



CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES

MELBOURNE LAW SCHOOL

NEWSLETTER NUMBER 29: SEPTEMBER 2015

Welcome to the twenty-ninth issue of the Centre for Comparative Constitutional Studies Newsletter, a guide to news and events at the centre and a spotlight on issues in constitutional law nationally and globally.

Message from the Director

Among the highlights of our last three months have been visits from a number of very distinguished judicial figures.

On 6 August, Centre members were fortunate to attend a lecture hosted by the Melbourne University Law Students' Society. The **20th Sir Anthony Mason Lecture** was delivered this year by **Sir Anthony Mason** himself. A recording of the lecture, *Proportionality and its uses in Australian Constitutional Law* can be found [here](#).

At the same time, we hosted **Justice Daphne Barak-Erez** from the Supreme Court of Israel. On 7 August, she and Professorial Fellow **the Hon. Kenneth Hayne AC** engaged in a 'A Comparative Conversation on Constitutions' on the topic 'Implications and the Recognition of 'Unwritten Rights' in Australia and Israel'. The seminar revealed how each constitutional system has derived 'rights' from a sparse constitutional text and examined the challenges these rights present.

The following month, we were delighted to welcome

Lady Hale, the Baroness of Richmond and Deputy President of the Supreme Court of the United Kingdom. Lady Hale was in Melbourne to deliver [the Caldwell Lecture](#) jointly hosted by Melbourne Law School and Trinity College. In addition, she found time to attend a regular CCCS 'Brown Bag' meeting. While her Caldwell lecture discussed the *Human Rights Act 1998* (UK), with CCCS Lady Hale discussed a recent trend toward greater judicial attention to common law rights.

A third event during this time was of quite a different character but equally exciting: On 26 - 28 September, Melbourne Law Students' Society (MULSS) hosted the *Sir Harry Gibbs Constitutional Law Moot*, an event co-sponsored with the Australian Association of Constitutional Law. Centre members were involved at all levels from assisting the MULSS with organization, coaching and judging.

Most excitingly, the University of Melbourne team (CCCS Researchers **Alex Lee and Minh-Quan Nguyen** and

fellow JD student Kelly Butler) won the final in a close victory over a highly competitive team from Monash Law School. Alex was also awarded the “Best Speaker” award for the competition and **Minh-Quan** was awarded the “Best Speaker” prize for the final. The team was coached by CCCS member **Kristen Walker QC**.



CCCS extends its congratulations to Kelly, Alex and Minh-Quan and to the MULSS for their excellent organisation of this event and all the competitors.

As we move to the final quarter of the year teaching, research and engagement activities continue apace: On 14 October, Professor Cheryl Saunders will deliver the [2015 Law Oration](#), on Australian Federal Democracy; and we welcome [Dr Harshan Kumarasingham](#) to our seminar program. I am looking forward to teaching [Constitutional Rights and Freedoms](#) with the Hon. Justice Susan Kenny in November and Melinda Richards QC will teach [Royal Commissions and Public Inquiries](#). In December, we welcome our friends from Auckland Law School and the University of Witwatersand to the third in a series of joint workshops on public law and then a visit from **Sumit Bisarya** of International IDEA and others to discuss Constitution Making Processes.

Professor Adrienne Stone
Director, CCCS

CENTRE UPDATE

Cheryl Saunders

Cheryl taught the subject Post-Conflict State Building in the Melbourne Law Masters (with Bruce Oswald) from 2-8 September.

She participated in a Preparatory Advisory Roundtable on a new Constitution for Sri Lanka, Colombo (11-13 September) and a panel presentation to a Conversation organised by the Melbourne Refugee Studies Centre on Asylum Seeker Issues (5 August).

She was also involved in the following activities:

- A presentation to the Research Support Program, MLS, on Comparative Constitutional Theory as Method (13 August);
- A presentation on Australian Federal Democracy to the Grattan Institute (24 August);
- A presentation on Australian Federal Democracy to a public meeting in Bendigo (10 September);
- Presentation at a launch of the Meanjin issue on Democracy (17 September);
- Presentation to a seminar on Public International Law in Domestic Courts at the British Institute for International and Comparative Law, London (24 September); and
- Presentation on Process to a conference on Territorial Cleavages in Constitutional Transitions, Brussels (28 - 29 September).

During this period, Cheryl published the following works:

- Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems*, McGill-Queen's University Press, 2015

- Cheryl Saunders, 'Designing and Operating Constitutions in a Global Context' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015)
- Cheryl Saunders, 'The concept of the Crown', in (2015) 28 *Melbourne University Law Review* 873
- Cheryl Saunders and Michael Crommelin, 'Federal Democracy in Australia', *Meanjin*, September 2015

Adrienne Stone

Adrienne participated as a witness representing CCCS at the Intelligence and Security Committee's public hearing for the Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 on 5 August 2015, following from the [CCCS submission](#) to that Inquiry.

Adrienne, together with other CCCS scholars, also made CCCS submissions to the [review of the Charter of Human Rights and Responsibilities Act 2006 \(Vic\)](#), and to the Legal and Constitutional Affairs References Committee on [the Inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia](#) (see page 2 of submissions).

She was [Interviewed by ABC Fact Check](#): 'Is it a Crime to Attack a Royal Commissioner?' (4 September 2015).

Additionally, Adrienne presented a paper on 'The Idea of Traditional Rights and Freedoms' at the Australian Law Reform Commission symposium on 'Fair trial, procedural fairness and other traditional rights', 30 September 2015. [Speaking notes available online.](#)

Scott Stephenson

Scott published 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] *Public Law* 394–402 and presented a version of the paper at the Council for European Studies' 22nd International Conference of Europeanists at Sciences Po in July;

He presented a paper titled 'Legislative Override and the Rule of Law' at the International Society of Public Law (ICON-S) 2015 Conference at New York University School of Law in July; and

He also commented on a paper and chaired a panel at the 2015 CCCS Constitutional Law Conference at Melbourne Law School in July and commented on a paper at the Legal Theory Workshop at Melbourne Law School in August.

Alison Duxbury

Alison attended and spoke at the annual conference of ANZSIL on 2 July at Victoria University in Wellington on the topic 'Using soft law to interpret the constituent instruments of international organisations'.

Coel Kirkby

Coel has written a short analysis on the IACL blog entitled [Analysis: Constitution of Fiji](#).

William Partlett

Will has published an article to the Social Science Research Network, entitled 'The Death of Socialist Law?', co-authored by Eric C. Ip of the Chinese University of Hong Kong. It will appear in the New York University

Journal of International Law and Politics.

He has also written an article for ConstitutionNet, entitled '[Agendas of Constitutional Decentralization in Ukraine](#)', and he presented a paper at the Annual Conference of the American Political Science Association entitled "Restoration Constitution-Making" which will be published in the Vienna Journal of International Constitutional Law in early 2016.

Joo-Cheong Tham

Joo-Cheong has written the following articles:

- Joo-Cheong Tham, 'The Crisis of Political Money; or, What the Rest of Australia Can Learn from New South Wales', (Spring 2015) 74(3) *Meanjin*
- Joo-Cheong Tham, 'Australia grows richer by exploiting foreign students', *The Age*, 19 August 2015
- Joo-Cheong Tham, 'What role should electoral commissions have in electoral law-making?', Electoral Authority Stakeholder Management Workshop sponsored by the State and Territory Electoral Commission, 23-24 July 2015, Victorian Electoral Commission, Melbourne

Joo-Cheong gave evidence to Senate Education and Employment References Committee's inquiry into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders' on 7-Eleven wage fraud (24 September 2015).

He was also a sponsored participant to the *Global Conference on Money in Politics*, organised by OECD, International Idea, National Electoral Institute and Electoral Tribunal of the Federal Judiciary of Mexico, Mexico City, (3 - 5 September 2015).

CONNECT WITH CCCS

TWITTER

- CCCS: [@cccsmelbourne](#)
- Adrienne Stone: [@stone_adrienne](#)
- Cheryl Saunders: [@cherylsaunders1](#)
- Scott Stephenson: [@s_m_stephenson](#)



ONLINE

- Our website: law.unimelb.edu.au/cccs
- Centre members also blog at Opinions on High: blogs.unimelb.edu.au/opinionsonhigh/
- The IACL Blog: iacl-aidc-blog.org



FORTHCOMING EVENTS

CCCS Seminar: Eastminster: Sir Ivor Jennings, the Westminster Model and State Building in Asia

Room 920, Melbourne Law School
Tuesday 20 October 2015, 1 - 2 PM

All of the Asian States that emerged from British control in varying degrees took key substantial elements from the British Westminster system. This system was more commonly associated with the British settler countries like Australia, Canada and New Zealand where “kith and kin” links with Britain seemed to make this appropriate. However, the British and the Asian indigenous elites saw advantages in applying this very British system to the very different context of the East.

These Asian nations did not have centuries to interpret and adjust in order to develop their constitution as the British had. Instead within months they needed to formulate and design a constitution and therefore invariably drew upon the system of their imperial master and advisers like Sir Ivor Jennings. Since the Westminster system is based on convention and ambiguity and not rigid rules and clarity the same Westminster system could be adopted and manipulated to produce diverse results and reactions that would shape their countries forever. These states therefore became Eastminsters.

This talk broadly examines the concept of Eastminster in the eventful context of Asian decolonisation and the need for rapid constitutional settlement.

Dr Harshan Kumarasingham is a Senior Research Fellow at the Institute of Commonwealth Studies, University of London and Lecturer in Comparative Politics at Ludwig Maximilians University, Munich (LMU).



Prior to this he was Smuts Fellow in Commonwealth History and Politics at the University of Cambridge. Harshan’s latest book is *A Political Legacy of the British Empire - Power and the Parliamentary System in Post Colonial India and Sri Lanka* and he recently edited for Cambridge University Press *Constitution Maker - Selected Writings of Sir Ivor Jennings*.

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Bookings are essential!

RECENT EVENTS

CCCS Seminar: A Comparative Conversation on Constitutions: Implications and the Recognition of 'Unwritten Rights' in Australia and Israel **Friday 7 August 2015**

Speakers: the Hon. Justice Daphne Barak-Erez (Justice, Supreme Court of Israel) and the Hon. Kenneth Hayne AC QC (former Justice High Court of Australia)

Commentator: Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies.

This seminar explored the recognition of unwritten doctrines of constitutional law in Australia and Israel, with a particular emphasis on constitutional rights. The speakers - Justice Daphne Barak-Erez and Justice Kenneth Hayne - each explained and analysed the approaches of the courts on which they have served as a Justice. Professor Adrienne Stone offered a comparative commentary.



CCCS IILAH Seminar: American Law Institute Restatement of the Law Fourth, the Foreign Relations Law of the United States **Tuesday 13 August 2015**

Paul B Stephan
John C Jeffries, Jr, Distinguished Professor of Law - University of Virginia School of Law

This Restatement updates the influential 25-year-old Restatement Third of The Foreign Relations Law of the United States. It is a very large project involving eight reporters, including two coordinating reporters. Initial topics for consideration include jurisdiction, the domestic effect of treaties, and sovereign immunity. Professor Stephan is one of the coordinating reporters for this project.

Paul B Stephan is John C Jeffries, Jr, Distinguished Professor of Law in the University of Virginia School of Law. He is an expert on international business, international dispute resolution and comparative law, with an emphasis on Soviet and post-Soviet legal systems. In addition to writing prolifically in these fields, Stephan has advised governments and international organisations, taken part in cases in the Supreme Court of the United States, the federal courts, and various



foreign judicial and arbitral proceedings, and lectured to professionals and scholarly groups around the world on issues raised by the globalization of the world economy. During 2006-2007, he served as counsellor on international law in the U.S. Department of State. He is one of the coordinating reporters for the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States. He is visiting the Melbourne Law School this week to teach Energy Resources in Emerging Markets in the Melbourne Law Masters program.

CCCS Seminar: Constitutional Statutes

Tuesday 25 August 2015

Adam Perry (Queen Mary University of London)

Farrah Ahmed (Melbourne Law School)

Chair: Professor Adrienne Stone (Melbourne Law School)

The British constitution includes many statutes, such as the Bill of Rights 1689 and the Scotland Act 1998. Since 2002, British courts have treated constitutional statutes differently than ordinary statutes. In this article we address three questions: (1) How have courts treated constitutional statutes differently than ordinary statutes? (2) What is a constitutional statute? (3) Why, if at all, should constitutional statutes be treated differently than ordinary statutes? We explain that courts have made it harder for ordinary statutes to repeal constitutional statutes by implication, and easier for constitutional statutes to repeal ordinary statutes by implication. We suggest that a constitutional statute is a statute which concerns state institutions, which depends on few other governmental norms, and on which many other governmental norms depend. Drawing on our definition, we show the extent to which the special treatment of constitutional statutes is justified, and we explain when one constitutional statute should be held to repeal another constitutional statute by implication.

Brown Bag Seminar with Special Visitor: Lady Hale

Tuesday 8 September 2015

Brenda Hale, Baroness Hale of Richmond, DBE, QC, PC, FBA (Hon) is the current Deputy President of the Supreme Court of the United Kingdom.

During her visit to Melbourne Law School, Lady Hale was kind enough to take some time to speak at a CCCS Brown Bag lunch, attended by many CCCS academics and research assistants. She discussed common law fundamental rights jurisprudence in recent UK Supreme Court cases.





PUBLIC LAW IN THE MELBOURNE LAW MASTERS 2016

A rich program in Public Law will be offered in the MLM in 2016.

The twelve core subjects are:

- Statutes in the 21st century (Justice Michelle Gordon, HCA; the Hon Kenneth Hayne)
- Comparative human rights law (former Justice Kate O'Regan, SA)
- Comparative (federal) constitutional law (Professor Vicki Jackson, Harvard; Professor Cheryl Saunders)
- Constitution making (Professor Christina Murray, Bingham Centre; Professor Cheryl Saunders)
- Freedom of speech (Professor Frederick Schauer, University of Virginia; Professor Adrienne Stone)
- Current issues in administrative law (Justice Debbie Mortimer, FCA; Professor Cheryl Saunders)
- Executive power in Australia (Professor Simon Evans; Mr Graeme Hill)
- Regulatory policy and practice (Professor Karen Yeung, King's College London)
- Royal Commissions and public inquiries (Melinda Richards, SC)
- Judicial reasoning (Judge Dennis Davis, High Court, Capetown)
- Post-conflict state building (Dr Bruce Oswald; Professor Cheryl Saunders)
- Reimagining human rights law (Professor Philip Alston, NYU; Professor Grainne de Burca, NYU)

A wide range of subjects from other specialisations also are linked to the public law program. All these subjects can be taken for credit towards an LLM, a Masters of Public and International Law, a Graduate Diploma in Government Law or as a single subject, by assessment or audit.

The 2016 public law program has all the hallmarks of the Melbourne Law Masters:

- Teachers comprise judges and practitioners in the field from Australia (Gordon, Hayne, Mortimer, Hill, Richards); international experts from across the world (O'Regan, Jackson, Murray, Schauer, Yeung, Davis, Alston, de Burca); and leading scholars from Melbourne Law School (Evans, Oswald, Saunders, Stone)
- Many subjects are taught in teams, blending theory and practice; Australian and comparative perspectives, and domestic and international law
- All subjects are currently highly relevant, dealing with questions at the cutting edge of public law.

Students who wish to specialise in Australian public law at an advanced level are able to do so by choosing from the following: Statutes in the 21st century; Current issues in Australian administrative law; Executive power in Australia; Royal Commissions and public inquiries.

Students who prefer international and comparative perspectives are able to build a program that meets their interests and needs from the following: Comparative human rights law; Constitution making; Freedom of speech; Regulatory policy and practice, Judicial reasoning, Post-conflict state building; and Reimagining human rights law.

Questions about the program should be directed to Professor Cheryl Saunders as the Director of Studies:
c.saunders@unimelb.edu.au.

PENDING CASES

High Court of Australia

QUANDAMOOKA OLOOBURRABEE ABORIGINAL CORPORATION RNTBC V QUEENSLAND

Special case in the original jurisdiction

The High Court will hear a special case on whether the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) is inconsistent with the Native Title Act 1993 (Cth) contrary to s 109 of the Constitution. The State law purports to allow several mining lease holders to apply for renewals that the plaintiffs contend are inconsistent with the Indigenous Land Use Agreement concluded between the plaintiffs and the State (question 2), and with the native title rights and interests held by the plaintiffs (question 4). As a threshold issue for both of these arguments, the plaintiffs seek to argue that s 109 applies to inconsistencies between a) State laws and registered Indigenous Land Use Agreements (question 1) and b) State laws and native title determinations by the Federal Court (question 3).

The parties written submissions are available [here](#). The hearing transcripts are available [here](#) and [here](#).

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LTD V NORTHERN TERRITORY OF AUSTRALIA

Special case in the original jurisdiction

Division 4AA of Part VII of the *Police Administration Act* (NT) ('the PA Act') provides for new powers that apply where a member of the police force arrests a person without a warrant and does so believing on reasonable grounds that the person has committed, was committing or was about to commit an 'infringement notice offence'. The majority of such offences are minor offences for which no term of imprisonment could be imposed as a penalty for the offence. The new powers purport to authorise police to take a person into custody and hold the person for a period of up to four hours or, if the person is intoxicated, for a period longer than four hours, until

the member believes on reasonable grounds that the person is no longer intoxicated.

The first plaintiff, the North Australian Aboriginal Justice Agency ('NAAJA'), provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory ('the NT'). It alleges that a disproportionately high number of people detained under s 133AB of the PA Act since it came into effect are indigenous. The second plaintiff was arrested and taken into custody purportedly pursuant to s 133AB(2)(b) of the PA Act and held in custody for almost 12 hours. (Section 133AB(2)(b) of the PA Act provides that a member of the police force may take a person into custody on reasonable grounds that the person has committed an 'infringement notice offence' and, if the person is intoxicated, hold the person for a period of longer than 4 hours.)

The plaintiffs challenge the validity of Division 4AA Part VII of the PA Act on the basis that, because Div 4AA lacks any non-punitive purpose, and because it cannot be regarded as being reasonably capable of being considered necessary for any such purpose, the detention which that Division authorizes can only be an incident or result of a judicial order or warrant. Division 4AA purports to allow detention at the instance of the Executive without judicial order or warrant. It is therefore invalid for conferring judicial power on the Executive rather than on a court as required by s 71 of the *Commonwealth Constitution*.

In response, the NT submits that the doctrine of separation of powers in Chapter III of the Constitution does not apply to the NT. It further submits that detention under s 133AB of the PA Act is within one of the qualifications accepted in [Lim v Minister for Immigration, Local Government and Ethnic Affairs](#) to the general proposition that the power to require a citizen to be involuntarily detained in custody is exclusively judicial.

The issues before the High Court are: (a) whether the separation of powers enshrined in Chapter III of the *Commonwealth Constitution* limit the legislative power of the Parliament under s 122 of the Constitution; and (b) whether the impugned provisions undermine the institutional integrity of the courts of the NT contrary to the principle in [Kable v Director of Public Prosecutions \(NSW\)](#).

The parties' written submissions are available [here](#). The transcript is available [here](#) and [here](#).

PLAINTIFF M68/2015 V MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Special case in the original jurisdiction

On 10 September 2012, the first respondent ('the Minister') designated Nauru as a regional processing country under s 198AB(1) of the *Migration Act 1958* (Cth). On 29 July 2013, the Minister issued a direction under s 198AD of the *Migration Act* requiring officers to take unauthorised maritime arrivals to Papua New Guinea or Nauru.

The plaintiff is a citizen of Bangladesh who on 19 October 2013 was on board a vessel that was intercepted at sea by officers of the Commonwealth. She was taken to Christmas Island and then to detention on Nauru. She had applied to be recognised as a refugee under the *Convention relating to the Status of Refugees*. On 23 January 2014, the Principal Immigration Officer of Nauru granted to the plaintiff a regional processing centre visa, which specified that she must reside at the Nauru Regional Processing Centre ('the RPC'). Pursuant to s 18C of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and rule 3.1.3 of the Rules of the RPC Centre it was unlawful for the plaintiff to leave, or attempt to leave her accommodation facility within the RPC without the permission of an authorised officer.

On 2 August 2014 the plaintiff was brought to Australia for medical treatment. The plaintiff filed an application for an order to show cause seeking, among other things, a writ of prohibition to prevent the Minister from taking steps to return her to Nauru. The issue before the High Court is whether the Commonwealth can take persons, who are present in Australia and have the full protections of the Australian Constitution, to a foreign country so as to subject them to extra-judicial, extraterritorial detention which is funded, caused and effectively controlled by the Commonwealth, but which lacks those constitutional protections.

The plaintiff submits, among other things, that officers of the Commonwealth engaged in conduct which authorised, procured, caused and resulted in her detention at the RPC, and that the conduct was required to be but was not authorised by a valid statutory provision or by s 61 of the Commonwealth Constitution.

In response the Commonwealth submits, among other things, that the impugned conduct was authorised by s 198AHA of the *Migration Act* (which provides that the Commonwealth may take any

action or make payments in relation to a regional processing arrangement), or alternatively that the impugned conduct was authorised by s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) (which provides the Commonwealth with supplementary powers to spend relevant money on an arrangement under which money is payable). Additionally, the Commonwealth submits that its non-statutory executive power authorises actions directed at putting into effect commitments made by Australia and Nauru in the relevant Memorandum of Understanding ('MOU') between the two countries, and that since all acts of the Commonwealth impugned in the present proceedings are aspects of implementing the MOU, they are within the executive power on that basis.¹

The parties' written submissions are available [here](#).

DECIDED CASES

A. High Court of Australia

MCCLOY V NEW SOUTH WALES [\[2015\] HCA 34](#)

Special case in the original jurisdiction

Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the Act') regulates political donations and electoral expenditure in relation to the Parliament and the local councils of New South Wales. Div 2A of Pt 6 of the Act imposes caps on political donations in relation to State elections and makes it unlawful for anyone to accept a donation that exceeds a prescribed cap. Section 96E of the Act prohibits the making of certain indirect campaign contributions, such as payments for advertising and the provision of equipment in return for inadequate payment. Section 96E is an anti-avoidance provision — its purpose is to prevent political donations being made to a monetary value larger than the applicable cap in Div 2A of the Act by indirect means. Div 4A of Pt 6 of the Act prohibits the making of political donations by certain classes of person including 'property developers'.

The first and third plaintiffs were 'property

¹ Minister for Immigration and Border Protection, Commonwealth of Australia, 'Submissions of the First and Second Defendants', Submission in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, M68/2015. 18 September 2015, [82]–[84].

developers' and the second plaintiff made an 'indirect campaign contribution' within the meaning of the Act. At the time the plaintiffs commenced proceedings in the High Court they each intended to make donations to the Liberal Party of Australia or to other political parties.

The plaintiffs challenged the validity of s 96E and Divs 2A and 4A of Pt 6 of the Act on the basis that at least some of the relevant provisions impermissibly infringed the constitutionally implied freedom of political communication, since the laws lacked a rational connection with a legitimate end or, alternatively, were plainly disproportionate to any legitimate end. (It was common ground that the impugned provisions imposed a burden on political communication.)

Judgment

The High Court accepted that impugned provisions indirectly burdened political communication by restricting the funds available to political parties and candidates. However, the Court unanimously held that the burden imposed by the donation caps in Div 2A was not impermissible and that the provisions were a legitimate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in NSW politics.² (Section 96E was also held valid, on the basis that as an anti-avoidance provision its validity depended on that of Div 2A).³

By majority, the court also upheld the prohibition on donations by property developers in Div 4A. This was on the basis that the purpose of Div 4A was to reduce the risk of undue or corrupt influence in an area relating to planning decisions, an area in which such risk may be greater because of the degree of dependence of property developers on decisions of government.⁴

Significantly, French CJ, Kiefel, Bell and Keane JJ explained that the second step of the second limb of the *Lange* test involves 'proportionality testing'.⁵ In short, a law that burdens the implied freedom must be suitable (meaning that it has a rational

connection to the purpose of the provision),⁶ necessary (meaning that there is no less restrictive and reasonably practicable alternative means of achieving the purpose)⁷ and 'adequate in its balance' (meaning that there must be an adequate congruence between the benefits gained by the law's policy and the harm it may cause).⁸ Gageler J reached the same result as the majority, but rejected the majority's 'template of standardised proportionality analysis'.⁹ In his Honour's view, the 'standardised criteria' are not appropriate to be applied to every law burdening political communication irrespective of the subject matter of the law and how large or small the burden on the implied freedom might be.¹⁰ His Honour also saw the criterion that a law burdening political communication is 'adequate in its balance' as not sufficiently focused to reflect the reasons for the constitutionally implied freedom.¹¹ Nettle J held that, on the facts of the present case, it was unnecessary to resolve these differences in view regarding the second limb of the *Lange* test.¹² Gordon J took the view that the 'known questions and tools' for conducting the *Lange* analysis 'have been applied without apparent difficulty' and therefore that the method of reasoning proposed by the majority was unnecessary.¹³

DUNCAN V INDEPENDENT COMMISSION AGAINST CORRUPTION [2015] HCA 32

Cause removed from the Court of Appeal of the Supreme Court of New South Wales

In July 2013, the Independent Commission Against Corruption ('ICAC') published a report containing findings that the applicant had engaged in 'corrupt conduct' within the meaning of s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW) ('the Act'). The applicant commenced proceedings in the Supreme Court of New South Wales challenging the validity of those findings. His claim was dismissed by the primary judge. The applicant, Mr Duncan Travers, appealed to the Court of Appeal.

On April 2015, prior to the determination of the

2 *McCloy v New South Wales* [2015] HCA 34, [94] (French CJ, Kiefel, Bell and Keane JJ), [98], [200] (Gageler J), [256] (Nettle J), [275] (Gordon J).

3 [22] (French CJ, Kiefel, Bell and Keane JJ), [199] (Gageler J), [370]–[382] (Gordon J).

4 [48]–[53] (French CJ, Kiefel, Bell and Keane JJ), [190]–[198] (Gageler J), [275] (Gordon J).

5 [2].

6 [80].

7 [81].

8 [87].

9 [98].

10 [142].

11 [145].

12 [254]–[255].

13 [310]–[311].

Court of Appeal proceedings, the High Court delivered its judgment in *Independent Commission Against Corruption v Cuneen* [2015] HCA 14 ('Cuneen'), holding that 'corrupt conduct' within ICAC's investigative jurisdiction under the Act does not encompass conduct which does not adversely affect the probity, even if it adversely affects the efficacy, of the exercise of the functions of a public official. Mr Traver's conduct the subject of ICAC's findings in the report did not affect the probity of the exercise of the functions of a public official. The applicant therefore added to the grounds of his appeal the contention that the respondent lacked jurisdiction to make findings of corrupt conduct against him.

The NSW Parliament then enacted the *Independent Commission Against Corruption (Validation) Act 2015* (NSW), which added Part 13 Schedule 4 to the Act. Part 13 purports to validate ICAC's actions done and findings made prior to *Cuneen*, and to this end extends the meaning of 'corrupt conduct' in s 8(2) of the Act to include (contrary to *Cuneen*) conduct that could adversely affect the efficacy of the exercise of official functions by a public official.

Before the High Court, the applicant made two challenges to Part 13 of the Act. The first was that the relevant provisions of Part 13 impermissibly purported to oust the power of the Supreme Court to grant relief for a specific genus of jurisdictional error by ICAC, contrary to the principle in *Kirk*. The applicant also argued that Part 13 contravened the *Kable* principle by directing courts to treat as valid acts that were, and remained, invalid.

Judgment

The High Court unanimously rejected the applicant's challenge to the validity of Part 13 of the Act.

In a joint judgment, French CJ, Kiefel, Bell and Keane JJ held that Part 13 attached new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status,¹⁴ and that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the *Constitution* even if those rights are in issue in pending litigation.¹⁵ Furthermore, Part 13 did not confer any power or function upon a court; it effected a retrospective alteration of the substantive law to be applied by the courts in accordance with their ordinary processes.¹⁶ On these grounds, their

14 *Duncan v Independent Commission Against Corruption* [2015] HCA 32, [25].

15 *Ibid* [26].

16 *Ibid* [28].

Honours rejected the applicant's *Kable* argument. Regarding the applicant's argument based on *Kirk*, their Honours held that since Part 13 effected an alteration in the substantive law as to what constitutes corrupt conduct, it did not withdraw any jurisdiction from the Supreme Court and therefore the principle in *Kirk* was not engaged.¹⁷ Nettle and Gordon JJ reasoned along similar lines.¹⁸

B. Supreme Court of Canada

GUINDON V CANADA [2015 SCC 41](#)

On appeal from the Federal Court of Appeal

Julie Guindon made false statements in donation receipts she issued on behalf of a charity, which she allegedly knew or would reasonably be expected to have known could be used by taxpayers to claim an unwarranted tax credit.

Guindon was assessed by the Minister of National Revenue for penalties of \$546,747 under s 163.2(4) of the *Income Tax Act*,¹⁹ which imposes monetary penalties for the making of a false statement that could be used by another for tax assessment purposes.

She appealed to the Tax Court of Canada, which vacated the assessment. The Federal Court of appeal restored the assessment.

Before the Supreme Court of Canada, there was a substantive and procedural issue. The substantive issue was whether Guindon was a person 'charged with an offence' and therefore a person entitled to the procedural safeguards in s 11 of the *Canadian Charter of Rights and Freedoms* ('Charter').²⁰ If the procedural safeguards were engaged the matter should not have proceeded in the Tax Court.

The procedural issue was whether her failure to give notice of the constitutional question to the Attorneys-General prior to her appeal to the Tax Court prevented her from having the merits of the constitutional issue addressed.²¹

Judgment

The appeal was dismissed by all members of the Court. Rothstein and Cromwell JJ (joined by Moldaver and Gascon JJ) decided the substantive

17 *Ibid* [29].

18 *Ibid* [44]–[47].

19 RSC 1985 (5th Supp), c C1.

20 *Constitution Act 1982*, Part 1, s 2.

21 See *Tax Court of Canada Act 1985*, c T-2, s 19.2.

issue, holding that s 11 *Charter* protections did not apply. Abella and Wagner JJ (joined by Karakatsanis J) dismissed the appeal on the procedural issue.

Rothstein and Cromwell JJ recognised the Court’s discretion to address the merits of a constitutional issue if proper notice has not been given, as it had in this case, even if notice was not given in the courts below.²² The Court decided to exercise its discretion on the basis that the issue raised was important to the administration of the *Income Tax Act*,²³ a decision was in the public interest and Guindon did not deliberately flout the notice requirement.²⁴

The Court next considered the substantive issue by applying the *Wigglesworth/Martineau* tests;²⁵ according to which an individual is entitled to the procedural protections of s. 11 of the *Charter* where the proceeding is, by its very nature, criminal, or where a ‘true penal consequence’ flows from the sanction.²⁶

The Court found the proceedings were not criminal in nature since the purpose of the proceeding was to promote honesty and deter gross negligence on the part of tax preparers²⁷, and that the process did not bear the traditional hallmarks of criminal proceedings.²⁸

Furthermore the proceedings did not lead to a ‘true penal consequence’.²⁹ Citing *Wigglesworth*, the Court stated that a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance.³⁰ A fine will be such a true penal consequence when it is punitive, in purpose or effect.³¹ Having regard to the magnitude of the fine, to whom it was paid, whether its magnitude was determined by regulatory considerations rather than principles

22 *Guindon v Canada* [2015] SCC 41 [15], [21] (Rothstein and Cromwell JJ).

23 *Ibid* [35] citing *Income Tax Act RSC 1985* (5th Supp), c C1.

24 *Ibid* [39].

25 *R v Wigglesworth* [1987] 2 SCR 514; *Martineau v MNR* [2004] SCR 737.

26 *Ibid* [44] citing *R v Wigglesworth* [1987] 2 SCR 514; *Martineau v MNR* [2004] SCR 737.

27 *Ibid* [62].

28 *Ibid* [63]–[73].

29 *Ibid* [88].

30 *Ibid* [75] citing *R v Wigglesworth* [1987] 2 SCR 514.

31 *Ibid* [76].

of criminal sentencing, and whether stigma was associated with the penalty, the Court concluded that the fine did not constitute a true penal consequence.³² Therefore, s 11 *Charter* procedural safeguards did not apply to the proceedings.³³

Abella and Wagner JJ dismissed the appeal on procedural grounds. Their Honours concurred that the Court had discretion to address the constitutional issue, however found that that discretion should be characterised narrowly, so as to avoid the practice and perception that mandatory notice provisions could be circumvented by raising constitutional arguments as new issues and giving notice for the first time in the Supreme Court.³⁴ Given the language of the statute and the policy reasons underlying notice provisions, the discretion to entertain a constitutional argument where notice was not provided should not be exercised absent exceptional circumstances.³⁵ Their Honours found that there were no exceptional circumstances in the instant case and therefore declined to consider the *Charter* issue.³⁶

C. Supreme Court of the United States

OBERGEFELL V HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH (USCC NO 14-556, 26 JUNE 2015)

On appeal from the US Court of Appeals for the Sixth Circuit

The laws of Michigan, Kentucky, Ohio and Tennessee defined marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners were deceased, filed suits in Federal District Courts in their home States, claiming that the respondent state officials had violated the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in favour of the petitioners, but the Sixth Circuit consolidated the cases and reversed the decisions of the District Courts.

32 *Ibid* [76]–[77], [88].

33 *Ibid* [90].

34 *Ibid* [122].

35 *Ibid* [130].

36 *Ibid* [136].

Judgment

In a 5:4 decision, the Supreme Court held that the State laws were invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.³⁷

Justice Kennedy (with whom Ginsburg, Breyer, Sotomayor and Kagan JJ joined) held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex.³⁸ This was for two reasons. First, the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including the right to marry.³⁹ Furthermore the reasons why marriage is fundamental under the Constitution apply with equal force to same-sex couples.⁴⁰ Secondly, the right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection.⁴¹ The marriage laws at issue were in essence unequal, since same-sex couples were denied benefits afforded to opposite-sex couples and were barred from exercising a fundamental right.⁴²

Chief Justice Roberts filed a dissenting opinion (in which Scalia and Thomas JJ joined), holding that the fundamental right to marry does not include a right to make a State change its definition of marriage.⁴³ The Chief Justice agreed with the majority that the Constitution protects a right to marry and requires States to apply their marriage laws equally,⁴⁴ but held that the Constitution entrusts to the States to decide what constitutes marriage.⁴⁵

Regarding the petitioners' 'fundamental right' claim, his Honour reasoned that the argument did not contend that State marriage laws violated an enumerated right, but rather a right implied by the Fourteenth Amendment, and that allowing unelected judges to select which unenumerated rights rank as fundamental raises concerns about the judicial role.⁴⁶ Therefore, in applying the doctrine of implied fundamental rights, the Court

37 *Obergefell v Hodges, Director, Ohio Department Of Health* (USCC No 14-556, 26 June 2015), 22-23 (Kennedy J).

38 *Ibid* 10-27.

39 *Ibid* 10-12.

40 *Ibid* 12-18.

41 *Ibid* 18-22.

42 *Ibid* 18-22.

43 *Ibid* 2.

44 *Ibid* 4.

45 *Ibid* 6.

46 *Ibid* 11.

must exercise judicial self-restraint,⁴⁷ by respecting the requirement that implied fundamental rights are deeply rooted in the

Nation's history and tradition.⁴⁸ Furthermore, the Chief Justice held that the marriage laws at issue did not violate Equal Protection Clause because distinguishing between opposite-sex and same-sex couples was rationally related to the States 'legitimate state interest' in 'preserving the traditional institution of marriage'.⁴⁹ The Equal Protection analysis might have been different if the petitioners' challenge had been focussed on laws denying benefits attached to marriage, rather than laws defining marriage generally.⁵⁰

Justice Alito also dissented. His Honour reasoned along similar lines to Chief Justice Roberts, holding that the majority's decision had 'usurped the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage'.⁵¹

HORNE V DEPARTMENT OF AGRICULTURE ([USSC, NO 14-275, 22 JUNE 2015](#))

On appeal from the US Court of Appeals for the Ninth Circuit

The *Agricultural Marketing Agreement Act 1937* authorizes the Secretary of Agriculture to promulgate marketing orders to help maintain stable markets for particular agricultural products. The marketing order for raisings established a Raisin Administrative Committee that imposes a reserve requirement — a requirement that growers set aside a certain percentage of their crop for the account of the Government, free of charge. The Government makes use of those raisins by selling them in non-competitive markets, donating them, or disposing of them by any means consistent with the purposes of the program. If any profits are left over after subtracting the Government's expenses from administering the program, the net proceeds are distributed back to the raisin growers. The petitioners — Marvin Horne, Laura Horne, and their family — are raisin growers who refused to set aside any raisins for the Government on the ground that the reserve requirement was an unconstitutional taking of their property for public use without just compensation, contrary the Fifth Amendment.

47 *Ibid* 13.

48 *Ibid* 14.

49 *Ibid* 24.

50 *Ibid* 24.

51 *Ibid* 6.

The Ninth Circuit held that the reserve requirement was not a ‘per se taking’ but rather a ‘use restriction’ (the latter being subject to a more flexible standard). According to the Ninth Circuit, this was since the Fifth Amendment affords less protection to personal than to real property, and the Hornes were not completely divested of their property (because they retained an interest in any net proceeds). The taking could be characterized as part of a voluntary exchange for a valuable government benefit (being an orderly raisin market).

The petitioners appealed to the Supreme Court.

Judgment

In an 8:1 decision, the Supreme Court reversed the decision of the Ninth Circuit.

Chief Justice Roberts (with whom Scalia, Kennedy, Thomas and Alito JJ joined) held that the Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property.⁵² Secondly, any net proceeds received by the raisin growers from the sale of the reserve raisins went to the amount of compensation received for the taking — it did not mean that there had been no taking at all.⁵³ Thirdly, the taking could not be characterized as a voluntary exchange for a valuable government benefit since the ability to sell produce in interstate commerce was not a ‘benefit’ that the Government could constitutionally withhold.⁵⁴ Justice Breyer (with whom Ginsburg and Kagan JJ joined) agreed with these aspects of the majority’s reasoning, but would have remanded the case to the Ninth Circuit to calculate the just compensation due to the petitioners.⁵⁵

Justice Sotomayor dissented, holding that the Hornes had not suffered a ‘per se taking’ and affirmed the Ninth Circuit’s reasoning.⁵⁶ Her Honour reasoned that a governmental action is only a ‘per se taking’ if it destroys each and every property right,⁵⁷ whereas in this case the Hornes retained a meaningful property interest in the reserve raisins (being the right to receive some money for the disposition of the reserve raisins).⁵⁸

52 *Horne v Department of Agriculture* (USSC, No 14–275, 22 June 2015) 4–9.

53 *Ibid* 9–12.

54 *Ibid* 12–14.

55 *Ibid* 1.

56 *Ibid* 13.

57 *Ibid* 1–4.

58 *Ibid* 4.

REED V TOWN OF GILBERT, ***ARIZONA*** ([USSC NO 13–502, JUNE 18 2015](#))

On appeal from the US Court of Appeals for the Ninth Circuit

Gilbert, Arizona (‘the Town’) has a comprehensive code (‘the Sign Code’) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs. Relevantly, the excluded categories of signs include the following. ‘Ideological Signs’, defined as signs ‘communicating a message or ideas’ that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. ‘Political Signs’, defined as signs ‘designed to influence the outcome of an election’, may be up to 32 square feet and may only be displayed during an election season. ‘Temporary Directional Signs’, defined as signs directing the public to a church or other ‘qualifying event’, have even greater restrictions: no more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the ‘qualifying event’ and 1 hour after.

The petitioners, Good News Community Church (‘the Church’) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, the petitioners filed suit, claiming that the code abridged their freedom of speech. On appeal, the Ninth Court concluded that the Code’s sign categories were content-neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech. The petitioners appealed to the Supreme Court.

Judgment

The Court unanimously held that the Sign Code’s provisions abridged freedom of speech.

Justice Thomas (with whom Roberts CJ, Scalia, Kennedy, Alito and Sotomayor JJ joined) held that the Sign Code’s provisions were content-based regulations of speech that did not survive the strict

scrutiny test.⁵⁹ Contrary to what the Ninth Court held, the Sign Code was content-based on its face since the restrictions that applied to different signs depended entirely on their communicative content (specifically, whether the content of the sign was temporary, political or ideological).⁶⁰ Content-based laws are subject to the test of strict scrutiny (meaning that the law must narrowly tailored to serve compelling state interests).⁶¹ The Sign Code's content-based restrictions did not survive strict scrutiny since the Town's claim that strict limits on temporary directional signs was necessary to beautify the Town failed to account for the fact that other types of signs pose the same problem,⁶² and separately, the Town failed to show that temporary directional signs posed a greater threat to public safety than ideological or political signs.⁶³ His Honour emphasised that the Court's decision would not prevent governments from enacting effective sign laws, since the Town had ample content-neutral options to resolve the problems with safety and aesthetics it had identified.⁶⁴

Justice Kagan (with whom Ginsburg and Breyer JJ joined) gave a separate judgment that concurred in the result, but disagreed with the majority's reasoning. According to Justice Kagan, the test of strict scrutiny should only be applied to facially content-based regulations of speech when there is any 'realistic possibility that official suppression of ideas is afoot'.⁶⁵ Where there is no such realistic possibility, the Court should apply a less exacting standard so that 'entirely reasonable' laws can survive.⁶⁶ In this case, however, the challenged law's breadth made it unconstitutional on any standard since (for example) the Town had failed to explain why it had prohibited directional signs while placing no limits on other types of signs.⁶⁷

59 *Reed v Town Of Gilbert, Arizona* (USSC No 13–502, June 18 2015) 6–17.

60 *Ibid* 7.

61 *Ibid* 6.

62 *Ibid* 14–15.

63 *Ibid* 14–15.

64 *Ibid* 16–17.

65 *Ibid* 3.

66 *Ibid* 4.

67 *Ibid* 6.

WALKER V TEXAS DIVISION, SONS OF CONFEDERATE VETERANS 576 US (2015) (USSC, NO 14-144, JUNE 18 2015)

Appeal from the United States Court of Appeals for the Fifth Circuit

The State of Texas offers automobile owners the option of speciality license plates, as an alternative to ordinary license plates. Members of the public may propose a plate design comprising a slogan, graphic or both. The Texas Department of Motor Vehicles Board ('the Board') determines whether to approve the design. If a design is approved the State will make licence plates bearing the design available for display on vehicles registered in Texas.

The Sons of Confederate Veterans ('SCV') is a state chartered association of male descendants of ex-confederate soldiers and sailors. The Texas Division of SCV proposed a specialty licence plate design featuring a Confederate battle flag. The Board refused approval, on the basis of reasonable comments from members of the general public who found the design offensive.⁶⁸

The SCV filed suit against the Chairman and members of the Board arguing that the rejection of SCV's proposed design violated the First Amendment free speech guarantees.

Judgment

In a 5:4 decision, the Supreme Court held that the Board's refusal did not violate constitutional free speech guarantees.

Justice Breyer (joined by Thomas, Ginsburg, Sotomayor, and Kagan JJ) held that Texas's speciality licence plate designs constitute government speech.⁶⁹ When the government speaks it is not barred by the Free Speech Clause from determining the content of what it says and therefore Texas was entitled to refuse to issue plates featuring SCV's proposed design.⁷⁰

Breyer J applied the analysis from *Summum*,⁷¹ in

68 *Walker v Sons of Confederate Veterans* 576 US (2015) 4 (Breyer J) citing Texas Transport Code §504.801(c) (1995).

69 *Ibid* 6.

70 *Ibid* 5–6 citing *Pleasant City v Summum*, 55 US 460, 467 (2009).

71 *Pleasant City v Summum*, 55 US 460, 467 (2009).

which a city municipality refused to erect a religious organisation's monument in a city park. His Honour considered three factors, which together showed that the specialty plates were government speech.⁷² First, Texas had long used licence plates to convey government speech (for example in slogans urging action and promoting tourism).⁷³ Secondly, the plate designs were often closely identified in the public mind with the State.⁷⁴ Thirdly, Texas maintained direct control over the messages conveyed on its speciality plates by giving the Board final approval.⁷⁵

Breyer J rejected SCV's contention that the specialty license plates were a forum for purely private speech on government property and that consequently 'forum analysis' was appropriate.⁷⁶ The final authority of the Board, the ownership of plate designs by the State and its traditional use for government speech indicated that the speciality plates were neither a designated public forum nor a limited public forum.⁷⁷ Rather, the State was speaking on its own behalf.⁷⁸

Breyer J acknowledged although the designs were government speech, this did not mean that they did not also implicate free speech rights of private persons, since drivers who display the licence plates convey the messages communicated through those designs.⁷⁹

Justice Alito (with whom Roberts, CJ and Scalia and Kennedy JJ joined) dissented, holding that the specialty license plate designs were private speech. Alito J also applied the analysis from *Summum*,⁸⁰ but held that since none of the critical factors were present in this case, the licence plates constituted a limited public forum.⁸¹ Consequently, government regulation may not favour one speaker over another and the Board's refusal was viewpoint discrimination in violation of the First Amendment.⁸²

72 Ibid 11–12.

73 Ibid 9–10.

74 Ibid 10–11.

75 Ibid 11.

76 Ibid 13–14 citing *Cornelius v NAACP Legal Defences & Ed Fund Inc*, 473 US 788, 800 (1985).

77 Ibid 14.

78 Ibid 15.

79 Ibid 17.

80 Ibid (Alito J).

81 Ibid 14–15.

82 Ibid 16–17 citing *Rosenberger v Rector and Visitors of University of Virginia*, 515 US 819, 828 (1995).

[GLOSSIP V GROSS \(USCC, NO 14-7955, JUNE 29 2015\)](#)

Appeal from the United State Court of Appeals for the Tenth Circuit

Four death-row inmates filed a 42 USC §1983 motion, a civil action for deprivation of rights, seeking a preliminary injunction against Oklahoma's lethal injection protocol, arguing that it violates the Eighth Amendment prohibition on cruel and unusual punishment.⁸³

Oklahoma uses a three-drug protocol for executions by lethal injection, which was found not to violate the Eighth Amendment in *Baze v Rees*.⁸⁴ However, Oklahoma is no longer able to obtain the first drug in the protocol; sodium thiopental (a barbiturate), or an alternative pentobarbital. Following pressure from anti-death-penalty advocates pharmaceutical companies have refused to supply these to Oklahoma. Oklahoma now uses 500-milligrams of midazolam, a sedative, as the first drug in its three-drug protocol.

The issue is whether the use of midazolam violates the Eighth Amendment on the basis that it does not render the prisoner unable to feel pain associated with the administration of the second and third drugs.

The District Court denied the motion, the Tenth Circuit Court of Appeal affirmed this decision.⁸⁵

Judgment

The Court held 5:4 that the injunction should be refused.

Alito J (joined by Roberts CJ Scalia, Kennedy and Thomas JJ; Scalia J concurring) held that the petitioners failed to establish a likelihood of success on the merits of their claim.⁸⁶

Following *Baze v Rees* ('*Baze*'), in order to succeed

83 Richard E Glossip, John M Grant and Benjamin R Cole Sr. Charles F Warner was a fourth party to the original motion but was executed on 15 January 2015 after the Supreme Court denied a stay in *Warner v Gross*, 574 US (2015).

84 553 US 35.

85 *Warner v Gross*, 776 F 3d 721 (10th Cir, 2015).

86 *Glossip v Gross*, 56 US (2015) 11 (Alito J) citing *Winter v Natural Resources Defence Council, Inc* 555 US 7, 20 (2008).

on an Eighth Amendment cruel and unusual punishment method-of-execution claim, a prisoner must establish that the method creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.⁸⁷ Citing *Baze*, the Court recognised that because it is settled that the death penalty is constitutional it necessarily follows that there must be a constitutional means of carrying it out.⁸⁸

The motion was refused for two independent reasons.

First, the petitioners failed to establish that any risk of harm was substantial compared to a known and available alternative method.⁸⁹ The petitioners were unable to point to an available alternative, and their argument that they were not required to identify an alternative was rejected by the Court.⁹⁰

Second, the petitioners failed to establish the use of midazolam entails a substantial risk of severe pain.⁹¹ The Court stated a number of considerations, first noting the 'clear error' standard of review of the District Court, the onus of persuasion on the petitioners and the numerous decisions finding midazolam is effective.⁹² Furthermore, pointing to the expert testimony that it was a 'virtual certainty' midazolam would prevent pain.⁹³ Third, finding that evidence regarding the 'ceiling effect', a dose of midazolam at which further increases produce no further effect, did not establish a substantial risk of severe pain.⁹⁴ Finally, the petitioners remaining arguments were found to lack merit.⁹⁵ The Court also warned that federal courts should not embroil themselves in ongoing scientific controversies beyond their expertise.⁹⁶

Sotomayor J (joined by Ginsburg, Breyer and Kagan JJ) dissented. Her honour found that the petitioners had demonstrated an objectively intolerable risk

of severe pain.⁹⁷ Sotomayor J found clear error in the District Court's acceptance of expert testimony about the effectiveness of midazolam, criticising it as scientifically unsupported and implausible.⁹⁸ In addition, Sotomayor J found *Baze* did not require that the petitioners identify a known and available alternative means of execution.⁹⁹ Her Honour rejected the Court's contention that if the death penalty is constitutional there must be a constitutional means of accomplishing it, stating that this would convert the categorical prohibition on cruel and unusual punishment into a conditional one.¹⁰⁰

Breyer J (joined by Ginsberg J) dissented for the reasons expressed by Sotomayor J. His Honour questioned whether the death penalty itself violates the Eighth Amendment.¹⁰¹ Breyer J found that circumstances and the evidence of the application of the death penalty have changed radically since it was upheld 40 years ago.¹⁰² His Honour identified constitutional defects with the death penalty, being: serious unreliability,¹⁰³ arbitrariness in application,¹⁰⁴ and unconscionably long delays that undermine the penalty's penological purpose.¹⁰⁵ Breyer J concluded that the death penalty, in and of itself, now likely constitutes legally prohibited cruel and unusual punishment and the Court should call for a full briefing.¹⁰⁶

Scalia J and Thomas J both wrote opinions concurring with the majority, responding to Breyer J's opinion. Scalia J rejected Breyer J's interpretation and application of the Eighth Amendment and reiterated that it is impossible to find the death penalty unconstitutional.¹⁰⁷

87 Ibid 12.

88 Ibid 4 citing *Baze v Rees*, 553 US 35, 47 (2008).

89 Ibid 13

90 Ibid 13-14 citing *Hill v McDonough*, 547 US 573 (2006).

91 Ibid 16.

92 Ibid 16-18.

93 Ibid 18-22.

94 Ibid 22-25.

95 Ibid 26-28.

96 Ibid 18 citing *Baze v Rees*, 553 US 35, 51 (2008).

97 *Glossip v Gross*, 56 US (2015) 10-11, 16-23 (Sotomayor J).

98 Ibid 1, 15.

99 Ibid 24.

100 Ibid.

101 *Glossip v Gross*, 56 US (2015) 1 (Breyer J).

102 Ibid 2, 40 citing *Gregg v Georgia*, 428 US 153, 187 (1976).

103 Ibid 2-9.

104 Ibid 9-17.

105 Ibid 17-33.

106 Ibid 41.

107 *Glossip v Gross* 56 US (2015) 2 (Scalia J).

D. UK Supreme Court

R (ON THE APPLICATION OF BOURGASS AND ANOTHER) (APPELLANTS) V SECRETARY OF STATE FOR JUSTICE (RESPONDENT) [\[2015\] UKSC 54](#)

On appeal from [2012] EWCA Civ 376

The appeals challenged decisions to keep the appellant prisoners in solitary confinement for substantial periods. The decisions were made under the *Prison Act 1952*, rule 45 of the *Prison Rules 1999* and the “Prison Service Order 1700” (‘PSO 1700’), a non-statutory document issued by the Secretary of State. Rule 45, paragraph (1) enabled the governor of the prison to arrange for the prisoner to be segregated. Paragraph (2) provided that a prisoner should not be segregated under the rule for more than 72 hours ‘without the authority of the Secretary of State’ and that ‘authority given under this paragraph shall be for a period not exceeding 14 days’. PSO 1700 provided for the establishment of a ‘Segregation Review Board’ (‘SRB or the Review Board’), chaired by ‘a competent operational manager’. The PSO stated that the initial SRB had to be held within 72 hours of a prisoner being placed in segregation, and that subsequent SRBs should be held at least every 14 days. The PSO also stated that the Review Board would take the final decision whether or not to authorise segregation to continue. It therefore purported to confer a on a member of the staff of the prison the power to authorise the continued segregation of a prisoner after the initial 72 hours ordered by the governor.

The first appellant, Kamel Bourgass, was serving a life sentence in Her Majesty’s Prison Whitemoor. He was segregated under rule 45(1) on the orders of the “challenging prisoners’ manager”, Mr Colley. The reason given was investigation into a serious assault. He remained in segregation for seven months. His continued segregation after 72 hours was purportedly authorised under rule 45(2), in accordance with PSO 1700, by various prison officers chairing the prison’s SRB, including Mr Colley. Authority for his segregation was accompanied by the same reason on a number of occasions, being the investigation of the assault of another prisoner. The police indicated that they did not regard Bourgass as a suspect in connection with the assault. After that another reason given for continued segregation was that the prison was referring Bourgass to the Close Supervision Centre (‘CSC’). The CSC decided not to accept Bourgass,

stating that there was insufficient evidence to support the allegations.

The second appellant, Tanvir Hussain, was serving a life sentence in Her Majesty’s Prison Frankland. He was placed in segregation under rule 45(1) on the orders of the ‘residential governor’ Mr Greener. He remained in segregation for six months. His continued segregation after 72 hours was also purportedly authorised under rule 45(2), in accordance with PSO 1700, by various prison officers chairing the SRB, including Mr Greener.

There were two issues on appeal: whether the segregation was lawfully authorised, and whether the procedure followed met the requirements of fairness under the common law and, if applicable, article 6(1) of the European Convention on Human Rights (which provides, among other things, that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’).

Judgment

The Supreme Court allowed the appeals and granted a declaration in each case that the appellant’s segregation beyond the initial period of 72 hours was not authorised.

Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Hodge agreed) gave the judgment for the Court.

On the first issue, the decisions taken under rule 45(2) were not taken by the Secretary of State, but by a senior prison officer or ‘operational chairing the Review Board in accordance with PSO 1700. The Secretary of State’s argument was that the decision of the operational manager was the decision of the Secretary of the State, by virtue of the *Carltona* principle.¹⁰⁸ *Carltona* held that a decision of a departmental official is constitutionally the decision of the minister himself.¹⁰⁹ However, both the *Prison Act 1952* and the *Prison Rules 1999* contained provisions imposing duties specifically on the governor and provisions that confer separate powers on the Secretary of State. It was therefore clear that the relationship between the governor and the Secretary of State bore no resemblance to the relationship between a minister and his officials.¹¹⁰ Furthermore, rule 45(2) was intended to provide a safeguard for the prisoner against

108 *R (Bourgass) v Secretary Of State For Justice* [2015] UksC 54 [44]–[46], [58], [60], [72].

109 *Ibid* [48]–[49].

110 *Ibid* [58]–[60], [64].

excessively prolonged segregation by the local prison management. It could only operate as a safeguard if it ensured that segregation did not continue for a prolonged period without being considered by officials independent of the prison. Therefore, the *Carltona* principle did not apply to rule 45(2) so as to enable a governor to take the decision on the Secretary of State's behalf.¹¹¹

On the second issue, the Court held that common law fairness required that a prisoner should normally have a reasonable opportunity to make representations before a decision to authorise continued segregation. The Court said that in normal circumstances, this requires the prisoner to be informed of the substance of the matters on the basis of which the authority of the Secretary of State was sought. In the case of the appellants, more could and should have been said about the basis for the continued segregation.¹¹² In *Bourgass'* case, for example, although some of the reasons given to him explained that his segregation was based on suspected involvement in the assault of another prisoner, the prison failed to provide any information as to why he was considered to have been involved in an assault which took place in his absence.¹¹³

As to whether the decisions to authorise continued segregation fell within article 6(1) of the ECHR, so that the prisoner was entitled to a hearing before an independent and impartial tribunal, this depended on whether the decision involved the determination of a civil right recognised by English law.¹¹⁴ The Court held that a prisoner does not possess any private law right to association, or any precisely defined entitlement as a matter of public law. Article 6(1) therefore did not apply. In any event, judicial review could meet the requirements of article 6(1) in this context.¹¹⁵

111 Ibid [88]–[89].

112 Ibid [98], [100].

113 Ibid [101].

114 Ibid [117].

115 Ibid [122]–[126].

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