikanga (*Ellis*: para 125, per Glazebrook J).

The Supreme Court in *Wairarapa Moana* said that “tikanga speaks to process as well as substance” (*Wairarapa Moana*: para 95, per Williams J, emphasis added). That is engaging tikanga processes to resolve applications (*Wairarapa Moana*: para 226, per O’Regan J), which could include, depending on the particular iwi, hapū or grouping, wānanga, hui (gathering) and the involvement of taumata (gatherings of elders).

The Māori Land Court, established under Te Ture Whenua Māori (Māori Land) Act 1993, comprises judges appointed because of their expertise, having regard to the person’s knowledge and experience of te reo Māori, tikanga Māori and Te Tiriti (Te Ture Whenua Māori (Māori Land) Act 1993, section 7(2A)). There is an ability to refer questions of tikanga that arise in the High Court to the Māori Appellate Court also established under that Act for its opinion (Te Ture Whenua Māori (Māori Land) Act 1993, section 61; Marine and Coastal Area (Takutai Moana) Act 2011, section 99(1)(a)).

Māori Land Court judges, who are eligible for appointment as alternate Environment Court judges (Resource Management Act 1991, section 249(2)(a)), are increasingly being invited to sit on the Environment Court to assist that court in carrying out its obligations to Māori.<sup>17</sup> The Environment Court is required “to recognise tikanga Māori where

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<sup>17</sup> For example, *Ngāti Māru Trust v Ngāti Whātua Ōrākei Whaia Maia* (2020: para 102); *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Toanga* (2021); *Te Whanau a Kai Trust v Gisborne District Council* (2021); *Director-General of Conservation v Taranaki Regional Council* (2021); *Director-General of Conservation v New Zealand Transport Agency* (2019); *Puwera Māori Ancestral Land Unincorporated Group v Whangarei District Council* (2016).

appropriate” (Resource Management Act, section 269(3)), and the Resource Management Act 1991 provides that “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” is a “matter of national importance” to be recognized and provided for (section 6).

The Marine and Coastal Area (Takutai Moana) Act 2011 also legislates the ability of the High Court to “obtain the advice of a court expert (a pūkenga)” where applicants under that Act raise a question of tikanga (Marine and Coastal Area (Takutai Moana) Act 2011, section 99(1)(b)).

## [F] CROSSOVER BETWEEN JURAL TIKANGA AND SOCIAL AND CULTURAL FRAMEWORK APPLYING TO INDIGENOUS AND SUPERDIVERSE POPULATIONS: *DENG v ZHENG*

*Deng v Zheng* is another significant Supreme Court decision providing guidance on when a social and cultural framework would be relevant to the determination of adjudicatory facts and issues in a case with culturally and linguistically diverse parties.

The Court in *Ellis* was alive to the crossover between tikanga and social and cultural issues more broadly. This is reflected in three footnotes to the judgment of Glazebrook and Williams JJ, who sat on both cases.

At footnote 142 in *Ellis* (para 118), Glazebrook J states:

But note the caution expressed in *Deng v Zheng* [2022] NZSC 76 about stereotyping at [80]–[82]. See also the general observations in that case at [78]. While the Court in *Deng v Zheng* said at [77] that these comments do not address tikanga, *many of the observations will still have resonance in this situation* (emphasis added; see also Glazebrook & Chen 2023).

At footnote 149 in *Ellis*, on appropriate ways of ascertaining the relevant tikanga, Glazebrook J states:

As noted above at n 142, while the case of *Deng v Zheng*, above n 142, said at [77] that it does not address tikanga, *the comments in that case may nevertheless be of relevance in this context* (*Ellis*: para 121, footnote 149, emphasis added).

At footnote 266 in *Ellis*, on some contexts only requiring references to learned texts or Waitangi Tribunal reports, Williams J said:

... and, in a different context which was not intended to apply to Tikanga, *Deng v Zheng* [2022] NZSC 76 at [79]-[84] acknowledged different ways in which relevant cultural information could be brought before the court.

So what are the observations and comments in *Deng v Zheng* that are both of broad application and of specific relevance to tikanga (see Goddard & Chen 2022)?

That case concerned whether, despite a lack of formal documentation, the parties had entered into a legal partnership, of which they would be jointly responsible for the debts of the partnership. Two issues arose relating to the culture of the parties: namely, whether the meaning to be ascribed to 公司 (*gingsi*) went beyond ‘company’ and could extend to ‘firm’ or ‘enterprise’ and the significance of 关系 (*guanxi*). Both parties were Chinese and their business relationship appeared to have been conducted in Mandarin.

The specifics of the case are less important than the Court’s guidance as to how “the social and cultural framework within which one or more of the protagonists [may operate] ... can be brought to the attention of the court” when it is “of ... significance” (*Deng v Zheng*: para 77).

First, the court noted that cases involving a cultural dimension (where one or more parties have a cultural background different from the judge) are likely to become more common in the future and must be approached with caution (*Deng v Zheng*: 78(a)-(b)). Judges need to develop “a mental red-flag cultural alert system” so they can assess what needs to be done about it (*Deng v Zheng*: para 78(b), citing Kyrou 2015: 226), and recognize that “some of the usual rules of thumb they use for assessing credibility may have no or limited utility” (*Deng v Zheng*: para 78(c)). In my view, the same advice applies to lawyers. Both lawyers and judges need to acquire a base level of cultural competency and be able to identify when a deeper level of cultural expertise is needed of indigenous or superdiverse cultures, especially those that are very distant from New Zealand culture.

Not all cases with a cultural dimension will require social and cultural framework evidence to be adduced. The usual ways that judges assess credibility remain available, and a “sense of proportionality” is required (*Deng v Zheng*: para 78(d)). It is therefore a matter of striking the right balance. The cost of providing the necessary evidential basis as well as funding interpreters could create a barrier to equal access to justice for culturally and linguistically diverse parties. Where judicial common sense can be exercised, counsel would only introduce evidence of cultural and linguistic context to inform the court why the implicit or explicit

assumptions a judge might make about behaviour do not apply in the court's assessment of the evidence.

In cases where it is appropriate to introduce social and cultural evidence, the court said (*Deng v Zheng*: para 79):

- ◇ it is open to witnesses to explain their own conduct and relationships with reference to their own social and cultural background;
- ◇ this may be supported by expert evidence or reference to sources of information of unquestionable accuracy or reliable published documents;<sup>18</sup>
- ◇ where a litigant wishes to explain the conduct of another party, such evidence is likely best provided by an expert, or by reference to sources of information of unquestionable accuracy or reliable published documents.

The court also sounded some important notes of caution. General evidence about the social and cultural framework cannot, of course, replace a careful assessment of the case-specific evidence (*Deng v Zheng*: para 80), and

people who share a particular ethnic or cultural background should not be treated as a homogeneous group. ... The more generalised the evidence of information, and the less it is tied to the details of what happened, the greater the risk of stereotyping (*Deng v Zheng*: para 81(a)).

Specifically concerning “*guanxi*”, the Court stated that:

We have no doubt that the Court of Appeal was entitled to refer to *guanxi* in the way in which it did. But, to reiterate a point we have already made, while *guanxi* influences the behaviour of some Chinese people, it should not be assumed that this is so with all Chinese people (*Deng v Zheng*: para 82).

In contrast to the French court system, New Zealand courts are adversarial, and therefore it is for counsel to raise issues of the social and cultural framework where they consider them to be relevant. In an adversarial system at least, the failure to call evidence when the social and cultural framework is of significance can be fatal to a party's case (*Ming Shan Holdings Ltd v Ma and Zhang* 2008; *Zhang v Li* 2017; *Li v Wu* 2019; *Zeng v Cai* 2018). As the court noted in *Tian v Zhang*:

[The plaintiff provided] no independent evidence that there was any customary practice in Chinese culture for the payment of a dowry by an internet husband to his intended wife or family ... The dispute about the existence of such a custom as is alleged might have been

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<sup>18</sup> As permitted under sections 128 and 129 of the Evidence Act 2006.

easily resolved by evidence from an independent expert, but there was none. Ms Tian suggested in evidence that evidence of the custom would be found on the internet, but the court is not disposed to “Google” its way past the inadequacies of the plaintiff’s proof to find the answer (2019: para 56).

The Supreme Court in *Deng v Zheng* noted that “while judges can usually leave it to the parties to put relevant information before the court”, they can still “inquire of the parties if they consider they would be assisted by additional information as to social and cultural context” (*Deng v Zheng*: para 84). In both *Ellis* and *Deng*, the cultural aspects were raised by judges sitting on the cases in the Supreme Court and the Court of Appeal, and not by counsel. The Supreme Court also noted the ability of the court to appoint an expert.<sup>19</sup>

Using the mechanism of a court-appointed expert to assist the judge is not, however, a silver bullet. Judges may not have enough information to select the right expert, if the parties are unable to agree, even if an expert with the requisite expertise is available. Often very little factual detail about the parties’ backgrounds, culture and dialects is provided by the parties’ counsel, or the parties themselves, if self-represented. It is very seldom that you see the degree of detail about different types of dialect and phonology, as in *Ye v Minister of Immigration* (2002, 2008).

There may be very rare dialects and cultures where it would be difficult to source an expert in New Zealand. Also if both sides call experts, it still leaves the judge having to decide which expert is right—through a cultural lens—which underscores the need again for judges and lawyers to have a base level of cultural competency. Our High Court Rules Committee recently recommended that expert evidence be subject to the presumptions that there will be one expert witness per topic per party, and experts must confer before expert evidence may be led at trial, which may help.<sup>20</sup>

The guidance provided by the Supreme Court with respect to tikanga and cultural and social issues is, however, a critical step in the right direction to ensuring justice is done in our courts for indigenous and culturally and linguistically diverse people in particular.

In conclusion, this Global Symposium on cultural experts in the courts is timely as indigenous and superdiverse populations expand in a growing number of countries around the world, and there is recognition of their

<sup>19</sup> Rule 9.36 of the High Court Rules 2016 and rule 9.27 of the District Court Rules 2014.

<sup>20</sup> Recommendation 21 of the Rules Committee Report, *Improving Access to Civil Justice Report* (November 2022) at 57.

rights and interests and the role of indigenous custom and practices as the first law of a nation. Experts are increasingly needed to explain what customs and practices are law, and whether they apply to a particular case, as well as what the parties did and said, and what they intended, to allow courts to properly determine the law that applies as well as the facts and the credibility issues fundamental to preventing miscarriages of justice and ensuring equal access to justice. Experts are also critical to assisting the Court to adapt and develop the common law to new circumstances where culture may be relevant. This is essential to ensure justice in individual cases and to maintain constitutional legitimacy more broadly (Chen, forthcoming 2024).

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**“TOO FAR, TOO SOON”:  
SPEECH GIVEN ON 3 MAY 2023 AT THE  
WĀNANGA ON TIKANGA AND THE LAW**

JUSTICE JOE WILLIAMS

Te Kōti Mana Nui o Aotearoa | Supreme Court of New Zealand

*Tēnā koutou katoa kei aku hoa-whakawā, me aku hoa-rōia.*

**[A] SOME BASICS**

I think it is good to always start with basics and context. Tikanga is a Polynesian system of law, one of many cognate systems that populate the Polynesian triangle from Hawaii to Rapanui to here. When Kupe and his people arrived here around, they say, 900 years ago, he brought that legal tradition with him. Over maybe three or four generations, Aotearoa changed from a jural blank slate into a land where law was planted and legal ecosystems developed—all long before the arrival of the European colonizers.

The basic ideas of tikanga are simple enough and easily stated, though their application is more difficult, which is probably true with all law. The most important idea, the most important principle in Kupe’s law, is whanaungatanga or kinship. It is the infrastructure that holds the whole system together. It is much broader than the Western idea of kinship. It is wider than just rights and obligations between individuals who are related. It also involves rights and obligations between those individuals and the ecosystems in which they live, between the living and their ancestors, and between the living and their descendants as yet unborn.

Whanaungatanga is a holistic framework into which some other basic tikanga principles fit. These include the concepts such as tapu (the idea of the presence of the divine in all things animate and inanimate); utu (the striving for reciprocity or balance in relationships); mana (the idea of human dignity as expressed in modern terms, as well as the currency or coinage of leadership; how you get it, lose it and what you are allowed to do with it); and kaitiakitanga—the responsibilities associated with belonging. That is the responsibility to care for your community—whānau, hapū, iwi, its knowledge, lands, waters, and other resources and its mana. And all of this is bound together by the conceptual and emotional infrastructure of kinship.

## [B] POST-COLONIAL TIKANGA

So, when Cook, then Hobson, and eventually millions of others arrived—Aotearoa was no *lex nullius*; it was already a jural entity. Though British colonization changed much and displaced much, it did not succeed in wiping that pre-existing slate clean again. Earlier this century, the Supreme Court delivered its decision in *Takamore v Clarke* (2012) which dropped the old colonial rules of incorporation and replaced them with the broader idea that tikanga, as the Chief Justice said, is part of the “values” of New Zealand’s common law. More recently, the Court in *Ellis v R* (2022) has said that tikanga is simply a part of the common law in New Zealand and was the first law.

This did not just pop up out of the blue. In the postcolonial period, which started tentatively in the late 1970s and took off in the reforming 1980s, New Zealand abandoned its colonial mindset. It was at this time that various aspects of tikanga came to be inserted in the law. It is important to understand the cultural process going on at the same time. Anyone born in New Zealand in the 1940s to the 1960s (ie the Boomers) would be forgiven for thinking these islands were located somewhere off the coast of Britain. As time went on we drifted towards the United States because of the political and economic heft of that country. But still, we were somewhere in the Atlantic, not the Pacific. In the 1970s and 1980s Aotearoa began to drift back to the Pacific. That process started, probably, in 1975 with the enactment of the Treaty of Waitangi Act and the creation of the Waitangi Tribunal, but more clearly in the 1980s when tikanga, sometimes via references to the Treaty of Waitangi and sometimes on its own terms, came to be inserted into contemporary legislation.

In addition to the arrival of the Waitangi Tribunal (Waitangi Tribunal 1983), the Māori Land Court came to take a much more tikanga-based approach to its work and to the retention of Māori land (McHugh 1991) (Māori Affairs Act 1953, section 438). And the Town and Country Planning Act 1977 contained section 3(1)(g) which made Māori relationships with their ancestral land an important factor in town planning.

Then in 1989 the Children and Young Persons Act (which ultimately became the Oranga Tamariki Act 1989) referred to whanaungatanga; that is to the importance of whānau, hapū, iwi in child welfare matters. Four years before that, section 15 of the Criminal Justice Amendment Act 1985 (which became section 27 of the Sentencing Act 2002) introduced considerations of culture into sentencing with a particular focus on Māori culture and the background of Māori offenders. What followed then was, as Whata J aptly described it, a Cambrian explosion of Treaty

and tikanga-focused legislative reform (Whata 2013). These included the administration of the Department of Conservation estate which covers 30% of our land surface area and a significant proportion of our territorial sea;<sup>1</sup> multiple substantive and procedural provisions in the Resource Management Act 1991; the Ture Whenua Māori Act 1993; and the Local Government Act 2002. More recently similar provisions have been enacted in relation to Hazardous substances (Hazardous Substances and New Organisms Act 1996, section 8), the Environmental Protection Authority (Environmental Protection Authority Act 2011, section 4), patents, trademarks and designs,<sup>2</sup> and all educational institutions. And of course multiple Treaty claims settlements introduced legislatively, local tikanga considerations into local decisions, often environmental but also local and central government service delivery and the like.<sup>3</sup> The most spectacular examples are the Waikato and Whanganui river settlements and the Tūhoe settlement in relation to the Urewera forest.<sup>4</sup>

Most provisions were general in their nature and forward-looking. The detail was left to iwi and hapū leaders, state and local officials and the judges. So from the 1980s through to the 2010s a welter of judge-made law was developed about what they meant, in the context of which, judges were required to confront the larger questions arising from the insertion of tikanga and Treaty clauses into legislation of general application.

This meant that by the time we get to *Takamore* and more recently *Ellis*, lawyers were pretty familiar with the presence of tikanga in the life of the law in Aotearoa. And judges were familiar with having to think about tikanga issues in identifiable parts of their work. With *Takamore* and then *Ellis*, the common law finally caught up as it usually does in situations of social change that drives an initial legislative response. The common law is methodologically, procedurally and, by inclination, conservative. Almost always in situations like this across the common law world, responses to social change are legislative first, and then judicial in the gaps. What follows then is a feedback loop between community, legislature and the courts which finds balance over time.

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<sup>1</sup> See Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 4 and 12. See also Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9. For a discussion, see *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* (2021).

<sup>2</sup> Patents Act 2013; Trade Marks Act 2002; and Designs Act 1953.

<sup>3</sup> See, for example, Te Arawa Lakes Settlement Act 2006, pt 3, subpt 1; and Ahuriri Hapū Claims Settlement Act 2021, pt 3.

<sup>4</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; and Te Urewera Act 2014.

## [C] IS TIKANGA OK FOR EVERYONE?

Some of the questions I have been asked to address at this Wānanga and comments I have heard elsewhere give you a sense that *Ellis* and *Takamore* and similar cases might have spooked the horses a bit too much and introduced a level of imprecision which may not be particularly good for the law in Aotearoa. I thought I would pick up on a few of those themes. There is often the comment that the application of tikanga to non-Māori is somewhat unorthodox, and, in that sense, *Ellis* was pushing the canoe too far out into the surf. My own reaction to that is that this is a fear arising from a lack of memory.

First of all, some of the earliest and most celebrated cases on tikanga did not involve any Māori at all. For example, *The Queen v Symonds* (1847), usually cited as New Zealand's acceptance, early on, of the enforceability of aboriginal title, did not involve any Māori litigants. It was a fight between the Pākehā holder of a title derived from a local hapū, and the Pākehā holder of a title to the same land derived from the Governor. It was, as David Williams explains, deliberately set up as a test case in order for the conflict to be resolved, and, of course, the owner, by virtue of the Governor's writ, won (Williams 1989: 388). But the original Māori owners were not part of the case at all. Similarly *Public Trustee v Loasby* (1908) is often held out as a case where New Zealand law recognized the application of tikanga early on, and it is. But the beneficiary of that recognition was a Pākehā. Hamuera Tamahau Mahupuku, a very important Wairarapa chief, died. He had a typically lavish tangi, as befitted his status. The question in the case was who should pay the local grocer Mr Loasby's bill: the Public Trustee who administered Mahupuku's estate or his widow. The Supreme (now High) Court held that if the tikanga is that chiefs have large tangi, then the common law should recognize it and payment should come from the estate.<sup>5</sup> Had the court found that Mrs Mahupuku was solely responsible to settle the debt, Loasby would almost certainly have gone unpaid. There is, I noticed while driving around Greytown a few years ago, a Loasby Place behind Pāpāwai marae; testament I presume, to the way the Public Trustee paid Mr Loasby's bill.

The other well-known case, *Baldick v Jackson* (1910), is about a dead right whale (agreed value 200 pounds) found by Jackson floating in Cook Strait. Jackson hitched the whale to his ship towed it ashore and claimed it. Baldick sued, claiming the whale was killed by his crew who had "made

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<sup>5</sup> The Court found that Loasby should have sued the widow as she (not the Public Trustee) had placed the order, but that the Public Trustee was required by Māori custom to indemnify her from the assets of the estate; at 806-807 and 809-810.



it fast” to his boat but then released it to float when they saw and pursued another whale. They were presumably intending to retrieve it later. Jackson argued Baldick could not claim property in the whale even if it had been made fast to his boat because by English law whales were royal fish and so belonged to the sovereign. Stout CJ rejected the argument. He said that the English common law doctrine that whales belong to the crown cannot apply in New Zealand because of the guarantees in the Treaty of Waitangi and the fact that Māori traditionally hunted whales. *Baldick v Jackson* is often held out as a case about the relevance of both the Treaty and tikanga in early 20th-century case law, and it is. But again there were no Māori involved and no Māori rights claimed in the dispute.

So, right from the early days, tikanga has been applied to non-Māori where this was seen to be appropriate. Similarly, in modern times, legislation which incorporates tikanga is often, and intentionally, for general application. The Resource Management Act 1991 intentionally integrates tikanga considerations such as kaitiakitanga, whanaungatanga and mana whenua into all environmental processes and decisions. They are intended to affect non-Māori as well as Māori. The Oranga Tamariki Act does the same thing. Oranga Tamariki (the agency) and the Family Court must be guided by the mana tamariki of the child or young person.<sup>6</sup> It does not assume only Māori have mana tamariki. On the contrary it defines mana tamariki as the intrinsic value and inherent dignity all children derive from belonging to family and culture. In intellectual property, provision for avoiding offensive use of Māori phrases and images in the Trade Marks Act 2002 (sections 17(1)(c) and 177–180) and Designs Act 1953 (section 51), and for the protection of traditional knowledge and species in the Patents Act 2013 (sections 15 and 225–228) necessarily apply to everybody. That is their point. We have had a hybrid system for a long time.

With that context in mind, let us turn to some of the difficult issues—the issues that present, or are likely to present problems in the future.

## [D] ACHIEVING A CERTAIN FLEXIBILITY

There is a sense out there that tikanga is too imprecise, adaptable and flexible; that it threatens, if not undermines, the necessity that the law be certain and predictable in its application.

There is something in the suggestion that tikanga is less rigid and more flexible than state law. Tikanga is a system of law for village people,

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<sup>6</sup> See Oranga Tamariki Act 1989, s 5(1)(b)(iv); and s 2 for the definition of mana tamariki.

in which maintaining the cohesion of the village is as important as maintaining the symmetry of the law. So it is willing to make exceptions in the way the traditional common law once did and equity still does. But this distinction can be overplayed. When you have to grapple with what irrationality means in public law, what is a sufficiently proximate relationship in general negligence, or what are charitable purposes or public benefit in charities law, the certainty glow of state law fades a little. Resort must often be had to policy considerations to resolve these questions case by case, but that does not make the answer any more certain or predictable. It just makes the reasoning process more honest. In some ways, all law is inherently imprecise. It has to be, or it will be unjust. Tikanga, like the common law, is instinctively facts first and principles second. It is inductive in its response to new situations. A settled principle will apply by analogy only if the facts justify it.

So, certainty is an issue to be worked through, but it is not an issue with which we are unfamiliar, still less one to be afraid of.

## [E] DIFFERENCES AND CONFLICT

Relatedly, there is the potential for friction between the cultural values that underpin the tikanga system and the western values that underpin the common law. In that mixing zone tikanga and the common law and tikanga and legislation must interact to produce useful results or problematic ones. I do not think there is any dodging this friction. Nor is there just one way of thinking our way through those problems. They are sometimes just difficult, although, in my experience, that is rather less often the case than is assumed. The whole point of the structural fusion of tikanga and state law is to establish a place where safe conversations can be had when needed about how these two ways of perceiving the world should resolve their differences. The infrastructure built in the last 40 years is an admission that there is something to be discussed here. Denying that this is the case would be to classify these differences as extralegal; that is, as matters to be resolved somewhere else. First, that is no longer an option, and second, even if it were, it is one to be assiduously avoided.

## [F] WHOSE TIKANGA?

There is then the question of who expounds tikanga in the modern context. If tikanga is woven too tightly into the common law, judges may be unable to resist the temptation to take it over. In taking it over, they will inevitably freeze it in time, and thereby kill it. Or worse, they may

distort it to fit with their own assumptions and legal training. Common law judges did both of these things to local custom in England in the period before the 18th century.

Judges in Aotearoa will have to understand that while they will be required to declare and apply tikanga for the purposes of a particular case, they do not make it; others, outside the judiciary, do. The judge’s function is to apply it as established to the facts rather than to expound or develop it according to their own preferences. Judges are familiar with this deference when we apply legislation, although the fact that in relation to tikanga there is not necessarily a definitive text setting out the relevant law adds an extra and important layer of difficulty.

This is not a problem unknown to the common law either historically or currently, it is just a problem we will have to work our way through with care and humility. Especially, humility.

## [G] THE COGNITIVE SHIFT

So, my take on this is, lawyers and judges are going to be required over the next few years, in fact, over the next generation, to achieve a cognitive shift.<sup>7</sup> Many of you will know that the old approach to the application of custom (including tikanga) was to treat it as foreign law to be proved in evidence and then to subject it once proved to the tests of certainty, antiquity and reasonableness.<sup>8</sup> *Takamore* impliedly overruled this, and *Ellis* did so expressly. Tikanga is definitely not foreign law, it is quintessentially local law. But, of course, it is foreign in a broader sense to many lawyers and judges. Over the next generation, something of a cognitive shift is going to have to occur so that lawyers and judges can work with it and in it, when required.

Let me start with the lawyers. Most bad decisions about tikanga are the result of judges not getting enough help from lawyers, who, though perfectly competent, do not understand its principles and processes. I am sorry to lay the blame on lawyers like that. I would rather place it at the feet of the judges to be honest. But judges are usually pretty good at applying principles explained by reference to appropriate sources by counsel or referred to in evidence. If the judge fails in that regard we can expect that the case will have been so structured and the evidence-base

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<sup>7</sup> Cognitive shift is a term Horiana Irwin-Easthope used in a conversation we had earlier this year. It so perfectly captured what I was trying to describe to her that I now use it routinely as a useful label to convey the change in thinking that I have in mind. The credit belongs entirely to Horiana.

<sup>8</sup> See *The Case of Tanistry* (1608); and *Campbell v Hall* (1774).

sufficient that mistakes can be corrected on appeal. The really problematic cases are those in which the statements of claim or defence, arguments and evidence are so lacking that correction is impossible, assuming a correct result is discernible. So, this system-wide cognitive shift simply cannot occur unless lawyers develop their own intuition about the place of tikanga in the case, just as they have intuitions about disputes arising from contract, crime, intellectual property, property, equity or public law.

Easy for me to say right? But bear with me. I readily acknowledge that tikanga is a very different form of law to that in which you have been trained, but it is law nonetheless. You will not need to become instant tikanga experts any more than you must be expert in other subcategories of law with which you are unfamiliar. You just need know enough to develop good instincts. These will help you to judge when tikanga might be relevant to your case, when you need help and if you do, where to go to get it. You will then be able to explain to us poor judges why tikanga is relevant, how it is relevant, and, where needed, how other non-tikanga principles or considerations in the case are to be weighed, measured or reflected as the case may be. That is the cognitive shift: the development of an ability to step into the shoes of someone from the partner system of law, even if imperfectly, in order to view the conflict from their perspective. A profession with that kind of intuition will make all the difference.

That is going to take time, and we are on that journey. I do not think there are any shortcuts. At least none worth taking. We are helped, going forward, by the fact that the New Zealand Council for Legal Education has made tikanga a compulsory aspect of core law degree courses from 2025. Meanwhile, us judges are in the process now of developing a postgraduate judicial diploma course about tikanga in partnership with Te Whare Wānanga o Awanuiārangi. We are developing that course because the needs are the same for practitioners and judges. Once we have successfully road-tested it, our aim will be to make the programme available to practitioners too. This must be a joint endeavour.

There are a small number of practitioners around now who do have those instincts and intuitions. Not all of them Māori. They know when they have got or might have a tikanga issue; whether evidence will be required, or whether the textbooks or primary sources will do, or whether there are modern authorities that articulate the principle at a sufficient level of particularity. These are all judgement calls that in other areas of the law, lawyers (and judges) are required to make every day. So I would not catastrophize. Rather I would embrace this process of change because it does seem to me that the direction of travel of our national project

generally is one of the steady dilution of the influence of inappropriate colonial doctrines and attitudes and their replacement where required with law that is either a hybrid of the local Polynesian law and the common law or in some relatively narrow areas, solely tikanga-based.

The direction of travel is clear now and your role in it as counsel or as lawyers advising clients is going to be utterly crucial. In fact. If you are not up to the job, this will fail. Probably spectacularly. So I encourage you to do your bit. I encourage you to engage in educational programmes that will help you make that cognitive shift so you can help us do a better job of applying tikanga in the courts. With your help, we judges are going to try and do our bit to avoid making a mess of this.

*Nō reira tēnā koutou katoa.*

### **About the author**

For further details of the **Honourable Justice Williams'** legal career, please visit the Courts of New Zealand website [Supreme Court Judges page](#).

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# TIKANGA AND THE LAW: A MODEL OF RECOGNITION

JUSTICE CHRISTIAN WHATA  
High Court of New Zealand

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## **Abstract**

This paper is based on the transcript from a presentation given at the New Zealand Asian Lawyers Wānanga on Tikanga and the Law given on 3 May 2023. This paper offers one of many explanations of tikanga and is an entry level introduction only to a complex kaupapa. This paper traverses briefly a proposed three-part model of recognition of tikanga. The first part of the model is a methodology of engagement. The second part is the notion of kaitiaki as a controlling principle. The third part is tikanga-enabling processes. The last two steps of the methodology are covered briefly due to time restraints.

**Keywords:** tikanga; normative system; recognition; methodology of engagement; tikanga-enabling processes; common law.

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## [A] INTRODUCTION

Thank you for the kind introduction from Maria Dew KC, President of the New Zealand Bar Association.

It is always a difficult task to follow my tuakana Justice Joe Williams when he speaks. Who else can talk about 700 years of law and actually make it sound interesting?

My objective is more humble, although it links into his notion of a need for a cognitive shift. I hope you will leave with more insight into tikanga as a normative system and as a system of law. Understanding tikanga as a system will address, in my view, many of the core issues confronting us now: lack of certainty. When is it relevant? What is the weight that we give tikanga in any particular case? Tikanga when viewed as a system provides many of the answers. We just need to understand it.

Some disclaimers before I start. First, I am not an expert on tikanga Māori. That expertise resides in local marae and in our koroua, our kuia. I have had the privilege over the last 18 months or so of sitting at the feet

of some very great people who are tikanga experts, and they have passed on to me some of their wisdom which I have gratefully accepted.<sup>1</sup>

The second disclaimer is that I am not speaking as a High Court Judge nor as a Law Commissioner today.

## [B] THREE-PART MODEL OF RECOGNITION

I am going to talk about what I call a three-part model for recognition of tikanga. The first and very important part of the model is a methodology of engagement, and the most key element is to apply a tikanga or Māori lens to everything we do when we engage with tikanga.

The second part is the notion of kaitiaki (or similar concept) as a controlling principle, and what I mean by that, when we engage with tikanga we have to have the humility to understand that tikanga has its genesis, and exists in a very special way, in another place. And then when it comes out of its natural environment and into our legal domain, we need to take care of it.<sup>2</sup> More importantly, we need to understand that there are others that must take care of it. And we have to give them the opportunity and empower them to exercise their kaitiaki responsibilities.

The third aspect I want to talk about briefly is tikanga-enabling processes, for example like the processes used by my colleagues at the Māori Land Court and at the District Court who weave tikanga into their everyday activities. The District Court is probably undertaking the largest exercise in that weaving process with its Te Ao Mārama, which is critical in this time of transition.

## [C] THE COMMON LAW

Before I address my proposed model of recognition I want to look first at the common law and its capacity to recognize tikanga. As Chief Justice Elias said in *Lange v Atkinson* (1997: 45), the common law is, at its

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<sup>1</sup> It is important to note that what I say here involves “an” explanation of tikanga only. On matters of this complexity such an explanation must be treated with caution, and as an entry-level introduction only to a very complex kaupapa.

<sup>2</sup> In the presentation I used the word “want” rather than must. But the obligation to take care of tikanga is not a matter of desire but responsibility. I also take the opportunity to acknowledge that use of the concept kaitiaki in this context is not without complexity. Some would prefer the concept of tino rangatiratanga to denote mana, as in authority and responsibility, in respect of tikanga. While kaitiaki and kaitiakitanga is better reserved for protection of mauri within the whakapapa-whanaunga matrix. The use of it here is strictly confined to the notion that there are expert stewards of tikanga within te Ao Māori who must be acknowledged and given the opportunity to perform their responsibilities when engaging with tikanga.

heart, “the application of established principle to new situations”. This is important because tikanga also involves the application of established principles to new situations.

## Issues

This brings me to some of the key issues involved with the application of tikanga by the courts. First, dealing with what I call the “common law” issues. There is much talk of concern about tikanga being too uncertain for the common law method. But all of the research that I have done and all the people that I have spoken to are clear that the fundamental principles of tikanga are broadly shared, and they are clear, and they can be applied consistently, as we like to do when we apply the principles of the common law.

We often hear the question: “But how does tikanga fit in with the ‘rule of law’?” I do not want to talk about the constitutional and philosophical debate about the rule of law today. But a key aspect of the rule of law, when thinking about the inculcation of tikanga into the common law, is the principle of procedural and substantive fairness, often referred to as legality. People order their lives in reliance on the law and we have to be cognizant of that when we bring something new or different to the common law. It is a guiding principle in my view, in terms of this process of weaving or stitching of tikanga into the law.

More specifically, the requirement for certainty is, in my view, an aspect of procedural fairness, namely that the law needs to be sufficiently certain so that it can be applied fairly. And we need to have some idea of when a new principle is relevant to a fact situation. We also need to know how we weigh these new principles. A significant part of the answer to concerns about uncertainty is tikanga itself. Tikanga provides the boundaries that we need to identify when it is relevant—it will tell you; it will give you that cue. And as Justice Williams mentioned, the law is not absolutely certain most of the time anyway, but fundamental tikanga do have that core of certainty, and then the rest evolves according to context.

I turn to examine the other side of the coin—the “tino rangatiratanga” side. Kingi Snelgar, who is here today, has been helping me on the Law Commission’s tikanga project with some insights on this. There is a part of our world that believes that tikanga should be managed and enforced by iwi Māori only. We have to be aware that there are hapū and iwi who believe this is a fundamental aspect of tino rangatiratanga, and it should be another guiding principle. It means we have to be careful about how we use tikanga, how we bring it into this common law environment and

recognize that there are those that think this taonga<sup>3</sup> should stay within te Ao Māori, and this links to another point, namely of integrity. We need to be conscious that we need to maintain the integrity of this thing called tikanga.

## Categories of tikanga cases

My team at the Law Commission and I have reviewed and identified three broad categories of tikanga cases. These categories help in terms of engagement with tikanga because they involve recognition of tikanga in very different and important ways. The first way that most of us will be familiar with is custom law recognition. That is the recognition by the common law of custom. And then a process of conversion of custom into proprietary rights.

I had a debate with my colleague, Justice Powell, who says we are not engaged in the process of making proprietary rights when we recognize tikanga. “Property” did not exist in tikanga, and I fully agree with him. But under this category of law, I believe once you do go through that transformational custom law process, you end up with something that very much looks like a property right.

We have developed rules around custom law and it is important that those settled rules remain with us because if you are going to introduce custom into the property law matrix, where people order their lives by reference to property rights, then it is important to maintain the certainty that comes with that form of custom law recognition.

The second major category in this taxonomy is “tikanga values”. Those of us that have worked under the Resource Management Act (RMA) will be familiar with the fact that we have these values inculcated throughout the RMA. They do not translate to exact rights because they are always subject to an exercise of discretion; so it is what I call a values engagement. But the beauty of values engagement is that we are not necessarily in a contest of opposites, of absolutes: there is an opportunity for synthesis and harmonization in reaching the result. That is what I think former Chief Justice Sian Elias was saying when she talked about tikanga values being part of values of common law. It gives us an opportunity for synthesis and harmonization; and, in that way, we weave or stitch tikanga into the law.

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<sup>3</sup> Referring to tikanga as a “taonga” is another complex proposition. Some leading tikanga and Tiriti o Waitangi jurists do not consider it is correct to refer to tikanga as a taonga, for example in the context of article 2 of the Tiriti.

The final category is in some ways the most significant, and the most fragile. It is the notion of tikanga law, or what I would prefer to call tikanga relational interests. It is a term that Moana Jackson coined many years ago. At its simplest, it involves the identification of a tikanga-based right or obligation, according to tikanga. It is the third branch of engagement by the common law with tikanga.

It is a whole new area that we have to come to grips with, and I hope some of my discussion today will help us navigate, at least in a very introductory way, how we might do that, because it needs its own approach.

## [D] A METHODOLOGY FOR ENGAGEMENT

So, what is this methodology of engagement? Here are some key concepts that I think are important.

Mātauranga Māori and mātauranga-ā-iwi:

- ◇ a normative system (patrolling its own boundaries)
- ◇ a living system
- ◇ a natural environment
- ◇ te Whareniui

First, we must appreciate that tikanga exists within te Ao Māori, and it is based on mātauranga Māori, that is Māori knowledge. Its deeper contextual meaning lies in mātauranga iwi or iwi knowledge. Tikanga Māori are the principles of, say, general application and tikanga-a-iwi (and by iwi I mean hapū, whānau, iwi, Māori communities) are the localized expressions of tikanga. These localized expressions are particularly important when dealing with what I have called tikanga relational interests.

Second, equally important to understand, is that there is a coherent normative framework of tikanga. Tikanga is not simply a collection of abstract principles that float around in the atmosphere. There is a clear normative framework, an integrated system of norms that includes values, principles and rules. They operate as an integrated whole and you have to view it in that full normative context.

The third point I want to make is that it is a living system—the system lives on every marae (and elsewhere), the 700-plus of them every day, up and down New Zealand. The people of those marae are exercising these concepts of tikanga Māori every day, and they are expressing them in their own way every day.



That is the natural environment for tikanga, the marae, but of course extends out to all Māori whanaunga that live and breathe it. And to understand that natural environment is really important because when we try to extract tikanga out of that natural environment and put it in an alien environment, problems arise. That is when there is the potential for overreach, and the integrity of tikanga itself is potentially affected.

I spent some time with my tikanga experts on the issue of how to assist diverse audiences with varying degrees of understanding of tikanga to locate themselves within te Ao Māori so as to really understand tikanga. We came up with concept of Te Wharenuī (the meeting house). It is not an original concept. Te Wharenuī are important to Māori in many ways. They are a store of knowledge. Metaphorically and literally, wharenuī store knowledge within te Ao Māori. It also connects us to our ancestors and connects us to atua (creators). It places us within our context of being Māori. It symbolizes order. The construction of a wharenuī is the accurate application to tikanga. It follows particular processes and in accordance with particular rules and principles. It is the place of interaction of tikanga. It is the place where tikanga is expressed every day. Every pōwhiri is an expression of a detailed set of rules that must be abided by. If you don't follow them, there will be consequences. And so we landed on Te Wharenuī as our reference point for te Ao Māori.

Now, I can imagine you sitting in your offices sometime in the future confronting some tikanga problem and puzzled about what Justice Whata was meaning. How do I get into this wharenuī? Well, in truth, we already do this sort of metaphysical exercise every day. For example, when we think about contracts and we do so within this settled framework or wharenuī of principles, because that's how we've been trained. We need to get ourselves to that point with tikanga. It does not have to be a wharenuī. It can be something else, but I propose use of the wharenuī. So take yourself into that wharenuī (or something equivalent) when you are engaging with tikanga because it is an important device for reminding you that you are dealing with a particular system that needs to be engaged with in a particular way.

## Tikanga as a normative system

Turning to what I mean by tikanga as a normative system. I want to share some core tikanga concepts with you and offer an explanation of how they function as a system, namely concepts of:

- ◇ connection (structural norms)—whakapapa, whanaungatanga, mauri;
- ◇ balance (prescriptive norms)—utu and ea;
- ◇ status (relational norms)—mana, tapu, noa;
- ◇ responsibility (obligations)—kaitiakitanga, manaakitanga, aroha (etc); and
- ◇ procedure—kawa.

Tikanga is a multi-layered system of norms, commencing with what I call structural norms. They are congruent with the framing of te Ao Māori, namely according to whakapapa, whanaungatanga and mauri. Whakapapa is often referred to as genealogy. It is the map that connects all things to all things. It is critical to understanding your place within that complex map; where you are located on it will often define your rights, your obligations, your responsibilities.

Justice Williams often refers to whanaungatanga as the glue. It is the binding element that runs through whakapapa that seeks to sustain that whakapapa and keep us connected. It is a fundamental structural principle that governs all behaviour. I also refer to mauri as a structural norm, in that it is central to existence, often referred to as life force, the signature as to who you are, what a place is, or what a hapū or iwi is. It runs through this map glued by whanaungatanga and is something we have to be conscious of in everything that we do.

You also need to be very familiar with utu and ea—what I refer to as prescriptive norms of balance. They make the prescriptive demand that we seek to achieve balance in our arrangements with each other and in our relationship with the environment. Utu is the means by which we restore balance. For example, a gift if unreciprocated will lead to imbalance and a gift in return will restore balance. So, these two concepts are intertwined and fundamental to understanding the operation of tikanga, the why of tikanga remedies. If there is lack of balance, then there is a weighty issue that needs to be resolved.

The next layer, in very simple terms, refers to status according to mana, tapu and noa. They are the infrastructure of jural relations in te Ao Māori, particularly mana and tapu.<sup>4</sup> Mana in this context means power, but integral to that power is responsibility. There is no point having mana without a concomitant responsibility. If you do not discharge the

<sup>4</sup> By jural I simply mean a condition that attracts powers, rights, obligations, freedoms, immunities. Another word of caution is needed here. There is no exact correspondence between tikanga and jural concepts. They are at best, a loose descriptor to assist with understanding of the operation of tikanga.

responsibility, your mana will diminish. Kaitiakitanga is the example that Justice Williams used in his korero. If you have mana in relation to the environment as a steward of that environment, you must discharge that responsibility to that environment; and if you fail to discharge that responsibility to that environment, your mana will diminish accordingly.

Tapu is often connected to sacredness of a person, place, or thing in terms of the spiritual dimension of te Ao Māori, but it can also simply refer to, say, the inherent worth of a person and that inviolable part of you. Think of it as an immunity in terms of legal language, but also closely aligned with mana so that the two go together; so the protection (or restriction in relation to) something that is tapu is also a matter of right. Now noa, again in very simple terms, refers to freedom—freedom from restriction.

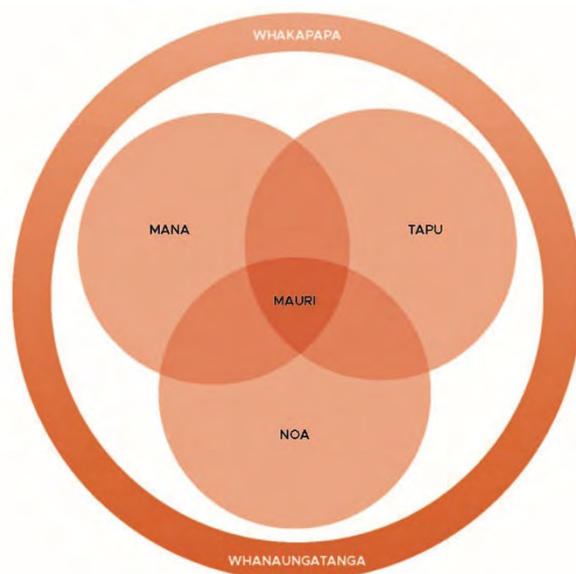
We see the operation of these particular concepts on a marae especially during a powhiri processes. At the beginning of that process the people of the marae and the visitors to the marae are tapu with respect to each other, and it is necessary to go through a process to lift that tapu to reach a state of noa, so that you are free to engage with each other in a place of harmony. It is a very simple illustration of the operation of jural relations, of the engagement of mana, tapu and noa.

Responsibilities are the next layer and they are key. Justice Williams mentioned the obligations of kaitiakitanga, manaakitanga and aroha that are linked to, whanaungatanga, the glue. We must also discharge these obligations to keep our mana.

It is also really important to understand the significance of kawa. These are procedural rules that we have in tikanga that guide our behaviour, particularly in terms of our relationships with each other. For example, it may appear confusing to say a person or place is tapu sometimes and then not at other times. But part of that confusion might be because the functions of kawa processes are not well understood. They may for example be used to alleviate that tapu at a particular time, that then enables us then to engage with that otherwise tapu person, or place.

## Mana, tapu and noa

I want to elaborate on the operation of mana, tapu and noa. Figure 1 attempts to capture the potential jural status of an entity. It can represent a person, a mountain, a river, the sea, or anything natural. Mauri is located in the centre referring to that life-force signature that makes a



*Figure 1*

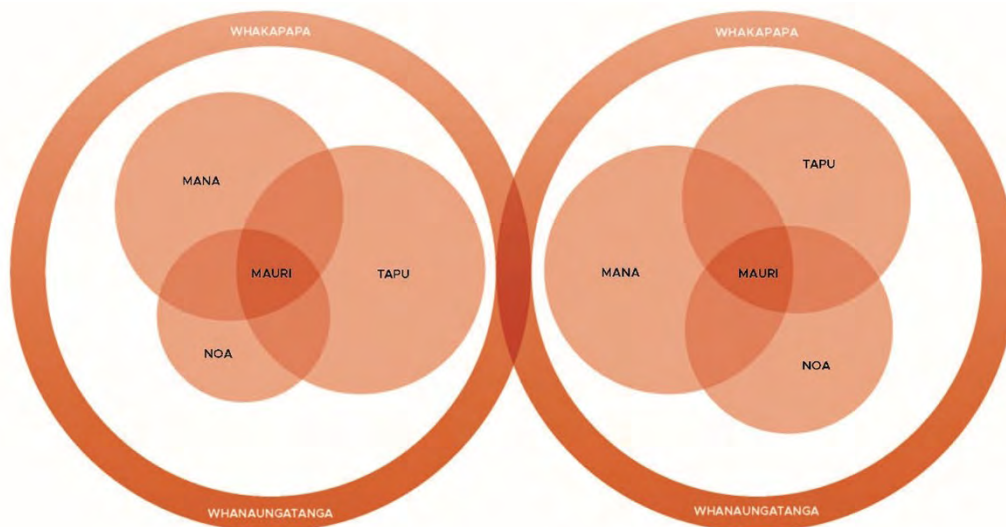
person or thing special, that inheres within all natural things. Mauri is then surrounded by layers of mana, tapu and noa.<sup>5</sup>

Mana can materialize at a particular time, say when a person has been given the mana (power and responsibility) to do something. A person may also have this layer of tapu potential within them all the time, and that tapu may or may not come to the fore on a particular occasion, but may be completely at the fore for some people a lot of the time. The layer of noa then refers to the potential to be free from restriction, especially to engage with others. These potential layers may then actualize or materialize depending on context.

Figure 1 also shows that all of these layers of potential are surrounded by whakapapa and whanaungatanga to signify that all of these potential jural conditions exist within a whakapapa–whanaungatanga matrix. That is the natural environment within which these tikanga jural relations take place.

Thus, if you extract one of these layers out to explain a jural relationship, let's say we're talking about property and let's say it is mana, because the issue is about control of that property. If you extract it out, without

<sup>5</sup> As with the explanation of tikanga as a normative system, this figure must be treated with care. It does no more than introduce the reader to the presence of these elements (and corresponding potential jural status) in all natural things, and how they may manifest themselves according to context and then function to regulate relationships between all natural things. Importantly, the intersection of the spheres does not denote intersection of the layers—many tikanga jurists would not describe tapu and noa, for example, as intersecting states of being. Rather the emphasis here is to show the potential for each of these states, or status, in all things depending on context.



*Figure 2*

whakapapa and whanaungatanga, then that is not tikanga in action. That mana needs to be relocated within the whakapapa–whanaunga matrix. You are then looking at whenua (not property). You are looking at a relation through whanaungatanga and something that you are connected to through whakapapa. So the boundaries of that engagement are set by those tikanga.

Figure 2 refers to two natural entities. Now let us just assume the figure on the left is a river, and this river is in a state of tapu at that time.<sup>6</sup> On the right are the people of that river. The river and the people are connected by whakapapa and whanaungatanga, represented by the two circles intersecting to signify that connection. The tapu circle within the river is amplified to show that the river is in a state of tapu or restriction. On the right we see the enlarged mana circle to indicate the responsibility of those people to the river. They are kaitiaki of the river. They have the power and responsibility to restrict access to the river while it is in that tapu state.

I mentioned before that a person may lose mana if the responsibility attached to that mana is not discharged. Referring to Figure 2, that mana circle would then be shown as much reduced and potentially to the point that the person or people no longer have the mana. That would be a travesty in tikanga Māori, so you never let that happen. This also helps to illustrate normative weight attached to whanaungatanga and kaitiaki responsibilities to a place.

<sup>6</sup> A river may be in a state of tapu, for example, while fishing is occurring or where a death has occurred.

## Methodology

I suggest engagement involves a step by step process as follows:

- ◇ Step one: identify key facts;
- ◇ Step two: identify the cause of the dispute;
- ◇ Step three: identify any core tikanga principles in play—whakapapa, whanaungatanga, mauri, utu, ea (framing);
- ◇ Step four: identify the key relational tikanga—mana, tapu or noa (including their source and associated responsibilities); and
- ◇ Step five: identify methods of resolution—rāhui, karakia, koha, hui, kawenata.

As Justice Williams says, first identify the facts, and whether the facts engage tikanga. Identify the cause of the dispute. Are there violations in tikanga that we are concerned with or does this dispute exist in a different place such that it is not a tikanga concern? Can you see, on the fact pattern, tikanga concepts engaged by the facts?

You then need to be able to frame the dispute within the whakapapa, whanaunga and mauri matrix and identify whether any one of these core tikanga principles is engaged on the facts and how they are engaged. For example, on cases concerning climate change, you can see whanaungatanga and whakapapa and mauri engaged. However, whose whakapapa, whose whanaungatanga, whose mauri, and who then has the mana in relation to that issue? These are really difficult questions that need to be properly framed before you can articulate an answer (or a pleading). Even if you do see these principles located, how do they devolve into relational tikanga, mana, tapu and/or noa?

Can we see displayed, according to the histories of the people that you are dealing with, that the facts engage those concepts, that there is a mana issue here, and who has the power and responsibility, kaitiakitanga being an obvious responsibility in this context?

And then, of course, you must look to whether in a particular context there is a method of resolution that exists within or outside of the court process.



## [E] KAITIAKI AND ENABLING PROCESSES<sup>7</sup>

Briefly, on kaitiaki controlling the boundaries, pūkenga (tikanga experts) can be helpful. A specialist court may also be helpful, particularly in this time of transition, when we need to have people who can help us protect the integrity of tikanga through this period.

Enabling processes, outside of the court, like arbitration, should be considered because they are consensual. We can more easily frame the engagement by reference to tikanga. Not all arbitrations have in the past been successful, but that problem may be about whether they are framed correctly.

More broadly, the Te Ao Mārama initiative and the experience of the Te Kōti Whenua Māori are very important because of their active engagement of tikanga-enabling processes. The more we utilize tikanga-enabling processes, the better.

### Te Reo and tikanga

In response to the question—can you really understand the tikanga without reo fluency? My instinct is that you can develop an intuition about tikanga even if you are not reo fluent. But if you want to develop expertise about tikanga, then I think you definitely have to be able to speak te reo Māori. For that deeper esoteric knowledge, I think you need people that are te reo fluent.

In response to the question about how we deal with conflicting views on tikanga, we need the right people with the right expertise in the right places.

#### ***About the author***

*For further details about Justice Whata's legal career, please visit his page on the [New Zealand Law Commission website](#).*

### Legislation, Regulations and Rules

Resource Management Act 1991

Te Tiriti o Waitangi 1840

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<sup>7</sup> I only had a short amount of time in the presentation to talk about the last two steps in the methodology.

## Cases

*Lange v Atkinson* [1997] 2 NZLR 22, [1998] 3 NZLR 424, [2000] 1 NZLR 257, [2000] 3 NZLR 385

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## THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 AND TIKANGA: SOME CHALLENGES ARISING

THE HONOURABLE JUSTICE GRANT POWELL  
Judge of Te Kōti Matua o Aotearoa | High Court of New Zealand

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### **Abstract**

The following article is based on a speech delivered by Justice Powell on 3 May 2023 on the challenges of applying the Marine and Coastal Area (Takutai Moana) Act 2011. Justice Powell discusses the background and history of the current legislation. He then considers the challenges of applying tikanga under the statutory tests for customary marine title and protected customary rights.

**Keywords:** tikanga; customary rights; High Court of New Zealand.

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Thanks to the New Zealand Asian Lawyers and Buddle Findlay for putting on this very worthwhile and topical event. Thank you, Yvonne Mortimer-Wang, Barrister at Shortland Chambers and member of the New Zealand Asian Lawyers Board, for your warm introduction, and I join the other presenters in acknowledging Mai Chen for her persistence and potent persuasive skills in organizing the presenters.

Mai asked if I could talk a little about tikanga and the Marine and Coastal Area (Takutai Moana) Act 2011, commonly known as the MACA.

I do not intend to talk about the difficulties of ascertaining tikanga and whether its identification is properly considered as a matter of law, or a fact to be proved in evidence, or a mixture, although these are issues in MACA cases as in other areas of the law. Instead, my focus is on specific issues thrown up by the MACA itself, and the light these issues throw on other legislation where issues of tikanga are specifically referred to.

Most of you will be aware that the MACA is the current legislative response to Māori claims for recognition of customary rights over the foreshore and seabed, having replaced the unlamented Foreshore and Seabed Act 2004 (FSA). The FSA was the controversial response to the Te Tau Ihu Iwi claims for recognition of customary ownership of the foreshore

and seabed in the Marlborough Sounds and the decision of the Court of Appeal in *Ngāti Apa v Attorney-General* (2003) allowing the Māori Land Court to investigate those claims.

As enacted the MACA provides mechanisms for determining whether identified customary rights can then be recognized as either customary marine title (CMT) in sections 58 and 59 or protected customary rights (PCR) in section 51 of the Act. It is an important addition to the jurisdiction of the High Court. Each application is substantial and in many ways puts a High Court judge into the position of becoming a one-person Waitangi Tribunal without the backup, while the number of applications means it will take many years for all of the applications to be determined.

Included in the many challenges are:

- ◇ the fact that the generation of tribal experts, the kuia and koroua who led the Treaty claims for their respective groups, are now passing and a new generation is having to take over; and
- ◇ the fact that the applications deal with fundamental issues of iwi and hapū identity and their relationships with adjoining groups place a heavy responsibility upon the High Court.

There are two pathways for recognition for both types of rights: either through direct negotiations with the Crown or through an application to the High Court.<sup>1</sup> To date, in the limited number of applications considered by the High Court, applicants generally are content to take the opportunity to negotiate PCR directly with the Crown, and as a result the focus of the High Court has overwhelmingly been upon CMT. Building on earlier judgments of the High Court, for example in *Re Tipene* (2016) and *Re Edwards (No 2)* (2021), I have set out how I think the CMT jurisdiction works in my judgment in *Ngā Pōtiki Stage 1–Te Tāhuna O Rangataua* (2022).

In summary, the criteria for the issue of CMT are set out in sections 58 and 59 of the MACA. The key elements of the test are outlined in section 58(1), which provides:

**58 Customary marine title**

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
  - (a) Holds the specified area in accordance with tikanga; and

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<sup>1</sup> Separate applications were required for both within six years of the commencement of the MACA (ss 95(2) and 100(2)) so an applicant group that has applied for recognition of CMT through direct negotiations with the Crown has not filed an application in the High Court and its application cannot be considered by the Court.

- (b) has, in relation to the specified area,—
- (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
  - (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

At first glance it appears tikanga is front and centre of the test. This you might think should make things easier: one of the challenges thrown up by the Supreme Court in *Ellis v R* (2022) is understanding where tikanga fits in to any particular area of New Zealand law and how it is to be applied. Just because there is an explicit reference to tikanga in a statute does not necessarily make its application any easier and instead throws up a range of issues that need to be worked through.

Part of the difficulty stems from the fact that the test is not limited to tikanga, while the outcome of the test, the CMT itself, does not fit easily into a tikanga paradigm.

In relation to the test, the MACA followed the FSA in bolting on additional components to the test so that unlike the situation on dry land (above the high-water mark), tikanga by itself is not determinative of whether title can be issued.

To explain this issue I need to go back a bit.

The obligation to recognize the customary rights (including property rights) of indigenous people first arose in western legal thought following colonization of Mexico and Peru in the 16th and 17th centuries. After considerable debate the Spanish Crown accepted that it had an obligation to protect the property rights held by indigenous people. That obligation developed into what is known as the doctrine of aboriginal rights/aboriginal title and became part of the English common law. By the date of the Treaty of Waitangi in 1840 there was a clear acceptance of this obligation in the British Colonial Office. As the High Court of Australia noted in *Mabo v Queensland (No 2)* (1992), in many respects the guarantees contained in article 2 of the Treaty of Waitangi are simply a restatement of the common law obligation to protect the property rights of indigenous people.

As a result, when such rights have been shown to exist, they cannot be ignored by the Crown.<sup>2</sup> The rights of indigenous peoples framed in New Zealand by tikanga need to be considered on their own terms.

The focus, as Whata J observed, has often been on those rights identified as being proprietary in nature. This is not so much about the nature of the customary right itself. Rather, it is an issue of categorization by the colonial legal system due to the potential effect on particular customary rights on the property rights claimed by colonists at the point at which the customary rights come up for consideration.

In any event the obligation upon the Crown goes further than simply recognizing and protecting such rights where they have been proved. The Crown must also ensure that it has either provided a mechanism by which Māori are able to prove such rights themselves or, alternatively, put on notice that such rights are claimed to exist. The Crown must, as part of the obligation to actively protect the Māori interest, undertake an appropriate investigation to determine the nature and extent of such rights.

Section 58(1)(b)(i) of the MACA changes this approach by not simply limiting the investigation to the nature of the tikanga but requires investigation of the tikanga in conjunction with other matters. The section therefore sits uneasily outside of tikanga, particularly in relation to the requirement that a specified area of common marine and coastal area is “exclusively used and occupied”. This is a term used in overseas jurisdictions and case law, and, as I explained in *Ngā Potiki–Stage 1* (2021), fits better with claims to dry land rather than areas of foreshore and seabed given the limited number of transitory uses that are possible within the common marine and coastal area.

The effect of the additional requirements contained in section 58(1)(b)(i) of the MACA is that applicants are required to meet a statutory threshold that goes beyond tikanga in order to meet the requirements for issue of a CMT. One of the challenges for counsel working in this jurisdiction is to ensure that the other elements of the test are not neglected, particularly when it comes to establishing the continuity requirements.

The additional components are important. If not met, a group can be excluded from CMT notwithstanding they may clearly retain customary rights in the specified area, with no mechanism in the statute for those

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<sup>2</sup> See, for example, *Mabo v Queensland (No 2)* (1992) which cited the New Zealand cases of *R v Symonds* (1847) and *Nireaha Tamaki v Baker* (1901) with approval, and see also *Tamihana Korokai v Solicitor-General* (1912).



lesser customary interests to be recognized. The second form of customary rights, the PCRs, may provide recognition in some cases but are unlikely to be broad enough to cover the type of rights that may be in issue. A PCR cannot include an activity that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource.

It is noted that the approach taken in the MACA contrasts with historical recognition of customary rights in New Zealand prior to this point (or at least prior to the FSA). Since the introduction of the Native Land Court in 1862, through to the present Te Ture Whenua Māori Act 1993, customary land has always been identified according to tikanga, first as being land held in accordance with the customs and usages of Māori and rephrased since 1993 as “land held in accordance with tikanga Māori”. Throughout tikanga has been determinative, with the primary issue in case law being the identification of those who hold the customary rights rather than whether the land was customary land. This reflected the objectives of successive colonial governments which were to ensure that title could be issued to specified owners and thereby facilitate the more efficient alienation of Māori interests to that land.

If the inputs required to establish CMT are problematic, in the event that groups are found to have CMT the outputs can be even more so.

This is because the MACA, like Te Ture Whenua Māori Act and preceding Māori land legislation since 1862, is a statutory translation mechanism which takes customary rights originally defined by tikanga and fits them into an essentially alien legal framework.<sup>3</sup>

For example, identifying the extent of a particular CMT poses difficulties. Tikanga may establish that a group is entitled to a CMT to seaward of land remaining in the ownership of that group. That group then becomes one of a number of groups “sharing exclusively” in a CMT further offshore. The question that the court needs to determine is where that boundary in between those two CMT should be drawn? Tikanga, while able to provide guidance on exclusive or shared exclusive areas is less useful in determining where exactly the boundary should be crystallized to enable a title to be issued. The reason for this is obvious, as tikanga never had to draw boundary lines in the open sea and is far better able to accommodate gradual changes in intensity of customary rights. If CMT is to be issued, however, the court must grapple with the

<sup>3</sup> In Te Ture Whenua Māori Act 1993, for example, in the event land is identified as Māori Customary Land, as soon as owners are identified the status of the land changes to Māori Freehold Land for the purposes of that Act. See particularly ss 129(2)(a) and (b) and 132.

need to conceptualize the boundaries of the CMT in accordance with tikanga rather than simply drawing arbitrary lines on charts.

The difficulty in drawing boundary lines also complicates governance arrangements for the holders of CMT that are ultimately recognized by the court. The fact that different areas of sea will have multiple different customary owners the further one travels along the coast means that in many cases an applicant group's post-settlement governance entity as utilized for Treaty settlements will be unable to hold any CMT. At the same time, any attempt to create a new governance entity for each CMT issued to reflect the different groups with interests raises the unattractive and draining possibility of the proliferation of cumbersome and expensive governance entities. To date the only alternative appears to be the vesting of the CMT in individuals identified as representative of the customary owners, although it must be remembered that this too was problematic for much of the history of the Native Land Court and raises questions of accountability when it comes to making decisions as provided for in the MACA.

Without legislative change, these issues must be worked through in order to achieve outcomes that are consistent with the original tikanga that necessarily underpins the CMT issued.

It also provides a broader challenge at the law reform level. If it is decided to give effect to tikanga through legislation, care must be taken in legislative drafting to ensure the tikanga at issue is cared for and protected throughout the statute and not distorted in implementation.

### ***About the author***

*For further details of the **Honourable Justice Powell's** legal career, see the [Courts of New Zealand Judges page](#).*

## **Legislation, Regulations and Rules**

Te Ture Whenua Māori Act 1993

Treaty of Waitangi 1840

Marine and Coastal Area (Takutai Moana) Act 2011

Foreshore and Seabed Act 2004

## Cases

### **Australia**

*Mabo v Queensland (No 2)* (1992) 66 ALR 408

### **New Zealand**

*Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239

*Ngā Pōtiki Stage 1—Te Tāhuna o Rangataua* [2022] 3 NZLR 304, [2021] NZHC 2726

*Ngāti Apa v Attorney-General* [2003] 3 NZLR 643

*Nireaha Tamaki v Baker* [1901] NZPCC 371

*R v Symonds* [1847] NZPCC 387

*Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772

*Re Tipene* [2016] NZHC 3199, [2017] NZAR 559

*Tamihana Korokai v Solicitor-General* (1912) 15 GLR 95

## REMARKS ON TIKANGA AND THE DISTRICT COURT

CHIEF DISTRICT COURT JUDGE HEEMI TAUMAUNU  
District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa

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### Abstract

This article explores tikanga in the District Court context. It explains that the incorporation of Te Reo Māori (Māori language) and tikanga Māori is relatively new in the District Court. It discusses the introduction of Te Ao Mārama and solution-focused judging approaches since 2020 and goes on to describe how tikanga might operate in a Te Ao Mārama context.

**Keywords:** Te Ao Mārama; tikanga; education; rangatahi; te reo.

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*Tēnā koutou katoa (Greetings in Te Reo Māori).*

Thank you, Frazer Barton, for that wonderful introduction. I wanted to start on one of the values of tikanga, whakaiti or humility, and also by being very clear that there is a lot to this complex topic. It has all been explained in the way that Justice Whata outlined his framework, and I thought I might capture some of the themes that I have heard already this afternoon, by speaking about this idea of capacity-building within the profession and within the judiciary. When it comes to understanding tikanga, I want to capture an idea of building the capacity to the point where the level of intuition about tikanga is the norm. Tikanga is the correct way of doing things for a specific purpose, from a Māori worldview.

Much of the behaviour you see associated with tikanga is simply informed by tikanga values and principles. What has been very clearly identified, not just within the District Court, is the education around tikanga that is needed. So I wanted to acknowledge you, Mai Chen, for bringing us together this afternoon to speak about this really important topic.

I want to set the scene by talking about the District Court on 30 May 2008. That was the date of the first sitting of the Rangatahi (Youth) Court. The reason I mentioned that date is because, prior to that date, there was no incorporation of Te Reo Māori (the Māori language) or tikanga Māori in any division of the District Court whatsoever. That was only 15 years ago.

So we should not be too hard on ourselves that there is an education gap.

It may well have been discussed in the senior courts' decisions over generations, but in the District Court, we have some catching-up to do.

We announced Te Ao Mārama in 2020, which has been described by Justice Whata as an enabling process. I want to explain what Te Ao Mārama is and how tikanga fits into the new landscape in the District Court.

I want to share a document that we commissioned in our Chambers that has been drafted by our clerks for the benefit of the District Court bench and to fill that education gap. But there must also be a way that we can share this with the profession. It is not an attempt at an authoritative textbook, but it actually is quite helpful.

I don't want to go through any of the history of how we've ended up at Te Ao Mārama. That has been clearly explained in the Norris Ward McKinnon speech in 2020. I wanted to give you some key statistics and give you an idea of the focus of Te Ao Mārama. It relates to the experience of people who are dealt with in our courts, across the divisions of the District Court including the Family Court, the Youth Court and the adult court in the criminal jurisdiction.

A 2018 report found 83% of young people in the adult prison system had been through the state care and protection system. There is a direct connection. Any child who has transitioned from state care to youth justice is 15 times more likely to go on to offend, and 107 times more likely to be sentenced to a term of imprisonment before reaching the age of 21. Just over half of the adult prisoners have been exposed to sexual and family violence when they were children. For Māori prisoners that figure is at 60% and for female prisoners, the figure is nearly 70%.

Those statistics paint a very grim picture of the justice highway that represents our legal system in the District Court. The system traps people from a young age and really holds on to them, following a path from state care to the Youth Court and then to the adult criminal court. There is quite a confronting context that informs where Te Ao Mārama is directed. Te Ao Mārama is a judicially led response to longstanding calls for transformative changes, over four decades. This is not something that happened overnight. This is a long-standing issue. The words Te Ao Mārama have the literal meaning "world of light", but they have been used as a metaphor for reform in the District Court to suggest a deliberate intention to adopt a more enlightened approach to justice. This is based on

what we have been trying to establish over the years in certain specialist courts and jurisdictions.

Te Ao Mārama aims to promote both tangata Tiriti and tangata whānau customs and values as well as principles of restoration, healing and enhancing community wellbeing. So why would we want to better connect our courts to our communities? Because the legitimacy of the District Court actually relies on public confidence in the way that we operate. So the District Court must be perceived to be both relevant and legitimate.

The idea behind Te Ao Mārama is to draw on those best practice approaches that have been developed over the years. Many of you have probably heard of some of these developments. I have already mentioned the Rangatahi Court, which is here in Auckland. There is also the Matariki Court in Kaikohe and in Wellington the Court of Special Circumstances, by way of example.

These are all examples of judicially led, solution-focused approaches in our mainstream courts. I do not think we can realistically adopt them wholesale. The approaches that have been taken in these specialist courts must be modified so that we do not cause too many issues. We know the courts have major backlogs that we are addressing at the same time.

In terms of Te Ao Mārama, if you use Māori words to describe a mainstream concept, there could be a perception that it is only for Māori. I need to be very clear that it is designed for everyone who has been affected by the business of the court. The solution-focused approaches are extended to all, and they are not designed solely for Māori.

Picking up on Justice Williams' point from the beginning of this afternoon, about early tikanga cases that did not involve Māori people, much of the solution-focused approach that will form part of Te Ao Mārama will not involve Māori people either. But because there is such a high representation of Māori in our court, it will inevitably affect Māori. It will also have to be relevant and reflect who we are today in 2023: a multicultural, vibrant society that has people from all sorts of different ethnicities that the courts see.

There is no intention to infringe upon fair trial rights. In fact, much of the solution-focused approach only applies if people plead guilty or if they are found guilty. However, there are parts of Te Ao Mārama that apply generally based on procedural fairness in the way that we deal with people. For example, Te Ao Mārama deliberately encourages the use of plain language in the court. While legal terms have their place, we often do not go further and actually explain in plain English what we



are talking about. So it can be quite a closed conversation when you use terms like “section 106” and do not say what that is.

Toning down the formalities in court, as long as it is done appropriately, is intended to increase engagement and strengthen inclusiveness. This is so people actually participate in proceedings that involve them. The real scope for all of this is going to be asking how tikanga operates in a Te Ao Mārama landscape.

I think it has two aspects to it. One is enabling processes. If Te Ao Mārama is a vision of the District Court being a community-connected court that engages participants in the process, then we must invite tikanga into the process. Especially if the providers of therapeutic services approach their task informed by a tikanga perspective. Then the processes that they should be adopting for the people that they are serving means that tikanga will have relevance. Not necessarily across the country and not necessarily for everyone, but most relevantly for people who are Māori.

In the District Court, tikanga has relevance in the development of the well-known jurisprudence when a case makes it through to the senior courts on appeal effectively. However, there are a growing number of District Court decisions that are developing an analysis of tikanga.

As I said earlier, we have tried to fill the education gap by producing a document on tikanga through the clerks in our office that I think will be of interest when it is published, not just with our bench, but also for the profession, and for the wider stakeholders of the District Court. The principles of Te Tiriti are also captured in the publication. It is designed to be referred to and used in practice.

If 30 May 2008 was the start date for the incorporation of tikanga and Te Reo Māori in the District Court, there is a bit of catching-up to do on our part. The relevant provisions in the Oranga Tamariki Act that include tikanga concepts and Treaty principles are required to be applied in an accurate and informed manner in cases in the Youth Court and Family Court.

In this publication, there is a summary of senior courts’ decisions outlining how they have dealt with tikanga concepts and Treaty principles. However, I think that the most interesting part of the paper from the District Court point of view is the outline of a collection of relevant cases that have actually been decided in the District Court, understanding what other District Court judges in our court have been doing as they have incorporated tikanga concepts in a substantive and legal manner.

For example, tikanga concepts are increasingly incorporated during sentencing under the Sentencing Act 2002.

There is plenty of room for development of the jurisprudence in the District Court, and no doubt the same applies for the senior courts. When appropriate cases are brought up to the senior courts, they will continue to build on and take the lead on all of this. However, it is helpful for one District Court judge in the South Island to know what a brother or sister judge in the North Island is up to when it comes to dealing with statutory provisions, treaty principles and tikanga concepts. Having it all in one publication will help.

### ***About the author***

**Judge Taumaunu** (*Ngāti Porou, Ngāti Konohi and Ngāi Tahu*) is the Chief District Court Judge of the District Court of New Zealand, Te Kōti-ā-Rohe o Aotearoa. Appointed in 2019, he was the first Māori to be appointed to the role and is a fluent Te Reo Māori speaker. Judge Taumaunu is regarded as a pioneer of the Ngā Kōti Rangatahi o Aotearoa, the Rangatahi Court. He has been a driving force in encouraging the District Court to embrace tikanga as a way to enhance Māori engagement and confidence in the court.

## Legislation, Regulations and Rules

Oranga Tamariki Act 1989

Sentencing Act 2002

Te Tiriti o Waitangi 1840

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# TIKANGA AS THE FIRST LAW OF NEW ZEALAND: AN IMPORTANT COGNITIVE SHIFT

## KO TE TIKANGA MĀORI TE TURE TUATAHI O AOTEAROA: HE ARONGA NEKEHANGA NUI

ACTING CHIEF JUDGE CAREN FOX\*  
Māori Land Court

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### Abstract

This article provides an overview of the history of the Māori Land Court, as well as present day developments of the Court. It considers the role that tikanga (Māori customary values and practices) plays in the Māori Land Court, and how the Court has applied tikanga in a number of contemporary judgments. It then considers the Waitangi Tribunal (a Commission of Inquiry which examines Crown breaches of its obligations to Māori), and how tikanga can be demonstrated in the process and the findings of the Tribunal. It discusses how both judicial bodies have approached the challenge of competing tikanga claims. Finally, the article poses ideas of how tikanga can be applied going forward.

**Keywords:** tikanga; Māori Land Court; Native Land Court; Waitangi Tribunal; indigenous law; cultural considerations.

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*Tēnā koutou, koutou e whakarongo mai nei—kei te mihi ki a koutou. Ahakoa he iti tēnei wāhanga, he mihi mahana rawa atu mai i te Tairāwhiti. (Translation—Greetings to those who are listening. Despite this small mihi, know that is very warmly given from the East Coast of New Zealand).*

### [A] INTRODUCTION

I wanted to start by acknowledging what Chief Judge Taumaunu has said. Namely, procedure is as important as the substantive law. This presentation builds on that theme by reviewing both the procedure and substantive law of the Māori Land Court and the Waitangi Tribunal.

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\* For full citations of cases and reports and all slides referred to in this article, see the appended PowerPoint presentation.

## [B] THE MĀORI LAND COURT

The modern Māori Land Court is a product of its history. It has been operative since 1865. In fact, it was initially established in 1862. But, it was revamped into what was the forerunner of the modern Māori Land Court—namely the Native Land Court—in 1865. So it is a very old, established institution of the New Zealand legal system.

The modern Māori Land Court (since 1993):

- ◇ is a court of record;
- ◇ is a creature of statute administered under Te Ture Whenua Māori Act 1993;
- ◇ is primarily a land title court; and
- ◇ has jurisdiction to deal with disputes concerning fisheries representation issues, Te Ao Māori and taonga tūturu cases, which are protected objects cases, family protection matters and a number of other jurisdictional issues.

Tikanga is bolstered by the fact that before judges are appointed, they must have knowledge of te reo Māori under Te Ture Whenua Māori Act 1993, section 7(2A).<sup>1</sup> Some of us are better at speaking Māori than others, but all the judges are competent enough to conduct their roles in te reo should they need to, or at least with the assistance of interpreters who can guide them through proceedings if need be. They are also competent in tikanga in the sense that they know enough about the law and about how tikanga has been analysed and implemented in the law, to do their jobs when it comes to dealing with tikanga in the courtroom. They must also be knowledgeable about the principles of the Treaty of Waitangi. They must have and bring that knowledge with them to the role of being a judge of the Māori Land Court.

They should also know the history of the Native Land Court. Emeritus Professor David Williams's book *Te Kooti Tango Whenua (The Land Taking Court)*, just in that title, captures the history of the old Native Land Court (Williams, 1999). That Land Court was, through the legislation that supported its operation, designed to individualize title, and thereby to facilitate alienation of land. It was a very effective tool in facilitating that outcome.

The modern Māori Land Court's purpose runs in the opposite direction. Under Te Ture Whenua Māori Act 1993 it must work with owners to retain what is left of the land, less than 6% of New Zealand's land base.

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<sup>1</sup> Slide 3 "Tikanga in the MLC".

*Figure 1: Maori Land Court hearing in Wairoa.*



*Figure 1: Maori Land Court hearing in Ruatoria.*



Today judges are assigned to the seven districts of the Māori Land Court. They are encouraged to familiarize themselves with the iwi (tribe), the hapū (sub-tribes), and the marae (gathering places) of the area.<sup>2</sup>

Under section 66 of Te Ture Whenua Māori Act 1993, a judge may apply to their hearings such rules of marae kawa as the judge considers appropriate and make any ruling on the use of te reo Māori during the hearing. They should also avoid unnecessary formality. That necessarily means that they allow a fair degree of interaction from people who are generally unrepresented. In practice judges will attempt to understand and follow the local tikanga and kawa of tangata whenua (local indigenous people) in all aspects of the ceremonial duties, and that is a matter that they have worked hard to do.<sup>3</sup>

<sup>2</sup> Ibid.

<sup>3</sup> Slide 4 “Procedure”.

Figures 1 and 2 are pictures I wanted to share with you because a picture paints a thousand words. They depict Māori Land Court hearings in Wairoa and Ruatoria.

During the hearings, the ceremonial formalities include beginning with karakia (prayers) and mihi whakatau (greetings). The use of te reo Māori is actively encouraged, and that can happen without warning, so the judges have to be prepared to respond to that. Judges also must have knowledge of the poroporoaki (farewell) process, and how to close proceedings at the end with karakia whakamutunga (final prayer).<sup>4</sup>

All of these aspects of our work are designed to make the process tika (right), a matter we have heard so much about today. We attempt to hear applications in the appropriate and respectful way, and we finish in a way that Māori people would want to see, namely to release all that is sacred or bad that has occurred during the hearing of an application(s), and we bring everybody back from that state so they are able to conduct their affairs in accordance with the notion of whakanoa (cause to be free of anything sacred) and whakaea (cause to be restored to balance).

At the end of last year, the first fully bilingual te reo Māori judgment of our court was issued. It has taken this long time to get to the position of being able to issue judgments in this way because the predominant language of the judges and the court has been English. This was a judgment of his Honour Judge Warren in *Pokere v Bodger—Ōuri 1A3* (2022). In this case the applicants' counsel submitted both written and oral submissions in te reo Māori. Prior to the substantive hearing a pūkenga was appointed under section 32A Te Ture Whenua Māori Act 1993, who assisted the judge in both hearing the matter bilingually and in producing this first bilingual judgment. This judgment represents a significant milestone in the development of the court because it means that we have almost reverted back to what the court was like in the initial years of its history, where nearly everybody spoke Māori in proceedings, including the judges.<sup>5</sup> It has taken this long to get back to what was a tika procedure for hearing matters. I want to come back to this case because it also has quite a lot to say about tikanga. But it is a more recent judgment and I want to demonstrate its place in our history.

The court receives an average of between 5000 to 6000 applications per annum. There has been a drop over the last year or two because of

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<sup>4</sup> Slide 5 “Karakia, Mihi whakatau, Kōrero Reo Māori Poroporoaki, Karakia whakamutunga”.

<sup>5</sup> Slide 6 “Te Reo Māori”.



Covid.<sup>6</sup> The number of applications that we have been processing has been steadily rising, yet our disposal rate has slowed. There have been a number of factors impacting on the accessibility to the court process and then to the disposal process, which I will not go into, but it has meant that there are many applications sitting in the system both before and after court, waiting for processing.

The applications tend to cover successions constituting management structures, governance issues, reviews of trusts, fencing issues, trespass and injury to land claims, actions for recovery of land, mortgagee issues, relief against forfeiture issues, actions for specific performance of leases, easements and covenants, Māori reservation issues and issues concerning significant cultural sites. So our work is really focused on land titles.<sup>7</sup>

The preamble to our statute and sections 2 and 17 guide the interpretation of Te Ture Whenua Māori Act 1993, and there are sufficient provisions to argue that tikanga applies both procedurally and substantively to all that we do. The preamble recognizes that the Treaty of Waitangi established the special relationship between Māori people and the Crown. It notes the exchange of kāwanatanga (governance) for the protection of the rangatiratanga embodied in the Treaty, and it recognizes that land is taonga tuku iho of special significance to Māori people, and it has been retained and utilized by the owners, their whānau and hapū. So, because of those directions given in the legislation, tikanga has been embedded since 1993 in various ways through procedure and through the substantive law.<sup>8</sup>

Section 4 of Te Ture Whenua Māori Act 1993, defines tikanga as meaning Māori customary values and practices. Those of you who are familiar with the Resource Management Act 1991 will know it is almost the same definition in that legislation. The Supreme Court has stated that such definitions are not to be read as excluding tikanga as law or that tikanga is not law; rather tikanga is a body of Māori custom and practice, part of which can be properly described as customary law. Thus tikanga as a law is a subset of the customary values and practices of Māori. That is taken from *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors* (2021: para 169), which for those of you who have been following developments in this field, you will be familiar with. This definition is really important, because it makes it clear that, when we are working with our legislation as judges, we must have regard to

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<sup>6</sup> Slide 7 “Nature of Applications”.

<sup>7</sup> Ibid.

<sup>8</sup> Slide 8 “Tikanga in Substantive Law”.

tikanga components that may affect the way we are generally applying the provisions of Te Ture Whenua Māori Act 1993.

Turning to tikanga in the substantive law, I wanted to deal with a number of cases concerning the application of tikanga. The first case is called *Gibbs v Te Rūnanga o Ngāti Tama—Part Lot 2 and Lot 1 DP 4866* (2011). It is a decision of Judge Harvey (now Justice Harvey). He was a judge of our court before he went to the High Court. In this decision, he discusses tikanga in relation to an application to establish a Māori reservation. The case involved the legal owners of general land, held by a general land trust, known as the Gibbs Family Trust. The beneficiaries of the Trust were the Gibbs family, and that included their children. Mrs Gibbs was Māori, and she affiliated to Tūhoe. The land involved in this case was 227 hectares of general land north of Taranaki, well outside the area of land normally associated with Tūhoe. Mr Gibbs was European. The children were obviously Māori because of Mrs Gibbs. Again, the affiliation to the land was non-existent because other than living on the land, there was no genealogical link to the land as their tribal affiliation was through their mother, who was Tūhoe. Justice Harvey denied this application on the following basis:

- 1 the size involved with the reservation;
- 2 the link needed to establish customary entitlements to the land, which was unavailable to the applicants in this case; and
- 3 the application had been opposed by Ngāti Tama of Taranaki. The Gibbs family were supported by some tangata whenua (people of the land).

Justice Harvey concluded that if you look at why reservations are created in the first place, what the purposes of them are, then the Gibbs family could not meet the criteria in the legislation. They could not demonstrate that all the purposes for which a reservation should be set aside had been addressed.

There is a really good discussion in that case of competing tangata whenua views over whether an application is supported, and then how the judge reconciled the competing assertion of mana whenua that came from the two different groups. I really recommend this judgment to those people who are grappling with these issues, as, although it is a decision out of the Māori Land Court, it does raise contestable tangata whenua evidence, analyses it and goes through the process of reasoning why an outcome is decided in favour of one party over another.

The next judgment is *Tautari v Mahanga—Mohini 3B2B* (2011). It is a decision of the late Judge Ambler who was one of our most competent judges in terms of the substantive law in our jurisdiction. In this case, he discusses tikanga in relation to an application for an occupation order. He analyses the importance of the mana of individuals who had leadership in a whānau (family), and how they guided their whānau. This involved decisions made concerning what should happen to land, the rangatiratanga (authority) of the people involved, their mana and ultimately the answer. The answer in this case was that the whānau had developed their tikanga for land allocation. Different parts of the land were granted to different branches of a large extended family. Those people who had direct lines of descent from each of those siblings that had divided the land were to stay and occupy within the areas of land that were allocated to their ancestor, rather than traverse into other areas of the land, and thereby unsettle the tikanga that was very much at the heart of this extended family. The decision is really useful for reminding all the participants that tikanga rights exist at the whānau level, it is ever evolving and dynamic, it has hard parameters. As Justice Whata said, you end up having to come to the point where tikanga is restricted in how it can be applied. Everybody knows its metres and bounds even if sometimes they come to court to argue the opposite. It is a really good judgment in that respect.

The third judgment is called *Mihinui—Maketu A100* (2007: 243). It is a Māori Appellate Court judgment that involved our former Chief Judge, two chief judges ago, now Sir Justice Joe Williams. His judgment is the dissenting judgment in this case. It is about the definition of the preferred class of alienee under our legislation. Only certain classes of alienees in our jurisdiction can be the recipients of land or receive land that is transferred, especially Māori land interests called shares. Section 4 of Te Ture Whenua Māori Act 1993 defines the preferred classes, and the only category that the applicants could have fallen into in this case were “whanaunga of the alienating owner who are associated in accordance with tikanga Māori with the land”. This is a decision about whether or not Te Arawa Lakes Trust could claim to be whanaunga (a relative or relation) of the alienating owner who was selling her shares to the Lakes Trust, and whether or not they could be said to be associated with the land in accordance with tikanga. It is a really fascinating discussion by Justice Harvey, Justice Joe Williams and Judge Savage (now retired). I really recommend it as a judgment that considers the role of tribal authorities *vis-à-vis* landholding hapū. It analyses whether or not, as a matter of

tikanga, the Trust, representing all of Te Arawa, could take shares that were centralized in one hapū territory. The hapū was Ngāti Whakaue.

Returning to the judgment of *Pokere v Bodger-Ōuri 1A3* (2022), this is a judgment by a judge who is very familiar with the substantive law that is coming out of the superior courts. In this case there was evidence about a house that was partly built by traditional means in 1938. It was not a marae. It was used for whānau purposes. It was a central hub where whānau gatherings occurred. It was argued that the ahu whenua (land-holding) trustees in this case had acted inconsistently with their duties as trustees, including that they had breached tikanga in choosing to make the decision to demolish the homestead. The line of the whānau who had recently been associated with the house objected to the decision and were arguing tikanga principles to prevent the demolition. Dr Ruakere Hond was appointed as a pūkenga under section 32A of the Te Ture Whenua Māori Act 1993 to assist with the case. As the pūkenga he was an active judicial officer, making decisions and writing parts of the judgment, including that part in te reo Māori on Taranaki kawa. That last section is not translated. Dr Hond took a very active role in determining the outcome of the proceedings.

This judgment takes quite a different structure from our previous judgments. It starts with a tikanga framework. It looks at what tikanga the parties said were relevant, it assesses that tikanga framework against the facts, and then it draws conclusions. It is an interesting judgment because it is innovative. I highly recommend it for people to review just to see how the judge and the pūkenga go through the reasoning process.

## [C] WAITANGI TRIBUNAL

Turning to the Waitangi Tribunal, we are on the cusp of 50 years since its establishment. There are 20 members of the Tribunal. Māori Land Court judges preside in the Waitangi Tribunal. It sits in panels of four to five members and a Māori Land Court judge. We have tikanga experts on the panels. People are appointed because of their knowledge and experience of different aspects of matters likely to come before the Tribunal and tikanga is one of those aspects.

The Waitangi Tribunal currently has 3263 registered claims before it. Of those claims, around 1086 have been settled by legislation. There are 2177 claims that have yet to be heard or have been heard but not settled or are contemporary thematic claims, which are part of the kaupapa inquiry program. This is all important background because there are big

changes that are happening in the Tribunal which we wish to share with you.<sup>9</sup>

Currently, there are two district inquiries that have largely been completed and are in the report-writing phase. These are Taihape ki Rangitikei ki Rangipō (Wai 2180) and Te Paparahi o te Raki (Wai 1040). Those reports should be out in the next year or two. Then there are three district inquiries in active hearings. These are North Eastern Bay of Plenty (Wai 1750) with Judge Doogan as the presiding officer; Muriwhenua Land (Wai 45), with Judge Wainwright presiding; and Porirua ki Manawatū (Wai 2200). With respect to the last one, I am the presiding officer and we have already issued reports for two of the tribes in the district, and there is only one tribe to hear from. We will produce their report on iconic issues and then a very short generic issues report. The point is that nearly all historical inquiries are complete.<sup>10</sup>

The kaupapa inquiry program commenced several years ago. These are claims that raise issues that affect Māori generally. The kaupapa inquiries that are under way are:

- ◇ The Military Veterans Claim (Wai 2500);
- ◇ The Health Services and Outcomes Inquiry (Wai 2575);
- ◇ The Mana Wāhine Inquiry (Wai 2700);
- ◇ The Housing Policy and Services Inquiry (Wai 2750);
- ◇ The Marine and Coastal Area Act Inquiry (Wai 2660);
- ◇ Te Rau o te Tika—the Justice Inquiry (Wai 3060); and
- ◇ The Constitutional Inquiry (Wai 3300).

Thus seven out of 13 kaupapa inquiries are underway.

Those who are appointed as Waitangi Tribunal members and who have tikanga expertise assist the inquiry program. For the 2023-2024 year there will be 189 events. Of these 110 will be hearing days, 21 will be judicial conferences and 58 are panel hui. There will also be three to four wānanga over and above the 189 days. So the program for 2023 to 2024 is busy. It is a program that depends on the tikanga experts to support the many activities that are taking place. There are at least 10 members who fit into this category. They really work hard at providing support for their Waitangi Tribunal panels.<sup>11</sup>

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<sup>9</sup> Slide 14 “Waitangi Tribunal: Nature of Claims”.

<sup>10</sup> Ibid.

<sup>11</sup> Slide 17 “Work Programme 2023-2024”.

Venues for Waitangi Tribunal hearings are dominated by the cultural motif of being Māori, whether they are in Māori venues like marae or they are in neutral venues which are taken over by the claimants and made very Māori during the proceedings. This is again another reason why tikanga is really important in our procedure because, as the *Wairarapa Moana ki Pouakani Inc v Mercury NZ Ltd* (2022: paras 86-87) decision of the Supreme Court makes clear, the Tribunal has to get its processes tika (right) in order to make sure that the outcome substantively is correct and tika in tikanga terms.<sup>12</sup>

That decision is also important, as you will know, because it dealt with the issue of mana whenua. In summary, the High Court's decision was criticized because not enough consideration was given to other tikanga values and principles that were relevant in the weighing-up of the issues. In the context *Wairarapa Moana* (2022: paras 86-87) facts, the principles of hara, utu, ea and mana should have been given due weight as was done in the Waitangi Tribunal. The matter was returned to the Waitangi Tribunal for completion of its hearing. The Government moved to settle the claims by legislating, but that is neither here nor there (*Wairarapa Moana* 2022: paras 76-77). What the judgment does is that it sends a direction to the Waitangi Tribunal about how it may analyse tikanga principles in its work.

There are many challenges that the Waitangi Tribunal is facing in its work. There is, for example, a perception that the Waitangi Tribunal's historical (district inquiry) claims process is too legalistic. Those who have been to a district inquiry hearing would know that they are dominated by lawyers. The judges are very instrumental in deciding procedure. Researchers have dominated the research process and claimant evidence is used to supplement their reports and those of other experts. It is not a process that puts claimants front and centre. So, that has caused its own problems with the way claimants engage in the hearing process. Then there is a perception that the Waitangi Tribunal is unable to produce timely reports. Notably the process is one that can be flexible. The Tribunal can set its own process as *Wairarapa Moana* (2022) noted as per schedule 2 of the Treaty of Waitangi Act 1975, which governs our procedures.

The seven kaupapa inquiries are an opportunity for innovation. So what you are seeing at the moment are the appointment of pou tikanga and reo. These pou are appointed to assist Tribunal panels in developing new procedures with claimants that are tikanga and/or reo-centred.<sup>13</sup>

<sup>12</sup> Slide 20 "*Wairarapa Moana ki Pouakani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [86] – [87]".

<sup>13</sup> Slide 22 "Issues".



The Kura Kaupapa Inquiry is an example of this procedure. It will hear and report in te reo Māori on all issues raised before it. We are watching that inquiry with interest to see how the process works out. I noted while viewing the live stream that the claimants were actively engaged in determining the procedure as well as the production of evidence. It was very interesting to see how the power dynamic had changed, how the lawyers were all behind the claimants, and how the claimants were very engaged with the Waitangi Tribunal members. We will see whether that has been a successful way of dealing with some of the perceptions that currently plague the Waitangi Tribunal.

We also have developed this idea of staged reporting. The Kaupapa hearings have also introduced the tūāpapa or foundational hearings that facilitate staged reporting. This assists both the claimants and the Crown to address issues that have some degree of priority with some timely reporting. In this way the parties can actively do something about any of the issues the Waitangi Tribunal identifies in its recommendations.

Looking to the future, the Standing Claims Panel is being deployed into areas not under district inquiry. It will deal with any claim that for some reason did not get captured by treaty settlement legislation. There are many of them that still have to be tidied up. That is ongoing stick-to-our-knitting work.

We also need to review the relevance of the Waitangi Tribunal beyond the completion of historical claims and the kaupapa inquiries. We are continuously evaluating that because the timeframes keep changing.

I want to investigate whether the tikanga expert members of the Waitangi Tribunal should be recognized as a unit now in their own right. That is because of the dependency that we have on them as the experts in tikanga. Their assistance to the tribunal is significant. They should be more actively engaged with mediation. The Tribunal's power to order mediation will be used more to encourage their involvement.

In terms of reports and the substantive law. All reports deal with tikanga matters in one shape or form. But those presented below are some of my favourites, namely:<sup>14</sup>

- 1 Waitangi Tribunal (2011), *Ko Aotearoa tēnei: Report*—Justice Joe Williams's report on law and policy affecting Māori culture and identity.

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<sup>14</sup> Slide 23 "Reports that have tikanga components".

- 2 Waitangi Tribunal (2008), *He Maunga Rongo—Report on Central North Island Claims*.
- 3 Waitangi Tribunal (1988), *Muriwhenua Fishing Report*—this report has one of the best succinct summaries of a tribal fisheries system that I have ever read and I really recommend it.
- 4 Waitangi Tribunal (2018), *Te Mana Whatu Ahuru—Report on Te Rohe Pōtae Claims*—we had Ta Hirini Mead and Ta Pou Temara on that panel for that inquiry. The tikanga discussion in that report is very significant.
- 5 Waitangi Tribunal (2014), *He Whakaputanga me te Tiriti—The Declaration and the Treaty Report on Stage 1 of the Te Paparahi o Te Raki*, and Waitangi Tribunal (2022), *He Whakaputanga me te Tiriti—The Declaration and the Treaty Report on Stage 2 of the Te Paparahi o Te Raki*. The Te Paparahi o Te Raki panel reports consider the constitutional and jural issues.

In response to the question about whether regional variations in tikanga cause issues for our work, I do not think they do. Once you are aware of the history and the nature of the tribes and their settlement patterns and the knowledge of how each became neighbours to each other you soon start to work out very quickly, why they might be either supportive of each other or in oppositional terms in any litigation that is before you. Waitangi Tribunal reports can assist your learning in this regard.

So, respectfully dealing with each side's story is how the Waitangi Tribunal has managed overlapping claims issues. Because the Waitangi Tribunal's jurisdiction does not require firm decisions about mana whenua, we tend to talk about spheres of influence. So we do not demarcate boundaries or say that groups on this side of a boundary belong here and groups on that side belong there, unless determining boundaries is important to the claim, and the Motiti Island Inquiry was one where it was. There are occasional exceptions. However, most of the reports do not have to determine the issue. Rather they acknowledge peoples' mana whenua or claim to mana whenua. They talk about peoples' tikanga as being their tikanga, their kōrero, what they say, because they are not really that important to the jurisdictional issues before the Waitangi Tribunal. You can very quickly work out, with the help of pūkenga, or through authoritative texts, or your own general knowledge, how to deal with competing tikanga claims.

In the Māori Land Court, judgments can be more definitive.

I end by recommending Justice Whata's methodology as a way that a lawyer should approach trying to get a case ready for judges that work in this space.

### **About the author**

**Acting Chief Judge Caren Fox** was appointed to the Māori Land Court on 1 October 2000 and was later appointed as Deputy Chief Judge on 20 February 2010, and Acting Chief Judge on 1 May 2023. She is one of the resident judges for the Tairāwhiti District of the Māori Land Court, hearing cases in Gisborne. Acting Chief Judge Fox has also sat as the presiding officer for the Waitangi Tribunal on inquiries into claims in the Central North Island, Te Rohe Pōtae and Porirua ki Manawatū regions, as well as numerous urgent inquiries into specific Treaty of Waitangi claims. She was also appointed as an Alternate Environment Court Judge in 2009.

Before becoming a Judge, Acting Chief Judge Fox was a Lecturer in law at Victoria University and a Senior Lecturer in law and Director of Graduate Studies at the University of Waikato. In addition, she acted as legal counsel for Treaty claimants and Māori land clients. A specialist in international human rights, Acting Chief Judge Fox was a Harkness Fellow to the USA from 1991 to 1992 and a Pacific Fellow in Human Rights Education employed by the Commonwealth Fund for Technical Co-operation 1997-1999. For her work in human rights she won the NZ Human Rights Commission 2000 Millennium Medal. In March 2023 Judge Fox received her PhD at Te Whare Wānanga o Awanuiārangi for her thesis "*Ko te mana te utu: Narratives of sovereignty, law, and tribal citizenship in the Pōtikirua ki te Toka-a-Taiau District*".

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## Cases

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*Mihinui—Maketu A100* (2007) 11 Waiariki Appellate MB 243 (11 AP 243)

*Pokere v Bodger and Others—Ōuri 1A3* (2023) 466 Aotea MB 120 (466 AOT 120)

*Tautari v Mahanga—Mohini 3B2B* (2011) 18 Taitokerau MB 6 (18 TTK 6)

*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors* [2021] NZSC 127 [169]

## Legislation, Regulations and Rules

Resource Management Act 1991 (NZ)

Te Ture Whenua Māori Act 1993 (NZ)

Treaty of Waitangi 1840

Treaty of Waitangi Act 1975

# Tikanga in the Māori Land Court and the Waitangi Tribunal

Deputy Chief Judge Caren Fox

Acting Chief Judge

# The Māori Peoples' Court

- It is a product of its history (1865-2009)
- It is a court of record
- It is a creature of statute administered under the Te Ture Whenua Māori Act 1993 (TTWM)
- It is primarily a land title court
- It also has jurisdiction to deal with disputes concerning fisheries, representation, taonga tuturu & family protection



# Tikanga in the MLC

- Judges must have knowledge of te reo, tikanga and the Treaty of Waitangi before they are appointed as per s 7(2A) of TTWM Act 1993.
- They should also have knowledge of the history of the Native Land Court and experience in the modern Māori Land Court.
- Where sitting in a Court district, judges are encouraged to familiarise themselves with that district, the iwi, hapū and marae of the area.

# Procedure

- In terms of procedure, s 66 of Te Ture Whenua Māori Act 1993 allows any judge to apply to the hearing such rules of marae kawa as the Judge considers appropriate and make any ruling on the use of te reo Māori during the hearing. They should also avoid unnecessary formality.
- In practice judges will attempt to understand and follow the local tikanga and kawa of the tangata whenua in all aspects of their ceremonial duties.

# Karakia, Mihi Whakatau, Kōrero Reo Māori Poroporoaki, karakia whakamutunga



# Te Reo Māori

- In *Pokere v Bodger – Ōuri 1A3* (2022) 459 Aotea MB 210, applicant counsel submitted both written and oral submissions in te reo Māori. Prior to the substantive hearing, a **pūkenga** was appointed under s 32A who assisted the judge in both hearing the matter bilingually, and in producing the first MLC bilingual judgment.

# Nature of Applications

- The Court receives on average between 5-6000 applications per annum and these are heard in court houses, on marae or in other appropriate venues.
- Process is one where the applicant should be treated as manuhiri subject to our manaakitanga until the end of process.
- Cover successions, constituting management structures, governance (particularly trust) reviews, fencing issues, trespass and injury to land claims, actions for recovery of land, mortgagee issues, relief against forfeiture, actions for specific performance of leases, easements and covenants, **Māori** reservation issues and significant cultural sites

# Tikanga in Substantive Law

- Preamble, ss 2 & 17 guide the interpretation of TTWM 1993. There is sufficient evidence to argue tikanga applies both procedurally and substantively to all we do.
- The Preamble recognises the Treaty of Waitangi established the special relationship between the Māori people and the Crown: It notes that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed. It recognises that land is a taonga tuku iho of special significance to Māori people, to be retained and utilised by the owners, their whānau and hapū.



# Tikanga

- S 4 of TTWM 1993 defines tikanga as meaning Māori customary values and practices
- The Supreme Court has stated that such definitions are not to be read as excluding tikanga as law or that tikanga is not law. Rather tikanga is “a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices ...” *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board & Ors* [2021] NZSC 127 at [169].

# MLC Tikanga Cases – Numerous

- *Gibbs v Te Rūnanga o Ngati Tama - Part Lot 2 and Lot 1 DP 4866* (TNK 4901) (2011) 274 Aotea MB 470 (274 AOT 470) – Discusses tikanga in relation to an application to establish a Māori reservation.
- *Tautari v Mahanga – Mohinui 3B2B* (2011) 18 Taitokerau MB 6 (18 TTK 6) – Discusses tikanga in relation to an application for an occupation order.
- *Mihinui – Maketu A100* (2007) 11 Waiariki Appellate MB 243 (11 AP 243) – concerns the Preferred Class of Alienee question, turning on whether the Te Arawa Lakes Trust can be said to be associated with the land in accordance with tikanga.

# Contested tikanga issues

- *Doney v Adlam* [2023] NZHC 363 (HC) Harvey J. Case concerned *inter-alia* leave to issue enforcement proceedings against Adlam. A judgment was issued by the Māori Land Court in 2014 where Mrs Adlam was ordered to repay various amounts totalling approximately \$15 million to a land trust. She had paid just over \$4 million. The trustees were seeking enforcement of the outstanding judgment debt including by the sale of two of her properties.
- Adlam raised mana, whakapapa, whanautanga, turangawaewae to argue against enforcement. The applicants contested the meanings ascribed to those terms by Adlam, and relied on tino rangatiratanga, kaitiakitanga, muru, hara and utu. There were no independent tikanga experts but Harvey J used various authorities to inform his judgment in favour of the applicants.

# WAITANGI TRIBUNAL – on the cusp of 2025 (50 years)





# Presiding Officers & Members

- There are 20 members of the WT. The WT sits in panels.
- Presiding officers are MLC judges or barristers & solicitors of the High Court with 7 or more years standing. (See Schedule 2, Cl 5)
- Under s 4 of the Treaty of Waitangi Act 1975, and in considering the suitability of persons for appointment to the WT, the Minister of Māori Development has regard to the partnership between the 2 parties to the Treaty; and must have regard not only to a **person's** personal attributes but also to a **person's** knowledge of and experience in the different aspects of matters likely to come before the Tribunal. Tikanga is one of those matters.

# WAITANGI TRIBUNAL

## Nature of Claims

- The Tribunal currently has 3263 registered claims. Of those claims, around 1086 claims have been settled by legislation
- There are 2,177 claims that have yet to be heard, have been heard but not settled or are contemporary claims and part of the kaupapa inquiry programme.
- There are two district inquiries that have largely been completed and are in report writing stage: Te Paparahi o te Raki Inquiry (Wai 1040) and Taihape ki Rangitikei Inquiry (Wai 2180); and
- The three district inquiries in active hearings: are North Eastern Bay of Plenty Inquiry (1750), Muriwhenua Land (Wai 45) and Porirua ki **Manawatū** (2200).



# 7 KAUPAPA INQUIRIES

- 1. The Military Veterans (Wai 2500);
- 2. The Health Services and Outcomes Inquiry (Wai 2575);
- 3. The Mana Wāhine Inquiry (Wai 2700);
- 4. Housing Policy and Services Inquiry (Wai 2750);
- 5. Marine and Coastal Area (Takutai Moana) Act Inquiry (Wai 2660);
- 6. Te Rau o te Tika: the Justice System Inquiry (Wai 3060); and
- 7. The Constitutional Inquiry (Wai 3300).

# 4 Urgencies & Priority Inquiries

- Urgency: the Kura Kaupapa Inquiry (Wai 1718);
- Priority Inquiry: National Freshwater and Geothermal Resources (Stage Three) (Wai 2358);
- Remedy: the Mangatū Remedies Inquiry (Wai 814/1489); and
- Remaining Historical Claims: The Standing Panel Inquiry (Wai 2800).

# Work Programme 2023-2024

- It is expected there will be a total of 189 event days. Of these 110 are hearing days, 21 are judicial conferences, 3-4 are wānanga and 58 are panel hui.
- Inquires that will be progressed are the:
  - Remaining historical inquiries.
  - 7 Kaupapa inquiries.
  - Remaining urgencies/priority matters
  - Standing claims

# Venues for hearings



# Tikanga in the WT

- WT Panels include members that have the following skills:
- Te reo **Māori**, Kawa and tikanga, Karanga, **Whaikōrero**, Waiata, Karakia, Mihi Whakatau, Knowledge of iwi and **hapū** history, Whakawatea skills, Poroporoaki skills



*Wairarapa Moana ki Pouakani Inc. v Mercury NZ Ltd* [2022] NZSC 142 at [86] - [87].

- WT understands that tikanga is as much about right or tika processes and it is about tika outcomes and *whaka-ea* is best achieved through tika processes – [86]
- The WT may regulate its procedure “as it sees fit” and may have regard to and adopt such aspects of “te kawa o te marae” as it thinks appropriate to the case – at [87] & Sch 2 cl 5 (9)



# Tikanga *Wairarapa Moana [76]-[77]*

- Mana whenua need not be the controlling tikanga because other tikanga principles were also in play.
- These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.

# Issues

- Perception that WT historical process is too legalistic
- Reality that it is research bound - perception that lawyers and historians holding the process to ransom
- Perception that WT is unable to produce timely reports
- WT process is flexible, can provide purpose built inquiries See Schedule 2
- 7 Kaupapa Inquires chance for innovation
- Appointment of Pou tikanga/reo to develop new procedures with claimants that are tikanga or reo centred. Kura Kaupapa urgency will hear and report in te reo.
- Use of wānanga –cf. formal JCs
- More directed mediation
- Tuapapa hearings with staged reporting

# Reports that have tikanga components

- All reports and my favourites are:
- Waitangi Tribunal (2011). *o Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Wai 262.
- Waitangi Tribunal. (2008). *He Maunga Rongo – Report on Central North Island Claims*, Wai 1200, Legislation Direct
- Waitangi Tribunal. (1988). *Muriwhenua fishing report*, Wai 22. Government Printer.
- Waitangi Tribunal. (2018). *Te Mana Whatu Ahuru - Report on Te Rohe Pōtae claims*, Wai 898 Prepublication version.

# Future Directions from 2025 and beyond

- Standing claims panel deployed in areas not under district inquiry
- Review relevance of WT beyond completion of historical claims and Kaupapa inquiries - focus on mediation
- Have a tikanga unit within the WT to optimally use WT membership expertise.
- Tikanga Unit to assist Crown and **Māori** where the Treaty relationship breaks down. This to be done through improved mediation, **wānanga** or other tikanga based procedures with adjudication as a default

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## TIKANGA AND THE LAW WĀNANGA: TIKANGA IN ENVIRONMENTAL JURISDICTION

JUDGE MICHAEL DOOGAN  
Māori Land Court

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### Abstract

Tikanga Māori is increasingly influencing the law of New Zealand, in every jurisdiction. The Environment Court is becoming more concerned with issues which necessitate knowledge of different tikanga Māori, matauranga Māori and Te Reo Māori. The following is a discussion on how tikanga affects the incorporation of Treaty of Waitangi and Māori concepts in the Resource Management Act 1991. It then moves to how and to what extent the Environment Court can consider relational and mana whenua issues. And lastly, Judge Doogan gives insights from a Māori Land Court, Waitangi Tribunal and Environment Court judge for practitioners on understanding tikanga issues and working with Māori collectives.

**Keywords:** Environment Court; Māori Land Court; Waitangi Tribunal; Resource Management Act 1991; *Lex Aotearoa*; Te Reo; tikanga; mātauranga; mana whenua; procedure; advocacy.

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*Tuatahi, e tautoko ana ahau i te mihi kua mihia mai i te timata o tēnei hui, tēnā koe Coral. Aku tuakana o te ture tēnā koutou, ka mihi hoki ki a koutou kua huihui mai nei, e tae atu hoki ki ngā karangatanga maha o te ture ki te huitopa tēnā tatou katoa.*

*Kia ora koutou for all your kaha to still be here. I support the mihi to Mai Chen and the New Zealand Asian Lawyers for this opportunity. Thank you, Takeshi Ito, Vice President Legal and Company Secretary of Millennium and Copthorne Hotels NZ Ltd and Secretary of NZ Asian Lawyers, for that introduction. I do have a slide presentation.*

*I am not speaking on behalf of the Māori Land Court, the Waitangi Tribunal or the Environment Court.*

## [A] INTRODUCTION

As the earlier speakers made clear, there is turbulence going on in the way tikanga is being integrated into all the jurisdictions that you have heard from today.

Mai Chen gave me three helpful questions.<sup>1</sup> The first was how tikanga, as the first law of Aotearoa New Zealand, affects the express incorporation of Treaty and Māori concepts in the Resource Management Act 1991 (the Act), with a particular focus on the Part 2 provisions. The second question was regarding the extent of the Environment Court jurisdiction regarding relational or mana whenua issues, and Acting Chief Judge Fox has just discussed this. Last was suggestions that may assist counsel to advocate well in relation to tikanga issues in the Environment Court. I am going to focus on the last two questions.

## [B] “LEX AOTEROA”

Justice Williams has today already touched upon the “Lex Aotearoa” concept of the first law, an idea that I think came originally from Ani Mikaere.<sup>2</sup>

Justice Williams’ lecture *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law* is well worth a read in its entirety (Williams 2013). It provides an understanding of the first and second laws of Aotearoa New Zealand. I am going to skip through the first and second layers and focus on the third law.<sup>3</sup>

The third law is predicated on perpetuating tikanga in a way intended to be permanent and, within the broad confines of the *status quo*, transformative. At the end of that lecture Justice Williams makes the very important point, that: “In fact all three layers are still alive and interacting organically” (Williams 2013: 32). It is the interaction of these layers that gives rise to the dynamics that the courts deal with and you, as practitioners, will encounter. If you can understand it in big-picture terms I think you will get some insight, at least, into why parties may take the position they do at certain points. I am going to develop that a bit more when I come to this third question.

I would recommend the forthcoming paper that Whata J and the Law Commission are developing. We have had the benefit of some discussions

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<sup>1</sup> Slide 1 “Three topics”.

<sup>2</sup> Slide 2 “Tikanga as the first law in Aotearoa”.

<sup>3</sup> Slides 3-7 “Tikanga as the first law in Aotearoa”.



as a bench with Whata J and his team, and you have had a brief snapshot today. The work that the team are doing to bring together a conceptual framework will be of immense value to practitioners and to judges. I also want to acknowledge my colleague, Judge Sheena Tepania, who is with me today to tautoko.<sup>4</sup>

Tikanga comes to the court through statutory doors and windows. The *Ngāti Maru Trust v Ngāti Whātua Ōrākei* (2020) provides a very clear and helpful articulation of the boundaries of the court's jurisdiction when it comes to the section 61 relational or mana whenua issues.

The slides set out the statutory scheme of the Resource Management Act 1991 and the relevant provisions concerning tikanga and Te Tiriti ō Waitangi.<sup>5</sup> There is a hierarchy of obligation. At the high end, there is the requirement to “recognise and provide for” (section 6), then to have “particular regard to” (section 7) and finally to “take into account” the principles of the Treaty (section 8). Kaitiakitanga in the Act is defined as “the exercise of guardianship by tangata whenua of an area, in accordance with tikanga Māori”. There are intersecting definitions between tangata whenua and mana whenua, which locate the emphasis on collective customary interests and authority, held at the iwi and hapū level.

First this tension between the second and third law, I know other speakers have already touched on today. As Natalie Coates said: “Should Māori attempt to carve out a small space within the whare of the state legal system if the whenua and foundations upon which it is built are defective?” (Coates 2017: 54)<sup>6</sup> The ongoing question Whata J touched on was concerning the space for rangatiratanga to operate. I have included a little whakataukī here: “*Kei whawhati noa mai te rau o te rātā—Do not pluck the blossoms off the rātā tree, some things are perfect just the way they are.*” That is there as a note of caution. Our legal training leads us to become rather impatient for answers, and you develop ways of thinking and skills designed to try and assist you to quickly isolate, prioritize and advocate on a fairly selective use of information.

In this space, particularly at this time of transformation, there is a real question for practitioners and judges which we need to keep at the forefront: how far do we need to go in terms of the engagement with tikanga? I will try and highlight where I think the guardrails might be.

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<sup>4</sup> “Tautoko” can mean to support, assist, or to give encouragement.

<sup>5</sup> Slide 8 “Statutory Scheme–Resource Management Act 1991 relevant provisions” and Slide 12 “Statutory scheme”.

<sup>6</sup> Slide 13 “Some ongoing tensions between second and third law to be aware of” and Slide 14 “Nature of the Treaty relationship”.

I have highlighted three extracts from various Waitangi Tribunal reports which touch on this tension. First, from *He Whakaputanga me te Tiriti*:

Rangatira did not cede authority to make or enforce law over their people and within their territories. They agreed to share power and authority with the Governor, with whom they were to be equal though with different roles and different spheres of influence (2014, 526-527).

Second, from the *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*:

The Treaty guaranteed to Māori their Tino Rangatiratanga was at a minimum the right to self-determination and autonomy ... that included the right to work through their own institutions of governance and apply their own tikanga and system of customary laws (2018, 158-169).

Thirdly, from *He Pāharakeke He Rito Whakakikinga Whāruarua Oranga Tamariki Inquiry*, noting the contemporary facts that, from a Treaty of Waitangi or Te Tiriti o Waitangi analysis, concern the statistics in the care and protection space, and Chief District Court Judge Taumaunu's address about other statistics in the criminal justice sphere, the Tribunal's conclusion was that:

The Crown has intruded in harmful ways into the areas the Treaty guaranteed to Māori. "... Māori must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over kainga." (2021, 183-184).

I highlight these passages to shine a light on ongoing issues which are in part legal, and part political. The resolution of some of these matters, and what a truly contemporary Treaty-consistent Aotearoa New Zealand might look like, is the big issue of the day. For lawyers and judges there is a need to at least have an understanding of that wider context in order to navigate the appropriate space for whatever our legal role may be.

## [C] THE ENVIRONMENT COURT AND MANA WHENUA ISSUES

Coming to the second question Mai Chen posed around the extent of the Environment Court jurisdiction in relation to mana whenua issues. Whata J's decision in the *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* (2020: para 133) case is a really helpful and clear statement of the boundaries. This particular decision came from an appeal on a case that I was sitting on with his Honour Environment Judge Newhook and Environment Commissioner Paine, and has been referred back to our

court. I am still sitting, and the matter is adjourned while the other *Ngāti Whātua* litigation goes through the higher courts.

I want to note the clarity of guidance that the High Court has given. I highlight in the slides that: “The Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties” (*Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* 2020: para 68).<sup>7</sup> Where iwi claim that a particular outcome is required to meet those directions according to tikanga Māori, the resource management decision-makers must meaningfully respond to that claim, including when different iwi make divergent tikanga-based claims.

This may involve evidential findings in respect of the applicable tikanga, and to hold otherwise would be to deprive the provisions of their meaning and effect.<sup>8</sup>

Whata J also noted the need for caution and cited the Tribunal’s decision on the *Tamaki Makaurau Settlement Process Report* from 2007 (*Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* 2020: [72]). The central point there being that in tikanga terms, “Where there are layers of interests in a site, all are valid” (*Tamaki Makaurau Settlement Process Report* 2007, 97). It is not appropriate for the Te Arawhitito try to recognize the interest of just one iwi in an iconic site such as a Maunga.<sup>9</sup>

I also highlighted *Ngāi Te Hāpu Inc v Bay of Plenty Regional Council* (2017) and the *Motiti* report (Waitangi Tribunal 2023) as examples of forensic examination of competing mana whenua claims and how the Environmental Court and the Waitangi Tribunal went about weighing, considering and coming to a decision where they were required to decide on a contested mana whenua issue. From *Ngāti Hokopū Ki Hokowhitu v Whakatane District Council* (2002) which, quite some time ago, set out a very helpful set of metrics for approaching these relational claims, I simply summarize the points in the slide.<sup>10</sup>

In *Director General of Conservation v Te Runanga o Ngāti Tama Trust & Ors* (2019), or the *Mt Messenger* case, a Public Authority, Waka Kotahi, with compulsory acquisition powers wished to acquire land returned to Māori under Treaty settlement. Secondly, non-Māori asserted tangata whenua status. Thirdly, Māori with whakapapa to a different area asserted

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<sup>7</sup> Slide 15 “Environment Court jurisdiction regarding relational or mana whenua issues”.

<sup>8</sup> Slide 16 “And further”.

<sup>9</sup> Slide 17 “But note need for caution in these types of assessments”.

<sup>10</sup> Slide 18 “Some metrics for the exercise of the jurisdiction to consider relational claims”.

tangata whenua status. There was an internal conflict within the iwi that does unquestionably hold mana whenua status. Then a couple of things arise from the evidence and the role of counsel in the case.<sup>11</sup>

I want to start with a submission of counsel for Ngāti Tama that the court approved. The case was appealed. The High Court has upheld the decision of the Environment Court and leave to appeal has been declined:

Tangata whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council noted, these rights are “strong directions to be borne in mind at every stage of the decision-making”. These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of Māori. It is therefore extremely important that such rights are reserved to tangata whenua/mana whenua alone. Extending such rights to non tangata whenua/mana whenua interests is inconsistent with the RMA and diminishes both the value and meaning of such rights, and the mana of the iwi or hāpu that holds mana whenua (*Mt Messenger* case 2019: para 338).

That was a submission and a finding that the court made based on the particular facts of the case. Context is everything. In terms of the observation that Williams J made at the start of this wānanga, in relation to the application of tikanga to non-Māori, notwithstanding the jurisprudence in *Ellis v R* (2022) and in other cases, there are still circumstances where it is quite critical to understand and apply the use of statutory terms, such as “tangata whenua” and “mana whenua”, in a way that keeps fidelity to the origin of the term or principle. There is a lot of discussion in this case and other cases related to it about the centrality of whakapapa to the land. The case that Acting Chief Judge Fox cited from his Honour Justice Harvey in *Gibbs v Te Runanga o Ngāti Tama* (2011) is a precursor to some of the very same facts in this case. It is the whānau, the Gibbs whānau, who were claiming tangata whenua status. The Environment Court relied on, in part, Judge Harvey’s decision in *Gibbs v Te Runanga o Ngāti Tama* (2011).<sup>12</sup>

Some observations about the *Mt Messenger* case.<sup>13</sup> First, the early recognition by Waka Kotahi that it would not be right, in principle, to try to acquire land returned to an iwi in its Treaty settlement by using the compulsory acquisition powers. Not so long ago that probably would not have even been a question. But to their credit and to the credit of the advisors of Waka Kotahi, and I acknowledge again Buddle Findlay,

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<sup>11</sup> Slide 19 “An example: *Mt Messenger* case” and Slide 20 “The Court cited with approval the following submission of Ngāti Tama”.

<sup>12</sup> And see also *Poutama Kaitiaki Charitable Trust v Heritage* (2021).

<sup>13</sup> Slide 21 “Some observations”.

who very early on Waka Kotahi took that principled position. They also appointed an external consultant who had expertise in Treaty negotiations to guide their process of engagement with Ngāti Tama. By the time it came to the court, they had a very sophisticated amount of evidence to demonstrate how they had engaged with not only Ngāti Tama, but the neighbouring iwi Ngāti Maniapoto, Ngāti Mutunga, and the Poutama group that was claiming status. They also made it quite clear to the court that unless they could get the agreement of the iwi, they would have to go to an alternative route. The route chosen was the best on all the scientific and technical evidence according to Waka Kotahi, but if they could not get agreement from Ngāti Tama they would go back to one or other of the less preferred alternative options. That was a very important step.

Secondly in terms of the findings, Ngāti Tama has mana whenua over the project and importantly that was recognized by both Ngāti Maniapoto and Ngāti Mutunga. There was evidence to that effect. The only challenge came from the Poutama Collective.

Neighbouring landowners also affected by the proposal (the Pascoes) were not kaitiaki in the sense that the word “kaitiakitanga” is used in the Act. The relationship there was one of stewardship. In that case, Mrs Pascoe had lived on the land for about 30 years and had some whakapapa that she had only just become aware of to a hapū to the south, but outside the project area. But on the facts, the Pascoes were not able to demonstrate the kind of link that would displace the mana whenua of Ngāti Tama. And then the finding was that the collective Poutama are not exercising mana whenua over the project area.

## [D] ADVOCACY AND TIKANGA

So the last area, and a really big topic, is how to advocate well on tikanga and the law.<sup>14</sup> The phrase Williams J uses in *Lex Aotearoa* to describe the third phase is essentially a process of integrating tikanga in order to perpetuate it (2013, 32-3). He distinguishes that concept from “separate to survive”, which is the Canadian or American reservation type model.

Respectfully, while I think that it is accurate to say there is a process of integration, in order to perpetuate and accord tikanga its rightful place in our legal framework and in everything we do, I still see the issues evolving in a way that will require some form of reconciliation about how the Treaty guarantee of tino rangatiratanga is appropriately recognized and provided for within that overall framework.

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<sup>14</sup> Slide 22 “How to advocate well on tikanga and the law”.

When tikanga comes to the Environment Court, the court must hear evidence grounded and defined in terms of tikanga Māori and mātauranga Māori, in order to make the best decisions. The best evidence of tikanga Māori and mātauranga Māori will of course be in Te Reo Māori. That is in response to the earlier question on whether you need to have Te Reo Māori to understand tikanga Māori. The immediate answer is yes, because that is how it is expressed and how it is held.<sup>15</sup>

The task of the courts and the task of practitioners, if we are not fluent in Te Reo or if we are not tikanga experts, and I put myself in both of those categories, is to ensure that, as a matter of procedure and as a matter of evidence, you have access to the relevant information and the relevant tikanga. That in itself is actually trickier than it sounds because there are a lot of reasons why holders of tikanga, holders of knowledge, are very careful and selective about when they want or choose to release that information to any kind of public forum, let alone a legal process.

My observation from my time as an advocate, and from my time sitting in both the Waitangi Tribunal, the Māori Land Court and the Environment Court, is that the quality of the information we receive from a pou tikanga depends a good deal on the confidence that they have that the information they choose to share is treated with respect, appropriately understood and not misapplied or misappropriated. These are all factors at work in this area that practitioners and judges need to be, at the very least, aware of.<sup>16</sup>

In the Waitangi Tribunal, as Acting Chief Judge Fox said, we sit with some of the leading pou tikanga in Aotearoa. When we are hearing from pou tikanga for claimants in the Waitangi Tribunal, most speakers are speaking to the kaumatua sitting alongside me. In the Māori Land Court or in the Environment Court, sitting with someone with that kind of expertise greatly assists the way the evidence comes to the court and assists the panel or the judge in properly respecting and understanding the evidence.

Finally, for practitioners, if you are acting for a collective, an iwi or a hāpu, it takes time to build a relationship of trust. You must recognize that it is not like gathering evidence for the collapse of the bridge or a car crash. You are not going to get a decent understanding of the important and fundamental issues from a hāpu or iwi unless you have got to a point where they feel confident enough not only that you can do your legal job,

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<sup>15</sup> Slide 23 “Cultural competency: what does it mean?”.

<sup>16</sup> Slide 24 “No matter how good you are as an advocate”.



but that you are trustworthy with this information. You are unlikely to be trusted with tikanga and mātauranga unless you show genuine respect for it.

Turning to this idea of cultural competency or capability, first, building and maintaining capability in Te Reo is fundamental. Secondly, understanding the Treaty jurisprudence is also fundamental. I note that the work that Chief District Court Judge Taumaunu and his clerks have developed will be a great resource.

Court procedure or the Tribunal procedure needs to show respect for tikanga, or you are not going to get much engagement, nor will you get the information you need in order to make proper and balanced decisions. So, for counsel, if it is unclear, just ask the registrar and do some inquiries prehearing. If you are acting for Māori clients, or if you are acting in circumstances where you are advising others who are responding to tikanga-related issues, be respectful of the need for the processes to accommodate ways of delivering and receiving tikanga evidence. That includes sitting on marae or other similar venue to receive the tikanga evidence.

Be sensitive to the ongoing effects of the second law.<sup>17</sup> I note the observation in the statement of the Mātanga Tikanga in the *Ellis v R* case (2022: 38) about the effects of colonization on Maoridom.<sup>18</sup> Many Māori have been alienated from lands, culture and are unfamiliar with tikanga. By being sensitive, if I could give an example from the Māori Land Court, in cases of succession where there are whāngai we are required to deal with those matters in accordance with the tikanga of the relevant hāpu.<sup>19</sup> We often must ask the applicant for succession, depending on the location of the land, what is the tikanga of the hāpu in the lands here? It is not uncommon for someone to say look, “I don’t know”, “I’m not sure, I can ask my auntie, my whānau”, “I know who can check this out.”

We must slow our procedures down. Where necessary we get court staff to assist applicants, making sure that the right information about the lands is taken out and given to the them so that they can make the right inquiries and slow everything down until the information comes back. The dimensions this can lead to are all sorts of very human feelings

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<sup>17</sup> Slide 25 “Be sensitive to the ongoing effects of the second law”.

<sup>18</sup> Mātanga Tikanga—tikanga experts. Used in *Ellis v R* to give insight and guidance on the relevant tikanga concepts being advanced by the court.

<sup>19</sup> Whāngai—Māori customary adoptions which are not legal adoption, but adoption within the wider whanaunga group.

of shame or whakamā. There can be tensions within the wider groups between those who hold some tikanga and Te Reo, and those that do not. Tension between hau kāinga and these who live away. At the very least counsel, and those interacting with these kind of issues, need to be sensitive and aware of these issues and how they may present. Cross examination. Again, try to narrow issues prior to hearing.

Our new judge, Alana Thomas, and Corrin Merrick, wrote in 2019 *Kia Kākano Ru ate Ture: Te Reo Māori Handbook for the Law*. The start of the book has good practical guidance.

I found a quote from an anthropologist called Mary Catherine Bateson to guide us in this time of transition:

Ambiguity is the warp of life, not something to be eliminated. Learning to savour the vertigo of doing without answers, and making do with fragmentary ones, opens the pleasures of recognising and playing with pattern, finding coherence within complexity, sharing within multiplicity.

*Kia ora tātau.*

### **About the author**

*Judge Michael Doogan was appointed to the Māori Land Court on 25 January 2013. Based in Wellington, he provides support for hearings in the Aotea District of the Māori Land Court and hears cases in Taumarunui, Tūrangi and Palmerston North. Judge Doogan also sits as a Presiding Officer in the Waitangi Tribunal, and as an Alternate Environment Court Judge.*

*Judge Doogan graduated from Massey University with a Bachelor of Arts in 1983 going onto graduate with a Bachelor of Law from the University of Otago in 1986. He commenced work as a Judges' clerk in Hamilton in 1986 and worked in private practice and in local government in Wellington before moving to England in 1990. Between 1990 and 1995 he worked in private practice in England before returning to New Zealand to take up a position in the Public Law team with Simpson Grierson in Wellington. In 1998 he joined the Crown Law Office's Treaty Issues and International Law Team. In 2005 Judge Doogan commenced practice as a barrister sole in Wellington. As a barrister, Judge Doogan represented a range of Māori clients before the Courts and the Waitangi Tribunal.*

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# Tikanga and the law **wānanga** - Tikanga in Environmental Jurisdiction

Judge Michael Doogan

Judge of the **Māori** Land Court and alternate Judge of the Environment Court


3 May 2023

# Three topics:

How tikanga as the first law of NZ affects the express incorporation of Treaty and **Māori** concepts in the Resource Management Act 1991, particularly the Part 2 provisions.



The extent of the Environment **Court's** jurisdiction with regard to “**relational**” or mana whenua issues (s 6(e)).



Suggestions that may assist counsel to advocate well in relation to tikanga issues in the Environment Court.

# Tikanga as the first law of Aotearoa

*Lex Aotearoa*, Williams J describes the law in NZ as having been laid down in three layers and that we are now operating in the third layer

- The first layer was a system of law that emerged from what Kupe, Toi and other voyagers brought here and has come to be known as tikanga **Māori**.



# Tikanga as the first law of Aotearoa

The second layer arrived with the British and collided with **Māori** customary law. Tikanga was explicitly rejected and viewed as “a temporary expedient in the wider project of extinction and cultural assimilation.”

# Tikanga as the first law of Aotearoa

The third layer begins in the 1970s with increasing political and legal recognition of custom law. The third law is predicted on perpetuating the first law. The recognition of customs (tikanga) in the modern era is different - and:

“It is intended to be permanent, and admittedly within the broad confines of the status quo, transformative.”

# Tikanga as the first law of Aotearoa

But “in fact all three layers are still alive and interacting organically.”

# Tikanga - an overview

Sir Hirini Moko Mead: “**Tikanga Māori** focuses on the correct way of doing something.”

Justice Joe Williams: “... Tikanga **Māori**: ‘**tika**’ meaning correct, right or just; and the suffix ‘nga’ transforms ‘**tika**’ into a noun, thus denoting the system by which correctness, rightness or justice is maintained. And: “**tikanga** and law are not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored \_\_”

Durie J: “**conceptual** regulators.”

Ani Mikaere: “**enabled** change while maintaining cultural integrity.”

See also pending study paper “**Tikanga Māori**” for Te Aka Matua o Te Ture Law Commission - Whata, J and Statement of Tikanga of Sir Hirini Moko Mead and Professor (Sir) Pou Temara 31 January 2020 - appendix to Judgment of Supreme Court in Ellis (2022) NZSC 114.

# Tikanga as first law in the Environment Court

- ▶ Comes to the EC through statutory doors and windows.
- ▶ The Court has no inherent jurisdiction and the task of declaring or affirming tikanga based rights in state law rests with the High Court and/or the **Māori** Land Court.
- ▶ *Ngāti Maru Trust v Ngāti Whātua Ōrākei* (Whata J).

# Statutory Scheme - Resource Management Act 1991 relevant provisions

The Part 2 provisions include three requirements:

- ▶ First, in order to achieve the sustainable management purpose of the Act, it is deemed a matter of national importance that all persons exercising functions and powers under the Act must recognise and provide for:

*The relationship of **Māori** and their culture and traditions with their ancestral lands, water, sites, **wāhi** tapu, and other taonga...*

- ▶ Second, in achieving the purpose of the Act, all persons exercising functions and powers shall have "particular regard to":

*a) Kaitiakitanga ...*

- ▶ Thirdly, in achieving the purpose of the Act, all persons exercising functions and powers must "take into account" the principles of the Treaty of Waitangi.



# Statutory scheme continued

There is a hierarchy of obligation. At the high end, the requirement is to "recognise and provide for" (s 6) then to have "particular regard" (s 7), and finally to "take into account" (s 8).

**"Tikanga Māori"** is defined in the RMA as **"Māori customary values and practices."**

That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of **Māori** customs and practices, part of which is properly described as custom law.

(Supreme Court, *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*)

# Statutory scheme

“**Kaitiakitanga**” is defined as “**the** exercise of guardianship by tangata whenua of an area, in accordance with tikanga **Māori**; in relation to natural and physical resources; and includes the ethics of **stewardship**”.



“**Tangata whenua**” means “**in** relation to particular area, the iwi, or hapu, that holds mana whenua over that area.”



“**Mana whenua**” is defined as meaning “**customary** authority exercised by an iwi or **hapū** in an identified area.”

# Statutory scheme

The intersecting definitions of kaitiakitanga, tangata whenua and mana whenua place emphasis on collective customary interests and authority, held at the iwi or **hapū** level.

## Numerous other provisions of significance, but note:

Local authority and consent authority shall recognise tikanga **Māori** where appropriate and receive evidence written or spoken in **Māori** (s 39(2)(b)).

The Environment Court shall recognise tikanga **Māori** where appropriate (s 269(3)).

# Some ongoing tensions between second and third law to be aware of:

- ▶ “**Should [Māori]** attempt to carve out a small space within the whare of the state legal system if the whenua and foundations upon which it is built are **defective?**” - Natalie Coates.
- ▶ Space for rangatiratanga to operate.

“**Kei** whawhati noa mai te rau o te **rātā**” - Don't pluck the blossoms off the rata tree (some things are perfect just the way they are)

# Nature of the Treaty relationship - Waitangi Tribunal

Rangatira did not cede authority to make or enforce law over their people and within their territories. They agreed to share power and authority with the Governor, with whom they were to be equal though with different roles and different spheres of influence. (Waitangi Tribunal 'He Whakaputanga me te Tiriti' pages 526-527).

The Treaty guaranteed to **Māori** their Tino Rangatiratanga was at a minimum the right to self determination and autonomy... That included the right to work through their own institutions of governance and apply their own tikanga or system of customary laws. (Waitangi Tribunal - Te Mana Whatuahuriri: Report on Te Rohe Potae claims 2018 pg 158-169)

The Crown has intruded in harmful ways into areas the Treaty guaranteed to **Māori**. “...**Māori** must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over **kainga**”

(Waitangi Tribunal - He **Pāharakeke**, He Rito **Whakakīkinga Whāruarua** Oranga Tamariki Inquiry 2021, p183, 184)



# Environment Court jurisdiction regarding relational or mana whenua issues

“...when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of **Māori** and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the **hapū/iwi** relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.” (Whata J, *Ngāti Maru trust v Ngāti Whātua Ōrākei*).

And further:

▶ “But any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.”

So:

▶ “The Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties.”

▶ Where iwi claim that a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision makers must meaningfully respond to that claim, including when different iwi make divergent tikanga based claims as to what is required to meet the Part 2 obligations.

▶ This may involve evidential findings in respect of the applicable tikanga.

▶ To hold otherwise would be to emasculate those Part 2 directions of their literal and normative potency for iwi. (Whata J, *Ngāti Maru trust v Ngāti Whātua Ōrākei*).

But note need for caution in these types of assessments:

“**Where** there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation.” (Tamaki Makaurau Settlement Process Report: Waitangi Tribunal 2007)

See *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [82]

See also Motiti Report on the Te Motere o Motiti Inquiry: Waitangi Tribunal 2023 for examples of forensic weighting of competing mana whenua or customary authority claims.

# Some metrics for the exercise of the jurisdiction to consider relational claims:

## “the rule of reason” approach (Ngāti Hōkōpū):

- whether the values correlate with physical features of the world (places, people);
- peoples' explanations of their values and their traditions;
- whether there is external evidence (e.g., **Māori** Land Court Minutes) or corroborating information (e.g., waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value holders;
- the internal consistency of peoples' explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held. In a Court, of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are 'rules' as to how to weigh or assess evidence.

# An example: *Mt Messenger* case

(*Mt Messenger (Director General of Conservation vs Te Runanga o Ngāti Tama Trust and others*  
[2019] NZEnvc)

The case concerned a planned upgrade of the Mt Messenger section of a state highway east of New Plymouth. Required for the project was over 20 hectares of land returned to **Ngāti Tama** as part of its 2003 Treaty of Waitangi Settlement.

Some features to note:

A public authority with compulsory acquisition powers wishes to acquire land returned to **Māori under a Treaty settlement**

Non-**Māori** assert tangata whenua status

**Māori** with whakapapa to a different area assert tangata whenua status

Internal conflict within an iwi/hapu

Evidence including expert evidence

Role of counsel

# The Court cited with approval the following submission of counsel for **Ngāti Tama**:

“**Tangata** whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council has noted, these rights are “strong directions to be borne in mind at every stage of the decision-making process”. These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of **Māori**. It is therefore extremely important that such rights are reserved for tangata whenua/mana whenua alone. Extending such rights to non tangata whenua/mana whenua interests, is inconsistent with the RMA, and diminishes both the value and meaning of such rights, and the mana of the iwi or **hapū** that holds mana whenua.”



# Some observations:

- ▶ Early recognition by Waka Kotahi that it would not be right to use compulsory powers and early appointment of external consultant to manage engagement with **Ngāti** Tama and other **Māori**.
- ▶ Commitment not to proceed with the preferred road realignment unless agreement could be reached with **Ngāti** Tama.
- ▶ Relevant findings:
  - ▶ **Ngāti** Tama has mana whenua over the project area and it is therefore appropriate that it be the only body referred to in conditions addressing cultural matters.
  - ▶ Neighbouring land owners also effected by the proposal (the Pascoes) are not kaitiaki in the sense that the word kaitiakitanga is used in the Act. The relationship of the Pascoes to the land is of stewardship.
  - ▶ A collective known as Poutama are not tangata whenua exercising mana whenua over the project area and therefore not appropriate that they be recognised in any consent condition addressing cultural matters.

# How to advocate well on tikanga and the law

- ▶ Tikanga: (“**integrate** to **perpetuate**”) Williams J, Lex Aotearoa.
- ▶ When tikanga comes to the Environment Court, the Court must have evidence grounded in and defined in accordance with tikanga **Māori** and matauranga **Māori** to make the best decisions.
- ▶ The best evidence of tikanga **Māori** and matauranga **Māori** will of course be in te reo **Māori**.

# Cultural competency: what does it mean?

- ▶ Build and maintain capability in te reo.
- ▶ Building and maintaining understanding of Treaty of Waitangi jurisprudence, both the Courts and the Waitangi Tribunal.
- ▶ If a non-**Māori** practitioner acting for **Māori** hapu or iwi, you may not be able to locate, understand or receive most relevant tikanga knowledge and evidence unless the knowledge holders trust you. The more central the knowledge to hapu or iwi identity, the harder it will be to earn that trust. It will also take time.

- ▶ No matter how good you are as an advocate, you are very unlikely to be trusted with tikanga or matauranga **Māori** unless you show genuine respect for it.
- ▶ The same general point applies to Court procedure. It is now far more common across courts in all jurisdictions to allow appropriate space for mana whenua to open and close proceedings with mihi and karakia. If procedure on the day is uncertain or unclear, counsel should advocate for this and also if leading tikanga evidence in te reo **Māori** ensure that the Court is notified early so that arrangements for simultaneous translation are made (if possible).
- ▶ Where appropriate, propose that the Court sit on the relevant marae (or similar venue) to receive tikanga evidence.

- ▶ Be sensitive to the ongoing affects of the second law:  
“**Tikanga** and **Māori** society, more generally, have been subject to the devastating impact of colonisation on its institutions and practises. This is meant that for many **Māori**, they have become alienated from their lands, culture and are unfamiliar with tikanga.” (Statement of **Mātanga** Tikanga, Ellis case at para 38)
- ▶ Cross-examination where there is competing evidence as to tikanga may be required, but try to first narrow issues in contention pre-hearing and be aware that traditional adversarial cross-examination of a Pou Tikanga will seldom be productive or helpful.
- ▶ Allegations of bias or suggestions that the evidence may not be genuinely held are not likely to be viewed favourably by the Court (*Greymouth Petroleum v Heritage NZ* [2016] NZEnbC11).
- ▶ Be aware of, and where appropriate, use extrinsic evidence as context for tikanga evidence such as reports of the Waitangi Tribunal and primary sources such as texts on tikanga **Māori**.

## CULTURAL EXPERTISE AND EVIDENCE IN AUSTRALIAN COURTS

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Victorian Court of Appeal, Melbourne, Australia

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### [A] INTRODUCTION

In this article, I will discuss four factors that are relevant to how cultural issues inform judicial decision-making in Australia. They are:

- ◇ internal cultural expertise in Australian courts;
- ◇ the admissibility of expert evidence on culture in Australian courts;
- ◇ the availability of authoritative documentary evidence on culture;  
and
- ◇ the availability of expert witnesses on culture.

### [B] AUSTRALIA'S LEGAL SYSTEM

Before I address these four issues, it is necessary to make some brief comments about some aspects of Australia's legal system and multiculturalism.

The uniform Evidence Act applies to proceedings before most Australian courts but generally does not apply to proceedings before administrative tribunals.

Proceedings before Australian courts are conducted on an adversarial basis and not on the inquisitorial system that applies to many European courts. This means that, in general, courts make decisions based upon the evidence presented by the parties and do not conduct their own investigations. The position is different for administrative tribunals, which are sometimes given inquisitorial powers.

### [C] MULTICULTURALISM IN AUSTRALIA

Australia's indigenous population, which comprises Aboriginal and Torres Strait Islanders, dates back more than 40,000 years. As at 30 June 2021, that population numbered 984,000, representing 3.8% of Australia's

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\* Paper delivered at the Euro-Expert Conference on Cultural Expertise, Sorbonne University on 7 April 2023. I gratefully acknowledge the assistance of my associates Lydia Taylor-Moss and Duncan Willis in the preparation of this paper.



then total population of nearly 26 million. The indigenous population is culturally diverse, with over 150 languages being spoken.

Australia's total population increased dramatically after the Second World War, with sponsored migration from Europe. In recent decades, more migrants have originated from Asian countries such as China and India, and also from New Zealand and other nearby South Pacific countries. Australia has also received refugees, including from Africa and the Middle East.

According to the 2021 Australian Census, 51.5% of all people then living in Australia were born overseas or had a parent who was born overseas. The top five countries of birth outside Australia were England, India, mainland China, New Zealand and the Philippines. Approximately 22.8% of the population—around 5.8 million people—spoke a language other than English at home (Australian Bureau of Statistics 2022), the most common non-English languages being Mandarin, Arabic, Vietnamese, Cantonese and Punjabi.

## [D] INTERNAL CULTURAL EXPERTISE IN AUSTRALIAN COURTS

Australian courts have little, if any, internal cultural expertise. Where expert evidence on culture is admitted in court proceedings, the experts are always from outside the court, and they are usually appointed by the parties rather than the court.

Australian judges are predominantly of Anglo-Celtic background. It is only in the past 20 years or so that judges from more diverse backgrounds have been appointed.

The absence of internal cultural expertise in Australian courts does not necessarily apply to an administrative tribunal which is not bound by the rules of evidence and exercises inquisitorial powers. Such a tribunal can develop its own internal expertise and rely upon it in making decisions provided it discloses to the parties the information it proposes to rely upon and gives them an opportunity to make submissions on that information.

For example, when the Commonwealth Administrative Appeals Tribunal hears refugee claims, it is required to take into account country information reports prepared by the Department of Foreign Affairs and Trade. Those reports deal with cultural and other issues that are relevant

to the question of whether the claimant has a well-founded fear of being persecuted in his or her country of origin based upon one of the five recognized grounds.<sup>1</sup>

## [E] THE ADMISSIBILITY OF EXPERT EVIDENCE ON CULTURE IN AUSTRALIAN COURTS

Expert evidence on culture is potentially admissible under section 79 of the uniform Evidence Act. For evidence on culture to be admissible as expert evidence under that section, the person giving the evidence must have specialized knowledge on the cultural issue based upon his or her training, study or experience and that opinion must be wholly or substantially based upon that knowledge.

If an expert meets these threshold requirements, he or she can give expert evidence. Provided the threshold requirements are met, the court does not evaluate the degree of expertise or experience held by the expert in determining whether his or her evidence is admissible. However, that degree can be taken into account in assessing the weight the court will give to the expert's evidence. Similarly, whether an expert is independent or has a relationship with one of the parties is not relevant to the admissibility of the expert's evidence, but it is very relevant to the weight the court will give to the evidence. Ordinarily, independent expert evidence will be given greater weight than expert evidence from a witness who is connected to one of the parties.

Section 78A of the uniform Evidence Act provides that evidence by a member of an indigenous group about the existence or non-existence, or the content, of the traditional laws and customs of that group can be admissible.<sup>2</sup>

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<sup>1</sup> The grounds are race; religion; nationality; membership of a particular social group; and political opinion. Section 499 of the Migration Act 1958 (Commonwealth) requires the Administrative Appeals Tribunal to comply with any written directions given by the Minister for Immigration in the performance of its function of deciding whether to accept a claim for refugee status. Ministerial Direction 84 requires the Tribunal to take into account country information reports prepared by the Department of Foreign Affairs and Trade. Section 33(1)(c) of the Administrative Appeals Tribunal Act 1975 (Commonwealth) provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

<sup>2</sup> The Dictionary to the uniform Evidence Act defines "traditional laws and customs" as including "any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs" of the relevant indigenous group.

As a result of the above statutory requirements for expert evidence on culture to be admissible, such evidence has not been a prominent feature of legal proceedings in Australia. It has been used mainly in cases involving our indigenous population, family law, criminal law and immigration law.

Anthropological expert evidence is commonly admitted under section 79 of the uniform Evidence Act in native title claims brought by indigenous communities.<sup>3</sup> Such claims can be brought where an indigenous community seeks to establish that its members have had a continuous connection with the land or waters of which they claim to be the traditional owners. That connection must date back at least to the time the land or waters were annexed by European settlers.

A case where expert evidence relating to indigenous art and culture was admitted in a non-native title context is *Australian Competition and Consumer Commission v Birubi Art Pty Limited (in liq) [No 3]*.<sup>4</sup> That case concerned a successful claim by a regulator alleging that the respondent had engaged in conduct likely to mislead potential purchasers by falsely implying that products had been hand-painted by Australian Aboriginal persons in Australia.

Evidence on cultural practices is admitted in family law proceedings because culture is relevant to determining what is in a child's best interests,<sup>5</sup> particularly where the child is indigenous.<sup>6</sup>

In criminal cases, cultural factors might be relevant on the issue of guilt where personal subjective elements are involved. One such case is *Warren v The Queen*,<sup>7</sup> where Aboriginal defendants unsuccessfully relied upon the defence of duress to charges involving the infliction of physical injuries upon the victim. An independent witness gave evidence that, under the customary law of the defendants' Aboriginal tribe, they would

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<sup>3</sup> See eg *Malone v Queensland [No 5]* (2021) 397 ALR 397, 457-460 [197]-[206], 624-625 [954], [2021] FCA 1629; *Malone v Queensland* [2022] FCA 827, [34].

<sup>4</sup> (2019) 374 ALR 776, 780-781 [12]-[15]; [2019] FCA 996.

<sup>5</sup> Since the commencement of section 69ZT of the Family Law Act 1975 (Commonwealth) on 1 July 2006, section 79 of the uniform Evidence Act has not applied to child-related family law proceedings. Compare *In the Marriage of H* (2003) 198 ALR 383, 391-394 [35]-[43], which was decided prior to the enactment of section 69ZT. Evidence on cultural practices may otherwise be admissible under section 144 of the uniform Evidence Act or other provisions of the Family Law Act 1975 (Commonwealth): *Donnell v Dovey* (2010) 237 FLR 53, 89-98 [193]-[230]; [2010] FamCAFC 15.

<sup>6</sup> Family Law Act 1975 (Commonwealth), section 60CC(3)(g)-(h), (6).

<sup>7</sup> (1996) 88 A Crim R 78.

be severely beaten unless they severely beat the victim as punishment for his alleged breaches of customary law.

Issues regarding the admissibility of expert evidence on cultural practices have also arisen in criminal proceedings involving female genital mutilation.<sup>8</sup> In *A2 v The Queen*,<sup>9</sup> the court held that an expert's opinion on a particular practice within an Indian community was not admissible under section 79 of the uniform Evidence Act because it was not based upon an area of specialized knowledge.

In *R v Singh [No 1]*,<sup>10</sup> a husband was charged with murdering his wife by setting her on fire. The husband's defence was that the burns were self-inflicted. The prosecution sought to rely upon an expert report about aspects of Punjabi-Sikh culture for the purpose of assisting the jury to understand the victim's behaviour, including why she had not reported to police prior acts of domestic violence by her husband. The court held that the report did not satisfy section 79 of the uniform Evidence Act in part because the expert's specialized knowledge was too narrow.<sup>11</sup>

Cultural factors feature more prominently at the sentencing stage of the criminal process because a defendant's personal circumstances, including his or her cultural background where relevant, must be taken into account by the court in deciding an appropriate sentence.<sup>12</sup> Evidence of the defendant's personal circumstances is usually given in the form of a report by a psychiatrist or psychologist which is based upon information provided by the defendant. These experts are usually selected and remunerated by the defendant and may, where relevant, express an opinion on whether the defendant's upbringing and cultural background played a role in the offending.

In immigration cases, evidence on culture tends to be used in claims for refugee status and in deportation cases. In refugee cases, a claimant may rely upon expert evidence about his or her cultural group and how

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<sup>8</sup> *R v A2 [No 2]* [2015] NSWSC 1221, [45]; *A2 v R* [2018] NSWCCA 174, [713]-[714]; *R v A2* (2019) 269 CLR 507, 513 [6].

<sup>9</sup> *A2 v R* (n 8 above) [713]-[714].

<sup>10</sup> [2019] NSWSC 1000.

<sup>11</sup> *Ibid* [123]. See also section 388 of the Criminal Procedure Act 2009 (Victoria) regarding the admissibility of expert evidence about cultural factors that may affect the behaviour of a victim of a sexual offence.

<sup>12</sup> Crimes Act 1914 (Commonwealth), section 16A(2A), precludes a court from taking into account cultural practices as a reason for excusing, justifying, authorizing, requiring, lessening or aggravating the seriousness of the criminal conduct. That Act only applies to Commonwealth offences.

that group is persecuted in his or her country of origin. That evidence may seek to contradict any country information report prepared by the Department of Foreign Affairs and Trade. For example, a report prepared by the United Nations High Commissioner for Refugees on a particular country may be used to contradict the Department's country information report.

In deportation cases, the person facing deportation may rely upon evidence about factors relating to his or her culture that might cause him or her hardship if he or she is deported to his or her country of origin. For example, based upon cultural and other information provided by the applicant, a psychiatrist or psychologist may express an opinion about the effects of deportation upon the applicant.

## [F] THE AVAILABILITY OF AUTHORITATIVE DOCUMENTARY EVIDENCE ON CULTURE

Expert evidence on culture is potentially admissible under section 144 of the uniform Evidence Act. For a court to rely upon a cultural matter under that section, that matter must not be "reasonably open to question" and either be "common knowledge in the locality in which the proceeding is being held or generally" or "capable of verification by reference to a document the authority of which cannot reasonably be questioned".

A number of reports have been published following public inquiries relating to issues affecting Australia's indigenous population, including stolen generations (Human Rights and Equal Opportunity Commission 1997) and Aboriginal deaths in custody (Royal Commission into Aboriginal Deaths in Custody 1991). It is possible that cultural matters dealt with in these types of reports, and also reports of some organizations which have a long-standing reputation for rigorous and impartial research, may satisfy section 144 of the uniform Evidence Act.

Apart from these types of reports, it is difficult to think of other examples of evidence on culture that would satisfy the requirements of section 144.

## [G] THE AVAILABILITY OF EXPERT WITNESSES ON CULTURE

The parties to criminal or civil proceedings may call expert witnesses to give evidence on a matter within their expertise. Civil procedure legislation or court rules may confer power on the court to appoint an expert to inquire into and report on any issue in a proceeding.<sup>13</sup> I am not aware of any case where a court has used such a power to appoint an expert to report on a cultural issue in a proceeding involving private litigants.

Courts have access to online information about interpreters accredited by the National Accreditation Authority for Translators and Interpreters, but they do not have a comprehensive register or database of expert witnesses on particular cultures.

Anthropologists with expertise on indigenous cultures can be readily identified. It is likely that there are experts, particularly at universities, who could give expert evidence on linguistic issues and historical issues relating to some cultural groups. Also, leaders of particular cultural groups might be able to give evidence regarding certain customs, such as wedding dowries, and a senior cleric of a particular religion might be able to give evidence about the principles and practices of that religion.

Because of the limited use of expert witnesses on culture to date, beyond these examples, there may be difficulty in identifying individuals who may be able to qualify as expert witnesses in particular cultures.

It must be borne in mind that our indigenous population and many cultural groups are not homogenous but have internal diversity. It must also be borne in mind that some cultural groups are small in number, and it would be difficult to find a cultural expert regarding such groups.

## [H] CONCLUSION

As we have seen, expert evidence on culture has not been a prominent feature of proceedings in Australian courts. This is partly due to the statutory requirements for the admissibility of such evidence. Such evidence is used mainly in cases involving Australia's indigenous population, family law, criminal law and immigration law. Australia does not have a comprehensive register or database of expert witnesses on culture, and finding an individual who may be able to qualify as an expert witness in a particular culture may be problematic.

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<sup>13</sup> See, for example, Civil Procedure Act 2010 (Victoria), section 65M.



### About the author

**The Honourable Justice Emilios Kyrou** is a Judge of the Victorian Court of Appeal.

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*R v A2 [No 2]* [2015] NSWSC 1221

*R v Singh [No 1]* [2019] NSWSC 1000

*Warren v The Queen* (1996) 88 A Crim R 78

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## **SUMMARY DISMISSAL IN ARBITRATION: A NEED FOR REFORM TO THE ARBITRATION ACT 1996?**

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### **Abstract**

This article considers the United Kingdom Law Commission's recent proposal to amend the Arbitration Act 1996 so as to expressly empower arbitral tribunals to make orders for summary dismissal of meritless claims/defences (among several other reforms to the Act). Noting the summary dismissal procedures available in the English courts and the provisions for summary dismissal now included in the procedural rules of the major arbitral institutions, this article concludes that such an amendment to the 1996 Act would be a very welcome development, promoting efficiency in London-seated arbitration and thereby further securing London's position as one of the most popular seats of arbitration.

**Keywords:** summary dismissal; summary judgment; Arbitration Act 1996.

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## [A] INTRODUCTION

As an alternative form of dispute resolution, arbitration offers several potential advantages over other binding dispute resolution mechanisms. Through an agreement to arbitrate, parties can establish a private and confidential process to resolve their disputes before a neutral and bespoke tribunal, with a robust international legal framework for enforcing any resulting award (pursuant to the New York Convention). Owing to these benefits, arbitration has increasingly become a preferred dispute resolution mechanism for a wide range of disputes, particularly disputes under cross-border contracts.

At least in theory, arbitration also offers the potential for a more efficient dispute resolution process. Free from the constraints of the

prescriptive procedural codes that often apply in national courts, parties and tribunals have more autonomy and flexibility to tailor the process to their specific dispute and to adopt procedures that are as time- and cost-efficient as possible. In practice, however, arbitration is generally perceived as having failed to live up to its potential for efficiency. Whether as a result of “due process paranoia” or a lack of procedural rigour (on the part of practitioners, as well as tribunals), there is ample anecdotal, if not empirical, evidence of disputing parties finding arbitration to be as unwieldy and inefficient as litigation before some national courts.

Of course, such criticisms have not gone unnoticed, and the arbitration community is increasingly focused on ways to ensure that arbitration is efficient not only in theory, but also in practice. To that end, over the last decade or so, one mechanism that has increasingly gained attention is “summary dismissal”, namely, a procedure enabling a party to obtain speedy dismissal of a meritless claim or defence raised in the proceedings. Such procedures can be akin to the “summary judgment” or “strike-out” procedures generally available in the domestic courts of common law jurisdictions.

Tribunals have arguably always had an inherent power to adopt summary dismissal procedures, as part of their broad procedural powers. Nonetheless, the existence of such a power has been a matter of considerable debate, with some commentators suggesting that summary dismissal runs counter to the duty of tribunals to afford parties a reasonable opportunity of presenting their case. This may perhaps be because of that debate and because tribunals are naturally wary of giving any party a basis for complaining that it has not been given a reasonable opportunity to present its case (for fear that the complaining party will challenge the award or resist enforcement under the New York Convention), summary dismissal procedures in arbitration have historically been a relatively rare phenomenon. In turn, this has led commercial parties in certain sectors, where summary dismissal is of particular value, to prefer court litigation over arbitration.<sup>1</sup>

To address the limited use of summary dismissal procedures by tribunals, several leading arbitral institutions have, in recent years, amended their rules to make express provision for summary dismissal procedures. And now a further development is anticipated: the United Kingdom (UK) Law Commission is proposing to include a provision in the Arbitration Act 1996 (the legislation that governs arbitrations seated

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<sup>1</sup> For example, in the finance sector, where the speedy resolution of a debt claim via a summary dismissal procedure may be valuable.

in England & Wales and Northern Ireland) which expressly empowers tribunals to adopt such procedures.

In that context, this article discusses the availability and use of summary dismissal procedures in arbitration, and considers whether there is a need for reform of the Arbitration Act 1996 as proposed by the UK Law Commission. Part B provides an overview of summary dismissal procedures and their historical origins in English court procedure. Part C describes the rules and guidelines for summary dismissal procedures recently introduced by leading arbitral institutions. Part D considers the issues raised by summary dismissal procedures in arbitration, including in light of case law from the English courts. Finally, Part E considers the UK Law Commission's proposed amendment to the Arbitration Act 1996.

## [B] WHAT IS A SUMMARY DISMISSAL PROCEDURE?

At its broadest, a “summary dismissal procedure” encompasses any procedure whereby a court or tribunal considers whether a particular claim or defence can safely be dismissed at an early stage without determining all of the legal or factual points that have been put in issue, and without engaging in a process that requires a full evidentiary hearing.

The policy rationale for such a procedure is the same for courts and tribunals: to avoid delay and ensure that disputes are determined as efficiently as possible.

In the context of London-seated arbitrations, tribunals may look to English court procedure as a reference point when considering applications for summary dismissal, turning in particular to parts 3 and 24 of the Civil Procedure Rules (CPR), which apply to litigation in the English courts. Those rules of procedure provide for two specific and well-established summary dismissal procedures: a “strike-out” application (via CPR rule 3.4); and summary judgment (via CPR rule 24.1)—both of which are related, but use different tests, as set out in more detail below.

### The History and Development of Summary Dismissal Procedures in the English Courts

Before considering the specific mechanics of the English court procedures for summary dismissal, it is useful to consider their origins. Unsurprisingly, the need for efficient procedures to resolve disputes was (at least in England) initially driven by demands from businesses using

litigation to enforce money claims. Summary procedures had evolved at least as early as the 13th century for use by merchants at trade fair courts in England (also known as “piepowder courts”), primarily for debt collection, owing to the desire of merchants to avoid the “unendurable” delays and technicalities of the common law courts. However, as commerce became more sophisticated, trade fair courts disappeared and merchants increasingly turned back to the common law courts for the settlement of their disputes. As a result, and by at least the early 17th century, those courts had developed a speedy procedure for the resolution of commercial disputes, using informal oral pleadings (Bauman 1956, 329-332).

For present purposes, the key event leading to the creation of modern summary procedures can be found in the introduction of written pleadings in the English common law courts between the 17th and 18th centuries. While written pleadings initially offered a potential way to help crystallize the issues in dispute (and so ensure the efficiency of the process overall, particularly in document-heavy cases), the English court rules on pleading became so complex, rigid and overly technical that they caused considerable delay, enabling “unscrupulous lawyers” to plead meritless defences in order to stall the resolution of a dispute. Indeed, by the 18th century, commercial parties were being advised to arbitrate rather than litigate, so as to avoid the frustrating delays and expense of court litigation (Bauman 1956, 332-334).

Those frustrations led to the emergence of various proposals for summary procedures during the 19th century, drawing on more sophisticated procedural mechanisms existing in Scottish, French, Dutch and Roman procedural law. In turn, those proposals led to “Keating’s Act”, also known as the Summary Procedure on Bills of Exchange Act of 1855, which allowed a claimant to obtain a court order warning a defendant that judgment would be entered against it unless the defendant either paid into court a security for the amount in dispute or presented an affidavit demonstrating that a full trial was necessary (Bauman 1956, 337-338). There were various refinements of this summary procedure over the next century, initially via the Judicature Act of 1873 and the Rules of the Supreme Court 1883, including in order to make clear that the burden of proof was on the party seeking summary judgment (Bauman 1956, 340-341; Bogart 1981, 555).

Ultimately, the English courts adopted the procedure now reflected in CPR parts 3 and 24, which has in turn been carried through to other common law jurisdictions, including the United States (Bogart 1981, 557). That procedure recognizes the need to balance the obvious care



that judges should exercise in not issuing a judgment against a party who “shows a genuine issue as to a material fact” with the “[j]ust as obvious ... obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all” (Clark 1952, 578). As the Court of Appeal explained in *Kent v Griffiths* (2001, para 38):

Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. ... Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible.

### CPR 3.4: Strike-Out

As part of the case management powers set out in CPR rule 3.4, the English courts may strike out a statement of case, or part of a statement of case, if it appears to the court that: (a) the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) there has been a material failure to comply with a rule, practice direction or court order, which cannot more appropriately be addressed via costs sanctions (CPR rule 3.4(2)). The court may exercise this power either upon the application of one of the parties or on its own initiative (CPR Practice Direction (PD) 3A.1.2).

Of the various grounds on which an application for strike-out may be brought, parties will (in practice) typically rely on grounds relating to the adequacy of the other party’s statement of case. Where an application is brought on that ground, the court will consider that a statement of case discloses no reasonable grounds to bring or defend a claim if *inter alia*: (a) no facts are set out regarding the nature of the claim; (b) the statement of case is incoherent, unreasonably vague, vexatious or scurrilous; (c) the facts do not disclose a recognizable claim or defence; or (d) the facts—even if coherent, and true—would not amount in law to a defence to the claim (CPR PD 3A.1.2).

A strike-out application will not, however, be allowed if a claim is merely defective. In such a case, a court is obliged to consider whether the defect might be cured by an amendment to a party’s case and, if so, whether the relevant party should be given an opportunity to amend (*Soo Kim v Young* 2011). Similarly, if the viability of a claim or defence depends on a substantial issue of law, or an issue of fact which can only be determined

at a hearing, it will not normally be appropriate for a summary procedure to be adopted (Halsbury 2008, 522-523; *White Book* 2023, 3.4.1-3.4.2).<sup>2</sup>

## CPR 24: Summary Judgment

Although there is substantial overlap between strike-out and summary judgment, an application for summary judgment under CPR 24 entails a slightly more in-depth analysis of a claim or defence, by requiring the court to consider evidence beyond just the parties' statements of case. CPR 24 requires that a party applying for summary judgment must show that the claim or defence has "no real prospect" of success, and that there is no other compelling reason why the claim or issue should be disposed of at trial (CPR rule 24.2). Predictably, the evidentiary bar for either of those conditions to be satisfied is high. As per the key principles for summary judgment, summarized succinctly by Lewison J in *Easyair Ltd v Opal Telecom* (2009, para 15), on a summary judgment application:<sup>3</sup>

- ◇ a court must consider whether the claimant or defendant has a "realistic" as opposed to a "fanciful" prospect of success – a "realistic" claim or defence is one that carries some degree of conviction, being more than merely arguable;
- ◇ in reaching its conclusion the court must not conduct a "mini-trial" (although this does not mean that the court must take at face value everything that a party says in its statements before the court, particularly if any statements are contradicted by contemporaneous documents);
- ◇ in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
- ◇ even if the resolution of a case appears straightforward, the court should hesitate in making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would affect the outcome of the case;

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<sup>2</sup> See, for example, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7. Similarly, the English courts will typically exercise caution in striking out a claim if it would risk infringing the right of access to a court pursuant to article 6 of the European Convention on Human Rights—for example, by conferring a *de facto* immunity from civil liability on a particular group: *Osman v United Kingdom* (2000) 29 EHRR 245. But article 6 does not prevent the striking out of a claim or defence in an appropriate case: see *Z v United Kingdom* [2002] 34 EHRR 3.

<sup>3</sup> See also *Three Rivers District Council v Bank of England* (2001) and *Swain v Hillman* (1999).

- ◇ however, it is not enough for a party simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on a question of construction relevant to the outcome of the case; and
- ◇ if a summary judgment application gives rise to a short point of law or construction and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, the court should “grasp the nettle and decide it”.

It is important to note that the above principles do not preclude an application for summary judgment in a dispute involving issues that depend on expert evidence. While a strike-out procedure is unlikely to be appropriate in such a case, an application for summary judgment may still be made after the exchange of experts’ reports and the production of a joint statement from those experts identifying their areas of agreement and disagreement (*White Book 2023*, 24.2.1).

## [C] SUMMARY DISMISSAL PROCEDURES IN INSTITUTIONAL ARBITRAL RULES AND GUIDELINES

Echoing the same calls that led to the development of summary procedures before the English courts, in recent years a number of arbitral institutions have made express provision for summary dismissal procedures in arbitrations conducted under their procedural rules, either via amendments to their procedural rules or via “soft law” guidelines that expressly recognize the potential for a summary dismissal procedure.

The first institution to adopt express provisions for summary procedures was the International Centre for Settlement of Investment Disputes (ICSID) in 2006.<sup>4</sup> Commercial arbitration institutions followed suit some time afterwards, drawing inspiration from the ICSID Rules,

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<sup>4</sup> ICSID Arbitration Rule, rule 41(5): “Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.” See also Gill 2009, 517-519.

with the Singapore International Arbitration Centre (SIAC) being the first to amend its Rules in 2016. Examples of such provisions include:<sup>5</sup>

- ◇ The 2016 Arbitration Rules of SIAC, rule 29.1, the “early dismissal of claims and defences”:

A Party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:

- (a) a claim or defence is manifestly without legal merit; or
- (b) a claim of defence is manifestly outside the jurisdiction of the Tribunal.

- ◇ The London Court of International Arbitration (LCIA) Arbitration Rules 2020, article 22.1, “additional powers”:

The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub- paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

...

- (viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an “Early Determination”).

- ◇ The 2023 Arbitration Rules of the Stockholm Chamber of Commerce Arbitration Institute (SCC), article 39, “summary procedure”:

- (1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily taking every procedural step that might otherwise be adopted in the arbitration.
- (2) A request for summary procedure may concern issues of jurisdiction, admissibility, or the merits. It may include, for example, an assertion that:
  - (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
  - (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

<sup>5</sup> The Hong Kong International Arbitration Centre Administered Arbitration Rules 2018, article 43, also allows for early determination: “[the] arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.”

- (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

As the above rules demonstrate, the major arbitral institutions are broadly aligned in terms of the nature and scope of the summary dismissal powers granted to tribunals and the flexibility given to tribunals to determine the appropriate procedure. In particular, all of the relevant rules set a high threshold, in similar terms, for a successful application for summary dismissal, requiring a claim or defence to be “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal” (SIAC Rules 2016, rule 29.1(a)-(b)); “manifestly outside the jurisdiction of the Arbitral Tribunal” or “inadmissible or manifestly without merit” (LCIA Rules 2020, article 22); or to relate to an allegation of fact of law that is “manifestly unsustainable” (SCC Rules 2023, article 39(2)(i)).

One leading arbitral institution, the International Chamber of Commerce (ICC) International Court of Arbitration, has taken a slightly different approach. Rather than expressly providing for summary dismissal powers in the ICC Rules 2021, the ICC Court has provided guidance via a Practice Note issued in 2021, which makes clear that a tribunal’s broad case management powers under the ICC Rules include the “expeditious determination of manifestly unmeritorious claims or defences” (ie using a test similar to other institutions), in order to ensure the “expeditious and cost-effective” conduct of the arbitration (ICC Note to Parties 2021, D-109). The ICC’s Practice Notice also makes clear that a tribunal constituted under the ICC Rules will have “full discretion to decide whether to allow the application to proceed, taking into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency” (ICC Note to Parties 2021, D-111).

## [D] SUMMARY DISMISSAL IN ARBITRATION: PERCEIVED RISKS AND RECENT ENGLISH CASE LAW

Despite the steps taken by leading arbitral institutions to expressly empower tribunals to adopt summary dismissal procedures, the (relatively limited) data available indicates that such procedures are still only adopted in a small number of cases. For example:

- ◇ The LCIA’s 2021 Annual Casework Report records that 15 applications were made for summary dismissal in 2021, set against a total caseload of 322. Seven of those applications were granted,

two were rejected, one was superseded by the parties' settlement of the case and five remained pending at the end of 2021 (LCIA Annual Casework Report 2021, 27).

- ◇ The 2022 SIAC Annual Report records that ten summary dismissal applications were received in 2022, set against a total caseload of 336. Five of the applications were allowed to proceed. Two applications were not allowed to proceed, one remains pending, and the other two were withdrawn. Of the five applications allowed to proceed, three applications were rejected and two remained pending when the report was published (SIAC Annual Report 2022, 29).

Insofar as the above statistics reflect any ongoing reluctance on the part of parties and tribunals to use summary dismissal procedures in arbitration proceedings, that reluctance may be attributable to a continuing concern that the adoption of such a procedure could increase the risk that the tribunal's award may be challenged and set aside at the seat of arbitration, or not enforced under the New York Convention.<sup>6</sup>

So far as the English courts are concerned, relatively recent case law has given parties and tribunals some comfort in this regard. In particular, at least two High Court decisions provide reassurance that the adoption of a summary dismissal procedure should not, in principle, give rise to any basis for challenge or resisting enforcement in England & Wales.

The first of those cases is *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* (2014). In that case, the High Court indicated that where the parties to an arbitration agreement expressly agree that the tribunal will have the power to adopt a summary procedure, the tribunal's adoption of such a procedure will not, in and of itself, give rise to grounds for challenging the award under the Arbitration Act 1996, or resisting enforcement in the English courts.

The dispute in *Travis Coal* arose out of a share purchase transaction between Essar Minerals (as buyer) and Travis Coal (the seller). As part of the consideration for the sale, Essar Minerals issued promissory notes to Travis Coal. A guarantee for the notes was provided by Essar Minerals' parent entity (Essar Minerals Global Fund Ltd (EGFL)). That guarantee contained an arbitration clause that referred disputes to New York-seated ICC arbitration, subject to New York law. When Essar Minerals defaulted under the notes, Travis Coal initiated arbitration proceedings under the

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<sup>6</sup> See New York Convention, article V(1)(b). See also Arbitration Act 1996, section 103, which governs the refusal of recognition or enforcement of New York Convention awards in the English courts. Section 103(2) reads: "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves— ... (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."



guarantee. The tribunal adopted a summary procedure and rendered an award in favour of Travis Coal. EGFL (the guarantor) subsequently applied to the New York courts to set aside the award, while Travis Coal applied to the English High Court to enforce the award.

Before the High Court, EGFL argued that the arbitration clause in the guarantee did not provide the tribunal with jurisdiction to adopt a summary dismissal procedure. In considering this argument, Blair J noted that the real question under the Arbitration Act 1996 was whether “the procedure adopted by the Tribunal was within the scope of its powers, and was otherwise fair”. This was described by the court as “a question of substance, rather than how it was labelled” (*Travis Coal* 2014: para 44). In considering this point, Blair J noted that the procedure adopted by the tribunal was expressly permitted by the arbitration agreement set out in clause 7.7 of the guarantee, which was in the following terms (emphasis added):

The arbitrators shall have the discretion to hear and determine at any stage of the arbitration *any issue asserted by any party to be dispositive of any claim or counterclaim*, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators *may render an award on such issue*.

On its proper construction, Blair J held that this provision expressly allowed the tribunal to determine dispositive issues at any stage of the arbitration. Blair J also noted that the tribunal made “every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the nature of the dispute it had to decide. In doing so, it gave each party a fair opportunity to present its case” (*Travis Coal* 2014: para 50). Moreover, Blair J rejected EGFL’s broader submission that summary dismissal was “strongly disfavoured in international arbitration” and that there was “an important distinction between empowering a tribunal to conduct proceedings efficiently and exercising a summary judgment power” (*Travis Coal* 2014: para 43).

Following the reasoning in *Travis Coal*, nothing prevents parties from expressly agreeing to empower a tribunal to adopt summary dismissal procedures in an appropriate case. In particular, parties may do so by incorporating, in their arbitration clause, the procedural rules of an arbitral institution that expressly include such a power.

The second case is *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* (2018), which arose out of a challenge to an award rendered by a London-seated sole arbitrator regarding a dispute over delivery and payment for a shipment of nickel. The dispute arose between Gunvor, the “seller” (a

Singaporean nickel supplier) and Uttam Galva, the “buyer” (an Indian steel producer). Gunvor applied to the tribunal for a partial final award—essentially seeking summary dismissal—requesting payment of the bills of exchange on the basis that the “general rule is that the Court will give summary judgment for a claimant on a bill of exchange save in exceptional circumstances” (*Uttam Galva* 2018: para 16).

The tribunal refused to render a partial award on the basis that this would result in the “total loss of the opportunity” to consider the defences raised, and instead ordered the buyer to make an interim payment on account of the monetary award which the tribunal considered was likely to be recovered. The buyer then challenged the award under section 67 of the Arbitration Act 1996 on the basis that the tribunal had exceeded its jurisdiction in making the payment order (*Uttam Galva* 2018: para 25).

In considering the buyer’s application, the High Court helpfully made clear that the alleged “unavailability” of summary dismissal procedures in arbitral proceedings has been “overstated” (*Uttam Galva* 2018: para 49). In particular, Picken J did not accept: (a) that “relief akin to summary judgment would not be available in arbitration in an appropriate case” (*Uttam Galva* 2018: para 49); or (b) the observation of the Singapore Court of Appeal in *CA Pacific Forex v Leong* (1999) that “the availability of summary judgment procedures in international arbitration, and specifically under the ICC Rules, appears to be a matter of controversy in England” (*Uttam Galva* 2018: paras 60-61).

Chong and Primrose note that section 33(1)(b) of the Arbitration Act 1996 (which provides that a tribunal shall “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”) may be read as providing the “appropriate key to unlock” any limitation on summary dismissal procedures arguably imposed by section 33(1)(a) (which requires each party to be given a “reasonable opportunity of putting [its] case”), by enabling tribunals to adopt summary procedures in order to avoid unnecessary delay or expense (Chong & Primrose 2017, 67).

## [E] A WELCOME DEVELOPMENT: THE LAW COMMISSION'S PROPOSAL TO REFORM THE 1996 ACT

The UK Law Commission is currently conducting a public consultation process relating to reforms to the Arbitration Act 1996, and its consultation papers include a proposal for the inclusion of a provision for summary dismissal in the Act. Specifically, the Law Commission has provisionally proposed “a non-mandatory provision which gives arbitrators the power to adopt a summary procedure to decide issues which have no real prospect of success and no other compelling reason to continue to a full hearing” (Law Commission 2022, 6.2).

The Law Commission has justified this proposal on the basis that such an express provision would “reassure arbitrators who wish to manage the arbitral proceedings in an efficient manner, while also ensuring that proceedings are conducted fairly” (Law Commission 2022, 6.2). Noting that stakeholders have expressed support for reform in favour of summary procedures, and that parties are overwhelmingly in favour of innovation aimed at improving the efficiency of arbitration, especially in the banking, finance and construction sectors (Law Commission 2022, 6.9), the Law Commission’s first consultation paper has expressed the hope that making express provision for summary dismissal procedures in the 1996 Act will allay tribunals’ “due process paranoia” and enable them to adopt such procedures with confidence (Law Commission 2022, 6.21).

If such a provision is to be included in the Arbitration Act 1996, this of course leaves open several questions as to how that provision should be drafted, including the threshold test that should apply for summary dismissal. The Law Commission is proposing to stipulate the threshold for summary dismissal explicitly in the Act in order to ensure consistency of application (Law Commission 2022, 6.30) and has suggested a test that mirrors the test for summary judgment in the English courts (CPR, rule 24), namely, “no real prospect of success” and “no other compelling reason” for the issue to proceed to trial. Although that test differs from the test as articulated in the procedural rules of the majority of arbitral institutions—the “manifestly without merit” test—the Law Commission has noted that the “no real prospect of success” test has a strong basis in common law countries and a well-understood meaning, as outlined in detail in case law (Law Commission 2022, 6.33).

## [F] CONCLUSION

The arbitration community continues to consider how it can ensure that arbitration remains an efficient method for the resolution of disputes, and summary dismissal procedures certainly promote that objective.

The UK Law Commission's proposal to include a provision in the Arbitration Act 1996 expressly empowering arbitral tribunals to adopt summary dismissal procedures is therefore to be welcomed; such a provision should give parties and tribunals greater confidence to use such procedures and should further secure London's position as one of the most popular seats of arbitration.

Regardless of whether or not a provision for summary dismissal is included in the Arbitration Act 1996, it should at least be clear (in light of the case law noted above) that where parties have expressly agreed to empower a tribunal to make an order for summary dismissal (including by adopting institutional rules that provide for such a power) and the tribunal exercises such a power in accordance with the terms of the parties' agreement, there should be no basis for any challenge to the validity or enforceability of the tribunal's award under the Arbitration Act 1996.

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**PUTTING THE ARTIFICIAL INTELLIGENCE IN  
ALTERNATIVE DISPUTE RESOLUTION: HOW AI  
RULES WILL BECOME ADR RULES**

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**Abstract**

This article argues that the evolving regulatory and governance environment for artificial intelligence (AI) will significantly impact alternative dispute resolution (ADR). Very recently, AI regulation has emerged as a pressing international policy issue, with jurisdictions engaging in a sort of regulatory arms race. In the same way that existing ADR regulations impact the use of AI in ADR, so too will new AI regulations impact ADR, among other reasons, because ADR is already utilizing AI and will increasingly utilize AI in the future. Appropriate AI regulations should thus benefit ADR, as the regulatory approaches in both fields share many of the same goals and values, such as promoting trustworthiness.

**Keywords:** artificial intelligence; online dispute resolution; alternative dispute resolution; regulation; governance; trustworthiness; transparency; fairness; diversity; explainability.

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**[A] INTRODUCTION**

The last year has witnessed a proliferation in the development and use of artificial intelligence (AI). ChatGPT, a chatbot developed by OpenAI, was recently recognized as the fastest-growing consumer application in internet history, acquiring 100 million users between December 2022 and January 2023 (Gordon 2023). In February 2023, Columbian Judge Juan Manuel Padilla García posed several legal questions to ChatGPT, including the chatbot’s replies alongside his own ruling (2023) to “extend

the arguments of the adopted decision” (Rose 2023).<sup>1</sup> Following extensive online debate, Judge García remarked that while ChatGPT and other technology programs should not be used to replace judges, they can improve the efficiency of judicial proceedings by aiding in document drafting and performing other secretarial tasks: “by asking questions to the application, we do not stop being judges, thinking beings”, he said (Taylor 2023). Ironically, when asked by journalists about its role in the judicial system, ChatGPT itself appeared more reluctant than Judge García, responding, “Judges should not use ChatGPT when ruling on legal cases ... It is not a substitute for the knowledge, expertise and judgment of a human judge” (Taylor 2023). If the swift uptake of ChatGPT for legal support is any indication, there will soon be a greater influx of AI systems in legal and alternative dispute resolution (ADR).

## [B] BACKGROUND ON AIDR

Nearly 70 years after the term “artificial intelligence” was coined, it lacks a generally accepted definition. The struggle to achieve consensus on the definition of AI is symbolic of a larger struggle to achieve consensus on appropriate AI regulatory and governance frameworks. We define AI as an algorithm or machine capable of completing tasks that would otherwise require cognition (Abbott 2020, 22). This definition centres on AI’s functionality rather than the specific way it is programmed, because the law should focus on regulating AI behaviour (Abbott 2020).

Recent improvements in AI capabilities are due in large part to increases in the availability of on-demand, voluminous and complex (structured and unstructured) datasets, or ‘Big Data’, along with advancements in software designs and computing power. Many of the recent and most prominent breakthroughs in AI have relied on machine learning, a particular sub-discipline of computer science that operates by using statistical methods to make classifications or predictions. However, in the ADR context, from the 1970s until recently, AI models were largely rule-based or expert systems, requiring developers to foresee and manually code all potential inputs and outputs relevant to a given dispute. For example, one early ADR system utilizing AI (AIDR), developed by the RAND Corporation in the 1970s and 1980s to support California product liability settlements, modelled human litigators’ and insurance adjusters’

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<sup>1</sup> Judge García asked several questions, including, “Is an autistic minor exonerated from paying fees for their therapies?” and “Has the jurisprudence of the constitutional court made favorable decisions in similar cases?” The chatbot responded correctly: “Yes, this is correct. According to the regulations in Colombia, minors diagnosed with autism are exempt from paying fees for their therapies.”

decision-making processes for a series of hypothetical disputes. The if-then (input-output) rules mirrored a person's mental linking of facts and conclusions, chained together by legal rules (Waterman & Peterson 1981). The AI documented its reasoning in a decision tree, adjusting course in response to new or altered facts, and ultimately providing visual evidence of how it reached its conclusion (Waterman & Peterson 1981). Affirming the technical sophistication needed to build a system capable of handling even relatively straightforward disputes in a narrowly defined area with known parameters, the RAND prototype required several thousand if-then rules (Waterman & Peterson 1981). Relatively large-scale consumer e-commerce systems, such as eBay's and PayPal's dispute resolution systems from the early 2000s, operated in a similar rule-based fashion.

AIDR systems<sup>2</sup> have come a long way since these applications, and demand has increased recently due to the Covid-19 pandemic that restricted travel and face-to-face interaction, leading practitioners to leverage online dispute resolution (ODR) systems incorporating some degree of AI in document-sharing, video-conferencing and case-intake technologies (Orr & Rule 2019; Rickard 2021). Some AIDR systems also help facilitate or independently manage legal research, negotiation, settlement, document drafting and decision support (Zelevnikow 2021).

There has been continued debate about whether and how best to regulate ADR and AIDR (eg command-and-control regulations, self-regulation, trust marks, clearing houses), and no specific regulatory approach or centralized enforcement authority<sup>3</sup> has emerged (Liyanage 2013). This landscape has led some to conclude that there is little to no regulation, authority, standards or monitoring, making ADR an "informal system" (Menkel-Meadow 2013) and a "largely unregulated industry" operating behind closed doors (Dore 2006; Hensler 2017). Commentators point to the absence of agreed-upon and enforceable qualification and licensing requirements, responsibilities and obligations, and behavioural standards for neutrals (Rolph & Ors 1996; Menkel-Meadow 1997; Hensler 2017),<sup>4</sup> procedural safeguards of adjudication (Roberts 1993)

<sup>2</sup> "AI systems" refers to the entirety of the AI lifecycle, including the models, composed of algorithms and data, as well as the human, social, and industry context or ecosystem the AI operates in or impacts.

<sup>3</sup> There is "no national or centralised form of 'regulation' of dispute resolution in the US" (Menkel-Meadow 2013).

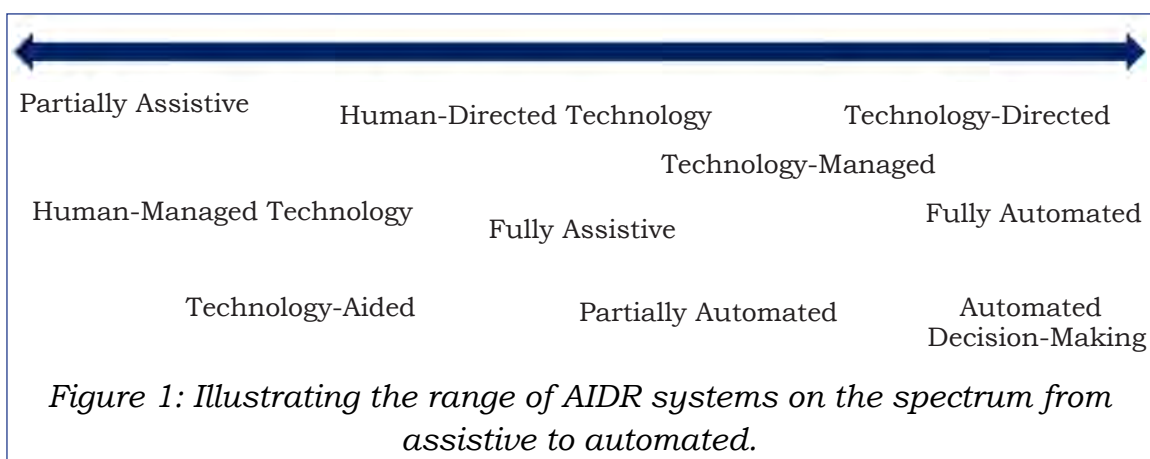
<sup>4</sup> "ADR itself is arguably a low governance field because in most countries practitioners are unlicensed and the field is largely unregulated ... Standardization or regulation of any sort has generally only applied to practitioners seeking to practice in official or public frameworks, such as professional organizations and courts, which require certain standards of certain practitioners, in particular for those practitioners involved in courtconnected mediation" (Ebner & Zelevnikow 2016).

and judicial review except in limited instances of neutral misconduct (Dore 2006). Where private and court ADR rules of practice and ethics exist, some argue that the “breadth, reach and enforcement mechanisms for an ethics of ADR become highly pluralistic, substantively conflictual and procedurally cumbersome” (Menkel-Meadow 1997).<sup>5</sup> The absence of formal procedural and institutional safeguards and enforcement mechanisms has led some to question the quality of ADR in the absence of regulation (Rolph & Ors 1996).

While ADR is not regulated in the same way or to the same extent as conventional litigation or legal practice, there are a host of laws that apply to ADR despite not being ADR-specific, such as professional standards that apply to advocates and neutrals licensed to practise law and working in ADR, or data protection laws that govern the use of certain information in ADR proceedings. These rules may conversely apply to the use and development of AI systems *in* ADR, and there are some existing and emerging institutional governance and regulatory mechanisms that set standards and expectations specifically for ADR systems’ design, development and deployment.

## Classifications, Applications and Impacts

How AI impacts ADR processes, disputants and the role of the third-party negotiator, mediator or arbitrator (the “neutral”) depends, among other things, on the technology used, tasks executed and the level of human oversight and intervention. It is helpful to consider ADR systems as existing on a spectrum (see Figure 1).



<sup>5</sup> “Governmental and other organizations in the United States are regulating ADR and TPs [third parties], but the common regulatory approach is formalistic at best; mediators are subject to one set of regulations, arbitrators another, and many of these rules apply only to court-attached procedures” (Silver 1996).

*Assistive technologies*, which can support, inform or make recommendations to neutrals, account for one end of this spectrum. These technologies can expedite and improve ADR outcomes by eliminating administrative and procedural impediments (eg document management and drafting, communications, calendaring, travel) and equipping neutrals with the informational resources (eg advanced legal research) that they need to make accurate, informed decisions. Assistive technologies are being leveraged in real time. Harvey, a large language model-based platform, is assisting attorneys with contract analysis, due diligence, litigation and regulatory compliance in several languages (Allen & Overy 2023). The system is reportedly providing faster, improved and cost-effective recommendations and predictions that attorneys can review and verify (Allen & Overy 2023). Applied to ADR, such a system could simplify and supplement the time- and resource-intensive aspects of neutrals' work and help satisfy various procedural requirements, such as by providing oral and written communications to disputants or decreasing costs for human translators by providing first-pass translations.

The benefits offered by assistive technologies can accrue to disputants, who may utilize ADR over traditional litigation due to its relative efficiency, affordability and reliability (Carneiro & Ors 2014). Assistive ADR is therefore well equipped to satisfy ADR's core objective to provide disputants with a fair, efficient and economical resolution process (United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006). Since neutrals retain control over the dispute resolution process and sole authority over case outcomes, there is broad support in the ADR literature for expanding the use and development of AI that assists or enables neutrals in performing their work in line with generally accepted ADR values (Zelevnikow 2021).

*Automotive technologies*, which occupy the other end of this spectrum, can partially or fully automate discrete tasks and, in some narrow instances, even replace neutrals. Some applications include automated negotiation, settlement, award and resolution plan drafting, and decision-making. CoCounsel, released in March 2023, claims to be the world's first-ever AI legal assistant (Casetext 2023). Users can delegate "substantive, complex work" (paras 5-7) to the system, including legal research, document and contract analysis, and deposition preparation (Casetext 2023). Proponents of automotive technologies note that, insofar as AI can detect correlative patterns in large datasets with a speed, scale and precision that often outpaces human ability, it could study previous disputes and apply core features, rules and insights to future matters.

Equipped with these insights, neutrals could improve the accuracy<sup>6</sup> of their decisions (Barysé & Sarel 2023). Or, with AIDR systems independently resolving minor, straightforward disputes, neutrals could focus their time on more complex matters.

Automated systems can also improve access to justice for self-represented litigants by offering real-time, inexpensive legal advice and explanation (de la Rosa & Zeleznikow 2021). Providing potential disputants with an accurate forecasted case outcome empowers underrepresented parties to make informed decisions about whether to pursue ADR altogether, helping alleviate long-standing concerns about ADR favouring disputants with more power and resources (Miller 2022). Studies have also found that some individuals have an easier time confiding in an AIDR system than a human neutral, either because there is a greater degree of anonymity or because AI systems offer no (overt) feelings of judgment or bias against identity traits (Orr & Rule 2019).<sup>7</sup> ADR participants are often concerned about neutral bias and may select, for example, neutrals whose nationalities differ from disputants' to promote impartiality (UNCITRAL Mediation Rules 2021). ADR participants may similarly view AI as less likely to be partial to a particular disputant or dispute domain, regardless of whether that is a correct perception. Disclosure requirements vary greatly between jurisdictions,<sup>8</sup> which some commentators say prevents parties from easily or inexpensively accessing information about neutral misconduct or conflicts necessary to make an informed selection (Silver 1996; Dore 2006). Lacking any outward personal, financial or professional interests, a well-trained and explainable AI system could operate as an uninterested neutral.

Most existing automative systems are unable to perform significant tasks independently or without any human oversight, however (McKendrick & Thurai 2022). Many commentators have noted this "implementation gap between those technologies which are proposed and predicted within the field, and those which have been realized" (Alessa 2022, 324). Moreover, despite automative technologies' potential benefit to disputants and neutrals, there are significant costs and risks associated with the adoption of automative ADR technologies, as we

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<sup>6</sup> For example, in 2017, an AI system developed by researchers at Cambridge University performed with greater accuracy (87%) than a group of 100 experienced lawyers (62%) when predicting the outcomes of 775 financial ombudsman cases (Tashea 2017).

<sup>7</sup> Some scholars are exploring whether automated decision-making can de-bias judges (Chen 2019, as cited in Barysé and Sarel 2023).

<sup>8</sup> California has the most comprehensive disclosure requirement in the US, requiring disclosure of a third party's past ADR work "to inform the disputants of a pattern of bias within an industry or substantive dispute" (Silver 1996).



consider further below (Orr & Rule 2019; Rajendra & Thuraisingam 2021).<sup>9</sup> In contrast to assistive technologies, automative technologies face greater scepticism because their outputs can be used to determine ADR case outcomes with little to no human oversight.

Many systems occupy the space between these two ends of the AIDR spectrum. For example, British Columbia's Civil Resolution Tribunal (CRT), an AI expert system, independently performs case intake, management and communications and provides disputants with a negotiation forum.<sup>10</sup> However, if disputants are unwilling or unable to reach an agreement in an automated environment, the CRT will notify a human tribunal member, who will then oversee the duration of the resolution process. Other systems, such as SmartSettle, an AI negotiation tool, can independently arrive at a compromise between disputants and provide a recommended settlement to a human neutral.<sup>11</sup> The neutral may agree with the recommendation and provide it to the disputants, or overrule it and make their own mediator's proposal. A system's position on the AIDR spectrum is therefore not solely determined by its design and capabilities, but also how and for what purpose(s) the technology is used by parties and neutrals. Still, given the impact that even partially assistive AI systems can have in dispute resolution, it may be useful to think of AI as taking on an active "fourth party" role in the ADR process (Katch & Rifkin 2001, as cited in Carneiro & Ors 2014), and of AI developers as a "fifth party" due to their discretion in setting AI's rules and logic and supplying its training data (Lodder 2006, as cited in Carneiro & Ors 2014). Acknowledging AI and its developers as active participants in the ADR process is critical to understanding the technical, procedural and normative impacts of AI involvement.

## Challenges and Risks for AIDR

AIDR systems based on machine learning can operate by detecting correlative patterns in data, developing rules based on this analysis, and applying those rules to new data. Unfortunately, this presents a weakness in the dispute resolution context, as laws and rules do not provide "the kind of structure that can easily help an algorithm learn and identify patterns and rules" (Orr & Rule 2019, 9-10). Conflicts sometimes involve

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<sup>9</sup> Some automated negotiation support systems, which "do not automate the negotiation process but provide IT support for complex negotiations, leaving the control over the negotiation process with the human negotiators", are viewed as a limited exception (Schoop & Ors 2003, as cited in Zeleznikow 2021).

<sup>10</sup> Civil Resolution Tribunal, 'Societies and Cooperative Associations'.

<sup>11</sup> See [Smartsettle Infinity](#).

multiple areas of law (eg tort, property, insurance, family) and concern disputants located across international borders. In these cases, human neutrals must identify relevant rules from disparate areas of law (and perhaps legal systems) and interpret them against complex and disputed fact sets. Conflicts of this nature do not lend themselves to “specialization into specific case types” necessary for instructing AI (Orr & Rule 2019, 10). Add to this a dearth of sufficiently representative datasets due to ADR confidentiality obligations, and it is even more difficult to train a machine learning-based AI system to successfully navigate a complex dispute without error and unfair bias.

Further calling into question AI’s ability to independently resolve disputes are capabilities lacking in such systems. Novel analysis and interpretation may be required to determine standards or the application of rules to new facts. Whether behaviour was “reasonable” or an outcome “foreseeable” can depend entirely on subtle differences in context.<sup>12</sup> Mediation, for example, often requires human neutrals to navigate social and emotional issues, sometimes with underlying cultural differences (Schmitz & Ors 2022). To assess disputants’ reliability, neutrals regularly depend on previous experiences, knowledge and normative judgements (Waterman & Peterson 1981). AI may not be well equipped to successfully automate the interpretive, human aspects of ADR, especially because disputed facts are an inherent feature of many conflicts. While some AI-powered lie detectors are better at discerning human credibility than people (Shuster & Ors 2021), no existing system can do this reliably, and several have been found to produce biased, discriminatory or otherwise inaccurate results (Bittle 2020; Lomas 2021).

Concerns about AI accuracy, bias and fairness are significant given the impact that ADR outcomes can have on individuals’ rights. Some AI systems, colloquially referred to as “black boxes”, can lack transparency and explainability, meaning the logic according to which they make predictions, recommendations or decisions is not explainable—at least not in ways that make sense to system users. The use of such opaque systems in legal or dispute resolution settings can undermine individuals’ right to a reasoned decision, as well as their right to challenge and appeal from a decision, raising due process concerns.

For all these reasons, some critics conclude that “machine-made justice” by *automotive* technologies should never replace existing dispute resolution processes by humans. They contend that technology can

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<sup>12</sup> According to the RAND corporation, the “derivation of rules to describe such imprecise terms would be among the more technically difficult tasks in developing a comprehensive rule-based model” (Waterman & Peterson 1981, 18).

neither substitute human reasoning and common sense nor achieve fairness and justice in the ADR context (Condlin 2017). Others are open to automation on a more limited basis, for certain high-volume, low-value disputes, or those with relatively limited grounds for factual disputes and developed bodies of law, such as certain traffic violations.

## [C] EXISTING RULES AND STANDARDS FOR AIDR

Even in the absence of AIDR-specific rules and standards, rules and standards that apply generally to ADR also apply specifically to AIDR. For instance, for over 50 years, the UNCITRAL has published conventions, model laws and rules for international commercial trade law. The Model Law on International Commercial Arbitration (amended in 2006), aimed at developing harmonized international economic relations, has been adopted in over 119 jurisdictions. While the Model Law is directed at states, the UNCITRAL Arbitration (revised in 2010) Rules and UNCITRAL Mediation (2021) Rules are rule sets that disputants can agree to use in their ADR proceeding. While not the only set of ADR standards, the UNCITRAL rules offer a globally accepted benchmark used by professional associations, chambers of commerce and arbitral institutions.<sup>13</sup>

Though not drafted with AI in mind, several UNCITRAL arbitration rules apply to AIDR, including requirements that neutrals must disclose any conflicts of interest or biases undermining their impartiality or independence; treat parties equally and provide reasonable opportunities to present their cases; conduct hearings fairly and efficiently without unnecessary delay and expense; determine the admissibility, relevance and weight of evidence presented by disputants; and state the reasoning upon which the award is based (UNCITRAL 2010).

In 2016, UNCITRAL articulated four principles that should underlie any ODR process—fairness, transparency, due process and accountability—and emphasized that existing ADR rules and standards, including confidentiality, due process, independence, neutrality and impartiality, apply equally to ODR (2016). UNCITRAL’s Expedited Arbitration Rules further affirm that technology uses are also subject to fair proceedings rules, stating that neutrals should give disputants “an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties” (2021, 52).

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<sup>13</sup> UNCITRAL, [‘Technical Assistance and Coordination](#).

The frameworks governing the ethical conduct of arbitrators (American Bar Association (ABA) 2004) and mediators (American Arbitration Association, & Ors 2005) also articulate agreed-upon expectations and best practices for neutrals' obligations. In addition to those articulated by UNCITRAL, several other ABA principles also apply to AIDR, including prohibitions on neutrals acting with more or less authority than provided by the agreement of parties or in a manner inconsistent with applicable procedures and rules; requiring that decisions be made independently and insulated from "outside pressure, public clamor, and fear of criticism or self-interest" (ABA 2004, 4); and prohibiting non-accurate or untruthful advertisements or the promotion of services and abilities related to arbitration in a manner likely to mislead. In 2022, the ABA's Dispute Resolution ODR Task Force developed a set of guiding principles for ODR and thus, AIDR, namely that the process should be; accessible, accountable, competent, confidential, equal, fair, impartial, legal, secure and transparent (2022), adding additional considerations for court-connected ADR systems.

## [D] THE EMERGING GLOBAL AI REGULATORY LANDSCAPE AND ITS APPLICABILITY TO AIDR

The AI regulatory landscape is extensive, dynamic and fragmented.<sup>14</sup> We focus here on approaches taken by the European Union (EU), United Kingdom (UK) and United States (US), but many other jurisdictions are also active in this area.<sup>15</sup> By encouraging the responsible use of trustworthy technology, or that which is fair, safe and consistent with human and civil rights, these approaches attempt to address and mitigate many of the challenges and concerns associated with AI previously discussed.

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<sup>14</sup> For a representative list of global AI regulatory initiatives from governments, international organizations, and civil society, see [OECD Policy Observatory](#).

<sup>15</sup> For example, Singapore was the first Asian country to publish a Model AI Governance Framework (Infocomm Media Development Authority 2019) and the first country to launch an AI Governance Testing Framework and Toolkit ("AI Verify") (Infocomm Media Development Authority 2022); Canada was the first country to directly regulate federal government use of AI (Directive on Automated Decision-Making 2019); Japan was the first country to raise, as an official policy matter, the need to create AI development and implementation standards (Iida 2021).

## European Union: AI System Risk Classification and Product Liability Laws

The EU Artificial Intelligence Act (AI Act), proposed in 2021 and pending potential enactment, would make the EU the first large jurisdiction to specifically regulate AI. The AI Act seeks to regulate systems that pose a potential risk to fundamental rights or human wellbeing and categorizes AI use cases along four risk tiers: minimal, limited, high and unacceptable (European Commission 2022). System developers' and users' documentation, disclosure and transparency obligations correspond with the risk levels, ranging from voluntary to obligatory. The Act considers the use of AI technologies in the administration of justice, or "applying the law to a concrete set of facts", as a high-risk application subject to the following mandatory requirements before systems can be released on the market (European Commission 2022, 41, para 40):

*High risk* – Risk assessment and mitigation systems, high quality datasets, activity logging to promote traceability, appropriate levels of human oversight, and high levels of robustness, security, and accuracy.

The EU's proposed amendments to its product liability laws (European Commission 2022) will complement the AI Act by ensuring providers and manufacturers of AI or AI-enabled systems that are defective, cause physical injury, property damage, or data loss or privacy breach are liable to compensate injured parties (European Commission 2022). These rules apply broadly to both new and existing hardware and software products, and manufacturers will be responsible for harms resulting from changes or software updates that they make to products already on the market (European Commission 2022). Cited forms of compensable harm include discrimination by AI recruitment software or the onset of a health condition caused by an innovative medical device.

## AIDR Systems and Automated Decision-Making

Affirming that the EU considers AI in ADR high risk, in 2018, the European Commission for the Efficiency of Justice (CEPEJ) adopted five ethical principles for the use of AI in judicial systems, including ODR: (1) respect for fundamental rights; (2) non-discrimination; (3) quality and security; (4) transparency, impartiality and fairness; and (5) "under user control" (CEPEJ 2018). While the CEPEJ acknowledged that AIDR could significantly improve access to justice (2018, 44), it believes users

and deployers should assess the appropriateness<sup>16</sup> and degree of AI's integration in the dispute resolution process to ensure that transparency, neutrality and loyalty requirements are being upheld (CEPEJ 2018). To this end, the CEPEJ asserts that technology applications must not undermine the following rights guaranteed in all civil, commercial and administrative proceedings: access to a court; adversarial principle;<sup>17</sup> equality of arms; impartiality and independence of judges; and right to counsel (2018).

With respect to automated ODR systems, the CEPEJ references section 22 of Europe's data protection law, the General Data Protection Regulation (GDPR), which allows persons "to refuse to be the subject of a decision based exclusively on automated processing" when the automated decision is not required by law and entitles them to decisions made by human decision-makers (2018). Beyond the right to *object*, both the EU GDPR and UK Data Protection Act 2018 also confer on data subjects the rights to be *informed* about the existence and use of automated decision systems and to *access* meaningful information about the systems' underlying logic and potential consequences (UK Parliament 2018). Data subjects who explicitly consent to decisions based solely on automated processing possess a right to obtain an explanation of the system's decision (UK Parliament 2018). According to the UK Information Commissioner's Office, explainability statements containing the following explanations must accompany automated decision systems released for use, namely: rationale, responsibility, data, fairness, safety and performance, and impact (2020). These statements help address concerns around black-box systems and provide disputants with the greater ability to challenge an automated decision with legal effect.

The EU GDPR and UK Data Protection Act protect the personal information of all citizens and residents regardless of whether they are physically present in those territories (GDPR 2018, article 3). This means that organizations operating outside the territories but processing the information of EU or UK citizens and residents, monitoring their behaviour or offering them goods and services, nonetheless, must comply with the GDPR. Individuals protected under these laws could foreseeably opt out or require explainability statements of automated decisions that are part of AIDR processes outside of Western Europe. Even if an automative AI system is not legally required to adhere to GDPR because,

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<sup>16</sup> The use of AI in a low-value e-commerce dispute poses less risk of serious harm than its use in divorce proceedings or allocation of health care resources, for instance (CEPEJ 2018, 44).

<sup>17</sup> "An adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what" (Freedman 1998, 1).



for example, it only processes the data of US citizens residing in the US, GDPR has become a *de facto* standard for international organizations because of the significant technical complexity and costs of having systems operate in compliance with (sometimes conflicting) rules in different jurisdictions. To lessen this burden and enable systems to be used across jurisdictions, it is preferable for AIDR systems to abide by a single data protection standard.

The ability to opt-out of ADR processes that use automative technologies and request a dispute be overseen by a human neutral is a governance mechanism also being considered in the US. In October 2022, the White House's Office of Science and Technology Policy (OSTP) released its "Blueprint for an AI Bill of Rights". Focused on high-risk automated technology systems, the Blueprint advances<sup>18</sup> five key principles<sup>19</sup> that mirror or expand on those found in many other AI governance frameworks (White House OSTP 2022). It identifies judicial and ADR processes as requiring more stringent safeguards and protections, which might include (a) the ability to opt-out of ADR processes involving automated technologies; (b) access to an explanation of how the system operates and why it arrived at its resolution, so parties can challenge or appeal the decision; and (c) comprehensive privacy-preserving security measures for systems that use, process or extract sensitive data about individuals (White House OSTP 2022). Some US state privacy laws, including those in California (2018), Colorado (2021), Virginia (2023) and Connecticut (2022), now codify residents' rights to opt-out of automated decision-making technologies in certain contexts and to receive meaningful information about AI decision logic. Therefore, like the EU and UK, the US is also emphasizing that, in high-risk areas, the logic and intent underlying AI system outputs should be understandable to consumers.

## Non-Regulatory AIDR Governance

AI governance is not purely a matter of regulatory compliance; a wide range of non-binding best practices and standards also exist. The ABA, for instance, notes it is critical to incorporate a broad range of ADR practitioners and stakeholders' input into ODR system design and development (ABA (Dispute Resolution ODR Task Force) 2022). In the absence of close collaboration between system developers and an

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<sup>18</sup> "The Blueprint for an AI Bill of Rights is non-binding and does not constitute U.S. government policy. It does not supersede, modify, or direct an interpretation of any existing statute, regulation, policy, or international instrument" (White House OSTP 2022, 2).

<sup>19</sup> Safe and effective systems; algorithmic discrimination protections; data privacy; notice and explanation; and alternative options.

implementing organization, the former will have discretion in determining the model's design, training data and underlying logic, thereby influencing the system's outputs. If collaboration in the design phase is not possible, organizations procuring systems from external developers should take steps to assess and mitigate any gaps between the developer's and the user's needs, such as by articulating clear values, objectives and key performance indicators for systems, and performing impact assessments before and continuously after implementation (National Center for State Courts *et al.*; ABA 2022). Offering guidance for designers, developers, providers, practitioners and users, the ABA lists the following criteria among those it uses to describe accountable, secure, equal, and transparent ODR systems (2022):

- ◇ uses data security technologies and practices that meet industry standards for information technology;
- ◇ indicates whether they comply with relevant governmental and non-governmental guidelines on transparency and fairness of AI systems;
- ◇ includes metrics used to assess system performance, including the accuracy of those metrics;
- ◇ regularly audited for compliance and to evaluate whether the system is meeting articulated goals;
- ◇ provides at least the same confidentiality and privacy as does offline dispute resolution;
- ◇ does not provide any user with a systemic advantage.

The ABA maintains that these provisions supplement “applicable technical standards or the legal and ethical principles that apply in face-to-face dispute resolution processes”, such as due process and self-determination (2022, 2).

In 2019, the UK became the first jurisdiction to pilot public sector AI procurement guidelines (World Economic Forum 2019), seeking to encourage the adoption and use of responsible AI by the public sector and, by extension, private businesses designing AI systems for government use. Given that ADR processes deal with sensitive personal information and decisions need to be explainable, the following procurement principles are especially relevant for AIDR: enabling algorithms' internal and external interpretability to establish accountability and contestability; appropriate confidentiality, trade-secret protection and data-privacy practices; and clearly defined data-sharing agreements with vendors (World Economic Forum 2019).

The procurement of robust and secure AI systems is likewise encouraged in the US. In January 2023, the National Institute of Standards and Technology (NIST) published the first official draft of its AI Risk Management Framework (RMF), a voluntary framework intended to encourage the development, deployment and use of responsible and trustworthy technology.<sup>20</sup> Relevant for the entire spectrum of AIDR systems, the RMF notes that human baseline metrics must be established for AI applications that augment or replace human activity (NIST 2023). It also recommends that organizations using external developer software, hardware and data ensure that their risk tolerances align with those of the developer, so as not to introduce any unanticipated risks (NIST 2023).

## [E] HOW AI RULES WILL BECOME ADR RULES

AI and ADR are both regulated through rules that apply to more general areas, such as privacy and advertising practices (Atleson 2023). Likewise, ADR rules, such as requirements for conflicts disclosures, apply to AI used in ADR. So too will the emerging body of AI rules apply to ADR. AI is already part of ODR and many ADR processes, whether it is doing something relatively simple on the assistive end of the spectrum like enabling video conferencing and scheduling, or something closer to the automative end. Recent advances in AI combined with the Covid-19 pandemic accelerated the adoption of AIDR, but AIDR adoption will continue to increase as AI capabilities continue to improve. Even very traditional ADR systems will face competitive pressures to incorporate AI. Just as traditional legal practitioners will face increased competition from legal practitioners augmented by AI, or in some cases using automated systems, traditional ADR providers and processes will face increased competition from AIDR systems. At some point, it is likely that all ADR will be AIDR. As this transition accelerates, AI rules will increasingly apply to ADR.

For instance, the European Parliament has suggested that deployers of AI systems are in control of risks and have corresponding liability for AI-generated harms (Committee on Legal Affairs 2020). ADR practitioners may thus be liable for harms caused by AI systems they adopt in ways they would not be liable for similar harms they cause directly. For example, an ADR provider may have liability for using an AI system that is ultimately proven to have a systemic racial bias, as has been alleged against systems used by some judges to make bail determinations (Larson & Ors 2016). While human neutrals can have liability for racially motivated behaviour,

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<sup>20</sup> Valid and reliable; safe, secure and resilient; accountable and transparent; explainable and interpretable; privacy-enhanced; and fair with harmful bias managed.

a neutral cannot be interrogated about biases in the same manner as an AI system. A human neutral is exceptionally unlikely to admit to racial bias, or may have an unconscious bias, but either way is likely to justify an award in a reasoned decision based on permissible criteria. Even if it is possible to detect a potential bias through aggregating and analysing enough of a neutral's publicly available arbitration awards, or a judge's for that matter, such a finding is unlikely to be adequate grounds for challenging a particular award's validity. In the case of a biased human neutral, all of whose awards rule against disputants of a particular race, it will thus be very difficult to prove that such an outcome is not coincidental. By contrast, some AI systems can be evaluated directly to prove the existence of bias if such a statistical finding emerges. AIDR systems revealed to be operating with errors or unfair biases will then need to be reprogrammed or decommissioned, providing another ADR accountability mechanism. Human neutrals on the other hand are very rarely disciplined or held accountable for errors or unfair biases (Silver 1996; Dore 2006). Similar liability considerations may apply under product liability rules for AIDR systems, such that some harms caused by AI systems in the ADR context would not entail liability had they been caused by a person. One effect of this enhanced liability may be greater attention to system designs of AIDR processes.

Even non-binding regulations may have a similar effect. For instance, while the UNCITRAL and ABA rules and guidelines affirm neutrals should treat parties equally and fairly, neither claims they should not provide users with a "systemic advantage" like that of the ABA ODR standards (2022). Though not defined, systemic advantage in AIDR likely includes technology-based advantages. Technology access and comfort shape the dynamics of disputants in relation to each other and the neutral. Parties using video-conferencing software may perform differently depending on their backgrounds and environment, video quality and internet connections. These technical factors can have small to large impacts on the ADR process and ultimate resolution. For example, they can play a role in advocates' abilities to present their arguments and neutrals' perceptions of parties' professionalism and reliability. As these standards become part of ADR, it may result in heightened obligations for neutrals to level the playing field.

## [F] CONCLUDING THOUGHTS

Appropriate AI regulations should benefit ADR because these regulations seek to achieve goals and values that exist in both fields, such as promoting trustworthiness, fairness and diversity. To the extent that AI systems

will be held to higher standards than human neutrals, such as greater explainability and transparency standards, AI rules may help solve some of the long-felt needs in ADR governance.

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# THE EUROPEAN PARLIAMENT'S AI REGULATION: SHOULD WE CALL IT PROGRESS?

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## Abstract

The European Union (EU) has been leading the world with its influential digital regulation. However, the EU's legislative process is sufficiently complex and careful that some national legislation clearly influenced by the EU's AI Regulation is already in place in other countries, before the law has even been finalized in the EU. Meanwhile, other states and regions are just beginning to develop AI policy. For both the EU and such others, we here describe the outcomes of the first round of legislative action by one of the EU's two legislative bodies, the European Parliament, in terms of modifying the Artificial Intelligence Act. The Parliament has introduced a number of changes we consider to be enormously important, some in a very good way, and some in a very bad way. At stake is whether the AI Act really brings the power and strength of product law to continuously scale improved practice on products in the EU with intelligent components, or whether the law becomes window-dressing aimed only at attacking a few elite actors *post hoc*. We describe here the EU process, the changes and our recommendations.

**Keywords:** AI Act; digital governance; AI regulation; parliamentary processes; European Union; transnational regulation.

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## [A] INTRODUCTION

Roughly two years ago, the European Commission announced a regulatory proposal for artificial intelligence, the Artificial Intelligence (AI) Act (European Commission 2022b). This Act is already undoubtedly one of the most influential regulative proposals for AI globally, with clear echoes in law from Brazil to China, as well as impacting on regulatory discourse in the United States. In August 2021, we analysed the core policy concepts of the AI Act, its strengths and weaknesses, to provide

input to policy-makers and anyone else affected by the coming regulation (Haataja & Bryson 2022). Since then, the AI Act has proceeded through the legislative process of the European Union (EU). A key step in this process is the adaptation of the Act by the Commission's key stakeholders: the two legislative bodies of the EU—the Council of the European Union (also known as the Council of Ministers) and the European Parliament. The Council of Ministers is a rotating body of ministers from whichever of the EU's 27 constituent states currently holds its presidency, whereas the Parliament is directly elected by the 375 million eligible voters of the EU. Now the legislative process is nearly completed: the Council adopted its final compromise version of the AI Act on 21 November 2022, and the European Parliament is expected to adopt its own final version in June 2023. These “final” versions are critical to the true final outcome, which results from trilateral talks between the two legislative bodies and the Commission.

In this article, we again aim to influence these final outcomes. Here, we consider the key provisions of the European Parliament's new proposals. We briefly analyse the amendments prepared during the parliamentary process and adopted by the two leading committees in May 2023. This analysis is intended to help pave the way for the next and final stage, trilateral negotiations between the European Parliament, the Council and the Commission, which will soon be underway, with an expected completion before the end of the year. We hope this analysis can help readers understand the strengths and weaknesses of the European Parliament's present proposal and its position in anticipation of the coming negotiations. Our perspective, as earlier in our assessments, is based primarily on the expected practical impacts of the proposed adaptations on the providers and deployers of AI-based systems, though also, of course, where relevant considering these products' ultimate consumers.

## [B] THE EUROPEAN PARLIAMENT IS HIGHBALL-ANCHORING

It seems that the proposal on the table is set intentionally high in expectation of coming compromises needed in the trilateral negotiations. Readers should be mindful of this and certainly not consider the proposal as a collectively adopted version fully agreed by all key stakeholders.

Nevertheless, some of these extraneous additions raise questions about the legitimacy of the requirements overall. For example, additions related to general principles (article 4a) and AI literacy (article 4d) in chapter 4 seem to target strengthening the influence of the Act beyond the high-risk



systems. While we are strong proponents of AI transparency, the European Parliament's version seems to both unnecessarily and impractically require the extension of AI literacy and educational obligations to the industry. We suggest instead *setting the requirements to transparency to be in line with established literacy*. Rather than putting AI players in the role of government in themselves ensuring education, this would simply motivate players with sufficient capacity to consider contributing to those endeavours in order to reduce their own efforts and liabilities in achieving transparency.

We are particularly worried that such extraneous requirements beyond what is necessary can motivate an avoidance of being classified as AI. As we have argued previously (Bryson 2022; Haataja & Bryson 2022), the regulatory considerations the Commission has chosen to address in this Act are broad and the compliance burden rather light-weight, relative to other sectors. Ideally, any system capable of generating actions deemed “high risk” (that is, essentially, altering human lives, such as medical devices or welfare decisions) would provide adequate documentation for such actions or decisions to be auditable and adequately explainable for courts to determine if the decisions were correct, or at least the product of due care and diligence. The Commission itself set the precedent of recognizing that liability—a significant component of the earlier White Paper (European Commission 2020)—as a horizontal concern better handled by updating product liability law (an excellent draft of this update and the new AI Liability Directive are already available: European Commission 2021, 2022a).

## [C] DEPLOYER OBLIGATIONS ARE CLEARER, BUT NEW ONES GO BEYOND THE NECESSARY

One of the significant changes by the European Parliament is when it comes to the role of deployers. First, it hugely clarified the Act's text by adopting the term “deployer” rather than “user” for those institutions deploying AI in their products or services. The term “user” was ambiguous as it is ordinarily applied to the end-users with no role in the design of the AI system (Haataja & Bryson 2022). Now, however, the responsibilities and obligations of deployers of high-risk systems are a clear change from any previous versions. Earlier versions set expectations for the deployers not only to use the systems as instructed by their providers, but also to exercise human oversight, keep automated logs, and monitor their

systems once active. But the European Parliament has now gone on to ask for more.

The deployers under the present European Parliament draft should also inform the end-users that they are subject to the use of a high-risk AI system and offer complaint-handling and redress procedures for affected individuals. This seems a logical step, assuming the levels of capacity and costs are proportionate to the amount of potential harm caused. Deployers can if they choose demand these capacities as part of procurement, and providers can compete in providing efficient and effective tools for such processes. However, the biggest change for deployers clearly comes from a new obligation to conduct a fundamental rights assessment of a high-risk AI system before deploying the system into use. So, for example, a recruiter using human resources (HR) tools in its recruitment process would be obliged not only to ensure that the provider of the system complies with the AI Act, and to use the system according to the instructions provided by the provider, but also to conduct their own individual fundamental rights assessment of the use of such a system (article 29a). In addition, the deployer of an HR AI system would be required to consult workers' representatives to reach an agreement and inform the affected employees that they will be subject to the system (article 29(5a)).

Hiring clearly has life-changing consequences, so certainly it falls under the category of “high-risk” AI that requires sufficient oversight to ensure that no errors or illegal biases are introduced through such a system. But this critical impact on lives and communities is true of hiring *whether or not* AI is utilized. In fact, with a well-written digital system, potential applicants and employees are likely to have more access to explanation and more recourse to remedies than if decisions were being made over thousands of applicants by overworked humans. AI trained through machine learning by default reflects the same biases as the humans who would otherwise be doing the procedures without AI augmentation (Caliskan & Ors 2017). In practice, we hear anecdotally that HR departments have found AI an excellent way to bypass implicit biases and reveal diverse candidates previously overlooked.<sup>1</sup> Thus adding the extra burden of a fundamental rights review only in the case when software is secured by the AI Act makes no sense. The AI Act should not introduce burdens unless they are directly relevant only to AI, not to the

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<sup>1</sup> Unfortunately, for perhaps obvious liability reasons, we have failed to find anyone willing to go on the record about such improvements, but we have heard this from multiple sources and no counter-narratives. Famously, Amazon caught such an error in its AI HR system, though what was a triumph of *ex ante* AI auditing has often been unfortunately presented in the press as a failure. The biased system was never permitted to go live with that fault.

process in general. Similarly, there is no question that strong worker representation and consultation is excellent practice. This may well explain, for example, why AI deployment in Germany tends to increase workers' wages (Battisti & Ors 2023). However, this labour arrangement is part of Germany's sovereign law and applies to employer behaviour far beyond only introducing artificially intelligent systems. These are excellent regulations, but they do not belong in the AI Act.

Putting undue burdens in the AI Act encourages people to engage in regulatory avoidance by pretending that the systems they deploy are not "intelligent". This brings us back again to the question of the *definition of intelligence*, which is one of the most reworked pieces of the AI Act. We again advocate for the simplest, broadest definition possible. Really, all software should be subject to product law, which is largely the impact of the AI Act. The kinds of diligence we are asking for in high-risk systems should be applied to any system that might "decide" something life-changing, whether that system uses Excel macros, large language models, or steam-punk clockwork. If there is a possibility that a human might not be present at the point of the decision, then humans need to do due diligence on that decision-making *ex ante*, and humans need to be able to go back and ensure that a decision was made justly in retrospect.

The European Parliament's proposal goes on to require that deployers notify national supervisory authorities, consult relevant stakeholders and involve representatives of the affected people in providing input to such impact assessments. Such representatives could include but are not limited to, for example, equality bodies, consumer protection agencies, social partners and data protection agencies (article 29a(4)). While again we recognize the value of systematic stakeholder involvement in the deployment of AI systems and are generally in support of such processes, regulating such mechanisms as obligatory for every deployment is clearly overly demanding and provides the basis for serious complaints of over-regulation, and perhaps successful challenges in court.

Looking at the initial proposal, the European Commission has prioritized proportionality and sought to avoid over-regulation by several means. One such means is, for example, leaning towards options that rely predominantly on self-assessment processes rather than obliging providers to have independent audits. The Council, in its own compromise version, seems to build on these same premises (European Commission 2022b). However, the European Parliament is taking a major step in the opposite direction. The deployers of high-risk systems are not trusted to the same extent as providers, but instead, are required to undertake

obligatory consultations with stakeholders, and, further, to notify supervisory authorities. To some extent, this is sensible, since it is the specific application or deployment of AI that determines what harms are available and likely. However, where such considerations are sensible and truly specific to AI, it is important that the costs are kept proportionate to the potential harms. Where they are not specific to AI, it is important that they are in legislation appropriate to their sector. If such requirements are allowed to inflate the number of operators facing serious obligations under the Act, this would increase the costs enormously and decrease the probability of compliance with the Act. In order to properly evaluate the impacts of such a major change, it is essential that the impacts assessment of such amendments are reported. We would like to see all such language carefully reconsidered and reframed in a way that is most likely to benefit the European digital economy.

This same reasoning applies to providers of high-risk systems, who are also burdened with added accessibility and environmental reporting requirements. In line with our previous suggestion, we would prefer the scope of accessibility requirements to be controlled in the accessibility regulations to avoid misalignment of the scope of products and services that would face the accessibility requirements. Just as we do not want to motivate evasion of the label “AI”, we do not want to generate justifiable reasons for evasion of the label “high-risk”. We believe that the inclusion of AI should not be the defining factor for whether or not a system should be green or accessible. We affirm that there can literally be no greater concern than sustainability, and that human rights are rightly central to all EU legislation as well as agreed international law because they are essential to not only our ethics but our survival. Fundamental rights are why we are here: they are what it means to be here. We are a social species that cares for one another and can persist only in a vibrant ecosystem. But burdening some but not all products (annex IV(3b))—digital or otherwise—with these concerns begs regulatory evasion.

## [D] WHAT IS A HIGH-RISK SYSTEM?

Moreover, perhaps the European Parliament’s most worrying change renders the question of what systems even need to comply with the most stringent regulatory burden highly debatable. The proposal introduces an extra layer of consideration when it comes to classifying a system as high-risk. The systems used in high-risk domains, as in annex III, would only be classified as high-risk if they pose a “significant risk of harm” to the health and safety or the fundamental rights of persons (or, in some cases, the environment). Practically, this would mean that a provider could—

based on their own assessment of the risk's severity, intensity, probability of occurrence and duration—object to the regulatory requirements by notifying a supervisory authority with a one-page notification letter and would be free to place their system on the market without such obligation. In response, if necessary, the supervisory authority could object to such a claim within three months of such notification.

We find this process extremely problematic for a variety of reasons. Firstly, it questions the rule-maker's capability to create credible categories of high-risk systems. Surely, the list of high-risk areas is based on a plethora of previous evidence of (and often research into) harm to health and the safety of fundamental rights to back up the classifications? Second, it opens considerable wiggle room for highly compromised interpretations of risk levels by providers who prefer not to comply. Finally, such an amendment would require the significant additional administrative capacity necessary for assessing these notifications. Taken in combination with our previous concern, it seems almost as if the European Parliament is seeking to make the Act a weapon to be used only in extreme circumstances, perhaps always *ex post*, where a very high regulatory burden can be asserted against only a small number of hand-picked companies. This is in complete opposition to the vision of an EU and digital economy full of safe, fair, trustworthy AI products. We strongly encourage sticking to a narrow enough but definite list of high-risk categories in order to avoid the harmful effects of such a new layer in the classification of an AI system as a high-risk system.

## [E] NECESSARY CLARIFICATIONS ON FOUNDATION MODELS

On the positive side, the European Parliament takes both a clear and specific approach when it comes to ensuring the fair sharing of responsibilities along the AI value chain. The Council's approach suggests that general-purpose AI systems should be classified as high-risk if they could be used for high-risk use cases, which of course, if they are truly general-purpose, would encompass all such systems. Contrary to this, the European Parliament prefers an alternative approach: anyone who modifies a general-purpose AI system such that it becomes part of a high-risk AI system (for example, by fine-tuning a general-purpose model specifically for recruiting purposes) becomes the provider of the high-risk system. This makes sense, as we strongly believe that the severity of the limitations and risks of general-purpose systems are specific to their applications. General-purpose AI providers will still be motivated to

provide “hooks” or application programming interfaces to support high-risk systems’ audits because those who make this process easiest will be the ones whose product deployers will choose to deploy.

The European Parliament’s take on a special type of general-purpose AI, so-called *foundation models*, is particularly interesting. Its proposal defines foundation models as AI models that are trained on broad data at scale, designed for generality of output, and that can be adapted to a wide range of distinctive tasks (article 3(1c)). Furthermore, it rightly notes that such models can be “reused in countless downstream AI or general-purpose AI systems”, and they “hold growing importance to many downstream applications and systems” (recital 60e).

While the Council of the EU has focused on regulating such models in the same way as high-risk systems, the European Parliament takes better account of their special nature. Its suggestion is threefold. First, providers of foundation models, including open-source models, would be obliged to comply with specific guardrails related to data governance, risk management, model evaluation, energy efficiency and quality management (article 28b). Secondly, providers of foundation models would be expected to provide “extensive technical documentation and intelligible instructions for use” to help downstream providers of high-risk systems comply with their regulatory obligations, and to register all of this in a central EU database (article 28b(2e, g)). Finally, as a special obligation for the providers of generative AI foundation models, they would be required to ensure safeguards against the generation of content in breach of existing laws and make publicly available a “sufficiently detailed summary of the use of training data protected under copyright law” (article 28b(4b-c)). We welcome this transparency-centred approach that is highly aligned with what we have previously suggested. We also applaud the European Parliament’s suggestions for the development of capabilities for the benchmarking of foundation models, in collaboration between national and international metrology and benchmarking authorities (Haataja 2022; article 58a, article 15(1a)).

For the sake of clarity, contrary to claims by some earlier commentators (Technomancers.ai 2023), the proposal does not suggest any prohibitions or bans on foundation models, nor does it hold them accountable for their applications, provided they function correctly as specified in their documentation.



## [F] SUPPORTING THE RIGHTS OF AFFECTED INDIVIDUALS AND GROUPS AND FURTHER PROHIBITIONS

An amendment that has been long awaited by many (including us) is the right of individual persons or groups of persons to lodge complaints of infringement of the AI Act to supervising authorities. The European Parliament wishes to protect the rights of affected individuals by granting them a right to request from a deployer a clear and meaningful explanation of the role of the AI system in the decision-making procedure, including the main parameters of the decision taken and the related input data (article 68c(1)). This approach to complaints processes seems to align closely with that of the General Data Protection Regulation 2016 (GDPR), though it includes a minor extension. The European Parliament adds the same right not only for individual persons affected but also for collectives of affected people. When coming to remedies, the proposal should be analysed in conjunction with the suggested AI Liability Directive, which (again, in our minds rightly) would take the role of ensuring fair remedy for any individuals harmed by AI systems (European Commission 2022a). We welcome these additions and believe the actionable recourse is what must become an increasingly important ingredient of good AI governance.

Throughout the legislative process, the unacceptable use cases (ie prohibitions) have divided opinions. As expected, the European Parliament is continuing the push for a full ban on biometric identification systems other than the ones used solely for biometric verification and authentication. To understand its logic, it is worth remembering that biometric data is considered sensitive personal data under the GDPR. Furthermore, the European Parliament is worried about the combination of potentially uncontrolled power of the deployers of AI-based biometric categorization systems with well-known biases of the same systems. It is understandable that the European Parliament is seeking a complete ban on AI-based biometric identification in publicly accessible spaces. In contrast to such potentially pervasive surveillance applications, biometrics used for verification and authentication are necessarily consensual. These are systems like passports where the document is matched to user-provided biometric information. Such narrow, consensual uses of biometrics are permitted. Some claim that banning wide-scale face recognition in public spaces disadvantages blind people who might not be able to use their devices to “see” their friends walking by, but so long as friends consent to sharing their photos, a blind person through such a device would be able recognize them but not strangers, just like anyone else. Other additions

to the suggested list of prohibitions are AI systems used for assessing a person's risk for committing criminal offences (predictive crime) and emotion recognition systems for law enforcement, border management, workplaces and in an education setting. The bans are in line with established failings and abuses seen in other countries, such as the “re-education” camps in China.

## [G] CONCLUSION

Based on our assessment, it looks as if the European Parliament has taken some important steps forward, but some quite surprising and large steps back. These odd combinations of moves could make the trilateral negotiations dance an interesting one. We applaud the sensible division of responsibilities between deployers and general-purpose providers, the specific transparency requirements for the foundation models, and particularly the new mechanisms for supporting the actionable recourse by affected persons. The European Parliament's clear recognition that the severity of limitations and risks of AI systems can only fully be assessed and mitigated with a clear-use case in mind is essential to good governance, and the suggested clarifications on the roles of providers of foundations models, as well as the role of deployers, deserve positive remark. We believe these are suggestions worth fighting for in the coming trilateral negotiations. We hope our short assessment encourages further impact assessment though for various of the other suggestions, which in our opinion, go beyond necessary and, at worst, carry disproportionately regulative burdens—some for the entire AI ecosystem, others only on the providers of high-risk systems. Particularly concerning (almost incomprehensible) is the suggestion that the relatively light-weight regulatory burden proposed in the AI Act, which should help ensure due diligence, might only apply to sufficiently risky (“significant risk of harm”) high-risk systems. This almost makes a joke of the long years of effort to ensure that all AI in the EU is responsibly deployed. Nothing should motivate more providers to position their systems as non-AI, or “mostly harmless”. While the market desperately needs clarity, the European Parliament's suggestion for the extra layer in classifying systems as high-risk seems an antithesis, and potentially dangerous to all the good attempts to establish regulative clarity that the AI market truly needs.

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## IS LEGAL KNOWLEDGE REGRESSING (THANKS TO AI)?

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### Abstract

This review article focuses on a recent book that poses the following question. Is law computable? In examining some of the contributions in this edited collection the article poses a second question. Is, as a result of artificial intelligence (AI) and law research, legal knowledge regressing? In its analysis of the book, the article examines several of the major epistemological problems facing the creators of a legal reasoning AI programme; and it concludes that some of the epistemological assumptions upon which AI research is based are assumptions rooted in old and discredited legal knowledge. Nevertheless, the article has few illusions that judging will one day be dispensed by robot judges, especially if liberal democratic cultures slide slowly into authoritarian societies.

**Keywords:** artificial intelligence; computer; Deakin (Simon); epistemology; Markou (Christopher); *mos mathematicus*; reasoning (legal); rule-model.

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It might seem a most provocative reaction, in response to a recent edited work asking if law is computable, to suggest that legal knowledge might be regressing. Yet the encroachment of computer technology and artificial intelligence (AI) into the domain of legal reasoning, while raising some profound questions about legal knowledge, seems also to be exposing what some might consider to be rather naive thoughts about legal knowledge. Naive, because these thoughts often reveal an ignorance not just about the history of legal thought but also about the legal tradition that AI advocates are discussing. The purpose of this review article is, accordingly, to pose two general questions. Is law computable? And is legal knowledge regressing? There are, of course, a range of sub-questions provoked by these two general questions.

## [A] INTRODUCTION

The question whether law is computable is a question that ought to be of particular interest not just to legal theorists and philosophers but equally to legal historians, comparative lawyers and specialists in legal education because it raises fundamental questions of an epistemological nature. What is it to have knowledge of law? And can such knowledge be reduced to an AI program that reasons more ‘efficiently’ (or whatever) than a human judge? According to Frank Pasquale, who writes the “Foreword” to a recent edited collection examining the question of whether law is computable, “the stakes of this volume could not be higher” because the future of law as a distinctive profession is in issue (Pasquale 2020, v). Might it just become a sub-field of computer science? Pasquale says that this issue involves three questions:

Are our current legal processes computable? Should they become more computable? And should scholars and practitioners in AI and computer science work to develop software (and even robots) that better mimic the performance of current legal professionals? (2020, v).

One might note at once that Pasquale does not seem to identify what “law” he is discussing. Is it American law (he is a United States legal academic), the common law in general, French law, German law, Roman law, Chinese law, Islamic law or what? He subsequently discusses *stare decisis* which would suggest that he has the common law tradition in mind, but in seemingly focusing on this tradition it leaves out an examination of the history of legal thought in continental Europe which actually has an epistemological history that embraced the idea that legal knowledge was “computable” in the sense that it could be dispensed by a machine.

Simone Deakin and Christopher Markou do not, however, ignore this continental tradition in that they implicitly refer to the era of the *mos mathematicus* in their discussion of the importance of Gottfried Wilhelm Leibniz (1646-1716)—a discussion about the conceptual origins of the computerization of law. As they say, “Leibniz believed that it was possible to develop a consistent system of logic, language and mathematics using an alphabet of unambiguous symbols that could be manipulated according to mechanical rules” (2020, 9). Yet, as important as Leibniz is regarding the conceptual origins, these origins stretch back much further into the history of Roman law in Europe (for Leibniz had Roman law in mind), and they reveal a number of distinct reasoning schemes. One question to be investigated, therefore, is the extent to which these different schemes are researched and discussed by those involved in the law and AI debate.



Associated with the *mos mathematicus* mentality are various other epistemological issues. Deakin and Markou talk of Leibniz's influence on legal thought and see this influence as one of an axiomatic conception of law and of legal formalism (2020, 12ff). These two issues are usually associated with the idea that law is a science. Yet what actually is the ontological and the epistemological basis of this science and what are its methods? It is here that one finds some of the most fundamental debates and tensions that underpin the discipline of law, and these tensions come to the surface in debates not just about legal theory but also about the relevance of interdisciplinary approaches to legal knowledge (see, for example, Bódig 2021; Husa 2022). One can see at once why these tensions become central to any discussion about AI and law. As the two authors point out, a certain type of computer programming "still rests on the Leibnizian-Langdellian assumption that there is a purified essence to law and legal reasoning there to be mathematised" (Deakin & Markou 2020, 16). Put another way, such computer programming is founded on the idea of a "legal singularity" which "describes a version of a complete legal system overseen by a superhuman intelligence" itself "premised on the possibility of the perfect enforcement of legal rights" (2020, 27). Accordingly, those advocating such a thesis often "have in their sights the eventual replacement of juridical reasoning as the basis for dispute resolution and the substitution of some protean triumvirate of powers, rights, and responsibilities for legal authority" (2020, 19). Were such advocates to be taken seriously, one can see, as indeed the Deakin and Markou book itself bears witness, a whole range of new tensions and issues arising whose roots are not just in legal knowledge but also in moral and social philosophy, political theory, economic theory and the like. The very issue of AI and law has, then, the effect of exposing all the contradictions and tensions that have "plagued" legal knowledge not just in recent times but in past centuries as well.<sup>1</sup>

To say this risks the accusation of stating the obvious. Yet while the tensions and debates that "plague" legal knowledge might seem obvious, the moment one starts to talk about computer or robot judges one might also begin to appreciate the extent to which legal theory and legal education have in truth failed to expose the tensions in a way that actually impacts on legal learning and traditional (doctrinal) legal scholarship. As Mátyás Bódig notes in his attempt to defend traditional legal scholarship, "the contemporary agenda of mainstream legal theory is far removed from the

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<sup>1</sup> The metaphor of a plague is employed in this contribution as a way of describing tensions within a discipline which some within the discipline might well want to suppress but which keep resurfacing to cause trouble.

epistemological challenges facing legal scholarship”. Indeed, he goes on to say, “one can argue that, in certain respects, the influence of contemporary academic legal theory has been positively unhelpful” (Bódig 2021, 12). The proof of this assertion would seem to be located in the fact that one can be a perfectly good—even an exceptionally good—lawyer and jurist without ever having studied legal theory (jurisprudence). Bódig is surely right to note that this situation results from a kind of layering of legal knowledge, the lower levels of theorizing engaging with law as a practical discipline while the highest level is too abstracted to be of any use to actual doctrinal scholarship (Bódig 2021, 34-45). This said, the fact that one can be a good lawyer without having studied jurisprudence (legal theory and philosophy) does not mean that such a lawyer is operating within some theory-less zone. As Terry Eagleton reminded his literary theory readers, and quoting the economist Keynes, “those economists who disliked theory, or claimed to get along better without it, were simply in the grip of an older theory” (Eagleton 2008, xiii).

What theory is gripping the advocates of AI and law? If such a theory can be identified, what can it reveal about the state of legal knowledge? If one adopts a diachronic approach to this question, might such a theory reveal an advance or a regression in legal knowledge? What one means by regression is of course a delicate question. But in order to appreciate what is meant by the idea of “legal singularity” it is necessary to examine it both from a synchronic—which is what the contributors to the Deakin and Markou collection largely do—and from an historical angle because, as indeed Deakin and Markou themselves indicate with their references to Leibniz, the past is always with us. What is legal knowledge? Well, one starting point is to ask: what has legal knowledge been? Saying this is not, however, enough. For how is this past to be understood? One of the problems with the teaching and the study of Roman law—important with regard to “legal singularity” because it was regarded by many Romanists as a closed and complete legal system—was that there has been a tendency to view it through modern eyes with the result that it became not so much a Roman as a modern system claiming to be the product of the Roman genius (see Ernst 2019, 109-110). The modern historian can no doubt see things in retrospect that the jurists or “theorists” of the time were not able to see—just as the hunter cannot see the forest but only the trees. Yet the past may still have epistemological lessons, and ones for those dreaming of an AI judge. A synchronic approach to “legal singularity” might, in other words, amount to a retrogressive step in that it eclipses these lessons.

## [B] EPISTEMOLOGICAL APPROACHES (1): SYNCHRONIC APPROACH

How should one approach the question, vital surely to the AI project, of what it is to have legal knowledge? The late epistemologist of science, Robert Blanché (1898-1975), in his introduction to epistemology, identified four broad approaches. The first is what he described as a philosophic and a scientific approach. By this he meant that even when philosophy and science had undergone a separation the latter could not ignore the teachings of the old philosophers since the problems that they identified recur to “plague” modern science. It is not really possible, therefore, to make a clean separation between a philosophic epistemology and a scientific one (Blanché 1983, 30). Having discussed the work of various scientists and philosophers of science, he concluded that it would be better to talk in terms of approaches. There is a scientific approach associated with those actually working within the scientific community—practitioners of science one might say—and there is a philosophical approach associated with those writers whose writings have expanded beyond science into more abstract philosophizing. In fact, he said, it might be better to distinguish between an internal and an external epistemology, the scientist making internal contributions to epistemology without really knowing it since these contributions are integrated with their practical scientific work. As for the external contributors, they are more detached; they are consciously involved in speculating about scientific knowledge—about epistemology—as an end in itself (Blanché 1983, 33).

It hardly needs stating that the lawyer and the jurist will at once identify with this approach—or at least with the dichotomy between the internal and the external view of law. Bódig thus talks of legal scholars who “produce knowledge about law from an ‘internal point of view’”, that is to say, “the epistemological profile of the discipline is adjusted to the perspectives and practical orientations of participants of the legal practice” (Bódig 2021, 121). Dan Priel equally notes the distinction, saying that “‘external’ legal scholarship ... takes greater interest in ideas coming from other disciplines and seeks (to varying degrees) to use ideas coming from economics, philosophy, sociology, psychology, literary theory, or even neuroscience, to explain, justify, or challenge the law” (Priel 2019, 166). However, the analogy with science must be treated with some care because the jurists who specialize uniquely in legal theory, as opposed to those specializing in some positive legal subject (or indeed those in professional practice), are not necessarily to be classed as externalists. They may well be working, like the lawyer specializing in some specific

subject such as contract or property law, within what might be termed the authority paradigm (see Samuel 2009) and thus theorizing about law from the internal viewpoint.

Yet even if both groups of jurists—the specialists in doctrinal legal subjects and the legal theorists—are working within an internal point of view, this does not mean that their epistemological reflections will necessarily be the same. Will a person who spends most of their time reading judgments end up with the same view of legal knowledge as the person who spends most of their time reading books by Hans Kelsen, Herbert Hart and Joseph Raz? Again, what of the jurist who spends most of her time reading Rudolf von Jhering, Felix Cohen and Jerome Frank? Or, again, a jurist who spends at least half her time reading social science and humanities theorists? An AI “legal singularity” specialist keen to develop the notion of “legal singularity”, and who consults jurists from each of the above reading groups, might well find herself either having to abandon the project on the ground that there is no singularity or deciding to focus her attention on only one or two of the above groups. Such a specialist who is not keen to abandon her project might, therefore, adopt a view noted by Dan Priel. There are theories *of* law and there are theories *about* law (Priel 2019, 167), the latter theories being ejected from the domain of legal knowledge. In fact, Priel goes further and identifies within the group of internalist lawyers two categories of doctrinalists: there is one approach that is labelled “conceptualism” and another labelled “doctrinalists”. “The doctrinalist”, he says, “will cite lots of cases, and he or she will mostly cite cases; the conceptualist, on the other hand, will have relatively few citations to cases, which he or she will use to illustrate ideas said to be implicit in the law” (Priel, 2019: 167).

The second approach identified by Blanché is one that he described as a direct or intemporal analysis. This is a point of view that is static or synchronic in its timeless structure as it exists today (Blanché 1983, 34). The emphasis in this approach will often be on logic and on a symbolic language whose precision permits the operation of such logic. Blanché cited here the importance of the Vienna Circle and logical empiricism which, he said, in a way that can seem paradoxical, brought together the idea that science is based only on what the human senses see as real with the Russellian logic used to interpret the empirical data (1983, 35). Reality is accessed through a model consisting of symbolic language which translates this reality into a structure of formal concepts and of symbols that gives expression to these concepts (1983, 35). Blanché concluded that what one owes to logical empiricism is the introduction into epistemology of a systematized logical language whose utility endows

it with validity (1983, 36). Erica Thompson, writing recently, might characterize this as an escape *into* model land (Thompson 2022).

Again one can see the importance of this logic approach with regard not just to legal thinking in general but also, and more importantly for present purposes, to the search for a computable AI model of law and legal reasoning. As Deakin and Markou point out, “for machine learning to replicate legal reasoning it requires the translation of the linguistic categories used by the law into mathematical functions” (2020, 66). And these authors conclude by saying that what underlies this project “is the goal of a perfectly complete legal system” which in turn “implies that the content and application of rules can be fully specified *ex ante* no matter how varied and changeable the social circumstances to which they are applied” (2020, 66). Jennifer Cobbe, one of the contributors to the Deakin and Markou book, develops this point in examining the writings of those who assert “legal singularity” by saying that the supposed great value of it is “that advanced deep learning systems will be able to find the single “correct” answer to every legal problem” (2020: 107). Such a goal is not confined to AI and law specialists. If law is perceived as a closed highly coherent system consisting of axiomatic principles (or whatever), and, as the neo-formalist jurists claim, a system from which social goals are excluded (on which see, for example, Stevens 2009), then the idea that it ought to be capable of producing through deductive logic the correct answer is highly attractive. It is an epistemological paradigm (to borrow Kuhn’s expression) that is immensely powerful, and quite possibly is a rather dominant one for those faced with learning the law and with teaching it. For, as Bódig claims, the “influx of non-doctrinal knowledge into legal materials generates adaption pressures that complicate the job of cultivating doctrinal knowledge about law” (Bódig 2021, 216).

## [C] EPISTEMOLOGICAL APPROACHES (2): DIACHRONIC APPROACH

The third approach suggested by Blanché is a historical-critical analysis. As he says, while the emphasis in the epistemology of science tends to be dominated by its actual state, such a state can be understood only by the past. History offers a means of analysis in separating by date and by the circumstances of their appearance, the various elements which have contributed to the formation, little by little, of the principles of modern science (Blanché 1983, 36). However, this history needs to be distinguished from a history of science as such in that the historical-critical approach is a means and not an end in itself (1983, 37). One is critically examining



the past in order to understand modern science and indeed the formation of the scientific ideal. However, distinguishing between the two is not easy since there are various ways in which such an historical approach can be undertaken. Is one focusing on the names of scientists in what is essentially a chronological approach? Or is one undertaking a history of ideas or of events or what? These questions matter because a history of ideas is not the same as a history of events, the latter emphasizing causal relations much more than the former. In the case of ideas, said Blanché, a history can only be written by grasping these ideas from their interior so to speak (1983, 38). However, this raises the historiographical problem of projecting the present on the past which means that a history of ideas is always, to some extent, a philosophical exercise.

Another problem associated with the historical approach is how the whole notion of science is to be understood. What are the internal divisions? Does one, for example, make a division between the abstract and concrete sciences? Here Blanché made an interesting observation: the most concrete sciences need to call upon concepts and thus upon abstraction, while even the most abstract of sciences cannot completely cut themselves off from the concrete foundations of which they were once a part (1983, 65). Rather than a binary division, he said, it would be better to think in terms of deductive and inductive sciences and when such a distinction is placed in an historical context what emerges is a progression from induction to deduction. Indeed, he went on to say, all sciences pass through four stages; they start out in a descriptive stage and end up at an axiomatic one, passing on the way through an inductive and then deductive stage (1983, 65). Blanché also emphasized the importance, historically, of the division between mathematics and physics. There is *a priori* knowledge and there is experimental knowledge, and this led to the idea that mathematics is a science not like the others. It is not a knowledge of things; it is a coherent language that is indifferent to reality (1983, 66). What is important, epistemologically, about this distinction is that it represents a distinction between purely formal systems on the one hand and concrete interpretations that these systems can generate on the other (1983, 67-68). And as for these formal systems, they can be constructed, said Blanché, only when a science has become axiomatized (1983, 68).

Is this third approach of relevance to legal epistemology, and thus to AI and law? If one looks at the history of the civil law—in effect the history of Roman law in Europe (see Stein, 1999)—one analogy with science stands out at once. This is the progression, identified by Blanché, from the descriptive to the axiomatic. One starts with the Twelve Tables,



descriptive in essence, and moves, with the Republican and Classical jurists (and continued by the medieval Roman lawyers), to the inductive. The humanists then take Roman law to a deductive stage, and they were followed by the *mos mathematicus* jurists of the 17th and 18th centuries, and then the Pandectists of the 19th century, who sought to axiomatize law, those axioms being reflected in the civil codes of Europe (see, generally, Samuel 2022b). The basis of these axioms was to be found in the *regulae iuris* collected together in the last book of Justinian's *Digest*; and they then became, along with others from Canon law, the foundational *principia* of legal knowledge thanks particularly to the late medieval jurist Baldus (1327-1400). Matteo Gribaldi Mofa (1505-1564), writing in the early 16th century, described these principles as *axiomata*, and in the same century Hugues Doneau (1527-1591) rearranged the structure of the *Digest* along institutional (persons, things and obligations) lines—as well as reorientating the material in terms of individual rights—creating a much more systematic vision of law from which one could deduce these rights. It was upon this basis that Leibniz and Heineccius (1681-1741) built their mathematical view of law (see Samuel 2022b, 121-125).

However, the axiomatic stage did not prove a final end point for legal thought. During the 20th century such axiomatic thinking seemed, for some jurists, nothing but “transcendental nonsense” (Cohen 1935; and see Deakin & Markou 2020, 12-14) and so the law appeared to have entered a fifth, post-axiomatic, stage in which a much more functional orientation became influential. This was particularly true of the common law world where the axiomatic thinking had had much less of an influence thanks mainly to a historical tradition where jury procedure and the absence of law faculties until the 19th century kept much continental legal thinking at bay. The idea of a “legal singularity” during the last century thus became lost within a functional mentality in which the social sciences—and in particular economics—made their way into the domain of legal knowledge and legal reasoning. It is only with the rise of neo-formalism in the common law world that the realist view of law started to come under serious attack (see, for example, Robertson & Wu 2009; Robertson & Goudkamp 2019), while from another quarter—that of AI and law—“the idea of law as axiom” would inspire AI pioneers “to investigate whether the axiomatic method could be applied beyond mathematics” (Deakin & Markou 2020, 14). In the light of the historical development just outlined, one can ask whether this AI movement amounts to a progression or a regression (from post-axiomatic back to the axiomatic) in legal knowledge. Are there lessons from history yet to be learned by AI pioneers, or is

history simply irrelevant? This is a serious epistemological question, and sadly not one properly investigated in the Deakin and Markou collection.

Mention must also be made of Blanché's fourth approach which he called genetic epistemology and was one inspired by the work of Jean Piaget (1896-1980) who specialized in the psychology of children and how their minds developed. This approach emphasizes the psychological aspect of the acquisition of the scientific mind and is diachronic in its approach "in that it takes the development of knowledge below the point where the history of science commences" (Blanché 1983, 40). Science, even at its early stages, utilizes notions that have already been developed by an already constituted mind, and these notions themselves can only be understood thanks to a kind of embryology of the ability to reason (Blanché 1983, 40). It is not just the history of science (*res*) that the epistemologist must study but equally the history of the *intellectus*.

The relevance of this genetic approach to legal knowledge and to AI and law seems beyond doubt since one is attempting to understand the human mind (*intellectus*) so as to be able to reproduce its processes in a legal-reasoning machine. Does the mind have built-in psychological structures that act as a means for some kind of pre-understanding that in turn project themselves on how the legal mind (*intellectus*) comprehends the world which in its turn seems to project back onto reality (*res*) the mind creating the concepts and categories that form the basis of an actual understanding? Markou and Deakin, in their contribution, quote Manning and Schütze in respect of natural language processing (NLP). They say that "[o]ne has to assume [there is] some initial structure in the brain which causes it to prefer certain ways of organizing and generalizing from sensory inputs to others, as no learning is possible from a completely blank slate, *tabula rasa*" (2020, 42, quoting Manning & Schütze 1999, 5). NLP, continue Markou and Deakin, "assumes that a baby's brain starts out with general associative rules that allow it to detect patterns, generalise information, and that both can be recursively applied to sensory data in the baby's environment that allow it to learn detailed and nuanced structure of natural language" (2020, 43). Later these authors point out that researchers in psychology "observe that the capacity for inference and abstraction is seen in seven month old toddlers who can learn language rules from a limited number of labelled examples in under two minutes" (2020, 52).

How, then, might such a genetic epistemological approach aid the understanding of legal reasoning in a way that is useful both for jurists and for AI specialists? Much depends upon what might be described as the

ontological basis of law and legal reasoning. A rule-based model is likely to focus on the process of moving from the rule to its application to a set of facts, and here the basis is symbolic knowledge. As Christopher Markou and Lily Hands point out, in their contribution to the collection, “[a]t their core computers are ultimately symbol manipulating machines” (2020, 250). But this begs a question. What about the brain and non-symbolic knowledge? Markou and Hands make the point that the “classical view of the brain assumed that biological cognition in general, and language processing specifically, involved the manipulation of symbols according to various rules” (2020, 250). Such an assumption was to prove wanting; research along these lines turned out to be a matter of “over-promising and under-delivery” (2020, 252). The current approach, say the two authors, is “connectionism” which “incorporates elements of systems-thinking, cybernetics, and autopoiesis” (2020, 252).

Certainly these ontological elements of reasoning are by no means irrelevant to legal thinking and reasoning. Yet non-symbolic knowledge—the use of imagery in particular—does not seem to have been pursued in any seriousness (if at all) in the Deakin and Markou collection. Now metaphor and analogy may be inimical to proper legal reasoning for some jurists (see, in particular, Alexander & Sherwin 2008), but the fact is that the law reports, in the common law world at least, are full of such reasoning methods, and these are methods that appeal to the imagination rather than to symbolic processing. Moreover, there is serious work by legal theorists on the role of metaphor and analogy in legal reasoning (see Del Mar 2020, 278-329); and so it does seem extraordinary that the Deakin and Markou collection does not consider this important aspect of knowledge and reasoning. Indeed, Markou and Deakin’s own contribution about exploring the limits of legal computability, insightful as it is, ends with a particularly weak conclusion that simply begs questions. They say that “for machine learning to replicate legal reasoning it requires the translation of the linguistic categories used by law into mathematical functions”. They then, of course, conclude that the various “juridical forms ... cannot be completely captured by mathematical algorithms” (2020,; 66). Quite so, one might say.

Take the following example that perhaps best illustrates this point, especially as the Markou and Deakin paper actually looks at employment relationships in the context of AI:

In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in,

or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another (Mummery J in *Hall v Lorimer* 1992, 944).

Can mathematics capture the mind's capacity for imagination—for “painting a picture”? Maybe it will be able to at some point in the future. Or maybe, as Larry Alexander and Emily Sherwin (2008) assert, reasoning by analogy and metaphor should be expunged from legal reasoning (which might delight some AI specialists). Whatever the situation, Professor Del Mar thinks that we “need to take seriously what goes on when we imagine metaphorically, including not only how we do so as individuals, but how we do so interactively and collectively” (Del Mar 2020, 288). One might think that those involved with the question of whether law is computable would be at the forefront of jurisprudential debates and thus immersing themselves in the challenges presented by legal theorists such as Del Mar. Yet, if the Deakin and Markou collection is anything to go by, one wonders whether such a book—and indeed the whole AI and law debate—is still rooted in old thinking.

## [D] EPISTEMOLOGICAL PROBLEMS

Not that old thinking is irrelevant. Yet the different approaches to epistemology, while vital to an understanding of how one might engage with legal knowledge, do not, in themselves, provide answers to some of the most fundamental problems that can plague disciplines. One of these problems is the level at which engagement takes place. Can “law” be reduced to a single form of knowledge? Do the different actors within the knowledge domain all conform to just one type of knowledge that can be, or ought to be, captured in a single book of legal knowledge? Or do judges, legislators, practitioners, professors, bailiffs and so on operate according to different epistemological models? Even among professors, one can ask if they all conform to some *savoir collectif*. Do legal theorists have the same knowledge, and conform to the same epistemological model, as a specialist in arbitration or immigration law? Do comparative lawyers conform to the same epistemological model as experts in employment law or contract law? Or what of the law and economics professor in comparison with a doctrinal professor who considers interdisciplinarity

to be an “enemy”? According to one specialist in legal epistemology, the late Christian Atias (1947-2015), the “different categories of lawyers do not use exactly the same knowledge” (Atias, 1994: 21). Thus, he said, the judge presents his or her decision in applying (or indeed not applying thanks to interpretation) established rules and by reference to the mass of previous decisions usually applied to the kind of case he or she is confronting. The legislator, in contrast, works with reference to the parliamentary debates and to a range of data from human nature and life in society. The practitioner works according to the interests of his or her client; what matters is the result and how to achieve it which may involve procedures that do not have their source in legislation or case law (1994, 21-28).

Legal singularity by its very conceptual nature wants to coalesce these different models into a single knowledge model that is computer readable, and its focal point for doing this is the judge. As Markou and Deakin themselves say, the view of some AI experts is that “human judges are not just replaceable with AI, but that ‘AI judges’ should be preferred on the assumption that they will not inherit the biases and limitations of human decision-making” (2020: 5). Another contributor notes that some AI specialists such as Daniel Goldsworthy not only believe that the machine could become equivalent to or even better than humans “at understanding, applying, and, potentially, writing the law” but “that advanced deep learning systems will be able to find the single ‘correct’ answer to every legal problem” (Cobbe 2020, 107; and see Goldsworthy 2019). As Goldsworthy indicates, this was “Dworkin’s dream”, though it has to be said that Ronald Dworkin never saw himself as formulating some computer readable model (Dworkin 1986, 412). If anything is to be noted in Goldsworthy’s defence it is that he does see this whole AI exercise as a matter of collective knowledge culled from the “great legal minds across countries, continents and generations – past and present” (quoted by Cobbe 2020, 107-108). In other words, he does see legal knowledge as something that transcends both space and time. This is probably one of the most important asides (so to speak) in the whole collection in that he is implying that if one wishes to have knowledge of law there is a whole two thousand (or more)-year tradition in Europe which must be carefully mined for information. What, then, does this judge who transcends time and space know and how can it be modelled into computer-readable knowledge?

Viewed from this historical and transnational position, it hardly needs to be said that the epistemological problems facing the AI specialist are, to say the least, considerable. Several fundamental questions present



themselves. First, how has legal knowledge been, and how is it to be, represented? Secondly, what are the reasoning methods and techniques associated with decision-making in law? The two questions are by no means exclusive, and so it might be useful to add a third: how is law taught and learned? After two millennia, one might think that these questions would have been much researched and some sophisticated answers formulated. Yet it is not entirely clear that this is the case. Writing in 1985, Stig Strömholm said that “whereas substantive Roman law belongs, since more than eight hundred years, to the most widely and intensely studied among all fields of human knowledge ... the methods, and habits of thought, of ancient Roman lawyers have never been made the object of systematic study” (Strömholm 1985, 67). No doubt some Romanists would claim the position has changed over the last 40 years, but, if it has (which is by no means certain), none of this learning seems to have found its way into the Deakin and Markou collection.

No doubt the AI specialist might respond in asserting that Roman law is of no relevance today. Yet Roman law should, arguably, be of great interest to law and computer research since many of the categories and concepts are still to be found in modern legal systems and, just as important, it is a complete and closed system that could be ideal in terms of what Cobbe calls “reflexivity”. By this she means that “law is not just a product of its society (as certain strands of jurisprudence have argued), but also something that affects, alters, and itself produces that society” (Cobbe 2020, 111). It is “a reflexive construct of society that not only reflects society but itself has significant influence on society” (2020: 111). Cobbe makes it clear that the reflexivity that concerns her is its social effect. She is not concerned with legal and process and reasoning, or the operation of the law in relation to itself; she is interested in “how law functions within society more generally to reflexively reproduce the conditions, assumptions, and priorities from and upon which it is constructed” (2020, 111). This is not an unreasonable position by any means—in fact Cobbe, as we shall see, makes some very pertinent social and political points which elevates her contribution to one of the most interesting in the whole collection. But it can be asked if making the distinction between what might be called internal reflexivity (internal to law) and external reflexivity (how the system acts reflexively in society) does not eclipse the possibility that an internal reflexivity might not always be the result of intentional design. Is not one of the characteristics of a system that it can create its own elements simply as a result of the internal interactions within the system itself? One of the values of studying Roman law is that one can see how, for example, a corporate group (*universitas*) became a



legal subject almost by accident; the jurists arrived at the conclusion that a town ought to be able to bring an action against anyone who walks off with an item of public property. Having established this action, they had indirectly turned the town into a person.

This is by no means to question Cobbe's point about the actual marginalizing effects of a legal system or how it strengthens the power of capital (2020, 113). Yet if one could look at Roman law from the position of an AI "legal singularity" system (assuming such a thing is possible) and how it has reflexively developed over both its first life (Roman law in the Roman Empire) and its second life (in Europe from the 11th century onwards), it does have to be asked if the machine would have developed the system in the same way as did the generations of jurists (on which see Gordley 2013). The point of saying this is to elicit what must surely be the immediate responses of any epistemologist. What is the ontological basis of the system? What makes up the "singularity"? What are the reasoning methods associated with the system and its elements? What are the internal factors within the legal knowledge system that stimulated the evolution of the system over the centuries? What non-legal factors stimulated the developments?

## [E] IS LAW A SYSTEM OF RULES?

One early AI and law specialist answered the ontological questions unambiguously. Richard Susskind asserted:

Before proceeding, however, one fundamental assumption ... should be articulated: that *rules* do and should play a central role in legal science, legal knowledge representation, and in legal reasoning. Overwhelming authority for this proposition can be found in legal theory, and even a philosopher such as Dworkin, who has questioned the sufficiency of rules for legal decision-making, does nevertheless himself seem to presuppose a predominant place for them, as MacCormick has shown (Susskind 1987, 78-79).

It would be idle to claim that rules are not of ontological and epistemological importance (see, generally, Stein 1966). The Roman jurists frequently employed the term *regula* and the final title of the *Digest* consists uniquely of over 200 *regulae iuris*. However, the first of these rules or maxims states that the law does not arise out of a rule, but a rule is fashioned out of the law as it is (*non ex regula ius sumatur, sed ex iure quod est regula fiat*: D.50.17.1). What did the jurist Paul mean by this comment? One other *regula* possibly gives a hint: all definitions in the civil law are dangerous (*omnis definitio in iure civili periculosa est*), for they are insufficient, said Javolenis, and the possibility exists that they may

be rendered meaningless (D.50.17.202). This perhaps is reflected in a comment by two modern AI specialists:

Traditional rule systems are *brittle*, and can be made to capture ... detailed phenomena only awkwardly (eg, by having a separate rule for each “exception”). ... Rules and symbols have their most obvious use in building higher-level models that abstract away from many of the detailed phenomena exhibited in behavioural data. When the details are not needed these are the models of choice (at least for description); but to model the actual mechanisms of cognition, more detailed, less brittle models are needed ... . [T]he behaviour of the cognitive system is not *rule-governed*, but rather is only (approximately) *rule-described* (Bechtel & Abrahamsen 1991: 227).

This comment seems uncannily close to Paul’s view about rules, and so the question arises as to what was, then, the ontological foundation of the law if not a system of rules? The answer to this question is by no means easy because, while we are informed by Paul where the law is not to be found, no jurist in the *Corpus Iuris* tells us directly where it is to be found ontologically. There are, nevertheless, a number of observations that one can make with regard to the Roman materials.

The first is that one of the main focal points in terms of the operation of the law was the legal action (*actio*). The jurists, when considering a problem, tended to ask not what the applicable rules were but whether or not an action would lie (see D.9.2.52.2 for a typical example). Secondly, the late medieval Italian jurists (the Post-Glossators) formulated the expression *ex facto ius oritur*, that is to say the law arises out of facts (see, for example, Baldus’ comment on D.9.2.52.2). The actual method employed by the Roman jurists when analysing factual situations was to apply an early form of dialectics: the jurist would examine the facts and the possibility of an action by creating an either/or dichotomy. Again one can see this in Alfenus’ analysis of the wagons accident case (D.9.2.52.2). What is useful here for the AI specialist is that such a dialectical approach was in essence a form of algorithmic reasoning, later to be developed into a more sophisticated method by the Post-Glossators (especially Bartolus). Thirdly, and interestingly, the Romans made a distinction between texts designed for students and texts for practitioners, the former being known as *institutiones*. What is striking about the two classes of books is that the *institutiones* read more like books of general rules while the principal practitioner work (the *Digest*) is largely a collection of problem cases and factual examples. Moreover classification and systematization is a notable characteristic of Gaius’ and Justinian’s *Institutes*; the *Digest* and the *Codex*, in contrast, pay no regard to taxonomical organization. One had to wait until the 16th century before the institutional scheme was used

to reorganize the *Digest*. One can, possibly, conclude that learning rules, or at least rule-like descriptive statements, was essential in learning the law, but not so important for practical analysis by experienced lawyers. Problem solving involved knowledge that extended beyond the rule-model.

This distinction between learning the law and practising it finds some reflection in the Deakin and Markou collection. In their contribution to the book, Christopher Markou and Lily Hands quote Edward Feigenbaum and Pamela McCorduck who claim that domain expertise is reducible to two categories. The first is the knowledge to be found in textbooks and expounded by professors, and the second is heuristic knowledge which is knowledge of good practice and good judgment employed by practitioners in the field (Markou & Hands 2020, 243, quoting Feigenbaum & McCorduck 1983, 76-77). They then go on to note, again referring to Feigenbaum and McCorduck, that practical expertise is not something “that can be atomized into constituent parts and recombined using formal rules to form a valid diagnosis” (2020, 247). The expert is not following rules but recognizing thousands of special cases, and this is why expert systems are never as good as actual human experts. Accordingly, if “one asks the experts for rules, one will, in effect, force the expert to regress to the level of the beginner and state the rules he still remembers, but no longer uses” (Feigenbaum & McCorduck 1983, 184, quoted in Markou & Hands 2020, 247). Rules, in short, do not capture understanding. Admittedly, Feigenbaum and McCorduck are not referring to the legal expert but to medical and psychology professionals. Yet if their analysis has relevance for all professional activities, then it would appear that an AI program based on a rule-model of legal knowledge might well result in knowledge regression. Legal knowledge becomes a matter of learned rules operating at different levels; there are the rules of law itself, the rules referring to the interpretation of these rules and the rules concerning the application of the legal rules to the facts. There are probably other rules as well, one of which, as Feigenbaum and McCorduck point out, would be a rule about knowing “when to break the rules” (Feigenbaum & McCorduck 1983, 184-185, quoted in Markou & Hands 2020, 248).

A rule-model approach to law seems effective, therefore, only at an early learning stage. Nevertheless it would be idle to think that such a model does not have a strong grip on what is considered to amount to legal knowledge. Article 12 of the French code of civil procedure states that “the judge must decide a case in conformity with the legal rules that are applicable to it” (*Le juge tranche le litige conformément aux règles de droit qui lui sont applicables*); and common law judges often talk about law as pre-existing rules or principles to be applied to the cases before them (see,

for example, Samuel 2016, 36-38). At its strictest, the application of such rules can be described as a matter of syllogistic logic (see, for example, Lord Simon in *Lupton v FA & AB* 1972: 658-659), although in fairness other judges have not been hesitant in declaring that judges are prepared to abandon logic in favour of a “pragmatic solution” when necessary (see, for example, Griffiths LJ in *Ex parte King* 1984: 903). Academic lawyers have equally championed the rule model. Alexander and Sherwin, for example, argue that “the rule model of common-law decision making has advantages that we believe justify the courts in adopting it” (Alexander & Sherwin 2008, 43).

Indeed, these two authors present a view of the common law that would surely appeal to the AI specialist keen to develop a computerized judge:

The rule model of judicial decision making, which allows the common law to function as law and to settle controversy, is defensible only when judicial rules are justified as rules, and only when judicial rules are generally followed. Rule following depends on the willingness of judges and actors to apply rules even when the results the rules prescribe conflict with their own best judgment (Alexander & Sherwin 2008, 127).

If ever there was a manifesto for an AI judge, this must surely be a ready-made one. Moreover, as has been mentioned, these two authors are sceptical about analogy:

In our view, there is no such thing as analogical decision making, case to case. Judges who resolve disputes by analogy either are acting on a perception of similarity that is purely intuitive and therefore unreasoned and unconstrained, or they are formulating and applying rules of similarity through ordinary modes of reasoning (Alexander & Sherwin 2008, 234).

The argument here appears to assert that reasoning by analogy is either unacceptable because it is not reasoning but intuition or that the reasoning is not actually analogous but founded upon a rule. In other words, the rule model governs.

## [F] NORMATIVE AND DESCRIPTIVE EPISTEMIC APPROACHES

The two authors are of course entitled to their view. However, from an epistemological viewpoint there are some problems because the two authors are not actually describing how judges think and reason; they are asserting how they *ought* to reason. This presents an epistemological challenge for those involved in constructing an AI model of legal reasoning. Should such a model be based upon how judges actually think and

reason or how they ought to think and reason? Once this dichotomy between what might be termed descriptive epistemology and normative epistemology is appreciated, one can begin equally to appreciate that the debates around the question of whether or not law is computable is not just about constructing an AI robotic judge. It might well be about reconstructing law and legal reasoning themselves. This is the great value of the Alexander and Sherwin book because in arguing for a strict rule-model approach to legal reasoning they are, unconsciously no doubt (because their book is not about AI), exposing the fundamental issue that underpins the search for the robot judge. Is one modelling such a judge on an “is” or an “ought”?

The Deakin and Markou book seems ambiguous on this question. These two authors themselves say that “legal singularity ... describes a version of a complete legal system, overseen by a superhuman intelligence” and that such “a system is premised on the possibility of the perfect enforcement of legal rights” (2020, 27). This statement suggests that legal singularity is simply a highly refined version of law as it is; it is “a perfectly complete legal system” (2020, 66). Yet is a perfectly complete legal system—if such a thing is possible—based on a descriptive epistemology or a normative one? Given that this is an ideal rather than a present fact, such legal singularity, because “it requires the translation of the linguistic categories used by the law into mathematical functions” (2020: 66), cannot be entirely descriptive. It is a process by which one is attempting to fashion an idealistic legal system. This, surely, is a lesson that can be learned from history. Anyone familiar with Roman law will know that it was anything but an axiomatized legal tradition (see, for example, D.50.17.1). Studying Roman law, as has been mentioned, involved studying in great detail the *Digest* and the *Codex*, but neither of these books was organized in any systematic way and the former book consists largely of a mass of factual problems discussed in the opinions of jurists. In the 17th century the French jurist Jean Domat (1625-1696) considered that the Roman laws as set out in their source texts “were not easy to learn in depth” (*il n’est pas aisé de les bien apprendre*) and required “a long and painful study” (*une longue et pénible étude*) (*Loix Civiles*, first edition 1689, ‘Preface’). He thus produced a work that set out Roman law in a systematized and “scientific” body of axioms (*ordre universel*). In doing this he insisted that he was not producing some abridged version of Roman law, but a work on Roman law in all its detail (thus each principle or axiom is footnoted to the relevant Roman authority). In the following century Robert Pothier (1699-1696) undertook a similar exercise. However, as James Gordley



has pointed out, the “price paid for this [ease of reading] advantage was that the student learned Roman law as described by Domat and Pothier, and not as presented by the Roman jurists” (Gordley 2013, 145). In other words they were not really learning Roman law but a kind of “legal singularity” version of law supposedly based on Roman law.

What this means is that the project to translate law into a computerized model is a project that in many ways is analogous to the project undertaken by Domat and Pothier. Were it to succeed, it might give the impression that it is reflecting supposedly existing legal rights and duties under the control of a superhuman intelligence. Yet, of course, not only is the whole idea of “existing” law something that is debateable in itself (see Glanert & Ors 2021, 1-30; Legrand 2022, 219-220), but the transposition or translation of the “existing law” into a computer-readable “law” to be “read” and “applied” by a brain that is not human will result in a new “law” that is not the same as the old “law” even if this appears undetectable.

Does the Deakin and Markou collection investigate this epistemological conundrum? It is fair to say not as such—or at least not directly. But the two authors themselves do get close to appreciating the issue:

Efforts to formalise legal knowledge into mathematical axioms and transform judicial reasoning into something that can be modelled echo the Neo-platonism of the early scientific era and revive the Leibnizian assumption that there exists a hidden mathematical order underlying the structure of reality and human cognition. With the rise of “LegalTech”, it is now presumed that mathematical formalisation is not just possible, but that strategic reasoning expressed via computation should be considered ontologically superior to inherently faulty practical reasoning expressed through natural language categories (2020, 50).

In fact Mireille Hilderbrandt, in her contribution to the book, perhaps comes closer in highlighting “computational legalism”. By this she means the assumption in code-driven normativity that legal systems are coherent and complete, whereas the reality is that text-driven normativity does not in truth afford logical and deductive coherence (2020, 75). This distinction suggests that the translation of a text-driven normativity into a code-driven one would result in two rather different normativities. As she says:

The force of code differs from the force of law. The act of translation that is required to transform text-driven legal norms into computer code differs from the constructive interpretation typically required to “mine” legal effect from text-driven legal norms in the light of the reality they aim to reconfigure. The temporal aspect is different because code-driven normativity scales the past; it is based on insights from



past decisions and cannot reach beyond them. The temporality also differs because code-driven normativity freezes the future; it cannot adapt to unforeseen circumstances due to the disambiguation that is inherent in code (2020,78).

One might note, finally, that Lyria Bennett Moses observes that “[u]sing rules as code techniques to render all law computable would require changing the content of that law” (2020, 210). Indeed, one might say.

## [G] METHODOLOGY AND KNOWLEDGE

Be that as it may. If one is attempting to develop an AI programme on the basis of an “is”, then, of course, one has—or at least it would seem necessary—to examine in all its complex depth how judges actually decide cases and the reasoning involved in such decision-making. Yet if, as Alexander and Sherwin hope, metaphor and analogy are to be consigned to the side-lines, what are the methodological orientations that receive attention? Algorithms, of course, are central and are defined in the Deakin and Markou collection as “a finite sequence of defined instructions used to solve a class of problems or perform a computation” (2020, 286). And such sequence thinking has a long methodological history in law and so may reasonably be seen as one of the foundational methods that underpin casuistic analysis typical of the inductive stage of legal thought (see Samuel 2018, 12-32; Samuel 2022b, 72-74). However, there is more to legal reasoning than just dialectical and algorithmic methods. One might ask, accordingly, whether legal singularity is a promising epistemological starting point. This idea of legal singularity which, as has been seen, appears to be the major epistemological model that has underpinned the question of whether law is computable, seems methodologically to be a matter of producing solutions to legal problems through deduction from a set of positive rules. At least this was the methodology that informed the original machine-learning projects and remains one that has not lost its influence even if AI research has moved on. As Hildebrandt says, formalization and logical deduction “are crucial for automation, which is the core of computing systems” (2020, 72).

Yet once one focuses on methodology it might be valuable to recall that lawyers and jurists have not been particularly good at articulating their methods (see van Gestel & Lienhard, 2019, 449). As the position does not appear to have improved much, it has to be asked if this lack of methodological insight is a serious obstacle to constructing any AI programme capable of reasoning like a human judge. Now it would be misleading to say that the Deakin and Markou book ignores completely this methodological problem, but it does have to be stressed that the

chapters seem little interested in investigating methodology in the social and human sciences despite the existence of a huge body of literature. This literature reveals that how a researcher engages with a text or with facts is governed (for want of a better term) by a range of schemes of intelligibility, programmes and paradigm orientations (see, for example, Berthelot, 2001) and the employment of different schemes, or mixture of schemes, results in different knowledge. These issues have been investigated elsewhere (see Samuel 2022b, 50-55), but it might be useful to return to them, if only briefly, because it is difficult to conceive of an AI reasoning programme that is unaware that a causal scheme of engagement is very different from a hermeneutical one and that structural approaches are different from interactional ones. Functional schemes of engagement can also be contrasted with dialectical ones.

That these schemes are very relevant to legal reasoning has hopefully been demonstrated elsewhere (see Samuel 2018, 273-277), but it might be useful to recall just how relevant they are. One can often discern this relevance when there are differences between judges which may occur in the same court—dissenting opinions—or between two courts when, say, the Supreme Court judges overrule a decision of the Court of Appeal. These different schemes of engagement often reveal themselves in cases involving statutory interpretation (see, for example, Samuel 2022a, 60-61). And in *Campbell v Gordon* (2016) Lord Toulson said:

30 ... I have set out the alternative approach, which looks at the function and substantive effect of the deeming provision in real terms. The choice between a formal approach and a functional approach in the interpretation and application of statutory language is an aspect of the choice between formalism and realism which has been a fruitful subject since as long ago as the publication of Holmes's *The Common Law* in 1881. In deciding which approach is preferable, the context matters. The present context is legislation for the protection of a vulnerable group, a company's employees. In that context I regard the functional approach as more appropriate.

There is equally the engagement with facts. This, surely, is an aspect of legal reasoning that presents one of the greatest challenges to formulating an AI programme since there is no such thing as raw or brute facts. As Stephen Waddams has noted, facts “may be stated at countless levels of particularity” and that no “map or scheme could possibly classify all imaginable facts, for there is no limit whatever to the number of facts that may be postulated of a sequence of human events” (2003, 14). Take the famous case of *Donoghue v Stevenson* (1932). How does one describe the “relevant facts”? Was it a case about a bottle of ginger beer causing damage, about a consumable item causing damage, a product causing

damage, or the negligent act of a person causing damage? Alexander and Sherwin argue that in the case involving the application of a legal rule it is the rule itself that determines “the important features of individual cases” (2008, 22), but a case from Roman law indicates that matters are not so simple (on which see, generally, Ernst 2019). As recorded by the jurist Gaius, the *lex Aquilia* stated in its first chapter that “one who unlawfully (*injuria*) kills another’s slave or female slave, or a four-footed animal belonging to the class of *pecudes*, let him be condemned to pay to the owner an amount that was the highest value in the previous year”. (D.9.2.2).

The problem raised by the jurists was this. What if a person mortally wounds a slave but before he dies another person delivers a further mortal wound that immediately causes the death of the slave? Is the first attacker to be liable for the death of the slave or only for wounding? The jurist Ulpian thought that the first attacker was not to be liable for the killing:

Celsus writes if one man strikes [a slave] with a mortal wound, and afterwards another kills him, the first of them is held not liable for killing but for wounding, because he died from another wound; the second is held liable [for killing] because he killed. Marcellus seems to be of the same view, and it is the more plausible one (D.9.2.11.3).

However, another jurist, Julian, thought the opposite:

So badly wounded was a slave from a blow that it was certain he would die; then, in the time between the hit and death, he was made an heir and following this he died from a blow by another person. I ask whether an action for killing under the *lex Aquilia* can be brought against each of them. He [Julian] replied: in fact it is commonly said to have killed whoever is the cause of death (*qui mortis causam*) by whatever means; but under the *lex Aquilia*, is considered to be held liable only he who applied violence and by his own hand, so to speak, caused the death, that is to say in extending the interpretation of the words “to kill” (*a caedendo*) and “to hit” (*a caede*). Again, however, under the *lex Aquilia*, have been held liable not only those who wound in such a manner to deprive immediately life but also those who as a result of wounding it is certain that life will be lost. Therefore if someone mortally wounds a slave, and another, during the interval, hits him in such a way that he dies more quickly than he would have done from the first wound, it is determined that the two are held liable under the *lex Aquilia* (D.9.2.51pr).

Interestingly, Julian does not stop here. He continues by justifying his conclusion in two ways. First:

And this is in accord with the authority of the old jurists who, where several persons wound the same slave in a way that it is not apparent

which one committed the mortal stab, decided that all were held liable under the *lex Aquilia* (D.9.2.51.1).

And secondly:

With regard to this, if anyone thinks that what we have decided is absurd, he should reflect that it would be far more absurd if neither is held liable under the *lex Aquilia*, or one rather than the other [be held liable]; for wrongs ought not to go unpunished and nor is it easy to establish which of the two is to be held liable under the statute. Many are the examples that can be proved in civil law that go against rational reasoning and argumentation (*contra rationem disputandi*) in favour of the common policy good (*pro utilitate communi*). I shall content myself with one example. Where several people with an intent to commit theft carry off a wooden beam belonging to another that no single person could do himself an action for theft lies against all of them, although subtle reasoning (*subtile ratione*) says it would lie against no one of them because in truth no one of them could carry it (D.9.2.51.2).

This conflict of opinion may seem ordinary enough in that judges and jurists regularly disagree over a decision. Yet there are reasoning complexities here that need further examination because they arguably present fundamental challenges to the question of computability of law. The first challenge is with regard to the facts. Ulpian is seeing the whole episode as two individual events that from a causal point of view must be kept separate. Julian, in contrast, is seeing the episode as one single event; he is, in other words, adopting a very different—and holistic—view of the facts. This difference between an individualistic vision and a holistic one is often to be found at the basis of a difference of opinion in legal reasoning (see, for example, *Re Rowland* 1961) and so the question arises as to how the AI programme is going to accommodate such different visions.

The second challenge is the engagement with the text itself. Ulpian's engagement is via a scheme of intelligibility that is causal, while Julian's is functional (although he also adds an argument founded on precedent authority). Not only, then, is there a difference at the level of engagement with facts (holistic versus individualistic) but also a divergence at the level of the text (causal versus functional scheme). How is an AI programme going to handle these different scheme possibilities? One answer, of course, is not to have a single robot judge, but a college of them, different robots being programmed with different schemes of intelligibility and different paradigm orientations (holism versus individualism). Yet this would seemingly undermine part of the purpose of replacing human judges with a computerized judge supposedly free of human biases. It would undermine the idea of legal singularity.

## [H] NATURALISM AND ANTI-NATURALISM

Regarding legal singularity, much that has been said so far might be said to fall within a paradigm orientation that is labelled “naturalist”. What this term means is an epistemology that assumes that the social sciences are governed by the same “scientific” laws (axioms, principles) as the hard sciences; it is associated with positivist thinking that displays a number of characteristics, two of which are objectivism and reductionism (Berthelot 2006, 379). In other words, law not only is the object of a scientific approach whose assertions are subject to a rigorous deductive logic but is governed by a unitary epistemological model. In contrast to this paradigm, there is an anti-naturalist one that sees law as a cultural phenomenon that has to be *understood* rather than explained in scientific terms. Law is a sign which, through a hermeneutic scheme of intelligibility or engagement, reveals deeper significations within a cultural mentality itself embedded in social, political, economic, philosophical and theological matrix. Within this latter paradigm there is not the same rigid distinction between the scientific model and the object of the scientific model—between, one might say metaphorically, the map and the territory (on which see Markou & Hand’s 2020 contribution, 280-281). Instead the map is the territory and the territory is the map (see Glanert & Ors 2021, 1-30). As Frank Pasquale says in his “Foreword” to the Deakin and Markou book, “a plant does not grow differently in response to a botanist’s theory of photosynthesis” but “in the social world, a hall of mirrors of perceptions and counterperceptions, moves and countermoves, endangers any effort to durably and effectively predict the behaviour of humans, much less control them” (2020, x-xi).

How, then, is the research into an AI law program to be viewed from the position of an anti-naturalist paradigm? Not very favourably if some of the contributors to the Deakin and Markou book are to be believed. Hildebrandt sees what she calls computable code-driven law as having a number of challenges that are not faced with text-driven law. Basing herself on Dworkin’s work, she sees code-driven law as lacking the “implied philosophy” that is inherent in Dworkin’s integrity thesis because code-driven law is too closed to be able to interact with legal intra- and extra-systematic meaning, such interaction creating fundamental uncertainty that sustains the “dynamic between the internal coherence and the performative nature of attributing legal effect” (2020, 75). The implied philosophy “must take into account both the justice and the instrumentality of the law (next to legal certainty)” which involves a Dworkinian “constructive interpretation, which emphasises that the right interpretation is not given but must be constructed as part of the



refined but robust fabric of legal meaning production” (2020, 76). A feature of text-driven law is its adaptability to changing circumstances. It might be worth recalling here that Dworkin himself asserted that he had “not devised an algorithm for the courtroom”. And thus no “electronic magician could design from my arguments a computer programme that would supply a verdict everyone would accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer’s disposal” (1986, 412).

Cobbe notes that absent from the notion of legal singularity “is any meaningful discussion of the role that law plays in society; of the effect it has on society and the people within it; or of how those things should be” (2020, 108). While Hildebrandt talks of the implied philosophy inherent in law, Cobbe is more interested in the social function and social effects of law which, she says, does not necessarily live up to its supposed “lofty normative ideals of justice, fairness, accessibility, and so on” (2020, 113). What, she asks, are the actual effects of the system of law? Her answer is that the “purpose of law as historically and currently constructed has been to reflexively entrench the power of capital, strengthen the position of the wealthy, reinforce inequalities, and protect established interests from outside challenges” (2020: 113). It is tempting to say that one only has to look at some contemporary cases—such as *Director General of Fair Trading v First National Bank* (2002), *Shogun Finance Ltd v Hudson* (2004), *Arnold v Britton* (2015) and *ParkingEye Ltd v Beavis* (2015)—where the consumer interest came up against the commercial interest, to see that she may have a point. Indeed, one United Kingdom (UK) Supreme Court judge has suggested recently that the “rule of law” is all about protecting the interests of the commercial community and that one should celebrate the income that it generates for the UK (Hodge 2022). The implication here is that law, like accountancy and banking, is simply a commercial service, presumably to be readily available to the power and interests of capital. Be that as it may, Lord Hodge’s lecture certainly appears to confirm Cobbe’s assertion that legal AI proponents may well “prioritise the kind of market-orientated and commercially driven ways of thinking about and seeing the world”—that is to say a “neo-liberal capitalist frame of thought” (2020, 125). Given, then, the role of law “in reproducing inequalities and hierarchies of contemporary society, and given the reflexive, sociotechnical nature of AI, how are Legal AI’s algorithmic systems, trained on data about society and the law, supposed to be objective?” (2020, 120). As she says, no answers are readily forthcoming.

Sylvie Delacroix approaches the AI issue from the position of moral change which, she thinks, presents a serious methodological problem



for automated systems. “Systems designed to simplify our practical reasoning”, she says, “can also undermine our ability to keep calling for better ways of living together” (2020, 161-162). Algorithms are backward-looking because they are based on historical data and thus will be inadequate when faced with dealing with the changing views and circumstances of the future. Moreover, “an established legal system may be particularly conducive to a society that is ‘deplorably sheeplike’” and thus “our ability to question and call for better ways of doing things – calling to account a perverted legal system or denouncing deficient automated systems – cannot be preserved through cognitive vigilance alone” (2020, 169-170). This sheeplike-ness is likely to be exacerbated by the epistemic confidence and reliance on automated systems. This could lead to the end of ethics, for “we might be normative animals, but without regular exercise, our moral muscles will just wither away, leaving us unable to consider alternative, better ways of living together” (2020, 172). Indeed, one might again say. But while Delacroix is offering a warning to those of us steeped in a liberal democratic social and political culture, she is equally offering what would be a most valuable tool to those desirous—and they seem to be on an upward march in parts of the world (including Europe)—of an authoritarian society where people are not continually thinking of better ways of living together. An appropriately programmed AI-controlled legal system might well appear as a most attractive proposition especially if it could result in a society that is “deplorably sheeplike”. Cobbe might well agree.

## [I] CONCLUDING OBSERVATIONS

If this sounds a little pessimistic it is only because there is something very pessimistic underpinning the question of whether law is computable. The pessimism springs primarily from the woeful state of epistemological thinking in law. This is not to criticize the contributors themselves to the Deakin and Markou book who, on the whole, are aware of some of the epistemological issues at stake. It is to criticize those who think in terms of legal singularity because this is, it is submitted, nothing less than legal knowledge regression. It is to resurrect the jurists from the past era of the *mos mathematicus* who dreamed of a law that consisted of axioms and theorems capable of answering any legal problem and thus freeing students from having to learn hundreds of cases (see Samuel 2022b, 121-125). Yet it is not just those in computer and AI departments who are to blame for this regression; legal theorists have been churning out rule-model—and often simplistic—theories about the nature of law and legal reasoning, and so it is not surprising that those trained in computer

logic and systems have come to believe that there exists out there (so to speak) something called law. One may be highly critical of Bódig's attempt to defend legal doctrinal scholarship (see Samuel 2022a), but he is surely right in his observation that in certain respects "the influence of contemporary academic legal theory has been positively unhelpful" in that the "dominance of legal positivism in mainstream legal theory (which is, to an extent, the by-product of the rise of analytical legal theory), lends credibility to the idea that doctrinal reflection does not need to worry about its justificatory background" (Bódig 2021, 12). Many of the contributors to the Deakin and Markou collection would surely agree.

The other principal question—the principal question really—is whether law is computable. The contributors to the Deakin and Markou book are all offering a pushback of one kind or another against such an AI trend. But they are probably, in one respect at least, on a doomed mission. It would be idle to think that by the end of this century (if not before) much of the work of lawyers and judges will not be handled by legal robots and these robots will, if nothing else, be producing very convincing judgments probably indistinguishable as texts from those once produced by humans. Yet this does not mean that the doomed mission is in vain. Hildebrandt, Cobbe and Delacroix, in particular, have few illusions as to what this might mean and about the kind of society that will host such machines. If the society is an authoritarian one, as it well might be given the crises facing the world, the "sheep" will not be encouraged—and one is going to mix metaphors here—to open the "black box" to see what is going on in the "mind" of the robotic judge. Those who assert that legal singularity is nothing but epistemological fantasy will be arrested, interned and "re-educated" on books like the one written by Alexander and Sherwin. The intellectual gyms will be closed, thus depriving the intellectual "muscles" of any exercise. But the great strength of the Deakin and Markou book (and many of the references cited or noted therein) is that it will prevent present and future jurists claiming that they had not been warned.

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**THEORISING SOUTH AFRICA'S INSURANCE LAW  
DISCLOSURES: *SWANEPOEL V BROLINK (ET  
HOLLARD INSURANCE)* S638/18F**

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**[A] SIMPLE INTRODUCTION TO INSURANCE  
LAW: *SWANEPOEL V BROLINK* S638/18F**

In South Africa, insurance disputes between an insurer and the insured could be settled either by the courts or alternative dispute resolution bodies, for example, the Ombudsman for Short-Term Insurance. Short-term insurance deals with movable things—such as, vehicle insurance—or, to put it another way, non-life insurance.

A standard method of obtaining insurance in South Africa is for the prospective insured or policyholder to complete a questionnaire, commonly referred to as an underwriting questionnaire, the purpose of which is to identify whether the policyholder is high or low risk. Low-risk status can only be achieved if the insured or prospective insured correctly answers the questions and makes full disclosure. In this regard, an insurer will refuse to accept liability in the event of an incorrect answer or undisclosed risk factor. This is governed by the reasonable person test, as a method of assessing what a reasonable person would have disclosed to the insurer. It is also possible to draft underwriting questions that require specific “yes” or “no” answers. Other questions can be unspecific, for example: do you know of any reason why the insurer should not accept the proposal for insurance, or is all the information disclosed true and correct? For this reason, it is not always clear how the reasonable person test should be applied to insurance contracts (commonly known as insurance policies) to understand whether or not disclosures are required by the prospective policyholder before the inception of the policy. This reasonable person test is acceptable in South African insurance law, but its application is not always understood or appreciated correctly by either the insurer or the insured.

To explain this issue more clearly, we focus on the following case involving the Ombudsman for Short-Term Insurance (an alternative dispute resolution body): *Swanepoel v Brolink*, which was decided in 2019. In brief, the insured, a Mr Swanepoel, purchased a short-term insurance policy on his vehicle. The policy inception date was 14 May 2015. On 8 April 2018, the insured caused a motor vehicle accident and the vehicle was declared a write-off. During the underwriting process (before the inception of the policy), the insurer, in this regard Hollard Insurance Company Limited acting through a binder holder (a type of agent in South Africa) Brolink Property (Limited), did not use any voice recordings to assess the risk of the insured. Instead, Brolink used a written checklist to ask the insured certain relevant underwriting questions that required simple “yes” or “no” answers, as well as requesting any additional information that the policyholder might consider important for the insurer.

After the claim was submitted by the insured (on the 8 April 2018), it was rejected by Brolink on the basis of non-disclosure prior to the inception of the policy. The underwriting question Brolink focused on in this regard read as follows: “Have you, or any other person that will be covered by this insurance, ever had an application for insurance declined or has any insurer ever cancelled your policy or refused to renew your insurance or imposed special terms or conditions on your insurance cover?” The insured answered the question with a “no”. Subsequently, Brolink investigated the “no” answer in order to understand whether “no” was indeed true. During Brolink’s investigation it emerged that the insured, Mr Swanepoel, had a previous Outsurance Insurance Company Limited claim which was cancelled by Outsurance on 17 November 2009, owing to the insured having submitted a fraudulent claim. When one reads the Outsurance repudiation letter, the phrase “fraudulent claim” is used to “cancel” the contract/policy. In other words, Outsurance did not state that the policy was void from the date of inception (due to intentional misrepresentation), but rather that it was “cancelling” the policy. In focusing on the correct terminology in contract law or insurance law, it is apparent that cancellation is a remedy for breach of contract. In this regard, we will discuss whether the insured did not commit breach of contract to allow Outsurance a cancellation remedy. In addition, one can argue that the Outsurance legal department should have used the correct legal terminology, for example the word “void” instead of “cancellation”.

Whatever the case, Brolink did not have a legal department when the insured, Mr Swanepoel, submitted the claim. In this regard, Brolink was simply using a “compare and match” approach (the word “cancellation” in the Outsurance repudiation letter having matched Brolink’s

underwriting question) without considering the correct meaning of the term “cancellation” in the law of insurance. For this reason, Brolink focused on the “no” answer and consequently argued non-disclosure on the Brolink application form—the answer should have been “yes”, because the question contained the word “cancellation”. This was unfortunate and was probably used opportunistically so as not to accept the insured’s claim, even after the insured informed Brolink of the incorrect use of the term “cancellation” in the Outsurance letter. Brolink argued that had it known about the cancellation by a previous insurer, it would never have issued the policy to the insured.

However, Brolink also did not consider the end result of a court case decided in 2012 to understand the correctness of the “no” answer. The police investigated the Outsurance claim for fraud, and eventually the state prosecutor referred to the matter as *nolle prosequi*, in other words there was no evidence of any fraud committed by Mr Swanepoel. By focusing on the latter *nolle prosequi* it indicates that the Outsurance repudiation letter had no legal relevance and that no legal weight could be attached to it—no fraud was committed and therefore no “cancellation” could have occurred for repudiating the Outsurance claim. On this basis, Brolink could not have relied on the non-disclosure of a previous “cancellation” or “fraud” because of the *nolle prosequi* court order. By ignoring the true legal meaning of “cancellation” as a contractual remedy for breach of contract, Brolink’s investigations were therefore unreliable when one considers the factual circumstances relevant to *nolle prosequi*. Nevertheless, on 6 August 2019, the assistant short-term ombuds, Ayanda Mazwi, delivered her judgment as to why the claim submitted on 8 April 2018 by the insured, Mr Swanepoel, should not be honoured by Brolink:

Having regard to the insured’s submissions, our office gave the binder holder (Brolink) an opportunity to provide reasonable proof of the insured’s actual knowledge of Outsurance’s cancellation of the policy prior to underwriting this risk in May 2015. The binder holder was not able to satisfy this request. *It did however point out its reliance on the following declarations made by the insured in the underwriting documents.* (emphasis added).

From the above, it is clear that Brolink was unable to provide any reasonable proof of actual “cancellation” and “fraud”, owing to the fact that the Outsurance policy was never truly cancelled and there was never fraud committed. However, Brolink continued with other underwriting questions in the application form as a method to reject the insured’s claim and relied on the following underwriting question:

The insurer or binder holder could repudiate a claim if they find that information given was incorrect. *Can you please confirm that all of the information* you have supplied pertaining to this application for insurance is correct and that you do not know of *any reason* why an insurer should not grant you cover for the property to be insured? [the insured answered] no (emphasis added).

The reason why the insured, Mr Swanepoel, answered “no”—to the above question quoted—is that Outsurance reported the 2009 claim to the South African Police Service for investigation purposes to prosecute the insured for giving an intentional instruction to a friend to write off his vehicle. The police investigated the matter which was eventually classed as *nolle prosequi* by the state prosecutor, meaning that the state was unable to prosecute the insured since the police had obtained evidence that the insured did not commit any fraud. Bearing this in mind, it seems that the above answer (the insured’s “no”) is the correct answer. However, the assistant to the ombuds held that the insured had a duty to disclose the *nolle prosequi*, without requesting the insured for an oral explanation of *nolle prosequi*. The assistant ombuds stated that a reasonable person would have disclosed this fact to Brolink during the underwriting process. Owing to this non-disclosure of “any other reason”, the assistant ombuds rejected the insured’s claim. Be that as it may, a reasonable person test was also used by Profmed Medical Scheme to reject an insured’s medical aid claims based on non-disclosures. The paragraphs that follow show the different interpretations relevant to the reasonable person test to distinguish between reasonable and unreasonable disclosures in insurance law.

[B] *MIGNON ADELIA STEYN V PROFMED  
MEDICAL SCHEME CASE NO: 23378/2018,  
2021 (3) SA 551 (WCC)*

Mignon Adelia Steyn applied for Profmed Medical Aid membership in November 2015. Her membership commenced on 1 January 2016, and, during that year, the policyholder, Ms Steyn, underwent several medical procedures amounting to ZAR400,000. Profmed, the insurer, refused to settle these claims on the basis of non-disclosure, subsequently terminating the policyholder’s membership owing to non-disclosure of gastritis, breast aspiration, wrist pains and hip problems. We do not have access to the Profmed underwriting questions, but we believe they were non-specific answers to questions similar to those of Brolink: for example, “Do not know of any reason” in response to why the insurer should refuse to accept the application. The insurer, Profmed, argued that these medical

conditions were not disclosed by the prospective policyholder prior to her acceptance as a member of Profmed. We believe that Profmed could have, instead of rejecting the claims, applied a specific weight attached to wrist pains, breast aspiration, gastritis and hip problems to calculate an additional monthly premium for the policyholder and to deduct it from the claim amount, to equal the premium to the undisclosed risk as a method of honouring the claim submitted. However, Profmed did not consider the later as an option, and to resolve the dispute the policyholder approached the Registrar of Medical Schemes (an alternative dispute resolution body) in relation to section 47 of the Medical Schemes Act 131 of 1998. The Registrar held that a reasonable person would have considered the latter non-disclosures and would have at least disclosed gastric ulcers as material medical information to Profmed and the termination of the policy was therefore justified.

The policyholder subsequently lodged an appeal against the Registrar's decision with the Council for Medical Schemes (also an alternative dispute resolution body) in terms of section 48 of the Medical Schemes Act. During the appeal process, the policyholder also applied for medical aid from Momentum Insurance and subsequently did add gastritis, breast aspiration, wrist pains and hip problems to the application form to secure membership. During the Council for Medical Schemes hearing, Profmed's legal representative used this Momentum application form to support the importance of the non-disclosed gastritis etc. In other words, Profmed used the Momentum application form for the sole purpose of illustrating why a reasonable person would have disclosed these ailments on an application form.

Keeping this application form in mind, the contrary is also true and correct: that is, a reasonable person could consider gastritis, breast aspiration, wrist pains and hip problems to be unimportant medical information. Surely gastritis is not similar to gastric ulcers, wrist pains are not equal to osteoarthritis, and hip problems are not an indication for hip replacements. In addition, breast aspiration is conducted on most women at least once in their life time to detect breast cancer. By comparing these non-disclosures to other similar severe medical conditions like breast cancer, hip replacements, gastric ulcers, osteoarthritis and the like it is possible to argue that on the date of completing the Profmed application form, these non-disclosures were not high-risk medical conditions. To support this, we assume that Profmed's software program for calculating premiums did not assign any weights to these medical procedures or conditions since the court did not indicate which underwriting questions were answered "no". On the other hand, Profmed has been insuring

policyholders for the past 60 years, and we believe that any medical aid application form would contain specific underwriting questions relevant to all severe medical conditions. To support the above views, the Council held that breast aspiration is not a material non-disclosure, in other words it is not a severe medical condition that justifies rejection of claims. This is probably the real reason why Profmed has not included breast aspiration as a specific underwriting question, since it is considered non-material by the medical profession. However, according to the Council, gastritis (although not as severe as a gastric ulcer) and hip problems are considered material facts and should have been disclosed to Profmed. As stated previously, hip problems do not necessarily indicate hip replacements and wrist pains are not necessarily indicative of osteoarthritis; in addition, the Council did not consider which type of gastric ulcer the policyholder suffered from or why hip arthroscopy is a serious medical condition. The Council also did not ask the policyholder for an explanation of these conditions to understand their seriousness. Accordingly, the Registrar and the Council applied the same reasonable person test with two different end results, namely that hip arthroscopy was considered a non-material disclosure by the Registrar but not by the Council. It should be borne in mind that the policyholder is not a medical practitioner but a layperson; hence, why would she have disclosed hip arthroscopy if she were not suffering constant pain nor had any expectations of hip replacements? Nevertheless, the matter was appealed to the Appeal Board (another alternative dispute resolution body) in terms of section 50(3) of the Medical Schemes Act. To consider how difficult it is to understand whether a disclosure is truly required or not, the Appeal Board considered the Momentum application form as well.

## [C] THE APPEAL BOARD AND THE HIGH COURT

Before we focus on the gastric ulcer and hip arthroscopy, one should keep in mind that Profmed added additional non-disclosures which were not previously communicated to the applicant and presented those non-disclosures to the Appeal Board to justify the rejection of the claims submitted. The non-disclosures that were added later were the following: possible heart murmur and kidney stones. As stated earlier, generally the calculation of a premium is based on a software program which requires relevant information. If the application form does not contain a specific question pertaining to a gastric ulcer, it is probably because it is considered to be a non-serious medical condition. To a certain extent, this also happened to the insured in the Brolink matter discussed earlier: after



the assistant ombuds realized the inappropriateness of “cancellation”, she turned to other non-disclosures to reject the insured’s claim, for example an undisclosed *nolle prosequi*. Nevertheless, the Appeal Board argued that it is not restricted from considering new arguments based on “new” undisclosed information, since it may consider all information and new information relevant to non-disclosures afresh, for example hip arthroscopy, possible heart murmur and kidney stones. Hip arthroscopy is not a hip replacement, a heart murmur is not heart failure and kidney stones are a common medical condition suffered by many people. These medical conditions are not serious and a software program can attach a specific weight to each condition, having the potential to increase the monthly premium or to be deducted from the claim amount instead of rejecting the claim, as will be discussed later.

Subsequently, the policyholder appealed to the High Court which held that the Appeal Board had made an error in law by not allowing the policyholder an explanation of the relevant non-disclosures and/or to put these non-disclosures in context. The Court held that it is very important to follow the principle of *audi alteram partem* to understand the policyholder’s explanation of these medical conditions—for example kidney stones or the difference between hip replacements and hip arthroscopy—to put the reasonable person test in perspective. To illustrate the importance of this, Profmed abandoned the applicant’s hip problem as a non-disclosure and, instead, raised hip arthroscopy as a non-disclosure to the Appeal Board based on the Momentum application form. The applicant/policyholder was never required to explain how serious hip arthroscopy was. These actions could also be examples of the *in fraudium legis* principle or doctrine. In other words, Profmed’s original arguments and additional arguments were raised with the sole purpose of circumventing liability for the policy (the policy is a contract between the insurer and insured). The High Court held that the onus was on Profmed to prove the materiality of any non-disclosure and why the non-disclosure amounted to a severe medical condition or conditions. The court held that, for the reasons stated above, the policyholder had disclosed all relevant information to Profmed and as a result Profmed should be liable to settle the ZAR400,000 medical claims, as the above non-disclosures (kidney stones, gastric ulcer, hip arthroscopy and heart murmur) were non-material or did not comprise severe medical conditions that could justify a rejection of the policy or claims. Needless to say, Profmed appealed the High Court judgment to a full bench of the High Court (hereafter appeal judgment).

[D] APPEAL TO THE FULL BENCH OF THE  
HIGH COURT IN *PROFMED MEDICAL SCHEME*  
*V MIGNON ADELIA STEYN* CASE NO: A  
171/2021, [2021] ZAWCHC 60

Profmed appealed the Western Cape High Court decision in *Profmed Medical Scheme v Mignon Adelia Steyn* due to the court a quo's interpretation of what constitutes material non-disclosures, for example gastric ulcers, possible kidney stones, hip arthroscopy and possible heart murmur. The appeal judgment is not complicated, amounting to approximately 12 pages in total. Profmed asked the High Court whether gastritis and hip arthroscopy are in fact material non-disclosures in addition to heart murmur and kidney stones etc. The court focused on the Momentum application form which stated that the policyholder suffered from a gastric ulcer, gastric influenza and certain hip arthroscopies. When Profmed referred to the Momentum application form to avoid the contract between Profmed and the insured, the respondent's legal counsel argued "trial by ambush" or, in other words, *in fraudum legis*. The Council for Medical Schemes established that the policyholder had been admitted to hospital previously for the treatment of a gastric ulcer. The court held that the gastric ulcer and hip arthroscopy were therefore pre-existing medical conditions but did not indicate whether these were serious medical conditions. Kidney stones, for example, could also be a pre-existing medical condition, although they do not generally constitute a serious condition. The court emphasized that Profmed could add any other ground or grounds to support their actions to refuse to settle the ZAR400,000 claim since informal tribunals as alternative dispute resolution forums, such as the Appeal Board, are not bound by the principles of law of evidence: for example the *audi alteram partem* rule is not required to explain these conditions (by leading oral evidence whether they are life-threatening conditions or not). The court held that gastritis could be a serious medical condition and that a medical scheme would most likely increase the monthly premium and/or include a waiting period (of at least 12 months before a policyholder could submit claims) for gastric ulcers claims. In this instance, the exact details of the ZAR400,000 claim were not presented to the court—we do not know whether these claims related only to gastric ulcers and or hip arthroscopy and so forth. For this reason, the most appropriate method would be to implement a waiting period to avoid settling those gastric ulcers or hip arthroscopy claims or add an additional amount to the usual monthly premium to be deducted from the claim, as will be discussed later. For this reason, the court

held that a reasonable or prudent person would have disclosed gastritis and hip arthroscopy only on any application form for any medical aid option or scheme. To understand why the prudent person would have disclosed this, the court focused on the following relevant information: the policyholder underwent an emergency procedure for the treatment of a gastric ulcer. By applying logic, the court held that this non-disclosure was in fact reasonable—a reasonable person would have disclosed previous gastric emergency procedures on an application form. However, the court did not consider how long ago this emergency procedure occurred—15 years ago? And or whether it could still be relevant in the present. Based on this view, the court held that all the informal tribunal bodies (the Medical Registrar, Council of Medical Schemes and Appeal Board)—of which the presiding officers comprise experts on medical conditions—had decided correctly regarding the gastric ulcer and hip arthroscopy, and the technical arguments that the policyholder was given no opportunity to reply to or to explain the gastric ulcers or hip arthroscopy in context were therefore irrelevant.

### [E] REVISITING THE *SWANEPOEL V BROLINK* OMBUDS CASE

It is apparent that the Ombudsman for Short-Term Insurance decides on its own procedures for settling a complaint: this includes not taking the law of evidence into account since the Ombudsman is also part of an informal tribunal or dispute resolution system in the insurance industry. The insured, Mr Swanepoel, followed the rules of the Office of the Ombudsman for Short-Term Insurance to appeal the assistant ombuds' judgment to the Ombudsman. However, in 2019 there were no rules on how the complainant should be lodging an appeal to the Ombudsman or how to draft such an appeal on the website of the Short-Term Ombudsman. The Office simply required that documents on record be forwarded to the Ombudsman. The ombuds, Deanne Wood, once again focused on the reasonable person test and that such a person would have disclosed fraud and/or cancellation to Brolink—the ombuds also ignored the legal consequences of *nolle prosequi*, as discussed earlier. The insured, Mr Swanepoel, petitioned the ombuds decision to the chair of the Appeal Board for Short-term Insurance (an alternative dispute resolution body).

The chair is a retired Constitutional Court Judge, Justice Sandile Ngcobo. Justice Ngcobo delivered his judgment in this matter in two pages. Justice Ngcobo held the view that no other court or tribunal would consider the matter differently and the appeal was therefore dismissed.

In other words, the application of the reasonable person test was applied correctly by the assistant ombuds and the ombuds—*nolle prosequi* should have been disclosed on the application form. On the other hand, logic would therefore dictate that if no fraud were committed, then the non-disclosure of fraud or cancellation is in fact non-material and irrelevant. The latter was clearly explained in *Ristorante Limited t/a Bar Massimo v Zurich Insurance plc* (2021) and could be viewed as a very good example for the South African judiciary and or alternative dispute resolution bodies of why no emphasis could be placed on unspecific underwriting questions, such as: have you disclosed all relevant information to the insurer or is there any reason why the insurer would not cover you? Nevertheless, we believe that the retired Constitutional Court Judge could also have considered the following instead of rejecting Mr Swanepoel's claim.

Generally, the calculation of monthly premiums is based on a software program, which needs the answers provided to underwriting questions to calculate the monthly premium. One could argue that most underwriting application forms probably do not include a question that requires an answer regarding *nolle prosequi* and, therefore, the software program does not take it into account and nor does it consider it to be important information when calculating the monthly premium. In this instance, we may assume that no weight is attached to *nolle prosequi*, since if it were an important risk factor an application form would require its disclosure (specifically) for calculating the monthly premium in exchange for cover of the insured's property. As a rule, the insurer can always claim the additional monthly premium at the claim stage or deduct the additional monthly premium from the claim in the event of a non-disclosure. For example, undisclosed *nolle prosequi* equals ZAR100 per month extra on the premium and the monthly premium payable on a vehicle is ZAR500. After 12 months, the insured submits a claim and the insurer realizes *nolle prosequi* was undisclosed. Instead of rejecting the claim, the insurer could use the following calculation: if the claim is ZAR10,000 and the ZAR100 spread over 12 months equals ZAR1200, the insurer will pay only ZAR8800 to settle the claim. The latter option is far better than rejecting the claim as a result of an undisclosed *nolle prosequi*. The assistant ombuds in the *Swanepoel* case could have asked Brolink what the monthly premium would have been in the event of a non-disclosed *nolle prosequi* as calculated by their software program, if any.

## [F] CONCLUSION

From the above it is clear that what constitutes reasonable disclosures is by no means clear. It is an inexact science, influenced by the interpretation of the factual circumstances—without the law of evidence applying to informal insurance tribunals. It is clear that it is a flexible test when indicating what a reasonable person would have disclosed or not. However, the reasonable person is not a super human; the reasonable person can make mistakes, even honest mistakes that are relevant to disclosures. On the other hand, it is possible that non-disclosures that are non-reasonable could allow an insurer to reject a policy or to reject the claims subsequently submitted, for example the *Swanepoel* matter as discussed earlier. Instead of rejection of claims, it is possible for the insurer to calculate the correct premium and either deduct the difference in premium from the claim amount or ask the insured/policyholder to pay the extra amount to the insurer. One must keep in mind that, after being in business for 60 years or so, Profmed as an insurance company should be able to draft effective underwriting questionnaires—application forms that contain specific questions and require specific answers to those questions. Even after all this time, South African insurers are still making use of non-specific questions as a method of rejecting the policy or the claims received. For this reason, alternative dispute resolution bodies and or the courts of South Africa should take note of *Ristorante Limited* pertaining to unspecific underwriting questions, for example, to disclose “all of the information” to the insurer, and that such a question should be rejected by alternative dispute resolution bodies and or courts on the basis of unreasonableness.

### **About the author**

**Neels Kilian** is an Associate Professor at the University of the North-West. He was previously a research fellow at Deakin University (Australia) and the Free State University (South Africa).

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### Cases

[Mignon Adelia Steyn v Profmed Medical Scheme Case No: 23378/2018, 2021 \(3\) SA 551 \(WCC\) paras 20-32, 37 & 44-47 \(Lekhuleni AJ\)](#)

[Profmed Medical Scheme v Mignon Adelia Steyn Case No: A 171/2021, \[2021\] ZAWCHC 60 paras 5-15 & 25-35 \(Baartman, Steyn and Wille JJ\)](#)

*Ristorante Limited t/a Bar Massimo v Zurich Insurance plc* Case No: BL-2020-MAN-000035 Manchester Circuit Commercial Court (QBD), [2021] EWHC 2538 (Ch) electronic pages 4-9 (Snowden J)

*Swanepoel v Brolink (et Hollard Insurance)* S638/18F 5 December 2019 pages 1-2 (Chairman of Appeal Sandile Ngcobo J)—the decision is attached as an Appendix to this article.

*Swanepoel v Brolink (et Hollard Insurance)* S638/18F 6 August 2019 pages 1-7 (Assistant Ombudsman Ayanda Mazwi and Ombudsman Deanne Wood )

## Legislation, Regulations and Rules

Medical Schemes Act 131 of 1998



## PETITION BEFORE THE CHAIRMAN OF THE APPEAL TRIBUNAL

**Policy Claim No:** 00271980005

**Ref:** S638/18F

IN Re:

MR. FREDERICK SWANEPOEL

Petitioner

And

HOLLARD INSUREANCE CO LIMITED

Respondent

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### DECISION

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1. The Petitioner is seeking leave to appeal against the Formal Ruling of the Ombudsman. Petitioner had submitted a claim to the Insurer. This claim was rejected by the Insurer and his insurance policy was cancelled. The reason offered was “Undesirable Risk”. He subsequently submitted a complaint to the Ombudsman. In response to the complaint, the Insurer argued that the Petitioner had a duty to disclose the fact that in 2009 he had a claim rejected and his policy cancelled.
2. The Ombudsman found that the Petitioner was under a duty to disclose the fact that previously, he had an insurance claim rejected and his policy cancelled by OutSurance on account of fraud and dishonesty. It concluded that the Insurer was entitled to reject Petitioner’s claim and cancel his policy. He unsuccessfully applied for leave to appeal.

3. I have considered the Petition Against the Refusal of Leave to Appeal together with the supporting documents.
4. I am satisfied that there are no reasonable prospects that the appeal, either in whole or in part, if prosecuted, will succeed.
5. In the event, I make the following decision:

**THE DECISION OF THE OMBUDSMAN NOT TO GRANT LEAVE TO  
APPEAL IS HEREBY CONFIRMED.**

A handwritten signature in black ink, reading "Sandile Ngcobo", is written over a horizontal line. The signature is cursive and slanted to the right.

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JUSTICE SANDILE NGCOBO  
CHAIRPERSON OF THE APPEAL TRIBUNAL  
DURBAN  
5 DECEMBER 2019

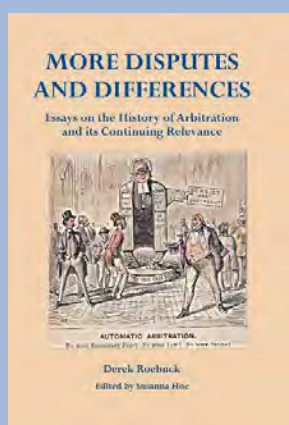
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***MORE DISPUTES AND DIFFERENCES (2022) BY  
DEREK ROEBUCK, EDITED BY SUSANNA HOE***

LING ZHOU

Shenzhen Technology University and Institute of Advanced  
Legal Studies, SAS, University of London

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Derek Roebuck (2022), edited by Susanna Hoe, *More Disputes and Differences: Essays on the History of Arbitration and its Continuing Relevance* is published by HOLO Books/Arbitration Press: Oxford in hardback, priced at £40 (retail) or £35/£37 online (UK/non-UK).

ISBN 978-1-9196318-3-7

This collection of essays, nearly all of which have already been published, on the history of arbitration by Derek Roebuck, was planned by the author, but put together by his long-time collaborator and wife, Susannah Hoe. The author's intention was to publish redrafted and updated versions of the essays, but this was not possible as a result of ill health. Hoe has kindly and cleverly republished the various chapters, lectures and articles under the generic categorization of "essays" and provided a helpful "Preface" explaining the background to the collection of papers. She has also done some updating of reference materials, provided a "Conclusion" that is very much located in the writing and thinking of Roebuck, and she has also compiled a very useful index. The essays may be seen as complementary to Roebuck's extensive work on the history of dispute resolution, especially his earlier book, published as *Disputes and Differences: Comparisons in Law, Language and History* (2010) and similarly dealing with important aspects of the history and development of arbitration (and to a lesser extent, mediation). The book will be very helpful to many scholars, offering as it does in one source (although in a wide range of prose styles) a substantial number of contributions originally published in a broad selection of sources, or which were unpublished.

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The essays focus on the nature and role of arbitration in several ways. Some concentrate on general issues in the arbitration process. Others look in particular at aspects of the history and development of arbitration in England, especially in London. Further essays are more comparative in nature, examining, for example, Scotland, Egypt, Malta and American colonists. There are also several essays dealing with issues of language, law and arbitration. The approach taken overall is one embedded in legal history and a reluctance to engage in a significant way with the discourses of alternative dispute resolution (ADR) and comparative legal studies, despite dealing with topics and issues that are often considered to fall within these fields. This gives the essays sometimes the exciting feel of a detective story, and certainly the reader will find many of the essays very engaging.

Roebuck enjoyed a long and varied academic career, and it was when he was founding Dean of City University Law School in Hong Kong in the late 1980s that his interest in arbitration and its history was established. Hong Kong was beginning to emerge at that time as a major centre for ADR, as a result of the massive construction work being carried out and its pivotal role in Asian trade and finance. Professor Roebuck remained there for a decade, but after leaving his work on arbitration continued. In due course he became editor and then emeritus editor of *Arbitration—The International Journal of Arbitration, Mediation and Dispute Management* (published by the Chartered Institute of Arbitrators in London, which also now hosts the annual Roebuck lecture on arbitration), and a Senior Research Fellow of the Institute of Advanced Legal Studies, University of London, where he located his History of Arbitration Project. This collection of *Essays on the History of Arbitration and its Continuing Relevance*, edited by Susanna Hoe, is a fitting and welcome tribute to Roebuck's work and influence.

### **About the author**

**Dr Ling Zhou** is an Assistant Professor at Shenzhen Technology University and an Associate Research Fellow at the Institute of Advanced Legal Studies. See [webpage](#) for details.

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### References

Roebuck, Derek. *Disputes and Differences, Comparisons in Law, Language and History*, edited by Susanna Hoe. Oxford: HOLO Books/The Arbitration Press, 2010.

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## **AMICUS CURIAE SPECIAL ISSUE—CALL FOR PROPOSALS**

VICTORIA McCLOUD

IALS, University of London, and Sorbonne Panthéon,  
Université de Paris 1

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On behalf of the editors of *Amicus Curiae*, the open access journal of the Institute of Advanced Legal Studies, School of Advanced Studies, London University, proposals are sought by authors for papers of up to 5000 words (in the range 3000-5000 words inclusive of references) for a planned Special Issue to be edited by Dr Victoria McCloud (Master McCloud, United Kingdom (UK) High Court and a Senior Associate Research Fellow at IALS, also Advisory Head of Interdisciplinary Collaboration, Euro-Expert, Sorbonne, Paris), Professor Michael Palmer (Professor, SOAS and IALS) and the Editorial Board of *Amicus Curiae*, on the subjects of abusive or obsessive litigation, its psychology, its impacts on justice systems, on justice and on judges.

The planned output will be the publication of a Special Issue (*Amicus Curiae* Series 2, Number 5.4) planned for 2024 and, depending on responses, may include a symposium event or publication in book form for which authors' consent would be sought beforehand.

The editors invite proposals from judges, professionals and academics in the law, in related psychology and justice fields, as well as from socio-legal scholars, on the above topics and welcome both domestic UK discussion and also international and comparative approaches.

The topics are intended to be widely drawn so that “abusive” can include offensive or threatening litigation as well as more technically abusive litigation such as claims which are intended to be used for purposes other than obtaining the resolution of the apparent dispute (such as economic oppression or political aims). The scope is, however, also intended to include alternative views of the concept of “abusive” litigation, including from a critical stance considering whether the concept itself operates as an unfair restraint on access to courts or hearings, or has a chilling effect on freedom to defend rights. The editors are also interested in any papers considering the rise of “common law” arguments and tactics deployed in court by movements such as “the sovereign citizens”. The

Spring 2023

editors will also welcome psycho-legal proposals in relation to the mental health and psychological issues in play when litigants become obsessive in pursuing claims in court, and on the use of collateral litigation in a family relationship as a means of exerting coercive control after divorces or family separation.

We also invite you to share this call with colleagues who might be interested in the initiative.

*Any inquiries should be sent to **Victoria McCloud**.*

*Email: [victoria.mccloud@sas.ac.uk](mailto:victoria.mccloud@sas.ac.uk).*



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## NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

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### Teaching Tomorrow's Law Teachers Summer Workshop

The summer workshop for early career legal academics, [Teaching Tomorrow's Law Teachers](#), will be held in the first week of July. This pilot project has been developed with the support of the Research England Strategic Investment Fund in the School of Advanced Study.

The workshop was designed and will be led by Professor Shauna Van Praagh, Professor of Law at McGill University, Montreal, and a Senior Associate Research Fellow at the Institute. Earlier this year, the Government of Canada announced that Professor Van Praagh has been appointed as the new President of the Law Commission of Canada. She will take up her post in June. During her visit to the Institute, Professor Van Praagh is hoping to meet with those involved in law reform in this country. We are keen at the Institute to facilitate those conversations with the intention of hosting an event on comparative strategies on law reform in the future.

### Practitioner in Residence

In February, the School of Advanced Study announced its [Practitioners in Residence programme](#) for 2023. This new scheme, which is made possible by Research England Knowledge Exchange funding, is designed to foster creative connections between research, teaching and other knowledge resources within the School and wider domains of creative practice outside of higher education. The funding provides a bursary for a creative practitioner to engage with an institute for a period of up to four months.

IALS was very pleased to have been approved as a host for this year's programme and engaged an excellent candidate, Anna Macdonald. Anna is a dance artist and scholar who specializes in practice-based, participatory research. Her practice is regularly exhibited internationally in both festival and gallery settings and was nominated for the International Video Dance awards in Barcelona and selected as a flagship example of socially engaged practice with the Social Arts Map (Sophie Hope), funded by the Arts and Humanities

Research Council and curated by Creative Works, London.

Anna's residency involves a creative collaboration with the Institute of Advanced Legal Studies (IALS) Library spaces, materials and staff. It focuses on the movement and flow of the Library, using somatic-based practices to explore how different users move within and through its spaces. The aim of this movement-based exploration will be to provoke new thinking about the potential connections between ideological, material and affective organizations of legal knowledge within the IALS Library. Anna will also contribute to the Teaching Tomorrow's Law Teachers summer workshop.

### Charles Clore House Wins Royal Institute of British Architects Award

IALS is pleased to announce that the IALS Library Transformation Project, which was under the direction of Burwell Architects, has been awarded a London Regional Award by the Royal Institute of British Architects.

The jury praised the sensitive vision of the project: "The architect invested much care and attention to ensure legibility between the old and the new, but finely tuned so that the new elements do not contrast or compete with the original architecture. This

is evident in the slightly offset relationship where new partitions meet the existing concrete structures, the colour matching of the new secondary glazing to the original glazing frames, and the choice of floor finishes. The result is a visually coherent design with well-enjoyed spaces.

The jury felt that this project was a true labour of love, conducted by a team that quite selflessly undertook much careful research to ascertain the specific architectural language they were dealing with, and that did all it could to minimize the impact of its own decisions on the original design. The project was conducted over four phases of operation, one floor at a time, allowing the library to function on two floors throughout the entire construction period."

Further information on the RIBA Award can be found at: [Institute of Advanced Legal Studies, Holborn, by Burwell Architects | RIBAJ](#).

### 2023-24 Inns of Court Judicial Fellow

IALS is pleased to announce that this year's [Inns of Court Judicial Fellowship](#) has been awarded to the Honourable Justice James O'Reilly of the Federal Court of Canada who will be visiting in the autumn term and undertaking research on "Thinking Judicially, Fast and Slow": judicial decision-

making: optimal conditions, cognitive errors, biases or illusions, and practical solutions for limiting such errors and inconsistencies in judicial decision-making.

Justice O'Reilly graduated from the University of Western Ontario with a BA (Hons) and then obtained his LLB from Osgoode Hall Law School and an LLM from the University of Ottawa. Justice O'Reilly has had a varied legal career, serving as Consultant to the Law Reform Commission of Canada, Legal Advisor in the Department of Justice, as a sole practitioner specializing in legal policy and law reform, Executive

Legal Officer at the Supreme Court of Canada, Associate Executive Director at the National Judicial Institute and Counsel to the Collusion Investigation in London, England.

He is the author of many reports and publications and has taught law at Carleton University, the University of Ottawa, McGill University, Western University and the Law Society of Upper Canada. He is a Fellow of McLaughlin College, York University. He was appointed to the Federal Court in 2002 and to the Court Martial Appeal Court in 2003.

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## Selected Upcoming Events

### **WG Hart Workshop 2023: Theorists in Company Law**

**Venue:** Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

**Date and time:** 29 June 2023-30 June 2023, 10:00am-5:00pm

#### **Workshop Organizers**

Professor Sally Wheeler, Law School, The Australian National University; Professor Marc Moore, Faculty of Laws, University College, London; Dr Victoria Barnes, Brunel Law School

The [WG Hart Workshop 2023: Theorists in Company Law](#) explores the development of company

regulation by examining the role that theorists played in it. In doing so, it adds to the burgeoning research on the lives and impact of theorists, scholars, academics and litigants. There is a general tendency to overlook this group, certainly in legal scholarship. This is owing to the primacy of legal sources and the emphasis placed upon using good legal authorities, such as legislation and case law. Judges, as the authors of leading judgments, therefore, naturally take centre stage in this body of research. Even within this idea of judicial primacy what matters, particularly in the United Kingdom context, is the dicta from individual judgments. The idea that a judicial figure can, through a series of judgments and extra-

judicial comments, craft and shape a branch of law has been largely missing from 20th and 21st-century jurisprudence.

The aim of this workshop is threefold. It enables us first to rediscover forgotten and neglected authors. Second, it encourages us to think about the biographical element of an author's work and to put theoretical work in its social, economic and historical context. Finally, a discussion

of the theorists in company law allows further insight into the distinctiveness of company law in the United Kingdom as opposed to the Anglo-American or European model. With the growth of the "Law and Economics" movement in the United States, the right-of-centre shift in American political thought has also been dominant in several theoretical discourses. There are—and were—other ways of viewing company law.

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**ILPC AI & Humanities Seminar Series: Toward a Global Index for Measuring the State of Responsible AI**

**Venue:** The Chancellor's Hall, First Floor, Senate House, Malet Street, London WC1E 7HU

**Date and time:** 6 September 2023, 4:00pm-6:00pm

**Lead Speaker:** Rachel Adams, Principal Researcher, ICT Africa

There is a global consensus that AI must be used responsibly if societies around the world are to enjoy the benefits of AI while avoiding the risks associated with even greater social and economic inequalities. To make progress in advancing responsible AI, it is critical to know and understand the current state-of-play, as well as to track progress over time.

This talk, [Toward a Global Index for Measuring the State of Responsible AI](#), will present a

new project underway to develop a Global Index on Responsible AI. The project seeks to address the need for inclusive, measurable indicators that reflect a shared understanding of what responsible AI means in practice and track the implementation of responsible AI principles by governments and key stakeholders.

The Global Index on Responsible AI is a rights-based tool to support a broad range of actors in advancing responsible AI practices. It is intended to provide a comprehensive, reliable, independent and comparative benchmark for assessing progress toward responsible AI the world over.

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**The Director's Seminar Series:  
Decolonising EU Law**

**Venue:** online via Zoom

**Date and time:** 20 September 2023, 4:00pm-5:30pm

**Speaker:** Professor Iyiola Solanke, Jacques Delors Chair in European Law, University of Oxford

**Chair:** Marilyn, Clarke, IALS Librarian

What happens when we take decolonization as the starting point

for our interaction with European Union (EU) law? What could this mean in relation to teaching and research in the various fields of EU law and the EU legal order? This presentation on [Decolonising EU Law](#) is an invitation to explore this idea of “decolonization” and think about how it could open up the world of European integration and EU law to a new generation of scholars and audiences.

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## SAS IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See [website](#) for details.

## SHEN JIABEN (1840-1913)

PATRICIA S.W. NG

Institute of Advanced Legal Studies, School of Advanced  
Studies, University of London

MICHAEL PALMER

*Amicus Curiae*

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This issue's Visual Law looks at a key figure, Shen Jiaben (沈家本) (pictured), in the efforts by China in the early 20th century to introduce legal and judicial reforms during the last years of the Qing dynasty and the early Republican period. While much of the literature on reform efforts in China has focused on the post-Mao era, in particular post-1979, Chinese efforts to develop a legal system that would assist China's economic development and improve relations with the international community began much earlier. Shen Jiaben was a key figure in promoting and implementing "modernizing reforms" during the 1900s and 1910s. These reforms, developed and applied within a broader programme of modernization known as the "New Policies", were a response to western imperial incursions into China, especially the system



of "extraterritoriality". Shen's legal career was based on several decades of service (mainly as a clerk) in the Qing regime's Board of Punishments, a central government body which heard appeals from provincial courts and which reviewed all capital cases. Having served in the Board for some 30 years Shen was made





*Boxer Uprising rebels*

a Magistrate<sup>1</sup> and appointed to several posts until arrested in 1901 by western powers who erroneously believed Shen had supported the Boxer Rebellion.<sup>2</sup> In reality, although a long-serving and rather conservative legal administrator in the Chinese imperial government, Shen had concluded that the humiliating system of extraterritoriality to which China had been increasingly subjected during the 19th century by western powers would be best ended by introducing a more western style legal system.

Serious legal reforms would obviate the need for western countries to maintain their own enclaves of western rule within China. In response, Great Britain, the United States of America and Japan undertook to give up extraterritoriality if the proposed reforms proved successful. Shen became a key reformist, trusted as a safe pair of hands by conservative figures because of his long period of service in the Board of Punishments and as a Magistrate. Following Empress Dowager Cixi's decision to pursue

<sup>1</sup> The local Magistrate in imperial China was a powerful figure, combining executive and judicial powers in one office. See, for example, Macauley 1998.

<sup>2</sup> The Boxer Uprising was a peasant rebellion of 1900 that attempted to expel all foreigners from China. "Boxers" was a characterization that foreigners gave to a Chinese secret society known in Chinese as the Yihequan ("Righteous and Harmonious Fists"). The group believed that they were invincible as a result of the various rituals, including boxing, that they practised.



*Empress Dowager Cixi*

reformist policies, Shen was appointed in 1904 as one of two heads of the newly established Law Codification Commission responsible for drafting new legislation, after several years' preliminary research. Working alongside him was Wu Tingfang, a Hong Kong lawyer who had been trained as an English legal practitioner at Lincoln's Inn in London, and whose expertise in the common law was to be drawn upon for innovative legal transplantation.

In its legal reform work, the Commission approached matters with two main aims. One aim was to revise existing law, especially laws imposing severe punishments (such as the death penalty by slow-slicing) which it had been concluded should be abolished. Shen hoped that this

would both meet many of the criticisms levelled against the Chinese legal system by western powers and prepare the way for more comprehensive legal and judicial reforms which would likely encounter conservative resistance. The other main aim was to draft new codes of law that were based on Western legal "templates". These included, for example, a General Principles for Merchants, Company Law and Bankruptcy Law and, in the spirit of separating the powers of the executive and the judiciary, an Organic Law for the Supreme Court and an Organic Law for the Courts were also promulgated. Procedural reforms attempted for the first time in Chinese history to distinguish civil from criminal cases. It should be noted, however, that the process of "legal westernization" was

mediated by Japan: not only was modernized Japanese law already based on European models, but much thinking about, for example, correct terminology made translation and therefore transplantation of European law into China much easier to effect. Moreover, Japan had rid itself of extraterritoriality and enhanced its international status by constitutional reform and transplantation of Western law, especially German law. This was especially important in the development of a Civil Code for Japan, although in the Chinese case in addition to the German Civil Code, local customary norms were to be blended in by drawing on official research into such norms.

Thus, the Qing dynasty began far-reaching legal and judicial reforms under the leadership of Shen Jiaben and Wu Tingfang.

With considerable skill, these two reforming leaders sought to renovate law codes, judicial institutions and their processes and to instill principles of the rule of law, independence of the judiciary and due process into the Chinese system. But the reforms were very much top-down, and in the years that followed, it often proved difficult for the authorities to implement the new system and its laws. Moreover, this reform mainly along the lines of continental law was favoured by the imperial authorities in China in part because without any system of binding judicial precedent the Qing authorities felt less encumbered by the pressures from a powerful judiciary. Issues of the nature of the attitude of the executive towards the courts, application of the death penalty, rule of law, judicial independence, precedent, and due process persist to the present day.

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