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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, Honorary Research Fellow, Monash University, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
john.prebble@vuw.ac.nz

Announcements

Victoria–Cornell Colloquium on Jurisprudential Perspectives of Taxation Law, Ithaca, NY, September 24 and 25, 2012, conveners Professor John Prebble, Victoria University of Wellington and Professor Bradley Wendel, Cornell University. For the Invitation and Call for Papers for this conference, click on "John Prebble" (above, to Professor Prebble's SSRN author page). Then click on the Victoria University Logo in the header of that page to reach the Victoria University of Wellington Law School home page and conference announcements.

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"M&A Under China's Anti-Monopoly Law: Update"
Victoria University of Wellington Legal Research Paper No. 23/2012

YEE WAH CHIN, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, Victoria University of Wellington Law School
Email: ywchin@alum.mit.edu

Since August 2010, China's Ministry of Commerce has reviewed over 230 notified transactions and issued 5 decisions under the Anti-Monopoly Law. These 5 decisions, plus the unconditional clearance of other transactions, reveal MOFCOM's rapidly increasing sophistication in analyzing the competition implications of transactions, as well as its continued delicate balancing of competition factors with other considerations. The decisions may also reflect the natural conservatism when acting in what is for China still fairly uncharted territory, a law that became effective only in August 2008. They confirm that China is a major competition law hurdle for cross-border transactions, sometimes surpassing the United States and the European Union. This article reviews developments in merger control under the AML since August 2010, and discusses what they reveal and their implications for cross-border transactions.

"Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia"
Joel Colón-Ríos, CARL SCHMITT AND CONSTITUENT POWER IN LATIN AMERICAN COURTS: THE CASES OF VENEZUELA AND COLOMBIA, Constellations, 2011
Victoria University of Wellington Legal Research Paper No. 24/2012

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

If there is a concept in modern constitutional theory that is unlikely to be found in a judicial opinion it is that of constituent power. And if there is a jurist not likely to be treated favourably by a court in a constitutional democracy, it is Carl Schmitt. Courts, and particularly courts in constitutional democracies, are close to be the exact opposite of the constituent power: they are called to limit political power, to put into practice the constraints placed by constitutionalism both in governments and their peoples. Schmitt, one of the most famous 20th century theorists of constituent power, was not only directly associated with National Socialism during the 1930's, but his theory of the constituent subject pointed toward an unlimited and uncontrollable sovereign, a political will whose decisions cannot be limited by any form of positive law. Perhaps more importantly, he maintained that constituent power could be exercised at any moment after a constitution is in place, an idea that, at least at first

glance, appears as radically alien to the activity of deciding cases according to the established law.

Latin American courts, however, represent an important exception to this rule. It is not only common for courts in this region to discuss in detail the theory of constituent power, but also to explicitly adopt the Schmittian conception of constituent power as surviving “alongside and above” the Constitution. This paper will examine two key judicial opinions from Venezuela and Colombia, which suggest that the theory of constituent power, as conceived by Schmitt, should not be summarily rejected as an invitation to absolute and arbitrary rule. The first of these decisions, Opinion No. 17 of the Supreme Court of Justice of Venezuela (1999), provides an example of the former in the context of the exceptional moment of constitution-making. There, the court declared that 'the people' was not bound by the amendment procedure contained in the constitution (which only applied to Congress in the exercise of the ordinary power of constitutional reform), and could therefore alter the constitution through other, constitutionally unspecified procedures. The second decision, Opinion C-551/03 of the Colombian Constitutional Court (2003), put into practice Schmitt's theory of implicit limits to constitutional reform, ruling that the constituted powers (that is, the executive and legislative powers) could not engage use the constitution’s amendment procedure to introduces changes so fundamental that amount to the creation of a new constitution (something that can only be done by the bearer of the constituent power). These decisions show that the Schmittian conception of an unlimited and ever present constituent power can be deployed by courts both as an enabling and limiting force. That is, as a justification for the idea of a legally unbound popular will, but also as a way of limiting political power in profound ways.

"'I'm Not Gay - Not that There's Anything Wrong with That!': Are Unwanted Imputations of Gayness Defamatory?"
Victoria University of Wellington Law Review, Vol. 37, p. 249, 2006
Victoria University of Wellington Legal Research Paper No. 25/2012

DEAN R. KNIGHT, Victoria University of Wellington - Faculty of Law
Email: dean.knight@vuw.ac.nz

The question of whether unwanted imputations of gayness are defamatory continues to be controversial. This article considers whether a person can bring a defamation claim if they have been described as being gay or lesbian. In particular, this article addresses whether such an imputation is defamatory, including whether such an imputation tends to lower the reputation of a person in the estimation of “right-thinking” members of society, and the unique issues that this imputation presents for possible defences. In addition to assessing the present position, this article considers whether imputations of gayness ought to be defamatory, particularly in the context of today’s legal environment. It is argued that an imputation of gayness should not be treated as being defamatory in the light of the reforms of gay and lesbian rights, including the anti-discrimination and equality protections that are now commonplace in Anglo-Commonwealth societies.

"Process and Substance: Charkaoui I in the Light of Subsequent Developments"
University of New Brunswick Law Journal, Vol. 62, No. 13, May 2011
Victoria University of Wellington Legal Research Paper No. 26/2012

RAYNER THWAITES, Victoria University of Wellington - Faculty of Law

Email: Rayner.Thwaites@vuw.ac.nz

The relationship between process and substance in the Canadian Supreme Court's 2007 Charkaoui decision, on the legality of the indefinite detention of foreign terrorist suspects under the Canadian Charter, is examined in the light of subsequent jurisprudential developments. Procedural modifications to the relevant detention regime, instigated by Charkaoui I had, by the end of 2009, resulted in cases which saw the release of two of the five men held under the regime (decisions of the Canadian Federal Court in the Charkaoui and Almrei litigation).

I argue that the benefits of the procedural solution arrived at by the Court in Charkaoui I do not outweigh the costs. My objective is to provide a fuller accounting of the costs of the Court's decision in Charkaoui I to opt for an exclusively procedural solution to rights infringements. I characterise the procedural solution determined on by the Court in Charkaoui I as a form of constitutional minimalism, as associated with Sunstein. Amongst other criticisms of the Court's "fixation with process", I suggest that Charkaoui I raises doubts as to the extent to which constitutional minimalism can, in practice, deliver on one of the desiderata it prides itself on, namely leaving the issues "open".
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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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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

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