CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES

MELBOURNE LAW SCHOOL

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CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES

Newsletter number 28/June 2015

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

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Our website:

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Centre members also blog at Opinions on High:

http://blogs.unimelb.edu.au/opinionsonhigh/

The IACL Blog:

http://iacl-aidc-blog.org

Message from the Director

Events: As this newsletter is published, CCCS has just held its major event of the year, the CCCS 2015 Constitutional Law Conference on 23 and 24 July. The Conference opened with a Public Conversation with the Hon Kenneth Hayne AC. In his first major event since joining Melbourne Law School as a Professorial Fellow, Justice Hayne reflected upon his years on the High Court in a conversation with our Dean, Professor Carolyn Evans.

The Conference featured a panel devoted to Justice Hayne's contribution to Australian public law as well as panels on Executive Power, Contracting and Spending, Constitutional Dimensions of Statutory Interpretation and Proportionality in Constitutional Law. The program featured leading practitioners, academics and judges.

This week, we also welcome Justice Daphne Barak-Erez of the Supreme Court of Israel to CCCS. Justice Barak-Erez will take part in a joint seminar with Professorial Fellow the Hon Kenneth Hayne AC exploring unwritten doctrines and implications in Australian and Israeli constitutional law.

Teaching: CCCS members and associations have been active in the Melbourne Law Masters teaching program in recent months. We were pleased to welcome back Professor David Sloss from Santa Clara Law School, who taught *International Law in Domestic Courts.* In addition, Cheryl Saunders taught *Comparative Constitutional Law*. Other Masters subjects in coming months include *Statutes in the 21st Century,* taught by Justice Michelle Gordon and Justice Kenneth Hayne; *Law making: Legislatures and Courts*, taught by Professor Neil Duxbury of the London School of Economics; *Money, Law and Politics,* taught by Associate Professor Joo-Cheong Tham and Professor Keith Ewing (King's College, London) and *Royal Commissions and Public Inquiries,* taught by Melinda Richards SC. Details here.

Welcomes: Since our last newsletter we have also welcomed a new PhD student, Osayd Awawda, who will be working with Professors Simon Evans and Cheryl Saunders on a a project entitled 'The judicialisation of Politics in Palestine: What is the Role of the Constitutional Court in Resisting the Authoritarian behaviours of the Fatah Regime in the West Bank?'

Congratulations: It is a pleasure to close this report with warm congratulations to Elizabeth Southwood whose PhD thesis, supervised by myself and Cheryl Saunders, was passed in April. Elizabeth examined the separation of judicial power under the Australian Constitution. She graduated as a Doctor of Philosophy on 31 July.

Professor Adrienne Stone

Director, CCCS

Centre Update

Adrienne Stone has:

- Delivered a paper on 'Separation of Powers in Old Constitutions' at *The 'New' Separation of Powers* held in Johannesburg South Africa on 28-29 May and attended a meeting of the Executive Committee of the International Association of Constitutional Law on 29 May;
- Attended a meeting of the Advisory Committee for the Australian Law Reform Commission's Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges on 7 May;
- Chaired APCML/CCCS Seminar: The Rise of the Orwellian State? Australia's Approach to Surveillance and Counter-terrorism on 29 April;
- Published 'The Ironic Aftermath of Eatock v Bolt' (2015) 38(3) Melbourne University Law Review (Advance)';
- Made a submission to the Australian Law Reform Commission's Inquiry into Traditional Rights and Freedoms (with Anna Dziedzic and Alexandra Harrison Ichlov): Traditional Rights and Freedoms - Encroachments by Commonwealth Laws; and
- Made a submission to the Victorian Government's 2015 Review of the Charter of Human Rights (with Andrew Currie and Anna Saunders).

Dale Smith published an article, co-authored with Colin Campbell from Monash: Colin Campbell & Dale Smith, "Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment" (2015) 43(1) *Federal Law Review* 91-118.

Scott Stephenson wrote a piece for the *International Journal of Constitutional Law's* blog, I·CONNECT, titled 'The Constitutional Referendum in Comparative Perspective: Same-Sex Marriage in Ireland and Australia'.

He also served as a commentator on the High Court's decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* at a CCCS Brown Bag Seminar and on undertaking historical research in the field of comparative constitutional law at the Engaging Constitutional History Workshop held at UNSW's Faculty of Law.

Cheryl Saunders has published:

- *An Enquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law*, Hart Publishing, 2015 (with Dennis Davis, Alan Richter);
- 'Values in Australian Constitutionalism' (with Megan Donaldson) in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Enquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law*, Hart Publishing, 2015, 16-66;
- 'The Interdependence of Federalism and Democracy in Australia' in Francesco Palermo and Elisabeth Alber (eds), *Federalism as Decision-Making*, (Brill, Martinus Nijhoff, 2015,20-39; and
- A submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Indigenous Constitutional Recognition: the Concept of Consultation.

Cheryl was also involved in several conference and seminar presentations, where she:

- Participated as discussant in a workshop on *Contemporary Issues in Indian Public Law* at the National Law University, Delhi, on 10,11 April;
- Delivered a paper on 'Constitutional Comparison between India and Australia' to a conference on *Contemporary Issues in Public Law: Transnational Perspectives* at the National Law University Delhi, 12 April;
- Delivered two papers to a conference on *Judicial Functions in Territorially and Culturally Compound Systems*, Trento Italy, 6,7 May, on 'The Judiciary in Common Law Federal Systems' and 'Use of Foreign Judges';
- Led discussion on 'Ten Principles to Guide Federalism Reform' at a Melbourne University Symposium, 19 May (with Michael Crommelin);
- Delivered an address on 'Magna Carta' to the Lyceum Club, Melbourne, on 9 June;
- Spoke on 'The Concept of Consultation' to a symposium on *Indigenous Constitutional Recognition and the Idea of an Indigenous Constitutional Body*, Sydney Law School, 12 June;
- Will speak on 'The Enemy Within', in the *Centenary War Lectures*, organised by the University of Melbourne, 24 June; and
- Will speak on 'Renewing Australian Federalism' at a Policy Breakfast Session, *Second Crawford Leadership Forum*, 28-30 June.

Cheryl also co-taught a subject on Comparative Constitutional Law at the University of Trento, Italy, from 20 April to 7 May.

Paula O'Brien has:

- Presented papers on 'Alcohol Advertising and the Failure of Industry Self-Regulation in Australia' at the University of Ottawa Law Faculty on 10 April 2015, the Centre for Addiction and Mental Health at the University of Toronto on 28 April 2015, and the University of Toronto Law Faculty on 7 May 2015;
- Commentated on a paper on direct to consumer advertising of pharmaceuticals in a digital age in the University of Toronto Law Faculty Health Law and Policy seminar series on 12 April 2015;
- Published the article 'Health care justice for temporary migrant workers on 457 visas in Australia: A case study of internationally qualified nurses' in the *Journal of Law and Medicine*.

Joo-Cheong Tham:

Fellowship: In April to May 2015, Joo-Cheong held a visiting fellowship under the Genest Global Faculty Program at Osgoode Hall Law School, Toronto.

Presentations:

- Joo-Cheong Tham, 'The Fault-lines of Fairness in Political Finance Jurisprudence', Pierre Genest Memorial Lecture, 14 April 2015, Osgoode Hall Law School, Canada. This paper was also presented at the Bell Chair in Canadian Parliamentary Democracy Lecture on 9 April at the Department of Political Science, Carleton University, Canada; and the Legal Theory Workshop on 27 March at McGill Law School, Montreal.
- Joo-Cheong Tham, Martina Boese and Iain Campbell 'Why is labour protection for temporary migrant workers so fraught? A perspective from Australia', Global Labour Research Centre, York University,

Canada, 21 April 2015. This paper was also presented at the Workshop on the 'Regulatory challenges of temporary labour migration' at the Institute for the Sociology of Law, Onati, Spain, 11-12 June; and the Labour Law Research Network Conference at the University of Amsterdam, 25-27 June.

- Joo-Cheong Tham, 'The 'trade union' question in political finance laws', Ontario Chapter of the Canadian Association of Labour Lawyers, 22 April 2015, Toronto.
- Joo-Cheong Tham, 'The regulation of precarious work in Australia', Ontario Ministry of Labour, 29 April 2015, Toronto.

Submission: to *the Inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders*, April 2015, 21 pp (invited to appear as witness before committee).

Opinion piece: Joo-Cheong Tham, Martina Boese and Iain Campbell, 'Taking a taxi ride to an inhospitable workplace', *Inside Story*, 5 June 2015.

CCCS New Graduate Research Students

This issue, we welcome one new PhD student:

Osayd Awawda

I finished studying my Bachelor of Law degree in Birziet University in Ramallah, Occupied Palestine in 2013. Fortunately, I received a scholarship from AusAID to study the Master of Laws LLM at Melbourne Law School. I finished my Masters in March 2015. During my Masters, I studied subjects related to legal reform in fragile and corrupted countries, including fiscal reform and development, post-conflict state-building, and international economic law. I was certainly interested in judicialisation of politics, and how to develop proper understanding of this phenomenon in the context of authoritarian Arab regimes, taking Palestine as a model. Through my thesis, I aim to suggest applicable avenues to reform judicial institutions in the Arab world; to make them more independent, and to provide Arabic-speaking legal experts with basic Arabic-literature; which I will offer through translating fundamental literature of this phenomenon to Arabic. It is worth mentioning that this thesis is the first to provide avenues and methods to reform judicial institutions in the authoritarian regimes of the Arab World.

Thesis: The Judicialisation of Politics in Palestine: What is the Role of the Constitutional Court in Resisting the Authoritarian Behaviour of the Fatah Regime in the West Bank?

Supervisors: Cheryl Saunders and Simon Evans

Many studies have been done to explore the practice of the judicial system in Palestine, particularly on the West Bank and Gaza Strip, because they are the only areas under the limited control of the Israeli authority, while the rest of Palestine is completely occupied by the Israeli occupying authorities.

An overview of these studies can easily make us realise that they were limited to the comparison between the nature of the legal functions in this system on one hand, and how they exercise these legal functions on the other hand. In other words, the conclusions were about explaining the differences between how courts should

operate according to the related law, and how they really operate, just in their field of competence.

However, after the Palestinian coup d'état in 2007, Fatah's regime in the West bank became an authoritarian one, and Hamas established its own regime in Gaza Strip. Researchers have not yet tried to figure out the role of courts and other legal actors in resisting the authoritative actions of Fatah regime through judicial means. In the scholarly field, this relationship between the political power and the judiciary is one of the most significant domains to understand in the last century. Judicialisation of Politics, as it is called, is the domain that studies this relationship.

To elaborate more, there is no one single study about the role of courts in general, and the constitutional court in particular, in justifying, legitimising, and enhancing the control of this regime in the West Bank. The key question of this thesis is the following: what is the Role of the Constitutional Court in Resisting the Authoritarian behaviours of Fatah Regime in the West Bank? The importance of this thesis arises from suggesting applicable recommendations to resolve the problems that courts face in Fatah's regime. This importance is original and significant because of the complexity of Fatah's regime itself. Fatah's regime is a regime in a state under occupation, where there is a coup d'etat as well. As a result, this thesis will identify the role of the constitutional court in such a multifarious and complicated sphere.

CCCS Visitors

The Centre for Comparative Constitutional Studies is a place where colleagues from around the world come to work and share ideas. The Centre has hosted numerous visitors over the years, and met with, and provided briefings to, many others. Since our last newsletter, CCCS has hosted:

Professor David Sloss (17 - 23 June 2015)

David Sloss is a Professor of Law at Santa Clara University School of Law, where he served as the Director of the Center for Global Law and Policy. He is the editor of *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge Univ. Press, 2009), and co-editor of *International Law in the US Supreme Court: Continuity and Change* (Cambridge Univ. Press, 2011). The American Society of International Law awarded a Certificate of Merit for the latter book "for high technical craftsmanship and utility to practising lawyers and scholars." He is a member of the American Law Institute (ALI) and is working on the ALI project to draft the Restatement (Fourth) of US Foreign Relations Law.

Forthcoming Events

CCCS Seminar: A Comparative Conversation on Constitutions: Implications and the Recognition of 'Unwritten Rights' in Australia and Israel

- Where: Room 920, Melbourne Law School
- When: Friday 7 August 2015, 1 - 2:00 PM

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

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

Recent Events

APCML/CCCS Seminar: The Rise of the Orwellian State? Austraia's Approach to Surveillance and Counter-terrorism

Speakers: Brett Walker SC, Senator Scott Ludlam, Professor Ben Saul and Dr Patrick Emerton

Chair: Professor Adrienne Stone

Wednesday 29 April 2015

Significant reforms to Australia's national security laws are on foot. Legislation was passed last year to expand ASIO powers in relation to computer networks, to increase penalties for revealing details of secret intelligence operations, and to restrict the travel of persons perceived as threats to Australia's security. Debates are ongoing as to the compulsory retention of metadata by telcos. Are these measures necessary to keep Australians safe or are we on our way to an Orwellian dystopia?

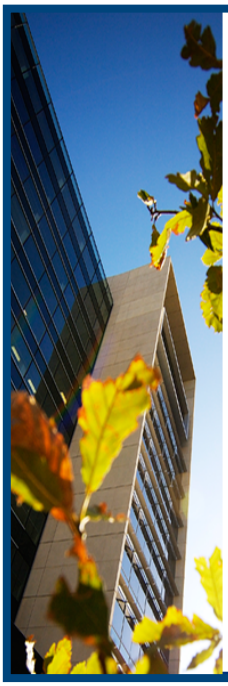
The Centre for Comparative Constitutional Studies and the Asia Pacific Centre for Military Law hosted a panel discussion on the wide ranging changes that have been implemented as well as those that are still being contemplated.

The panel consisted of four leading experts on security issues and counter-terrorism laws:

- Brett Walker SC: barrister; former Independent National Security Legislation Monitor;
- Senator Scott Ludlam: Senator for Western Australia; Australian Greens' spokesperson on Broadband, Communications and the Digital Economy, and on Defence;
- Professor Ben Saul: Professor of International Law at Sydney Law School; barrister; and
- Dr Patrick Emerton: Senior Lecturer at the Faculty of Law, Monash University.

CCCS 2015 Constitutional Law Conference

Thursday & Friday, 23 - 24 July 2015



PROGRAM

THURSDAY 23 JULY 2015

4pm — Registration

4.30-6pm — Session One

Public Event | **A Conversation with the Hon. Justice Hayne AC**

Speaker | The Hon. Justice Kenneth Hayne AC

Moderator | Professor Carolyn Evans (Dean & Harrison Moore Professor, Melbourne Law School)

6.15-7.15pm — Book Launch

James Stellios, *Zines' The High Court and the Constitution* (6th edition 2015)

Launch by | The Hon. Justice John Griffiths (Federal Court of Australia)

7.15 for 7.30pm — Conference Opening Dinner

UH@W, Level 10, Melbourne Law School

FRIDAY 24 JULY 2015

8.30am — Registration and Coffee

9-10.30am — Session Two

Constitutional Dimensions of Statutory Interpretation

Welcome | Professor Adrienne Stone (Melbourne Law School)

Speakers |

- Professor Cheryl Saunders AO (Melbourne Law School)
- Professor Jeremy Gans (Melbourne Law School)
- The Hon. Justice John Basten (Court of Appeal, Supreme Court of New South Wales)

10.30am — Morning Tea

11am-12.30pm — Session Three

Spending and Contracting: Executive Power after *Williams*

Speakers |

- Professor Michael Crommelin AO (Melbourne Law School)
- Professor Simon Evans (Melbourne Law School)
- Mr David Heaton (Oxford Law)

12.30pm — Lunch

2-3.30pm — Session Four

Constitutional Law in Comparative Perspective: Proportionality in Constitutional Law

Speakers |

- Professor Rosalind Dixon (UNSW Law School)
- Associate Professor Benjamin Berger (Osgoode Hall Law School)
- The Hon. Justice Nye Perram (Federal Court of Australia)

3.30pm — Afternoon Tea

4-5.30pm — Session Five

The Contribution of the Hon. Justice Hayne AC to Australian Public Law

Introductory Remarks | The Hon. Justice Geoffrey Nettle (High Court of Australia)

Speakers |

- Dr Stephen Donaghue QC (Owen Dixon Chambers West)
- Frances Gordon (Owen Dixon Chambers West)
- Kristen Walker SC (Owen Dixon Chambers West)

Melbourne Law Masters 2015

The 2015 program for the Melbourne Law Masters is now available for Semester Two, course subjects in the Master of Public and International Law include the following:

General Government Law:

Comparative Law LAWS70016 (5-11 August)

Professor Günter Frankenberg (Goethe University, Germany)

Constitutional Rights and Freedoms LAWS90013 (11-17 November)

Professor Adrienne Stone (Melbourne Law School)
The Hon. Justice Susan Kenny (Federal Court of Australia)

Law-making: Legislatures and Courts LAWS90024 (22-28 July)

Professor Neil Duxbury (London School of Economics, United Kingdom)

Money, Law and Politics (Formerly Law of Political Money) LAWS70425 (25 November-1 December)

Associate Professor Joo-Cheong Tham (Melbourne Law School)
Professor Keith Ewing (King's College London, United Kingdom)

Royal Commissions and Public Inquiries LAWS70037 (14-20 October)

Ms Melinda Richards SC (Victorian Bar)

Statutes in the 21st Century LAWS70404 (27 July-19 October)

The Hon. Justice Michelle Gordon (Federal Court of Australia)
The Hon. Justice Kenneth Hayne AC (High Court of Australia)

General Public International Law:

Domestic Courts and International Law LAWS90019 (17-23 June)

Professor David Sloss (Santa Clara University, United States)

Post-Conflict State-Building LAWS70313 (2-8 September)

Associate Professor Bruce Oswald CSC (Melbourne Law School)
Laureate Professor Cheryl Saunders AO (Melbourne Law School)

Other Subjects:

Fundamentals of the Common Law LAWS70217/LAWS70256 (2 March-28 May/ 29 July-22 October)

Ms Judy Bourke (Melbourne Law School)
Ms Erica Grundell (Victorian Department of Health)
Ms Raelene Harrison (Senior Fellow, Melbourne Law School)
Ms Claire Kaylock (Law and Language)

Regulation of Health Practitioners (Formerly Registration of Health Professionals) LAWS70401 (27 May-2 June)

Professor Loane Skene (Melbourne Law School)

Regulatory Policy and Practice LAWS70460 (8-14 April)

Professor Karen Yeung (King's College London, United Kingdom)

The Melbourne Law Masters offers masters degrees and graduate diplomas across 23 specialist legal areas to deepen knowledge and understanding generally or in a specialised area of law. Comprising almost 35 courses, the program offers exceptional quality and a wide subject choice that allows students to tailor courses to meet their personal and professional aspirations. MLM subjects focus on current and emerging legal issues. Quality is maintained by continual review and consultation with practitioner and academic experts in the field.

Comparative Constitutional Law Update

PENDING CASES

A. HIGH COURT OF AUSTRALIA

QUANDAMOOKA YOOLOOBURRABEE 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.

MCCLOY & ORS V NEW SOUTH WALES

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. Div 4A of Pt 6 of the Act prohibits the making of political donations by certain classes of person. Those classes include property developers. Section 96E (in Pt 4 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.

The first plaintiff, Mr Jeffery McCloy is or was a director of both the second plaintiff, McCloy Administration Pty Ltd and the third plaintiff, North Lakes Pty Ltd. Both the third plaintiff and Mr McCloy are 'property developers' for the purposes of Div 4A of Pt 6 of the Act.

Mr McCloy made donations in excess of $31,500 for the benefit of candidates in the New South Wales state election ('NSW election') held in March 2011. The second plaintiff made an indirect contribution of $9,975.00 to the election campaign of Mr Tim Owen, a candidate for the seat of Newcastle in the Legislative Assembly in the NSW election. At the time the plaintiffs commenced proceedings in this Court (in July 2014) they each intended to make donations to the Liberal Party of Australia or to other political parties.

The proceedings brought by the plaintiffs in this Court challenge the validity of s 96E and Divs 2A and 4A of Pt 6 of the Act. This is on the basis that at least some of the relevant provisions impermissibly infringe the freedom of communication on political or governmental matters implied in the Commonwealth Constitution.

The Special Case states the following questions for the opinion of the Full Court:

- Is Division 4A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication of governmental and political matters contrary to the Commonwealth Constitution?

- Is Division 2A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?
- Is s 96E of the Act invalid in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?

The parties written submissions are available here. The hearing transcripts are available here and here.

DECIDED CASES

A. HIGH COURT OF AUSTRALIA

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA V QUEENSLAND RAIL [2015] HCA 11 **(8 April 2015)**

Prior to the commencement of the *Queensland Rail Transit Authority Act* ('the Act'), Queensland Rail's operations were undertaken by Queensland Rail Ltd ('QRL'). Various of the plaintiffs were parties to two industrial instruments with QRL — the Queensland Rail Ltd Traincrew Collective Workplace Agreement ('the Traincrew Agreement') and the Queensland Rail Rollingstock Agreement ('the Rollingstock Agreement'), both made under the *Workplace Relations Act 1996* (Cth).

By the terms of the Act, the employees and assets of QRL were transferred to Queensland Rail (the defendant), which informed the plaintiffs that, by virtue of the Act, clause 22 of the Rolling Stock Agreement no longer had any effect and that the request to commence consultation pursuant to that clause was without foundation and also that the unions' request to negotiate for a new enterprise agreement to replace the Traincrew Agreement, in accordance with the *Fair Work Act 2009* (Cth), was not legally correct.

The plaintiffs, each an association or organisation of employees, brought a proceeding in the original jurisdiction of the High Court alleging that Queensland Rail and its employees were subject to federal industrial relations law. They alleged that Queensland Rail was a 'trading corporation' within the meaning of s 51(xx) of the Constitution and therefore, by the terms of the *Fair Work Act 2009* (Cth), it was an employer subject to the operation of that Act. They also alleged that provisions in the *Queensland Rail Transit Authority Act 2013* (Qld) and the Industrial Relations Act 1999 (Qld) which sought to apply Queensland industrial relations law to Queensland Rail and its employees were inconsistent with the *Fair Work Act 2009* (Cth), and to that extent inoperative by operation of s 109 of the Constitution.

Judgment

The High Court unanimously found that Queensland Rail was a trading corporation within the meaning of s 51(xx) of the Constitution and subject to the *Fair Work Act 2009* (Cth).

French CJ and Hayne, Kiefel, Bell, Keane and Nettle JJ observed that Queensland Rail had the 'full character of a corporation' since it was created as a separate right and duty bearing entity; could own, possess and deal with property; and had the characteristic of perpetual succession.[1] However, their Honours held that it was unnecessary to answer the question about whether Queensland Rail was a 'corporation', separately from the question of whether it was a 'trading corporation'.[2] Nonetheless, Queensland Rail was a 'trading corporation' since its functions included, among other things 'providing rail transport services' and 'providing services

1 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union Of Australia v Queensland Rail* [2015] HCA 11, [38].
2 Ibid [10], [45].

relating to rail transport services'.[3] Based on this conclusion, and by operation of s 109 of the Constitution, it followed that relations between Queensland Rail and its employees fell to be governed by the *Fair Work Act 2009* (Cth), and not by Queensland industrial relations law.[4]

In a separate judgment, Gageler J substantially agreed with the joint judgment but said it was necessary to answer the 'anterior question' of whether Queensland Rail met the constitutional description of a 'corporation'.[5] His Honour held that it did, since it was an entity established by law with capacity to own property, to contract and to sue.[6]

QUEENSLAND NICKEL PTY LIMITED V COMMONWEALTH [2015] HCA 12 **(8 April 2015)**

The *Clean Energy Act 2011* (Cth) ('the Act') and associated legislation required liable entities to report annually on their emissions and to surrender one 'carbon unit' for every tonne of carbon dioxide equivalent they emitted in that financial year. If a liable entity did not surrender enough carbon units to meet its emissions levels for a particular financial year, it was required to pay a 'unit shortfall charge'. While the Act was repealed on 1 July 2014, transitional provisions in the repealing statute (*Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth)) preserve the liability of liable entities in respect of unit shortfall charges levied in the 2012 and 2013 financial years.

At different times during the life of the scheme, carbon units could be purchased from the Clean Energy Regulator for a fixed price or through an auction conducted by the Regulator. Alternatively, an 'eligible person' could apply for free carbon units under the Jobs and Competitiveness Program. To be eligible, the person must have had operational control of a facility at which an 'emissions-intensive trade-exposed' activity identified in Sch 1 to the *Clean Energy Regulations 2011* (Cth) ('the *Regulations*') was carried out.

The Plaintiff (a 'liable entity' for the purposes of the Act) undertook the activity of the production of nickel at its nickel and cobalt refinery in Queensland. The only other significant nickel production in Australia was in Western Australia. Under Div 48 of Sch 1, the production of nickel was identified as an 'emissions-intensive trade-exposed' activity for the purposes of the Jobs and Competitiveness Program ('JCP'). When compared to nickel producers in Western Australia (who engaged in the same 'emissions-intensive trade-exposed' activity for the purposes of the *Regulations*), the Plaintiff produced a greater number of tonnes of carbon dioxide equivalence per tonne of equivalent nickel or cobalt. However, under the statutory formula set out in Sch 1 to the Regulations, each participant in a particular 'emissions-intensive trade-exposed' activity was entitled to the same number of free carbon units per unit of production irrespective of the amount of carbon dioxide equivalent emitted.

The Plaintiff argued that Div 48 of Sch 1 to the *Regulations* contravened s 99 of the *Constitution* because, in its legal and practical effect, it gave preference to nickel producers in Western Australia over nickel producers in North Queensland. It was contended that, as between the plaintiff and the nickel producers in Western Australia, there were differences in inputs, production processes and outputs and those differences were at least to some extent caused by 'differences in natural, business or other circumstances' as between the States in which each of the producers carried on its processing operations.[7] Furthermore the definition of 'production of nickel' in Div 49 Sch 1 made no allowance for those differences, such that it treated as alike activities which were not alike and thus mandated a different or unequal taxation outcome for nickel producers according to whether their processing operations were in Queensland or Western Australia.

In response, the Defendant argued that any difference in the amount of tax payable by the Plaintiff under the

3 Ibid [41].
4 Ibid [44].
5 Ibid [47]–[48].
6 Ibid [49].
7 *Queensland Nickel Pty Limited v Commonwealth* [2015] HCA 12,[51].

Act was a result of business decisions taken by the Plaintiff and not because the Act discriminated between States or parts of States.

Judgment

The High Court unanimously upheld the validity of the provisions of the Regulations that provided for the free issue of carbon 'units' to entities engaged in the production of nickel. The Court observed that in relation to taxation laws, it is not enough, in order to demonstrate discrimination in the sense required to attract s 99, to show only that a taxation law may have different effects in different States because of differences between circumstances in those States.[8] Nonetheless it found that, even allowing that there might be cases in which s 99 applies because a taxing Act produces different consequences because of 'differences between States in natural, business or other circumstances',[9] the differences between the plaintiff's and the Western Australian producers' inputs, production processes and outputs were not due to differences between States in natural, business or other circumstances.[10] This was since, among other things, the plaintiff's choice of inputs was based on 'economic considerations' which had nothing to do with the State in which it conducted its processing operations.[11]

DUNCAN V NEW SOUTH WALES; NUCOAL RESOURCES LTD V NEW SOUTH WALES; CASCADE COAL PTY LTD V NEW SOUTH WALES [2015] HCA 13 **(15 April 2015)**

The Independent Commission against Corruption (NSW) ('ICAC') commenced 'Operation Jasper' in November 2012. Among other things, that inquiry concerned the circumstances in which mining exploration licences were granted to NuCoal Pty Ltd and to two wholly-owned subsidiaries of Cascade Coal Pty Ltd of which, at the time of the grant, Mr Duncan was a director and shareholder. On 31 July 2013, ICAC issued a report entitled 'Investigation into the Conduct of Ian Macdonald, Edward Obeid Sr, Moses Obeid and Others'. The report concluded that various directors and shareholders of Cascade Coal and NuCoal had engaged in corrupt conduct within the meaning of the *Independent Commission against Corruption Act 1988* (NSW). In a further report, ICAC recommended the cancellation of exploration licences held by the wholly-owned subsidiaries of Cascade Coal and by NuCoal. On 31 January 2014, the NSW Parliament passed the *Mining Amendment (Operations Jasper and Acacia) Act 2014* (NSW) ('the Amendment Act'), which inserted Sch 6A into the *Mining Act 1992* (NSW). Among other things, Sch 6A purported to cancel the exploration licences issued to the Cascade Coal subsidiaries as well as an exploration licence that had been issued to NuCoal. Moreover, Sch 6A required the holders of cancelled licences to provide reports and exploration information to the NSW Government without compensation.

Mr Duncan, Cascade and NuCoal sought declarations of invalidity with respect to Sch 6A to the *Mining Act 1992* (NSW). The principal ground of challenge to the validity of the Amendment Act was that it involved an exercise of judicial power in the nature of a bill of pains and penalties. Such an exercise of judicial power, it was argued, was denied to the NSW Parliament by an implied limitation on State legislative power deriving from either Ch III of the *Constitution of Australia* or from an historical limitation on colonial legislative power. In the alternative, Duncan and Cascade submitted that the Amendment Act was not a 'law' within the competence of the NSW Parliament to enact under s 5 of the *Constitution Act 1902* (NSW), since Sch 6A, they contended, did not merely vary existing rights but destroyed them by way of punishment. Finally, Cascade and NuCoal argued that cl 11 of Sch 6A, which authorised certain officials to use information obtained under the Mining Act, was inconsistent with the *Copyright Act 1968* (Cth) and inoperative to the extent of the inconsistency because of s 109 of the Commonwealth Constitution.

8 Ibid [53], citing *Austin v The Commonwealth* (2003) 215 CLR 185.
9 Ibid [58].
10 Ibid [57]–[66].
11 Ibid [60].

Judgment

The High Court unanimously upheld the validity of the challenged provisions of Sch 6A.

First, the Court held that the Amendment Act was a law within the competence of the NSW Parliament because the grant of legislative power by s 5 of the *Constitution Act 1902* (NSW) implied no relevant limitation as to the content of an enactment of that Parliament.[12]

Secondly, the Amendment Act did not involve the exercise of judicial power, since the termination of a right conferred by statute is not a function that pertains exclusively to judicial power, even where the basis for termination is satisfaction of the occurrence of conduct which would constitute a criminal offence.[13] Nor was the Amendment Act akin to a bill of pains and penalties[14] since it exhibited neither the feature of being a legislative determination of guilt (since the NSW Parliament did not limit its consideration or link its conclusions to any specific finding in the ICAC reports)[15] or a legislative imposition of punishment upon such a determination (since the purpose of the Act was to promote integrity in public administration).[16] Because the Amendment Act was not an exercise of judicial power, it was unnecessary to consider the argument that such an exercise of power was denied to the NSW Parliament by an implied limitation on State legislative power.[17]

Finally, the Court held that it was unnecessary to address the contention concerning s 109 of the Commonwealth Constitution because it was not shown by the facts agreed in the special cases to be the subject of real controversy.[18]

B. UK SUPREME COURT

R (ON APPLICATION OF EVANS) V ATTORNEY GENERAL [2015] UKSC 21 **(26 MARCH 2015)**

The Freedom of Information Act 2000 ('FOIA 2000') enables members of the public to see documents held by many public bodies, subject to certain exemptions; the Environmental Information Regulations 2004 ('EIR 2004') enables members of the public to see documents containing 'environmental information', again subject to certain exemptions.

Mr Evans, a journalist, requested disclosure of communications passing between various government departments and the Prince of Wales ('the letters'). The requests were made under both FOIA 2000 and EIR 2004. The Departments refused to disclose the letters on the ground that they considered the letters exempt. Mr Evans complained to the Information Commissioner, who upheld the Departments' refusal. Mr Evans then appealed to the Information Tribunal, and the matter was transferred to the Upper Tribunal. The Upper Tribunal conducted a full hearing with six days of evidence and argument. It decided that many of the letters should be disclosed. The Departments did not appeal this decision, but the Attorney General issued a certificate under section 53(2) FOIA 2000 and regulation 18(6) EIR 2004 stating that he had, on 'reasonable grounds', formed the opinion that the Departments were entitled to refuse disclosure of the letters, and set out his reasoning. The purported effect of the certificate was to override a decision of the Upper Tribunal (a judicial body with the same status as the High Court).

Mr Evans issued proceedings to quash the Certificate on the grounds (1) that the reasons given by the Attorney General were not capable of constituting 'reasonable grounds' and/or (2) in so far as the letters were

12 *Duncan v New South Wales* [2015] HCA 13, [39].
13 Ibid [41].
14 Ibid [43].
15 Ibid [45].
16 Ibid [50].
17 Ibid [51].
18 Ibid [52].

concerned with environmental issues, the Certificate was incompatible with EU Council Directive 2003/4/EC ('the 2003 Directive'). The Divisional Court dismissed his claim. However, the Court of Appeal allowed his appeal on both grounds. The Attorney General appealed to the Supreme Court.

Judgment

Lord Neuberger (with whom Lord Kerr and Lord Reed agreed) held that section 53 FOIA 2000 does not permit the Attorney General to override a decision of a judicial tribunal by issuing a certificate merely because he, a member of the executive, considering the same facts and arguments, takes a different view from that taken by the tribunal. This would cut across two constitutional principles, namely that a decision of a court is binding between the parties and cannot be set aside, and that decisions and actions of the executive are reviewable by the courts, and not vice versa.[19] Clear words must be used if the statute is to have that effect, and section 53 failed to satisfy this requirement.[20] Lord Mance (with whom Lady Hale agreed) agreed that the Attorney General was not entitled to issue the certificate under section 53, but differed in his approach to the test for issue of a valid certificate.[21]

Lord Neuberger also held that the Certificate would in any event have been invalid insofar as it related to environmental information contained in the letters, since it was inconsistent with the provisions of article 6 of the 2003 Directive (which, among other things, provided that the decision of the judiciary is 'final') for there to be a right in the executive to override the judicial decision by the Upper Tribunal.[22] His Lordship noted that the 'same fundamental composite principle' justified dismissing the appeal on both grounds, namely that a decision of a judicial body should be final and binding and should not be capable of being overturned by the executive.

JAMES RHODES V OPO [2015] UKSC 32 **(20 MAY 2015)**

The Appellant ('the Father') wrote an autobiography, which he hoped to publish. It included accounts of the physical and sexual abuse and rape inflicted on him from the age of six by the boxing coach at his school. It went on to chart his subsequent resorting to drink, drugs, self-harm, attempts at suicide as well as his time in psychiatric hospital culminating in his redemption through learning, listening to and playing music.

The book refers to his marriage to his first wife ('the Mother'), and the child they had together ('the Son') to whom the book is dedicated. The Mother and Father divorced. By a residence and contact order, they agreed to use their best endeavours to protect the Son 'from any information concerning the past previous history of either parent which would have a detrimental effect upon the child's well-being'. The Son has been diagnosed with Asperger's syndrome, attention deficit hyperactivity order, dyspraxia and dysgraphia.

A draft of the book was leaked to the Mother. She was concerned that the book would cause psychological harm to the Son, now aged 11, if he came to read it. She brought proceedings on behalf of the Son, alleging that publication would constitute the tort of wilful infringement of another's personal safety and seeking an injunction prohibiting publication or the deletion of a large number of passages. She adduced evidence that the Son was likely to suffer severe emotional distress and psychological harm if exposed to material in the book because of his difficulties in processing information.

Bean J in the High Court dismissed the application for an interim injunction. The Court of Appeal reversed the High Court and granted an interim injunction restraining the Father from publishing certain information such as, for example, 'graphic accounts of … sexual abuse he suffered as a child'. The Father appealed to the Supreme Court.

19 *R (On Application Of Evans) v Attorney General* [2015] UKSC 21, [51]–[52].
20 Ibid [58]–[59].
21 Ibid [123]–[131].
22 Ibid [103] (Lord Neuberger); see also [147] (Lord Mance).

Judgment

The Supreme Court unanimously allowed the appeal. Writing for the Court, Lady Hale and Lord Toulson (with whom Lord Clarke and Lord Wilson agreed) held that the publication of the book was justified by the legitimate interest of the Father in telling his story, and the corresponding interest of the public in hearing his story.[23] In reaching this conclusion, the Court said that the freedom to report the truth 'is a basic right to which the law gives a very high level of protection', and that it was difficult to envisage circumstances in which speech which is not deceptive, threatening or abusive could give rise to liability in tort for wilful infringement of another's personal safety.[24]

Furthermore, by taking editorial control over the manner in which the appellant's story was expressed, the Court of Appeal failed to acknowledge that a right to convey information carries with it a right to choose the language in which it is expressed.[25] The Court also criticised the form of the injunction (in defining information forbidden to be published by the descriptive quality of being 'graphic') as lacking clarity and certainty, since what is sufficiently 'graphic' is a matter of impression.[26]

C. SUPREME COURT OF THE UNITED STATES

WILLIAMS-YULEE V FLORIDA BAR (USCC, No 13-1499, 29 April 2015)

Appeal from the Supreme Court of Florida

Florida is one of 39 States where voters elect judges at the polls. To promote public confidence in the integrity of the judiciary, the Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct, which provides that judicial candidates 'shall not personally solicit campaign funds … but may establish committees of responsible persons to raise money for election campaigns'. Yulee mailed and posted online a letter soliciting financial contributions to her campaign for judicial office. The Florida Bar disciplined her for violating a Florida Bar Rule requiring candidates to comply with Canon 7C(1), but Yulee contended that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. The Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailored to serve the State's compelling interest. Yulee appealed to the Supreme Court.

Judgment

In a 5:4 decision, the Supreme Court held that the First Amendment did not prevent enforcement of Canon 7C(1). The Court said that in the eyes of the public, a judge's personal solicitation could result in 'a possible temptation … which might not lead him to hold the balance nice clear and true', especially because most donors are lawyers and litigants who may appear before the judge they are supporting.[27] Chief Justice Roberts (joined by Breyer, Sotomayor and Kagan JJ, Ginsburg J concurring in the judgment) held that a State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.[28] However this test was satisfied, since Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary,[29] and it does so through means narrowly tailored to avoid unnecessarily abridging speech.[30] Regarding the latter requirement, the Court rejected Yullee's arguments that the Canon was either underinclusive (because it failed to restrict other speech equally

23 *James Rhodes v OPO* [2015] UKSC 32, [75].
24 Ibid [77].
25 Ibid [78].
26 Ibid [79].
27 *Williams-Yulee v Florida Bar* (USCC, No 13-1499, 29 April 2015), 11.
28 Ibid 8.
29 Ibid 9–12.
30 Ibid 12–20.

damaging to judicial integrity)[31] or too restrictive (because it failed to advance the State's compelling interest through the least restrictive means).[32] In reaching this conclusion, the Court observed that precedents applying to political (as opposed to judicial) elections were of little relevance since, unlike a politician, a judge is not to follow the preferences of her supporters.[33]

Scalia J (with whom Thomas J joined) dissented, holding that the Canon failed to narrowly target concerns about judicial impartiality or its appearance, since it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court, or when candidates ask for contributions in messages that do not target any listener in particular.[34] Justices Kennedy and Alito also dissented, for largely the same reasons.

ZIVOTOFSKY V SECRETARY OF STATE (USCC, NO 13–628, JUNE 8 2015)

Appeal from the US Court of Appeals for the DC Circuit

Zivotofsky was born to US citizens living in Jerusalem. Pursuant to §214(d) of the Foreign Relations Authorization Act, his mother asked American Embassy officials to list his place of birth as 'Israel' on, among other things, his passport. Section 214(d) states for 'purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel'. The Embassy officials refused to list Zivotofsky's place of birth as 'Israel' on his passport, citing the Executive Branch's longstanding position that the US does not recognize any country as having sovereignty over Jerusalem. Zivotofsky's parents brought suit on his behalf in federal court, seeking to enforce §214(d). The DC Circuit held the statute unconstitutional, concluding that it contradicts the Executive Branch's exclusive power to recognize foreign sovereigns. Zivotofsky appealed to the Supreme Court.

Judgment

In a 6:3 decision, the Supreme Court held that because the power to recognize foreign states resides in the President alone, §214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem.[35] Writing for the Court, Justice Kennedy held that the President's exclusive power of recognition is justified by both considerations of text and structure (since the Reception Clause directs that the President 'shall receive Ambassadors', an act tantamount to recognition of a foreign state)[36] and 'functional considerations' (namely, that the Nation must 'speak … with one voice', and the President is better positioned than Congress to perform this role).[37] It followed that Congress may not pass a law forcing the President to contradict his prior recognition decisions.[38]

In partial concurrence, Justice Thomas held that adhering to the Constitution's allocation of powers leads to the conclusion that §214(d) can be constitutionally applied to consular reports of birth abroad, but not passports.[39] Zivotofsky's challenge to the designation of his place of birth on his passport failed because the President has residual foreign affairs authority to regulate passports, and there is no congressional power that justifies §214(d)'s application to passports.[40]

31 Ibid 12–16.
32 Ibid 16–20.
33 Ibid 10–11.
34 Ibid 7–9.
35 *Zivotofsky v Secretary Of State* (USCC, No 13–628, 8 June 2015) 26–9.
36 Ibid 7–11.
37 Ibid 11–14.
38 Ibid 26–9.
39 Ibid 31.
40 Ibid 25.

In dissent, Justice Scalia (joined by Roberts CJ and Alito J) held that §214(d) has nothing to do with the power to recognize foreign states, since it does not require the Secretary of State to make a formal declaration about Israel's sovereignty over Jerusalem.[41] Since the powers of Congress extend to the grant of a passport and a birth report, Congress may also require these papers to record his birthplace as 'Israel' since birthplace specification 'promotes the document's citizenship-authenticating function'.[42]

D. SUPREME COURT OF INDIA

DEVIDAS RAMACHANDRA RULJAPURKAR V STATE OF MAHARASHTRA (CRIMINAL APPEAL NO 1179 OF 2010)

Article 19(1)(a) of the Indian Constitution provides that all citizens shall have the right to freedom of speech and expression. Article 19(2) provides that sub-clause (a) does not affect laws that impose reasonable restrictions in the interests of public decency and morality. Section 292 of the Indian Penal Code ('IPC') prohibits, among other things, putting into circulation obscene writings.

A member of the Patit Pawan Sangathan lodged a complaint with the police against the author and publisher of a poem, 'Gandhi Mala Bhetala' ('I met Gandhi') published in 'Bulletin' magazine and meant for private circulation amongst members of the All India Bank Association Union. The poem was said to be 'loathsome and vulgar' in its portrayal of Gandhi. The complaint alleged offences under ss 153A, 153B (causing disharmony between classes) and 292 of the IPC.

The Chief Judicial Magistrate held that no case for offences under ss 153A and 153B was made out, but declined to discharge the accused in respect of the offences under Section 292, IPC. The High Court of Bombay dismissed an appeal from the Magistrate's order. The issue for the Supreme Court was whether the poem could found a charge under s 292 of the Indian Penal Code against the author, publisher and printer of the poem, and more precisely, whether a poem can use the name of a 'historically respected personality' by way of an allusion or symbol in an obscene manner.[43]

Judgment

In a decision by a two-Judge bench, the Supreme Court held that the High Court was correct in holding that the poem could found a charge under s 292 of the IPC.[44] Drawing on the 1957 US Supreme Court decision in *Roth v United States*,[45] the Court identified the appropriate test for obscenity as the contemporary community standards test,[46] namely 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.'[47] According to the Court, this test is applicable with 'more rigour' where the obscene speech concerns a 'historically respectable personality'.[48]

In this case, the Court said that what could otherwise pass the contemporary community standards test failed to pass the test where, as on the facts before it, a historically respectable figure (here, Gandhi) was portrayed as doing obscene acts.[49] In reaching this conclusion, the Justices emphasized that the freedom of speech and expression, as enshrined under Article 19(1)(a) of the Constitution, was not an absolute right but

41 Ibid 6.
42 Ibid 3.
43 *Devidas Ramachandra Ruljapurkar v State Of Maharashtra* (Criminal Appeal No 1179 Of 2010),[2].
44 Ibid[105].
45 (1957) 354 US 476, cited at ibid [19]–[20].
46 Ibid [59].
47 Ibid [20].
48 Ibid [104]–[105].
49 Ibid.

instead subject to reasonable restrictions allowed for by Article 19(2), of which section 292 of the IPC was an example.[50]

E. CONSTITUTIONAL COURT OF SOUTH AFRICA

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE V SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE [2014] ZACC30 **(30 October 2014)**

Section 231(4) of the South African Constitution provides that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation'. The *Implementation of the Rome Statute and International Criminal Court Act 2002* ('ICC Act') enacts the Rome Statute into national legislation. Schedule 1 of the ICC Act includes the crime of torture as a 'national priority offence'. Section 17D of the South African Police Services Act provides that the function of the South African Police Services ('SAPS') includes the investigation of national propriety offences. Section 232 of the South African Constitution states that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

In March 2008, the Southern African Human Rights Litigation Centre (submitted to the Priority Crimes Litigation Unit of the National Prosecuting Authority ('NPA') a dossier documenting the alleged torture of members of the Movement for Democratic Change by Zimbabwean officials in Zimbabwe. The respondents requested that the NPA investigate these crimes, as the respondents believed the NPA and the SAPS had a duty to do so under the ICC Act and South Africa's international law obligations. In June 2009, the Acting National Director of Public Prosecutions informed the respondents that SAPS did not intend to initiate an investigation.

The respondents applied to the North Gauteng High Court, Pretoria for an order setting aside the decision not to investigate. The High Court granted the order. The Supreme Court of Appeal dismissed an appeal by the National Commissioner of the SAPS and the Acting National Director of Public Prosecutions. The National Commissioner of the SAPS appealed to the Constitutional Court.

The issues before the Constitutional Court were:

- whether, in the light of South Africa's international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity committed beyond South Africa's borders; and,
- if so, what circumstances would trigger this duty.

Judgment

In a unanimous judgment, the Court dismissed the appeal. Writing for the Court, Majiedt AJ held that the SAPS must investigate the complaint because under the Constitution, the ICC Act and South Africa's international law obligations, the SAPS has a duty to investigate crimes of torture allegedly committed in Zimbabwe.[51] This was since the crime of torture had been 'domesticated' into South African law by the ICC Act, and was part of the law of the Republic under s 232 of the Constitution due to the status of torture as a 'peremptory norm of customary international law'.[52] However, the duty to investigate was triggered only in instances where the country in which the crimes occurred is unwilling or unable to investigate[53] and the requirement that an investigation into an international crime committed elsewhere is 'reasonable and

50 Ibid [72], [104].
51 *National Commissioner Of The South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC30 [55], [60].
52 Ibid [77].
53 Ibid [61]–[62].

practicable'.[54]

The Court said that in this instance, there was no evidence that Zimbabwean authorities were willing or able to pursue an investigation.[55] Furthermore it was reasonable and practicable for the SAPS to investigate because of the likelihood the accused would be present in South Africa at some point[56] and the reasonable possibility that SAPS would gather evidence satisfying the elements of the crime of torture.[57] Therefore, the Court ordered that the SAPS had to investigate the complaint laid by the respondents.[58]

F. FEDERAL CONSTITUTIONAL COURT OF GERMANY

THE 'NEW' GERMAN TEACHER HEADSCARF DECISION (AVAILABLE HERE IN GERMAN, ENGLISH LANGAUGE PRESS COVERAGE HERE)

Article 4(1) of the German Basic Law provides that '[f]reedom of faith and conscience … shall be inviolable'. Article 4(2) provides that '[t]he undisturbed practice of religion shall be guaranteed'.

The state legislature of the State of North Rhine-Westphalia enacted a provision in its statute governing public schools that prohibited political, religious, or other ideological expressions by public school teachers if these expressions have the potential to endanger or disturb state neutrality or the peace at school. In particular, these outward expressions are impermissible if they could suggest to students and parents that the teacher objects to human dignity, equality, fundamental rights or the democratic order. Finally, the provision also declared the expression of Christian and Western teachings, cultural values, and traditions to be permissible.

Two teachers who were employed in the North Rhine-Westphalian public school system challenged the provision in a constitutional complaint after adverse rulings in the labor courts. The first teacher had been asked by school administrators to stop wearing her headscarf at school. She complied and instead started wearing a pink Basque-style beret covering her hair and ears, and a matching turtleneck sweater. School administrators then issued a disciplinary warning formally threatening to terminate her employment if she did not stop wearing a religiously motivated head covering. The second teacher was fired for refusing to stop wearing her headscarf at school.

Judgment

The Federal Constitutional Court, in a 6:2 decision via its First Senate, held that the state law provisions have to be narrowly construed in light of Article 4 of the Basic Law to ensure their constitutionality. The state labor courts and the Federal Labor Court, which initially ruled on the teachers' challenges, failed to do so. In light of Article 4, the Federal Constitutional Court did not deem the abstract possibility for endangering state neutrality or the peace at school a sufficient basis to issue a blanket ban on headscarves. Only a concrete danger to state neutrality or the peace at school would justify prohibiting the exercise of a binding religious command. The Court explained that the state legislature did have a legitimate goal in securing peace at school and state neutrality in matters of religion. However, the state-wide prohibition of religious expression by outward appearance — wearing a headscarf — was disproportionate. There must be some concrete danger to the values the state is trying to protect. While such a concrete danger might materialize, it was absent in this case. Thus, the Court reversed and remanded for further proceedings in light of this construction of the state law provision.

The full summary and analysis of the decision is available here.

54 Ibid [63].
55 Ibid [62].
56 Ibid [79].
57 Ibid [78].
58 Ibid [84].

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