LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

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"Discriminating Against Non-Citizens Under the Charter: Charkaoui and Section 15"

Queen's Law Journal, Vol. 34, pp. 669-718, 2009
Victoria University of Wellington Legal Research Paper No. 7/2011

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The Canadian security certificate regime has proved dysfunctional when assessed against its ostensible statutory purpose of facilitating the removal of foreign terrorist suspects. The regime has resulted in indefinite detention or constraint, not removal. The article considers how the Canadian Supreme Court [the Court] in Charkaoui (2007) gave legal sanction to the indefinite detention of non-citizens under the security certificate regime, and the implication of this for the view that section 15 of the Charter marked a departure from the days of status-based discrimination against non-citizens under a division of powers constitution. It is argued that the Court was only able to characterize the security certificate regime as "immigration" detention by relying on the hypothetical possibility of deportation to torture and treating a review process as a sufficient answer to indefinite detention.

The features of two competing judicial responses to the prospect of the indefinite detention of non-citizens subject to a removal order are considered. These two models of indefinite detention are developed as critical tools in the analysis of the case law. It is argued that both of these judicial responses are in play in both legal systems containing a bill of rights, and those that retain a division of powers constitution without one. The argument is developed with reference to a comparison of the Australian High Court decisions in Chu Kheng Lim and Al-Kateb in relation to a division of powers constitution, and in relation to Charkaoui and Belmarsh (A v. Secretary of State for the Home Department) in relation to systems containing a bill of rights. What is determinative of the legal result is the judicial understanding of the relationship between equality of treatment (the equal application of general norms) on the one hand, and a non-citizen's vulnerability to removal on the other.

"The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?"

Boston College International & Comparative Law Review, Vol. 34, p. 27, 2011
Victoria University of Wellington Legal Research Paper No. 8/2011

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The Office of the United States Trade Representative (USTR) is currently negotiating with seven other countries to form a new trade agreement called the Trans-Pacific Partnership (TPP). The TPP has the potential to expand into a Free Trade Agreement of the Asia-Pacific (FTAAP). At present there are several competing models for Asia-Pacific economic integration that exclude the United States entirely. In such an environment, the TPP presents the United States with a welcome opportunity, not only to participate, but also to take a leadership role in establishing the terms for a region-wide agreement. Nevertheless, the USTR must make the TPP sufficiently attractive to other Asia-Pacific economies, such that those countries will prefer the TPP over other integration models. This will require the USTR to partially diverge from its standard FTA template and liberalize in new areas. Although doing so may be politically challenging, it is the United States' best strategy if it wishes to solidify a role for

itself in an economically integrated Asia-Pacific.

"Human Rights and Social Policy in New Zealand"
Social Policy Journal of New Zealand, Vol. 12, No. 30, p. 12, 2007
Victoria University of Wellington Legal Research Paper No. 9/2011

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This article aims to facilitate debate about the implications for New Zealand social policy making of taking a rights-based approach. It does so by exploring the sources and scope of New Zealand's international human rights obligations, particularly in relation to economic, social and cultural rights. It identifies a range of constraints on social policy making deriving from these obligations and suggests that explicit and systematic attention to these constraints constitutes the essence of a rights-based approach to social policy making. Finally, the article comments on the adequacy of existing processes and structures of New Zealand government for giving effect to a rights-based approach and makes some suggestions for how these might be modified.

"Finding a Balance: Customary Legal Terms in a Modern Māori Legal Dictionary"
International Journal of Lexicography, Vol. 4, Issue 24, 2011
Victoria University of Wellington Legal Research Paper No. 10/2011

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English holds an almost exclusive status as the language of legal enactment in Aotearoa, New Zealand, but a substantial corpus of legal-related texts in the Māori language now reveals a terminology comprising a language for special purposes; namely, a legal Māori terminology pertaining to Western legal concepts. In creating a legal dictionary, however, due attention must be paid to the place of Māori customary legal terms. One reason is precautionary: to ensure that Māori legal concepts are not excluded from the content of the dictionary. Further, an identifiable core of such Māori customary legal terms (and phrasal variants), incorporating newer Western legal senses, has a strong presence within the lexicon of legal terms so far identified from the corpus texts. Two simple ways have been identified to ensure appropriate attention is paid to those customary legal terms: to prioritise the analysis and completion of dictionary articles comprising customary legal terms ahead of all other terms; and to identify and clarify customary legal Māori ideas within the formatting of individual dictionary articles. Some illustrative comparison is made with the dictionary format of two other well-known Māori language dictionaries.

"Exploiting Form in Avoidance by International Tax Arbitrage – Arguments Towards a Unifying Hypothesis of Taxation Law"
Asia-Pacific Tax Bulletin, Vol. 17, No. 1, pp. 8-14, January/February 2011
Victoria University of Wellington Legal Research Paper No. 11/2011

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This article, which is based on the inaugral address given at the IBFD Tax Lecture Series in Beijing, China, examines the basic foundations and nature of income tax law before going on to offer a unifying theory of taxation law.

Income tax law is notoriously complex for a range of reasons. One is that tax law must address a huge and never-ending range of business transactions and structures. Another is that governments adulterate tax systems by using them to promote or to manage all sorts of economic and social programmes from mineral exploitation to birth control. Often we cannot tell whether a particular complexity is inherent in tax law or results from exogenous causes. The result is that we fail to see the fundamental causes of the complexity of tax law.

The author's hypothesis is that since about 1960 there has been a steady move in countries' appoach to tax law from normative to factual analysis. Often, this change reflects a move from form to substance.

"A Murky Methodology: Standards of Review in Administrative Law"
New Zealand Journal of Public and International Law, Vol. 6, No. 117, 2008
Victoria University of Wellington Legal Research Paper No. 12/2011

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The approach the courts should adopt when reviewing the "merits" of an administrative decision continues to be a vexed issue. For many years Wednesbury unreasonableness was regarded as the appropriate monolithic standard for this task. However, dissatisfaction with this standard has led to the development of alternative approaches, most notably the concept of variegated standards of reasonableness. This article explores the methodology adopted by New Zealand courts on this point and concludes that, while the courts have been prepared to adopt a sliding-scale of unreasonableness, the approach is under-developed and inadequate in a number of respects. From the existing experience, a refined five-standard framework is proposed to guide the degree of intensity the courts should adopt in their supervisory judicial review role.

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The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the **Law School** has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from

chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

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