Announcements

VUW Legal Research Papers: 2011 Issues

1—General issue
2—General issue
3—General issue
4—Constitutionalism and Democracy as Conflicting Ideals.
5—Ectopia, Fictions, and Autopoiesis: Income Tax Law from Perspectives of Analytical Jurisprudence.
7—General issue

Table of Contents

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

Grant Hamilton Morris, Victoria University of Wellington - Faculty of Law

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

Catherine Iorns, Victoria University of Wellington - Faculty of Law

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

Mark J. Bennett, Victoria University of Wellington - Faculty of Law

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

Gordon John Anderson, Victoria University of Wellington - Faculty of Law
The Peterson Case and its Impact on the Rules in BNZ Investments Ltd. and Cecil Bros.

John Prebble, Victoria University of Wellington, Monash University, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien

A Construction Conundrum?

David McLauchlan, Victoria University of Wellington - Faculty of Law

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

Alberto Costi, Victoria University of Wellington - Faculty of Law

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

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

Victoria University of Wellington Legal Research Paper No. 39

GRANT HAMILTON MORRIS, Victoria University of Wellington - Faculty of Law
Email: Grant.Morris@vuw.ac.nz

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'?

Victoria University of Wellington Legal Research Paper No. 40

CATHERINE IORNS, Victoria University of Wellington - Faculty of Law
Email: Catherine.Iorns@vuw.ac.nz

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

MARK J. BENNETT, Victoria University of Wellington - Faculty of Law
Email: markbennett.nz@gmail.com

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"
Victoria University of Wellington Legal Research Paper No. 42

GORDON JOHN ANDERSON, Victoria University of Wellington - Faculty of Law
Email: gordon.anderson@vuw.ac.nz

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
Victoria University of Wellington Legal Research Paper No. 43
JOHN PREBBLE, Victoria University of Wellington, Monash University, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
Email: John.Prebble@vuw.ac.nz

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?"  
Victoria University of Wellington Legal Research Paper No. 44

DAVID MCCLAUCHLAN, Victoria University of Wellington - Faculty of Law
Email: David.McLauchlan@vuw.ac.nz

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

ALBERTO COSTI, Victoria University of Wellington - Faculty of Law
Email: Alberto.Costi@vuw.ac.nz

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 Massachusetts 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 Submissions 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
Email: rgilson@leland.stanford.edu

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

Links: Subscribe to Journal | Unsubscribe from Journal | Join Site Subscription | Financial Hardship

Subscription Management

You can change your journal subscriptions by logging into SSRN User HQ. If you have questions or problems with this process, please email UserSupport@SSRN.com or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- Accounting Research Network
- Cognitive Science Network
- Corporate Governance Network
- Economics Research Network
- Entrepreneurship Research & Policy Network
- Financial Economics Network
- Health Economics Network
- Information Systems & eBusiness Network
- Legal Scholarship Network
- Management Research Network
- Political Science Network
- Social Insurance Research Network
- Classics Research Network
- English & American Literature Research Network
- Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

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
To ensure delivery of this journal, please add LSN@publish.ssrn.com (Legal Scholarship Network) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email userssupport@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

Copyright © 2012 Social Science Electronic Publishing, Inc. All Rights Reserved