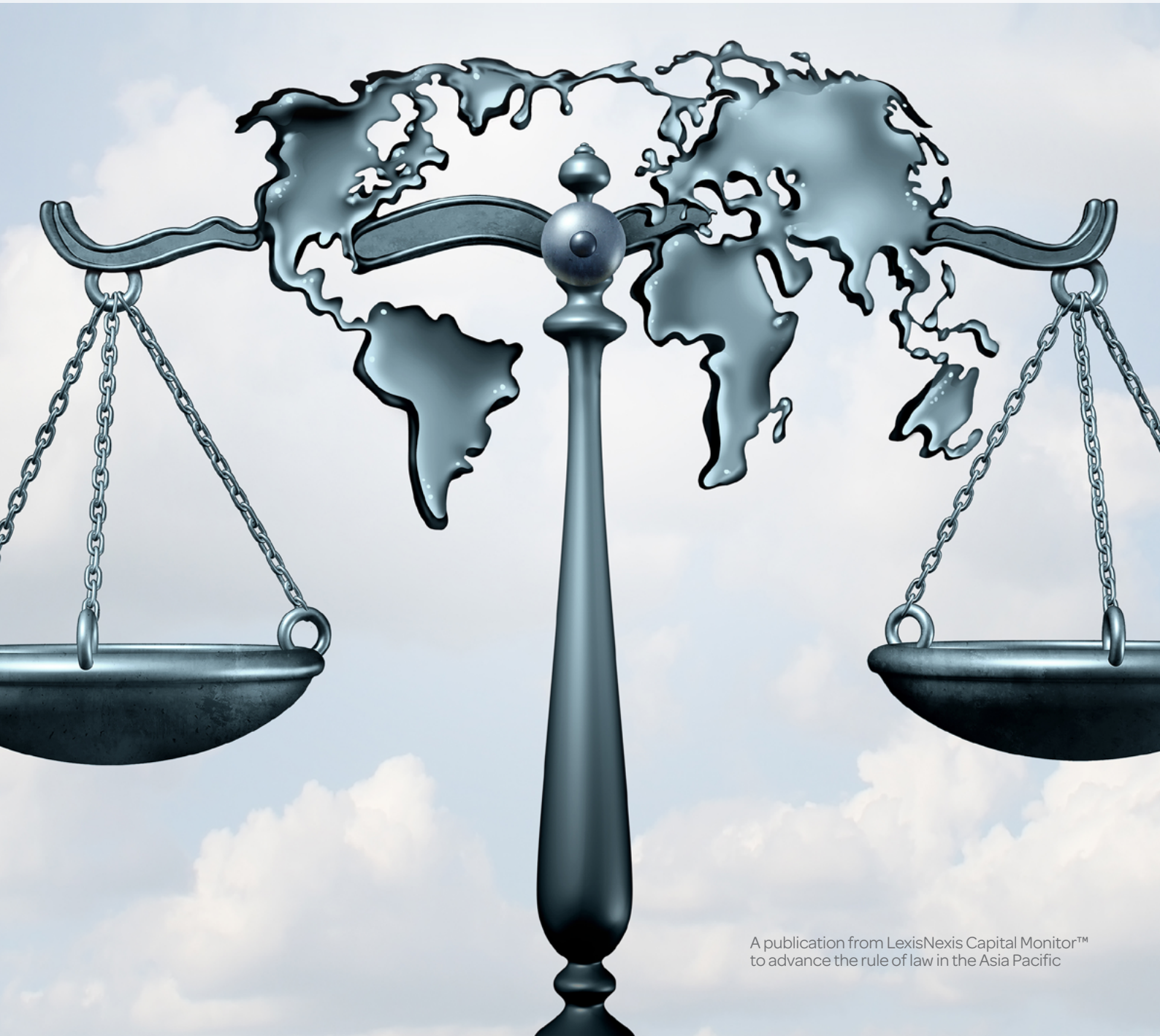
LexisNexis®
RULE OF LAW UPDATES AND PERSPECTIVES

Advancing together

Volume 7 • Issue 2 • December 2018



A publication from LexisNexis Capital Monitor™
to advance the rule of law in the Asia Pacific

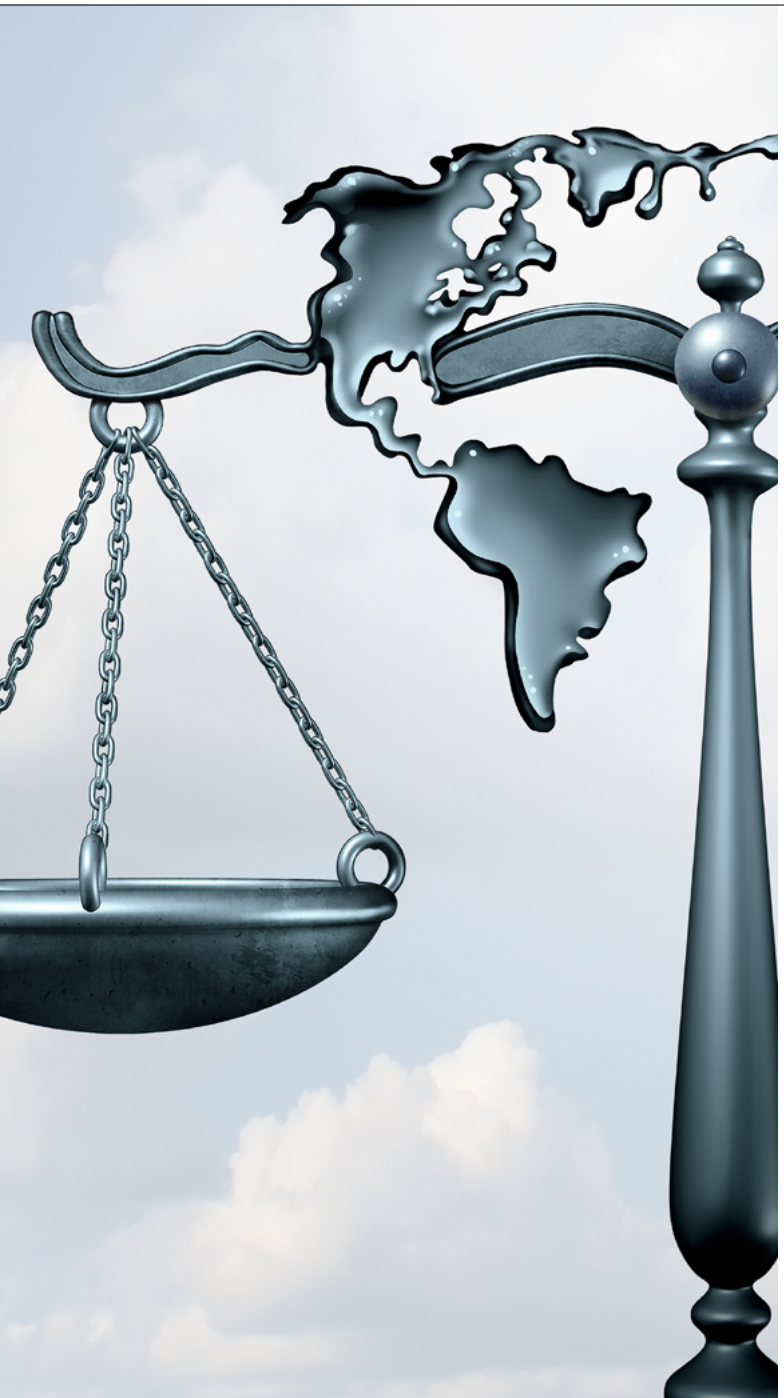
LexisNexis®

RULE OF LAW UPDATES AND PERSPECTIVES

Advancing together

Volume 7 • Issue 2 • December 2018

Contents



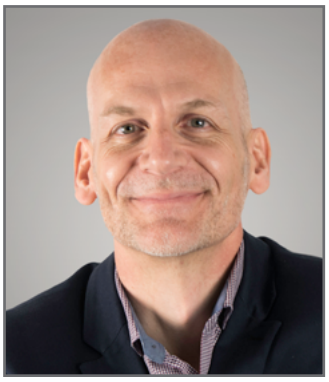
4 Rule of Robots vs Rule of Law

6 Asia Pacific poised to lead the future of global ocean conservation governance

9 Blockchain land registries in India: A modern solution to an old problem

11 Rule of Law: Judicial Independence and the Courts in Australia and Europe

17 Alternative facts, post-truth and the threat to Rule of Law



Hello and welcome to the December 2018 edition of Advancing Together.

What a year it has been – and with a particularly eventful second half as our team travelled across Australia for our 2018 LexisNexis Roadshow, *Legal Frontiers: From AI to Ethics*. We spoke to over 250 lawyers on how they have been affected by technology in their workplace and discussed the potential concerns and ethical consequences of using a tool which currently lacks proper regulation. We came away with some fascinating observations – including the fact that 64% of lawyers believe that artificial intelligence poses a threat to human rights and 69% advocate for stronger data and privacy laws in Australia, similar to that of the GDPR. If you're interested in reading more about our experience and findings, you can find out more here.

We have continued our partnership with the Australian Human Rights Commission (AHRC) on the Human Rights and Technology Project – a landmark inquiry into the protection of human rights in our increasingly technological and data-driven age. As both an industry partner and a legal technology business whose mission is to advance the rule of law, we feel strongly about making sure Australian legislation is poised to best address and regulate the way in which technology may have an impact on human rights. We will continue to work with the AHRC to develop their final report and recommendations (due to be released in 2019) and produce an effective legal framework to protect our fundamental rights.

We have also continued to work with the Fiji Judicial Department and the United Nations Development Program to publish the authorised Fiji Law Reports for the first time ever on Lexis Advance and Lexis Red. This is particularly significant as it will allow government officials who travel to remote areas without internet access to access the full law reports via Lexis Red – something which was never previously possible. We are also developing a website dedicated to the Laws of Fiji in partnership with the Office of Attorney-General which means the authorised legislation will now be freely available to the Fijian population, another ground-breaking first for the community.

All in all it has been a great year for LexisNexis Australia and we will keep striving to deliver valuable and relevant tools for you and your customers. I hope you enjoy what we have prepared for you in this edition of Advancing Together and invite you to share your thoughts and comments on how we can better serve you in the future.

Simon Wilkins
Managing Director
LexisNexis Australia

Rule of Robots vs Rule of Law

Simon Wilkins
Managing Director,
LexisNexis Australia

Artificial intelligence (AI). Technology. Two (or three, if we are being picky) words which seem to appear on my news feed every morning, as I am sure they have been for many of us out there. It feels like not a day goes past without another article being published about the ever-increasing spread of AI and technology – from transforming clinical trial recruitment[1] to concocting new perfume combinations[2]. We are now even hearing about how researchers have taught an AI program to identify galaxies in deep space from the facial recognition technology used on Facebook[3]. It really is incredible to see the astonishing pace at which technology is advancing and how we are seemingly coming to rely on it in nearly every facet of our lives. So, what does it all mean for us in the legal sphere?

Many of those working in private practice, as well as those in government and in-house counsel, are already aware of how AI technology can have a beneficial effect in the work place as an aid to their daily administrative responsibilities. In fact, survey results from the LexisNexis 2018 Roadshow Report showed that 44 percent of legal practitioners have seen technology remove the grunt work from legal practice and 42 percent acknowledge that the nature of legal work has been changed[4]. Through technology, data-intensive tasks such as practice management (i.e. timekeeping, billing and file management), document review, legal research, document and legislation analysis and comparison can now be completed in a much quicker time and potentially with greater accuracy.

What we are seeing more of now, however, is the use of artificial intelligence in the form of algorithm-based technology outside of the office space and increasingly in the public arena of justice (i.e the courthouse). In some American criminal courts[5], judges determining bail have experimented with using algorithm-based 'scores' which rate a defendant on several factors, such as the likelihood

(continued)

1 http://www.visualcapitalist.com/artificial-intelligence-transforming-clinical-trial-recruitment/

2 https://www.forbes.com/sites/andriacheng/2018/10/24/artificial-intelligence-designed-fragrance-is-now-a-reality/

3 https://www.sciencedaily.com/releases/2018/10/181031080608.htm

4 https://www.lexisnexis.com.au/en/insights-and-analysis/research-and-whitepapers/2018/legal-frontiers-ai-to-ethics

5 https://www.nytimes.com/2017/12/20/upshot/algorithms-bail-criminal-justice-system.html#commentsContainer

"...44 percent of legal practitioners have seen technology remove the grunt work from legal practice and 42 percent acknowledge that the nature of legal work has been changed."

of skipping trial and reoffending if released on bail as an influence in their final ruling. In Virginia[6], almost twice as many defendants as usual were released on bail with zero increase in pre-trial crime. Similarly, New Jersey[7] saw an almost 16 percent drop in its pre-trial jail population with no increase in

"...more is seemingly at stake when it comes to artificial intelligence taking on the role of an advisor or implementer of justice..."

crime. This example serves as resounding evidence for AI's ability to help protect the rights of defendants and ensure greater judicial equality. AI may also serve to decrease time to trial resulting in shorter remand times for those who don't get bail. More recently, a software app developed in Argentina was used to generate draft rulings in place of lawyers and paralegals. Those rulings so far have had a 100 percent approval rate from judges and lawyers and are clearing through six months' worth of cases in six weeks[8].

While these results are all promising, there is still the issue of whether we can truly trust artificial intelligence to decide the outcome of a court case instead of a human judge or give us legal advice instead of a lawyer. There is less of an issue in terms of using technology for administrative purposes like e-discovery and document review, but more is seemingly at stake when it comes to artificial intelligence taking on the role of an advisor or implementer of justice. We know that algorithms are not perfect, and that the data fed into an algorithm can be flawed and potentially result in biased outcomes. From a wider perspective, there are also issues of transparency in decision making and proper regulation of technology. If we are not provided with an explanation as to how an algorithm came to a decision, it will be near impossible for unsatisfied parties to examine and challenge the decision. Algorithm-based decisions could, therefore, effectively render the long-standing grounds of judicial review, such as procedural fairness and error of law, inoperable. Similarly, the current absence of proper and independent regulation of the use of algorithms leads to a complex discussion of the ethical and potentially fiduciary responsibilities of those using the algorithms – particularly for those who may not completely understand the technology that they use -- as well as the companies who design them. All of these are valid concerns and should be examined carefully. In fact, it is likely that the rapid development in legal technology will be raising more questions at a quicker pace than the legal industry, and quite possibly the world at large, can answer.

We should, however, not refrain from using something which has been proven to be beneficial simply because we do not fully understand it. There was a time when communicating with clients via email was relatively unreliable and seen as ground-breaking feat - yet we now cannot fathom business without it. Obviously, we must remain vigilant about how technology could undermine our access to legal justice and actively seek to address the current ethical debates. In paraphrasing a lawyer who lost to AI in a recent contract review challenge, however, the future of the rule of law will no longer be human versus computer. Instead, it will be human and computer versus another human and computer. Either one of them working alone will be inferior to the combination of both.[9]

"We should, however, not refrain from using something which has been proven to be beneficial simply because we do not fully understand it."

6 https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/risk-based-pretrial-release-recommendation-and-supervision-guidelines.pdf

7 https://www.vox.com/policy-and-politics/2017/9/22/16345092/california-new-jersey-state-legislature-advances

8 https://www.bloomberg.com/news/articles/2018-10-26/this-ai-startup-generates-legal-papers-without-lawyers-and-suggests-a-ruling

9 https://hackernoon.com/the-essential-guide-to-organizing-an-ai-vs-human-showdown-fe435701d755

Asia Pacific poised to lead the future of global ocean conservation governance

Jenna Allen MA
LexisNexis Capital Monitor Editorial, World Ocean Council Young Ocean Professional Member

Introduction

Ocean pollution and acidification, resource depletion, extreme drought and changes to typical weather patterns that cause massive ecosystem disruption all reinforce the need for drastic and dynamic cooperation regarding climate change and global water security. Perhaps one of the most notable attempts to facilitate such international cooperation is the 1982 United Nations Convention on the Law of the Sea (UNCLOS) that enshrined customary maritime law into an international treaty to promote the stability and peaceful uses of the sea[1]. While a monumental step for international law, the Treaty has also produced its own set of challenges as a legal framework for international management of ocean ecosystems. UNCLOS lead to the expansion of national sovereignty claims seaward and continued to leave much of the resource-rich high seas to the global commons[2]. This patchwork system of national ownership codified by UNCLOS has, unfortunately, supported an ad hoc approach to sustainable governance and management of ocean resources depending on domestic national circumstances. One such example of this can be seen in Australia.

Australia and the Seas

One of 162 signatories to UNCLOS, Australia ratified the Treaty in 1992, and an associated Convention for the conservation of fish stocks in 1999[3]. The Commonwealth Scientific and Industrial Research Organisation (CSIRO) has also deemed Australia's marine life and environment to be "vital resources to the nation" that necessitates management for the "future long-term sustainability" of ocean industries. Despite the acknowledged significance of sustainable management, the country's policy track-record is tumultuous [4]. In 2002, Australia opted to exclude itself from the jurisdiction of UNCLOS and the International Tribunal for the Law of the Sea process, declaring a preference for direct country-to-country negotiation over

(continued)

1 Iucn.org. (2018). United Nations Convention on the Law of the Sea. [online] Available at: https://www.iucn.org/sites/dev/files/unclos_further_information.pdf

2 UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: https://www.refworld.org/docid/3dd8fd1b4.html

3 UN General Assembly. Ibid.

4 Csiro.au. (2018). Sustainable marine management and conservation - CSIRO. [online] Available at: https://www.csiro.au/en/Research/Collections/ANFC/Fish-research/Sustainable-management-and-conservation

"Cooperation regarding ocean environments is partially dependent on all countries willingness to move past a preference for purely national economic gains toward shared global interests, instead."

marine disputes[5]. In 2013, the creation of a proposed network of marine conservation areas was postponed due to domestic political changes[6]. A lengthy review of the proposal that began in 2013 and did not end until 2017 was eventually seen by many to weaken the benefits and protections of the conservation areas [7]. More currently, the Australian Government has continued to largely ignore concerns regarding the predicted devastating impacts that the Carmichael ("Adani") Coal Mine will have on the survival of the Great Barrier Reef. The current approach of the Government makes sense from the perspective of protecting the country's individual national economic interests. It also, however, undermines the consensus of unwavering commitment to the frameworks of global governance and cooperation needing to be reached by governments to effectively manage ocean resources in response to environmental changes. Perhaps the best example of such a galvanising framework is The 2030 Agenda for Sustainable Development of the United Nations (UN).

Sustainable Development Goal 14

Adopted by all UN Member States in 2015, the heart of The 2030 Agenda for Sustainable Development is the 17 Sustainable Development Goals (SDGs). The SDG framework embodies the urgent need for global partnerships and solutions to ensure the future peace and prosperity of people and the planet in the face of global problems[8]. Each of the SDGs is equally important, interconnected and complex. SDG 14's goal to 'conserve and sustainably use the oceans, seas and marine resources for sustainable development' is, however, especially reliant on the critical paradigm shift toward global partnership that is embedded at the heart of the SDGs[9]. As such, it tests the limits of the legal frameworks of national sovereignty and the current international order. Cooperation regarding ocean environments is partially dependent on all countries willingness to move past a preference for purely national economic gains toward shared global interests, instead. This shift, however, is stifled by the ability of individual countries like Australia to shirk obligations of ocean conservation, when convenient, by hiding behind existing frameworks like UNCLOS that extend national sovereignty to marine areas. Protecting the rights of nations, therefore, to exploit and mismanage ocean resources within their control. Even further issues remain unsolved and unmanaged under the UNCLOS as national claims to marine areas only extend from 0 - 200 nautical miles from shore[10]. This leaves an array of environmental problems within a clear majority of the planet's high seas ungoverned. Despite ongoing challenges, SDG 14 has proven to be a rallying point that has galvanised some impressive action.

"A commitment by all nations to policy continuity and common global frameworks that prioritise innovative conservation efforts within and among all sectors are now non-negotiable."

The Future

The 2018 Sustainable Development Goals Report highlights that the percentage of protected areas of marine waters under national jurisdiction has more than doubled since 2010[11]. In a call for the implementation of the SDGs as essential to future security

(continued)

5 Aph.gov.au. (2002). Two Declarations by Australia. [online] Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/18_25_june_2002/report/chapter4.pdf

6 Strating, R. (2017). Law of the Sea: Settling the Australia and Timor-Leste Dispute - AIIA. [online] Australian Institute of International Affairs. Available at: https://www.internationalaffairs.org.au/australianoutlook/law-sea-settling-aus-timor-dispute/

7 Strating, R. (2017). Ibid.

8 Sustainabledevelopment.un.org. (2018). SDGs.:. Sustainable Development Knowledge Platform. [online] Availa-ble at: https://sustainabledevelopment.un.org/sdgs

9 Sustainabledevelopment.un.org. (2018). Goal 14.:. Sustainable Development Knowledge Platform. [online] Avail-able at: https://sustainabledevelopment.un.org/sdg14

10 Ga.gov.au. (2018). The Law of the Sea | Geoscience Australia. [online] Available at: http://www.ga.gov.au/scientific-topics/marine/jurisdiction/law-of-the-sea

11 Un.org. (2018). The Sustainable Development Goals Report 2018 | Multimedia Library - United Nations Depart-ment of Economic and Social Affairs. [online] Available at: https://www.un.org/development/desa/publications/the-sustainable-development-goals-report-2018.html

of humanity, UN Special Envoy for the Oceans Peter Thomson argued for increased investment in marine science and the transfer of marine research as a global responsibility[12]. Indeed, as research and innovation continue to reveal the economic potential that the world's oceans hold at a time of increasing global scarcity, the looming catastrophe facing ocean ecosystems has inspired an emergence of a Blue Economy. The recent proliferation and popularisation of terms like "Blue Economy"[13] and "Blue Tech" are indicative of a realignment of economic interests and ocean sustainability. New ideas, research and industries, such as 'offshore renewable energy, aquaculture, deep seabed mining and marine biotechnology', could unlock the immense economic potential of the planet's ocean resources, while simultaneously advancing the marine conservation necessary for future survival of humankind[14]. It is undeniable that cutting-edge research and development are essential to solving the environmental collapse we currently face. It is also clear that a paradigm shift toward global cooperation must be implemented to solve this growing global crisis. A commitment by all nations to policy continuity and common global frameworks that prioritise innovative conservation efforts within and among all sectors are now non-negotiable. In November 2018, The World Ocean Council held its sixth annual Sustainable Oceans Summit (SOS) that brought together the world's ocean industries to focus on the sustainable development, science and stewardship of the global ocean[15]. Held in Hong Kong and titled "Ocean Sustainable Development - Connecting Asia and the World" the 2018 SOS highlighted the key role of the Asia Pacific region for the future sustainable development of global oceans[16]. The Asia Pacific is one of the most dynamic regions on earth and, united in common purpose, could be poised to lead the future of Blue Economy if it so chooses. Furthermore, by acknowledging the evolution that has led to the present problems, we can more clearly see where we must go for solutions. And it is essential that we find these solutions should we wish to preserve the world's oceans as not only the common heritage, but also common future, of humankind.

"The Asia Pacific is one of the most dynamic regions on earth and, united in common purpose, could be poised to lead the future of Blue Economy if it so chooses."

Bibliography

Aph.gov.au. (2002). Two Declarations by Australia. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/18_25_june_2002/report/chapter4.pdf

Ga.gov.au. (2018). The Law of the Sea | Geoscience Australia. Available at: http://www.ga.gov.au/scientific-topics/marine/jurisdiction/law-of-the-sea Iucn.org. (2018). United Nations Convention on the Law of the Sea. Available at: https://www.iucn.org/sites/dev/files/unclos_further_information.pdf

Strating, R. (2017). Law of the Sea: Settling the Australia and Timor-Leste Dispute - AIIA. [online] Aus-tralian Institute of International Affairs. Available at: https://www.internationalaffairs.org.au/australianoutlook/law-sea-settling-aus-timor-dispute/

Sustainabledevelopment.un.org. (2018). SDGs: Sustainable Development Knowledge Platform. Available at: https://sustainabledevelopment.un.org/sdgs

Sustainabledevelopment.un.org. (2018). Goal 14.:. Sustainable Development Knowledge Platform. Available at: https://sustainabledevelopment.un.org/sdg14

Un.org. (2018). The Sustainable Development Goals Report 2018 | Multimedia Library - United Nations Department of Economic and Social Affairs. Available at: https://www.un.org/development/desa/publications/the-sustainable-development-goals-report-2018.html

Universitetet i Bergen (2018). Message from Peter Thomson, UN's Special Envoy for the Ocean, to SDG Bergen Conference. Available at: https://vimeo.com/255152593

Woi.economist.com. (2015). The blue economy: Growth, opportunity and a sustainable ocean economy. Available at: https://www.woi.economist.com/content/uploads/2018/04/m1_EIU_The-Blue-Economy_2015.pdf

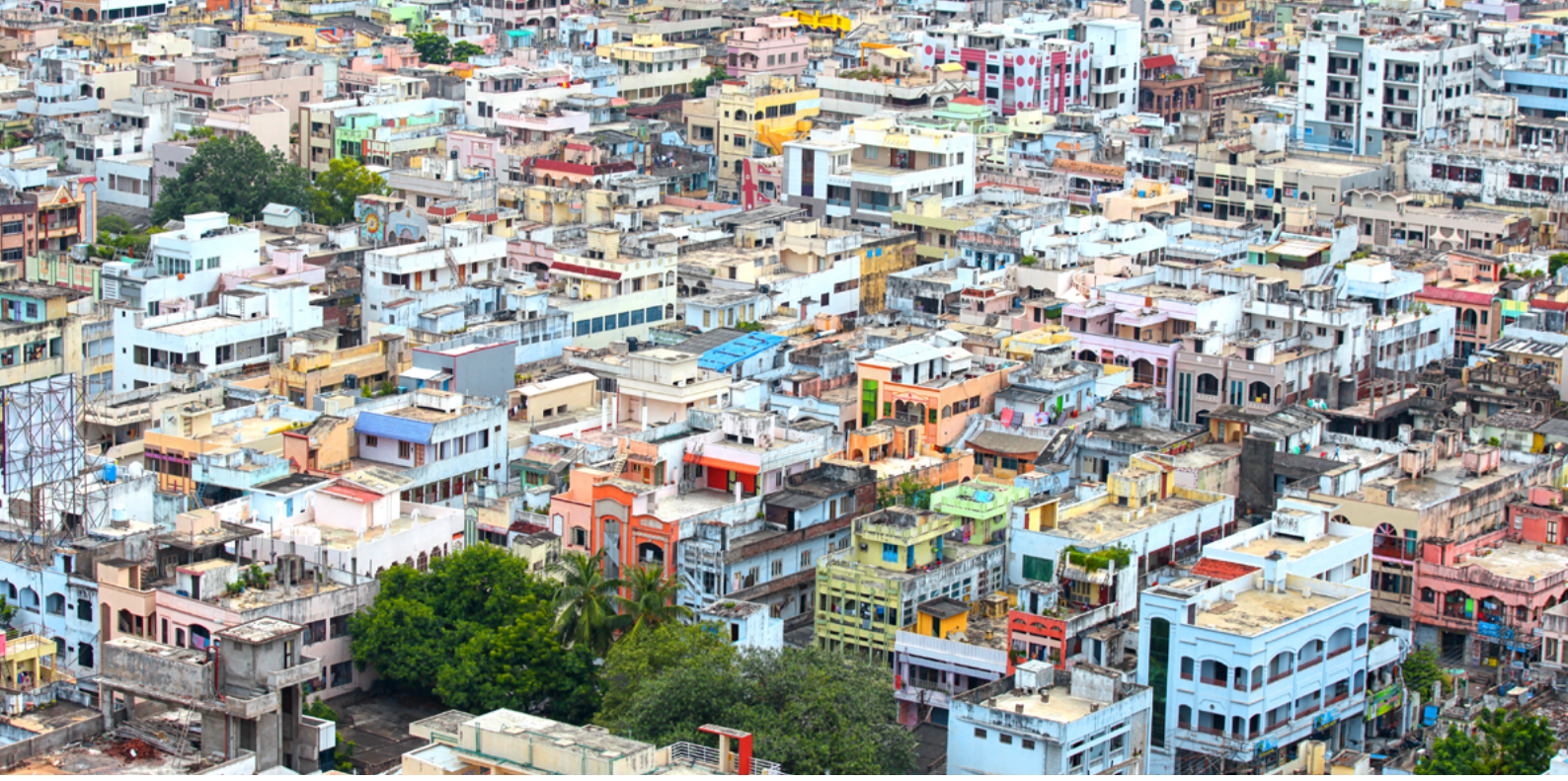
12 Universitetet i Bergen (2018). Message from Peter Thomson, UN's Special Envoy for the Ocean, to SDG Bergen Conference. [video] Available at: https://vimeo.com/255152593)

13 Woi.economist.com. (2015). The blue economy: Growth, opportunity and a sustainable ocean economy. [online] Available at: https://www.woi.economist.com/content/uploads/2018/04/m1_EIU_The-Blue-Economy_2015.pdf

14 woi.economist.com. Ibid.

15 WOC Sustainable Ocean Summit. (2018). WOC Sustainable Ocean Summit - Hong-Kong 2018. [online] Availa-ble at: https://sustainableoceansummit.org/

16 WOC Sustainable Ocean Summit. (2018). Ibid.



Blockchain land registries in India: A modern solution to an old problem

Patrick Cordwell
LexisNexis Capital Monitor Subeditor

Introduction

Tracking the transfer of property through land registries in developing countries can often be a futile exercise. Records can be incomplete, missing, or prone to fraud and corruption. This is problematic because a robust record of who owns what is fundamental for allowing individuals to assert rights over property so that they might securely buy, sell, or invest in their land.

In Haiti, for example, the 2010 earthquake destroyed records pertaining to land ownership across the country. The rightful owners of thousands of properties could not be identified, and farmers continue to dispute land ownership today. Similar issues are widespread across the developing world. Billions of individuals lack clearly defined legal ownership of the land on which they live and work.

Blockchain has been proposed as one solution to eliminate uncertainty in land ownership. The technology has been implemented to great success already, with land registries underpinned by blockchain appearing in Sweden, Russia, Brazil, Georgia, and Rwanda. The efficiency and transparency gains realised in these examples begs the question: How might similar solutions be rolled out to solve significant issues of land governance in other contexts?

Land registry challenges in India

Land registry issues are particularly pronounced in India. With contentious transactions frequently landing in the courts (two-thirds of pending court cases in India relate to property disputes) it is no surprise that the country ranks 154th in the world in difficulty registering property according to the World Bank's Ease of Doing Business Index[1].

For individuals, it can be extraordinarily challenging (and in some cases impossible) to confirm which land belongs to who. Many land owners are unsure if they have legal ownership of a piece of land, even where they possess the legitimate sale deed. Likewise, it is difficult for buyers to confirm whether

(continued)

1 World Bank Group, Doing Business 2018: Reforming to Create Jobs (2018) 167.

"...inefficiency and corruption in land transfers historically cost India 1.3 percent of its GDP every year..."

a seller actually has the title to the land that they are selling.

This problem is a systematic contributor to poverty and financial hardship in India. Vulnerable individuals are unable to demonstrate enforceable legal titles to property, and therefore cannot resolve disputes regarding the use of land. Economic opportunities are lost as issues of ownership mean they find themselves unable to borrow to invest in their farms, homes or businesses. It is therefore unsurprising that the impacts are felt more broadly, with reduced confidence in the land transfer system leaving a negative impact on the wider economy. Consultancy firm McKinsey calculated that inefficiency and corruption in land transfers historically cost India 1.3 percent of its GDP every year[2].

A blockchain solution

Blockchain is a digital ledger that exists on a network of computers. The ledger is constituted by groups of transitions called 'blocks'. When a new transaction takes place, it is authenticated across the network before being recorded as a new block on the chain. Each block is timestamped and includes key information about the transaction. The chain is decentralised; it is not controlled by any single entity or group, but by a peer-to-peer network of computers that record and store identical copies of each block. Transactions which appear on the ledger are therefore immutable and irreversible. Blockchain is therefore a powerful technology for facilitating transparent transactions that are resistant to tampering, loss, or sabotage.

For several years, blockchain has been making headlines for underpinning cryptocurrencies like Bitcoin and Ethereum. This same technology is increasingly being touted as a solution to many commercial and legal problems. While it is as yet unclear how much of this is simply hype (blockchain has rapidly become a buzzword over recent years), land registration seems the perfect candidate for the implementation of a blockchain solution with the potential to bring security and transparency to an area where these are sorely lacking.

"The blockchain improves transparency and safety of land sales, reducing fraud and ensuring that properties are not sold several times over."

It seems that public and private sectors in India agree, with Forbes declaring a 'blockchain revolution' in the country[3]. Governments are realising the potential of the technology through projects that integrate blockchain technology into land registry processes. The country's Digital India Land Records Modernisation Program (DILRMP) is seeking to implement a blockchain ledger that provides a government-approved record of property transactions[4].

The UNDP is demonstrating how this might work in practice, with the organisation working alongside government and blockchain organisations to build a blockchain-based land registry for the city of Panchkula in Harayana[5]. Here, a sale deed's details are registered on the blockchain in the presence of the buyer and seller at the local government services office. Once the transaction is recorded, governments, banks, buyers and sellers can access information regarding ownership of a property.

This immutable digital trail goes a long way to mitigating the headaches of India's land record system. The blockchain improves transparency and safety of land sales, reducing fraud and ensuring that properties are not sold several times over. There are efficiency gains too - the transfer of the sale deed can be monitored in real time, with instant access to complete transaction histories.

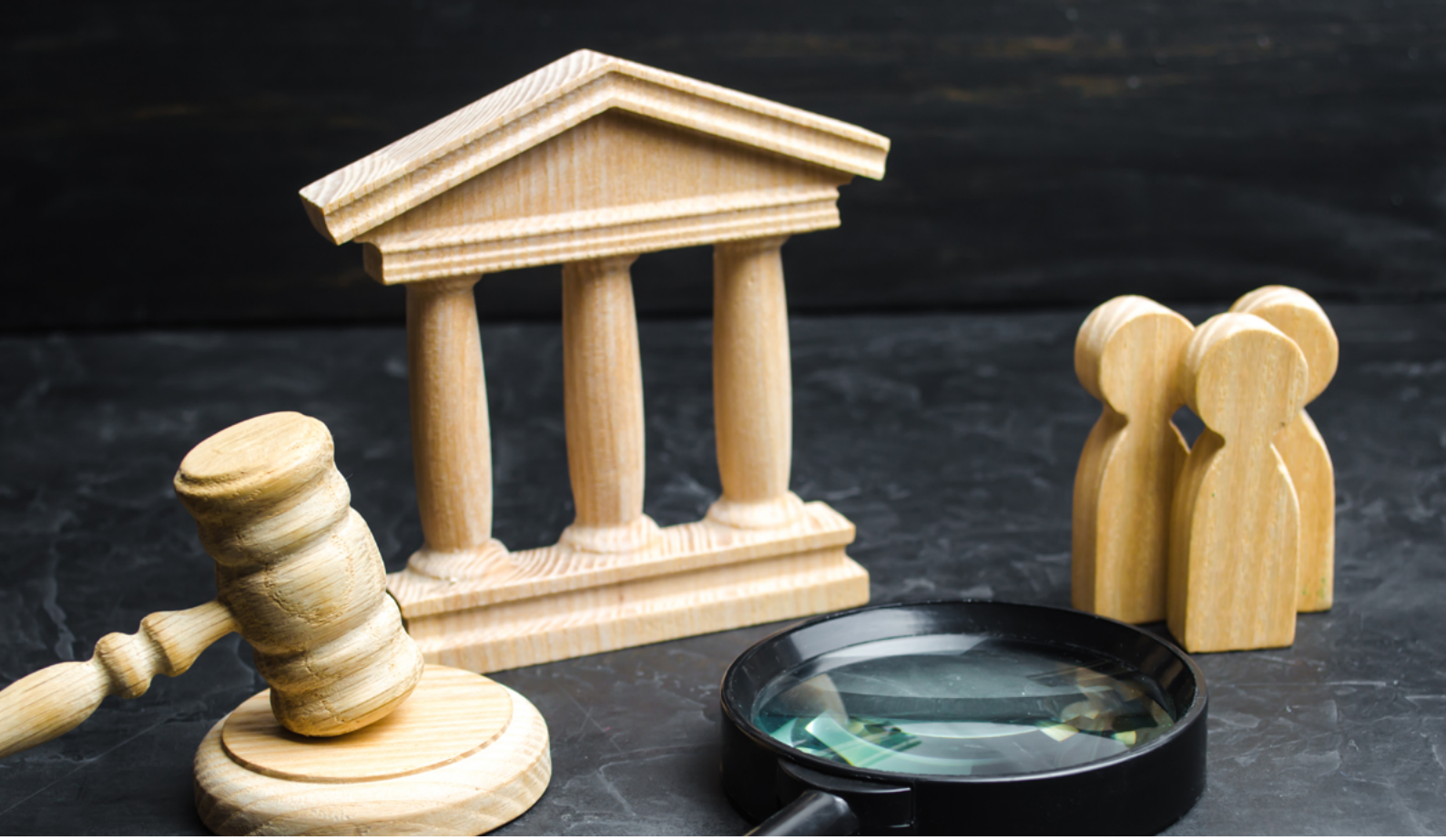
The social benefits that flow from this are immense. According to the UNDP, this blockchain-based land registry will fight corruption and imbue some of the world's poorest individuals with the confidence to purchase their first land assets, a major step in helping lift them out of poverty. The project demonstrates that not only is blockchain a commercially viable answer to India's land registry problems, it is a meaningful solution that has the potential to enrich the lives of billions of people.

2 McKinsey Global Institute, India: The Growth Imperative (2001) 4.

3 Sindhuja Balaji, 'India's Blockchain Revolution Goes Beyond Banks Into Land Records And Private Firms', Forbes (online), 28 December 2017 <https://www.forbes.com/sites/sindhujabalaji/2017/12/28/indias-blockchain-revolution-goes-beyond-banks/#521234684123>.

4 India Institute, Blockchain for Property: A Roll Out Road Map for India (2017) 18.

5 United Nations Development Program, Using blockchain to make land registry more reliable in India (2018) <http://www.undp.org/content/undp/en/home/blog/2018/Using-blockchain-to-make-land-registry-more-reliable-in-India.html>.



Rule of Law: Judicial Independence and the Courts in Australia and Europe

Fiona Leahy, Jackie Charles and Broderick Morgan
Rule of Law Institute of Australia

Introduction

The health of the rule of law around the world is in a constant state of flux, with multiple jurisdictions from common and civil law traditions navigating an increasingly challenging global political and legal landscape.

The legal profession, governments and courts should work together to ensure the fundamental principles of the rule of law are upheld and are at the core of their country's legal system. This article seeks to provide a moment-in-time snapshot of the state of the rule of law in three jurisdictions Australia, Hungary and Poland. It is not intended as a definitive examination, rather an overview with a focus on the key rule of law principles of independence of the judiciary and the courts.

Australia - Court upholds Rule of Law

In July 2018, 'The Justice Project Report' was published by the Law Council of Australia[1]. It comprehensively highlighted the deficits in access to justice faced by many Australians and focused on the fundamental rule of law principle of equality of access to the law. In his address to the National Press Club, Mr. Morry Bailes, Law Council of Australia President and co-author of the report, said:

> *"the legal profession and the courts are often the only vehicles for righting a wrong and correcting injustices and the rule of law must be there for all of us in equal measure."*[2]

This role is demonstrated by a recent decision of the Australia High Court in the case of *Tony Strickland (a pseudonym) v Commonwealth*

(continued)

1 Read the Justice Project report https://www.lawcouncil.asn.au/justice-project and the powerful speech given by the former President Fiona McLeod and the Current president Morry Bailes to get an understanding of the scope of the Access to Justice issues within Australia

2 Morry Bailes, President Law Council of Australia, 'Justice State of the Nation', National Press Club, Canberra, 14 March 2018

"...the legal profession and the courts are often the only vehicles for righting a wrong and correcting injustices and the rule of law must be there for all of us in equal measure."

Director of Public Prosecutions; Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions; Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions; Rick Tu [2018] HCA 53[3] ("Strickland") in which the strength of the rule of law and the fundamental right to a fair trial is preserved by the court.

In its decision regarding Strickland, the Court clearly articulates the fundamental nature and importance of a fair trial, the common law right to silence and the administration of justice in a common law adversarial system. This, in the view of the authors of this article, make it one of the most significant rule of law cases in Australia in recent times.

In Strickland, the High Court, by a 5-2 majority, allowed the appeals of four criminal defendants by upholding a permanent stay on their prosecutions.

In 2009, an investigation into a company XYZ Ltd for financial crimes was being conducted by the Australian Federal Police ("AFP"). The defendants, who worked for XYZ Ltd, exercised their right to silence and declined interviews with the AFP.

Following that, in 2010, they were subjected to an examination by an Australian Crime Commission ("ACC") examiner, despite there being no current ACC investigation under the Australian Crime Commission Act 2002[4] at the time. It was later determined that, when conducting these examinations, the ACC examiner unlawfully permitted AFP officers to secretly watch. The ACC examiner also allowed the recordings and transcripts of the examinations to be made available to the AFP and Commonwealth Director of Public Prosecutions ("CDPP")[5].

The defendants were later charged with both Federal and Victorian charges related to bribing of a foreign official and false accounting. Following an application by the defendants, a Victorian trial judge ordered a permanent stay on proceedings, which was subsequently overturned by the Victorian Court of Appeal. The defendants then appealed to the High Court.

In their judgement, the plurality of Kiefel CJ, Bell and Nettle JJ articulated the importance of government agencies conducting criminal investigations and prosecutions lawfully and that such agencies should not bring the administration of justice into disrepute[6].

> *"Those who framed the Constitution conceived of parliamentary supremacy and the rule of law as administered through the courts as better protecting traditional freedoms".*[7]

The decision found that the actions of the ACC examiner allowed the AFP and CDPP to utilise the coercive examination powers of the ACC, to overcome the defendants' exercise of their common law right to silence. The Court found this to be "profoundly unlawful"[8] and that it showed "reckless disregard for his statutory responsibilities"[9]. As a result, "the continued prosecution of the appellants would bring the administration of justice into disrepute"[10] and ordered the

(continued)

3 Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions; Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions; Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions; Rick Tu [2018] HCA 53 (8 November 2018) http://eresources.hcourt.gov.au/showCase/2018/HCA/53 Accessed 16 November 2018 9:15am

4 https://www.legislation.gov.au/Details/C2016C00713

5 The authors are thankful for the assistance of Professor Jeremy Gans of the University of Melbourne in bring this case to our attention and for his summary of key aspects of the case on Opinions on High - http://blogs.unimelb.edu.au/opinionsonhigh/2018/11/15/strickland-a-pseudonym-galloway-a-pseudonym-hodges-a-pseudonym-tucker-a-pseudonym-v-commonwealth-director-of-public-prosecutions-ors/ Accessed 15 November 2018 at 10:35am

6 Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions; Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions; Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions; Rick Tu [2018] HCA 53 (8 November 2018) [106]

7 ibid [101]

8 ibid [90]

9 ibid [86]

10 ibid [106]

"extraordinary step"[11] of permanent stay of the prosecution.

Her Honour Gordon J, in her dissenting judgment, found the stay of the prosecution was unwarranted, but clearly articulated the role of courts in preserving the right to a fair trial and administration of justice.

> *"Accused persons have a right to a "not unfair" trial and it is the courts that decide what is fair, or not fair. Courts have powers to protect an accused's right to a fair trial. A permanent stay of a criminal trial for abuse of process is one of those powers...the grant of a stay is not about punishing investigators or prosecutors. It is to prevent the court's processes being used in a manner inconsistent with the recognised purposes of the administration of justice."*[12]

While the above discussion may demonstrate that Australia is robust in the protection of its rule of law, the examples of Hungary and Poland below, where elected parliaments have changed law affecting judicial independence, show that diligence is required to uphold the crucial role of the judiciary and courts have in maintaining the health of rule of law.

Hungary and Poland - Threats to Judicial Independence

The Rule of Law has been in the spotlight in Poland and Hungary for the last few years. Similar concerns have arisen about changes in laws in both countries, particularly regarding the separation of powers and judicial independence.

> "Accused persons have a right to a "not unfair" trial and it is the courts that decide what is fair, or not fair. Courts have powers to protect an accused's right to a fair trial."

In the face of criticism from the European Parliament and European Commission, both countries have supported each other's right to determine their own outcomes, through their democratically elected parliaments. Other member countries of the European Union have supported this right.

Hungary

In Hungary, a new constitution called the *Fundamental Law*[13] was introduced in 2011 by the democratically elected government. This has been amended on a regular basis since its introduction. The new Constitution does not guarantee the independence of the judiciary nor of the Constitutional Court. Some of the changes introduced into Hungarian law included the following:

- The establishment of a National Judicial Office for the administration of courts. That is run by a single person, who is appointed for nine years[14]. The role includes the power to veto the selection of judges and apportion caseloads, however, the National Judicial Council (NJC) has some limited powers to supervise the practice of judicial appointments.[15]
- The case law of the Constitutional Court from 1990 to 2011 has been nullified, so none of the decisions of the Court from before the enactment of the new Constitution could be relied on as legal authority[16].
- The number of judges on the Constitutional Court has increased from 11 to 15. They are appointed through nomination of a parliamentary committee and the vote of two-thirds of the parliament[17].

(continued)

11 ibid [86]

12 ibid [202]

13 The Fundamental law of Hungary https://hunconcourt.hu/fundamental-law/ Accessed November 2018

14 "...In no other member state are such important powers--including the power to select judges and senior office holders...vested in a single person." the Venice Commission in (Gulyas, 2012).

15 Hungarian Helsinki Committee Attacking the Last Line of Defence - Judicial Independence in Hungary in Jeopardy 15 June 2018, at 1.

16 Kriszta Kovács, K. L. The fragility of an independent judiciary: Lessons from Hungary and Poland and the European Union. Communist and Post-Communist Studies,2018, 1-12.

17 Freedom House Report Hungary 2018. Accessed November 2018 https://freedomhouse.org/report/freedom-world/2018/hungary

- The retirement age of judges was reduced from 70 to 62 years, which meant that in 2012 over 200 judges were forced to resign[18].
- The recent setting up of an Administrative High Court, which will deal with all legal challenges of decisions taken by state authorities. The President of that Court will be directly elected by parliament[19].

It is yet unclear whether any of the changes made to the judiciary have impacted their independence, however the discretion of the Parliament and the President of the National Judicial Office to affect the appointment of judges and the impact of the latter on case distribution are not easy matters to measure.

Poland

In Poland the Law and Justice Party won an absolute majority of seats in the lower house of parliament in 2015, governing as a single bloc (formed by a coalition of three smaller parties) alone for the first time in the country's modern democratic history. In October 2015, they captured the presidency and the upper house of the parliament[20].

This government has made changes to the authority of the courts as follows:

- The appointment of judicial officers to the Constitutional Tribunal in breach of its rules of appointment[21]
- The refusal to heed or publish judgments of the Tribunal which declared these appointments unconstitutional.
- In April 2018, the retirement age of judges in the Supreme Court was lowered from 70 to 65 years with the result that a third or more judges had to retire. The number of judges on the court was also increased from 83 to 120[22]. The government argued that such changes were required to improve efficiency of the court[23]. Chief Judge Gersdorf of the Supreme Court declined to retire claiming that her appointment under the Constitution is until 2020. She has continued to turn up for work.

(continued)

18 Engstad N, 'Judicial Independence in Turkey', University of Oslo, 12 April 2018 https://www.juristforbundet.no/globalassets/dokumenter/organisasjon/dommerforeningen/challenges-to-judicial-independence.pdf. Accessed November 2018

19 Hungarian Helsinki Committee Attacking the Last Line of Defence - Judicial Independence in Hungary in Jeopardy 15 June 2018, at 2.

20 Kriszta Kovács, K. L. The fragility of an independent judiciary: Lessons from Hungary and Poland and the European Union. Communist and Post-Communist Studies,2018, 1-12.

21 Christian Davies, Hostile Takeover: How Law and Justice Captured Poland's Courts, May 2018, at 4.

22 Christian Davies, Head of Polish supreme court defies ruling party's retirement law, The Guardian, July 2018. https://www.theguardian.com/world/2018/jul/04/poland-supreme-court-head-malgorzata-gersdorf-defies-retirement-law Accessed November 2018

23 BBC News, EU court orders Poland to halt court retirements law, BBC News, October 2018. https://www.bbc.com/news/world-europe-45917830 Accessed November 2018

- Two new divisions were added to the Supreme Court: A Disciplinary Chamber, tasked with disciplining other judges in the court (and given salaries 40% higher than other judges) and a division in charge of review of elections.
- The (hitherto independent) office of Procurator was fused with the highly political office of the Minister for Justice, Zbigniew Ziobro.
- The Minister of Justice now has the power to appoint and dismiss presidents and deputy-presidents of ordinary courts; 150 of these staff members have been dismissed so far[24].
- Membership of the Polish Council for the Judiciary is voted on by the parliament and their chosen members dominate the council.
- This council plays an important role in the appointment and dismissal of judicial office[25].

"Previously the judicial members of the Council were selected by their peers. We have seen a governmental take-over of the judiciary and the institutions that were set up to safeguard the independence of Polish courts[26]."

- Several pieces of legislation were introduced that severely encroach on individual rights. These include laws regarding freedom of assembly, data protection and criteria for admission to the civil service[27].
- Public media has become a propaganda arm of the government, and there are threats that private media (often owned by foreign enterprises) will be attacked under the guise of 're-Polonisation'[28].

"The eroding of laws regarding civil liberties, and the proposing of broad legislation that authorises widespread electronic surveillance without sufficient judicial oversight, are currently matters that require attention to ensure the fundamental principles of the rule of law are not undermined."

European Union Response

The rule of law is enshrined in Article 2 of the Treaty on European Union ("the Treaty"). The European Commission, together with the European Parliament and the Council, is responsible under the Treaty for guaranteeing the respect of the rule of law as a fundamental value of the Union and making sure that EU law, values and principles are respected[29].

In December 2017, the European Commission (the executive of the European Government) voted for the EU Council of Ministers to activate Article 7 of the EU Treaty regarding a clear risk of a serious breach of EU values by Poland[30]

Following unsuccessful steps in mid-2018 to obtain what they considered an appropriate response from Poland, the European Commission referred Poland to the Court of Justice of the EU in September 2018, regarding its concerns over judicial independence and the lowering of the retirement age of judges. The Court was asked to order interim measures,

(continued)

24 Engstad N, 'Judicial Independence in Turkey', University of Oslo, 12 April 2018 https://www.juristforbundet.no/globalassets/dokumenter/organisasjon/dommerforeningen/challenges-to-judicial-independence.pdf. Accessed November 2018

25 ibid

26 ibid, 3

27 The authors are very thankful for the support and additional information provided on the rule of law in Poland by Professor Martin Krygier, University of New South Wales -Gordon Samuels Professor of Law and Social Theory,Co-Director - Network for Interdisciplinary Studies of Law, Co-Director – Australia-Myanmar Constitutional Democracy Project

28 ibid

29 European Commission - Press release, Rule of Law: European Commission acts to defend judicial independence in Poland Brussels, 20 December 2017 http://europa.eu/rapid/press-release_IP-17-5367_en.htm Accessed November 2018

30 European Parliament, 'Rule of law in Poland: Parliament supports EU action', European Parliament,1 March 2018 http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action Accessed November 2018

to restore the previous law and to expedite the matter[31]. At the same time, the European Commission advised that:

> *"This infringement procedure does not stop the ongoing rule of law dialogue with Poland, which is still the Commission's preferred channel for resolving the systemic threat to the rule of law in Poland[32]."*

In September 2018, for the first time, the European Parliament passed a motion requesting the EU Council of Ministers considers whether there was a clear risk of a serious breach of the values in Hungary under Article 7 of the Treaty, on which the Union was founded[33].

In October 2018, the European Court of Justice made interim orders for the immediate and retrospective suspension of the law that reduced the retirement age of judges.

On the 21 November 2018, a substantial change occurred in Poland. To quote Professor Martin Krygier who was in Poland when the amendments passed through the lower house of Parliament (the Sejm)[34]:

> *"The Chief Justice stays, and those forced to retire resume if they choose, until they turn 70,*
>
> *According to the government's explanation of the changes, they are due not only to:*
> - *Criticisms from the EU; and*
> - *The decision of the EU court that all the earlier measures be suspended until the Court's substantive decision re compatibility with EU law was decided,*
> - *But also because of reservations that have been expressed about the laws' constitutionality.*
>
> *Until today, all these reasons have been vehemently rejected by the government."*

Polish Justice Minister Zbigniew Ziobro told parliament.

> *"We are fulfilling our obligations," ... "At the same time, we are pushing forwards with our changes in the justice system[35]."*

"Although the recent decision by the Australian High Court sends a strong message that the rule of law is being protected by the court, Australia needs to ensure that transparency and the rule of law remain at the forefront of public discussion."

Conclusion

As is apparent above, the European Union's actions against Poland have led to substantial change and a welcome, if still very partial, compliance with the rule of law. There remains, however, a concern that these changes, rushed through the Sejm in three hours, are a political response and the politicisation of judicial appointments, and other assaults on the rule of law, will continue.

The authors of this article hope that these changes by the European Union will also be influential in Hungary.

Although the recent decision by the Australian High Court sends a strong message that the rule of law is being protected by the court, Australia needs to ensure that transparency and the rule of law remain at the forefront of public discussion. At the end of the day, the courts and hence the rule of law can be overridden by parliament. The eroding of laws regarding civil liberties, and the proposing of broad legislation that authorises widespread electronic surveillance without sufficient judicial oversight, are currently matters that require attention to ensure the fundamental principles of the rule of law are not undermined.

Despite the pleasing developments in Poland and Australia as outlined above, we still have concerns that the rule of law is not inherently safe in any jurisdiction and that it will not be protected without ongoing public discourse and diligence on the part of all members of the legal profession and citizens.

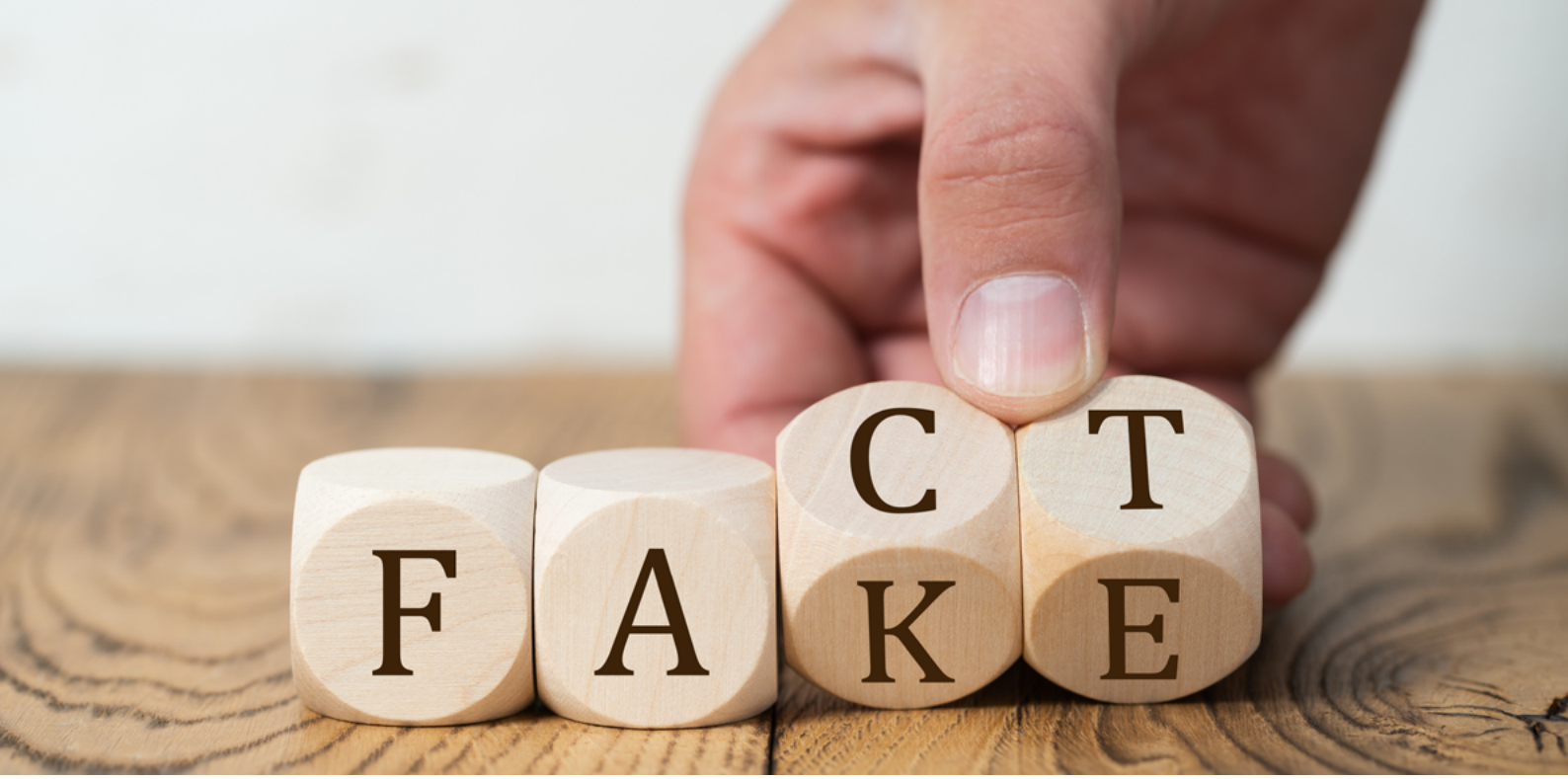
31 European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court', 24 September 2018 http://europa.eu/rapid/press-release_IP-18-5830_en.htm Accessed November 2018

32 ibid

33 European Parliament, Rule of law in Hungary: Parliament calls on the EU to act', European Parliament, 12 Spetember 2018 http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act Accessed November 2018

34 Professor Martin Krygier, University of New South Wales -Gordon Samuels Professor of Law and Social Theory,Co-Director - Network for Interdisciplinary Studies of Law, Co-Director – Australia-Myanmar Constitutional Democracy Project

35 Pawel Florkiewicz, Pawel Sobczak, 'Poland reverses Supreme Court law changes after EU ruling', Reuters, 21 November 2018. https://www.reuters.com/article/us-poland-eu-court/poland-backtracks-on-supreme-court-law-contested-by-eu-idUSKCN1NQ0VD Access 22 November 2018



Alternative facts, post-truth and the threat to Rule of Law

Saurabh Bhattacharya
Head Teacher,
Teaching & Learning of
Macarthur Girls High School

In an MSNBC interview on 22 January 2017, Counsellor to US President Donald Trump Kellyanne Conway used the term 'alternative facts'. The term was arguably coined by Ms Conway to justify then White House Press Secretary Sean Spicer's exaggerated assessment of the crowd size at Mr Trump's presidential inauguration. Over the last year or so, 'alternative facts' has become entrenched in popular culture. The term, in its inherent contradictoriness, is a clear example of Orwellian Newspeak - a fictional language developed by George Orwell in his dystopian classic 1984 by 'stripping such words as remained of unorthodox meanings, and so far, as possible of all secondary meaning whatever'[1]. By juxtaposing the amorphous 'alternative' with the specific 'fact,' the term not only negates the specificity of the latter but, in the process, creates a completely new meaning for 'fact' – a meaning that implies that 'facts' are not necessarily factual but open to subjective interpretation.

At any other time in history, Ms Conway's neologism may have vanished after its 30 seconds of notoriety on TV as yet another example of political spin. After all, the existence of spin in political communication is as old as Plato's Republic, which first argued for the necessity of making people believe in a Noble Lie – an oxymoron as potent as 'alternative fact' – in order to establish and maintain an ideal republic[2]. In Plato's time, the lie was a myth created to instil a sense of civic pride in belonging to a city-state. In Ms Conway's time, the 'alternative fact' is structured to instil a sense of belligerent triumph in winning a presidential election. In either case, however, it should feel like nothing more than wordplay to buttress political expediency.

But our era, the era of 'alternative facts', is much more susceptible to the spin-doctoring of political narrative than Plato's Greece. Our era is not just a post-modern, technologically savvy and politically uber-sensitive millennial world. It is the era of 'post-truth', and in the era of 'post-truth', the champions

(continued)

1 Orwell, G. (1949) Appendix to 1984. Accessed at https://www.planetebook.com/free-ebooks/1984.pdf, p. 377

2 Plato, The Republic. Accessible online at http://www.idph.net/conteudos/ebooks/republic.pdf, p. 133

> "Our era is not just a post-modern, technologically savvy and politically uber-sensitive millennial world. It is the era of 'post-truth', and in the era of 'post-truth', the champions of 'alternative facts' control all narratives. "

of 'alternative facts' control all narratives. The term 'post-truth' is another neologism, which traces its roots back to the 1970s post-modern rejection of institutional notions of truth. Then, the term was restricted to the hallowed halls of academic banter. It gained currency in the public sphere only in the 1990s and has, according to the Oxford English Dictionary (OED), peaked in usage by 2000% in 2016 compared to 2015, resulting in the OED declaring 'post-truth' to be the word of the year.

The OED defines 'post-truth' as 'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief'. The emphasis here, as with the phrase 'alternative fact', therefore is on the subjective, the personal – not what facts mean, but what we would like facts to mean. This is reminiscent of the inimitable Lewis Carroll's words in *Alice's Adventures through the Looking-Glass*:

> 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
>
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

Carroll's Humpty Dumpty, who boasts of having all the words – nouns, verbs, and adjectives – in his payroll, would have approved of the way language is being subjected to malleable interpretations in our post-truth world.

In stark contrast, the language of law is dependent on specifics, on facticity. As legal scholar Robert Stein states in his definition of the rule of law, 'the law is known, stable, and predictable'[3]. The law has no room for arbitrary interpretation. The statutes of law need to be clear for all and need to be equally applicable to all in like circumstances. Law should not be open to malleability by emotions or personal likes and dislikes. The language of law, however, is also the language of society. For how can there be clarity in law if it is not interpretable in the language of the society it seeks to govern and monitor? So, if societal language itself is being refurbished to accommodate a deeply subjective and arbitrary worldview, such a re-structuring of language goes beyond being an occasionally irritating and often absurd linguistic oddity to become a pernicious threat to the fundamental nature of rule of law. The question, though, is this: precisely how realistic is the threat, or are we merely tilting at the windmills of post-truth and confusing them with true dangers to the rule of law?

> "So, if societal language itself is being refurbished to accommodate a deeply subjective and arbitrary worldview, such a re-structuring of language goes beyond being an occasionally irritating and often absurd linguistic oddity to become a pernicious threat to the fundamental nature of rule of law. "

In a 2017 essay, aptly-titled 'Alternative Facts and the Post-Truth Society: Meeting the Challenge,' legal scholar S.I. Strong states that 'the increasing incidence of alternative facts in the popular and political arena creates a critical conundrum for lawyers,

(continued)

3 Robert Stein (2009), Rule of Law: What Does It Mean?, 18 Minn. J. Int'l L. 293. Available at http://scholarship.law.umn.edu/ faculty_articles/424

"The post-truth world is here to stay, and rule of law practitioners need to up their game if they wish rule of law to remain relevant in this brave new world."

judges, legislators, and anyone interested in deliberative democracy, since it is unclear how rational debate can proceed if empirical evidence holds no persuasive value'[4]. The implications of post-truth narratives on the daily workings of the rule of law are also highlighted by law professor Allison Orr Larsen in her 2018 paper 'Constitutional Law in the Age of Alternative Facts' in this manner:

> Factual disputes have been a part of constitutional debates for a very long time. But what is happening today... is different in a fundamental way... Facts that were once labelled outrageous are now quickly shared to those who want to believe them and are legitimized simply by their accessibility... At the end of the day confirmation bias and echo chambers have led to what I call a "my team-your team" double set of facts—about climate change, risks of vaccination, the prevalence of voter fraud, and more.[5]

While delivering the Jim Carlton Memorial lecture at the University of Melbourne in March 2018, former Australian Human Rights Commission President Professor Gillian Triggs described the post-truth environment as one where 'credible facts, evidence and reasoned reports and inquiries and recommendations are ignored in favour of political and short-term solutions that often fail to address the problem' and where 'evidence does not inform laws'[6].

The threat, therefore, is not quixotic at all. Rather it is clear and palpable. This is not to assume, though, that we do not have any means to stem this miasma of lies and confirmation bias that is slowly seeping into the framework of rule of law. To do so, however, we would need to potentially re-evaluate the traditional means often employed in deliberative democracies when confronted by what legal scholars term 'information deficit'.

The conventional approach has always been to counter 'information deficit' with what political philosopher Jurgen Habermas termed as 'discourse' in his theory of communicative action by providing more information in the form of dialogue and discussion. The problem with this form of discourse is that it presumes that 'all participants in discourse have to be oriented towards mutual understanding and consensus, driven by nothing but a collaborative search for truth'[7]. Clearly, the post-truth threat of 'alternative facts' is quite far from a consensual search for truth. The normal methods of discourse, therefore, will fail in defusing the threat of post-truth. Rather, rule of law practitioners may consider not piling on more information, however accurate, and instead focus on the means of the information delivery. As Strong puts it ' While some of the current difficulties arise as a result of unconscious bias, those types of cognitive distortions are difficult to address directly, and the better option may be to approach the issue from a communication perspective'[8]. He advocates legal scholars to adapt communication methods from other non-legal disciplines, such as psychology, sociology and neuroscience, in order to address the plague of alternative facts.

Today, it is extremely easy to insulate oneself from any opinion that runs counter to one's own belief system. If I don't believe in the rule of law, I can choose to only subscribe to websites that deride impartiality and enrol in online discussion forums that reject objectivity. I can, with digital media at my disposal, create a bubble of confirmation bias around me and happily float through life, never entertaining even the possibility that I may be wrong. For how can I be wrong? I merely believe in a fact that is an alternative to the notion of rule of law. It is imperative that the means of legal discourse itself is re-calibrated to staunch these bubbles of alternative facts from flooding the socio-political fabric of democracy. The post-truth world is here to stay, and rule of law practitioners need to up their game if they wish rule of law to remain relevant in this brave new world.

4 Strong, S. I. (2017) "Alternative Facts and the Post-Truth Society: Meeting the Challenge," University of Pennsylvania Law Review Online: Vol. 165 : Iss. 1 , Article 14. Available at: https://scholarship.law.upenn.edu/penn_law_review_online/vol165/iss1/14

5 Larsen, Alli Orr (2017), Constitutional Law in an Age of Alternative Facts. William & Mary Law School Research Paper No. 09-371. Available at SSRN: https://ssrn.com/abstract=3033038

6 Triggs, G (2018) "The decline of parliamentary democracy in a post-truth era". Jim Carlton Memorial Lecture. Speech transcript available online at https://law.unimelb.edu.au/__data/assets/pdf_file/0005/2727113/Professor-Gillian-Triggs,-The-decline-of-parliamentary-democracy-in-a-post-truth-era-a-Charter-of-Rights-for-Australia.pdf

7 Koekoek, C. (2017) Power Beyond Truth: The implications of Post-Truth Politics for Habermas' Theory of Communicative Action. Master thesis, Leiden University. Available online at https://openaccess.leidenuniv.nl/bitstream/handle/1887/57102/Thesis%20Catherine%20Koekoek.pdf?sequence=1

8 Strong (2017)

LexisNexis®

RULE OF LAW UPDATES AND PERSPECTIVES

Advancing together

Volume 7 • Issue 2 • December 2018

LexisNexis® Capital Monitor's editorial team prepares the Advancing Together, Rule of Law Updates and Perspectives from the Asia Pacific bulletin. The team is located in the Press Gallery of Parliament House, Canberra.

Simon Wilkins
Managing Director, Australia

Jack Clews
Managing Editor, Capital Monitor

Alex Gaffey
Supervisory Editor, Capital Monitor

Antoaneta Nina Dimitrova
Product & Content Manager, Capital Monitor

Max Becker
Marketing Communications Manager

Esther Lam
Social Media and Communications Specialist

Mark Pablo
Campaign Specialist

Michelle Santos
Graphic Designer

LexisNexis Capital Monitor™ provides parliamentary, political, legislative,regulatory and judicial news and information to its subscribers as soon as it happens.