LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS
Vol. 4, No. 16: Jun 23, 2014

ALLEGRA CRAWFORD, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
allegra.crawford@vuw.ac.nz

LAURA LINCOLN, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
laura.lincoln@vuw.ac.nz

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington, Adjunct Senior Research Fellow, Monash University, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
john.prebble@vuw.ac.nz

Announcements

Collected Papers by the Right Honourable Sir Geoffrey Palmer QC
Part V Constitutional Law, Government and Reform: The Judiciary

The Palmer Series collects the papers of the Right Honourable Sir Geoffrey Palmer QC, Distinguished Fellow of the Victoria University of Wellington Law Faculty. The series is sponsored by an anonymous donor whom the Faculty gratefully acknowledges.

Table of Contents

^top

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"Will Jurisprudence Become a Behavioural Science?"
New Zealand Law Journal 204, 1968
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 21

SIR GEOFFREY PALMER QC, Victoria University of Wellington

Email: geoffrey.palmer@vuw.ac.nz

This paper considers the interaction between jurisprudence and social science. It briefly covers the cynicism of writers such as Jerome Frank, who argue that judges are human and fallible and that juries are a triumph for irrationality, before considering the book 'The American Jury' which rebuts these points.

"Judicial Selection and Accountability: Can the New Zealand System Survive?" 
B. D. Gray and R. B. McClintock (eds) 'Courts and Policy - Checking the Balance' (Brookers, Wellington, 1995)
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 22

SIR GEOFFREY PALMER QC, Victoria University of Wellington
Email: geoffrey.palmer@vuw.ac.nz

It is clear that as the chief expositors, applicators and significant developers of the laws, Judges must be regarded as important. The rule of law is a key constitutional concept in democratic government, even if there is vagueness about the precise content of the notion. The Judges are the custodians of that principle. Several factors in recent years have led the author to believe that new Zealand Courts are moving ever closer to their American counterparts in terms of the extent and nature of judicial power. Given this trend it seems appropriate to re-examine the baseline assumptions about the appointment and retention of Judges in New Zealand. Do they hold up in the changing conditions of New Zealand society and the sustained forward march of judicial power?

This paper evaluates the answer to that question, turning first to consider the demystification of the law and how determinate or indeterminate the law is. Developments in New Zealand have been in the direction of more generalised and less specific statutory provisions. This tendency has contributed to Judges exercising greater lawmaking powers than they once did. There have been three other developments which have given Judges significant new power. The first is the power the Judges have given themselves by developing the common law doctrine of judicial review of administrative action. The second development has been the advent of Treaty of Waitangi jurisprudence. The third development was the passage of the New Zealand Bill of Rights Act 1990, which has given Judges a large number of generally state principles to interpret. All of these developments must be factored into the constitutional framework relating to the Judges in New Zealand. With the power and activism of New Zealand Judges increasing, it is likely that the selection and retention of Judges will come under a great deal more attention than hitherto.

The paper discusses the concept of judicial independence and considers whether the New Zealand judiciary fully exemplifies that principle or whether it consists of a blend of dependence and independence as with the English experience. Independence, like anything else, is not an absolute. It is relative. We do not want Judges to be so independent that their detachment from society is such that they do not understand it and cannot relate to it. The law as a workable institution would founder. Judicial independence is a notion which embraces a number of different strands: judges enjoy security of tenure and can only be removed of office for incapacity or misbehaviour; the salary of Judges cannot be reduced while they are in office; New Zealand Judges are free from political and financial pressure exerted by government; New Zealand Judges are incorruptible.

While the judiciary do not necessarily need to be representative, it requires diversity to enjoy the full confidence of the community. Currently there are no checks and balances laid down regarding appointment of Judges in New Zealand. In law, the Attorney-General could recommend to the Governor-General whosoever he or she pleased and the advice would have to be accepted. As a constitutional convention, however, the process is kept free from party political entanglements. The paper makes suggestions regarding improving the selection and appointment of Judges. Also discussed is the American tradition of judicial appointment, including the history and the contemporary position. The paper then turns to the suggestion for a Judicial Commission in New Zealand, considering that a Commission would be overly cautious with a tendency towards safe appointments and blandness.

"The New Zealand Constitution and the Power of Courts" 
Transnational Law & Contemporary Problems, Vol. 15, 2006
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 23

SIR GEOFFREY PALMER QC, Victoria University of Wellington
Email: geoffrey.palmer@vuw.ac.nz

The New Zealand Constitution in 2006 is neither readily accessible nor easily understood. It is flexible, malleable and mysterious, and, to a large extent, uncodified and fluid. The nature and extent of judicial power is perhaps the leading issue in the constitutional debate. The place of the Treaty of Waitangi in the New Zealand Constitution and legal system has also attracted debate and controversy for twenty years. In considering constitutional issues, it is always useful to remember that constitutions are a human construct and are driven by social and political values.

This article provides an overview of how the New Zealand Constitution functions, its component parts, and subjects for possible reform. The New Zealand Constitution is near-unique in its non-codified form. While the New Zealand Constitution Act 1986 provides a framework within which the New Zealand system of government functions, it provides little guidance as to the

distribution of powers to the various branches, or the rules under which they operate. Thus other sources of the Constitution – other statutes, judicial decisions, and constitutional conventions – must be consulted. After examining the functions of the Constitution Act, this article turns to discussion of other legislation including the Bill of Rights Act, non-legislative constitutional conventions, and broader principles and doctrines of New Zealand constitutional law such as separation of powers, parliamentary sovereignty and the rule of law.

The New Zealand system of government has many strengths, and the case for changing the Constitution needs to be well-developed with demonstrable and clear advantages flowing from the change. Its somewhat eccentric Constitution may not be of concern if it is judged to be working effectively, but there are demands for change. However, there is in New Zealand a great reluctance to engage seriously in the debate on constitutional issues because the traditions of pragmatism are so powerful. In some areas of public policy New Zealand can be innovative, but in constitutional matters, the country is extraordinarily conservative and the political culture remorselessly democratic. It is difficult to foresee any big constitutional changes in the immediate future.

"Judges and the Non-Judicial Function in New Zealand"
H P Lee (ed) 'Judiciaries in Comparative Perspective' (Cambridge University Press, Cambridge, 2011).
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 24

SIR GEOFFREY PALMER QC, Victoria University of Wellington
Email: geoffrey.palmer@vuw.ac.nz

This paper consists of analysis of the New Zealand Constitution and the place of the judiciary within it. It starts with an overview of New Zealand's key constitutional features: the Constitution Act 1986, the Bill of Rights Act 1990, the Treaty of Waitangi and the Waitangi Tribunal, cabinet government, and proportional democratic electoral system. It considers where the judges fit into this system, discussing the early establishment and constant maintenance of an independent judiciary and the ending of appeals to the Judicial Committee of the English Privy Council. The paper outlines the structure of the New Zealand Courts and the extensive system of tribunals, as well as explaining the function of judicial committees. The paper then turns to the long tradition in New Zealand of setting up inquiries into various public issues, and the use of judges for such inquiries.
^top

About this eJournal

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.

Submissions

To submit your research to SSRN, sign in to the SSRN User HeadQuarters, click the My Papers link on left menu and then the

Start New Submission button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: RPS@SSRN.com

Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: bblack@northwestern.edu

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: rgilson@leland.stanford.edu

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.
^top

Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters:
http://www.ssrn.com/subscribe

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to
Subscribe@SSRN.com
^top

To ensure delivery of this eJournal, please add **LSN@publish.ssrn.com (Prebble/Lincoln/Crawford)** to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at Site@SSRN.com
^top