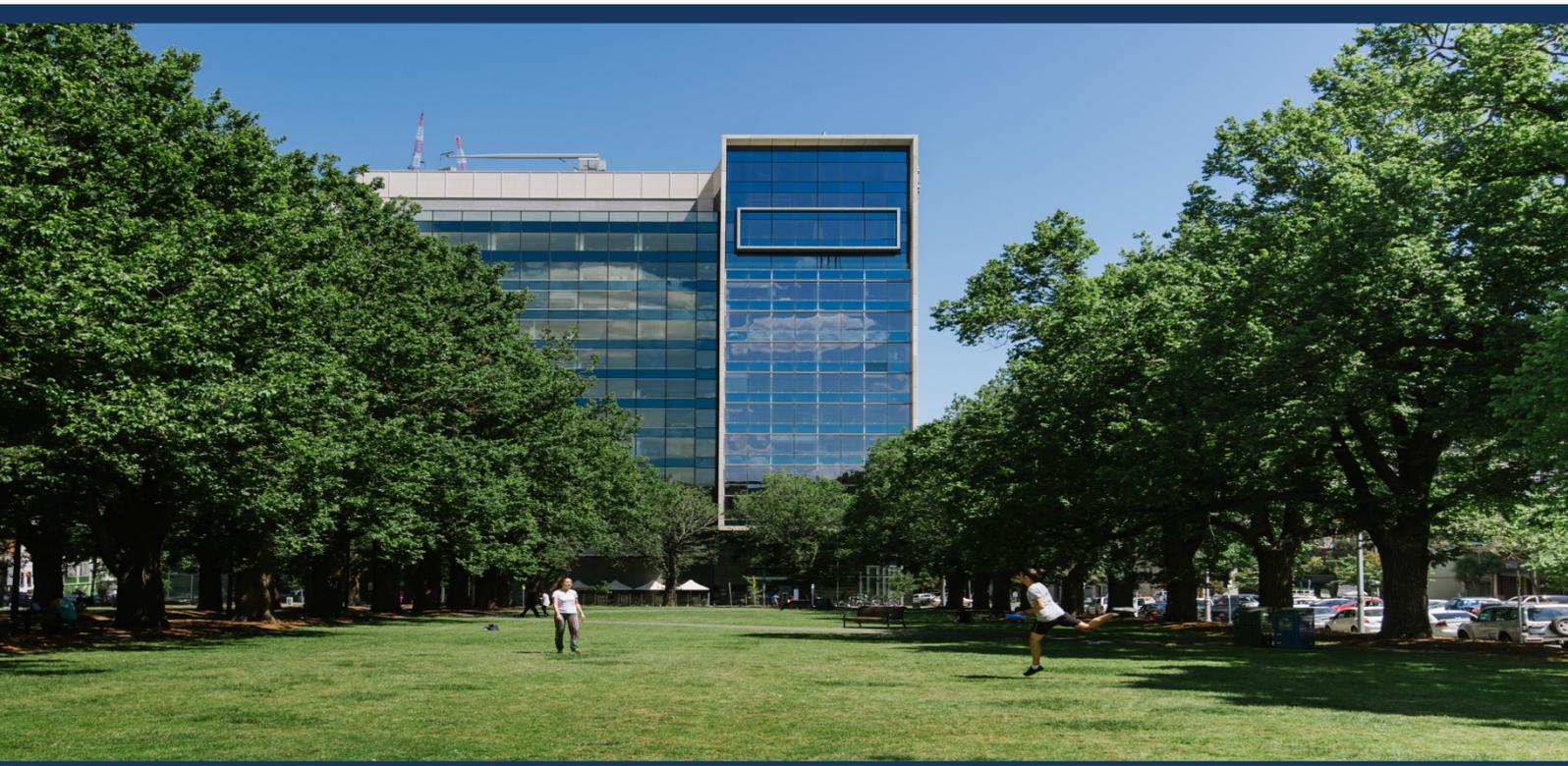


NEWSLETTER No. 30

DECEMBER 2016

Welcome to the 30th Edition of the Centre for Comparative Constitutional Studies Newsletter, a guide to both news and events at the Centre and a spotlight for commentary on issues in constitutional law, nationally and globally.



For the latest most up to date news, follow us on twitter or online.



- CCCS: [@cccsmelbourne](https://twitter.com/cccsmelbourne)
- 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)



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

DIRECTOR'S REPORT

2015 has been an exceptional year at CCCS. The growth in our academic staff has energised our research, teaching and engagement activities to the point that 2015 has been one of our most exciting and productive years ever. At the start of the year we welcomed [Dr Lulu Weis](#) (previously a McKenzie Fellow) and [Dr Scott Stephenson](#) to the academic staff of the Centre. In July, we were joined by [Dr William Partlett](#) (previously of the City University of Hong Kong). Over the latter part of 2015, Melbourne Law School and CCCS also welcomed [Dr Inbar Levy](#) whose research interests lie in legal theory and behavioural psychology as well as public law and [Dr Alysia Blackham](#) whose interests lie in labour law and discrimination law.

Events

With the benefit of this energy, we have maintained a full program of seminars and conferences. In July, our national constitutional law conference brought 200 participants to Melbourne for two days of constitutional law, with a special focus on the career of Melbourne Law School Professorial Fellow [the Hon Kenneth Hayne AC](#). The year ended with the third in a series of seminars held jointly since 2010 with Auckland Law School and the University of Witwatersrand. Over 9 and 10 December over 20 public lawyers from these three law schools gathered for a in-depth discussion of works in progress and recent developments in public law. Sandwiched between these two events our lively CCCS Seminar series and lunch time 'Brown Bag' discussion groups continued.

Research Projects

The year has also seen the start of a number of new research projects. We are excited to announce that CCCS has received a grant under the Melbourne Law School Major Collaborative Research Fund for a project on Constitution Making in the Asia-Pacific jointly with colleagues from the [Asian Law Centre](#) and the [Asia Pacific Centre for Military Law](#). This project aims to understand the relationship between constitution-making and the construction of constitutionalism. To do this, the project will take a broad theoretical framework for the global phenomenon of constitution-making and engage with constitution-making as it is occurring including as an aspect of peace building. More details will be available shortly with a launch of the project scheduled for early 2016. In addition, [Dr Farrah Ahmed](#) commenced a project on 'Constitutional Boundaries' funded by the Melbourne-Oxford Research Partnership jointly with [Dr Adam Perry](#) (Oxford) and [Professor Richard Albert](#) (Boston College).

Congratulations

CCCS colleagues have had many fine achievements during 2015 and their research publications, presentations and other activities are found in the newsletter but I would especially like to note that [Dr Scott Stephenson](#) was awarded the Inaugural Holt Prize by Federation Press for his work

'From Dialogue to Disagreement in Comparative Rights Constitutionalism' which was his SJD dissertation at Yale University. The dissertation will be published by Federation Press in 2016.

Farewells

Some of our CCCS members are leaving us in 2016. [Martin Clark](#) who has been a graduate researcher with the Centre since 2012 has completed his M. Phil. In January 2016 he will begin his Ph.D. studies at the London School of Economics and Political Science on a project investigating the origins of the division between international and domestic public law. However we are delighted that from London he will continue to work as a researcher at Melbourne Law School and to write for the MLS Blog *Opinions on High*. We congratulate Martin on the completion of his M. Phil. and look forward to our continuing association with him. [Alex Lee](#) who has been a Research Associate at CCCS since 2013 is graduating with his JD and will be working at Allens in 2016 and then for the [Hon. Justice Susan Kiefel](#) of the High Court in 2017. Lastly, we bid farewell to [Dr Zim Nwokora](#) who has been a McKenzie Fellow at Melbourne Law School and part of CCCS since 2013. Zim has secured a continuing position at Deakin University as a lecturer in Politics and Policy. We sincerely congratulate Zim on his appointment.

2016

A busy 2016 beckons. CCCS will host a conference for authors of the Oxford Handbook on the Australian Constitution in March, an IACL Roundtable on the "Invisible Constitution" in May (See further details about this event on page 9) and other events currently in development.

Our public law masters program is exceptionally busy. We will welcome as International Visiting Lecturers [Professors Vicki Jackson](#) (Harvard Law School), [Christina Murray](#) (British Institute of International and Comparative Law), [Fred Schauer](#) (University of Virginia) and as judges from Australia and elsewhere including [Justice Kate O'Regan](#) (formerly of the Constitutional Court of South Africa), [the Hon Kenneth Hayne](#) (High Court of Australia) and [Justice Michelle Gordon](#) (High Court of Australia), [Judge Dennis Davis](#) (High Court of South Africa) and [Justice Debra Mortimer](#) (Federal Court of Australia), (See page 10 of this Newsletter for further information).

We look forward to seeing you at CCCS in 2016.



Professor Adrienne Stone
Director, CCCS

CENTRE UPDATE

Cheryl Saunders

Conferences, Forums and Presentations

Participated in two conferences at Yale Law School on 29-31 October including; *Thinking about Federalism(s) beyond the United States Experience* and *Federalism(s) and Fundamental Rights – Europe and the United States Compared*.

Delivered a paper to the first of these conferences on: 'Executive power in federations'.

Delivered the Victoria Law Oration on 14 October on *Australian Federal Democracy*.

Delivered a public lecture in Suva, Fiji, on 7 October on *Implementing the Constitution of Fiji: Challenges and Opportunities*.

Chaired a session on 'The Federation' on 6 November in the 2015 Economic and Social Outlook Conference, *Rebuilding Foundations for Reform*.

Delivered a paper on 'Constitutional Courts in Asia: A Comparative Perspective' in the Sixth Asian Constitutional Law Forum, NUS, 10 December 2015.

Delivered a paper on 'Tax Reform in a Modern Federation' in the *Melbourne Economic Forum* on 17 December.

Scott Stephenson

Award

Awarded the Inaugural Holt Prize for 'When Constitutional Conventions Fail' (Scott's doctoral dissertation) which be published by Federation Press.

Publication

'When Constitutional Conventions Fail', was accepted for publication in volume 35(2) of the *Dublin University Law Journal* as part of a symposium issue on constitutional conventions.

Presentations

Presented a paper 'Legislative Override and the Rule of Law', at a CCCS Brown Bag Seminar, gave a lecture on the power and function of government agencies in a federated state to a delegation from the Vietnamese Ministry of Justice, and commented on John Finnis' lecture on judicial power at a CCCS Brown Bag Seminar.

Adrienne Stone

Publications

Published '[Judicial Power – Past Present and Future: A Comment on Professor Finnis](#)' published at Policy Exchange as part of their Judicial Power Project (see Professor Finnis' lecture [here](#))

'Situating Political Constitutionalism: A Reaction' was accepted for publication in the *International Journal of Constitutional Law*.

Meetings/ Reviews

Participated in the Australian Law Reform Commission's Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges as a member of the Advisory Committee.

Chaired the Annual General Meeting of the Australian Association of Constitutional Law on 19 October.

Media

Interviewed by the Weekly Times for an article '[Coal-seam gas mining loophole in Australian Constitution](#)' November 4, 2015.

Teaching

Co-taught Constitutional Rights and Freedoms in the Melbourne Law Masters on November 11 -17 (with the Hon. Justice Susan Kenny).



Coel Kirby

Papers and Presentations

'The Rebirth of Liberalisms in the Late Victorian Empire' (Invited paper to be presented at the 'Liberalisms within and beyond Empire' conference, Centre for Policy Alternatives, Colombo, Sri Lanka, 18-19 December 2015).

'Hart's Empire: Towards a Critical History of Anglo-American Legal Thought, c. 1830-1975' (Paper presented at the Melbourne Legal Theory Workshop, Melbourne Law School, 23 October 2015).

Farrah Ahmed

Award

Awarded funding under the 2016-2017 Oxford-MLS Research Partnership for a project entitled 'Constitutional Boundaries' jointly with Dr Adam Perry (Oxford).

Jeremy Gans

Appointment

Reappointed (as of 1 December) as human rights adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, sharing that position with Sarala Fitzgerald of the Victorian Bar. He will be responsible for advising on Bills on Justice and Health, as well as all statutory rules.

Joo-Cheong Tham

Presentations

'Commentary: How should political funds of trade unions be regulated', Electoral Regulation Research Network seminar, 27 November 2015, Melbourne Law School.

'The Trans-Pacific Partnership Agreement and Labour Migration', *TPP Revealed* Workshop, Global Economic Law Network, 13 November 2015, Melbourne Law School.

'McCloy v NSW, electoral regulation and political equality', Electoral Regulation Research Network 4th Biennial workshop, 5-6 November 2015, Law School, University of New South Wales.

Julian Sempill

Forthcoming Publication

'Ruler's Sword, Citizen's Shield: the Rule of Law & the Constitution of Power' was accepted and will appear in the *Journal of Law & Politics*, University of Virginia School of Law in 2016.

Invitation

Invited to present his research at the Atelier de Theorie Critique, Paris (Villanova University, Department of Philosophy/Universite Paris Descartes/Institut Mines-Telecom) in 2016.

Penny Gleeson

Conferences

Chaired a panel and spoke at the International Conference on Public Policy in Milan on 'Medical innovation and the Role of State' (July 2016).

Pip Nicholson

Conferences

Attended a conference between Hong Kong University, Monash, Chinese University of Hong Kong and Melbourne Law School on *Socialist legal legacy in Asia: China and Vietnam*. Pip is currently working on the resultant publication with Will Partlett.

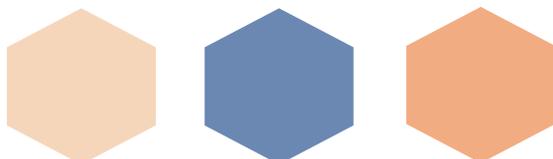
Paula O'Brien

Presentations

'Precious real estate: alcohol labelling and international trade' at the workshop, 'Trade, Investment and NCDs: Challenges for Regulating Alcohol and Unhealthy Foods' on 27 October 2015 (Melbourne Law School).

'Health and the Trans-Pacific Partnership Agreement' at the workshop, 'TPP Revealed' on 13 November 2015 (Melbourne Law School).

'A Public Health Approach to Alcohol Marketing Regulation: Does Industry Self-regulation Work?' at the Centre for Media and Communications Law 'Media and IP Law' conference on 23 November 2015 (Melbourne Law School).



William Partlett

Presentations

'Restoration Constitution-Making' at the American Political Science Association Annual Meeting in September.

'Courts and Constitution Making' at the TriNations Conference, held at the Melbourne Law School in December.

Forthcoming Publications

Courts and Constitution-Making, *Wake Forest Law Review*.

Restoration Constitution-Making, *The Vienna Journal of International Constitutional Law*.

The Elite Threat To Constitutional Transition, *Virginia Journal of International Law*.

Is Socialist Law Really Dead? *NYY Journal of International Law and Politics*.

Graduate Research Students

Anne Carter

Fellowship Award

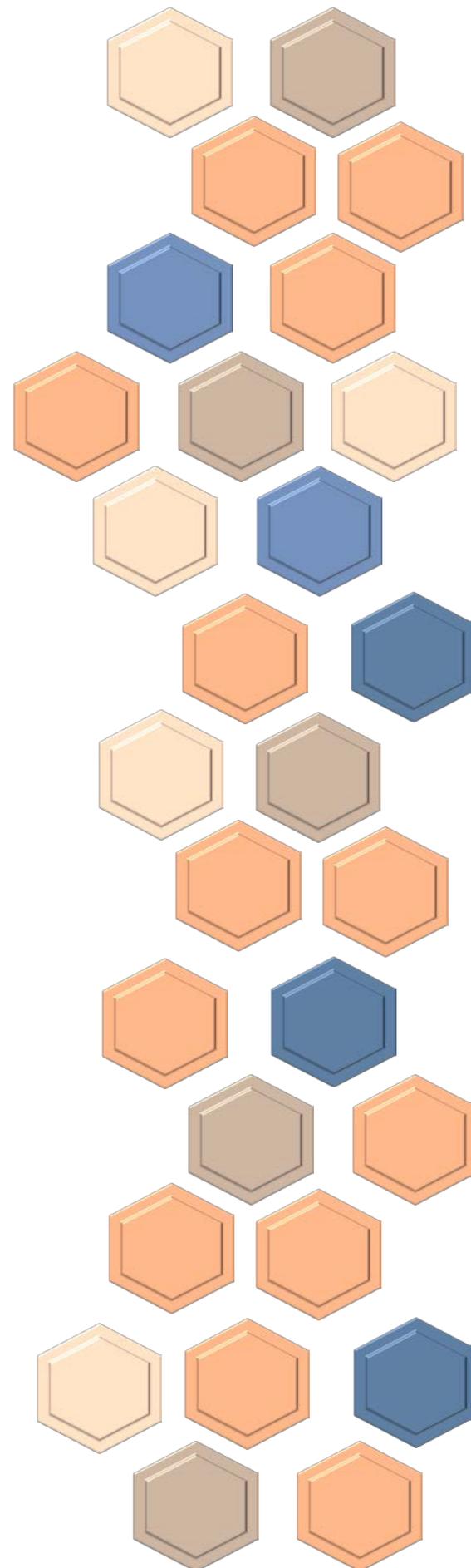
Awarded a visiting fellowship at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and will visit the Institute for three months during 2016.

Presentations

Presented a paper on the nature of proportionality reasoning at the Tri-Nations Symposium at Melbourne Law School in December.

Publications

Anne has published a case note on the recent decision of *McCloy v New South Wales* [2015] HCA 34 which will appear in the December edition of the *Public Law Review*.



Graduate Research Students

Arturo Villagran

Presentations

Presented 'The Many faces, Nature and Effects of the Latin American Amparo'.

Presented 'Constitutionalising International Law: An Experience from Latin America' in the TriNations Conference, held at the Melbourne Law School in December.

Martin Clark

Publications

'Making Sense of Indigeneity, Aboriginality and Identity: Race as a Constitutional Conundrum since 1983' (with Dr Mark McMillan).

'Experiences of Coming to Law: An Interview with Bob Brown on the Tasmanian Wilderness Society as Client in the *Tasmanian Dam Case*' as part of the Griffith Law Review's [recent symposium issue](#) on the *Tasmanian Dam Case*.

The [Oxford Handbook on the Theory of International Law](#), on which he was an assistant editor working with Laureate Professor Anne Orford and Professor Florian Hoffmann, has now been submitted to the publishers and is expected to be published in April 2016.

Prize

'Building the Dignified Authority of Legislation', won the Australian Legal Philosophy Student Association's annual essay competition judged by Jeremy Waldron, Brian Bix and Justice Susan Crennan AC, will appear in this year's volume of the *Australian Journal of Legal Philosophy*.

Presentations

Presented a completion seminar for MPhil thesis at MLS, entitled 'A Conceptual History of International Law', and intends to submit that thesis in coming weeks.

Research Assistants

Alexandra Harrison-Ichlov and Kathryn Wright

Projects

Research assistants Alexandra Harrison-Ichlov and Kathryn Wright are currently assisting Cheryl and Adrienne to update the Constitutional Law Fact Sheets on the CCCS website. Kathryn Lee is designing new templates for the Fact Sheets, which will hopefully be released gradually in the new year.

The Fact Sheets aim to educate members of the public about key topics concerning the Constitution, such as the circumstances leading to the drafting of the Constitution, the separation of powers, and rights protection.

Anna Saunders

Appointments

Elected as an Editor of the *Melbourne Journal of International Law* for 2016.

Projects

'Anna assisted with a CCCS submission to the Legal and Constitutional Affairs Senate Committee on the matter of a popular vote, in the form of a plebiscite or referendum, on marriage in Australia.



Harvard Law School Experience

By Dylan Lino

I've had an incredible time completing my PhD as a visitor at Harvard Law School. Researching and studying at the Law School has altered for the better the way I approach my research on Indigenous constitutional recognition, in particular by giving me an improved grasp on the comparative and historical dimensions of my project. I began my time here at the start of 2014 as a Visiting Researcher. I then enrolled in the LLM program in 2014–15, where I was able to do some new historical research on the constitutional theory of the British Empire, focusing on AV Dicey's work. Now as a Visiting Researcher again, I'm aiming to finish up my PhD thesis by mid-2016. I was lucky enough to be awarded a 2015 Qantas Fellowship by the American Australian Association to complete this research.

Throughout my time in the US, the support of the CCCS – and especially of my supervisors Adrienne Stone and Cheryl Saunders – has been amazing. They did a huge amount to help me get here and have done a great deal since to make sure my time here has been fruitful. While holding supervision meetings at ungodly hours via Skype has not been without its charms, there have also been some happy



Dylan Lino

instances of our paths crossing abroad. Adrienne and I held our first (and, I confidently predict, only) supervision meeting in Oslo, where we were attending the 2014 World Congress of Constitutional Law.

I was surprised (though I shouldn't have been) to encounter Cheryl's smiling picture hanging in the corridors of Harvard Law School as part of its inaugural International Women's Day Portrait Exhibit devoted to women inspiring change in law and policy. I've met a lot of wonderful people abroad, but it's been a special pleasure to run into my mentors overseas. The CCCS is a truly globetrotting institution with global reach.

PhD Student from Paris

CCCS welcomed Ninon Mathieu

Ninon Mathieu is a PhD student from Paris. Whilst studying her Masters at **Panthéon-Assas University**, Ninon developed an interest in Common Law systems, particularly in comparison with Civil Law systems operating in Europe, including France.

To complete her thesis in the area of habeas corpus, it is necessary to travel throughout her three year journey to her PhD. Australia was top of the list!

During her time here, Ninon has been mentored by Laureate Professor Emeritus, Cheryl Saunders, observed Court hearings, and met personally with the Hon Justice Bell QC of the Supreme Court and former Justice of the High Court of Australia, the Hon Kenneth Hayne AC.

In the future, Ninon will also travel to the United States as part of her studies.

When asked about the best part of her experience, Ninon stated, without a doubt, having the opportunity

to spend time getting to know members of CCCS and the legal fraternity, and learning as much as she can from their wealth of experience.



Ninon Mathieu

RECENT EVENTS

CCCS Seminar:

Dr Harshan Kumarasingham (University of London)

This talk examined the concept of Eastminster in the eventful context of Asian decolonisation and the need for rapid constitutional settlement. Eastminsters emerged when the Asian States from British control in varying degrees took key substantial elements from the British Westminster system. Since the Westminster system is based on convention and ambiguity and not rigid rules and clarity it could be adopted and manipulated to produce diverse results and reactions that would shape these countries forever. These states therefore became Eastminsters. Dr Kumarasingham is a Senior Research Fellow at the Institute of Commonwealth Studies, University of London and Lecturer in Comparative politics at Ludwig Maximilians University, Munich.



Workshop: Philosophical Foundations of Indigenous Law

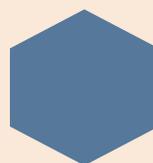
Dr Claire Charters (University of Auckland Law School)

Dr Kirsty Gover (Melbourne Law School)

Dr Nicole Roughan (National University of Singapore Faculty of Law)

The paper presented at this workshop came about from a new project to be conducted by Dr Claire Charters (Auckland), Dr Kirsty Gover (MLS) and Dr Nicole Roughan (NUS). The field of indigenous law is well populated by scholarship on positive law and on political theory, but legal theorists have been very tentative in their interventions. The 'scoping article' presented at this workshop outlined the contours and content of the field as it stands, highlighted core methodological strands, and identified promising avenues for further research on the 'Philosophical Foundations of Indigenous Law'.

The event was extremely well attended by members of the Melbourne Law School and visiting academics from South Africa and New Zealand.



FORTHCOMING EVENT

IACL Melbourne roundtable – The Invisible Constitution in Comparative Perspective

Monday 2nd & Tuesday 3rd May 2015

An IACL Roundtable will be held in Melbourne on 2-3 May 2016 under the auspices of the [Centre for Comparative Constitutional Studies](#) at [Melbourne Law School](#) (co-sponsored by the [Comparative Constitutional Law Project](#) (at the University of NSW). The convenors are [Professor Adrienne Stone](#) and [Professor Rosalind Dixon](#).

The aim of the roundtable is to invite reflection by scholars on the relationship between the textually explicit nature, or “written-ness”, of constitutional guarantees and courts’ approach to constitutional review in different constitutional contexts.

The workshop will include papers focused on particular country case-studies, but also aim to generate hypotheses about the relationship between courts’ willingness to rely on written, versus, unwritten bases for constitutional decision-making, and factors such as (a) the age of a written constitution; (b) the difficulty of formal amendment under a constitution; (c) the substantive scope of a constitution, or relevant categories of constitutional guarantee; and (d) the general abstraction or prolixity of constitutional language in a particular constitution.

Confirmed Speakers

- Associate Professor Simon Butt, (University of Sydney)
- Professor Johannes Chan, (University of Hong Kong)
- Dr Eoin Carolan, (UCD, Ireland) *
- Professor Albert Chen, (Hong Kong University)
- Dr Patrick Emerton, (Monash University)
- Professor Jeffrey Goldsworthy, (Monash University)
- Dr Caitlin Goss, (University of Queensland)*
- Professor Jongcheol Kim, (Yonsei Law School, Korea)
- Professor David E. Landau, (College of Law, Florida State University)
- Professor Russell Miller, (Washington and Lee Law School)
- Professor Iddo Porat, (College of Law and Business, Israel)
- Professor David Schneiderman, (University of Toronto)
- Professor Lawrence B Solum, (Georgetown Law Centre, Washington DC)
- Professor Yvonne Tew, (Georgetown Law Centre, Washington DC)
- Professor Renata Uitz, (Central European University, Budapest) *

*Participating via Skype

For further details please contact Adrienne Stone at a.stone@unimelb.edu.au

or refer to the IACL Blog: <http://iacl-aidc-blog.org/>.



PUBLIC LAW IN THE MELBOURNE LAW MASTERS 2016

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

The twelve core subjects are:

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

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

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

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

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

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

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

CENTRE PEOPLE

CCCS members are active researchers and teachers across a broad range of public law issues. Many are available to give presentations or to consult on public law projects, particularly contributing a comparative perspective to domestic issues. They are also interested in discussing potential projects with prospective research students.

Director: Professor Adrienne Stone

Administrator: Cindy Halliwell

Research Assistants

Kalia Laycock-Walsh, Constitutional Law Updates
Minh-Quan Nguyen, Public Law Review
Alexandra Harrison-Ichlov
Anna Saunders
Kathryn Wright
Nathan Ma
Anna Dziedzic

Research Centre Members

Professor Cheryl Saunders AO, Foundation Director
Professor Michelle Foster
Professor Beth Gaze
Professor Simon Evans
Professor Michael Crommelin AO
Professor Pip Nicholson
Professor Jeremy Gans
Associate Professor Kristen Walker QC
Associate Professor Alison Duxbury
Associate Professor Joo-Cheong Tham
Associate Professor Kirsty Gover
Associate Professor Margaret Young
Dr Lulu Weis
Dr Dale Smith
Dr Coel Kirkby
Dr Scott Stephenson
Dr Kristen Rundle
Mr Glenn Patmore
Ms Paula O'Brien
Ms Anna Hood

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COMPARATIVE CONSTITUTIONAL LAW UPDATE

A. High Court of Australia

North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41

Section 133AB of Div 4AA of the *Police Administration Act (NT)* ('PA Act') empowers police officers to detain a person arrested for an infringement offence for up to four hours, or longer if he or she is intoxicated.

The first plaintiff was a corporation which provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. The second plaintiff was a person who was held in custody for nearly twelve hours under s133AB of the PA act before being released and issued an infringement notice.

The plaintiffs contended that Div 4AA was invalid on the basis that the doctrine of separation of powers applies to the Legislative Assembly of the Northern Territory and that the power to detain offends this principle because it is punitive. Second, the plaintiffs submitted that Div 4AA offends the principle in *Kable*.¹

Judgment

In a 6:1 decision the High Court held that Div 4AA was valid.

A key issue was whether the detention under s137AB remained subject to the obligation, imposed by the common law and s137(1), that the person be brought before a justice of the peace or a court as soon as reasonably practicable unless he or she was released.²

French CJ, Kiefel and Bell JJ found that detention under s137AB remained subject to this duty and therefore the power to detain did not disclose a punitive purpose.³ As their Honours found the detention was administrative rather than punitive it was unnecessary to answer the constitutional question of whether the doctrine of separation of powers limits the legislative power of the Northern Territory's Legislative Assembly.⁴

Their Honours found that on this construction, in which the detention is still subject to the obligation to bring the person before a court as soon as practicable, Div 4AA does not offend the *Kable* doctrine.⁵

Keane J found that Div 4AA was valid, irrespective of whether the detention was punitive. His Honour held that the doctrine of separation of powers does not constrain the legislative power of the Legislative Assembly of the Northern Territory, refusing to reopen *Kruger v The Commonwealth*.⁶ His Honour agreed that Div 4AA does not offend the principle in *Kable*.⁷

Nettle and Gordon JJ found that Div 4AA is valid. Their Honours also preferred the construction that detention under Div 4AA is still subject to the duty to bring the person before a justice or court as soon as practicable. On this basis their Honours agreed the detention was not punitive.⁸ Therefore, the separation of powers issue was not considered. Their Honours agreed that Div 4AA does not offend the principle in *Kable*.⁹

1 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

2 *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41, 14 (French CJ, Kiefel and Bell JJ).

3 *Ibid* 17.

4 *Ibid* 23.

5 *Ibid* 22.

6 *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41, 55, 57, 59 (Keane J) citing *Kruger v the Commonwealth* (1997) 190 CLR 1.

7 *Ibid* 55.

8 *Ibid* 78.

9 *Ibid* 84.

Gageler J, in dissent, held that Div 4AA was invalid on the ground that it offended the principle in *Kable*. His Honour found that the power to detain under s133AB(2)(a) was not subject to the obligation, contained in s137(1), to bring the person before a justice or court as soon as practicable.¹⁰ His Honour found that the detention was neither reasonably necessary to effectuate a purpose which is identified in the relevant statute nor capable of objective determination by a court at any time and from time to time.¹¹ Therefore, on the basis of *Chu Kheng Lim* and subsequent cases, Gageler J concluded that the detention was punitive.¹²

However, his Honour held (applying *Kruger*) that the Legislative Assembly of the Northern Territory was not constrained by the doctrine of separation of powers as it applies to courts formed under Chapter III of the Constitution.¹³ Therefore, Div 4AA was not invalid on this basis. Nonetheless, his Honour found that Div 4AA was invalid on the basis that it offends the principles in *Kable* because it involves courts in a scheme to facilitate punitive executive detention and results in courts taking judicial action after a period of arbitrary executive detention.¹⁴

B. Supreme Court of Canada

***Association des Parents de L'école Rose-Des-Vents v British Columbia (Education)* [2015] 2 SCR 139**

On Appeal from the Court of Appeal for British Columbia.

The plaintiffs were parents of children studying at L'école élémentaire Rose-des-vents ('RDV'). RDV is the only publicly funded French-language primary school for children living in the west of Vancouver.

Section 23 of the *Canadian Charter of Rights and Freedoms* ('the *Charter*') guarantees minority language education rights, including primary and secondary schooling in English or French to the children of rights holders.¹⁵ The plaintiffs claimed that their s 23 rights were infringed because the educational services available to their children are not equivalent to those provided by the English-language schools in the area.¹⁶

The Court found that RDV had substandard facilities, including a very small library,, smaller than average classrooms and inadequate washrooms. In addition, RDV is overcrowded and most students had long travel times. The English-language schools servicing the same area had larger libraries and classrooms, better playing fields and most students lived very close to their school.

Judgment

The Court unanimously held that there was a prima facie breach of the minority language education rights under s 23 of the *Charter*.

Section 23 guarantees a 'sliding scale' of minority language education rights, depending on the number of children of minority rights holders affected.¹⁷ In *Association des Parents Francophones (ColombieBritannique) v British Columbia* it was decided that the number of French-language elementary students in that area of Vancouver was sufficient to warrant the highest threshold of minority education rights.¹⁸ At this level, rights holders are entitled to meaningfully similar educational facilities to those

¹⁰ *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41, 36 (Gageler J).

¹¹ *Ibid* 39.

¹² *Ibid* 40 citing *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369-370 [138]-[140]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231-232 [25]-[29]; *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207, 272 [374].

¹³ *Ibid* 45.

¹⁴ *Ibid* 50.

¹⁵ *Ibid* 146 [2], 152 [24].

¹⁶ *Ibid* 141.

¹⁷ *Ibid* 155-156 [29] citing *Mahe v Alberta*, [1990] 1 SCR 342, 366.

¹⁸ *Association des Parents Francophones (ColombieBritannique) v British Columbia* (1996) 27 B CLR (3d) 83.

of majority language students,¹⁹ with a focus on substantive equivalence rather than per capita costs.²⁰ The Court determined this by asking whether a reasonable parent would be deterred from sending their children to the minority language school because it was meaningfully inferior to an available majority language school.²¹

The Court found that the good quality of instruction and academic outcomes at RDV were not so superior to offset its inadequate facilities, overcrowding and long travel times.²² The Court concluded that RDV was not substantively equivalent to the relevant majority language schools and therefore there was a prima facie breach of s 23 of the *Charter*.²³

The Court found that costs and practicalities are relevant to determining what level of minority education rights are applicable, which was the question decided in *Association des Parents Francophones*,²⁴ but not relevant to the question of whether there was equivalence.²⁵

The proceeding was ‘phased’, and prima facie breach of s 23 was the only question considered in the initial phase.²⁶ The question of determination of responsibility, potential justification for the breach and a positive remedy was left to a subsequent phase, if necessary.²⁷

Special costs were awarded to the plaintiffs on the basis that they were successful public interest litigants.²⁸

***Mouvement Laïque Québécois c Saguenay (Ville)*) [2015] 2 SCR 3**

On appeal from the Quebec Court of Appeal.

The mayor of the City of Saguenay would make the sign of the cross and recite a prayer at the start of public meetings of the municipal council. A Sacred Heart statue and a crucifix were displayed in one of the council chambers.

S, an atheist, felt uncomfortable with the prayer, which he considered religious. The mayor refused a request by S to stop the practice. S complained to the Human Rights and Youth Rights Commission (‘Commission’) on the basis that the practice infringed his freedom of conscience and religion contrary to ss 3 and 10 of the *Quebec Charter*.

The Commission investigated the prayer but not the religious symbols and found that there was sufficient evidence to submit the dispute to the Human Rights Tribunal (‘Tribunal’). In the meantime the City adopted a by-law to regulate the recitation of the prayer.

The Tribunal found that the prayer breached the state’s duty of neutrality. The Court of Appeal reversed the Tribunal’s decision.²⁹

Judgment

The Court unanimously held that the practice infringed S’s freedom of conscience and religion protected under ss 3 and 10 of the Quebec Charter. Abella J, concurred in regards to the infringement of the Quebec Charter, however she disagreed as to the standard of review of the Tribunal’s decision.

19 *Association des Parents de L’école Rose-Des-Vents v British Columbia (Education)* 2015 SCC 21, 156 [30] citing *Mahe v Alberta*, [1990] 1 SCR 342, 366, 378.

20 *Ibid* 158 [33], 161 [41], 156 [30] citing *Mahe v Alberta*, [1990] 1 SCR 342-85.

21 *Ibid* 158 [35].

22 *Ibid* 166 [57].

23 *Ibid* 168 [61].

24 *Association des Parents Francophones (ColombieBritannique) v British Columbia* (1996) 27 B CLR (3d).

25 *Association des Parents de L’école Rose-Des-Vents v British Columbia (Education)* 2015 SCC 21, 163 [46].

26 *Ibid* 149 -150 [14]-[15].

27 *Ibid* 169 [63]; 169 [66].

28 *Ibid* 177 [90].

29 *Saguenay (Ville de) v Mouvement Laïque Québécois* 2013 QCCA 936.

McLachlin CJ and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ held that it was reasonable of the Tribunal to find that the prayer constituted a discriminatory interference with S's freedom of conscience and religion for the purposes of s 3 and 10 of the *Quebec Charter*.³⁰

In regards to the state's duty of religious neutrality, the Majority explained that it flows from its obligation to be respectful of every person's freedom of conscience and religion.³¹ They held that when state officials profess, adopt or favour one belief to the exclusion of others, this is discriminatory because there is exclusion or distinction based on religion.³² Further, they held that to infringe the *Charter* the practice must constitute a discriminatory interference with the individual's freedom of conscience and religion. It was noted that a trivial or insubstantial interference with a person's beliefs is insufficient to constitute discriminatory interference.³³

For these reasons, their Honours concluded that the practice of reciting the prayer resulted in the exclusion of S on the basis of religion and impaired his right to full and equal exercise of his freedom of conscience and religion.³⁴

The concept of 'benevolent neutrality', which does not go so far as complete secularity, was rejected. Their Honours concluded that the state's duty to remain neutral on questions relating to religion could not be reconciled with adherence to a religious belief.³⁵ The Court also rejected the contention that the reference to God in the preamble to the Canadian Charter authorises the state to consciously profess a theistic faith.³⁶

Their Honours did not consider the religious symbols and held that it was not open to the Tribunal to consider them as they had not been investigated by the Commission.³⁷

With respect to the administrative law issue, it was held that the standard of correctness should be applied to decisions of the Tribunal relating to the scope of the State's duty of religious neutrality and the standard of reasonableness to questions within the Tribunal's area of expertise.³⁸

In a separate concurrence, Abella J agreed that the appeal should be allowed. Her Honour disagreed on the administrative law issue, finding that the decision was within the Tribunal's area of expertise and should be reviewed on a standard of reasonableness.³⁹

C. Supreme Court of India

Supreme Court Advocates-on-Record & Another v Union of India , No 13 of 2015 ('the NJAC Case')

This case concerns the validity of legislation which would amend the Constitution of India to change the way that judges are appointed to superior courts.

Historically the appointment of judges was made by the President in consultation with the Chief Justice and other judges. The *First Judges Case* held that the Government had final say over appointments.⁴⁰ The *Second Judges Case* reversed this and introduced the collegium system, in which the Chief Justice of India and other

30 *Movement Laïque Québécois c Saguenay (VILLE)* [2015] 2 SCR 139, 60 [126] (McLachlin C J and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ).

31 *Ibid* 14 [1], 22 [23], 39 [71].

32 *Ibid* 45 [84].

33 *Ibid* 45 [86] citing *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, [56]–[59].

34 *Ibid* 37 [64].

35 *Ibid* 43 [78].

36 *Ibid* 67-68 [146]–[149].

37 *Ibid* 32 [53].

38 *Ibid* 31-32 [49]–[50].

39 *Ibid* 73-74 [165], 77 [172] (Abella J).

40 *S P Gupta v Union of India* (1981) (Supp) SCC 87 ('*First Judges Case*').

senior judges determine who is to be appointed to superior courts.⁴¹ This system was affirmed in the *Third Judges Case*.⁴²

The Constitution (Ninety-Ninth Amendment) Act 2014 ('the Amendment') and the *National Judicial Appointments Commission Act 2014* ('NJAC Act') provided for a National Judicial Appointments Commission ('NJAC') to make recommendations for the appointment of judges. The NJAC would consist of the Chief Justice of India, two other senior judges of the Supreme Court, the Law Minister and two eminent persons.

The petitioners argued that the Amendment was invalid on the basis of the 'basic structure doctrine', applied in *Minerva Mills Ltd v Union of India*,⁴³ which provides that Parliament does not have the power to amend the Constitution in a manner which would alter its basic structure. The respondents accepted the basic structure doctrine but argued that the Amendment did not alter the Constitution's basic structure and did not infringe upon the separation of powers or the independence of the judiciary.

Judgment

The Court held 4:1 that the Amendment and NJAC Act were invalid and that the collegium system as it existed before the Amendment should be reinstated. The five judges each wrote separately. All members of the Court recognised the basic structure doctrine and accepted that the independence of the judiciary is a basic feature of the Indian Constitution.⁴⁴

Khehar J held that removing the primacy of the judiciary in the selection and appointment of higher judiciary violates the principle of independence of the judiciary.⁴⁵ His Honour held the Amendment was also invalid because the participation of the Law Minister infringed the concepts of separation of powers and independence of the judiciary.⁴⁶

Both Kurian J and Goel J refused to revisit the *Second Judges Case*, which held that the appointment of judges is integral to the independence of the Judiciary,⁴⁷ and on this basis held the Amendment invalid.

Kurian J agreed with Chelameswar J's criticism that the present collegium system lacks transparency, accountability and objectivity.⁴⁸ However, his Honour concluded that the Amendment impairs the structural distribution of powers and is impermissible.

Lokur J held that the Amendment was invalid as it radically changed the process of judicial appointments as originally framed in the Constitution.⁴⁹ His Honour identified the role of the judiciary, the ability of the two eminent persons to veto appointments, the presence of the law minister and the requirement that the President must consult with the NJAC as particularly problematic.⁵⁰

Chelameswar J, in dissent, held that the Amendment was valid. His Honour accepted the basic structure doctrine and agreed with the Majority that the independence of the judiciary is a basic feature of the Constitution.⁵¹ However, his Honour disagreed that the Amendment abrogated the independence the judiciary.⁵²

41 *Supreme Court Advocates-on-Record Association v Union of India*, (1993) 4 SCC 441 ('*Second Judges Case*').

42 *In Re Special Reference 1 of 1998* (1998 7 SCC 739) ('*Third Judges Case*').

43 Citing *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.

44 *Supreme Court Advocates-on-Record & Another v Union of India*, No 13 of 2015, [244] (Khehar J), 936 [14] (Goel J), 896 (Kurian J), [12], [64], [67] (Chelameswar J), 579 [2] (Lokur J).

45 *Ibid* [244] (Khehar J).

46 *Ibid* [254].

47 *Ibid* 899 (Kurian J) 961, 1010 (Goel J).

48 *Ibid* 910 (Kurian J).

49 548

50 [490],[492],[523], [537].

51 Judgment [67] citing *L Chandra Kumar v Union of India & Others* (1997) 3 SCC 261 [64] and *His Holiness Kesavananda Bharati Sripadagalvaru and Others v State of Kerala and Another* (1973) 4 SCC 225, (Chelameswar J).

52 *Ibid* [87] (Chelameswar J).

His Honour noted the backdrop of the Amendment, including the manipulation of the system of appointments by the executive prior to the collegium system and examples of inappropriate exercises of power by judges under the collegium system.⁵³ Before concluding that the primacy of the judiciary in the matter of judicial appointments is not the only means of establishing an independent and efficient judiciary.⁵⁴ His Honour held that the NJAC system, including the participation of the executive in the selection process, does not abrogate judicial independence and thus is not invalid as a result of the basic structure doctrine.⁵⁵

D. Supreme Court of the United Kingdom

***R (on the application of Ali) v Secretary of State for the Home Department; R (on the application of Bibi) v Secretary of State for the Home Department* [2015] UKSC 68**

A 2010 amendment to the Immigration Rules ('the Rule') requires a foreign spouse or partner of a British citizen or resident to pass a test of competence in the English language before coming to live in the UK.⁵⁶ An exemption may be granted in exceptional circumstances, however the Guidance accompanying the rule states that such circumstances are rare and do not include financial reasons or lack of literacy.

The appellants were citizens of the United Kingdom married to foreigners. The first appellant's husband was unable to complete the test for financial reasons, and the second appellant's husband was also unable to complete the test because there is no test centre in the country in which he lived.

The appellants argued that the Rule is an unjustifiable interference with the right to respect for private and family life protected by art 8 of the European Convention on Human Rights ('EHCR'), or is unjustifiably discriminatory in securing the enjoyment of that right, contrary to art 14 of the EHCR. Alternatively, it was argued that the Rule is irrational, in contravention of the common law.

Judgment

Lady Hale, Lord Hodge and Lord Neuberger each wrote judgments which held that the Rule itself does not infringe art 8.

Lady Hale (with whom Lord Wilson agreed) recognised that art 8 does not impose a general obligation to accept non-national spouses for settlement.⁵⁷ Lady Hale applied the proportionality test from *Huang v Secretary of State for the Home Department* and *Aquilar Quila*.⁵⁸ First, her Honour found that the Rule has a legitimate aim; the 'promotion of integration' and 'community cohesion'. Second, she found that this aim is sufficiently important to justify interference with fundamental rights.⁵⁹ Third, there was found to be a rational connection between the measure, the language test requirement, and the aim.⁶⁰

In her Honour's view the real question was whether a fair balance had been struck between individual rights and the interests of the community, citing *Abdulaziz*.⁶¹ Her Honour concluded that in instances where there were practical barriers to fulfilling the language requirement, such as inadequate language skills or

53 Ibid [62]–[63], [46].

54 Ibid [98].

55 Ibid [104].

56 Rule E-ECP 4.1 and E-LTRP 4.1 in Appendix FM ('the Rule').

57 *R (on the application of Ali) v Secretary of State for the Home Department; R (on the application of Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, 13 [26] citing *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, [68].

58 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621.

59 *R (on the application of Ali) v Secretary of State for the Home Department; R (on the application of Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, 15 [30].

60 Ibid 19 [45]–[46].

61 Ibid 13 [27] citing *Jeunesse v The Netherlands* (2015) 60 EHRR 789, [106], 20 [48].

prohibitive cost, there was substantial, and potentially permanent, interference with art 8 rights.⁶² Lady Hale found that the comparatively modest benefits of the language requirement meant the Rule did not strike the required fair balance in such instances.⁶³

Lady Hale concluded that the Rule was not invalid as it was not an unjustified interference in all cases.⁶⁴ However, the operation of the rule was likely to be incompatible with art 8 in a significant number of cases. Her Honour invited further submissions on the issue of declaration of incompatibility in regards to the Guidance, as the appellants did not seek a declaration. The exemption for nationals of English speaking countries was held to be discriminatory, however, it did not contravene art 14 as her Honour found it was capable of justification.⁶⁵

Lord Hodge (with whom Lord Hughes agreed) held the rule was valid. However, his Honour noted that the narrowness of exceptional circumstances may result in a significant number of cases in which art 8 rights are breached.⁶⁶ His Honour found that in order to achieve a fair balance it should be considered whether it is reasonably practicable for the spouse to sit the test. His Honour had concerns about making a declaration of incompatibility but invited further submissions before reaching a concluded view.⁶⁷

Lord Neuberger held that the rule was lawful on the basis that although it interfered with art 8 rights it satisfies the requirements of legitimate aim,⁶⁸ rational connection,⁶⁹ less intrusive means and proportionality.⁷⁰ His Honour found that, bearing in mind the wide measure of discretion which should be accorded to the executive in such instances, the Rule strikes a fair balance between the rights of the individual and of the community.⁷¹

Lord Neuberger shared Lady Hale and Lord Hodge's concerns about the operation of the Guidance and found a declaration of incompatibility attractive.⁷² His Honour agreed to invite further submissions.⁷³

E. Supreme Court of the United States

Maryland v Kulbicki ————— [577 US \(2015\)](#)

On Appeal from the Court of Appeal of Maryland on the issue of the 6th Amendment right to criminal defence counsel.

Kulbicki shot and killed his mistress. At Kulbicki's trial in 1995, Agent Ernest Peele of the Federal Bureau of Investigation testified as an expert in Comparative Bullet Lead Analysis ('CBLA'). Peele testified that the composition of elements in the lead of a bullet fragment found in Kulbicki's possession matched the composition in a fragment removed from the victim; a similarity one would 'expect' if examining two pieces of the same bullet'. Although the bullet fragments were not an exact match Peele testified that they likely came from the same package. The jury considered the CBLA evidence, additional physical evidence and witness testimony and convicted Kulbicki of first-degree murder in 1995.

62 Ibid 21 [52].

63 Ibid 22 [54].

64 Ibid 23 [60].

65 Ibid 22 [56].

66 Ibid 23 [61]. 23 [58].

67 Ibid 27 [76].

68 Ibid 28-29 [83].

69 Ibid 29 [84].

70 Ibid 27 [77], 28 [79], 29 [87].

71 Ibid 30 [98].

72 Ibid 32 [102] citing *R (on the application of Ali) v Secretary of State for the Home Department*; *R (on the application of Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, 21 [53] (Lady Hale), 26 [73] (Lord Hodge).

73 Ibid 33 [104].

In 1997 Kulbicki filed a petition for post conviction relief under the *Uniform Postconviction Procedure Act*.⁷⁴ In 2006, the Court of Appeals of Maryland had held CBLA to be inadmissible in *Clemons v State* ('*Clemons*'), as it was no longer generally accepted by the scientific community.⁷⁵ In 2006 Kulbicki amended his petition, which was ongoing, and relied on *Clemons* to allege that his attorneys at trial were ineffective because of their failure to question CBLA on the basis of evidence that existed at that time.

In 2013, in *Kulbicki v State of Maryland*,⁷⁶ the Court of Appeals of Maryland considered Kulbicki's petition for post conviction relief. The Court found that his attorneys were constitutionally ineffective and ordered a new trial.

Judgment

The Court held that Kulbicki's 6th Amendment right to criminal defence counsel had not been infringed. Applying the standard from *Gideon v Wainwright*, Kulbicki's counsel were constitutionally 'effective'.⁷⁷ The Court reversed the 2013 decision of the Court of Appeal of Maryland.

The Court cited the principle from *Strickland v Washington* that counsel is unconstitutionally ineffective if his or her performance is both deficient and prejudicial.⁷⁸ *Strickland* defined this as consisting of errors so serious that he or she no longer functions as counsel and that this deprives the defendant of a fair trial.⁷⁹

In 2013 the Court of Appeals of Maryland found that 'any good attorney' should have detected the methodological flaws in CBLA at Kulbicki's trial in 1995.⁸⁰ These flaws ultimately lead the court to reject CBLA evidence in 2006 in *Clemons v State*.⁸¹ On the basis of this failure the Court of Appeals of Maryland found that Kulbicki's counsel were constitutionally ineffective and Kulbicki's 6th Amendment right was infringed.

The Supreme Court found that Kulbicki's attorneys were not constitutionally required to 'predict the demise of CBLA'.⁸² The counsels' conduct in question must be viewed as it would have been at the time the conduct occurred.⁸³ The Court noted that at the time of Kulbicki's trial in 1995 the validity of CBLA was widely accepted and CBLA evidence regularly admitted. The Court concluded that given the uncontroversial nature of CBLA at the time, the Court of Appeals in requiring Kulbicki's counsel to question it, demanded 'perfect advocacy' of them.

The Court held that Kulbicki's counsel satisfied the required 'reasonable competence' standard and therefore that Kulbicki's 6th Amendment right to counsel had not been infringed.

74 Criminal Procedure Article ch 10 Md Code Ann (2001).

75 *Clemons v State*, 371, 896 A 2d 1059, 1078 (Md, 2006).

76 *Kulbicki v State of Maryland*, 440 Md 33; (2013)

77 *Maryland v Kulbicki* 577 US _ (2015) 1, citing *Gideon v Wainwright* 372 US 335 (1963).

78 *Ibid* 1 citing 466 US 668, 687 (1984).

79 *Ibid* 1 citing *Strickland v Washington* 466 US 668, 687 (1984).

80 *Ibid* 3.

81 370, 896 A 2d 1059, 1077.

82 *Maryland v Kulbicki* 577 US _ (2015) 4.

83 *Association des Parents de L'école Rose-Des-Vents v British Columbia (Education)* 2015 SCC 21, 3 citing *Strickland v Washington* 466 US 668, 687 (1984) 690.