LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

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"Bench v. Bar: Contempt of Court and the New Zealand Legal Profession in Gillon v. MacDonald (1878)"

Victoria University of Wellington Law Review, Vol. 41, p. 541, 2010
Victoria University of Wellington Legal Research Paper No. 39

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Gillon v. MacDonald (1878) was the climax of a feud that caused division in, and undermined the reputation of, the early New Zealand legal profession. Gillon features one of the most controversial episodes of contempt of court by a barrister in colonial legal history. The nature of the New Zealand legal profession, and in particular the relationship between bench and bar, is exposed through the case, its prologue and its aftermath. The complex saga occurred over several years and involved all three branches of government. Its causes are open to debate, but this article argues that personal and professional rivalry lies at the heart of the saga, and in particular, an obsessive vendetta on the part of George Elliot Barton. The events described in this article had far reaching consequences including possibly influencing New Zealand's most infamous legal decision, Wi Parata v. Bishop of Wellington (1877).

"Indigenous Rights and Democratic Rights in International Law: An 'Uncomfortable Fit'?"

UCLA Journal of International Law and Foreign Affairs, Vol. 15, p. 111, 2010
Victoria University of Wellington Legal Research Paper No. 40

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Over the last 25 years, international recognition of the human rights of indigenous peoples has been increasing. One aspect of this recognition notes that existing, relevant human rights law has not been applied to their particular situations, such that indigenous peoples have not been accorded their full human rights. A second aspect is the recognition that the understanding of human rights laws has needed to develop, and that more specific, relevant standards have needed to be articulated. This paper is concerned

with the recognition of indigenous claims to greater control over and participation in decision-making over their lives. Indigenous peoples point to the lack of such control and participation as a significant problem and an impediment for achieving indigenous peoples' human rights. The need to address this lack of control has been recognized internationally and has resulted in the development of international guidelines for doing so. However, the guidelines do not yet fit easily with existing international human rights laws on participation in decision-making within states. This paper aims to describe this "uncomfortable fit," and hopefully also how it might be overcome.

An assessment can be made of how well the emerging indigenous rights 'fit' with international human rights law, comparing law within the areas of indigenous rights and democratic rights. The indigenous rights do not yet fit within the standard interpretations of democratic rights, and there is thus a slightly "uncomfortable fit," at least with respect to indigenous group rights to participation in political decision-making. There are, however, some positive illustrations of how such a fit might be made more comfortable so that indigenous peoples may be accorded their full human rights, and such illustrations will also be highlighted and examined.

"Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration"

Law and Philosophy, Vol. 30, No. 5, 2011
Victoria University of Wellington Legal Research Paper No. 41

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HLA Hart and Joseph Raz are usually interpreted as being fundamentally opposed to Lon Fuller's argument in The Morality of Law that the principles of the rule of law are of moral value. Hart and Raz are thought to make the 'instrumental objection', which says that these principles are of no moral value because they are actually principles derived from reflection on how to best allow the law to guide behaviour. Recently, many theorists have come to Fuller's defence against Hart and Raz, refuting the 'instrumental objection' and affirming the non-instrumental moral value of conformity to the principles of legality. This article argues that although this moral value should be affirmed, the orthodox view is incorrect, because Hart and Raz never understood their arguments about the instrumental or 'purposive' value of the principles of legality as denials of their moral value, as a close reading of their work shows.

"Good Faith in the Individual Employment Relationship in New Zealand"

Comparative Labor Law&Policy Journal, Vol. 32, No. 2, 2011
Victoria University of Wellington Legal Research Paper No. 42

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In 2000, the New Zealand enacted a comprehensive statutory duty of good faith applying to all employment relationships. While the duty arose out of a particular set of political circumstances its origins can be found in pre-existing legal obligations, such as the implied term of mutual trust and confidence, but also in the culture of nascent good faith that characterized New Zealand labour law and industrial relations for most of the last century. While the statutory obligation has resulted in important changes during collective bargaining and business restructuring it remains to be seen whether the duty will have any wider transformative effect for employment relationships generally given the persistence of common law values to employment and low union densities.

"The Peterson Case and its Impact on the Rules in BNZ Investments Ltd. and Cecil Bros."

TAXATION ISSUES IN THE TWENTY-FIRST CENTURY, Adrian Sawyer, ed., Christchurch, 2006
Victoria University of Wellington Legal Research Paper No. 43

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The Privy Council delivered its advice in the film shelter case of Peterson v Commissioner of Inland Revenue (2005) 22 NZTC 19,098 (PC), allowing Mr Peterson's appeal. While the Peterson case was a notable win for Mr Peterson, this essay argues that in a broader context it was a major victory for the Commissioner of Inland Revenue and for tax payers who do not invest in shelters. The Privy Council put paid to several judicial heresies that threatened to enfeeble section BG1 of the Income Tax Act 2004, the general anti-avoidance rule, which is the Commissioner's heaviest anti-avoidance artillery. Perhaps even more importantly, their Lordships interpreted the legalistic deduction rule in Cecil Brothers Pty Ltd v FCT almost into oblivion and recognised powers of apportionment in the Commissioner that no one thought he possessed. The judgment contains a detailed forensic template for the Commissioner to use in later cases.

"A Construction Conundrum?"

Lloyd's Maritime and Commercial Law Quarterly, p. 428, 2011
Victoria University of Wellington Legal Research Paper No. 44

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This article analyses the recent decision of the United Kingdom Supreme Court in Multi-Link Leisure Developments Ltd v North Larnakshire Council and argues that the reasons given by their Lordships for dismissing the appeal are unconvincing. It is suggested that the decision arguably crossed the fine line between giving a commonsense or "commercial" interpretation to the bargain actually made and granting relief from an unfavourable bargain. More importantly perhaps, it is argued that the case illustrates that, despite the wide acceptance of Lord Hoffmann's restatement of the fundamental principles of interpretation in Investors Compensation Scheme Ltd v West Bromwich Building Society, his Lordship's "old intellectual baggage of legal interpretation" is still carried around by some judges and, as a result, discrepancies continue in the basic approach of the courts to issues of contract interpretation.

"De La Définition Et Du Statut Des 'Réfugiés Climatiques': Une Première Réflexion (A Few Preliminary Reflections on the Definition and Status of 'Climate Refugees')"

Yearbook of the New Zealand Association for Comparative Law, Vol. 16, pp. 389-405, 2010
Victoria University of Wellington Legal Research Paper No. 45

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This paper is in French. More than 26 million people are currently displaced as a result of events related to climate change and this number is expected to triple by 2020. Desertification, rising sea levels and other devastating natural disasters will lead an increasing number of individuals to leave their homes and find refuge elsewhere in their own country or abroad. Aggravating the predicament of those who have to flee their home country is that, unlike political refugees, international law does not afford them an official refugee status. This article analyses the issue of protective rights for "climate refugees" from a multidisciplinary perspective. It also reviews briefly the legal and policy challenges faced by international law in devising a specific framework for the protection of climate refugees. The article concludes with some preliminary thoughts on the need for systemic changes to enable the development of a body of rights that will protect effectively climate refugees.

Solicitation of Abstracts

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.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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