



THE UNIVERSITY OF  
MELBOURNE

Melbourne  
Law School



CCCS NEWSLETTER #34

DECEMBER 2016

Welcome to the 34<sup>th</sup> edition of the Centre for Comparative Constitutional Studies newsletter, a guide to news and events at the Centre and a spotlight for commentary on issues in constitutional law, nationally and globally.

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

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- Cheryl Saunders: [@cherylsaunders1](https://twitter.com/cherylsaunders1)
- Scott Stephenson: [@s\\_m\\_stephenson](https://twitter.com/s_m_stephenson)
- William Partlett: [@WPartlett](https://twitter.com/WPartlett)
- Jeremy Gans: [@jeremy\\_gans](https://twitter.com/jeremy_gans)
- 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/)
- The IACL Blog: [iacl-aidc-blog.org](http://iacl-aidc-blog.org)



CENTRE FOR  
COMPARATIVE  
CONSTITUTIONAL  
STUDIES

MELBOURNE LAW SCHOOL

## DIRECTOR'S REPORT

This year has been an extraordinary one for CCCS. It has been a period of transformation as we've welcomed new staff and started new projects while continuing CCCS' long standing scholarly and engagement activities.

### New Projects: ConTransNet and the Laureate Project

I have previously reported on the activities [Constitutions Transformation Network](#) and now I am delighted to announce the commencement of the Laureate Project in Constitutional Law with the appointment of three new members of the project.

**Gabbi Dalsasso** joined Melbourne Law School and the Laureate Project as Project Manager on 1 December. Gabbi joins us after a career in the corporate and community sector including seven years at the foster Care Association of Victoria as the Member Relations, Project and Event Manager.

Next year, we will also be joined by **Dr Erika Arban** and **Dr Stijn Smet**. Dr Arban's research focuses on comparative federalism, comparative constitutional law and legal research methodology. Before joining the project, she lectured in Comparative Federalism at the University of Antwerp (Belgium) and in Public Law at the University of Ottawa (Canada). Dr Smet's research interests are in comparative constitutional law, human rights, legal theory and political theory (primarily on toleration and respect). Before joining the project, Dr Smet was a Postdoctoral Fellow at Ghent University Law School (Belgium), where he obtained his PhD in law as well. Dr Arban will arrive in Melbourne in May and Dr Smet in March.

### Return of Jean Goh

I am also very pleased to welcome Jean Goh, Centre Administrator since 2012 back to CCCS after 18 months' parental leave. We have missed Jean greatly though we were lucky to be assisted by Cathryn Lee, Cindy Halliwell and Amy Johannes (all of whom remain at Melbourne Law School in other roles).

### Congratulations

I have also reported on the many wonderful honours bestowed on CCCS members this year (including **Scott Stephenson's** Holt Prize and **Jason Varuhas'** Birks Prize reported previously). I am very happy to add to this long list **Dr Alysia Blackham's** success in winning an Australian Research Council Discovery Early Career Researcher Award (DECRA), in an astonishingly competitive award round. Dr Blackham research will focus on [addressing age discrimination in employment](#).

We also congratulate **Dr Kristen Rundle** on her promotion **Associate Professor**. The promotion is a very well deserved recognition of her highly influential work in legal theory including her [widely reviewed and internationally successful monograph](#) *Forms Liberate* (Hart, 2012)

And, just as we publish this newsletter we were thrilled to learn of the appointment of CCCS Advisory Board member **Dr Stephen Donaghue QC** as Solicitor-General of the Commonwealth of Australia. We are very proud that Dr Donaghue has deep links with CCCS extending to his days as a student and researcher in the Centre.

### Co-Director from 2017

Lastly it is my very great pleasure to announce that Associate Professor Kristen Rundle will be assuming a role as Co-Director of CCCS from 2017. Her energy, commitment and vision will be greatly welcomed.

Associate Professor Rundle's appointment responds to the increasing breadth and scope of CCCS' activities. We have an exciting series of events already announced on our [website](#) and many more in the works including a CCCS National Conference to be held on 21 July.

I look forward to seeing you at these events over 2017.



Professor Adrienne Stone

## CENTRE UPDATE

### Adrienne Stone, Director

#### Presentations

"The Implied Freedom of Political Communication", *Human Rights Law Centre Staff Seminar*, 2 November 2016

"Success in Research: Some 'Dos', 'Don'ts' and Some Cautionary Tales", *Griffith Law School Masterclass Series*, 18 November 2016

Commented on Vicki C. Jackson 'Proportionality and Equality', *Legal Theory Workshop*, 26 August 2016

Panel member on *Ways of Judging: The Intractable Dilemma of the Judicial Process at New Ways Forward: Reform and Renewal in Constitutional Interpretation and Legal Education*, 2 December 2016: [https://law.anu.edu.au/sites/all/files/media/documents/events/a4\\_coper\\_program\\_covers.pdf](https://law.anu.edu.au/sites/all/files/media/documents/events/a4_coper_program_covers.pdf)

Participated in *Global Constitutional Discourse and Transnational Constitutional Activity* organised by the Venice Commission, International IDEA and the International Association of Constitutional Law, Venice, 7 December

Participated in on *Constitutional Dialogue*, Faculty of Law, The University of Hong Kong, 9 December 2016: [https://hkuems1.hku.hk/hkuems/ec\\_hdetail.aspx?guest=Y&ueid=46941](https://hkuems1.hku.hk/hkuems/ec_hdetail.aspx?guest=Y&ueid=46941)

Chaired the *2016 Jim Carlton Lecture* delivered by the Hon. Peter Baume, Accountability Roundtable Table, 16 November 2016: <https://events.unimelb.edu.au/events/7570-integrity-in-public-life>

Chaired the *A Conversation with the Hon. Chief Justice French AC*, 14 November 2016

#### Publications

'Participation, Legitimacy and View-point Discrimination' for publication in Constitutional Commentary (forthcoming), *Symposium on Hate Speech and Political Legitimacy*

#### Research Grants

Freedom and Inclusion in the Modern University (with Professor Carolyn Evans), ARC Discovery Project 2017-2019: <http://law.unimelb.edu.au/centres/cccs/research/major-research-projects/freedom-inclusion-modern-university>

### Cheryl Saunders AO, Foundation Director

#### Publications

Cheryl Saunders, 'Australian Democracy and Executive Law-making: Practice and Principle (Part II)', in *Papers on Parliament*, October 2016, 71-87

Anna Dziedzic and Cheryl Saunders, 'Constitution-building in the Pacific in 2015', *International IDEA, Annual Review of Constitution Building Processes: 2015*, 31-50

#### Presentations

Introduction of Mme Louise Arbour as Tang Prize Laureate for the Rule of Law, Taipei, Taiwan, 25 September

Presented a paper on 'Executive Power in Australia: A Common Law Concept in a Written Constitution' at *Public Law Weekend*, ANU, 28 October

Participated on an international jury for a doctoral dissertation at University Pantheon Assas Paris II on 5 December

Presented a paper on 'Constitution Building as Applied Comparative Constitutional Law' to a conference on *Global Constitutional Discourse and Transnational Constitutional Activity* organised by the Venice Commission, International IDEA and the International Association of Constitutional Law, Venice, 7 December

Participated in the *III Edinburgh Dialogue on Post-Conflict Constitution Building* on 'Sub-state Constitutions in fragile and conflict-affected settings', Edinburgh, 9-10 December 2016

#### MLM Teaching

Post-Conflict State Building, with Professor Bruce Oswald, 12-18 October

#### Media Engagement

Brendan Trembath, 'What does the resignation of Justin Gleeson mean for one of Australia's top legal jobs?', ABC News: <http://www.abc.net.au/worldtoday/content/2016/s4562764.htm>

#### Videos

Professor Cheryl Saunders, '[Transplants in Public Law](#)' / Professor Aileen McHarg: '[Unity and Diversity in the United Kingdom's Territorial Constitution](#)', *Public Law Conference 2016*

## Centre Members

### Farrah Ahmed

#### Publications

##### Book:

Farrah Ahmed, *Religious Freedom under Personal Laws* (OUP 2016)

##### Journal Articles:

'The Autonomy Rationale for Religious Freedom', *Modern Law Review* (forthcoming)

'Constitutional Statutes', *Oxford Journal of Legal Studies* (forthcoming) (with Adam Perry)

#### Presentations

Book Launch of *Religious Freedom under Personal Laws* (OUP 2016) on 15 December, at the Centre for Policy Research, New Delhi

Presented a paper on 'Standing and civic virtue' at *Cambridge Public Law Conference* 12-14 September

Presented a paper on 'Arbitrary Power' at *New Theories of State Authority Workshop* at NUS, Singapore, 31 Oct-1 Nov

Launch of new journal on Indian law: *Indian Law Review* at the Law and Social Sciences Research Network (LASSnet) Conference 2016, Delhi 10-12 Dec

Presentation on 'Personal Laws and Religious Dispute Settlement' at the Law and Social Sciences Research Network (LASSnet) Conference 2016, Delhi 10-12 Dec

### Alysia Blackham

#### Publications

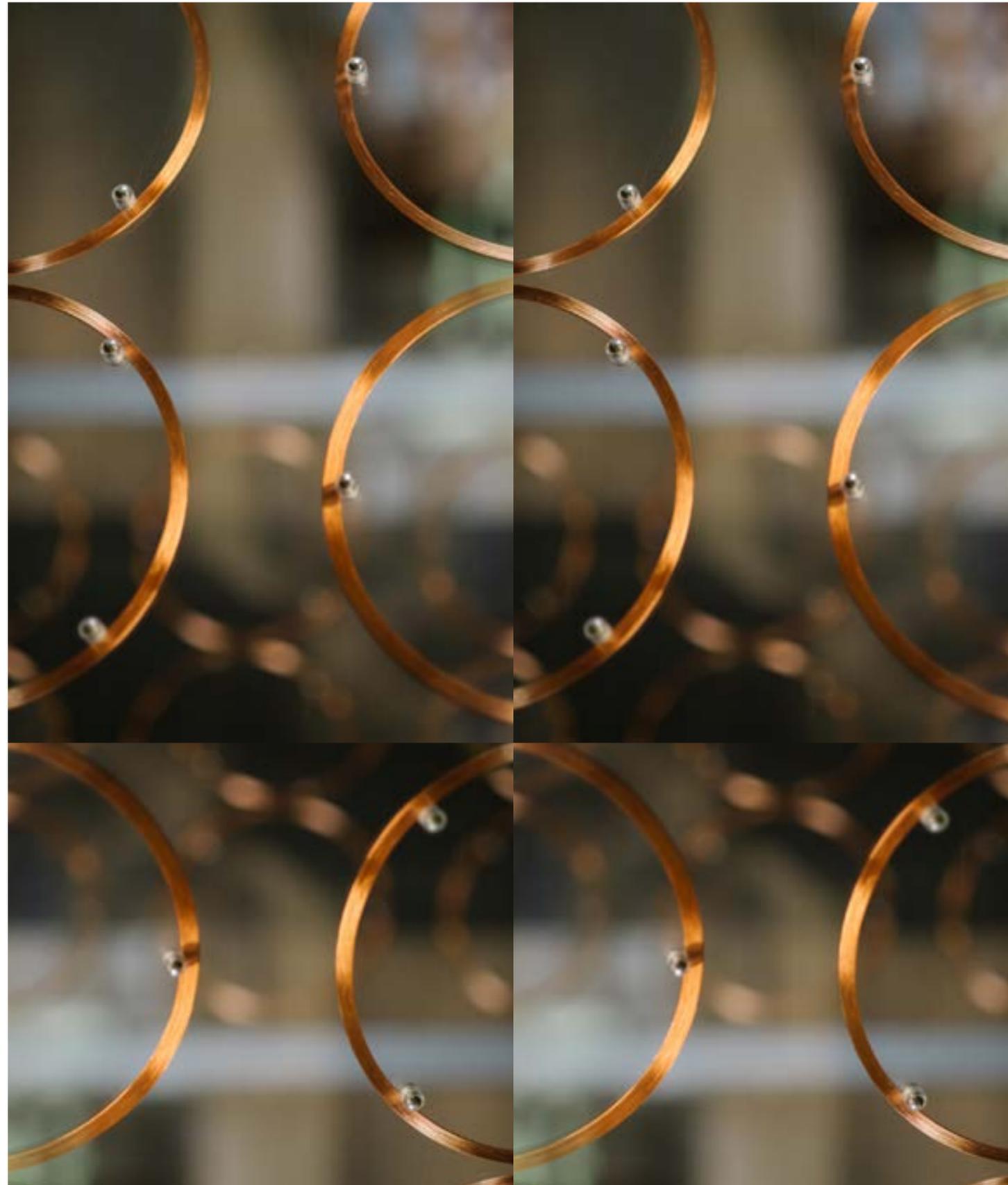
Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (2016, Hart, 248pp)

Alysia Blackham, 'Legitimacy and Empirical Evidence in the UK Courts' (2016) 25(3) *Griffith Law Review* (11,687 words; accepted on 9 November 2016)

Alysia Blackham, 'Judicial Retirement Ages in the UK: Legitimate Aims and Proportionate Means?' (2017) *Public Law* (9,442 words; accepted on 31 October 2016)

#### Blogs

Gabrielle Appleby and Alysia Blackham, 'Greyhounds, Michael McHugh and the Integrity of the Judiciary' on *Opinions on High* (19 October 2016) <http://blogs.unimelb.edu.au/opinionsonhigh/2016/10/19/appleby-blackham-greyhounds/>



#### Presentations

Presented at the Eighth Biennial National Australian Labour Law Association Conference on 'Defining 'Discrimination' in UK and Australian Age Discrimination Law', Melbourne, 2016

Awarded the Phillipa Weeks Prize for the Best Paper presented at the ALLA 2016 Conference

Presented with Gabrielle Appleby at International Legal Ethics Conference VII: The Ethics & Regulation of Lawyers Worldwide: Comparative and Interdisciplinary Perspectives on 'Retiring in the Shadow of the Court: Ethical and Legal Restrictions on Retired Judges', Fordham Law School, 2016

#### Research Grants

Discovery Early Career Researcher Award, Australian Research Council (AU\$355,000 for the project DE170100228 Addressing Age Discrimination in Employment, 2017-19)

Dyason Fellowship, University of Melbourne (AU\$4,052 to conduct comparative research with Professor Mia Rönnmar in Sweden on workability)

#### Submissions

Submitted a paper with Gabrielle Appleby to the Standing Committee on the Model Code of Professional Conduct, Federation of Law Societies of Canada, 2016 titled, 'Submission: Post-Judicial Return to Practice Discussion Paper'

### Anne Carter

#### Publications

'Uther's case (1947): Justice Dixon and the Troubled Legacy of the Commonwealth Immunity Doctrine' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) [with Stephen McDonald]

'Proportionality in Australian Constitutional Law: Towards Transnationalism' (2016) 76 *Heidelberg Journal of International Law* (forthcoming)

### Anna Dziedzic

#### Publications

Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' (2016) 44 *Federal Law Review* 337

Anna Dziedzic and Cheryl Saunders, 'Constitution-building in the Pacific in 2015' in *International IDEA, Annual Review of Constitution Building Processes 2015* (2016) <http://www.idea.int/publications/catalogue/>

**Presentations**

Presented 'Designing Constitutions for Foreign Judges: The Pacific Experience' at *Pacific Constitutions Research Network Conference*, 23-25 November 2016, Port Vila, Vanuatu

Convened a panel session on 'Women and Constitution Building in the Pacific' at the *Pacific Feminist Forum*, 28-30 November 2016, Suva, Fiji

**Coel Kirkby**

**Publications**

'Taking Hart Seriously: An Intellectual History of His Concept of Law' (forthcoming)

'A Cure for Coups: The South African Influence on Fijian Constitutionalism,' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Influence* (Cambridge University Press, forthcoming 2017)

**Presentations**

Presented 'The Barbarian and the King: The Constitution of Anglo-American Legal Thought at the End of Empire, c. 1800-1970' at the *Faculty Research Seminar Series*, Melbourne Law School, 10 October 2016

Presented a paper on 'The Constitution of Empire: Nation and Treaty in the Late Victorian Legal Imagination' at the *Australia and New Zealand Law and History Society Annual Conference*, Curtin Law School, 5-6 December 2016

**Julian Sempil**

**Publications**

Julian Sempil, *Rule of Law: Power & the Law: the Limited Government Tradition & its Rivals*, Cambridge University Press (forthcoming 2017)

Invited to contribute to a special issue on 'The History of the Rule of Law', *Hague Journal on the Rule of Law*

**Kristen Rundle**

**Publications**

Kristen Rundle, 'The Implications of Relative Authority: A Commentary on Nicole Roughan's Authorities', (2015) 40 *Australian Journal of Legal Philosophy* 198. [https://www.academia.edu/29773652/The\\_Implications\\_of\\_Roughans\\_Relative\\_Authority](https://www.academia.edu/29773652/The_Implications_of_Roughans_Relative_Authority)

Kristen Rundle, 'Fuller's Internal Morality of Law', (2016) 11(9) *Philosophy Compass* 499. [https://www.academia.edu/29773652/The\\_Implications\\_of\\_Roughans\\_Relative\\_Authority](https://www.academia.edu/29773652/The_Implications_of_Roughans_Relative_Authority)

**Teaching**

'Public Authority: A Critical Appraisal' (new JD Legal Research Seminar)

**Presentations**

Presented at the *ANU Public Law Weekend* on 'Executive Power in the 21st Century: What Can We Demand of its Forms?', National Museum of Australia, 28 October

Presented a paper on 'Subjects, Forms, and Relationships of Administrative Authority' at the *New Theories of the State's Authority Workshop*, National University of Singapore, 31 October-1 November

**Joo-Cheong Tham**

**Publications**

Book chapter:

Joo-Cheong Tham, Iain Campbell and Martina Boese, 'Why is labour protection for temporary migrant workers so fraught? A perspective from Australia' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (2016), Routledge, 173-200

Opinion pieces:

Joo-Cheong Tham and Malcolm Anderson, 'Taking Xenophobia out of the Political Donation Debate', *Inside Story*, 20 October 2016

Joo-Cheong Tham and Malcolm Anderson, 'Australia's Foreign Donations Fiasco', *East Asia Forum*, 20 October 2016

**Submission**

Submitted an inquiry to the inquiry of the Joint Standing Committee on Electoral Matters into the conduct of the 2016 Federal Election and matters related thereto (October 2016), 2 pp (appeared as a witness before committee)

**Presentations**

Presented a paper on '457 visa Workers and Human Rights at Work' at the *Australia's Migration Policies: A Consultative Workshop between the UN Special Rapporteur on the Human Rights of Migrants, Professor François Crépeau and Academia*, Sydney Law School, 16 November 2016

Presented 'What is the Problem of Precariousness for Temporary Migrant Workers?' at the *Beyond the Gig Economy: Opportunities to Organise, Collaborate and Develop New Responses to Insecure Work Seminar*, University of Melbourne (organised by the Brotherhood of St Laurence), 25 November 2016

**Martin Clark**

In February 2016, former CCCS researcher Martin Clark moved to the London School of Economics and Political Science to begin his PhD at the Law Department as Dame Rosalyn Higgins Scholar. The thesis, entitled 'The International and Domestic in Legal Thought', supervised by Professors Gerry Simpson and Tom Poole, will examine changing theories of the relationship between domestic and international public law in the works of British jurists at several critical moments since 1580.



In April 2016, he delivered a paper at the European Society of International Law Research Forum on the methods of global history and international law, and in September, presented a paper at the University of Helsinki on conceptual history and international law.

Later this month, he will attend a symposium at Lund University to launch the Oxford Handbook on the *Theory of International Law*, on which he was assistant editor with Anne Orford (MLS) and Florian Hoffmann (PUC-Rio) recently published by Oxford University Press, and give a short talk on the English sixteenth century jurist Richard Zouche's views on the purpose of international legal theory. He also participated in workshops on history, law and international order at the University of Cambridge in March, and on Cold War International Law at the LSE in August. An earlier draft of a section of his MLS MPhil thesis, 'A Conceptual History of Recognition in International Law', was published this year in 'British Contributions to the Concept of Recognition during the Interwar Period: Williams, Baty and Lauterpacht' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law, 1915-2015* (Brill), and won the MLS Graduate Research Degree student published research prize. He hopes to publish further research based on that thesis early next year.

Martin continues to write for the MLS High Court blog *Opinions on High*. He hopes you'll get in touch with him at [m.clark1@lse.ac.uk](mailto:m.clark1@lse.ac.uk) if you're in London soon!



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-convenors of the Constitutions Transformation Network are Laureate Professor Cheryl Saunders AO, Dr William Partlett and Ms Anna Dziedzic.



Website: <http://law.unimelb.edu.au/constitutional-transformations>

Twitter: @ConTransNet



## Integrity in Public Life: The Jim Carlton Memorial Lecture 16 November 2016, Wednesday



### Accountability: Do Programs Work? (and How Can We Find Out?) 'Through a Glass Darkly..'

The Hon. Peter Baume AC

The Centre for Comparative Constitutional Studies (CCCS) jointly hosted the Jim Carlton Memorial Lecture with the Accountability Round Table (ART) at Melbourne Law School. The Memorial Lecture was chaired by Professor Adrienne Stone.



The Honourable Peter Baume AC was Minister for Aboriginal Affairs, Health and Education in the Fraser Government, a Former Chancellor of the Australian National University and Former Professor of Community Medicine, University of New South Wales.



## CCCS and Constitution Transformation Network Seminar 5 December 2016, Monday

### Inclusive Constitution-Making and Religious Rights: Lessons from the Icelandic Experiment

Associate Professor H el ene Landemore (Department of Political Science, Yale University, United States of America)

The 2010-2013 Icelandic constitutional process offers a unique opportunity to test the predictions of epistemic deliberative democrats as well as some constitutional scholars that more inclusive processes lead to better outcomes. After briefly retracing the religious history of Iceland and the steps of the recent constitutional process, the paper thus compared three constitutional proposals drafted at about the same time to replace the 1944 Icelandic constitution. Two of these drafts were written by 7 government experts; the third one was written by a group of 25 lay-citizens, who further crowdsourced their successive drafts to the larger public. The paper suggested that on the question of religious rights the crowdsourced constitutional proposal indeed led to a marginally "better" (smarter and more liberal) constitutional document.

H el ene Landemore is Associate Professor of Political Science.



Her current research interests include democratic theory, theories of justice, the philosophy of social sciences (particularly economics), constitutional processes and theories, and workplace democracy.

She is the author of *Hume. Probabilit e et Choix Raisonnable* (PUF: 2004) and *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013). She is also co-editor with Jon Elster of *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press 2012).

Her articles have been published in, among others, *Journal of Political Philosophy*, *Political Theory*, *Politics, Philosophy, and Economics*, and *Political Psychology*.

"She is currently at work on a new book, tentatively entitled "After Representation: Rethinking Democracy for the 21st Century," which lays out the principles of post-representative (or "open") democracy.



## CCCS Brown Bag Series

4 October 2016, Tuesday

Arturo Villagran spoke to his paper "Comparative Regional Law".

11 October 2016, Tuesday

Will Partlett spoke to his paper "Criminal Law and Cooperative Federalism".

18 October 2016, Tuesday

Jason Varuhas spoke about the 2018 Public Law Conference which will be held at MLS.

25 October 2016, Tuesday

Anna Dzedzic discussed the project she undertook for International IDEA on 'Gender-Responsive Constitutional Implementation'. Anna's discussion focused on the ideas of constitutional implementation and gender responsive constitutional implementation.

9 November 2016, Wednesday

Robert Wintemute (Kings College London) discussed "Same-Sex Marriage: Should a court, legislature or plebiscite introduce it, and should religious individuals be granted exemptions".

10 November 2016, Thursday

Waheeda Amien (Cape Town) discussed "Legal Pluralism and Human Rights".

22 November 2016, Tuesday

Given the many constitutional law events at present, a Brown Bag meeting was specifically devoted to discuss:

1. constitutional dimensions of Brexit and especially the recent Article 50 decision;
2. recent Australian controversies over the eligibility to sit in the Senate and
3. Cheryl Saunders led the discussion on Brexit



## FORTHCOMING EVENTS

The Centre for Comparative Constitutional Studies will host a series of conferences, seminars and events in 2017 & 2018. For more information on these and other events see <http://law.unimelb.edu.au/centres/cccs#events>

**2017**

**CCCS Constitutional Law Conference**  
21 July 2017  
Melbourne Law School

**2017 Miegunyah Fellowship Public Lecture**  
presented by

**Professor Denis Baranger**

*Professor of Public law, l'Université Paris II Panthéon-Assas*  
Melbourne Law School

**2018**

**Third Biennial Public Law Conference**  
*co-hosted with the Faculty of Law, University of Cambridge*  
July 2018  
Melbourne Law School



## LEGAL THEORY WORKSHOP

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

Guest presenters for Semester Two 2016 (25 July – 23 October 2016) included:

**5 August 2016**

**Professor Aaron James** (UC Irvine), 'Investor Rights as Nonsense (on Stilts)'

Commentator: Dr Jarrod Hepburn (Melbourne)

**26 August 2016**

**Professor Vicki Jackson** (Harvard), 'Proportionality and Equality'

Commentator: Professor Adrienne Stone (Melbourne)

**2 September 2016**

**Dr Tria Gkouvas** (Monash), 'Making Law Intentionally: An Anscombian Defence of Legislative Intent'

Commentator: Dr Dale Smith (Melbourne)

**16 September 2016**

**Dr Ron Levy** (ANU), 'Shotgun Referendums: Deliberation and Constitutional Settlement in Conflict Societies'

Commentator: Dr William Partlett (Melbourne)

**23 September 2016**

**Professor Fabienne Peter** (Warwick), 'Political Legitimacy and the Authority of Reason'

Commentator: Dr Daniel Halliday (Melbourne)

**7 October 2016**

**Associate Professor Nicole Roughan** (NUS), 'Legitimacy of Whom?'

Commentator: Dr Kristen Rundle (Melbourne)

**21 October 2016**

**Dr Cormac MacAmhlaigh** (Edinburgh), 'Pluralising Constitutional Pluralism'

Commentator: Associate Professor Kirsty Gover (Melbourne)



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

#### Research Centre Members

Laureate Professor Emeritus 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 Kristen Rundle  
Associate Professor Joo-Cheong Tham  
Associate Professor Margaret Young  
Dr Alysia Blackham  
Dr William Partlett  
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

#### Administrator

Jean Goh

#### PhD Students in Residence

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

#### JD Research Associates

Elizabeth Brumby  
Sophia Charles  
Luke Chircop  
Tom Dreyfus  
Teresa Gray  
Alexandra Harrison-Ichlov  
Artemis Kirkinis  
Kalia Laycock-Walsh  
Mimi Oorloff  
Marcus Roberts  
Anna Saunders  
Kathryn Wright  
Joshua Quinn-Watson

#### Advisory Board Members

Ian Cunliffe  
Dr Stephen Donaghue QC  
Dr Gavan Griffith AO QC  
Peter Hanks QC  
Wendy Harris QC  
Justice Chris Maxwell AO  
Justice Stephen McLeish  
Justice Debbie Mortimer  
Justice Mark Moshinsky  
Professor Brian Opeskin  
Jason Pizer QC  
Justice Richard RS Tracey

To join our mailing list to receive notification about CCCS events and publications send an email to [law-cccs@unimelb.edu.au](mailto:law-cccs@unimelb.edu.au)

To learn more about us go to [www.law.unimelb.edu.au/cccs](http://www.law.unimelb.edu.au/cccs)

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#### A. HIGH COURT OF AUSTRALIA

*Cunningham & Ors v Commonwealth of Australia & Anor* [2016] HCA 39 (12 October 2016)

The four plaintiffs were former members of the House of Representatives of the Commonwealth Parliament<sup>1</sup>. The plaintiffs brought proceedings against the Commonwealth challenging amendments to the *Remuneration Tribunal Act 1973* (Cth) ('RT Act') which reduced superannuation entitlements of former members of Parliament under the *Parliamentary Superannuation Act 1948* (Cth) ('*Superannuation Act*'), as well as certain Remuneration Tribunal decisions. The third and fourth plaintiffs challenged amendments to the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) ('*LGP Act*') which reduced their entitlements to the payment of travel expenses as holders of a Life Gold Pass (LGP).

The plaintiffs challenged these amendments on grounds that the Commonwealth acquired property otherwise than on 'just terms' contrary to s 51(xxxi) of the *Constitution*<sup>2</sup>.

The High Court held that the amending legislation did not engage s 51(xxxi) of the *Constitution*.

#### Judgment

French CJ, Kiefel and Bell JJ held that the amendments to the *RT Act*, which had the effect of modifying the plaintiffs' retiring allowances, are not laws with respect to the acquisition of property, meaning that s 51(xxxi) does not apply<sup>3</sup>. Their Honours held that statutory rights are more liable to variation than others<sup>4</sup> and some statutory rights (including statutory remuneration) can be regarded as inherently variable by virtue of the statute creating them<sup>5</sup>. Contrary to the plaintiffs' claims, the retiring allowances were held, by their nature, to be variable rights<sup>6</sup>. Therefore, the amending legislation could not properly be described as an 'acquisition of property'<sup>7</sup>. In addition, the joint judgment held that the LGP was a gratuity and, therefore, a privilege of a kind which was 'liable not only to modification, but to extinguishment'<sup>8</sup>.

Gageler J held that the amendments did not 'reduce the amount of retiring allowances payable to the plaintiffs'<sup>9</sup>. Therefore there was no deprivation and no acquisition of

1 Case S140/2015 Particulars.  
2 Case S140/2015 Particulars, Special Case, Plaintiff Submissions [49].  
3 *Cunningham v Commonwealth* [2016] HCA 39 (12 October 2016) ('*Cunningham*') [48] (French CJ, Kiefel and Bell JJ).  
4 *Ibid* [43].  
5 *Ibid*.  
6 *Ibid* [39].  
7 *Ibid* [46].  
8 *Ibid* [55].  
9 *Cunningham v Commonwealth* [2016] HCA 39 (12 October 2016) ('*Cunningham*') [102] (Gageler J).

property<sup>10</sup>. Whilst the amendments altered the method of calculation of the current Parliamentary salary<sup>11</sup>, Gageler J held that they did not effectively reduce the amount the plaintiffs received. In addition, parliamentary allowances were protected by s 22T of the *Superannuation Act*, which set a floor on the amount that could not be adjusted downward<sup>12</sup>. Conversely, Gageler J accepted that there was acquisition of property otherwise than on just terms with respect to the LGPs<sup>13</sup>. Gageler J held in 'principle'<sup>14</sup> that the LGPs are 'statutory rights' which 'continued to subsist notwithstanding subsequent amendment or expiration'<sup>15</sup>. Accordingly, the Tribunal itself had no power to alter rights attaching to LGPs<sup>16</sup>. Gageler J also held that, in practice, the Tribunal's jurisdiction did not extend to retired members<sup>17</sup> and therefore those statutory rights were not 'variable'<sup>18</sup>.

Keane J held that the superannuation entitlements were not 'characterised as property for the purposes of s 51(xxxi)'<sup>19</sup>. Instead, the statutory rights were 'simply ... the payment of moneys from time to time from the public funds of the Commonwealth'<sup>20</sup>. Keane J held that the statutory right does 'not use the language of vesting'<sup>21</sup>, and is expressed in terms which indicate 'the possibility of subsequent amendment'<sup>22</sup>. Regarding LGPs, Keane J held that the power of the Tribunal to make determinations was subject to the *LGP Act*<sup>23</sup> such that the power can be used to exercise to reduce the allowance<sup>24</sup>.

Nettle J first held that the statutory right to superannuation entitlements was 'inherently defeasible'<sup>25</sup> by virtue of the 'intention' of the legislature<sup>26</sup>. Therefore the 'extinguishment or diminishment' of the right, such that it was 'reduced'<sup>27</sup>, did 'not result in any acquisition of property'<sup>28</sup> and did not engage s 51(xxxi)<sup>29</sup>. Nettle J held that the LGPs are an executive entitlement<sup>30</sup>, as determined by the Remuneration Tribunal

10 *Ibid* [105].  
11 *Ibid* [90].  
12 *Ibid* [86]–[87].  
13 *Ibid* [117].  
14 *Ibid* [111].  
15 *Ibid* [107].  
16 *Ibid* [109].  
17 *Ibid* [110].  
18 *Ibid* [111].  
19 *Cunningham v Commonwealth* [2016] HCA 39 (12 October 2016) ('*Cunningham*') [124] (Keane J).  
20 *Ibid* [155].  
21 *Ibid* [166].  
22 *Ibid* [167].  
23 *Ibid* [191].  
24 *Ibid*.  
25 *Cunningham v Commonwealth* [2016] HCA 39 (12 October 2016) ('*Cunningham*') [235] (Nettle J).  
26 *Ibid* [237]; see also [222].  
27 *Ibid* [240].  
28 *Ibid* [235].  
29 *Ibid* [240].  
30 *Ibid* [243].

and ‘necessarily subject to change’<sup>31</sup>. Therefore it could not amount to an acquisition of property<sup>32</sup>.

Gordon J held that whilst the retiring allowances are ‘an entitlement’ and a “right” created by statute, they nonetheless remain ‘inherently liable to variation’<sup>33</sup>. This is by virtue of the statutory scheme, its terms, ‘history, purpose and object’<sup>34</sup>, whereby entitlements were ‘subject’ to the *Superannuation Act*<sup>35</sup>, and ‘calculated’ and ‘decided’ by Parliament<sup>36</sup>. Therefore any such ‘rights’, where Parliament ‘has the power to make laws’<sup>37</sup>, are not protected from acquisition by s 51(xxxi)<sup>38</sup>. In addition, Gordon J held that the provisions of the LGP Act are ‘inherently liable to variation’<sup>39</sup>. Consistent with the statutory scheme, Gordon J held that the LGP’s were not accrued rights<sup>40</sup>.

## B. HIGH COURT OF ENGLAND AND WALES

### *Miller v Secretary of State for Exiting the European Union* [2016] EWHC 2768

#### Facts

On 23 June 2016, a referendum was held asking, ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ Against expectations, 51.9% voted to leave the EU.

At the time of the referendum, elements of EU law were given direct effect in domestic law by the *European Communities Act 1972* (UK) (*EC Act*). This had been enacted as condition of membership of the European Communities (a precursor to the European Union).

In October 2016, Prime Minister Theresa May announced her intention to trigger art 50 of the *Treaty on European Union*, which governs withdrawal from the EU. Paragraph 2 of art 50 provides that ‘[a] Member State which decides to withdraw shall notify the European Council of its intention’. This notification is irrevocable. Paragraph 3 provides that a Member State that gives notice under para 2 shall cease to be a Member State two years after notice is given unless the European Council and Member State unanimously decide to extend the period.

The issue before the Court was whether the Government is entitled to give notice under art 50 without reference to Parliament.

31 Ibid [243].  
32 Ibid [224].  
33 *Cunningham v Commonwealth* [2016] HCA 39 (12 October 2016) (*Cunningham*) [252] (Gordon J).  
34 Ibid [330].  
35 Ibid [328].  
36 Ibid [333].  
37 Ibid [336].  
38 Ibid [329].  
39 Ibid [253].  
40 Ibid [357].

#### Judgment

The Court held that the Government could not rely on its prerogative powers to trigger art 50 without reference to Parliament.

The basic principles regarding the sovereignty of Parliament and the prerogative powers of the Crown were not in contention: legislation enacted by Parliament is supreme and the Government has no ‘power to prescribe or alter the law to be administered by Courts of law’<sup>41</sup>. It was also common ground that triggering art 50 would, in due course, mean that elements of EU law which were translated into domestic law by the *EC Act* would inevitably cease to have effect.

The claimant argued that because triggering art 50 would alter the domestic law, the Government could not take that action through the exercise of its prerogative powers. However, the Government contended that because the content of EU rights is defined in the *EC Act* by reference to EU treaties, Parliament must be taken to have intended that continued membership of the EU was a condition for the existence of EU rights to be given effect in domestic law. It was then said that ‘whether that condition is satisfied or not was intended by Parliament to depend entirely upon the action of the Crown on the plane of international law’<sup>42</sup>.

The Court rejected the Government’s interpretation of the *EC Act*. The Court noted that the *EC Act* gave ‘EU law superiority even over domestic primary legislation’<sup>43</sup>. In this context, the Court accepted Laws LJ’s characterisation of the *EC Act* as a ‘constitutional statute’<sup>44</sup>. This raised a particularly strong presumption that Parliament intended to legislate in conformity with ‘background constitutional principles’<sup>45</sup>.

Of particular importance was the principle that ‘the Crown cannot use its prerogative powers to alter domestic law’<sup>46</sup>. In this context, the Court stated:

It would be surprising indeed if, in the light of that tradition [sc the struggle to assert Parliamentary sovereignty], Parliament, as the sovereign body under our constitution, intended to leave the continued existence of all the rights it introduced into domestic law by enacting [the *EC Act*] ... subject to the choice of the Crown in the exercise of its prerogative powers<sup>47</sup>...

The Court considered the principle that it should be presumed that Parliament does not intend to interfere with the Government’s prerogative to act on the international plane<sup>48</sup>. However, it considered that

41 *Miller v Secretary of State for Exiting the European Union* [2016] EWHC 2768 [29], quoting *The Zamora* [1916] 2 AC 77, 90 (PC).  
42 Ibid [77].  
43 Ibid [43].  
44 Ibid [44].  
45 Ibid [82].  
46 Ibid [85].  
47 Ibid [86].  
48 Ibid [89].

the justification for a presumption of non-interference ... is substantially undermined in a case such as this, where the Secretary of State is maintaining that he can through the exercise of the Crown’s prerogative bring about major changes in domestic law.<sup>49</sup>

The Court therefore accepted the claimants’ argument that the Government could not trigger art 50 through the exercise of its prerogative, as that would ‘change domestic law and nullify rights under the law’<sup>50</sup>.

Readers who are interested in further discussion of the legal dimensions of Brexit may like to browse the following blogs:

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## C. HIGH COURT OF JUSTICE IN NORTHERN IRELAND

### *McCord’s Application* [2016] NIQB 85 (28 October 2016)

On 23 June 2016, the majority of those who voted on the United Kingdom referendum, voted in favour of the UK leaving the European Union. Following this referendum, two applications were heard before the High Court of Justice in Northern Ireland for judicial review of the Westminster Government’s proposed invocation of art 50 of the *Treaty on European Union* (*TEU*), which would trigger the UK’s withdrawal from the EU.

The first applicant was McCord, a resident of Northern Ireland, self-described as a British and European citizen. The other applicants were Agnew and Others, who are members of the Northern Ireland Assembly. The respondents to the proceedings were the UK Government.

The case considered issues that were unique to Northern Ireland proceedings, and did not prejudice the issues being considered in *Miller v Secretary of State for Exiting the European Union*<sup>51</sup>.

The High Court of Justice in Northern Ireland dismissed the two judicial review challenges.

#### Judgment

The applicants first contended that the prerogative power had been displaced by the *Northern Ireland Act 1998* (*‘the Act’*), the Belfast Agreement and the British–Irish Agreement, with the result that the prerogative power could not be exercised for the purpose of notification in accordance with art 50(2)

49 Ibid.  
50 Ibid [95].  
51 *McCord’s Application* [2016] NIQB 85 (28 October 2016) (Macguire J). See, eg, [108].

of the *TEU*. In these circumstances, the applicants contended that an Act of Parliament is required to trigger art 50(2) (*‘issue one’*). Following the approach adopted in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*<sup>52</sup>, the Court found that there was no provision in the Act, which expressly or by necessary implication had the effect of curtailing the ability of the executive to use the prerogative power in giving notification for the purposes of art 50(2)<sup>53</sup>.

The applicants further contended that if an Act of Parliament is required to allow the Westminster Government to trigger art 50<sup>54</sup>, then the legislation must also receive consent by the Northern Ireland Assembly by a Legislative Consent Motion before such legislation could be passed authorising notification in accordance with art 50(2). The applicants argued that the ‘failure to seek and procure such consent would be in breach of a constitutional convention “whereby the consent of the Northern Assembly will be obtained for Westminster legislation affecting the developed powers of the Assembly”<sup>55</sup>. Whilst the Court assumed that this convention exists in Northern Ireland<sup>56</sup>, the Court held that the requirement for consent only exists for ‘legislation concerning relations with the European Communities and their institutions’<sup>57</sup>. It does not exist for legislation regarding ‘devolved matters’. In such cases, the consent of the Northern Ireland Assembly would not be required<sup>58</sup>.

The applicants contended that there were a series of public law constraints on the exercise of prerogative power to trigger art 50<sup>59</sup>. For example, the applicants asserted that the ‘prerogative may only be exercised after properly having taken into account and having enquired into all relevant alternatives to the entirety of the UK exiting the EU’<sup>60</sup>. The Court rejected these assertions on the grounds that they overlapped with issue one, which the Court already rejected<sup>61</sup>. In addition, the Court held that such assertions lacked evidence and that the Court lacked the ability to carry ‘out its own assessment of them’<sup>62</sup>. Finally, the Court considered that the prerogative power in question relates to ‘high policy’ and therefore lacks justiciability<sup>63</sup>.

The final constitutional issue raised by the applicants is that as a matter of law art 50 cannot be triggered without the consent of the people of Northern Ireland<sup>64</sup>. This was asserted on the basis that ‘the Northern Ireland people are said to have a legitimate expectation that there would be no change in

52 [2002] 2 WLR 1299.  
53 *McCord’s Application* [2016] NIQB 85 (28 October 2016) (Macguire J) [108].  
54 Ibid [110].  
55 Ibid [112].  
56 Ibid [119].  
57 Ibid [121].  
58 Ibid [121].  
59 Ibid [125].  
60 Ibid [125].  
61 Ibid [127].  
62 Ibid [128].  
63 Ibid [131]–[135].  
64 Ibid [147].

the constitution of Northern Ireland without their consent<sup>65</sup>. The Court held that no such norm was created<sup>66</sup>. The relevant provision relates to the question of whether Northern Ireland should remain as part of the UK or unite with the Republic of Ireland — not to the UK or Northern Ireland's continued membership in the EU<sup>67</sup>.

#### D. SUPREME COURT OF CANADA

*Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)* [2016 SCC 39](#)

##### Facts

In 2004, the government of Quebec reformed its judicial regime in response to a finding by the Court of Appeal of Quebec that its previous regime violated the guarantee of constitutional independence because judges were not given tenure<sup>68</sup>. Six sitting justices were introduced to the new regime. Those judges' salary was maintained. A number of new judges were appointed with significantly lower salaries.

In 2008, the *Conférence des juges de paix magistrats du Québec* ('Conférence') initiated proceedings against Québec, claiming that ss 27, 30 and 32 of the *Act to Amend the Courts of Justice Act and Other Legislative Provisions as regards the Status of Justices of the Peace*, SQ 2004, c 12 ('*Amendment Act*') and s 178 of the *Courts of Justice Act*, CQLR, c T-16 were unconstitutional because they infringed the financial security guarantee of judicial independence.

Section 27 and 30 of the *Amendment Act* established and froze the remuneration of the judges. Section 32 of the *Amendment Act* provided that the committee on the remuneration of judges (discussed below) would not exercise its functions until 2007 (three years after the start of the new regime). Section 178 of the *Courts of Justice Act* mandated the judges' participation in a certain public service pension plan that was less favourable than the sitting judges' previous pension plan.

The Quebec Superior Court and Quebec Court of Appeal held that the requirement of judicial independence was not violated because the challenged provisions were part of a reform creating a new judicial office<sup>69</sup>. The *Conférence* appealed to the Supreme Court.

##### Judgment

The Supreme Court allowed the appeal in part, holding that ss 27, 30 and 32 of the *Amendment Act* were unconstitutional but that s 178 of the *Courts of Justice Act* was not.

The Court agreed that the new regime had created a new judicial office. Factors relevant to whether a new judicial office

is created or an existing judicial office is modified include the judicial function and conditions of employment<sup>70</sup>. In this case, a new office was created because both the judges' jurisdiction and guarantees of judicial independence were changed<sup>71</sup>.

The Court's previous jurisprudence had established three elements relating to the financial security guarantee of judicial independence: (i) remuneration cannot be changed without review by an independent committee; (ii) the judiciary may not negotiate with the other branches of government with respect to remuneration; and (iii) remuneration must not fall 'below a basic minimum level ... required for the office of a judge'<sup>72</sup>.

The Court noted that it was not in contention that where changes in remuneration of an existing office are proposed, an independent committee must review the changes before they are implemented. However, the Court held that the Court of Appeal erred in finding that where a new judicial office is created no committee review of the initial remuneration is required. It stated that such an approach would allow the legislature to circumvent the financial security requirements of judicial independence<sup>73</sup>.

In the case of the establishment of a new judicial office, the Court considered that review by an independent committee should 'take place within a reasonable time after the appointment of the new judges'<sup>74</sup>. Section 32 of the *Amendment Act* was unconstitutional because the provision of a three-year period without review by an independent committee was not reasonable. Further, ss 27 and 30 were unconstitutional because they froze the judges' remuneration without reference to the need to have the remuneration reviewed by an independent committee.

Finally, the Court held that s 178 of the *Courts of Justice Act* was constitutional. Although it was not as favourable, it had been considered by an independent committee to meet the minimum constitutional threshold for the office of a judge.

65 Ibid [147].

66 Ibid [152].

67 Ibid [152].

68 *Pomerleau v The Queen*, 2003 CanLII 33471.

69 *Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)*, 2016 SCC 39 [4].

70 Ibid [67].

71 Ibid [75]–[76].

72 Ibid [34].

73 Ibid [44].

74 Ibid [49] (emphasis in original).



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