



*Welcome to the 32<sup>nd</sup> 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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- Our website: [law.unimelb.edu.au/cccs](http://law.unimelb.edu.au/cccs)
- Centre members also blog at Opinions on High: [blogs.unimelb.edu.au/opinionsonhigh/](http://blogs.unimelb.edu.au/opinionsonhigh/) and at the IACL Blog: [iacl-aidc-blog.org](http://iacl-aidc-blog.org)

# DIRECTOR'S REPORT

The past three months at CCCS has seen the culmination of some important projects and the launch of new initiatives.

A significant international Roundtable was held at CCCS on 2-3 May. Co-convened with [Rosalind Dixon](#) of the University of NSW, the [Invisible Constitution in Comparative Perspective](#) Roundtable brought scholars from around the world to discuss the multiple ways in which constitutional text relates to courts' approaches to constitutional review. The Roundtable was opened by **Justice Kate O'Regan**, formerly of the Constitutional Court of South Africa. Further details are found on page 7 of this newsletter.

The Roundtable also provided the occasion for a number of related further events: a launch of **Profess Charles Fombad's** book, [Separation of Powers in African Constitutionalism](#); a meeting of the Executive Committee of the International Association of Constitutional Law; a Chancellor's Human Rights Lecture by **Manuel José Cepeda Espinosa**, President of the International Association of Constitutional Law and former Justice of the Constitutional Court of Colombia on the topic [The Peace Process and the Constitution: Constitution making as peace making?](#)

Almost immediately following the Roundtable, a Review Panel ([Professor John Tobin](#) ; [Professor Helen Irving](#) and Justice Kate O'Regan) met to conduct a five yearly University mandated review of CCCS. That process is now successfully completed and I will be in a position to report on its results in the next newsletter.

In the meantime, there have been exciting developments at the CCCS. The first is the launch of the **Constitutional Transformations Network** a major new initiative that brings together a team of scholars at Melbourne Law School to explore both the practice and the concept of constitutional transformation through interrelated and overlapping themes: peacebuilding; constitution making; international and domestic interfaces; regionalism; and the dynamics of implementation. The project is coordinated by [Dr William Partlett](#) and [Professor Cheryl Saunders](#). For further details please see page 6 of this newsletter and also stay tuned for further announcements including the launch of the Network's website.

Lastly, I am delighted to announce that commencing in 2017 I will lead a five year ARC Laureate Fellowship program on the theme *Balancing Diversity and Social Cohesion in Democratic Constitutions*. The Laureate program will bring a team of researchers to the CCCS to investigate how Constitutions, in their design and in their application, can unify while nurturing the diversity appropriate for a complex, modern society. (Further details about the program are [here](#)). The Laureate Program includes the Kathleen Fitzpatrick Laureate Fellowship which provides support for mentoring of women researchers. As with the Constitutional Transformation Network, please stay tuned for further details of this exciting new development.

Finally, we bid farewell this week to CCCS researcher **Minh-Quan Nguyen**. Minh-Quan has been an indefatigable researcher at CCCS for the last two years making especially important contributions to the Public Law Review and the *Oxford Handbook on the Australian Constitution*. He will shortly commence his appointment as Associate to **the Hon Chief Justice Robert French** of the High Court of Australia. He leaves with our thanks for his many contributions to the work of CCCS and our best wishes for the future.



Professor Adrienne Stone  
Director, CCCS

## CENTRE UPDATE

### Adrienne Stone

#### Accepted for publication

'*New York Times v. Sullivan*' in the *Max Planck Encyclopedia of Comparative Constitutional Law*

'Constitutions, Gender and Freedom of Expression' in *Research Handbook on Gender and Constitutions*, Helen Irving (eds) (forthcoming 2016) (with Katharine Gelber) <http://ssrn.com/abstract=2795432>

'The Canadian Constitutional Law of Freedom of Expression', (forthcoming 2017) in R. Albert and D. Cameron (eds) *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press).

#### Conferences

Commentator, Legal Processes and Human Rights Workshop, Macquarie University Research Centre for Agency, Values and Ethics, 26 April 2016.

Convened [Invisible Constitution in Comparative Perspective](#) IACL Roundtable with Rosalind Dixon, 1–2 May 2016.

'The Canadian Constitutional Law of Freedom of Expression', delivered at '[Canada in the World: Comparative Perspectives on the Canadian Constitution](#)' Yale Law School, 12 April 2016.

Commentator, Australian Constitutional Values Roundtable, University of New South Wales, 10 June 2016.

#### Grants

[Kathleen Fitzpatrick Australian Laureate Fellowship](#) 2016 (awarded 6 May 2016).

### Cheryl Saunders

Taught Constitution Making (with Professor Christina Murray) in the Melbourne Law Masters from 18–24 May 2016.

#### Conferences

Chaired a Melbourne Conversation on Recognition, Treaty, Sovereignty and Self-Determination: Facts and Ambition, on 1 June 2016.

#### Presentations

Delivered an address on 'Public Law and Public International Law: a Public Law Perspective on Interdependence' at a conference on Dialogues between International and Public Law, London, 30 June 2016, jointly organised by the British Institute for International and Comparative Law and Melbourne Law School



## Anna Dzedzic

### Commentary

'Right to liberty, unconstitutional constitutional amendments, and foreign judges in PNG', Blog of the International Association of Constitutional Law, 31 May 2016. <https://iacl-aidc-blog.org/2016/05/31/analysis-right-to-liberty-unconstitutional-constitutional-amendments-and-foreign-judges-in-png/>

### Presentations

'Namah v Pato: PNG Supreme Court's decision on the constitutionality of the detention of asylum seekers on Manus Island' CCCS Brown Bag Presentation, 10 May 2016.

## Julian Sempill

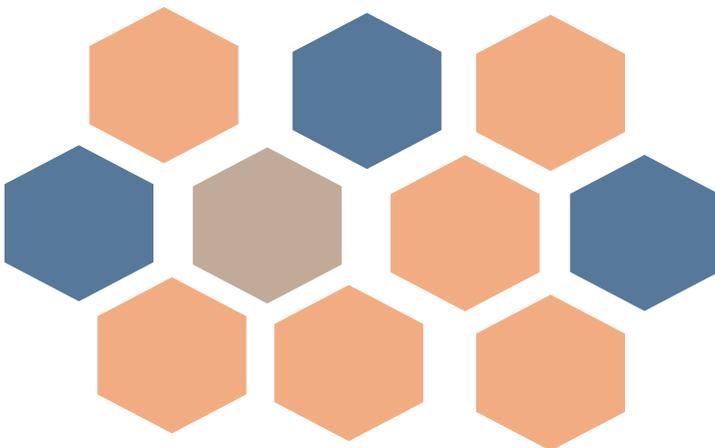
### Publications

"Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power" 31 *Journal of Law & Politics* 333 (2016) (University of Virginia School of Law).

### Presentations

Presented parts of "Ruler's Sword" at the University of New South Wales, Boston University, Boston College, and University College London.

Delivered a paper on the relationship between law and dignity at the Julius Stone Institute at Sydney Law School.



## Scott Stephenson

### Presentations

'The Rise and Recognition of Quasi-Constitutional Law': presented at the Symposium on Quasi-Constitutionality and Constitutional Statutes, Victoria University of Wellington, Wellington, 19-20 May 2016 & the International Society of Public Law (ICON•S) 2016 Conference, Humboldt University, Berlin, 17-19 June 2016.

'Democratic Debate & Deliberation': presented at the Conference on Australian Constitutional Values, University of New South Wales, Sydney, 10 June 2016.

'Reforming Constitutional Reform'" presented at the National Law Reform Conference, Australian National University, Canberra, 14-15 April 2016.

'Rights Protection in Australia': presented at the Conference on the Oxford Handbook of the Australian Constitution, The University of Melbourne, Melbourne, 18 March 2016.

He also presented at two CCCS Brown Bag Seminars, one on recent work by Aileen Kavanagh and Stephen Gardbaum and the other on quasi-constitutional law.

## Joo-Cheong Tham

### Paper

Joo-Cheong Tham, 'Political Equality', *Australian Constitutional Values Workshop*, UNSW Law School, 10 June 2016

Joo-Cheong Tham and Keith Ewing, 'Labour provisions in TPP and TTIP: A comparison without a difference?', *The Age of Mega-Regionals: TPP and Regulatory Autonomy in IEL*, Melbourne Law School, 20 May 2016.

### Opinion pieces

Joo-Cheong Tham, 'Eight ways to clean up money in Australian politics', *The Conversation*, 3 June 2016.

Joo-Cheong Tham, '7-Eleven is the tip of the iceberg in worker exploitation. So who's turning a blind eye?', *The Guardian: Comment is Free*, 12 May 2016.

### Media commentary

Radio National, *Background Briefing*, 'The price of politics', 19 June 2016.

Gina McColl, 'Turnbull's links to secretive fundraising practice', *The Age*, 19 June 2016.

Gina McColl, 'Political donations: new fears over shadowy Liberal fundraising groups', *The Age*, 29 May 2016.

## RECENT EVENTS

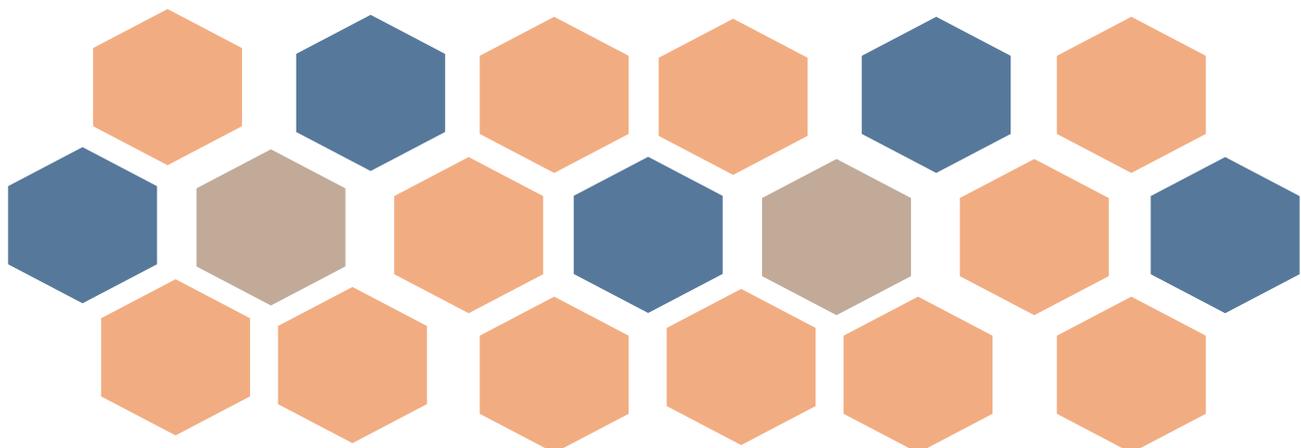
### Human Rights Lecture: The peace process and the Constitution: Constitution making as a peace making?

Monday 2 May 2016

Professor Manuel José Cepeda Espinosa, President (International Association of Constitutional Law) delivered a lecture at the Melbourne Law School on

**The peace process and the Constitution: Constitution making as a peace making?**

In 2015, the Colombia government entered into a transitional justice agreement with the FARC guerrilla movement that marked an important step towards ending decades of conflict in Colombia. This lecture by a member of the Commission negotiating this important part of the peace agreement brings a constitutional perspective to the peace process. The interface between peace making and constitution making and change is one of many challenges for contemporary international politics. While the relationship inevitably is context dependent to a degree the wide range of cases involving transition from conflict to forms of constitutional government make global experience a rich resource on which other states in conflict can draw. This lecture canvasses the experience of Colombia where, as the peace process unfolds, a consequential process of constitutional reform is underway. Some of the mooted changes relate to transitional justice for guerrilla forces and the military. Others concern broader developments, such as political representation and territorial autonomy. The lecture will focus on two questions in particular. The first is the way in which peace making has led to innovative institutional design. The second explores the way in which constitution making has been a tool to build peace at critical points over the last half century. This occasion will launch the Constitutional Transformation Network, a special project of the Centre for Comparative Constitutional Studies.



# THE CONSTITUTION TRANSFORMATION NETWORK

The Constitution Transformation Network is a new initiative that brings together a team of scholars at Melbourne Law School to explore both the practice and the concept of constitutional transformation.

At a practical level constitutional transformation is or has recently been underway in many states across the world. At heart, constitutional transformation involves the formulation and implementation of new Constitutions or major changes to existing Constitutions. It comprises questions about constitutional design as well as the processes of constitutional change. Depending on the context, constitutional transformation may encompass conflict resolution, peace building and other catalysts for regime change. It extends well beyond the ratification of new arrangements to include a period of transition, which may be drawn-out over a decade or more, and which covers implementation and constitutional change post-adoption.

In conceptual terms the very idea of a Constitution may be undergoing transformation, in the face of the conditions of internationalisation and globalisation that characterise present times. Pressures for change come from what is loosely described as the constitutionalisation of international law (the extent to which arrangements at the regional or international levels are beginning to take forms that might be described as 'constitutional') and the internationalisation of constitutional law (the impact of international actors and norms on constitutional transformation within a state). These interfaces between domestic and international interests have practical as well as theoretical implications.

The Constitution Transformation Network seeks to explore these issues through five interrelated and overlapping themes: peacebuilding; constitution making; international and domestic interfaces; regionalism; and the dynamics of implementation.

Collectively, team members bring knowledge in constitutional and comparative constitutional law, international law, military and international humanitarian law, regional law and Asian law. They believe that context is critically important in constitutional transformation, which therefore requires the knowledge and skills of comparative constitutional law. To that end, team members are committed to pooling their expertise to work together and with global partner institutions, scholars and practitioners to make a genuine difference to constitutional transformation in theory and practice.

The Co-ordinators of the Constitutions Transformation Network are [Professor Cheryl Saunders AO](#) and [Dr William Partlett](#).



## RECENT EVENTS

### IACL MELBOURNE ROUNDTABLE – The Invisible Constitution in Comparative Perspective

Monday 2 May–Tuesday 3 May

An IACL Roundtable was 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 were Professor Adrienne Stone and Professor Rosalind Dixon.

Speakers included Professor Johannes Chan, University of Hong Kong, Professor Jongcheol Kim, Yonsei University, Seoul, Professor Sudhir Krishnaswamy, Azim Premji University, Bangalore, Professor Lawrence B Solum, Carmack Waterhouse Professor of Law, Georgetown Law Centre, Washington DC, Professor Iddo Porat, Law School of the Academic Centre for Law and Business, Israel, Professor David E. Landau, Mason Ladd Professor, College of Law, Florida State University, Professor Jeffrey Goldsworthy, Monash University and Professor Yvonne Tew, Georgetown Law Centre.



## RECENT EVENTS

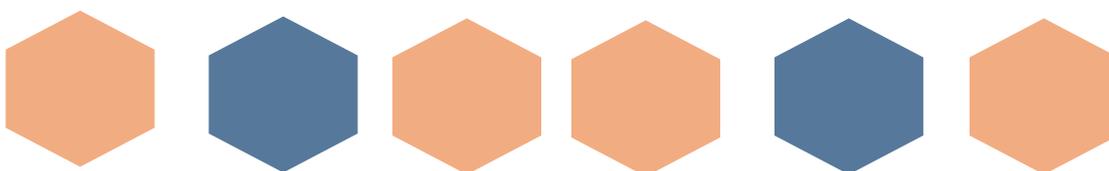
### SYMPOSIUM OF FREEDOM OF SPEECH

Thursday 23 June 2016

Professor Adrienne Stone and Professor Katharine Gelber were co-convenors for a one day event at Melbourne Law School.

The occasion for the Symposium was the visit of Professor James Weinstein the Amelia D Lewis Professor at Arizona State University.

In attendance were Elisa Arcioni, Elizabeth Brumby, Anne Carter, Anjalee De Silva, Patrick Emerton, Helen Irving, Sarah Joseph, Andrew Kenyon, Luke McNamara, Glen Patmore, Sangeetha Pillai, Marcus Roberts and John Tate.



## RECENT EVENTS

### CCCS Seminar Series 2016

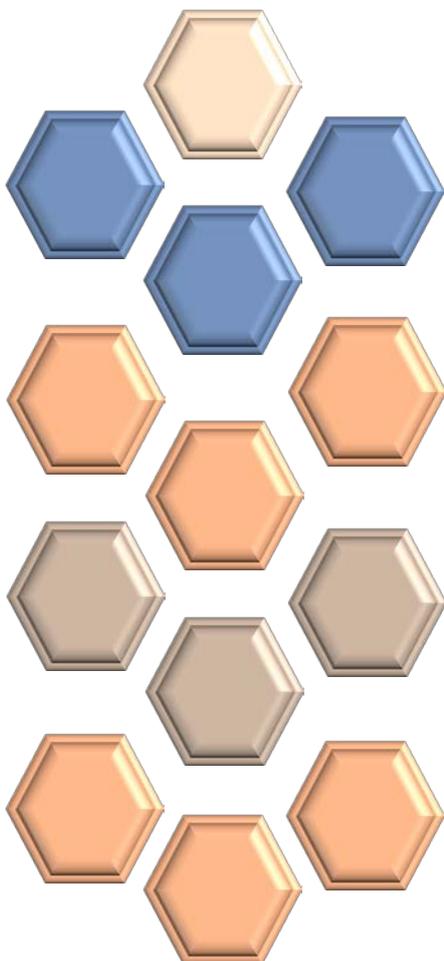
#### Seminar 4: Tuesday 19 April

#### **The New Indian Wars: Tribal Sovereignty, the U.S Supreme Court and Judicial Violence**

*Professor Bruce Duthu, Samson Occom Professor of Native American Studies at Dartmouth College.*

In the past four decades, the United States Supreme Court has issued a number of opinions that have drastically diminished the sovereign authority of tribal nations, particularly over non-members of the tribe. Ironically, this judicial posture has operated contemporaneously with a national policy that favours self-determination for the tribal nations. This legal phenomenon operates as a form of judicial violence against Indian tribes and serves to undermine the nation's formative commitment to a legally plural society. This article suggests that the modern court's dim view of tribal sovereign powers stems from two interrelated but distinct concerns: (a) the court's singular focus on the interests of non-members, particularly those living in Indian country; and (b) the court's stubborn attachment to a vision of American history that contemplated and actively pursued the eradication of an indigenous presence within the American territory.

[Bruce Duthu](#) is the Samson Occom Professor of Native American Studies at Dartmouth College. An internationally recognized scholar of Native American law and policy, Duthu is the author of *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* (Oxford University Press 2013) and *AMERICAN INDIANS AND THE LAW* (Viking/Penguin Press 2008). His co-edited special volume of *South Atlantic Quarterly*, "Sovereignty, Indigeneity and the Law," won the 2011 CELJ (Council of Editors of Learned Journals) award for Best Special Issue. He has lectured on indigenous rights in various parts of the world, including Russia, China, Bolivia, Italy, France, Australia, New Zealand and Canada.



## RECENT EVENTS

### CCCS Seminar Series 2016

#### Seminar 7: Thursday 5 May

#### **The Basic Structure Doctrine in South Asia: Form and Function in Comparative Constitutional Law**

*Sudhir Krishnaswamy, Professor of Law (Azim Premji University, Bangalore)*



This seminar was hosted by the Asian Law Centre and Centre for Comparative Constitutional Studies.

South Asian nations have had some difficulty in maintaining their post - Independence constitutions. Drafted in the euphoria of decolonisation these constitutions have been challenged by communal politics, revolutions of the political right and left and military coups. The Constitution of India 1950 is the only Constitution to survive these varied onslaughts without a break in application albeit with almost 100 constitutional amendments. Bangladesh and Pakistan have endured several phases of constitutional suspension or repeal. The resolution of the ethnic conflict in Sri Lanka arguably rests on the ongoing attempts to revise their Constitution. Nepal has adopted a new constitution in 2015 but its near future is still uncertain. In all these jurisdictions, the courts have engaged with some version of a 'basic structure doctrine.' The Indian Supreme Court has developed the doctrine into a novel and extensive doctrine of constitutional judicial review. The Pakistani and Bangladeshi Supreme Court have modestly embraced the doctrine in recent years to warn future coup plotters. The Sri Lanka courts have rejected the arguments that the doctrine applies to their constitution. The courts in Nepal have flirted with the doctrine intermittently but with limited impact on the wider constitutional culture.

In this paper, Professor Krishnaswamy will critically examine the historical development of basic structure doctrine and constitutional and political function of the basic structure doctrine in five South Asian jurisdictions. These jurisdictions share significant cultural affinities and some common legal trajectories. Moreover, they have developed political and constitutional cultures that share common idioms and practices. He will explore how a South Asian constitutional comparison of the effect of the basic structure doctrine on the development of constitutional and political culture in these jurisdictions illuminates debates on methodology in comparative constitutional law: on form and function as well as regional and global comparison. In particular, Professor Krishnaswamy shows why no meaningful comparison is possible without an approach that integrates legal and doctrinal form as well as constitutional and political function of the basic structure doctrine as it travels across these jurisdictions. Without such an approach we cannot explain why jurisdictions which abandon common law constitutional concepts of separation of powers and legislative sovereignty have greater success at constitutional maintenance than those that embrace them.

[Sudhir Krishnaswamy](#) is a Professor of Law and Director of the School of Policy and Governance at the Azim Premji University, Bangalore. He visited Columbia Law School as the Visiting Dr Ambedkar Chair Professor in Indian Constitutional Law from 2012-2015. His primary academic interests are in Indian constitutional and administrative law, as well as law and development issues with a focus on legal system reform. He has a D. Phil in Law and Bachelor of Laws degree from Oxford University and a Bachelors of Arts and Law (Honours) from the National Law School of India University Bangalore.

## RECENT EVENTS

### CCCS Seminar Series 2016

#### Seminar 8: Tuesday 24 May

##### "This Island's Mine: The Signatures of the Robben Island Shakespeare"

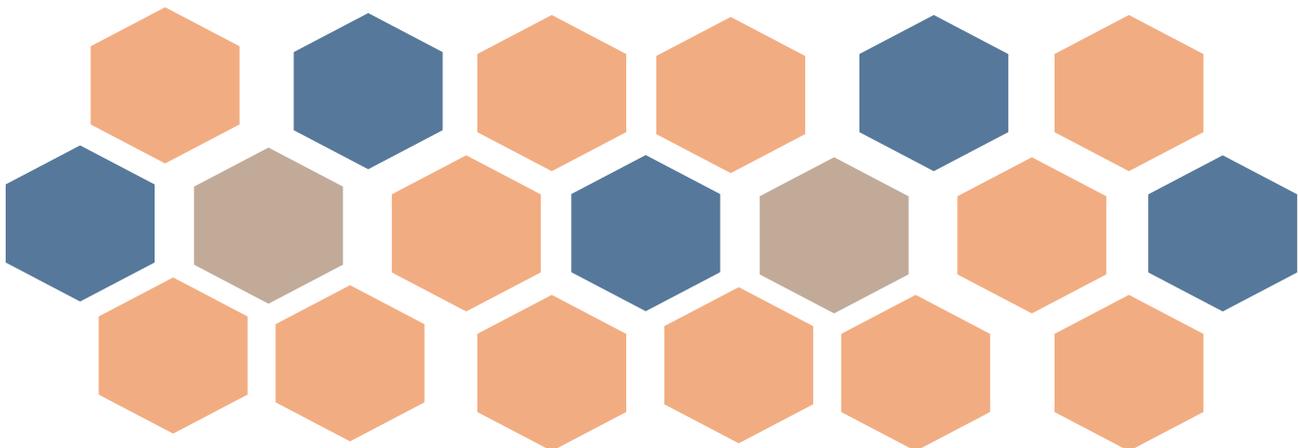
*Professor David Schalkwyk Academic Director of Global Shakespeare at Queen Mary University of London and the University of Warwick*



Between 1977 and 1979, a political prisoner on Robben Island disguised his Collected Works of Shakespeare as a Hindu religious text, and 34 of his fellow prisoners, including Nelson Mandela, signed their names against their favourite passages. That book, known as the "Robben Island Shakespeare" or the "Robben Island Bible" is now celebrated around the world. It was exhibited at the British Museum during the 2012 Olympic Games, at the Folger Shakespeare Library in Washington D.C. in 2013, and in Glasgow for the Commonwealth Games in 2014.

This paper investigates the personal, cultural and political significance of the book and its signatures. It asks why different prisoners might have chosen the passages they did in the light of their personal histories, the meaning of the Shakespeare text, and the political history of the struggle against Apartheid inside the prison and South Africa at large, suggesting ways in which the book may have prefigured South Africa's current political turmoil.

[David Schalkwyk](#) is currently Academic Director of Global Shakespeare at Queen Mary University of London and the University of Warwick. He was formerly Director of Research at the Folger Shakespeare Library in Washington D.C. and editor of the *Shakespeare Quarterly*. Before that he was Professor of English at the University of Cape Town. His books include *Speech and Performance in Shakespeare's Sonnets and Plays* (Cambridge, 2002), *Literature and the Touch of the Real* (Delaware, 2004), and *Shakespeare, Love and Service* (Cambridge, 2008). His most recent book is *Hamlet's Dreams: The Robben Island Shakespeare*, published in 2013 by the Arden Shakespeare.



## FORTHCOMING EVENT

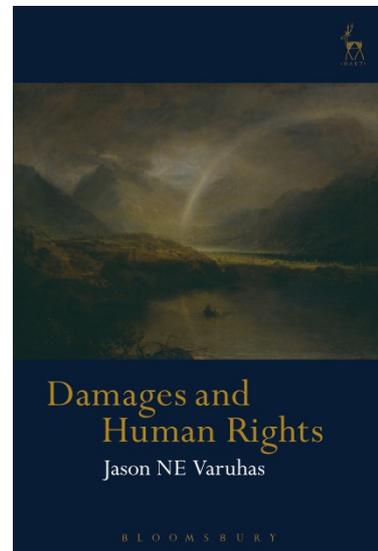
### Book Launch: Damages and Human Rights by Jason NE Varuhas

Wednesday 3 August 2016

The Centre for Comparative Constitutional Studies will host the book launch of Dr Jason Varuhas' *Damages and Human Rights*. The launch will be held at the Melbourne Law School on Wednesday 3 August 2016.

*Damages and Human Rights* is a major work on awards of damages for violations of basic human rights that will be of compelling interest to practitioners, judges and academics alike. The subject, lying at the intersection of public law, private law and international law, is one that has posed ongoing challenges for the highest courts in common law jurisdictions. Dr Varuhas analyses the existing law and explores the theoretical foundations of such awards, arguing for a move away from 'public law' approaches characterised by open-ended discretion and a paucity of principle, in favour of an approach based in axiomatic damages principles developed in the law of torts.

Professor David Feldman, Rouse Ball Professor of English Law, University of Cambridge, in the foreword to the book, says *Damages and Human Rights* "will quickly become the standard point of reference in its field. It is a pleasure to congratulate Dr Varuhas on this sustained, intellectually powerful and practically important piece of legal scholarship, and to commend it to the many readers, in many parts of the world, where it will, I hope, stimulate new approaches to the practice and theory of the subject".



[Dr Jason N. E. Varuhas](#) is Associate Professor at the University of Melbourne. He is also an Associate Fellow of the Centre for Public Law at the University of Cambridge. His research and teaching interests cross the public law-private law divide; his specialisms lie in administrative law, the law of torts, the law of remedies, and the intersection of public and private law. He has published on topics in private and public law in leading international journals and edited collections, has presented at international conferences across the common law world, authored policy reports, and has several books in press. Jason's most recent books include *Damages and Human Rights* (Oxford, Hart Publishing, 2016), and *Public Law Adjudication in Common Law Systems* (Oxford, Hart Publishing, 2016), a volume of essays co-edited with colleagues at the University of Cambridge. He is a founder and co-convenor of the Public Law Conferences, a biennial series of major international conferences on public law.

For further details please contact [law-cccs@unimelb.edu.au](mailto:law-cccs@unimelb.edu.au)



## **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](mailto: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 Alison Duxbury  
 Professor Simon Evans  
 Professor Michelle Foster  
 Professor Jeremy Gans  
 Professor Beth Gaze  
 Professor Pip Nicholson  
 Associate Professor Farrah Ahmed  
 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 Julian Sempill  
 Dr Dale Smith  
 Dr Scott Stephenson  
 Dr Jason Varuhas  
 Dr Lulu Weis  
 Ms Penny Gleeson  
 Ms Paula O'Brien  
 Mr Glenn Patmore

### 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  
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# COMPARATIVE CONSTITUTIONAL LAW UPDATE

## 1. DECIDED CASES

### A. HIGH COURT OF AUSTRALIA

#### ***Alqudsi v The Queen* [2016] HCA 24 (15 June 2016)**

Removed from the Supreme Court of New South Wales.

The applicant, Hamdi Alqudsi, is charged on indictment with seven offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) for allegedly supporting the entry of persons into Syria with intent to engage in armed hostilities. Pursuant to ss 132(1)–132(6) of the *Criminal Procedure Act 1986* (NSW) ('CPA') the applicant filed a notice of motion, seeking to be tried by a judge alone.<sup>1</sup>

The question for the High Court was whether ss 132(1)–132(6) of the CPA, which provide for trial to be heard by a judge without a jury, are incapable of being applied to the applicant's trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the *Constitution*, which requires that 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'.

The question could only be answered in favour of the applicant if *Brown v The Queen* ('Brown')<sup>2</sup> were overruled;<sup>3</sup> the applicant, the Attorney-General of the Commonwealth, and all intervening States except South Australia contended it should be.<sup>4</sup> *Brown* is authority for the proposition that 'where the Commonwealth Parliament [determines] that there [is] to be a trial on indictment of an offence against a law of the Commonwealth, trial by jury [cannot] be waived by the accused'.<sup>5</sup>

#### *Judgment*

In a joint judgment, Kiefel, Bell and Keane JJ held that *Brown* could not be distinguished<sup>6</sup> and was not overruled.<sup>7</sup> The main argument raised by the Commonwealth was that *Brown* should be overruled because s 80 allows the Parliament to determine the conditions upon which it is engaged.<sup>8</sup> This argument was rejected as contrary to the drafting history of s 80,<sup>9</sup> and inconsistent with the meaning of 'indictment' in the *Judiciary Act 1903* (Cth) s 68(1).<sup>10</sup> The main argument raised by the applicant, the Commonwealth Attorney-General and the intervening states, apart from South Australia, was that *Brown* should be overruled because the purpose of s 80 is to preserve the 'public interest', which in this case, required the trial on indictment of a Commonwealth offence to be heard by a judge alone, not a jury ('purposive argument').<sup>11</sup> This argument was rejected on two grounds. First, because s 80 provided in 'clear terms' that trial on indictment of any offence against any law of the Commonwealth 'shall be by jury'.<sup>12</sup> Second, because the trial judge has 'mechanisms' to ensure that trial by jury advances the 'interest of justice' such that the purpose of s 80, to advance the interest of justice is not

<sup>1</sup> Case S270/2015 Particulars.

<sup>2</sup> (1986) 160 CLR 171.

<sup>3</sup> *Alqudsi v The Queen* [2016] HCA 24 (15 June 2016) [95] (Kiefel, Bell and Keane JJ).

<sup>4</sup> Applicant's Submissions 2; Attorney General of the Commonwealth's Submission 2; Attorney General of Tasmania's Submission 2; Attorney General of Victoria's Submission 3; Attorney General of the Queensland Submission 4, 5.

<sup>5</sup> *Alqudsi v The Queen* [2016] HCA 24 (15 June 2016) [214] (Nettle and Gordon JJ).

<sup>6</sup> *Ibid* [95].

<sup>7</sup> *Ibid* [96]–[120].

<sup>8</sup> *Ibid* [106].

<sup>9</sup> *Ibid* [108].

<sup>10</sup> *Ibid* [109].

<sup>11</sup> *Ibid* [86]–[87].

<sup>12</sup> *Ibid* [115], [117] citing *Brown v The Queen* (1986) 160 CLR 171, 207 (Deane J).

undermined. Therefore the applicant's and intervener's 'assumption that the interests of justice, will on occasions [and in particular in this case] ... be advanced by trial on indictment of an offence against Commonwealth law by a judge alone', was not accepted and did not justify overruling *Brown*.<sup>13</sup>

Gageler J rejected the novel<sup>14</sup> purposive argument, stating that the purposes contended are too limited<sup>15</sup> and do not explain that s 80 preserves an essential requirement of the institution of trial by jury, which is representative of the 'wider community'<sup>16</sup> and a constitutional guarantee of 'democratic participation'.<sup>17</sup> Gageler J also rejected the Commonwealth's argument that s 80 did not apply in this case, stating that the prosecution was unquestionably a proceeding on indictment.<sup>18</sup>

In a joint judgment, Nettle and Gordon JJ found no basis to distinguish or overrule *Brown*.<sup>19</sup> Their Honours reiterated the principles of Ch III of the Constitution,<sup>20</sup> and the 'unqualified' and 'absolute' text of s 80,<sup>21</sup> which cannot be 'waived by the accused'<sup>22</sup> or 'side-stepped' by Parliament.<sup>23</sup> Contrary to the principles of the *Constitution* and words of s 80, their Honours rejected the purposive argument raised by the applicant and Commonwealth.<sup>24</sup> Whilst their Honours recognised that the Constitution 'speaks continuously to the present'<sup>25</sup> they also stated that 'trial by jury' was an essential feature, constitutionally entrenched, and that mechanisms that are in place to ensure fairness and integrity of the jury 'reinforce' not 'destroy' 'trial by jury'.<sup>26</sup>

French CJ, dissenting, applied the criteria from *John v Federal Commissioner of Taxation* to overturn *Brown*.<sup>27</sup> French CJ stated that the principle which underpinned *Brown* was not wrong, but 'too broad, imposing an unwarranted rigidity upon the construction of section 80'.<sup>28</sup>

### ***Bell Group NV (in liq) v Western Australia* [2016] HCA 21 (16 May 2016)**

This case is a judgment of three cases, all of which concerned s 109 of the Constitution, which concerns inconsistency, and the *Bell Group Companies (Finalisation of Matters and Distributing of Proceeds) Act 2015* (WA) ('*Bell Act*').<sup>29</sup> The *Bell Act* was enacted to provide a legislative framework for the 'dissolution and administration of the property' of The Bell Group Limited in liquidation ('TBGL') and, its subsidiaries, the WA Bell Companies.<sup>30</sup>

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<sup>13</sup> Ibid [120].

<sup>14</sup> *Alqudsi v The Queen* [2016] HCA 24 (15 June 2016) [124].

<sup>15</sup> Ibid [127].

<sup>16</sup> Ibid [128].

<sup>17</sup> Ibid [140].

<sup>18</sup> Ibid [148].

<sup>19</sup> Ibid [216].

<sup>20</sup> Ibid [166]-[172].

<sup>21</sup> Ibid [173].

<sup>22</sup> Ibid [178].

<sup>23</sup> Ibid [179].

<sup>24</sup> Ibid [186]-[187].

<sup>25</sup> Ibid [191] citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-144.

<sup>26</sup> Ibid [193], [195].

<sup>27</sup> *Alqudsi v The Queen* [2016] HCA 24 (15 June 2016) [72] citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey JJ).

<sup>28</sup> Ibid [76].

<sup>29</sup> Case S248/2015, Case P63/2015, Case P4/2015 Particulars; Bell Group N.V. (In Liquidation) Submissions, W.A. Glendinning & Associates Pty Ltd Submissions, Maranoa Transport Pty Ltd Submissions.

<sup>30</sup> Case S248/2015, Case P63/2015, Case P4/2015 Particulars, Maranoa Transport Pty Ltd Submissions [17].

The appellants of the proceedings were Bell Group NV (in liq) (BGNV), a subsidiary of TBGL and an unsecured creditor;<sup>31</sup> Maronoa Transport Pty Ltd (in liq) ('Maronoa Transport'), a subsidiary of TGBL;<sup>32</sup> and WA Glendinning & Associates Pty Ltd ('WA Glendinning'), an unsecured creditor of TGBL.<sup>33</sup> The Commissioner of Taxation, the Commonwealth Attorney-General and the Attorneys-General of each state intervened. The Commonwealth was a substantial creditor of a number of WA Bell Companies.<sup>34</sup>

The respondents, Western Australia, enacted the *Bell Act* to establish an Authority that collected and transferred TGBL and its subsidiaries' property to a vested fund.<sup>35</sup> The Authority was granted absolute discretion by the *Bell Act* to determine the property and liabilities of TGBL and its WA subsidiary companies.<sup>36</sup>

The issue was whether the *Bell Act* was rendered invalid by the operation of s 109 *Constitution* because it was inconsistent with one or more of the provisions of the *Income Tax Assessment Act 1936* (Cth), the *Taxation Administration Act 1953* (Cth) or the *Corporations Act 2010* (Cth) ('the *Commonwealth Tax Acts*') or s 39(2) of the *Judiciary Act 1903* (Cth) and Ch III of the *Constitution*.<sup>37</sup>

### *Judgment*

The High Court unanimously held that the entire *Bell Act* altered, impaired and detracted from the *Commonwealth Tax Acts* such that it was inconsistent with those Acts, and rendered entirely invalid pursuant to s 109 of the *Constitution*.<sup>38</sup> It was unnecessary to decide whether the Act was invalid due to inconsistency with s 39(2) of the *Judiciary Act 1903* (Cth), Chapter III of the *Constitution* and the *Corporations Act 2010* (Cth).<sup>39</sup>

French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ's judgment emphasised that where there is alleged inconsistency, a comparison of the rights, privileges or powers, and duties or obligations between the *Bell Act* and the *Commonwealth Tax Acts* is required to resolve the conflict.<sup>40</sup> Their Honours also reiterated that a conflict might occur in a number of ways, one being where the state law, 'alters, impairs or detracts' from the operation of a Commonwealth law that is 'significant' and 'not trivial'.<sup>41</sup>

The Commonwealth and the Tax Commissioner have rights under the *Commonwealth Tax Acts* to rely on an assessment in relation to the 'existence', 'quantification', 'enforceability' and 'recovery of taxation liability'.<sup>42</sup> In contrast, the *Bell Act* 'stripped' Commonwealth tax debts of those aforementioned characteristics ascribed to them under the *Commonwealth Tax Acts*.<sup>43</sup> It gave power to Western Australia and the State Authority to pool property into a vested fund of the TBGL and its subsidiaries and to distribute the property at its 'absolute

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<sup>31</sup> *Bell Group NV (in liq) v Western Australia* [2016] HCA 21 (16 May 2016) ('*Bell Group Case*') [12], [14].

<sup>32</sup> *Ibid* [13].

<sup>33</sup> *Ibid* [15].

<sup>34</sup> *Ibid* [16].

<sup>35</sup> *Ibid* [22].

<sup>36</sup> *Ibid* [39].

<sup>37</sup> Case S248/2015, Case P63/2015, Case P4/2015 Particulars, Special Case.

<sup>38</sup> *Bell Group Case* [2016] HCA 21 (16 May 2016) [66], [76].

<sup>39</sup> *Ibid* [75].

<sup>40</sup> *Ibid* [50].

<sup>41</sup> *Ibid* [51], [52] citing *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41].

<sup>42</sup> *Ibid* [55].

<sup>43</sup> *Ibid* [60].

discretion'.<sup>44</sup> The *Bell Act* also gave the Authority and the Governor complete discretion as to how all the liabilities of the subsidiary companies were to be determined.<sup>45</sup>

Therefore it was held that the *Bell Act* and its relevant provisions had impaired and detracted from the Commonwealth's rights under the *Commonwealth Tax Acts*.<sup>46</sup>

Whilst s 109 invalidates State legislation only so far as it is inconsistent<sup>47</sup> the majority judgment invalidated the *Bell Act* in its entirety. This is because the *Bell Act* presented 'a package of interrelated provisions' such that severance would result in a 'radically different and ... ineffective residue'.<sup>48</sup>

Gageler J, agreed that the entire *Bell Act* was invalid. However his Honour did so on a 'narrower basis', whereby ss 22 and 29 were sufficient to invalidate the entire Act because it altered and impaired ss 215 and 254 of the *Income Tax Assessment Act 1936* (Cth) and equivalent sections of the *Taxation Administration Act 1953* (Cth).<sup>49</sup>

***Day v Australian Elector Officer (SA) (2016) 90 ALJR 639; [2016] HCA 20 (13 May 2016)***

This case concerned a challenge to provisions of the *Commonwealth Electoral Amendment Act 2016* (Cth) that changed the requirements for the marking of Senate ballot papers as set out in the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*').

The *Electoral Act*, as amended, provides that an elector can vote either 'above the line', by numbering at least six party or group tickets in order of preference,<sup>50</sup> or 'below the line', by numbering at least 12 individual candidates in order of preference.<sup>51</sup> Ballot papers are not informal if at least one party or group ticket has been numbered above the line<sup>52</sup> or at least six individual candidates have been numbered below the line.<sup>53</sup>

Senator Bob Day, for South Australia, Peter Madden, a Tasmanian candidate for the Senate, and electors from each of the states and territories other than South Australia and Tasmania, initiated proceedings against the Australian Electoral Officers of their respective states. The plaintiffs' argument relied on ss 7 and 9 of the *Constitution*, which relevantly provide:

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until Parliament otherwise provides, as one electorate.
9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States.

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<sup>44</sup> Ibid [56].

<sup>45</sup> Ibid [57], [58].

<sup>46</sup> Ibid [60].

<sup>47</sup> Ibid [52] Citing Dixon J in *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84, 122.

<sup>48</sup> Ibid [70].

<sup>49</sup> Ibid [79].

<sup>50</sup> *Electoral Act* s 239(2)(a). If there are fewer than six party or group tickets, all of the tickets must be consecutively numbered: para (b).

<sup>51</sup> Ibid s 239(1)(a). If there are fewer than 12 individual candidates, all of the candidates must be consecutively numbered: para (b).

<sup>52</sup> Ibid s 269(1)(b).

<sup>53</sup> Ibid s 268A(1)(b).

The plaintiffs made three principal arguments.<sup>54</sup> (1) The amendments provide for two different voting methods (viz voting above the line and voting below the line) contrary to the requirement in s 9 that there be only one method. (2) The method of voting above the line for a party or group contravenes the requirement in s 7 that senators be 'directly chosen by the people' because such a vote is in fact a vote cast for an intermediary (viz the party or group). (3) The new ballot paper is misleading, and is therefore a burden on the implied freedom of political communication, because it instructs electors to number at least six parties or groups above the line or 12 individual candidates below the line without stating that a ballot will not be informal as long as one party or group above the line is numbered or six individual candidates below the line are numbered.

### *Judgment*

The High Court unanimously dismissed the application. The Court responded to each of the plaintiffs' arguments as follows. (1) The purpose of s 9 is to provide for a uniform method of electing senators.<sup>55</sup> The term 'method' can accommodate multiple ways of voting that coexist within a single uniform system.<sup>56</sup> The plaintiffs' construction of s 9 creates 'pointless formal constraint'.<sup>57</sup> (2) Section 7 prohibits the election of senators by an intermediary, such as an electoral college.<sup>58</sup> This is not the effect of the relevant provisions of the *Electoral Act*. A vote 'above the line' is a direct vote for candidates identified below the line.<sup>59</sup> (3) The ballot paper is not misleading. It correctly states the requirements of the *Electoral Act*. The ballot paper need not refer to the provisions setting out when a ballot paper will not be informal as these are merely vote saving provisions.<sup>60</sup>

## B. SUPREME COURT OF CANADA

### ***R v Lloyd*, [2016 SCC 13](#) (15 April 2016)**

This case concerned a challenge to the validity of a mandatory minimum sentence regime set up by the *Controlled Drugs and Substances Act*, SC 1996 ('CDSA').

Section 5(3)(a)(i)(D) of the *CDSA* provides a minimum sentence of one year of imprisonment for trafficking in certain drugs, or possession for the purpose of trafficking in certain drugs, in cases where the offender has been convicted of any drug offence (except possession) within the previous 10 years. Lloyd was convicted of possession of drugs for the purpose of trafficking. Because he had a relevant prior conviction, he was subject to a mandatory minimum sentence under s 5(3)(a)(i)(D).

Lloyd argued that s 5(3)(a)(i)(D) was contrary to s 12 of the *Canadian Charter of Rights and Freedoms* ('*Charter*'), which provides that '[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment'. Lloyd further argued that the provision was not a 'reasonable limit' for the purposes of s 1 of the *Charter*, which provides that the *Charter* 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

### *Judgment*

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<sup>54</sup> *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639, 649 [37].

<sup>55</sup> *Ibid* 650 [44].

<sup>56</sup> *Ibid* 650 [45].

<sup>57</sup> *Ibid* 650 [44].

<sup>58</sup> *Ibid* 651 [49].

<sup>59</sup> *Ibid* 650 [48].

<sup>60</sup> *Ibid* 651–2 [56].

A majority of the Supreme Court, McLachlin CJ and Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ, held that s 5(3)(a)(i)(D) violates s 12 of the *Charter*. A sentence that is grossly disproportionate — ie “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society<sup>61</sup> — will infringe s 12.<sup>62</sup> Section 5(3)(a)(i)(D) carries the potential for grossly disproportionate sentences because its scope is too broad: it catches ‘not only the serious drug trafficking that is its proper aim, but [also] conduct that is much less blameworthy’.<sup>63</sup> For example, in the case of a drug addict who deals drugs only to support his own addiction and who overcomes the addiction between conviction and sentencing, a mandatory one-year sentence ‘would be grossly disproportionate to what is fit and proper in the circumstances and would shock the conscience of Canadians’.<sup>64</sup>

As for s 1 of the *Charter*, while combatting the distribution of illicit drugs is an important objective that is connected with the imposition of a mandatory minimum sentence, the law does not minimally impair the s 12 right: the Crown failed to establish that less harmful means of achieving the objective were unavailable.<sup>65</sup>

Wagner, Gascon and Brown JJ dissented. Their Honours considered that s 5(3)(a)(i)(D) is ‘carefully tailored to catch only harmful and blameworthy conduct’.<sup>66</sup> The gross disproportionality test developed in respect of s 12 sets an ‘extremely high threshold’.<sup>67</sup> This threshold was not met in the scenarios contemplated by the majority.<sup>68</sup>

## C. SUPREME COURT OF PAPUA NEW GUINEA

### ***Namah v Pato* [2016] PGSC 13 (26 April 2016)**

This case concerns whether the detention of asylum seekers in Papua New Guinea (‘PNG’), pursuant to memorandums of understanding signed between Australia and PNG, is unconstitutional.<sup>69</sup> People who sought asylum in Australia were transferred to PNG by the Australian Government and detained at the relocation centre on Manus Island.<sup>70</sup>

The applicant, Beldan Norman Nama, Leader of the Opposition, sought declaratory relief.<sup>71</sup>

#### *Judgment*

The Court unanimously held that the detention of asylum seekers transferred to PNG is contrary to the *Constitution of the Independent State of Papua New Guinea* (‘*Constitution*’) and a purported amendment to the *Constitution* to authorise it was invalid and would not have been effective to permit the detention.<sup>72</sup>

Higgins J, with whom all members of the court agreed, wrote a brief judgment. Kandakasi J, with whom Salika DCJ, Sakora and Sawong JJ agreed, wrote a longer judgment which addressed the three issues raised by the applicant.

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<sup>61</sup> Ibid [24] quoting *R v Smith* [1987] 1 SCR 1045, 1072 (other citations omitted).

<sup>62</sup> *R v Lloyd*, 2016 SCC 13 [22] citing *Nur* [2015] 1 SCR 773 [39], *R v Smith* [1987] 1 SCR 1045, 1073.

<sup>63</sup> Ibid [27] quoting *Nur* [82].

<sup>64</sup> Ibid [33].

<sup>65</sup> Ibid [49].

<sup>66</sup> Ibid [85].

<sup>67</sup> Ibid [63].

<sup>68</sup> Ibid [96].

<sup>69</sup> *Namah v Pato* [2016] PGSC 13 (26 April 2016) [5]. Memorandums of understanding were signed in September 2012 and August 2013.

<sup>70</sup> Ibid [5].

<sup>71</sup> Ibid [5] (i).

<sup>72</sup> Ibid [39], [54] (Kandakasi J); [80], [88], [119] (Higgins J).

The first issue was whether the transfer to PNG and detention of the asylum seekers contravenes s 42(1) of the *Constitution* as it read prior to its purported amendment by the *Constitution Amendment (No 37) (Citizenship) Law 2014* ('2014 Amendment'). Section 42 states that no person shall be deprived of his personal liberty except in a manner set out in s 42.<sup>73</sup> Section 42(1)(g) permits the prevention of liberty for the purpose of preventing unlawful entry to PNG or effecting the expulsion, extradition or other lawful removal of a person from PNG.<sup>74</sup>

Kandakasi J explained that both arrest and detention for non-criminal purposes are governed by s 42, citing *Application of Ireeuw*.<sup>75</sup> Furthermore, in order for detention to be in accordance with s 42 it must be provided for by specific legislation.<sup>76</sup> His Honour identified the relevant exception as s 42 (1)(g) and the relevant legislation as the *Migration Act (Ch 16)* (PNG).<sup>77</sup> As entry permits had been issued under the *Migration Act* no situation had arisen to warrant the detention of the asylum seekers under the *Migration Act* or s 42(1)(g) of the *Constitution*.<sup>78</sup> Therefore, his Honour concluded that the detention of the asylum seekers was unconstitutional.<sup>79</sup>

The second issue was whether the *2014 Amendment* was a valid amendment to the *Constitution*. The *2014 Amendment* added s42(1)(ga), which permits the deprivation of liberty for the purpose of holding a foreign national under arrangements made by PNG with another country.<sup>80</sup> The *Constitution* may be altered by an Act of Parliament,<sup>81</sup> however, *Constitution* s 38(1) applies to laws which regulate or restrict the exercise of a right or freedom, such as the *2014 Amendment*. Such an amendment is permissible to the extent that it is in the public interest and 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'.<sup>82</sup> Kandakasi J explained that the respondents had failed to demonstrate that the *2014 Amendment* was reasonably justifiable and therefore held it was unconstitutional and invalid.<sup>83</sup>

The third issue was whether the *2014 Amendment*, if valid, would have permitted the detention of the asylum seekers. Kandakasi J concluded that it was ineffective to permit the detention because of a lack of enabling legislation clearly specifying how the asylum seekers were to be treated having regard to their rights and freedoms under the various international conventions and the *Constitution*.<sup>84</sup>

Higgins J, with whom Salika DCJ, Sakora, Kandakasi and Sawon JJ agreed, wrote a brief judgment in which his Honour also held that the detention contravened s 42 *Constitution*.<sup>85</sup> His Honour stated that the statements of principle in *Plaintiff S4/2014 v Minister for Immigration & Border Protection* that the detention is limited by the purpose for which it is being effected are equally appropriate to determining this issue.<sup>86</sup> Therefore, only those purposes authorised by s 42 could be used to justify the restrictions on liberty. His Honour concluded that the purpose was not authorised by s 42 and the detention was unconstitutional.<sup>87</sup>

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<sup>73</sup> Ibid [29]

<sup>74</sup> *Constitution of the Independent State of Papua New Guinea* 42(1)(g).

<sup>75</sup> Ibid [31] citing *Application of Ireeuw* [1985] PNGLR 430.

<sup>76</sup> Ibid [33].

<sup>77</sup> Ibid [34], [38] citing *Migration Act (Chp 16)* (PNG).

<sup>78</sup> Ibid [39]. Note s13 of the *Migration Act (Chp 16)* (PNG) contains the relevant power to detain.

<sup>79</sup> Ibid [39].

<sup>80</sup> Ibid [41].

<sup>81</sup> Ibid [46]-[47] citing *Constitution of the Independent State of Papua New Guinea* ss 13, 14.

<sup>82</sup> Ibid [48] citing *Constitution of the Independent State of Papua New Guinea* s38(1) [48].

<sup>83</sup> Ibid [54].

<sup>84</sup> Ibid [56], [69].

<sup>85</sup> Ibid [80].

<sup>86</sup> Ibid [89].

<sup>87</sup> Ibid [80], [88] -[89].

In regards to the validity of the *2014 Amendment*, like Kandakasi J, Higgins J stated that it must meet the requirement of s 38 of the *Constitution*. The issue was whether or not the detention of asylum seekers could be in the public interest and reasonably justifiable in a democratic society.<sup>88</sup> His Honour concluded that it could not and was invalid.<sup>89</sup> Furthermore, Higgins J noted that even if the *2014 Amendment* were valid the human rights and dignity of detainees, as guaranteed under s 36 of the *Constitution*, would still have to be respected.<sup>90</sup>

## D. SUPREME COURT OF THE UNITED STATES

### ***Betterman v Montana*, 578 US \_\_\_\_ (2016) (19 May 2016)**

This case concerned the application of the Sixth Amendment to the *United States Constitution* to the sentencing phase of criminal prosecution.

The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury'. Betterman was charged with domestic assault and failed to show up to court. He pleaded guilty to bail-jumping and was eventually sentenced to seven years' imprisonment with four years suspended. Due primarily to 'institutional delay', more than 14 months passed between Betterman's guilty plea and his sentencing.<sup>91</sup> Betterman argued that the delay violated his Sixth Amendment right to a speedy trial.

#### *Judgment*

The Supreme Court unanimously rejected Betterman's application. Ginsberg J delivered the opinion of the Court. Criminal proceedings normally have three stages: (1) investigation, leading to a suspect's being arrested and charged; (2) court proceedings, culminating in conviction upon trial or guilty plea; (3) sentencing.<sup>92</sup> The right to a speedy trial applies only to the second stage, at which point the accused is 'shielded by the presumption of innocence'.<sup>93</sup> Upon conviction, the right ceases to apply. This approach is consistent with the Sixth Amendment's text and history,<sup>94</sup> as well as its roots in English law:<sup>95</sup> the Sixth Amendment refers to the rights of 'the accused' and judges have stated that the right is especially important for those 'ultimately found to be innocent'.<sup>96</sup> Furthermore, the sole remedy for violation of the right to a speedy trial is dismissal of the charges, which 'would be an unjustified windfall ... in most cases'.<sup>97</sup>

Ginsburg J noted that relief may have been available under the Due Process Clauses of the Fifth and Fourteenth Amendments; however, as no argument was made on this point, her Honour did not address the question.<sup>98</sup> Thomas and Alito JJ and Sotomayor J, who wrote separate concurring judgments, gave further consideration to the question, while noting that Betterman had forfeited a claim to such relief.<sup>99</sup> Sotomayor J proposed that the correct test for deciding the question would have followed *Barker v Wingo* in considering four factors: 'the length of the delay, the reason for the delay, the defendant's assertion of his right, and

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<sup>88</sup> Ibid [96].

<sup>89</sup> Ibid [119].

<sup>90</sup> Ibid [98].

<sup>91</sup> *Betterman v Montana*, 578 US \_\_\_\_ (2016) 2.

<sup>92</sup> Ibid 3.

<sup>93</sup> Ibid 4.

<sup>94</sup> Ibid 6.

<sup>95</sup> Ibid 4–5.

<sup>96</sup> Ibid 6, quoting *Barker v Wingo*, 407 US 514, 523–3 (1972).

<sup>97</sup> Ibid 7 (citations omitted).

<sup>98</sup> Ibid 1.

<sup>99</sup> Ibid 1 (Thomas and Alito JJ), 1 (Sotomayor J).

prejudice to the defendant'.<sup>100</sup> Thomas and Alito JJ declined to 'prejudge the matter', suggesting that the *Barker* factors might not translate into the context of delayed sentencing.<sup>101</sup>

***Evenwel v Abbott (Governor General of Texas) 578 US \_\_\_\_\_ (2016)***

On appeal from the District Court for the Western District of Texas.

States must design legislative districts with equal population to comply with the one-person–one-vote principle. This principle is drawn from the 'equal protection clause' in the Fourteenth Amendment.<sup>102</sup> All states use total population to do this, which includes children and other non-voters, not the population of eligible or registered voters. A maximum deviation of less than 10% between the smaller and largest district is held to comply with the one-person–one-vote principle.

In Texas, the deviation of total population is within the 10% acceptable range. However, due to variations between legislative districts of the proportion of registered or eligible voters the deviation between voter population exceeds 40%.

The appellants, Sue Evenwel and Edward Pfenninger, are voters in districts with a large proportion of registered or eligible voters. The appellants argue that apportionment on the basis of total population, rather than voter population dilutes their votes in relation to voters in other districts in violation of the one-person–one-vote principle.

The issue was whether using total population to design legislative districts with equal population is permissible under the *Constitution*.

The District Court dismissed the appellants' complaint for failure to state a claim on which relief could be granted.<sup>103</sup>

*Judgment*

The Court unanimously held that legislative districts may be drawn on the basis of total population.

Ginsberg J, with whom Roberts CJ and Kennedy, Breyer, Sotomayor and Kagan JJ joined, held on the basis of constitutional history, the Court's past decisions and longstanding practice that a state may draw legislative districts on the basis of total population.<sup>104</sup>

The framers of the *Constitution* allocated seats in the House of Representatives to each State on the basis of total population, explained Ginsberg J.<sup>105</sup> Her Honour referred to *Wesberry v Sanders*, which held that because of this states were also allowed to apportion legislative districts on the same basis: total population.<sup>106</sup>

Ginsberg J stated that the Court's past decisions reinforce the conclusion that districts with equal total population comply with the one-person–one-vote principle.<sup>107</sup> Her Honour stated that mandating voter-eligible apportionment would upset a well-functioning approach used by all 50 States and countless local

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<sup>100</sup> Ibid 1–2, citing *Barker v Wingo*, 407 US 514, 533 (1972).

<sup>101</sup> Ibid 2.

<sup>102</sup> *United States Constitution*.

<sup>103</sup> *Shapiro v McManus* 577 US \_\_\_, \_\_\_-\_\_\_ (2015).

<sup>104</sup> *Evenwel v Abbott (Governor General of Texas)* 578 US \_\_\_\_\_ (2016) 1 (Ginsberg J).

<sup>105</sup> Ibid 8.

<sup>106</sup> Ibid 12, 2 citing *Reynolds v Sims* (1964) 377 U.S. 533, 568; *Wesberry v Sanders* (1964) 376 US 1, 7–8.

<sup>107</sup> Ibid 16.

districts.<sup>108</sup> This settled practice also confirmed the Court's conclusion. Ginsberg J also noted that non-voters, such as children, have an important stake in policy debates.<sup>109</sup>

Texas argued that States may use any population baseline so long as the choice is rational and not invidiously discriminatory.<sup>110</sup> However, Ginsberg J declined to address the question of whether States may use voter-eligible population rather than total-population.<sup>111</sup>

Thomas J concurred only in the outcome of the majority judgment. His Honour stated that there was no sound basis for the one-person–one-vote principle.<sup>112</sup> Rather, his Honour took the view that the Constitution left the design of legislative districts to the people and the Court should not interfere.<sup>113</sup> Thus States may design districts in order to equalize total population, equalize eligible voters or to promote any other principle consistent with the 'republican form of government', as art 4 of the *Constitution* requires.<sup>114</sup>

Alito J, with whom Thomas J joined in part, also concurred only in the outcome, stating that practical considerations and precedent supported the conclusion that total population is consistent with the one-person–one-vote rule.<sup>115</sup> However, his Honour rejected the reasoning adopted by Ginsberg J that because total population is used to allocate seats in the House of Representatives to States it could also be used to design legislative districts.<sup>116</sup>

***Fisher v University of Texas at Austin*, [579 US \\_\\_\\_\\_\\_ \(2016\)](#) (23 June 2016)**

This case concerned the constitutional validity of the University of Texas at Austin's race-conscious admissions process.

Under Texas legislation, any student who graduates from high school in the top 10 percent of her class is entitled to be admitted to a public university of her choice.<sup>117</sup> At the University of Texas at Austin, the remaining places in each incoming class are filled by considering a range of factors, one of which is race.<sup>118</sup> Fisher, whose application for admission to the University was rejected in 2008, alleged that the University's admissions policy disadvantaged her and other Caucasian applicants in violation of the Equal Protection Clause of the Fourteenth Amendment to the *United States Constitution*.<sup>119</sup> This Clause provides that '[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws'.<sup>120</sup>

*Judgment*

Kennedy J delivered the opinion of the Court, holding that the University's admissions policy is not unconstitutional.

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<sup>108</sup> *Ibid* 18.

<sup>109</sup> *Ibid* 19.

<sup>110</sup> *Evenwel v Abbott* (Governor General of Texas) 578 US \_\_\_\_\_ (2016) (Thomas J) 8.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* 1, 15.

<sup>113</sup> *Ibid* 2.

<sup>114</sup> *Ibid* 2, 12.

<sup>115</sup> *Evenwel v Abbott* (Governor General of Texas) 578 US \_\_\_\_\_ (2016) (Alito J) 1.

<sup>116</sup> *Ibid* 4.

<sup>117</sup> Top Ten Percent Law. Tex. Educ. Code Ann. §51.803 (West Cum. Supp. 2015). See *Fisher v University of Texas at Austin*, 579 US \_\_\_\_\_ (2016) 2 (Kennedy J).

<sup>118</sup> *Fisher v University of Texas at Austin*, 579 US \_\_\_\_\_ (2016) 3–4 (Kennedy J).

<sup>119</sup> *Ibid* 6.

<sup>120</sup> *United States Constitution* amend XXIV § 1.

Three principles are relevant to assessing the constitutionality of a public university's affirmative-action program. First, a university may only consider race if it can show that its 'purpose or interest [in doing so] is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of that purpose'.<sup>121</sup> Second, it is proper that there be 'some, but not complete, judicial deference' to 'the decision to pursue the educational benefits that flow from student diversity'.<sup>122</sup> Third, the university must show that 'a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense"'.<sup>123</sup>

The University's purposes in considering race are 'the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry'.<sup>124</sup> These purposes are constitutionally permissible and substantial. The use of race-conscious admissions policies has a 'meaningful ... effect on the diversity of the University's freshman class'.<sup>125</sup> On the other hand, extensive studies undertaken by the University show that race-neutral policies have failed to achieve these purposes.<sup>126</sup>

Alito J, with whom Roberts CJ joined, dissented. His Honour accepted the correctness of the principles stated by Kennedy J; however, his Honour considered that the University had failed to identify with sufficient specificity the interests served by the use of race in its admissions policy.<sup>127</sup> It is insufficient to invoke 'the educational benefits of diversity' without identifying 'any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests'.<sup>128</sup> Thomas J also joined Alito J's dissent, adding separately that 'a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause'.<sup>129</sup>

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<sup>121</sup> *Fisher v University of Texas at Austin*, 579 US \_\_\_\_ (2016) 7, quoting *Fisher v University of Texas at Austin*, 570 US \_\_\_\_ (2013) 7 ('*Fisher I*').

<sup>122</sup> *Ibid*, quoting *Fisher I*, 570 US \_\_\_\_ (2013) 9.

<sup>123</sup> *Ibid*, quoting *Fisher I*, 570 US \_\_\_\_ (2013) 11.

<sup>124</sup> *Ibid* 13 (internal quotation marks and citations omitted).

<sup>125</sup> *Ibid* 15.

<sup>126</sup> *Ibid* 13, 15–19.

<sup>127</sup> *Ibid* 1.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid* 1.