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GROUND-RULES: INDIGENOUS TREATIES IN CANADA AND NEW ZEALAND

John Borrows

Treaties between Indigenous peoples and the Crown in Canada and New Zealand could be seen as vital to each country's creation. If interpreted in their best light they can build each country on principles of cooperation and consent. This perspective would make all people within Canada and New Zealand treaty beneficiaries. To facilitate this view, treaty interpretation should take into account factors beyond their historical genesis. Treaties should be seen as law. They should be interpreted in light of contemporary legal principles which respect Indigenous rights as a part of the rule of law. The alternative to this approach builds Canada and New Zealand on questionable ideas of discovery, occupation, adverse possession and conquest. Treaties provide an alternative access to ideas surrounding national formation and reformation. They can be regarded as among our highest laws and could strengthen and enrich Canada and New Zealand if viewed in this light.

HYBRID TRIBUNALS AS A VIABLE TRANSITIONAL JUSTICE MECHANISM TO COMBAT IMPUNITY IN POST-CONFLICT SITUATIONS

Alberto Costi

Since the end of the 1990s, the international community has increasingly relied on hybrid or mixed tribunals to prosecute international crimes in the aftermath of armed conflict. Hybrid tribunals rely on national laws, judges and prosecutors, contributing to the capacity-building of the local judiciary and the legal system; while also including international standards, personnel, resources, experience and technical knowledge, conferring legitimacy upon them. At the same time, hybrid tribunals pose real problems in their attempt to incorporate different types of law, different levels of expertise and different models of management and funding. The emergence of hybrid tribunals in East Timor, Kosovo, Sierra Leone and Cambodia, and recent moves in Bosnia-Herzegovina and Burundi, are indicative that hybrid tribunals will be central to the development of international criminal law in the coming decades. This paper looks at the emergence of hybrid tribunals, analyses their practice and highlights their possible limitations.

JUDICIAL REVIEW OF SCHOOL DISCIPLINE

John Caldwell

There has been a longstanding reluctance on the part of the New Zealand courts to intervene in matters of school discipline. This article argues, however, that the current socio-legal emphasis on children's rights, evident at both an international and domestic level, means a more activist, child-oriented approach to judicial review of school discipline is likely in the future.

RETROSPECTIVE LEGISLATION: RELIANCE, THE PUBLIC INTEREST, PRINCIPLES OF INTERPRETATION AND THE SPECIAL CASE OF ANTI-AVOIDANCE LEGISLATION

John Prebble, Rebecca Prebble and Catherine Vidler Smith

This article develops themes introduced in "Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance", published in the last issue of this Review. It examines the balance between the public interest and the rule of law, considerations that may conflict when it is a question of whether a particular retrospective statute should be enacted. It compares retrospective taxing acts with retrospective criminal law, and explains that, on analysis, the most identifiable element of the common law that clearly weighs against retrospectivity is a presumption of statutory interpretation, not a rule of law.

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KEEPING THINGS IN PROPORTION: THE JUDICIARY, EXECUTIVE ACTION AND HUMAN RIGHTS

Jason N E Varuhas

This paper advocates the adoption of proportionality review as a new head of judicial review in New Zealand. First, the paper traces the European origins of proportionality review, the pervasiveness of the doctrine in United Kingdom law, and the impact of the doctrine in New Zealand. The paper then discusses the benefits of proportionality review over the traditional heads, answers certain critiques of proportionality review, and discusses the doctrine of deference. The last section has two aims: to place proportionality review in context, and traverse possible jurisprudential and legal justifications for adopting proportionality review. The role of the judiciary, the foundations of review, and New Zealand's domestic and international human rights obligations are considered.

THE DERIVATIVE ACTION IN THE COMPANIES ACT 1993: AN EMPIRICAL STUDY

Lynne Taylor

The rules governing the availability of the derivative action in New Zealand company law changed with the enactment of the Companies Act 1993 and consequent amendments to the Companies Act 1955. In order to assess the impact of this change in the law, an empirical study of applications for leave to bring derivative proceedings, derivative proceedings and patterns of shareholder use of the unfair prejudice remedy was conducted. This paper reports the findings of that study.