CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES

NEWSLETTER NUMBER 27 / MARCH 2015

Welcome to the twenty seventh 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

The New Year at CCCS has seen the arrival of new colleagues and new PhD students. We welcome Dr Lulu Weis, now in a permanent role after three years as a Post-Doctoral McKenzie Fellow who will be teaching Property, Constitutional Law and continuing as convenor of the Legal Theory Workshop; Dr Kristen Rundle, a legal theorist and administrative law scholar, whose has previously taught at the London School of Economics and the University of New South Wales and Dr Scott Stephenson who has recently completed doctoral work in comparative constitutional law at Yale Law School. They each bring a wealth of experience and contribute new and exciting perspectives to the work of CCCS.

In addition, we welcome Carlos Arturo, Anne Carter, Anna Dziedzic, Troy Keily as new PhD students. (Their full profiles and research interests are available later in this newsletter). We are delighted to have two new visitors to the Centre. We welcome Dr Patrick Emerton from Monash Law School who has joined us for a semester and Andrew McLeod from the Oxford-Burma Law Programme. We also bid farewell to Associate Professor Ridwanul Hoque from the University of Dhaka in Bangladesh has been with us for six months as an Endeavour Fellow and look forward to future collaborations with him.

During 2015, CCCS will continue its many and varied collaborations with Law Schools throughout the world. In February CCCS members Lulu Weis, Scott Stephenson and Anna Dziedzic met at the Hebrew University of Jerusalem for a joint workshop on ‘The ‘Soft’ and the ‘Fuzzy’ in Public and International Law’. The workshop, convened by Cheryl Saunders and our Melbourne Law School colleague Jurgen Kurtz, is the first in a series of collaborations with colleagues at the Hebrew University. Another collaboration will come to fruition later this year with the third in a series of collaborative workshops with the laws schools of Auckland University and the University of Witwatersrand. On 9 and 10 December this year, scholars from these three schools will meet in Melbourne for a workshop on the theme of Separation of Powers.

The CCCS will also be hosting a major public constitutional law conference 23 and 24 July. This conference, which follows highly successful conferences in 2009 and 2012, each of which provided an opportunity for reflection on constitutional questions of enduring significance. The Conference will open at 4pm on 23 July with a public event “A Conversation with Justice Hayne”. The Hon. Justice Hayne will reflect on his years on the High Court in a conversation with Professor Carolyn Evans, Dean of Melbourne Law School. The conference will also feature a panel dedicated to considering “The Contribution of the Hon. Justice Hayne AC to Australian Public Law”. Papers will be delivered by leading practitioners and academics including Professor Cheryl Saunders AO, Professor Jeremy Gans, the Hon. Justice John Basten (Court of Appeal, Supreme Court of New South Wales), Professor Michael Crommelin AO, Professor Simon Evans, Professor Rosalind Dixon (UNSW Law School), Associate Professor Benjamin Berger (Osgoode Hall Law School), the Hon. Justice Nye Perram (Federal Court of Australia), the Hon. Justice Geoffrey Nettle (High Court of Australia), Dr Stephen Donaghy QC, Frances Gordon and Kristen Walker SC. For more information on the Centre and the Conference, please see www.law.unimelb.edu.au/ccc

Finally, we extend our sincere congratulations to at CCCS Advisory Board member Justice Stephen McLeish on his recent appointment to the Court of Appeal of Victoria.

Professor Adrienne Stone
Director, CCCS
For more information about CCCS:

Please visit our website: [http://law.unimelb.edu.au/cccs](http://law.unimelb.edu.au/cccs)
Or follow us on twitter [@CCCSMelbourne](https://twitter.com/CCCSMelbourne)

Or follow our members:
Adrienne Stone [@stone_adrienne](https://twitter.com/stone_adrienne)
Cheryl Saunders [@cherylsaunders1](https://twitter.com/cherylsaunders1)
Scott Stephenson [@s_m_stephenson](https://twitter.com/s_m_stephenson)

Centre members also blog at:
The IACL Blog: [http://iacl-aidc-blog.org](http://iacl-aidc-blog.org)
**Centre Update**

**Anna Dziedzic** presented a paper on ‘Fuzzy Regulation of Executive Spending: An Australian Case Study’ at a Joint Research Workshop of the University of Melbourne and the Hebrew University of Jerusalem on “The “Soft” and the “Fuzzy” in Public and International Law’, hosted by Hebrew University Jerusalem, 17-18 February 2015. In addition, together with Professor Adrienne Stone and Alexandra Harrison-Ichlov, prepared a submission on freedom of speech to the Australian Law Reform Commission’s Inquiry into Traditional Rights and Freedoms. Also, Anna together with Professor Cheryl Saunders, provided coding information on Australia for Varieties of Democracy (V-Dem), a global project which measures democracy across the world, based in University of Gothenburg.

During this period, Anna published the following:
- an update to Title 19.3 of The Laws of Australia on the Executive

**Coel Kirkby** has spent most of 2014 since joining as a McKenzie Fellow, preparing his monograph and submitted a book proposal, provisionally entitled ‘The Birth of the Native in the Late British Empire, c. 1830-1900’. Coel has also co-founded the interdisciplinary Indian Ocean Research and Action Network at the University of Melbourne to foster engagements between innovative projects focusing on societies along the Indian Ocean rim, highlighting connections and rethinking the role of Australia in the region.

During this period, Coel published:

In addition, Coel presented the following:
- ‘The Invention of the “Native” and Reconstitution of the Late British Empire’, Faculty Research Seminar Series, Melbourne Law School, 22 September 2014

**Kristen Rundle** published the following during this period:

Commentaries:


During this time, Cheryl was appointed as:

- Senior Technical Advisor for the Constitution Building Program at International IDEA
- Member of the Advisory Board of the Yeoh Tiong Lay Centre for Politics, Philosophy and Law, King’s College, London

Cheryl’s teaching during this time including Comparative Constitutional Law in the Melbourne Law Masters from 25-31 March and commencing supervision of 5 new PhD students on subjects broadly relevant to the interests of the CCCS.


Adrienne Stone was elected as Vice-President of the Australian Association of Constitutional Law to serve from 2015-2017. She continues as First Vice President of the International Association of Constitutional Law and in that role has been involved with the launch of the new IACL-AIDC Blog (http://iacl-aidc-blog.org) and will serve as English language editor. She attended the UNSW Comparative Constitutional Law Forum on 9 December 2014 and provided a commentary on Mark Tushnet’s paper “Illiberal Constitutions”; delivered a paper on the ‘Freedom of Speech in the aftermath of Eatock v Bolt’ at the Human Rights Commission’s conference RDA@40 a conference to mark the 40th Anniversary of the Racial Discrimination Act 1975; and chaired the Judges and the Academy Seminar on 27 February 2015, held at Melbourne Law School.


Lulu Weis attended the Joint Hebrew University of Jerusalem/Melbourne Law School Workshop on “‘Soft’ and ‘Fuzzy’ Law in International and Domestic Public Law” held at the Hebrew University Jerusalem from 16-18 February and presented a paper titled, “Do Constitutional Lawyers Need a Concept of ‘Soft Constitutional Law?’”. Lulu also published an article in the Canadian Journal of Law and Jurisprudence (which came out in the January 2015 volume) titled, “Resources and the Property Rights Curse”, available here: http://dx.doi.org/10.1017/cjlj.2015.23.

Margaret Young had the following publications during this period:

CCCS New Graduate Research Students

Carlos Arturo
Carlos holds a Licentiate in Judicial and Social Sciences (cum laude) from Universidad Rafael Landivar, Guatemala, and a Master in Public and International Law from the Melbourne Law School. He is a registered Attorney and Notary from the College of Attorneys and Notaries of Guatemala, and worked as an Analyst and State Council for the Guatemalan Presidential Commission on Human Rights within the Project of Historical Memory and Human Rights for Peace of the United Nation Development Programme. In his line of work, he provided the Guatemalan Government with advisory and analysis in the response, application and implementation of Cautionary Measures solicited by the Inter-American Commission on Human Rights and Provisional Measures ordered by the Inter-American Court of Human Rights. Carlos Arturo is now doing his PhD at the Law School, researching on topics regarding the Central American Integration System, Global Constitutionalism and Subsidiarity.

Anne Carter
Anne is a PhD Candidate and Teaching Fellow at Melbourne Law School. She has worked at the Crown Solicitor’s Office of South Australia, practising predominantly in constitutional and administrative law. Anne holds first class honours degrees in History and Law from the University of Adelaide as well as the BCL and MPhil from the University of Oxford. She has previously worked as an Associate in the Supreme Court of South Australia and the Federal Court, and as the Researcher to the Victorian Solicitor-General. Anne’s research concerns proportionality in Australian constitutional law, with a particular focus on the role of fact-finding in proportionality reasoning.

Anna Dziedzic
Anna commenced her PhD in January 2015 under the supervision of Cheryl Saunders and Adrienne Stone. Her research will consider the interaction between written constitutions and Indigenous law in Pacific Island states. Her PhD research is supported by a Human Rights Scholarship awarded by the University of Melbourne.

Anna has been a member of CCCS since 2012, working with Cheryl Saunders on an ARC project entitled ‘Meeting the Challenges of Constitutional Comparison’. Anna completed an MA in Human Rights at University College London in 2011, and holds an Arts/Law degree from the Australian National University with First Class Honours in Law and a University Medal in English. Prior to joining Melbourne Law School she worked at the Department of the Prime Minister and Cabinet and the Australian Law Reform Commission, as well as an Associate to Justice Lindgren at the Federal Court.

Troy Keily
Troy lives in (and for) Richmond with his wife Laura, and their two young children, Nadia and Gabriel. Troy also lectures in corporations law and international commercial law in the law school at Deakin University. He completed his masters degree at Melbourne Law School several years ago and is very excited to be back to start his PhD. His research question is a work in progress, but broadly he is interested in the changing role played by our courts in foreign affairs. To this end Troy will examine the role played by the act of state doctrine and non-justiciability in limiting/permitting judicial review in matters that impact on Australia’s foreign relations. Troy is supervised by Professor Cheryl Saunders and Professor Richard Garnett.
CCCS Visitors

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

**Associate Professor Ridwanul Hoque** (1 October 2014 – 31 March 2015)
*Faculty of Law, University of Dhaka, Bangladesh*

Dr Ridwanul Hoque is Associate Professor of Law at the University of Dhaka, and formerly taught in the Department of Law at the University of Chittagong in Bangladesh. Dr. Hoque was a Commonwealth Scholar at the University of London's School of Oriental and African Studies (SOAS) where he studied for his Ph.D. in Comparative Public Law. He studied Law at the University of Chittagong for his LL.B. Honours and LL.M., and went to Cambridge where he studied for an LL.M. in International Commercial Law. He was a Fulbright Visiting Scholar at Cornell Law School (October 2013 to June 2014), and was a Visiting Scholar at the CCCS, Melbourne Law School, in 2013 (March-June). Dr. Hoque has published in British, American, Singaporean, Indian, Pakistani and Bangladeshi law journals. He is the author of a book titled *Judicial Activism in Bangladesh: A Golden Mean Approach* (2011)

**Dr Patrick Emerton** (2 March – 27 July 2015)
*Faculty of Law, Monash University, Australia*

Dr Patrick Emerton is a Senior Lecturer in the Monash University Faculty of Law and an Associate in the Castan Centre for Human Rights law. His research interests include constitutional, political and human rights theory, international justice, just warfare and terrorism. In 2010 the *Federal Law Review* awarded him the inaugural Leslie Zines Prize for Excellence in Legal Research. His recent work includes (with Mark Davison) "Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco", and (with Toby Handfield) the entry on humanitarian intervention in the forthcoming *Oxford Handbook of the Ethics of War*. He is currently working on the ARC-funded research project "Construing Statutes", using analytic philosophy of language to understand how statutes generate legal content.
Forthcoming Events


Speakers: Brett Walker SC, Senator Scott Ludlam, Professor Ben Saul and Dr Patrick Emerton
Chair: Professor Adrienne Stone
Wednesday 29 April 2015, 5.30-7pm
Theatre G08, Ground Floor, Melbourne Law School

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 are hosting a panel discussion on the wide ranging changes that have been implemented as well as those that are still being contemplated. The panel will consist of four leading experts on security issues and counter-terrorism laws.

Constitutional Law Conference 2015
Thursday & Friday 23 & 24 July 2015

On behalf of the Centre for Comparative Constitutional Studies, I invite you to register for a major conference on constitutional law to be held at Melbourne Law School on 23 and 24 July 2015.

The Conference will open at 4pm on 23 July with a public event “A Conversation with Justice Hayne”. The Hon. Justice Hayne will reflect on his years on the High Court in a conversation with Professor Carolyn Evans, Dean of Melbourne Law School.

The conference will also feature a panel dedicated to considering “The Contribution of the Hon. Justice Hayne AC to Australian Public Law”.

The conference papers will focus on themes of recent and continuing significance in constitutional law including the following:

- Constitutional Dimensions of Statutory Interpretation;
- Contracting and Spending: Executive Power after Williams; and
- Proportionality in Constitutional Law.

Papers will be delivered by leading practitioners and academics including Professor Cheryl Saunders AO, Professor Jeremy Gans, the Hon. Justice John Basten (Court of Appeal, Supreme Court of New South Wales), Professor Michael Crommelin AO, Professor Simon Evans, Professor Rosalind Dixon (UNSW Law School), Associate Professor Benjamin Berger (Osgoode Hall Law School), the Hon. Justice Nye Perram (Federal Court of Australia), the Hon. Justice Geoffrey Nettle (High Court of Australia), Dr Stephen Donaghy QC, Frances Gordon and Kristen Walker SC.

For more information on the Centre and the Conference, please see www.law.unimelb.edu.au/cccs

I hope to see you in Melbourne for this major event.

Professor Adrienne Stone
Director, Centre for Comparative Constitutional Studies
PROGR A M

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)

6.30 for 7pm 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)

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)

2015 Constitutional Law Conference and Dinner Registration Details

Registration Fees (General)
Conference and Dinner | $564
Conference Only | $449
Conference Dinner Only | $115 per person

Early Bird Discount | 20% off Conference Only price (Valid from 16 March - 1 May 2015)

Registration and payment available at:
www.law.unimelb.edu.au/cccs
Payment forms accepted: Visa, Mastercard or cheque
Registration closes 1 July 2015
No refunds can be issued for cancellations after 1 July 2015
Registration Enquiries:
Tel: (03) 8344 1011
Email: law-cccs@unimelb.edu.au

www.law.unimelb.edu.au/cccs
Recent Events

CREEL/ CCCS Seminar: After the Scottish Referendum: The “Enduring Settlement” and its Implications for the Energy Industries
Speaker: Professor Terence Daintith
Tuesday 17 March 2015
Room 605, Level 6, Melbourne Law School

Despite the rejection of independence, the Scottish referendum has led to proposals for substantial enlargement of the powers devolved to the Scottish government, including control of onshore oil and gas. This paper looked at the implications and possible further development of the devolution proposals, in the context of the unstable political situation that is expected to follow from the 2015 UK General Election.

Terence Daintith is a Professorial Fellow at the Institute of Advanced Legal Studies, University of London, where he was Director from 1988 to 1995. Before that he taught at the Universities of California (Berkeley), Edinburgh and Dundee, and was a research professor at the European University Institute in Florence, Italy. His main research interests are in the fields of oil and gas law, regulation, and constitutional law. He is co-editor of Daintith, Willoughby and Hill's multi-volume United Kingdom Oil and Gas Law, the basic reference in the field, and was founding editor of the Journal of Energy and Natural Resources Law. From 1994 until 2002 he was Dean of the University of London's School of Advanced Study, grouping its research institutes in the humanities and social sciences, and he now teaches oil and gas law at the University of Western Australia, and energy law and regulation at Melbourne.

ALC/ CCCS Seminar: Constitutional Transition from Military Rule in Burma/Myanmar: Beyond a Narrative of Linear Progress
Speaker: Andrew McLeod
Friday 13 March 2015
Room 609, Level 6, Melbourne Law School

The prospect of Myanmar's emergence from military rule has intrigued constitutional scholars by its apparent improbability. After two decades of near-complete isolation, a council of generals led the adoption of a new constitution in 2008; ceded power to a quasi-civilian regime in 2011; permitted the establishment of a constitutional reform process in 2013 with the stated aim of supporting stronger multi-party democracy and greater local autonomy; and in October 2014 confirmed multi-party elections for the end of 2015. The pace of these reforms, and the absence to date of concrete outcomes, has prompted suggestions that the transition is a sham and that the trajectory of change has reversed. Skeptics also note that these constitutional developments are taking place against the backdrop of a frustrated peace process that seeks to resolve decades-long armed conflicts between the military and ethnic groups.

This paper suggests a fresh reading of Myanmar's transition from military rule, offering tentative lessons for theorists of
constitutional transitions. The linear approach to analysing such transitions, marking progress in terms of the military's gradual withdrawal from political positions leading to genuine acceptance of full civilian control, is insufficient to assess Myanmar's ongoing constitutional reform process. I argue that understanding the transition underway in Myanmar requires looking further back in the country's constitutional history to reveal a more complex set of legal and political factors. The case of Myanmar is better explained in terms of a long planned and carefully executed constitutional and political transformation, where events are often orchestrated by the same actors who ruled before the transition and where seemingly spontaneous outbursts of protest are rooted in decades-old conflicts. I argue that a closer, contextualised reading of constitutional dynamics in Myanmar offers useful insight for studies of constitutional transitions, highlighting reference points, actors and dynamics worthy of closer attention when making sense of transitions involving the military.

Andrew McLeod is a research fellow in law at the University of Oxford and directs the Oxford-Burma Law Programme. For the past two years, he has led law and higher-education projects in Myanmar and served as an adviser on the constitutional reform process. He provides analysis on South-east Asia as region head for the global strategic consultancy firm Oxford Analytica. His commentary regularly features across the BBC, Reuters and Agence France-Presse. Andrew was previously a lecturer in constitutional law at the University of Sydney and special adviser to the H C Coombs Policy Forum, within the Crawford School of Public Policy at the Australian National University. He served as associate to the chief justice of Australia and worked as a senior analyst and speechwriter within the Australian Department of the Prime Minister and Cabinet. He holds degrees in law and chemistry from the University of Oxford and the University of Sydney.

CCCS Seminar: Defending Constitutionalism Through Public Interest Litigation in Bangladesh: A Sceptical View
Speaker: Associate Professor Ridwanul Hoque
Tuesday 10 March 2015
Room 608, Level 6, Melbourne Law School

The paper sought to critically assess the potency of the strategy of 'public interest litigation' (PIL) in defending constitutionalism in Bangladesh. The PIL-jurisprudence of the Indian Supreme Court, entrenched since the early 1980s, is rightly considered the most outstanding contribution of that institution to constitutional and adjudicative theories. The Indian-style PIL travelled to Bangladesh during the late 1990s. From the functionality point of view, the PIL-tool can be used to protect constitutional rights of various deprived segments of society, or to realise the wider principles of constitutionalism such as public participation, judicial independence, free election, and so on. This paper limited its focus on the instrumentality of PIL in the protection of constitutionalism in Bangladesh. While Dr Hoque tended not to belong to the camp of critics of PIL's moving away from its original ideal of protecting the rights of the desperately poor and socially disadvantaged sections of the public, he argued that PIL-strategy has delivered much less than it initially promised for constitutionalism. One potential reason is the increasing misuse of PILs purportedly involving issues of constitutionalism. The analyses were based on some select decisions of the Supreme Court of Bangladesh pertaining to judicial review of structural issues.

Dr Ridwanul Hoque is Associate Professor of Law at the University of Dhaka, and formerly taught in the Department of Law at the University of Chittagong in Bangladesh. Dr Hoque was a Commonwealth Scholar at the University of London's
School of Oriental and African Studies (SOAS) where he studied for his Ph.D. in Comparative Public Law. He studied Law at the University of Chittagong for his LL.B. Honours and LL.M. and went to Cambridge where he studied for an LL.M. in International Commercial Law. He was a Fulbright Visiting Scholar at Cornell Law School (October 2013 to June 2014) and was a Visiting Scholar at the CCCS, Melbourne Law School, in 2013 (March - June). Dr Hoque has published in British, American, Singaporean, Indian, Pakistani and Bangladeshi law journals. He is the author of a book titled Judicial Activism in Bangladesh: A Golden Mean Approach (2011).

Judges and the Academy Seminar: Disagreement About Values: Courts, Legislatures and the Reform of Tort Law (Invitation Only)

Co-hosted by the Centre for Comparative Constitutional Studies

Speakers: Professor Peter Cane and The Hon. Margaret Beazley AO
Friday 27 February 2015
Room G29, Ground Floor, Melbourne Law School
MLS LEGAL THEORY WORKSHOP

The Legal Theory Workshop series meets regularly to discuss unpublished works-in-progress on a variety of theoretical and normative issues in the law. Unless otherwise noted, all workshop meetings will be held on Fridays, from 12.30pm-2.30pm

Guests presenters for Semester One 2015 (2 March – 31 May 2014) includes:

27 March 2015
Dr Hedi Viterbo (SOAS), ‘Child-Adult Separation: Links, Analogies, and Continuities’
Commentator: Dr Coel Kirkby (Melbourne)
* Workshop co-sponsored by the Institute for International Law and the Humanities

24 April 2015
Mr Josh Paine (Melbourne - PhD Candidate), ‘Interpretive Communities in International Law: Understanding Legal Meaning, Regimes and Interpretive Power’
Commentator: Associate Professor Jürgen Kurtz (Melbourne)

8 May 2015
Professor Tony Coady (Melbourne - Philosophy), ‘Terrorism: the Hunt for its Distinctive Significance’
Commentator: Dr Anna Hood (Melbourne)

22 May 2015
Dr Patrick Emerton (Monash), 'Legislation as Stipulation'
Commentator: TBA

5 June 2015
Professor Liam Murphy(NYU), 'Private Law and Social Illusion: The Shackles of Everyday Libertarianism'
Commentator: Professor Matthew Harding (Melbourne)
* Workshop co-sponsored by the Obligations Group

Thursday 23 July 2015
Special Event: Workshop on Constitutional Theory, co-hosted by the Centre for Comparative Constitutional Studies and the Australian Society of Legal Philosophy. Details TBA.

For more information about the series, instructions for joining the LTW mailing list, please click here. The workshop is organised by Dr Lulu Weis and is supported by CCCS.
Melbourne Law Masters 2015

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

General Government Law:

**Australians Detained Abroad LAWS70407** (11-17 February)
Professor Tim McCormack (Melbourne Law School)
Lt Colonel (Ret) Dan Mori (Shine Lawyers)

**Comparative Constitutional Law LAWS90011** (25-31 March)
Laureate Professor Cheryl Saunders AO (Melbourne Law School)
Professor Jiunn-rong Yeh (National Taiwan University, Taiwan)

**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)

**Judicial Power in Australia LAWS70424** (18-24 February)
Mr Mark Moshinsky QC (Victorian Bar)
Dr Stephen Donaghey QC (Victorian Bar)

**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**

**A. HIGH COURT OF AUSTRALIA**

*CPCF v Minister for Immigration and Border Protection* [2015] HCA 1

On 29 June 2014, an Indian vessel was intercepted by an Australian vessel in Australia’s contiguous zone, outside its territorial waters. The Plaintiff, a Tamil Sri Lankan, was detained along with 156 other Tamils under the *Maritime Powers Act 2013* (Cth) (‘MPA’). When the Indian vessel became unseaworthy, the detainees were transferred to the Australian vessel. Under 72(4) of the *Maritime Powers Act*, a maritime officer may detain a person and take that person, or cause that person to be taken, to a place inside or outside Australia’s migration zone. On 1 July 2014, the National Security Committee of Cabinet determined that the detainees were to be taken to India. Steps were taken to implement that decision – including diplomatic negotiations with India – but ultimately the decision could not be implemented and, on 27 July 2014, the detainees were taken to the Cocos Islands. Upon arrival, they were detained under s 189(3) of the *Migration Act 1958* (Cth).

The Plaintiff challenged the lawfulness of his detention outside of Australia and Australia’s contiguous zone, and sought damages for false imprisonment.

The questions asked by the parties in the special case were as follows.

1. Did s 72(4) of the *MPA* authorise a maritime officer to detain the Plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia (being India) a. whether or not the Plaintiff would be entitled to the benefit of the non-refoulement obligations under the law of India; b. without independent consideration by an Australian maritime officer; c. whether or not an arrangement existed between Australia and India concerning the receipt of the Plaintiff in India?
2. Did s 72(4) of the *MPA* authorise a maritime officer to take the Plaintiff to India and to detain him for that purpose?
3. Did the non-statutory executive power of the Commonwealth authorise a maritime officer to do those things (in questions 1 and 2)?
4. Is the power under s 72(4) subject to an obligation afford procedural fairness?
5. If there is a non-statutory power, is that power subject to an obligation to afford procedural fairness?
6. Was the detention of the Plaintiff unlawful at any time between 1 July 2014 and 27 July 2014 and, if so, is he entitled to claim damages in respect of that detention?

**Judgment**

By a 4:3 majority, the Court held that s 72(4) of the *MPA* authorised the Plaintiff’s detention at all times. It was therefore unnecessary for the majority judges to resolve the constitutional question whether there was a power under s 61 which, absent the lawful exercise of power under the *MPA*, would have authorised the actions taken by the Commonwealth. Keane J nevertheless addressed the question, holding that the scope of executive power extends to the compulsory removal from Australia’s contiguous zone of non-citizens who would otherwise enter Australia contrary to the *Migration Act*, and that such a power had not been abrogated by statute.

In dissent, Hayne and Bell JJ held that, among other things, s 72(4) did not authorise a maritime officer to detain and take the plaintiff to India when, at the time that destination was chosen, the plaintiff had neither the right nor

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1  *CPCF v Minister For Immigration And Border Protection* [2015] HCA 1, [50] (French CJ); [228] (Crennan J); [392] (Gageler J); [455]–[475] (Keane J).
2  Ibid [42] (French CJ).
3  Ibid [476]–[492].
4  Ibid [484].
5  Ibid [488]–[492].
permission to enter India. Furthermore, 'adopting and adapting what was said in Chu Kheng Lim'; their Honours denied the existence of a non-statutory executive power that authorised the maritime officer to detain and take the plaintiff to India.

Kiefel J also dissented, deciding that in the absence of an arrangement or agreement with India, the decision to take the plaintiff to India was not authorised by s 72(4). Her Honour denied there was a non-statutory executive power that authorised the decision since, among other things, even if a relevant Commonwealth executive power existed at Federation it had likely been lost or displaced by statutes that have since provided for powers of expulsion and detention (including the MPA).

**Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd [2015] HCA 7**

During a radio broadcast in December 2012, a presenter working for the respondent phoned a hospital in London posing as Queen Elizabeth II and Prince Charles. The purpose of the call was to elicit information about the condition of the Duchess of Cambridge, a patient at the hospital. The Australian Communications and Media Authority ('ACMA') investigated the broadcasting of the phone call and, in a preliminary report, suggested that the Respondent had breached cl 8(1)(g) of the Broadcasting Services Act 1992, which provides that the holder of a commercial radio licence 'will not use the broadcasting service … in the commission of an offence'. The Appellant determined that the Respondent committed an offence against the Surveillance Devices Act 2007 (NSW).

In the Federal Court, Today FM unsuccessfully sought to retrain the Appellant from making any determination that an offence had been committed. Today FM appealed to the Full Federal Court, notwithstanding that the ACMA issued a report in which it found that Today FM had breached cl 8(1)(g) before the matter could be heard. The Full Federal Court unanimously allowed Today FM's appeal and held that ACMA's finding with respect to cl 8(1)(g) was set aside. Their Honours held that cl 8(1)(g) did not authorise the Appellant — an administrative body — to make a finding that an offence had been committed. This is because the words 'the commission of an offence' required a determination of guilt by a court, which could then be taken into account during an investigation of whether the holder of a licence had breached cl 8(1)(g).

In appeal to the High Court, ACMA argued that the Full Federal Court had erred by 'elid[ing] the "commission of an offence" with a "conviction for an offence"'. In ACMA's view, such a construction was not supported by a contextual and purposive reading of cl 8(1)(g). Moreover, the Appellant argued that there was no constitutional impediment to 'the conferral on administrative bodies of the function of forming opinions as the existence of legal rights … where that is no more than a step in the administrative body arriving at its ultimate decision'. In response, Today FM argued that, construed in context, the words 'commission of an offence' means that a court exercising criminal jurisdiction has found that an offence has been committed. Thus the Appellant does not have the authority to make a finding that a licensee has committed a criminal offence. In the alternative, Today FM argued that cl 8(1)(g) is an invalid purported conferral of judicial power on the ACMA.

**Judgment**

The Court unanimously allowed the appeal. French CJ, Hayne, Kiefel, Bell and Keane JJ held that it is not the case that cl 8(1)(g) empowers ACMA to make a finding that a licensee has 'committed an offence' only if a court has found that the relevant offence is proven. Among other things, their Honours pointed to the difference between the phrase 'the commission of an offence' and 'conviction of an offence', noting that only the latter connotes the finding of a court. Their Honours further held that cl 8(1)(g) is not constitutionally invalid by reason of an invalid conferral of judicial power on the ACMA.

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6 Ibid [164].
7 Ibid [150].
8 Ibid [137]–[151].
9 Ibid [323].
10 Ibid [277]–[280].
11 Australian Communications and Media Authority, 'Appellant’s Submissions', Submission in Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd, No S225 of 2014, 19 September 2014, [14] (emphasis in original).
12 Ibid [16].
13 Australian Communications and Media Authority V Today FM (Sydney) Pty Ltd [2015] HCA 7, [24] (French CJ, Hayne, Kiefel, Bell and Keane J); [61] (Gageler J).
14 Ibid [50].
15 Ibid [37].
judicial power on an administrative body, since ACMA’s finding that Today FM’s broadcasting service was used in the commission of an offence was a step in the determination of breach of the cl 8(1)(g) licence condition, not a resolution of a controversy respecting pre-existing rights or obligations16.

Gageler J delivered a separate judgment, allowing the appeal for similar reasons. His Honour added that, in the context of a statute empowering an administrative body publicly to inquire into and determine if a person has committed a criminal offence, the ‘trigger’ for the operation of the principle of legality is confined to circumstances where the determination would have an adverse affect on reputation or pose a risk to court processes for determining criminal guilt and punishment17. In his Honour’s view, these ‘concerns of the common law’ were specifically addressed by the statute18.

B. SUPREME COURT OF CANADA

Mounted Police Association of Ontario v Canada (Attorney General) [2015] SCC 1

The Public Service Labour Relations Act (‘PSLR Act’) provides the general framework under which employees of the Canadian federal public service can join and participate in employee associations. Upon being certified, such associations can engage in collective bargaining. Section 2(1)(d) of that Act excluded members of the Royal Canadian Mounted Police (‘RCMP’) from the application of the PSLR Act. Instead, s 96 of the Royal Canadian Mounted Police Regulations 1988 (‘RCMP Regulations’) (now s 56 of the Royal Canadian Mounted Police Regulations 2014) imposed a non-unionized labour relations regime on members of the RCMP as the sole means of presenting members’ concerns to management. The RCMP labour regime consisted of three bodies: the Staff Relations Representative Program (‘SRRP’), the Pay Council and the Legal Fund. The ‘core component’ of the regime was the SRRP. Under the SRRP, members’ representatives consulted with management on non-wage related initiatives and policies. As well as being the primary mechanism through which members could raise work-related issues, the SRRP was the only form of employee representation recognised by RCMP management.

The three plaintiffs engage in political lobbying and provides advice and assistance to RCMP members, but none of them are recognised for the purpose of collective bargaining by RCMP management or the federal government19. In 2006, the plaintiffs launched a challenge against the constitutionality of a) s 2(1)(d) of the PSLR Act and b) the SRRP imposed by s 96 of the RCMP Regulations. They argued that both provisions infringed the guarantee of freedom of association under s 2(d) of the Canadian Charter of Rights and Freedoms (‘the Charter’). The plaintiffs’ challenge was successful at first instance in the Ontario Superior Court of Justice but that decision was overturned on appeal by the Court of Appeal for Ontario. The plaintiffs appealed to the Supreme Court of Canada.

By majority, the Supreme Court concluded that s 2(1)(d) of the PSLR Act was unconstitutional and that s 96 of the RCMP Regulations would have been unconstitutional had it not been repealed. Writing for the majority, McLachlin CJ and LeBel J held that s 2(d) of the Charter ‘protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests’20. In regards to s 96 of the RCMP Regulations, their Honours held that the SRRP fell short of this standard in both its purpose and its effect. This is because the very purpose of the SRRP was ‘to prevent the formation of independent RCMP members’ associations for the purposes of collective bargaining’21. In addition, the effect of the imposition of the SRRP was to prevent RCMP members from genuinely advancing their own interests without interference by RCMP management22. In regards to s 2(1)(d) of the PSLR Act, their Honours held that the provision’s purpose was to prevent RCMP members from engaging in collective bargaining and it therefore constituted an infringement of s 2(d) of the Charter. McLachlin CJ and Lebel J further held that neither s 96 of the RCMP Regulations nor s 2(1)(d) of the PSLR Act could be saved under s 1 of the Charter as being a reasonable limitation on freedom of

16 Ibid [58].
17 Ibid [68].
18 Ibid [74].
19 Mounted Police Association of Ontario v Canada (Attorney General), [2015] SCC 1, [7].
20 Ibid [5]; see also at [81].
21 Ibid [110].
22 Ibid [111], [121].
association. This is because, among other reasons, neither section was rationally connected to the legitimate objective of enhancing public confidence in the neutrality, stability and reliability of the RCMP (the ‘legitimate objective’ posited by the Attorney General of Canada in argument)23.

In dissent, Rothstein J held that, among other things, the majority decision impermissibly compelled a single model of collective bargaining24.

**Meredith v Canada (Attorney General) [2015] SCC 2**

This decision is a companion case to Mounted Police Association of Ontario v Canada (Attorney General) (‘Mounted Police’) (see above).

The Treasury Board of Canada is responsible for setting the salary of members the RCMP. In doing so, the Treasury Board considers recommendations developed through the Pay Council (the ‘Pay Council process’). In mid-2008, the Treasury Board responded to recommendations made by the Pay Council by announcing salary increases for RCMP members for the years 2008-2010. However, in response to the global financial crisis, the salary increases were subsequently revised downwards by the Treasury Board to 1.5%. Moreover, in March 2009, the Expenditure Restraint Act (‘ER Act’) imposed a limit of 1.5% on wage increases across the public sector for the 2008-2011 fiscal years.

Two members of the SRRP challenged the constitutionality of the Treasury Board’s 2008 decision as well as the relevant provisions of the ER Act. They argued that both violated the guarantee of freedom of association under s 2(d) of the Charter because they rolled back scheduled wage increases for RCMP members without any prior consultation process. At first instance, the Federal Court declared that both the Treasury Board decision and the impugned provisions of the ER Act violated s 2(d) of the Charter. That decision was overturned by the Federal Court of Appeal.

By majority, the Supreme Court of Canada held that the ER Act did not infringe s 2(d) of the Charter. Writing for the majority, McLachlin CJ and LeBel J held that the Pay Council process depended on the existence of the SRRP and thus could not survive the decision in Mounted Police. However, notwithstanding the constitutional inadequacy of the Pay Council process, their Honours held that it nonetheless constituted ‘associational activity’ and attracted Charter protection. Thus the question considered by their Honours was whether the impugned provisions of the ER Act amounted to substantial interference with the Pay Council process for the purposes of s 2(d) of the Charter25.

Their Honours concluded that it did not because, among other things, the ER Act did not preclude consultation on compensation-related issues26.

Rothstein J agreed with the majority that the ER Act did not constitute a violation of s 2(d) of the Charter. However, because the Pay Council process itself was not the subject of constitutional challenge, his Honour held that the majority ought to have assumed that the Pay Council process itself was Charter compliant for the purposes of this appeal27.

In dissent, Abella J held that the impugned provisions of the ER Act were unconstitutional because, among other things, they had the effect of ‘completely nullifying the right to a meaningful consultation process and thereby denied members their s 2(d) Charter rights’28.

**Wakeling v United States of America [2014] SCC 72**

Part VI of the Canadian Criminal Code sets out a scheme to govern the interception and use of private communications for law enforcement purposes. Section 193(1) provides that it is an offence to use or disclose private communication intercepted without the consent of the originator thereof or the intended recipient. Subsection (2) states that s 193(1) does not apply if the person disclosed the private communication to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences ‘and is intended to be in the interests of the administration of justice’.

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23 Ibid [148].
24 Ibid [165].
25 Meredith v Canada (Attorney General) [2015] SCC 2, [4].
26 Ibid [28].
27 Ibid[49].
28 Ibid [50].
Mr Wakeling was the subject of a Canadian drug investigation. Over the course of the investigation, the Canadian Police lawfully monitored and recorded communications between Mr. Wakeling and others. These communications revealed a plot to transport drugs across the Canada-US border. Relying on s 193(2)(e), Canadian authorities disclosed this information to US authorities, who used it to intercept and seize 46,000 ecstasy pills. The US sought Mr. Wakeling's extradition from Canada for his involvement in the ecstasy shipment.

At the extradition hearing, Mr Wakeling submitted that the legislation authorising the disclosure was unconstitutional. Among other things, he argued that the provisions breached s 8 of the Charter, and that the wiretap information provided to US law enforcement authorities should therefore not be admitted as evidence against him. Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure.

The extradition judge rejected Mr. Wakeling's arguments and issued a committal order. That order was upheld by the British Columbia Court of Appeal.

Judgment

By a 4:3 majority, the Canadian Supreme Court dismissed the appeal. Writing for the majority, Moldaver J (LaBel and Rothstein JJ concurring) held that s 8 protects targets at both the interception and disclosure stages. Although disclosure of previously communicated communication is not a 'search' within the meaning of s 8 of the Charter, Parliament recognized that wiretap interceptions are an exceptional and invasive form of search and it is therefore appropriate that s 8 protections extend to wiretap disclosures by law enforcement. However the disclosure of the intercepted communications to US authorities did not violate Mr Wakeling's s 8 rights. The disclosure was 'reasonable' because it was authorised by law, the authorising law was a 'reasonable law' and the impugned disclosure was carried out in a 'reasonable manner'.

In a separate concurring judgment, Chief Justice McLachlin held that the constitutionality of s 193(2)(e) was not in issue since Mr Wakeling had failed to show that the law infringed his s 8 rights. According to the Chief Justice, an individual whose communications are lawfully intercepted under a valid warrant cannot complain that this unreasonably breaches his privacy, provided the execution of the warrant is reasonable and the information is used for the purposes of law enforcement.

In dissent, Karakatsanis J (Abella and Cromwell JJ concurring) found that the wiretap scheme violates s 8 because it permits disclosure to foreign officials without meaningful safeguards limiting how those officials may use the information they receive.

R v Fearon [2014] SCC 77

Two men, one armed with a handgun, robbed a merchant as she loaded her car with jewellery. The robbers grabbed some bags, one of which was filled with jewellery, and fled in a getaway vehicle. The police became involved very shortly afterward and at that point, they reasonably believed that there was a handgun on the streets and that the robbers had taken a large quantity of readily-disposable jewellery.

The police arrested Mr Fearon, the appellant, and another man, but had not at that point located any jewellery or the handgun. When Mr Fearon was arrested, a police officer conducted a pat-down search incident to the arrest and found a cell phone. The police searched the phone at that time. They found a draft text message referring to jewellery and opening with the words 'We did it'. They also found a photo of a handgun. Months later, the police applied for and were granted a warrant to search the contents of the phone.

At trial, Mr Fearon argued that the search of his cell phone had violated s 8 of the Charter and that admitting the

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29 Wakeling v United States of America [2014] SCC 72, [37].
30 Ibid [32].
31 Ibid [40].
32 Ibid [43]-[46].
33 Ibid [47]-[77].
34 Ibid [78]-[81].
35 Ibid [84].
36 Ibid [92].
37 Ibid [105].
photos and text message into evidence would bring the administration of justice into disrepute and the evidence should therefore be excluded under s 24(2) of the Charter. The trial judge found that the search of the cell phone incident to arrest had not breached s 8 and that the photos and text message were admissible. The Court of Appeal dismissed Mr Fearon's appeal.

Judgment
By a 4:3 majority, the Canadian Supreme Court dismissed the appeal. Writing for the majority, Cromwell J (McLachlin CJ and Moldaver and Wagner JJ concurring) held that the initial search was not reasonable and therefore breached Mr Fearon's s 8 rights\(^\text{38}\), but that the cell phone evidence should not be excluded under s 24(2) since, among other reasons\(^\text{39}\), the police acted on an 'honest mistake, reasonably made' and did not engage in state misconduct that requires exclusion of evidence\(^\text{40}\). Cromwell J said it was necessary to add safeguards to the existing law of the search of cell phones incident to arrest in order to make that power compliant with s 8 of the Charter\(^\text{41}\) by tailoring the scope of the search to the purpose of the search\(^\text{42}\); introducing an obligation for the police to keep a careful record of what is searched and how it was searched\(^\text{43}\); and limiting the use of the power to situations where it is not practical to postpone a search until a warrant is obtained\(^\text{44}\).

In dissent, Karakatsanis J (Lebel and Abella JJ concurring) held that the initial search breached Mr Fearon's s 8 rights\(^\text{45}\), and that the evidence should be excluded under s 24(2)\(^\text{46}\). Her Honour opined that the majority's modification of the common law power to search was overly complicated and did not ensure sufficient protection of privacy interests\(^\text{47}\), and held that a warrantless search of a cell phone on arrest will be justified only when (1) there is a reasonable basis to suspect a search may prevent an imminent threat to safety or (2) reasonable grounds to believe that the imminent loss or destruction of evidence may be prevented by a warrantless search\(^\text{48}\). In the circumstances, neither of these criteria were satisfied\(^\text{49}\). On the exclusion issue, her Honour found that the high privacy interest individuals have in their electronic devices 'tips the balance in favour of exclusion' and therefore allowed the appeal\(^\text{50}\).

C. SUPREME COURT OF INDIA

Chairman & Managing Director Central Bank Of India And Others v Central Bank Of India Sc/St Employees Welfare Association & Others

Article 16 of the Indian Constitution provides for equality of opportunity for all citizens in matters of public appointment. Clause 4 of Article 16 provides that a State may make provision for the reservation of appointments or posts 'in favour or any backward class of citizens, who in the opinion of the State, is not adequately represented in the services under the State'. Clause 4A or Article 16 provides that the State may make provision for reservation in matter of promotion 'in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in services under the State.' 'Reservation' refers to the process of setting aside a certain percentage of positions for members of under-represented communities.

The respondents were employees associations representing Scheduled Caste and Scheduled Tribe employees ('SC/ST employees'). The associations had filed writ petitions in the High Court of Madras arguing that in spite of a clear policy of reservation for promotion of SC/ST employees, the appellant Banks had not made provision for such reservations in carrying out promotions. The respondents sought mandamus compelling the banks to do so. On appeal to the Division

\(^{38}\) R v Fearon [2014] SCC 77, [88].
\(^{39}\) Ibid [89]–[98].
\(^{40}\) Ibid [95].
\(^{41}\) Ibid [65].
\(^{42}\) Ibid [76].
\(^{43}\) Ibid [82].
\(^{44}\) Ibid [80].
\(^{45}\) Ibid [182].
\(^{46}\) Ibid [197].
\(^{47}\) Ibid [172].
\(^{48}\) Ibid [179].
\(^{49}\) Ibid [180]–[182].
\(^{50}\) Ibid [198].
Bench, the employees succeeded. The banks appealed to the Indian Supreme Court.

**Judgment**

A bench of Justice Chelameswar and Justice Sikri emphasised that clauses 4 and 4A of Article 16 are only enabling provisions that permit the State to make provision for reservation in promotion of SC/ST employees. Therefore power lies with the State to make a provision, but the courts cannot compel the state to make such a provision\(^5\). The key issue was whether the State had, pursuant to Article 16 of the Constitution, made provision for any reservation in the promotions from one officer grade/scale to another grade/scale\(^2\). This in turn depended on the correct interpretation of a 13 August 1997 Office Memorandum issued by the Central Government\(^3\).

The Court held that Office Memorandum did not require reservation in promotion for top posts (Scale VII and above)\(^4\). However, in respect of promotions from Scale I upwards until Scale VI, reservation in favour of SC/ST employees was required\(^5\). Therefore, the Court allowed the appeal in part\(^6\).

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51 *Chairman & Managing Director Central Bank Of India And Others v Central Bank Of India Sc/St Employees Welfare Association & Others Special Leave Petition (Civil) No.209 Of 2015*, [24].
52 Ibid [1].
53 Ibid [12].
54 Ibid [31].
55 Ibid [35].
56 Ibid [36].
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