



NEWSLETTER No. 31

March 2016

Welcome to the 31st 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.



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- 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

The year has started energetically at CCCS. I am delighted to begin this newsletter with congratulations to two of our students. CCCS PhD student **Anne Carter** recently won the [prize for best conference paper](#) for her paper 'Proportionality and Transnationalism' at the International Graduate Law Conference at King's College London. CCCCS Research Assistant and Melbourne Law School JD student **Marcus Roberts** was awarded the [George Winterton Cup](#) for first place in the Governor – General's Essay Competition. Marcus' paper was on Section 18 C of the *Racial Discrimination Act 1975* (Cth).

Events

The Centre has already hosted one major event with another to follow shortly. On 18th and 19th of March, the CCCS hosted an authors' conference for contributors to the *Oxford Handbook on the Australian Constitution* which Cheryl Saunders and I are editing. The conference provided a valuable forum for the exchange of ideas and development of chapters and produced a lively discussion. On 2-3 May, the CCCS will host [The Invisible Constitution: Comparative Perspectives](#) a Roundtable of the [International Association of Constitutional Law](#) (IACL), co-convened with **Professor Rosalind Dixon** of UNSW. The program features prominent scholars and papers will reflect on constitutional law in Australasia, Asia, Europe, the Middle East and the Americas. Opening remarks will be delivered by **Justice Kate O'Regan** (formerly of the Constitutional Court of South Africa). For more details, see page 12 of this newsletter .

The evening of May 2 will feature a lecture from **Professor Manuel Cepeda**, President of the IACL entitled '[The Peace Process and the Constitution](#)' and a launch of **Professor Charles Fombad's** new book [Separation of Powers in African Constitutionalism](#).

Welcomes

We welcome new Centre members: [Associate Professor Jason Varuhas](#) who has interests in private law and public law, notably administrative law, torts and remedies. His book recently published book [Damages and Human Rights](#) (Oxford, Hart Publishing), stems from his doctoral thesis for which he won the Yorke Prize at the University of Cambridge

We also welcomed three new PhD students: **The Hon. Philip Cummins** (Chair of the Victorian Law Reform Commission and a former judge of the Supreme Court of Victoria) who is working with Cheryl Saunders and Michael Crommelin on the topic "Of judicial office". The thesis considers the nature and incidents of judicial office and whether there is a judicial culture separate from formal requirements and which is indispensable to the fulfilment of judicial office.

Anjalee da Silva will be working with me and an external supervisor (Katharine Gelber (UQ) on a thesis about gender-based vilification; and **Charmaine Rodrigues** who is working under the supervision of Cheryl Saunders and Will Partlett on a project on constitution making.

Publications

A CCCS project came to fruition this quarter. [A Symposium on Australasian Constitutionalism](#) which I co-edited with Cheryl Saunders and Claudia Geiringer (University of Victoria, Wellington) has been published in the International Journal of Constitutional Law which also features contributions from **Elisa Arcioni, Rosalind Dixon, Paul Rishworth, Janet McLean, Andrew Geddis**.

The remainder of the year promises to be busy and exciting. In particular we are looking forward to [Dialogues Between International and Public Law](#) a joint conference with the British Institute of International and Comparative Law to be held in London on 30 June – 1 July and to our busy masters of laws teaching program featuring as International Visiting Lecturers **Professors Vicki Jackson** (Harvard Law School), **Christina Murray** (British Institute of International and Comparative Law), **Fred Schauer** (University of Virginia) **Justice Kate O'Regan** (formerly of the Constitutional Court of South Africa; **Judge Dennis Davis** (High Court of South Africa) and **Justice Debra Mortimer** (Federal Court of Australia), (See page 13 of this Newsletter for further information).



Professor Adrienne Stone
Director, CCCS

CENTRE UPDATE

Adrienne Stone

Publications

'Constitutional Amendment and Political Constitutionalism' (with Rosalind Dixon) in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP): <https://global.oup.com/academic/product/philosophical-foundations-of-constitutional-law-9780198754527?cc=us&lang=en&#>

['The Small Brown Bird: Values Aspirations and the Australian Constitution; \(with Elisa Arcioni\)](#) Int J Constitutional Law (2016) 14 (1): 54-59

[Putting political constitutionalism in its place?: A reply to Cormac Mac Amhlaigh](#) Int J Constitutional Law (2016) 14 (1) 198-203

Conferences

Convened TriNations Symposium jointly with Professors Cora Hoexter (University of Witwatersrand) and Janet McLean (University of Auckland). 9 and 10 December 2015.

Delivered a commentary on Professor Ozan Varol's paper 'Structural Rights' at the Comparative Constitutional Law Workshop held at the University of New South Wales on 11 December 2015.

Cheryl Saunders

Publications

'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes*, Federation Press, 2015, 27-48

'Common law Public Law: Some Comparative Reflections' in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems* (Hart Publishing 2015) 353-366

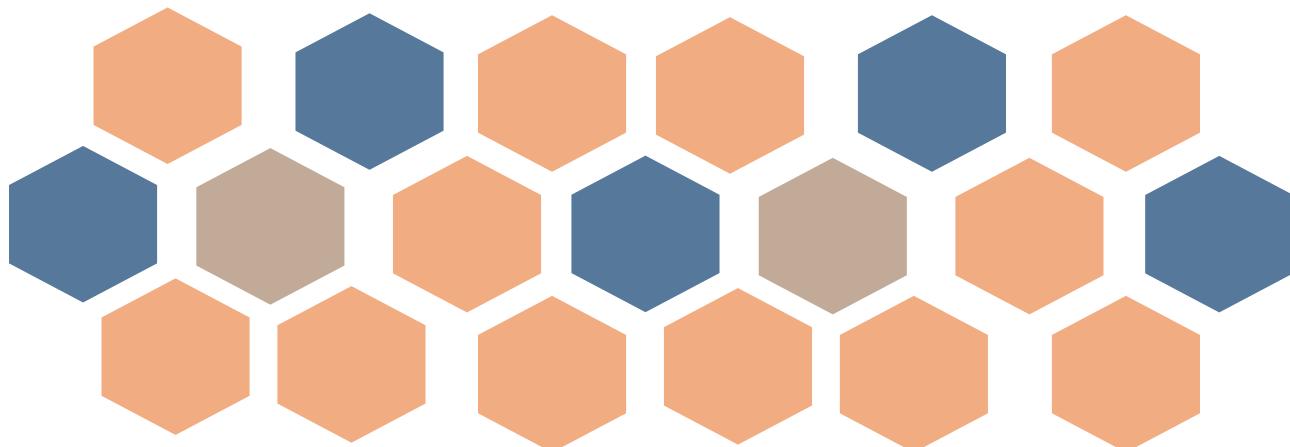
Presentations:

Concluding observations on Future Directions in a conference held jointly by the Victoria Law Foundation and Melbourne Law School, *Administrative Law in an Age of Statutes*, 26 February 2016. To see a video of the Senate lecture, go to:

<http://parlview.aph.gov.au/mediaPlayer.php?videoID=296976>

Senate Occasional Lecture, 11 March 2016, *Australian Democracy and Executive Law-Making: Practice and Principle* (with Stephen Argentum).

CCCS Brown Bag Lunch presentation on the reasons of Gordon J in *M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1



Farrah Ahmed

Workshop Paper

Attended a workshop on 'Regulating Religion' at National University of Singapore in December and delivered a paper which can be found at: SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743936

Pip Nicholson

Conferences

In February 2016, attended a conference at NUS hosted by Dr Bui Ngoc Son and presented "Deliberative Authoritarianism? Vietnamese constitutional change considered comparatively".

Kristen Rundle

Publications

Kristen Rundle, 'Gardner on Fuller: A Response to 'The Supposed Formality of the Rule of Law'', (2015) 6(3) *Jurisprudence: An International Journal of Legal and Political Thought* 580.

Presentations

In February 2016, presented an analysis of the current law on the ground of 'unreasonableness' in Australian administrative law to the Judicial College of Victoria's workshop on 'Administrative Law in the Age of Statutes', in response to a presentation on the same issue by President Chris Maxwell, Victorian Court of Appeal.

Friday 26 February, acted as a presenter (in collaboration with President Chris Maxwell) at the Judicial College of Victoria's 'Administrative Law in the Age of Statutes' workshop, on the subject of the statutory implication of 'reasonableness' in administrative law.

Dale Smith

Paper

Delivered a paper (with Colin Campbell from Monash) at the Monash Public Law Interest Group on March 8. The title of the paper was "Moreau, deliberative freedoms and the asymmetry of anti-discrimination law".

Scott Stephenson

Commentary

'Scott Stephenson, Michael Crommelin and Cheryl Saunders on the Judgments in Plaintiff M68-2015 v Commonwealth', [Opinions on High](#), 29 February 2016 (with Michael Crommelin and Cheryl Saunders).

'Court Ruling Leaves the Buck with MPs', [Pursuit](#), 3 February 2016.

Presentations

'The Debate Between Aileen Kavanagh and Stephen Gardbaum on Weak-Form Judicial Review', CCCS Brown Bag Presentation, 1 March 2016.

'Plaintiff M68/2015 v Commonwealth', CCCS Brown Bag Presentation, 16 February 2016.

Joo-Cheong Tham

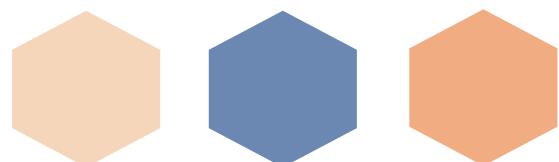
Publications

Joo-Cheong Tham, 'Labour standards and trade agreements: An exploratory analysis of the 'Labour' chapter of the Trans-Pacific Partnership Agreement', *The Evolving Project of Labour Law*, Centre for Employment and Labour Relations Law, Melbourne Law School, 4-5 February 2016, Melbourne Law School.

Joo-Cheong Tham, *Second Supplementary Submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders'*, January 2016, 8 pp.

Conference

Joo-Cheong Tham, 'McCloy, Political Equality and Electoral Regulation', Gilbert + Tobin Centre for Public Law 2016 Constitutional Law Conference, New South Wales Art Gallery, 12 February 2016.



Jason Varuhas

Book

J. Bell, M. Elliott, J. Varuhas, and P. Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016). 390pp.
<http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849469913>

Book Chapters

"The Public Interest Conception of Public Law" in J. Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 45-86.

<http://ssrn.com/abstract=2508981>

J. Bell, M. Elliott J. Varuhas and P. Murray, "Introduction" in J. Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 1-9.

"Against Unification" in H. Wilberg and M. Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing Ltd, 2015) 91-132. <http://ssrn.com/abstract=2602124>

Presentations

Presentations on UK and New Zealand Supreme Courts, Gilbert+Tobin Centre for Public Law and AACL Final Courts Round-up, Federal Courts Building, Sydney, December 2015.

Commentary on Article by Suk and Gerson, "The Sex Bureaucracy", Comparative Constitutional Law Workshop, UNSW, December 2015.

Margaret Young

Publications

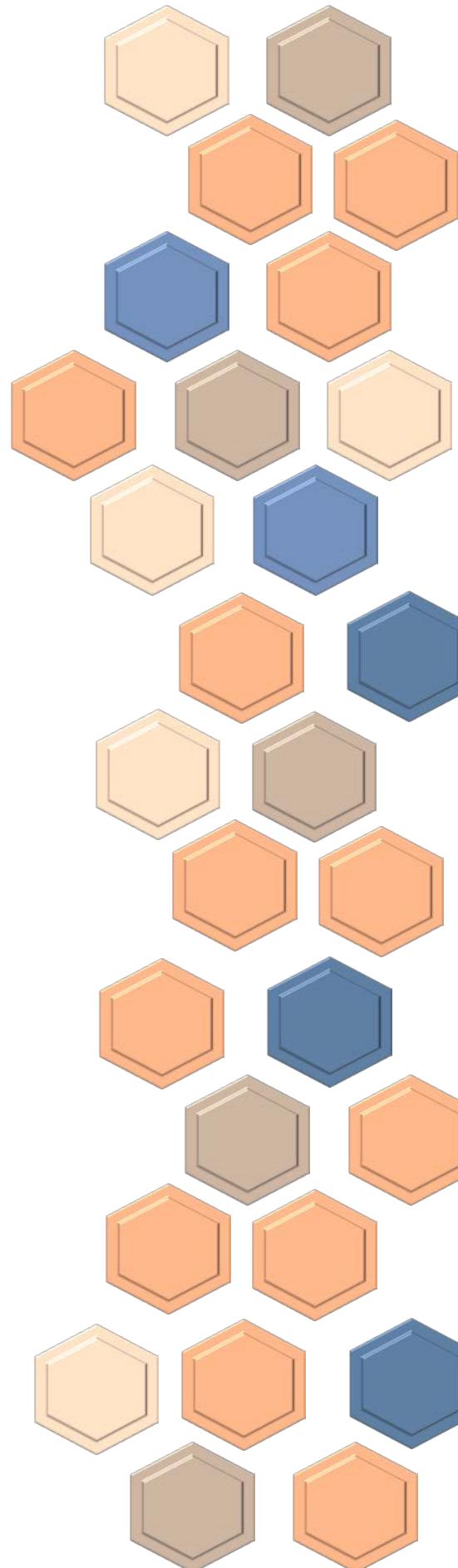
Margaret A Young, 'Fragmentation, Regime Interaction and Sovereignty' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, 2015) 71.

Margaret Young and Sebastián Rioseco Sullivan, 'Evolution through the Duty to Cooperate: Implications of the *Whaling* case at the International Court of Justice' (2015) 16 *Melbourne Journal of International Law* 310

Conference and seminar papers

'Fragmentation, Regimes and Legitimacy in International Law' Think piece prepared for the REFRACt seminar (network on 'Fragmentation and Complexity in Global Governance'), Brussels, 25 June 2015.

'Fairness in international law', invited speaker, Symposium in honour of Professor Gerry Simpson, Melbourne Law School, 29 October 2015



Graduate Research Students

The Hon. Philip Cummins

Thesis Topic

"Of judicial office". It considers the nature and incidents of judicial office and whether there is a judicial culture separate from formal requirements and which is indispensable to the fulfilment of judicial office.

Conferences

The Australasian Law Reform Agencies Conference (ALRAC) was held at the Woodward Centre on 2-4 March 2016. It is a biennial conference, and was attended by numerous delegates from Law Reform Agencies from all Australian States and Territories including the Australian Law Reform Commission, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Mauritius, Hong Kong and Kenya.

The theme of the Conference was Survival and Growth. The Conference was opened by the Victorian Attorney-General, The Hon Martin Pakula and the Keynote Address delivered by Sir Grant Hammond KNZM, Law Commissioner of New Zealand and former High Court Judge.

The Conference concluded with a Forum on Human Rights and Family Violence, at which the presenters were Professor Gillian Triggs, President, Australian Human Rights Commission and Dr. Eric Kwa, Secretary-General, Constitutional and Law Reform Commission of PNG.

There were 18 presentations by academics and law reformers. I chaired all sessions of the Conference, and delivered a Paper entitled " 'Big Picture' conceptual references - how appropriate are these for law reform agencies? " The next ALRAC will be held in Port Moresby in October 2018.

The Commonwealth Law Conference (CLC) was held in Melbourne on 19 - 23 March 2017. It is a major biennial event with over 200 speakers, in four streams. It was last held in Australia (and in Melbourne) in 2003. The Hon. Philip Cummins was Co-Chair, with Dr. Ian Freckleton QC, of the Legal and Judicial Education Stream.

Research Assistants

Anna Saunders

Moot

Anna has been selected for the Melbourne Law School team competing in the international rounds of the Price Media Law Moot at Oxford. The moot examines the law of freedom of expression from an international and comparative law perspective, and this year's problem focuses on issues of hate speech and intermediary liability.



Internship at the United States Congress

By Elizabeth Brumby

In early 2016, I was fortunate to spend two months interning at the United States Congress in the office of Representative Alcee Hastings, a Democrat from South Florida. In the current session of the House of Representatives, Congressman Hastings' legislative agenda is focused primarily on immigration, foreign affairs, trade and human rights.

My time on Capitol Hill provided many opportunities to engage with interesting and challenging aspects of U.S. constitutional law and public international law. As an intern, I assisted legislative counsel on both legal and policy issues – carrying out research looking at, for example, the evolution of constitutional reproductive rights; the validity of the Obama administration's executive action on gun control; and the role the U.S. might play in increasing accountability for crimes against humanity committed by Islamic State in Iraq.

I also had the opportunity to work on a range of matters relating to immigration policy, which was a priority issue during my time at Congress. In the aftermath of the terrorist attacks in Paris and the unfolding refugee crisis in Europe, border security and refugee admissions was the focus of much of the immigration-related legislative activity being debated in the House and Senate. This was a fascinating experience to be a part of. In addition to being a live, deeply contested political issue generating substantial media and public interest both in the U.S. and abroad, the response of the government to the refugee crisis raised many difficult constitutional questions. For example, shortly after my arrival in Washington, a number of Republican governors expressed an intention to restrict the resettlement of Syrian refugees within their states – something that would be susceptible to serious legal challenges as it would appear to be contrary to the Fourteenth Amendment, which applies to aliens as well as citizens and protects the right to move freely between states. As I departed Washington at the end of February, Congress was debating executive overreach in anticipation of *United States v. Texas*, the upcoming landmark Supreme Court challenge to President Obama's executive immigration action plan. As well as raising important questions concerning the discretion of the executive branch as to immigration, if the Supreme Court finds that Texas has standing to challenge the President's planned actions, the case could have significant implications in terms of the use of litigation as a partisan political tool.



Elizabeth at Capitol Hill

Although some of the specific legal issues are unique to the U.S. political environment, these questions have broad relevance beyond the American context. Mass migration of humans fleeing conflict is one of the greatest humanitarian challenges of our time, and I saw many parallels between the issues being debated in Congress and the challenging matters of law and public policy that our elected representatives are grappling with in Australia.

All this took place against the backdrop of the spectacle that was the presidential primaries, during what is certain to be remembered as a historically significant period in the development of American law and politics. At present, there is a widespread view that America's form of constitutional governance is in crisis. Congress, in particular, has come to be defined not by its power as a legislative institution, but by its inability to be dynamic and respond to a changing world. Throughout my time on Capitol Hill, I had the strong sense that the government was at a crossroads. Though I would not venture to predict what might happen over the coming months, it was a truly remarkable time to be in Washington and the experience served only to fuel my great interest in American constitutional law.

RECENT EVENTS

CCCS Seminar Series 2016

Seminar 1: Thursday 18th February

Banishment in the 21st Century: Citizenship Stripping in Common Law Nations

Sangeetha Pillai - Lecturer in the Faculty of Law and Associate of the Castan Centre for Human Rights Law (Monash University).

Democratic states are responding to the threat of terrorism, and in particular the problem of fighters returning home from conflicts in Iraq and Syria, by introducing laws for the stripping of citizenship. The United Kingdom is a world leader in this area, and is poised to further extend the reach of government power. Its model of citizenship stripping has also inspired like laws in Canada and Australia. This lecture will examine this important legal phenomenon as it is developing across these nations.



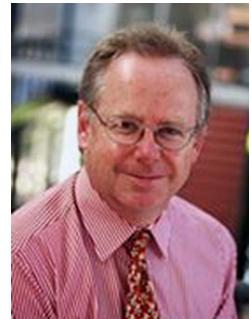
[Sangeetha Pillai](#) is a Lecturer in the Faculty of Law at Monash University, and an Associate of the Castan Centre for Human Rights Law. Prior to commencing this position, she was a Research Fellow and Director of the Federalism Project at the Gilbert+Tobin Centre of Public Law at UNSW. She specialises in constitutional law and citizenship, and has published and presented widely in these areas. Her PhD, awarded in 2015, examined the constitutional, statutory and common law dimensions of Australian citizenship, and the intersections between these dimensions. Sangeetha has commented widely in the media about the recent changes to Australia's citizenship revocation laws. She also gave evidence at the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Australian Citizenship (Allegiance to Australia) Bill 2015, and was a speaker at the Parliamentary Roundtable on Citizenship and the Constitution held in 2015.

Seminar 2: Wednesday 2 March

Too much law and not enough theory: A critique of the Commonwealth Constitution

Dr Bede Harris, Senior Lecturer and Law Discipline Head (Charles Sturt University).

The difficulty of amending the Australian Constitution has had the consequence that debate on systemic reform is virtually non-existent. Yet our constitutional arrangements manifest significant flaws: The Constitution is said to be based upon representative democracy, yet our electoral system is grossly unfair. The Constitution embodies responsible government, yet Parliament has few tools available to it to enforce ministerial responsibility. Australia is signatory to international human rights conventions, yet the Constitution protects only a handful of rights. Therefore, looked at from the perspective of constitutional theory, our Constitution is seriously deficient. Despite this, nothing changes. In part this is due to the poor state of civics education – ignorance of how our Constitution works creates fertile ground for constitutional conservatives to stoke fear of reform in the minds of voters. Yet, paradoxically, polls show that voters are increasingly disengaged from, and disenchanted with, our system of government. Drawing upon examples from other jurisdictions, this paper argues for reforms including the establishment of a truly representative electoral system, effective mechanisms for legislative oversight of the executive and protection for the full range of human rights. Such reforms would ensure consistency between the theories our Constitution is based upon what its text provides, and also create an environment in which citizens were fully engaged in the processes of government.



[Dr Bede Harris](#) has taught constitutional law in South Africa, New Zealand and Australia. He is currently a Senior Lecturer in Law at Charles Sturt University. His DPhil thesis from the University of Waikato was entitled Freedom of Expression and Human Dignity. His research interests lie in the areas of constitutional reform, human rights and Indigenous law. He participated in the Fulbright Senior Scholar programme where he studied the United States Constitution and native American governmental institutions. He has published numerous articles in the area of public law, in particular on freedom of expression and on legal dualism and the recognition of Indigenous law. His most recent books are Freedom, Democracy and Accountability – A Vision for a New Australian Constitution (2012) and Exploring the Frozen Continent: What Australians Think of Constitutional Reform (2014).

RECENT EVENTS

CCCS Seminar Series 2016

Seminar 3: Thursday 3rd March

Party Hopping in Israel: An assessment of the impact of anti-defection laws

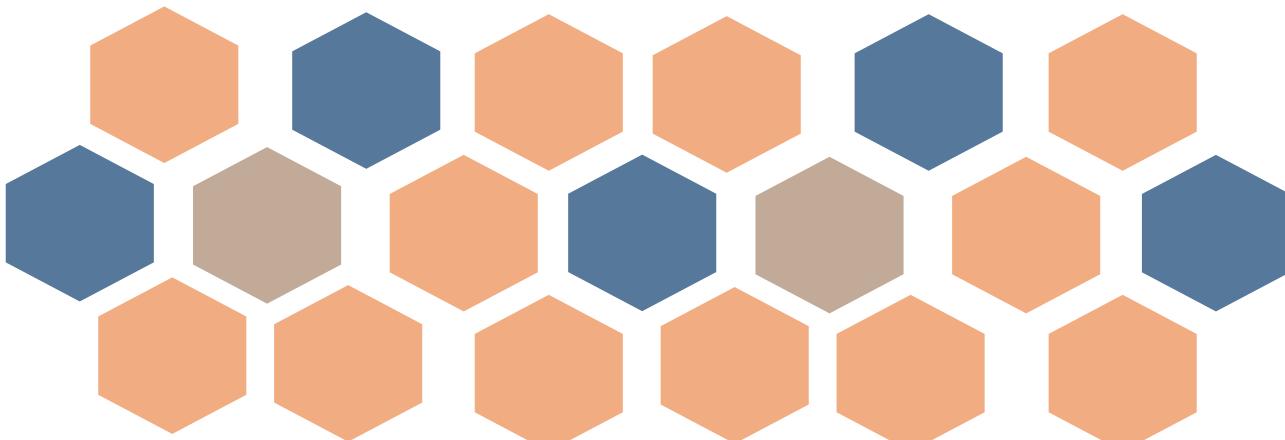
Professor Csaba Nikolenyi, Director (Azrieli Institute of Israel Studies)

Since 1991, Israel has been among the small number of parliamentary democracies that have passed anti-defection laws that aim to discourage parliamentarians from quitting their party's parliamentary group.

In this talk, I assess the impact of the Israeli legislation on political parties and the electoral process. My central finding is that legislative attempts to keep Israeli parties united have by and large failed: the overall rate of defections has increased since the law came into effect and political parties have become increasingly less rather than more cohesive and united. Moreover, since defections have been concentrated in the immediate pre-electoral period they have led to more volatility and fragmentation in the electoral competition. I propose that electoral reform may be a more effective, although indirect, way of keeping defections at bay.

[Csaba Nikolenyi](#), Director (Azrieli Institute of Israel Studies), received his PhD from the University of British Columbia in 2000 and was hired by Concordia University the same year. His research focuses on the comparative study of political parties, electoral systems and legislatures in post-communist democracies as well as on the political systems of Israel and India. He was former English Co-Editor of the Canadian Journal of Political Science (2006-11). He served as Code Administrator in the Faculty of Arts and Science between 2009 and 2011 and as Chair of the Department of Political Science between 2011 and 2014.

Currently, he is the Director of the Azrieli Institute of Israel Studies. Dr. Nikolenyi has published extensively in comparative politics journals and has authored two books: *Minority Government in India* (Routledge 2010) and *Institutional Design and Party Government in Post-Communist Democracies* (Oxford University Press, 2014). He was Visiting Professor at the Hebrew University of Jerusalem (2007-8) and at the Centre for European Studies at the Australian National University (2012).



RECENT EVENTS

OXFORD AUTHORS CONFERENCE

Friday 18th and Saturday 19th March

Laureate Professor Emeritus Cheryl Saunders and Professor Adrienne Stone, in their capacity as editors of the Oxford Handbook on Constitutional Law, chaired a conference for its authors at the Melbourne Law School.

In attendance, were the authors of each chapter of the handbook. This included academics from Universities around Australia, sitting and former Justices, including the Hon. William Gummow, the Hon. Kenneth Haynes, Justice Susan Kenny and Justice Stephen McCleish and Solicitor General of Australia, Justin Gleeson.

The goal of each workshop session was to canvass each theme comprehensively by providing a 10 minute presentation of a chapter, followed by discussion and questions. The Chapter themes included, Foundations, Constitutional Domain, Practices and process, Separation of Powers, Federalism and broader Constitutional Themes.

The conference was a resounding success, with editors and authors aiming to have the final product ready to publish by year's end.



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 Centre Members

Professor Cheryl Saunders AO, Foundation Director
 Professor Michael Crommelin AO
 Professor Simon Evans
 Professor Michelle Foster
 Professor Jeremy Gans
 Professor Beth Gaze
 Professor Pip Nicholson
 Associate Professor Farrah Ahmed
 Associate Professor Alison Duxbury
 Associate Professor Kirsty Gover
 Associate Professor Mark McMillan
 Associate Professor Joo-Cheong Tham
 Associate Professor Kristen Walker QC
 Associate Professor Margaret Young
 Dr Alysia Blackham
 Dr William Partlett
 Dr Kristen Rundle
 Dr Dale Smith
 Dr Scott Stephenson
 Dr Jason Varuhas
 Dr Lulu Weis
 Ms Penny Gleeson
 Ms Paula O'Brien
 Mr Glenn Patmore
 Mr Julian Sempill

Post Doctoral Research Fellow

Dr Coel Kirkby

PhD Students In Residence

Anne Carter
 Anna Dziedzic
 Anjalee De Silva
 Carlos Arturo Villagran Sandoval
 Charmaine Rodrigues
 The Hon. Philip Cummins

JD Research Associates

Minh-Quan Nguyen
 Alexandra Harrison-Ichlov
 Anna Saunders
 Kathryn Wright
 Elizabeth Brumby
 Joshua Quinn - Watson
 Marcus Robers
 Artemis Kirkinis
 Teresa Gray
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COMPARATIVE CONSTITUTIONAL LAW UPDATE

A. HIGH COURT OF AUSTRALIA

Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1 (3 February 2016)

The Plaintiff was a Bangladeshi national who became an ‘unauthorised maritime arrival’ upon entering Australia’s migration zone.¹ She was detained by officers of the Commonwealth and taken to Nauru where she continued to be detained.²

The Plaintiff sought a declaration that her past detention on Nauru was unlawful by reason that it was not authorised by any valid law of the Commonwealth nor based upon a valid exercise of the executive power of the Commonwealth.

Shortly prior to the hearing, ‘open centre arrangements’ were extended so that all residents of the regional processing centre at Nauru had total freedom of movement at all times.³ In light of this the Court did not consider injunctions sought by the Plaintiff to prevent her removal to Nauru and to prevent payments by the Commonwealth to operate the regional processing centre.⁴

The Commonwealth relied on s 198 AHA of the *Migration Act* to give statutory authority for the detention of the Plaintiff. Inserted during the proceedings with effect from August 2012, s 198 AHA provides authority for the executive to take actions and make payments in relation to regional processing arrangements.⁵

Judgment

The Court held 6:1 that the conduct of the Commonwealth was authorised by a valid law.

The joint judgment of French CJ and Kiefel and Nettle JJ concluded that upon arrival in Nauru the plaintiff was not detained by the Commonwealth.⁶ Their Honours stated that there was no doubt that Commonwealth had the statutory power to remove the plaintiff from Australia to Nauru and to detain her prior to her removal for that purpose, citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('Lim').⁷ Furthermore, the joint judgment held that *Lim* had nothing to say about Commonwealth participation in the detention of an alien by another State and therefore did not restrict the actions of the Commonwealth after the plaintiff's removal to Nauru.⁸

Keane J agreed that s 198 AHA was a law with respect to aliens and that the plaintiff's detention in Nauru was not detention in the custody of the Commonwealth. His Honour also concluded that on this basis the limitation on Commonwealth executive power discussed in *Lim* was not engaged.⁹

Bell J held that the actions and payments authorised by s 198 AHA(2) were sufficiently connected to the aliens power.¹⁰ Her Honour disagreed with the joint judgment and held that as a matter of substance the plaintiff's detention on Nauru was caused and effectively controlled by the Commonwealth and that the principle in *Lim*

¹ *Migration Act 1958 (Cth)* s5AA.

² Pursuant to s 198AD(2) of the *Migration Act 1958 (Cth)*.

³ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 [18], [218].

⁴ *Ibid* [23], [63].

⁵ *Migration Act 1958 (Cth)* s 198AHA (1), (2).

⁶ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 [32].

⁷ *Ibid* [31] citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10, 32-33.

⁸ *Ibid* [41].

⁹ *Ibid* [239], [241], [259], [260], [261] citing *Plaintiff M76/2013 v Minister for Immigration and Citizenship* (2013) 251 CLR 322, 369 [138].

applied.¹¹ However, her Honour concluded the detention did not infringe the principle in *Lim* because the detention did not have the character of being punitive.¹²

Gageler J held that s198 AHA was a law with respect to external affairs and also with respect to aliens.¹³ His Honour held that the power to detain the plaintiff was subject to the principles in *Lim* but did not offend the principle because it met the requisite conditions.¹⁴ Gageler J was the only judge to consider the executive power question and concluded that detaining the plaintiff was beyond the executive power of the Commonwealth.¹⁵

Gordon J, in dissent, held that the plaintiff's detention was unlawful. Her Honour detailed twelve actions taken by the Commonwealth in relation to the plaintiff's detention and on the basis of these held that she was detained by the Commonwealth.¹⁶ Gordon J held that the aliens power did not provide the power to detain after removal from Australia is completed.¹⁷ Furthermore, her Honour concluded that s 198 AHA is invalid because it 'contravene[s] Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates', citing *Lim*.¹⁸ It does so, her Honour explained, because it restricts liberty otherwise than by judicial order and beyond the limits of those few and confined exceptional cases where the executive without judicial process can detain persons.¹⁹ Therefore, s 198AHA could not be validly authorised by another head of power.²⁰

Her Honour held that no separate question arose about executive power because if s 198AHA was valid the question was unnecessary and if s198AHA was not valid the executive power of the Commonwealth could not fill the gap.²¹

B. SUPREME COURT OF CANADA

Carter v Canada (Attorney General) 2016 SCC 4 (15 January 2016)

In *Carter v Canada* the Supreme Court declared that ss 241(b) and 14 of the *Criminal Code* 'are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition'.²² The Court suspended this declaration for twelve months to allow Parliament to respond by enacting legislation consistent with the decision.²³

The Respondents in this case, the Attorneys General of Canada and British Columbia, sought a sixth month extension of the suspension. The Appellants, the British Columbia Civil Liberties Association and Lee Carter, opposed the extension and sought a constitutional exemption for individuals seeking assistance in ending their

¹¹ Ibid [93] 99] citing *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207, 240 [149]-[150]; [2015] HCA 1.

¹² Ibid [100].

¹³ Ibid [182] citing *Commonwealth Constitution* s 51(xxix) s 51 (xix).

¹⁴ Ibid [184], [183], [184].

¹⁵ Ibid [175].

¹⁶ Ibid [354], [352].

¹⁷ Ibid [393].

¹⁸ Ibid [388] citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33; *Plaintiff M76/2013* (2013) 251 CLR 322 at 369 [138].

¹⁹ Ibid [388].

²⁰ Ibid [403].

²¹ Ibid [368] citing *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416,454 [24], 457 [36], 467-469 [78]-[83].

²² *Carter v Canada* [2015] 1 SCR 331; *Criminal Code*, RSC 1985, c C-46, ss 241(b), 14.

life during any extension. The Attorney General of Quebec, as intervener, requested that Quebec be exempt from any extension.

Judgment

The Court unanimously granted a four month extension of the suspension. Abella, Karakatsanis, Wagner, Gascon and Côté JJ, McLachlin CJ and Cromwell, Moldover and Brown JJ dissenting, granted an exemption to Quebec and for individuals.

Abella, Karakatsanis, Wagner, Gascon and Côté JJ acknowledged that suspension of a declaration of constitutional invalidity is an ‘extraordinary step’.²⁴ However, their Honours accepted that the interruption of work on a legislative response due to the federal election constituted a circumstance sufficient to justify an extension.²⁵ The length of extension was limited to the duration of the delay caused by the election, being four months. The minority agreed on this point.²⁶

The majority granted an exemption for Quebec, in order to avoid uncertainty around the Province’s recently introduced legislation governing end-of-life assistance.²⁷ A further exemption was granted for individuals who wish to seek assistance from a physician in accordance with the criteria set out in *Carter v Canada*. Those individuals may apply to a superior court for relief during the extension.²⁸ The majority concluded that this was justified on the basis of the prejudice to rights flowing from an extension and concerns of fairness and equality across the country raised by the exemption for Quebec.²⁹

McLachlin CJ and Cromwell, Moldover and Brown JJ refused to grant an exemption to Quebec on the basis that it was unnecessary.³⁰ Their Honours noted that the legislation had come into force during the initial suspension.³¹ An exemption for individuals was also refused, citing the unanimous judgment on the merits, *Carter v Canada*, that if the Court created mechanisms for exemption it ‘would create uncertainty, undermine the rule of law, and usurp Parliament’s role. Complex regulatory regimes are better created by Parliament than by the courts’.³²

C. SUPREME COURT OF INDIA

Rajbala v State of Haryana No 671 of 2015 (10 December 2015)

This case concerns the Constitutional validity of the *Haryana Panchayati Raj (Amendment) Act* (2015) ('the Act').³³ The Panchayati Raj is a system of elected decision-making bodies at the village, intermediate and district levels governed by Part IX of the *Constitution of India* ('the Constitution'). The Act restricts the right to contest Panchayat elections in the state of Haryana.³⁴ The Act provides that a person is ineligible to contest the election if he; fails to pay arrears to co-operatives or electric bills; has not attained a minimum education

²⁴ *Carter v Canada* (2016) SCC 4 [2].

²⁵ Ibid [2].

²⁶ Ibid [8].

²⁷ Ibid [3]; *Act Respecting End-of-Life Care*, CQLR 2015, c S-32.0001 (“ARELC”), which came into force on December 10, 2015.

²⁸ *Carter v Canada* (2016) SCC 4 [6].

²⁹ Ibid [6].

³⁰ Ibid [10].

³¹ Ibid [10].

³² Ibid [12] citing *Carter v Canada* [2015] 1 SCR 331 [125].

³³ *Rajbala v State of Haryana No 671 of 2015 [11]* (Chelameswar J).

³⁴ Ibid [11].

level; or does not have a functional toilet at his place of residence.³⁵ The petitioners are political activists who wish to contest the local body elections and would be disqualified by the minimum education requirement.³⁶

The Petitioners argue that the disqualifications are wholly unreasonable and arbitrary and therefore violate art 14 of the Constitution of India, which provides for equality before the law and the equal protection of the law.³⁷

Judgment

The Court held unanimously that the *Haryana Panchayati Raj (Amendment) Act* (2015) was valid.

Chelameswar J explained that it was important to decide whether the right to vote and the right to contest elections to bodies created by the Constitution were constitutional or statutory rights.³⁸ His Honour concluded that both are constitutional rights; the *Constitution* includes limitations on these rights and there would be no need to prescribe constitutional limitations if these rights were not constitutional.³⁹ However, Chelameswar J concluded that it is not permissible for the Court to declare a statute unconstitutional on the ground that it is ‘arbitrary’.⁴⁰

In regards to the educational requirement, the petitioners argued that the Act was also invalid on the basis that there was no intelligible difference between the classes of person able and not able to contest and there was no nexus with the objects sought.⁴¹ Chelameswar J concluded that the prescription of an educational qualification is not irrelevant to the purpose of the better administration of the Panchayat and is therefore based on intelligible differentia, and not unreasonable or without a reasonable nexus with the objects.⁴²

His Honour then considered whether a provision which disqualifies a large number of persons who would otherwise be eligible is unconstitutional and concluded that the number of persons excluded is irrelevant unless it would render election to the bodies impossible.⁴³ Therefore, the education requirement was found to be valid.

In regards to the disqualification of persons in arrears of payments to cooperatives and of electricity bills,⁴⁴ Chelameswar J found these to be valid because of their similarity to the ineligibility of persons who are insolvent. The *Constitution* itself provides that such persons are ineligible to contest various elections.⁴⁵

In regards to the disqualification of persons who have no functional toilet, the petitioners argued that a large number of the rural population simply could not afford to have a toilet and to disqualify them from contesting elections was therefore discriminatory.⁴⁶ The factual basis of this was rejected and his Honour concluded the restriction was valid.⁴⁷

³⁵ *Haryana Panchayati Raj (Amendment) Act* (2015) s175 (t),(u),(v),(w).

³⁶ *Rajbala v State of Haryana* No 671 of 2015 [13] (Chelameswar J).

³⁷ *Constitution of India* art 14.

³⁸ *Rajbala v State of Haryana* No 671 of 2015 [18] (Chelameswar J).

³⁹ Ibid [37].

⁴⁰ Ibid [69].

⁴¹ Ibid [70].

⁴² Ibid [85].

⁴³ Ibid [86], [87].

⁴⁴ Ibid [88] citing *Haryana Panchayati Raj (Amendment) Act* (2015) s175 (t),(u).

⁴⁵ Ibid [88].

⁴⁶ Ibid [93].

⁴⁷ Ibid [94] citing *Haryana Panchayati Raj (Amendment) Act* (2015) s175 (w).

Abhay Manohar Sapre J concurred with Chelameswar J, adding that all of the requirements had a reasonable nexus with the object sought to be achieved.⁴⁸ In regards to the education requirement, his Honour explained that it was necessary for elected representatives to have some educational background to effectively carry out their functions and that it is the ‘legislative wisdom’ to decide the minimum qualification.⁴⁹ In regards to the functioning toilet requirement, his Honour stated that this is enacted essentially in the larger public interest and given that the State provides adequate financial assistance for toilet construction the requirement is not unreasonable in any manner.⁵⁰

D. SUPREME COURT OF THE UNITED STATES

Hurst v Florida [577 US _____ \(2016\)](#) (12 January 2016)

On Appeal from the Supreme Court of Florida

Timothy Lee Hurst was convicted of murder by a Florida Jury. At an additional hearing for sentencing, a penalty-phase Jury rendered an ‘advisory sentence’ to the judge, that the death sentence be imposed.⁵¹ Florida law requires that the judge then hold a separate hearing and independently find and weigh the aggravating and mitigating circumstances before deciding whether to enter a sentence of life imprisonment or death.⁵² The judge found aggravating circumstances existed and sentenced Hurst to death.

The issue was whether Florida’s capital sentencing scheme violates the 6th Amendment in light of the Supreme Court’s decision in *Ring v Arizona* (‘Ring’),⁵³ in which it was held that ‘capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment’.⁵⁴

Judgment

The Court held 8:1 that Florida’s capital sentencing scheme was unconstitutional. Sotomayor J, with whom Roberts CJ, Scalia, Kennedy, Thomas, Ginsberg and Kagan JJ joined, held that the scheme violated the 6th Amendment. Breyer J held that it violated the 8th Amendment and Alito J, in dissent, held that the scheme did not violate the Constitution.

Sotomayor J explained that the 6th Amendment, which provides for the rights to a ‘speedy and public trial, by an impartial jury’, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond reasonable doubt.⁵⁵ Furthermore, any fact that exposes the defendant to greater punishment is an ‘element’.⁵⁶ Sotomayor J concluded that the Florida scheme did not require the jury to make the critical findings necessary to impose the death penalty and therefore, applying the analysis in *Ring*, violated the 6th Amendment.⁵⁷

Florida presented a number of arguments in defence of the constitutionality of the scheme, including an argument based on *stare decisis*.⁵⁸ All of the arguments were rejected and Sotomayor J expressly overruled the relevant parts of the Court’s previous decisions, *Spaziano* and *Hildwin*, which had held that the 6th

⁴⁸ *Rajbala v State of Haryana* No 671 of 2015 [7] (Abhay Manohar Sapre J).

⁴⁹ *Ibid* [8].

⁵⁰ *Ibid* [12].

⁵¹ *Criminal Procedure and Corrections*, XLVII Fla Stat § 921.141(1) and (2).

⁵² *Criminal Procedure and Corrections*, XLVII Fla Stat § 921.141(3).

⁵³ 536 US 584 (2002).

⁵⁴ *Ring v Arizona* 536 US 584 (2002).

⁵⁵ *Hurst v Florida* 577 US _____ (2016) 4-5 (Sotomayor J) citing *Alleyne v United States*, 570 US _____, _____ (2013) (slip op 3); *United States Constitution* 14th Amendment, 15th Amendment.

⁵⁶ *Ibid* 5 citing *Apprendi v New Jersey*, 530 US 466, 494 (2000).

⁵⁷ *Ibid* 5 citing *Walton v Arizona*, 497 US 639, 648 (1990); *State v Steele*, 921 So 2d 538, 546 (Fla, 2005).

⁵⁸ *Ibid* 7-8 citing *Blakely v Washington*, 542 US 296 (2004), 303.

Amendment did not require specific findings authorising the death sentence be made by a jury.⁵⁹ Finally, her Honour chose not to depart from the Court's practice of declining to consider whether any error was harmless.⁶⁰

Breyer J concurred with the majority. His Honour cited his concurring opinion in *Ring*; the 8th Amendment's prohibition on cruel and unusual punishment requires that a jury, not a judge, make the decision to sentence a defendant to death.⁶¹

Alito J declined to overrule *Hildwin* and *Spaziano*.⁶² His Honour stated that there were strong reasons to question the principles relied upon in *Ring*.⁶³ Furthermore, Alito J considered that even if it was assumed that *Ring* was correctly decided it should not be extended as the sentencing scheme in question was much different to the scheme considered there.⁶⁴ Lastly, his Honour held that if there was any constitutional violation the error was harmless as a jury would have found the aggravating factors.⁶⁵

***Kansas v Carr* 577 US ____ (2016) (20 January 2016)**

On Appeal from the Kansas Supreme Court

The Attorney General of Kansas appealed the order of the Kansas Supreme Court to vacate the death sentence of the convicted murderers Sidney Gleason and Reginald and Jonathan Carr. The Kansas Supreme Court vacated the death penalties on the basis that the instructions to the Jury 'failed to affirmatively inform the jury that mitigating circumstances need only be proved to the satisfaction of the individual juror in that juror's sentencing decision and not beyond a reasonable doubt',⁶⁶ and therefore violated the 8th Amendment prohibition on cruel and unusual punishment. The Kansas Supreme Court further held that the death sentences of the Carr brothers should be vacated because the trial Court's failure to sever their sentencing proceedings was a violation of the 8th Amendment right 'to an individualized capital sentencing determination'.⁶⁷

Judgment

The Court held 8:1 that there was no violation of the 8th Amendment, Sotomayor J dissenting.

The Court first rejected an argument by one of the respondents, Sidney Gleason, that the Supreme Court did not have jurisdiction. While recognising that the Court would not intervene if the Kansas decision rested on adequate and independent state law grounds, the Court concluded that the Kansas decision relied on the Federal Constitution.⁶⁸

The Court considered that it may not be possible to apply a standard of proof to the mitigating factor determination as it is 'largely a judgement call (or perhaps a value call)' and 'mostly a question of mercy'.⁶⁹

⁵⁹ Ibid 9 citing *Hildwin v Florida*, 490 US 638 (1989), 640–641; *Spaziano v Florida*, 468 US 477 (1984).

⁶⁰ Ibid 10 citing *Ring*, 536 US 584,609.

⁶¹ *Ring v Arizona*, 536 US 584, 613–619 (2002), 614 (Breyer J) citing *Harris v Alabama*, 513 US 504, (1995).

⁶² *Hurst v Florida* 577 US ____ (2016) 1 (Alito J) citing *Hildwin v Florida*, 490 US 638 (1989), 640–641; *Spaziano v Florida*, 468 US 477 (1984).

⁶³ Ibid citing *Alleyne v United States*, 570 U. S. ___, ___–___ (2013) (slip op,1–2)(Alito J dissenting).

⁶⁴ Ibid 2 citing *Chapman v California*, 386 US 18, 24 (1967).

⁶⁵ Ibid 3.

⁶⁶ *State v Carr*, 329 P 3d 1195 (Kan 2014) [65].

⁶⁷ *State v Carr*, 329 P 3d 1195 (Kan 2014) 275; *State v Carr*, 331 P 3d 544 (Kan 2014) 717 ; *State v Gleason*, 329 P 3d 1102 (Kan 2014) 1212.

⁶⁸ *Kansas v Carr* 577 US ____ (2016) 8-9 (Scalia J) citing *Marsh*, 548 US 163, 184.

⁶⁹ Ibid 10 (Scalia J).

Furthermore, the Court stated that the case law does not require capital sentencing courts to affirmatively inform the jury that mitigating circumstances need not be proved beyond reasonable doubt.⁷⁰

In regards to the joint capital sentencing proceedings of the Carr brothers, the Court held that whatever the merits of the Defendant's procedural objections the Court would not 'shoehorn them into the 8th Amendment's prohibition on "cruel and unusual punishments".⁷¹ Furthermore, the Court concluded that only the most extravagant speculation would lead to a conclusion that the allegedly prejudicial evidence rendered the joint proceedings fundamentally unfair, and on the basis of *Romano*,⁷² this did not justify vacating the sentence.⁷³

Sotomayor J held that the cases should never have been reviewed by the Supreme Court,⁷⁴ as there was no suggestion that the Kansas Supreme Court had violated any federal constitutional right and was rather overprotecting constitutional rights.⁷⁵ Her Honour outlined a number risks of intervening in such cases. In particular, noting the majority judgment's criticism of a standard of proof for mitigating circumstances, her Honour highlighted the risk that the Supreme Court's reasons could discourage states from adopting valuable procedural protections as a matter of State law.⁷⁶ On the basis of the above factors, and the fact that the State of Kansas could, as a matter of State law, reach the same outcome, her Honour concluded that the Supreme Court should not have intervened.⁷⁷

⁷⁰ Ibid 11 (Scalia J) citing *Buchanan v Angelone*, 522 US 269 (1998).

⁷¹ Ibid 14 (Scalia J)

⁷² Ibid 15 (Scalia J) citing *Romano v Oklahoma*, 512 US 1, 13-14.

⁷³ Ibid 17 (Scalia J).

⁷⁴ *Kansas v Carr* 577 US ____ (2016) 1 (Sotomayor J).

⁷⁵ Ibid 3.

⁷⁶ Ibid 4.

⁷⁷ Ibid 7.

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