

PUBLIC LAW REVIEW

Volume 15, Number 1

March 2004

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ARTICLES

Punishment by another name? Detention of non-citizens and the separation of powers – *Eloise Dias*

Executive detention of non-citizens in Australia has been the subject of widespread debate, and the separation of powers enshrined in Ch III of the *Constitution* has founded a range of legal challenges to the legislative regime. Nevertheless, migration detention has been recognised as one of the exceptional circumstances in which the executive, with legislative authority, can validly deprive individuals of their liberty for regulatory purposes. This article considers whether migration detention can be punitive in effect, despite an asserted non-punitive intent. The article focuses on whether features of detention such as duration and conditions can be judicially appraised. An analysis of Australian and United States jurisprudence compares the tests which have been applied to acts of executive detention in the two jurisdictions, offering new insight into an issue that is currently before the High Court

The rising tide of customary international law: Will New Zealand sink or swim? – *Treasa Dunworth*

In recent years international law has been playing an increasing role in New Zealand jurisprudence. In general, attention has been focused on a narrow aspect of that relationship: international human rights treaties as they affect administrative decisions. Meanwhile, the role of customary international law has been relatively neglected. This article explains the extent to which, and the basis on which, customary international law is received in the United Kingdom, Australia, Canada and the United States with a view to anticipating how the relationship might develop in New Zealand. Specifically, a trend is identified whereby there is increasing instances of customary international law being pleaded in all of the jurisdictions considered. Coupled with a “renaissance” of customary international law in international circles, this leads to the conclusion that New Zealand will inevitably experience this same trend – the article outlines some ways in which that might eventuate. In the face of this inevitability, it is concluded that it is necessary to engage in a principled discussion about the appropriate relationship between customary international law and New Zealand domestic law

**Government regulation by contract: Implications for the rule of law –
*Cheryl Saunders and Kevin KF Yam***

The use of contracts between government and private sector providers for the provision of services has implications for the principles and practice of public law. This article considers the ways in which governments may achieve policy or regulatory aims through contracting, the effect of such regulatory potential on the relationship between the executive and legislative branches of government and its implications for the constitutional principles of the rule of law and parliamentary representation. The article considers a range of possibilities for improving the process of regulation by contract51

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ISSN 1034-3024

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW