



Centre for Comparative Constitutional Studies Newsletter

Number 8 / September 2009

Welcome to the eighth issue of the Centre for Comparative Constitutional Studies Newsletter, a guide to news and events at the centre and a spotlight on issues in constitutional law nationally and globally.

Centre Update

Professor Adrienne Stone, CCCS Director, presented a paper on 26 June entitled "Democratic Objections to Structural Judicial Review" at an international forum on "The Judicial Role in Constitutional Law" held at the University of Glasgow.

Her article "Comparativism in Constitutional Interpretation" is now forthcoming in the *New Zealand Law Review*.

Associate Professor Carolyn Evans, CCCS Deputy Director, presented a paper "Religious Schools, Discrimination Law and Bills of Rights" at a conference on Religious and Cultural Freedom under a Bill of Rights (Research Unit for the Study of Society, Law and Religion) in Canberra on 14 August 2009. She also had a chapter published "Religious Speech that Undermines Gender Equality" in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein, Oxford University Press (2009) 357-374.

Associate Professor Kristen Walker gave a paper at the 2009 Law Institute Victoria Human Rights Conference held on Friday 21 August 2009 on the National Human Rights Consultation. The Conference Program is available at the following link: http://www.cpd.liv.asn.au/downloads/2009%20Brochures/Human%20Rights%20Conference_F_LIER_D9.pdf.

Associate Professor Walker will be giving a paper at the 2009 Protecting Human Rights Conference to be held in Sydney on 2 October on the topic of human rights protection in Australia "Victorian Charter of Human Rights and Responsibilities."

Associate Professor Walker recently spent two weeks in Nauru, advising the Committee of the Whole of the Parliament of Nauru on proposed amendments to the Constitution. Kris was accorded temporary recognition as Parliamentary Counsel, which enabled her to sit and speak in Parliament, by way of answering questions and also to clarify matters as they arose in debate. Also involved in the process was Melbourne Law School alumna and former member of the CCCS, Katy Le Roy, currently the permanent Parliamentary Counsel of Nauru. Katy has had a long involvement in the process of constitutional reform in Nauru: she was retained as a consultant adviser by the United Nations in 2006 to advise Nauru on the design of their constitutional review process, and then conducted the initial public awareness and public consultation phases of the review. Katy also served as counsel to the

Constitutional Review Commission that produced the recommendations for reform, and as counsel to the Constitutional Convention in 2007.

Associate Professor Beth Gaze gave a presentation 'Appellants Impressions and Experiences in the Social Security Appeals Tribunal: A Preliminary Report' (with Ruth Quibell and Belinda Fehlberg) at the Australian Institute of Judicial Administration / Council of Australian Tribunals Conference, held on 4-5 June 2009, in Sydney. She also had an article published: 'Fair work, fair law and fair process?' (2009) 16 A *J Admin. Law*: 135-137. Beth is a consultant to the Scrutiny of Acts and Regulations Committee (Victorian Parliament) and the Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995 (Vic).

On 1 September 2009, **Associate Professor Alison Duxbury** was interviewed on the Law Report, ABC Radio National, regarding the history of the Military Court in Australia and the issue of the High Court striking down the Australian Military Court, leaving the whole military justice system up in the air. For a full transcript or to listen to the audio podcast please click on the following link: <http://www.abc.net.au/rn/lawreport/stories/2009/2671892.htm#transcript>.

Dr Joo-Cheong Tham has written on the need for rules to protect the integrity of the public office in *The Age*, Tuesday 23 June 2009, page 11.

Dr Kirsty Gover is updating the data set of constitutions that informs her forthcoming book: "Tribal Constitutionalism: Membership Governance in Comparative Perspective." The book will form the basis of the inaugural workshop of the Comparative Tribal Constitutionalism Research Program co-sponsored by the Centre for Comparative Constitutional Studies.

Dr Gover recently had an article published "Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States", *American Indian Law Review*, Vol. 33 (1) 2009.

She was also one of about 15 newly appointed academics selected to attend an Early Career Workshop at the Law and Society Association Annual Meeting in Denver, Colorado on May 26-27. Participants received mentoring from established socio-legal scholars and one-on-one advice on their current research projects.

****CCCS CONFERENCE REGISTRATION OPEN****

Please note that registration is open for the *International and Comparative Perspectives on Constitutional Law Conference*, the Centre for Comparative Constitutional Studies' major national conference to be held on **Friday 27 November 2009** at Melbourne Law School marking the Centre's 21st Birthday Anniversary. The program will feature the following speakers:

- The Hon Robert French, Chief Justice of Australia
- Professor Sujit Choudhry, Scholl Professor of Law, University of Toronto
- Professor Cheryl Saunders AO, Laureate Professor, Melbourne Law School
- Stephen Gageler SC, Solicitor-General for the Commonwealth of Australia

The Conference will be followed by a dinner at which The Hon Sir Anthony Mason AC will be the guest speaker.

To view the full program and register please click [here](#).

Forthcoming events

Further details of forthcoming events will be available shortly. Please check the CCCS [website](#).

Event: 2009 Protecting Human Rights Conference (co-hosted by the CCCS)
Date: Friday 2 October 2009
Time: 9.00 am – 5.00 pm
Venue: Art Gallery of New South Wales, Art Gallery Road, The Domain, Sydney DBD
Registration: Please click [here](#) for a conference registration brochure.

Speaker: Professor Stephen Gardbaum, Professor of Law, University of California, Los Angeles, USA

Topic: Reassessing the New Commonwealth Model of Constitutionalism.
Date: Monday 5 October 2009
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Event: APCML/CCCS Joint Seminar
Speakers: Alexander Street SC, Dr Matthew Groves, Associate Professor Alison Duxbury
Topic: The High Court versus Military Justice: Where to Next?
Date: Tuesday 6 October 2009
Time: 5.30 pm (refreshments) for 6.00 pm seminar
Venue: Room 920, Level 9, Melbourne Law School

Speaker: Professor Jeremy Webber, Canada Research Chair in Law and Society and Trudeau Fellow, Faculty of Law, University of Victoria, Canada

Topic: *tbc*
Date: Wednesday 21 October 2009
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Event: Joint CCCS and Australian Human Rights Commission Public Seminar
Speaker: The Hon Catherine Branson QC, President, Australian Human Rights Commission

Topic: The National Human Rights Consultation: Outcome from the AHRC Perspective
Date: Wednesday 21 October 2009
Time: 6.00 pm
Venue: Theatre G08, Melbourne Law School

Event: CCCS Book Launch: *Choosing the Republic* by Glenn Patmore

Speaker: *tba*
Date: 2 - 6 November 2009 - *tbc*
Time: *tbc*
Venue: Melbourne Law School

Event: CCCS/IILAH Joint Seminar
Speaker: Professor Frances Raday, Hebrew University, Jerusalem
Topic: *tbc*
Date: 18 or 19 November 2009 *tbc*
Time: *tbc*
Venue: Melbourne Law School

Speaker: Ms Kylie Evans, Victorian Department of Justice
Topic: Australian Charters of Rights
Date: November 2009 *tbc*
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Speaker: Professor Larissa Behrendt, University of Technology, Sydney
Topic: Human Rights and Indigenous Peoples
Date: November 2009 *tbc*
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Event: International and Comparative Perspectives on Constitutional Law: A 21st Anniversary Celebration for the CCCS
Date: Friday 27 November 2009
Time: 9.00 am – 5.00 pm
Venue: Melbourne Law School
Registration: Please click [here](#) for a conference registration brochure.

Speaker: Dr Alison Young, Faculty of Law, Oxford University
Topic: Practical aspects of the democratic dialogue theory
Date: December 2009 *tbc*
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Recent CCCS Events



Speaker: Associate Professor Michael Dowdle,
National University of Singapore

Topic: The Regulatory Constitution

Date: Monday 20 July

Seminar Details:

Particularly with regards to thinking about constitutions in a developmental context, the better approach is to approach constitutionalism from a 'regulatory' perspective rather than from a structural perspective. Both comparatively and historically, constitutionalism is better seen as a device that negotiates the interaction between two somewhat contradictory regulatory spaces. One such space is the more traditional space of government institutions – a space that is configured primarily around various forms of institutional or bureaucratic authority. The other space is a relatively new space that was created out of the Enlightenment, one that for convenience we might call the "Polity." The Polity is configured around a more persuasion-oriented form of authority characterized by what that I refer to as more 'open' political epistemologies – i.e., the idea that political knowledge is understandable to all, not simply to a select class.

In this seminar, Associate Professor Dowdle demonstrated how this regulatory model actually offers a more complete accounting of Western constitutional history than does the Montesquieuan model. Looking outside the West, he also argued that this model helps us better understand what he has elsewhere called "the curious case of constitutional development in China" – a case that defies Montesquieuan explanation. He concluded with a brief investigation into what this model might have to tell us about recent constitutional developments in the EU, Thailand and Malaysia.

Michael W. Dowdle is a Distinguished Visiting Scholar at the Department of Business Law and Taxation, Monash University; and Visiting Associate Professor on the Faculty of Law, National University of Singapore



Speaker: Professor Claude Klein, The Hebrew
University of Jerusalem

Topic: Backlash Against Judicial Activism: The Case
of Israel

Date: Friday 4 September 2009

Seminar Details:

Beginning in the mid-1980s, the Supreme Court of Israel, under the leadership of Chief Justice Aharon Barak, adopted a very activist policy. This culminated in 1995 in a "coup" according to which the Basic Laws (the status of which had previously been controversial) were to be considered as "higher law" and the Courts could exercise judicial review. At the same time, the Court has continued its policy, according to which "everything is justiciable". It is no wonder that

the backlash was equally as strong as this “judicial activism”. This seminar will review this debate and its consequences.

Professor Klein was born in France, where he studied law and political science at Strasbourg University. He taught there and subsequently joined the Law School of the Hebrew University in 1968. He has served as Professor and also as Dean. He has visited many foreign law schools (France, Switzerland, Canada and US) and has written extensively on matters relating to Israel's constitutional law and to the theory of Law and State (mainly on the theory of the constituent power).



Speaker: Professor Hugh Corder, Professor of Public Law, University of Cape Town, South Africa

Topic: The Constitutionalisation of South African Administrative Law: Has it Worked?"

Date: Monday 21 September 2009

Seminar Details:

South Africa's process of reform of administrative law mirrors and was heavily influenced by Australia's experience in the 1970s. Yet it differs in several important respects, most noticeably the inclusion in the Bill of Rights of rights to “just administrative action”. The courts have been interpreting and enforcing such rights for a decade now. This seminar sought to describe and analyse the changes made in this area of the law, and evaluated their success in achieving “administrative action which is lawful, reasonable and procedurally fair”. Reference was also made to developments in comparable jurisdictions in the British Commonwealth.

Professor Hugh Corder was born and educated in Rondebosch, Cape Town. He has a BCom LLB (Cape Town), LLB (Cantab), DPhil (Oxon) and is an Advocate of the High Court of South Africa. He has been Professor of Public Law at UCT since 1987 and held the position of Dean of the Faculty of Law at UCT from 1999-2008. A graduate of the universities of Cape Town, Cambridge and Oxford, his main teaching and research interests fall within the field of Constitutional and Administrative Law, particularly judicial appointment and accountability and mechanisms to further administrative accountability. Professor Corder has been widely involved in community work since his student days, concentrating on popular legal education, race relations, human rights and the abolition of the death penalty. He served as a technical adviser in the drafting of the transitional Bill of Rights for South Africa. He has written two books and edited a further three, and has contributed many articles and chapters in books. Recent books include Realising Administrative Justice. (SiberInk, Cape Town, 2002 with Linda van de Vivjer); and Comparative Administrative Justice in the Commonwealth (Juta, Cape Town, forthcoming).

Centre Visitors

Professor William Buss

O.K. Patton Professor of Law, University of Iowa

23 May – 1 July 2009

Professor Buss' research project is a study of the influence of the American constitution on the Australian constitution. A series of articles will include a detailed analysis of what the Australian framers said at their conventions; how they understood and agreed about the meaning of the American constitution: how their choices of what to adapt for Australia have played out compared to developments in American law. Professor Buss' current focus is on the Judicature; during his time in Australia he expects to be working on interstate commerce and interstate freedom of movement.

Professor Michael W. Dowdle

Distinguished Visiting Scholar at the Department of Business Law and Taxation, Monash University; and Visiting Associate Professor on the Faculty of Law, National University of Singapore

Monday 20 July 2009

Professor Hugh Corder

Senior Fellow (The Melbourne Law Masters), University of Cape Town, South Africa

16-22 September 2009

Professor Corder has been Professor of Public Law at UCT since 1987. A graduate of Cape Town, Cambridge and Oxford universities, his teaching and research focuses on constitutional and administrative law, particularly judicial appointment and accountability. He is very involved in community work, concentrating on popular legal education, race relations, human rights and the abolition of the death penalty. He was a technical adviser in drafting the transitional Bill of Rights for South Africa and has written two books, editing a further three. He was elected a Fellow of the University of Cape Town in 2004.

Professor Vicki Jackson

Senior Fellows (The Melbourne Law Masters), Georgetown University, United States

5 – 11 August 2009

Professor Jackson teaches constitutional law, comparative constitutional law, federal courts, the Supreme Court and gender-related subjects. She is co-author of *Comparative Constitutional Law* and an Articles Editor for the *International Journal of Constitutional Law*. Her research interests also include comparative constitutional law, comparative federalism and freedom of expression. She served as a Deputy Assistant Attorney General in the Office of Legal Counsel in the US Department of Justice, as a member of the DC Bar Board of Governors and as a co-chair of the Special Committee on Gender of the DC Circuit Task Force on Gender, Race and Ethnic Bias.

Dr Alison Young

Lecturer and Fellow, Tutor in Law, Faculty of Law, Hertford College, University of Oxford

15 September – 15 December 2009

Research carried out by the Centre for Comparative Constitutional Studies, particularly the work investigating human rights protections in Australia

Comparative Constitutional Law News Update

South Africa - Constitutional Court - Constitutionality of 30-day time limit for an application to court - *Brümmer v Minister of Social Development*

This case concerned the constitutionality of s 78(2) of the *Promotion of Access to Information Act*. Under that section, a person who is refused access to government information has 30 days to lodge a challenge to that refusal in court. The Department of Social Development had refused a request for information by Mr Brümmer, a journalist, who then attempted to challenge the refusal in court after the 30-day time limit. The Constitutional Court unanimously confirmed the High Court's finding that this time limit was unconstitutional. Writing for the Court, Ngcobo J impermissibly limits the right to access the courts and to access information. 30 days did not provide 'an adequate and fair opportunity to launch the application', given the steps needed to prepare for such an application. The reasons for refusal had to be considered, legal advice sought, and funds had to be raised (at [53]).

See: [*Brümmer v Minister of Social Development*](#)

Canada - Canadian Human Rights Commission - Constitutionality of provision on hate messages - *Warman v Canadian Human Rights Commission*

In 1990, in a 4:3 decision, the Supreme Court of Canada in *Canada v Taylor* [1990] 3 SCR 892 found that s 13 of the *Canadian Human Rights Act* did not breach the *Charter* on the principal ground that it had a remedial and non-punitive purpose. Section 13 makes it a discriminatory practice to communicate telephonically or cause to be communicated 'any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.' The Commission is empowered under the *Canadian Human Rights Act* to order that such practice cease and that penalties be paid. In *Warman v Canadian Human Rights Commission*, the Canadian Human Rights Tribunal considered s 13 to be an impermissible intrusion into freedom of expression. The legislative amendments empowering the Commission to order penalties had the result that s 13(1) 'has become more penal in nature ... The provision can no longer be considered exclusively remedial, preventative and conciliatory in nature, which was at the core of the Court's finding in *Taylor*' (at [279]). Since the Tribunal does not have the power to declare a law invalid, it simply refused to apply s 13 in this case.

See: [*Warman v Canadian Human Rights Commission*](#)

France – Constitutional Council – Right to access the internet – *Decision No 2009-580 of June 10th 2009*

This case involved a referral for review by the Constitutional Council of the *Act furthering the diffusion and protection of creation on the Internet*. Section 5 purported to establish an independent administrative body, the High Authority for the diffusion of works and protection of copyright on the Internet. Section 11 imposed a duty on the High Authority to monitor access to the internet and to determine whether in any given case an internet subscriber has infringed copyright and the appropriate penalty to be imposed. The penalties included suspension of access to the internet for up to one year. The Constitutional Council found these provisions to be invalid. The Council recognised that article 11 of the *Declaration of the Rights of Man and the Citizen of 1789*, proclaiming the right to freedom of communication, 'implies freedom to access such [internet] services' in 'the current state of the means of communication' (at [12]).

Despite the right to enjoy property, including intellectual property (at [13]), the powers vested in the Authority were too broad:

The powers vested in this administrative authority are not limited to a specific category of persons but extend to the entire population. The powers of this Committee may thus lead to restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home (at [16]).

Moreover, section 11 impermissibly reversed the burden of proof whenever a copyright infringement occurred at the IP address of the registered subscriber, contrary to the presumption of innocence under article 9 of the *Declaration of 1789*.

The Council also found that the monitoring of internet access was not a violation of the right to privacy as the information gathered could only be used for strict purposes (at [31]). Finally, section 10, which empowered the Tribunal de grande instance to make orders preventing or ending copyright infringement, was constitutional. It did not impermissibly infringe freedom of expression because it left it to the court to determine whether such orders were necessary (at [38]).

See: [Decision No 2009-580 of June 10th 2009](#)

Germany – Federal Constitutional Court - Treaty of Lisbon compatible with *Basic Law*

The German Federal Constitutional Court has recently held that the *Act approving the Treaty of Lisbon* is compatible with the German *Basic Law*. A key consideration in the judgment was the relationship between the German constitutional system and the width and depth of power at the level of the European Union. Ultimately, the European Union did not yet have such broad competency as to curtail the German sovereignty, and so the Act was in principle compatible with the *Basic Law*. However, the *Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters* was found to be unconstitutional on the basis that it extended to the German parliament and the German states insufficient rights of participation when implementing European law.

See: [Judgment of 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09](#)

Fiji – Plans for New Constitution

In April 2009, Fijian President Iloilo declared the Fiji *Constitution* void and sacked all of the country's judges following the Court of Appeal's decision in *Qarase v Bainimarama* (For further details, see CCCS Newsletter No 7). In July 2009, Commodore Frank Bainimarama announced plans for a new *Constitution* to be completed by 2013 with elections to take place in 2014. According to the announcement, the new *Constitution* is to abolish the ethnicity-based system of voting previously in place, under which Fiji's population voted for candidates of their own ethnicity. The long delay before elections are to be held, amongst other considerations, has led to the suspension of Fiji from the Pacific Islands Forum and the Commonwealth.

See: [BBC news report](#)

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

Deputy Director

Associate Professor Carolyn Evans

Administrator

Dr Madeline Grey

Advisory Board Members

Ian Cunliffe

Dr Stephen Donaghue

Dr Gavan Griffith AO QC

Peter Hanks QC

Wendy Harris

Justice Chris Maxwell

Debbie Mortimer SC

Mark Moshinsky SC

Stephen McLeish SC

Professor Brian Opeskin

Jason Pizer

Justice Richard R S Tracey

Centre Members

Professor Saunders AO, Foundation Director

Associate Professor Simon Evans

Associate Professor Beth Gaze

Associate Professor Kristen Walker

Associate Professor Jeremy Gans

Associate Professor Pip Nicholson

Associate Professor Alison Duxbury

Professor Michael Crommelin

Dr Joo-Cheong Tham

Dr Michelle Foster

Dr Kirsty Gover

Dr Margaret Young

Dr Fiona Hanlon

Mr Glenn Patmore

Mr John Waugh

Ms Katy Le Roy

You have received this newsletter by email as a member of the Centre for Comparative Constitutional Studies' mailing list. If you do not wish to receive future issues of the newsletter, please email law-cccs@unimelb.edu.au. (You can join or rejoin the mailing list by emailing the same address, law-cccs@unimelb.edu.au.)

Centre for Comparative Constitutional Studies, Melbourne Law School, The University of Melbourne Victoria 3010 Australia

Tel: (61 3) 8344 1011

Fax: (61 3) 8344 1013

E-mail: law-cccs@unimelb.edu.au

Web: <http://cccs.law.unimelb.edu.au>