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Compendium: Recent Graduate Student Dissertation and Thesis Abstracts

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Compendium

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A. THE TRANSNATIONAL PRACTICE AND REGULATION OF TORTURE IN THE AMERICAN 'WAR ON TERROR': A PORTFOLIO OF THREE LAW REVIEW ARTICLES, BY ALAN CLARKE

US use of torture and inhumane and degrading treatment in interrogating prisoners in the war on terror is well established. Linked to earlier harsh practices by the intelligence establishment, the United States established a torture culture in response to the "war on terrorism." So-called harsh or alternative interrogation techniques came to be accepted practices in the treatment of detainees. We

have come to understand that despite denials, this means using torture as an interrogation technique. Furthermore, revelations that the National Security Council—sitting in formal session and with the specific approval of President Bush—micromanaged the interrogation of "high value" detainees provide legal and political cover such that domestic and international prosecution will be difficult, if not impossible.

Moreover, passage of the *Military Commissions Act* of 2006 (*MCA*) retroactively excused certain potential breaches of the Geneva Conventions and provided some, but not absolute, insulation from prosecution by domestic courts. These specific interrogation techniques were vetted, case-by-case, in minute detail, by the nation's highest lawyers and approved at the very top. Regardless of any potential gaps left by the *MCA*, domestic courts will not likely find that following such orders was "manifestly unlawful" as the law has developed since Nuremberg. Other nations will likely find it politically inexpedient to prosecute either high-level US officials or low-level governmental employees. Thus, the United States may succeed in an end run around any exercise of universal jurisdiction by any of the world's courts. However, this has not been without cost, and international pressures are combining to bring these practices to a halt.

Finally, the United States knowingly and intentionally rendered people, some of whom were innocent of any connection to terrorism, to torture. Others simply disappeared. While the United States steadfastly denies that it rendered people to torture, evidence continues to accumulate that it indeed did so. These renditions have caused multiple legal, political, and international problems for the United States. Although the Obama administration maintains the right to continue with extraordinary renditions, these international and domestic pressures make continuance of the Bush program unlikely.

B. ABORIGINAL ENGAGEMENT IN CANADA: SEEKING RECONCILIATION THROUGH ELECTORAL PARTICIPATION AND LAND NEGOTIATIONS, BY JENNIFER E. DALTON, PH.D.

Aboriginal reconciliation is a process of healing that seeks to repair and restore the legal, political, and socio-cultural relationships that exist between Aboriginal peoples and the rest of Canada. In order to heal these relationships, a new approach to reconciliation that emphasizes active, meaningful Aboriginal engagement may be effective. To this end, it is presumed that positive forms of

engagement contribute to reconciliation. However, meaningful Aboriginal engagement can only be a successful mechanism through which to achieve reconciliation if the multifaceted differences that define Aboriginal peoples and their histories, cultures, languages, and practices are accepted and respected. Moreover, meaningful engagement means effective outcomes wherein the uniqueness of Aboriginal identities are more fully represented and included, so as to foster greater cooperation, mutual awareness, reciprocity, and trust between Aboriginal peoples and Canada.

To demonstrate the importance of these factors, a theory of cultural sensitivity is put forward, which posits that respectful, inclusive social interaction that acknowledges Aboriginal distinctiveness may lead to increased social cohesiveness between Aboriginal peoples and Canada. This model is an amalgamation of theories on social capital and social intelligence, only it is broadened to encompass a compassionate awareness and acceptance of Aboriginal distinctiveness in order to promote higher levels of social cohesion, respect, and trust across Aboriginal-Canada relations.

Two specific forms of Aboriginal engagement are evaluated: participation in Canadian elections, particularly voter turnout, and involvement in land negotiations. The dissertation seeks to determine the extent to which elections and land negotiations provide positive opportunities for meaningful Aboriginal engagement and whether improvements need to be made to the election system and to the negotiations process in order to promote more positive engagement.

Ultimately, it is argued that increased Aboriginal engagement will improve overall social cohesiveness, at the very least by increasing the frequency of positive interactions between Aboriginal peoples and Canada. Where such exchanges are constructive, Aboriginal-Canada relationships should ideally improve through the building of trust and mutual respect. This, in turn, ultimately leads to an increased likelihood of achieving more meaningful Aboriginal reconciliation.

C. FASHIONING ADMINISTRATIVE INDEPENDENCE AT THE "TRIBUNAL" LEVEL: AN ETHNOGRAPHIC STUDY OF ACCESS TO INFORMATION AND PRIVACY COMMISSIONS IN CANADA, BY LAVERNE ASTRID JACOBS

The independence of administrative agencies has become one of the most controversial topics in Canadian administrative law. The Supreme Court of Canada decision of *Ocean Port Hotel Ltd. v. British Columbia (General Manager,*

Liquor Control and Licensing Branch)[1] is a landmark case for its express judicial statement that the will of the legislature can be determinative of the amount of independence that a tribunal should have. Given the relationship between independence and impartiality drawn in the jurisprudence and literature, *Ocean Port* implicitly invites scholars to determine factors that truly affect the independence of various decision-making bodies in order to help policy-makers design effective and fair statutory regimes. However, this invitation has not been readily taken up. Not much has been done on the development of models of independence and impartiality that are true to the work of tribunals themselves.

This dissertation theorizes from qualitative empirical field research findings. Statutory, legislative officers were used as a case study due to the importance of independence to the work that they do. The author conducted over thirty interviews, held focus group sessions, and spent nine months observing the daily operational context of three commissions responsible for regulating access to information and/or privacy in Canada. Time was spent at the Office of the Information and Privacy Commissioner/Ontario, at the Québec *Commission d'accès à l'information*, and at the federal Privacy Commissioner's office in Ottawa. There is a dearth of Canadian administrative law theory that takes a close empirical look at how tribunals function on the ground and that uses an approach based on a qualitative, ethnographic methodology. Moreover, little administrative law scholarship has been done on the government accountability provided by administrative bodies based on the ombudsman model.

The study concludes that there are at least three models of administrative independence that can be perceived when one takes an ethnographic portrait of what goes on in the everyday context of administrative action: *independence informed by judicial dictates, independence informed by traditional cultural understanding,* and *independence informed by fundamental values of fairness.* This study therefore takes the concept of independence beyond judicial understanding to examine empirically and comparatively how the relationships that exist within the daily workings of an administrative decision-making body can affect the value of independence within it. These relationships include those between the branch of government with arm's length responsibility for the agency and the

1. [2001] 2 S.C.R. 781.

agency itself; between agency decision makers; and between decision makers and others such as the chairperson, staff, and members of the public.

D. RULES VERSUS DISCRETION IN THE DESIGN OF COMPETITION LAW, BY REZA RAJABIUN, LL.M. (2004), PH.D. (2009)

Anticompetitive agreements and abusive practices can limit the efficiency of market mechanisms. The design of substantive rules and enforcement mechanisms of competition law nevertheless remains an important and unresolved element of the legal framework for the operation of market economies. This dissertation investigates the implications of different design strategies available to lawmakers for the effective enforcement of legal constraints against anticompetitive practices under conditions of asymmetric and costly information.

Two important observations about contemporary competition regimes in developed and developing countries motivate the analysis. First, anticompetitive practices are perceived to represent a relatively significant constraint on economic growth and development. However, most jurisdictions that introduced a new competition regime in the 1980s and 1990s have implemented a flexible rule-of-reason framework, which requires the balancing of multiple objectives in addition to the protection and/or promotion of competition. Consequently, these regimes are information-intensive and prone to uncertainty about the range of permissible market conduct. Most jurisdictions also rely almost exclusively on the information and incentives of public agencies and prosecutors to enforce competition law.

This dissertation contends that from a theoretical perspective, the optimal design of rules and procedures is ambiguous and provides an empirical assessment of possible tradeoffs facing lawmakers. Analyses of the evolution of competition regimes in the Russian Federation, Poland, the United States, and the European Union suggest that in the presence of costly and asymmetric information per se prohibitions and decentralized enforcement mechanisms are likely to impose more credible constraints against undesirable conduct than the rule-of-reason approach and purely public enforcement. This dissertation contributes to the literature by highlighting the complementarities between public and private enforcement institutions. Public and private mechanisms are likely to exhibit distinct capacities and incentives to search for and deter illegal practices. This implies that private rights of action can often complement institutions of modern nation-states for regulating economic behavior and extend their authority.

E. LEGALITY, DISCRETION AND POWER IN DEMOCRATIC GOVERNING: A COMPREHENSIVE THEORY OF POLITICAL LAW, BY GREGORY TARDI, D.JUR.[2]

This dissertation argues that the web of relationships among the legal basis of government, the application of discretion through the public service, and the use of political power in the context of democracy is most usefully described as "political law." It presents an analytical framework that is suitable to explain the current state of the relationships among these forces. As well, the dissertation proposes an additional method of ensuring democratic accountability on the part of those exercising administrative discretion and political power through the reinforcement of the legal component of their professional action, based on an essential characteristic of democracy—the rule of law.

Existing studies of public law tend to focus on federalism and the Charter. Academic and even professional analysis of political science and of public administration tends to omit reference to legality. This creates a double lacuna in our knowledge of public life. On the one hand, there is a great deal of public law other than what has traditionally been cast as constitutional law. On the other, in a democracy, consideration of politics, political science, and public administration with no grounding in the rule and the rules of law is incomplete. Political law aims to fill theses voids, most notably in an interdisciplinary fashion, drawing from each of the underlying fields of scholarship, but maintaining an emphasis on law.

The primary focus will be the interplay among legality, discretion, and power, with an emphasized study of mechanisms of accountability to legality in Canada's federal government. The importance of the particular approach is that, through an interdisciplinary perspective, it will try to shed new light on the proper functioning of democratic governing.

The dissertation begins (chapter 1) with the definition of terms and the setting out of the most basic elements of the subject matter. The following two chapters are of an historical nature. In chapter 2, the works of the scholars most relevant to this dissertation over several centuries are analyzed. In chapter 3, the basic instruments which allow us to draw conclusions about the balance of legality and power are chronicled.

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2. Senior Parliamentary Counsel [Legal].

Chapter 4 deals with the fundamental questions related to my argument. That is followed by chapters 5, 6, and 7, in which several of the fundamental functions of the state and of statecraft are summarized, using the particular analytical methodology of focusing not merely on the law or on politics, as most scholars tend to, but rather on the interaction of these societal forces in regard to each such function.

Finally, in chapter 8, the conclusions derived from the text are assembled into a comprehensive proposal for a novel approach to what has traditionally been regarded as the study of "law and politics." The effort is made to show that this area of investigation should be thought of not as the combination of two disparate and parallel topics, but rather as a single, comprehensive, integrated subject matter, namely "political law."

F. TOWARDS THE CONSTITUTIONALIZATION OF VICTIMS' RIGHTS?, BY MARIE MANIKIS, LL.M.

In recent years there have been a number of initiatives, ostensibly undertaken to assist victims, which for the most part simply pay lip-service to the interests of victims and offer them little more than symbolic protection. Providing victims with enforceable rights is the first step in giving them a real voice and place in the justice system. The Canadian Charter of Rights and Freedoms can be a vehicle for reform that can provide victims with enforceable rights. This research will provide a definition of the nature and content of victims' rights as well as arguments that militate in favor of their constitutionalization. Arguing that constitutional evolution through the judiciary is inefficient when explicit rights are not entrenched, it will be suggested that a constitutional amendment would be a laudable remedial option to implement in order to provoke changes and induce compliance among government officials and institutions.

G. NIGERIA: INTERROGATING THE SHARIA PROJECT BEYOND AMINA LAWAL'S FREEDOM, BY AYODEJI N. OTITI

My paper examines the constitutionality of the ongoing implementation of the orthodox Sharia in northern Nigeria. The case of Amina Lawal—in which a single mother was sentenced to death by stoning on account of adultery (zina), but was later acquitted—serves as a window through which the constitutionality of the implementation is explored, particularly its compliance with the

constitutionally-informed rights of those women who live in the orthodox Sharia-compliant states of Nigeria.

I argue that Amina's acquittal by the orthodox Sharia criminal justice system is of little consequence because the acquittal fails to address a crucial issue: to wit—the constitutionality of the implementation of the orthodox Sharia. I claim that, while the extant constitution of Nigeria does not ban the application of Sharia per se, it, however, abrogates the application of the orthodox Sharia because of its draconian, misogynistic, and rigid nature, limiting its application only to purely civil Islamic matters, e.g., marriage and wills.

Furthermore, I examine orthodox Sharia implementation against the backdrop of international human rights regimes, particularly those that are strictly women-informed rights, e.g., the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). I claim that as Nigeria both signed and ratified the Convention, it is obliged to comply with it. Finally, I suggest a number of solutions to address those problems bred by the implementation, e.g., an urgent reference question to the Supreme Court of Nigeria regarding the constitutionality of the implementation.

H. ASSESSING TORT DAMAGES IN THE CONFLICT OF LAWS: A NEW FRAMEWORK FOR AN OLD SET OF RULES, BY CHRISTINA M. PORRETTA, LL.M.

This paper considers the history of choice of law in tort with respect to the assessment of damages and recent developments in common law and civil law jurisdictions. It suggests a new framework with respect to the assessment of pecuniary, non-pecuniary, and punitive damages where a conflict of laws situation arises. As the frequency of multinational litigation has increased over time, new rules are required to ensure that plaintiffs are properly compensated, while still protecting defendants from excessive damages awards. This paper illustrates the injustice that can be caused by rules that are not specifically adjusted to respond to fairness issues arising from international litigation. This paper also considers whether and to what extent foreign damage awards should be reviewable by Canadian courts at the enforcement stage. The reviewability of excess damage awards in foreign judgments is currently something Canadian courts hesitate to do for various reasons, including judicial comity, inefficiency of process, and cost. However, there is a dire need for reformulation of the

common law enforcement rules that balances respect for comity while providing necessary protection for Canadian defendants in a globally integrating world. This paper critiques the current enforcement regime and considers the attempts that have been made, both nationally and internationally, respecting the reviewability of foreign judgments.

I. ANALYZING THE THIRD-PARTY ABCP LIQUIDITY CRISIS AND RESTRUCTURING THROUGH THE LENSES OF SECURITIES AND INSOLVENCY LAW, BY VIRGINIA TORRIE

The CDN 32 billion third-party Asset-Backed Commercial Paper (ABCP) liquidity crisis has arguably been the most visible impact of the American subprime mortgage crisis in Canada. This thesis examines this event as follows: Part 1 focuses on the securities law aspects of the crisis; Part 2 analyzes the restructuring from an insolvency law perspective.

Investigations have revealed that ABCP was insufficiently regulated, leaving open the possibility of a liquidity crisis. Accordingly, the first Part of this thesis analyzes this event from a securities law perspective and puts forth a series of recommendations to address regulatory failures.

The restructuring of twenty third-party ABCP trusts under the Companies Creditors' Arrangement Act represents one of the most creative uses of the statute in recent history. Therefore, the second Part of this thesis adopts an insolvency law perspective in analyzing several features of this precedent setting case and the Plan of Arrangement.

J. RESPONDING TO ENVIRONMENTAL DISPLACEMENT AND ADAPTATION TO CLIMATE CHANGE IN DEVELOPING COUNTRIES: THE ROLE OF LAW AND POLICIES OF THE EAST AFRICAN COMMUNITY (EAC), BY IRENE CONNIE TUMWEBAZE

The research examines current efforts and debates on regional and global institutional approaches to environmental displacement. The focus of this research is particularly on the effectiveness of regional institutional approaches. Regional initiatives promoting environment and climate change governance have complemented the establishment of global principles and continue to be significant in examining and implementing those principles. Therefore, the research explores various criteria for choosing between regional and global institutional approaches and discusses an analytical framework for responding to environmental challenges regionally and for adapting to climate change. The

research uses the East African Community (EAC) as a regional bloc and examines how it may respond to the problem of environmental displacement and climate change adaptation in the region. An effective architecture for tackling the problem is feasible, but this will require re-thinking current partnerships, cooperation, and collaboration amongst the EAC member states.