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

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Announcements

Victoria University of Wellington Archival Collection Issue 2: Papers on Environmental Issues

The Archival Collection is an addition to the Victoria University of Wellington Legal Research Paper Series that has been under consideration for some time. Covid-19 has caused a slow-down in many areas of human activity. For scholarly publishing, the virus has meant that VUW's Legal Research Paper series has space for older work. We have brought forward the distribution of papers written by Victoria University of Wellington staff from earlier years. To maintain momentum, however, the collection will include recent papers where their topic matches the topic of an issue in the Archival Collection. All papers will remain fully searchable on the VUW pages of SSRN, by both **papers** and **authors**.

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"Access to Environmental Justice for Maori"
2017 Yearbook of New Zealand Jurisprudence, Special Issue on Access to Justice for Maori, pp. 141-181
Victoria University of Wellington Legal Research Paper No. 51/2020

CATHERINE J. IORNS MAGALLANES, Victoria University of Wellington - Faculty of Law

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Access to environmental justice addresses the more typical access to (procedural) access to the decisions by which natural resources are allocated, and justice in the substantive results of those decisions. While environmental justice goals are typically conceptualised as being either procedural or substantive, indigenous Māori claims to and aspirations for environmental justice introduce additional elements that make this binary categorisation too simplistic. This paper suggests that there is a third type of environmental justice that needs to be identified and addressed separately: indigenous environmental justice.

Unique to Māori as indigenous people is their cultural connections to Aotearoa New Zealand's natural environment, while also having a history of dispossession and forced alienation from it. One way of conceptualising Māori aspirations for environmental justice is as three types of goals. One goal for Māori environmental justice is political, in that it concerns the distribution of power. This goal is for the active protection of the environmental assets of Aotearoa as well as the recognition of Maori authority to control and/or share in making decisions over them. A second type of environmental justice goal is cultural: for Māori values and culture to be equally respected and protected in environmental law and decision-making, including metaphysical as well as physical features of the natural environment. A third type of goal is the respect of equality of treatment as individuals. This encompasses the more traditional procedural and substantive aspects identified above. This includes access to the legal system in respect of environmental and resource decision-making, and the distribution of environmental benefits and burdens; this distribution is most commonly discussed in relation to bearing of environmental burdens such as pollution and its impact on individual health.

This paper introduces some of the different types of environmental justice: procedural, substantive, and indigenous. It then discusses aspects of justice under the New Zealand Resource Management Act 1991 and Environment Court. The second half of the paper illustrates some of these elements and issues with two case studies: Mount Te Aroha and the Tui mine pollution, and the aftermath of the grounding of the MV Rena in the Bay of Plenty.

The issues arising from the loss of land and resources after colonisation adds an extra layer of complexity to the discussion of environmental justice. Some issues of environmental justice for indigenous peoples will concern traditional, procedural aspects, such as an individual's access to the courts for environmental claims, and some will concern traditional substantive elements, such as the distribution of pollution and other environmental burdens. Other environmental justice claims can only be understood in terms of these additional historical, political and cultural elements of justice.

"Courts as Decision-Makers on Climate Adaptation Measures: Lessons from New Zealand"

Leal Filho, W. (ed), Climate Change Impacts and Adaptation Strategies to Costal Communities (Springer, Berlin, 2018)
Victoria University of Wellington Legal Research Paper No. 52/2020

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New Zealand has an extensive coastline, and most of its cities, significant infrastructure and population are located in low-lying coastal areas. Sea level rise is already impacting on coastal communities and a sea level rise of one metre would have a devastating impact on the country. Cohesive and appropriate adaptation measures are urgently needed at both central and local government level to reduce the impact on communities, protect against potential loss of life, and limit economic losses. However, responsibility for climate change adaptation measures in New Zealand has been devolved to local government without any significant direction or guidance from central government. This has produced climate change adaptation policies that vary significantly across the country and leaves councils vulnerable to legal action.

This paper addresses legal challenges to sea level rise adaptation measures in New Zealand. It adopts a case study approach, discussing four decisions in cases where a precautionary sea level rise adaptation measure taken by a territorial authority was challenged by a holder of property rights in the coastal area. The paper explores the broader lessons they offer for decision-making on climate adaptation measures. While the decisions are grounded in New Zealand's particular legal framework for resource management, they offer broader insight into the types of issues that arise in adaptation decision-making and how to overcome them. It suggests some lessons that are applicable beyond New Zealand - lessons that better enable appropriate sea level rise adaptation measures and thereby increase the resilience of coastal communities to climate change.

"Native American Values and Laws of Exclusion"

Environmental Law and Contrasting Ideas of Nature: A Constructivist Approach, Keith H Hirokawa (ed), (CUP, 2014)
Victoria University of Wellington Legal Research Paper No. 53/2020

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Native American and other indigenous views of their relationship with nature differ from those of the settler states within which they live. Such different views stem from different cosmologies and religions that define the appropriate place of humankind within nature. They give rise to different understandings of human rights and responsibilities in relation to the natural world, and what people can and cannot do with it. This difference goes to the heart of disputes between indigenous peoples and settler states over the use and occupation of land and natural resources. The forcible dominance in America of a Western, liberal construction of nature has led to the near exclusion of indigenous constructions from mainstream law and policy, which has enabled the destruction of many aspects of indigenous societies and of the natural environment. This chapter addresses these different constructions, their treatment in law and policy, and some illustrations of an alternative treatment that holds promise for a more sustainable future.

This chapter first addresses Native American beliefs and constructions of nature, and how the Native American construction contrasts with the dominant and prevailing American construction. The dominant construction in America is anthropocentric, whereby humans are considered rightfully dominant over nature. Nature is only good insofar as it serves a useful purpose for humans and can be civilized to that end. In contrast, the Native American construction considers humans as being part of nature and that the world is an interdependent whole. Under this construction, there is no right of any one part of that whole to dominate another part. Instead, methods of equal co-existence are prized.

The second part of the chapter summarizes the Western construction of Native Americans, from contact to modern times. It notes how the prevailing view of them was as wild and savage, and in a state of nature. Thus Native Americans had to be controlled and civilized, just as did nature, in order to progress to modernity and full salvation. Yet, at the same time, an acknowledgement that Native Americans were still human posited them against the natural idea of wilderness, such that they had to be removed from national parks, for example, for the proper protection and preservation of nature.

The third part discusses some suggested alternative conceptions or constructions of nature. Alternatives to the dominant paradigm have been suggested from within Western societies for many years. Some examples from New Zealand provide interesting illustrations of the integration of indigenous conceptions with a dominant Western society, including implementation within law. These examples illustrate one way in which the law can be used to alter the mainstream construction of nature and of the indigenous peoples themselves.

"Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand"

VertigO - la revue électronique en sciences de l'environnement. septembre 2015, DOI: 10.4000/vertigo.16199
Victoria University of Wellington Legal Research Paper No. 54/2020

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In this chapter I first briefly outline the indigenous Maori concept of nature as an ancestor, with the correlative human responsibilities of guardianship for nature. I then describe the two examples where nature is being given legal personality in New Zealand law: that of the Whanganui River and of what was previously Te Urewera National Park, now simply called Te Urewera. I then offer some concluding observations and comments.

This paper is a shorter summary of some longer papers I have written on this topic. It appeared in both book chapter and refereed journal article published in Sept 2015 by VertigO. This SSRN version is the 2014 author's draft of the final, published paper.

"Anti-Sprawl Initiatives: How Complete is the Convergence of Environmental, Desegregationist, and Fair Housing Interests?"

Buffalo Public Interest Law Journal, Vol. 30, No. 1, (2011-2012)
Victoria University of Wellington Legal Research Paper No. 55/2020

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Sprawl and segregation are inextricably linked. Sprawl has been occurring on a grand scale in the United States for sixty years; but in the past ten or so years; politicians, the media, and the public have begun to take it seriously as a problem that needs solving. The Environmental Movement has been a vocal advocate of anti-sprawl measures, and has contributed significantly to the growing momentum of the Anti-Sprawl Movement. There is clearly an environmental interest in combating sprawl. This article considers the degree to which that interest aligns with desegregationist and fair housing interests.

"Food Miles: Environmental Protection or Veiled Protectionism?"

Michigan Journal of International Law, Vol. 35, No. 3, 2014
Victoria University of Wellington Legal Research Paper No. 56/2020

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This article examines the international trade, environmental, and development implications of campaigns to convince consumers to make food purchases based on food miles. Buying food from nearby sources has become a popular objective. One of the unmistakable messages of the "locavore" movement is that importing food – particularly food that comes from far away – causes environmental harm. The theory is that transporting food long distances results in the release of high levels of greenhouse gases (GHGs) into the atmosphere and is thus a dangerous contributor to climate change. Proponents of this view therefore argue that "food miles" – the distance food travels from farm to plate – should be kept to a minimum.

The problem is that in reality, food miles are a poor proxy for environmental harm. Studies have demonstrated that differences in farming methods as well as natural factor endowments can mean that growing some products locally may in fact result in more GHG emissions than importing those same products. Notwithstanding this disconnect, legislators frequently propose policies based on food miles. Were a government to permit discrimination on the basis of food miles, or to otherwise endorse such a policy through its actions, it could be vulnerable to a World Trade Organization (WTO) dispute resolution challenge.

We first explain the term "food miles", and how the concept has been used around the world. Second, it addresses the use of food miles as an indicator of environmental harm. We argue that food miles are in fact a poor proxy of such harm, and therefore should not be used. Part III considers whether food miles labeling currently in use as well as legislation that has been proposed could be successfully challenged through a WTO dispute settlement proceeding. Our analysis includes a detailed examination of the three 2012 Appellate Body decisions addressing the TBT Agreement, US – Clove Cigarettes; US – Country of Origin Labeling (US-COOL); and US-Tuna II (Mexico), and as such will be one of the first articles to engage in such an assessment. Fourth, we address the implications for developing countries of actions taken to reduce food miles. And finally, we examine and critique alternatives to food miles for those wishing to reduce greenhouse gas emissions through farming and food consumption.

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About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

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 Appellate 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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