

## Centre for Comparative Constitutional Studies Newsletter

*Number 5 / December 2008*

Welcome to the fifth 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.

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### Season's Greetings

The CCCS wishes you all the best for 2009. We thank you for your support and involvement during 2008 and we look forward to another busy year in 2009.

### Centre Update



Left to right: Professor Adrienne Stone, Visiting Scholar Dr Harshan Kumarasingham, Associate Professor Jeremy Gans, Professor Cheryl Saunders, Associate Professor Beth Gaze.

A CCCS morning tea was held on Tuesday 21 October. The morning tea was a wonderful opportunity for CCCS members, JD students and international visiting scholars to catch up. Dr Harshan Kumarasingham, a Research Fellow in the School of Government, Victoria University of Wellington, New Zealand, was a visiting scholar attached to the Centre. During his visit he examined how Westminster constitutional Conventions operate at executive level compared to South East Asian and New Zealand.

**Professor Adrienne Stone**, CCCS Director, travelled to London to attend the meeting of the International Association of Constitutional Law (IACL), a worldwide association of constitutional scholars and jurists who examine the unprecedented challenges of a new world order. The IACL in conjunction with the United Kingdom Constitutional Law Group held a Round Table on *The Regulatory State: Constitutional Implications* on 14-15 November. The event explored the impacts on constitutional arrangements of the development over the last thirty years or so of a 'regulatory state' in the UK and other Western countries, and in EU law. Professor Stone participated in the executive committee meeting, the roundtable on regulation and participated in the meeting of the interest group on the use of foreign law in constitutional interpretation.

On 26 November Professor Stone gave her Inaugural Professorial Lecture "*Foreign Law and Constitutional Interpretation: Cautious Comparativism or Judicial Activism?*" In her lecture Professor Stone addressed claims that reference to foreign law amounts to an unethical activism. Professor Stone defended the use of foreign law and considered the following questions:

§ Is it legitimate to refer to foreign law in interpreting the Australian Constitution?

§ Is foreign law relevant to the Australian Constitution?

§ How should judges use foreign law in constitution cases?

The Dean, Professor Hathaway had the following to say: "I was thrilled to attend Professor Adrienne Stone's inaugural Professorial lecture last night, followed by a convivial dinner with colleagues and guests. Congratulations to Adrienne on a lecture of great depth and eloquence, and for representing the Law School so expertly in the area of comparative constitutional law."

Professor Stone attended a colloquium entitled 'The Hart-Fuller Debate 50 Years On' held 17-19 December at the College of Law, the Australian National University, Canberra. The aim of the colloquium was to revisit strands in the original Hart-Fuller debate in the light of social, political and intellectual developments in the past 50 years. For further details of the program, speakers and commentators, and papers click on the following link: [http://law.anu.edu.au/JFCALR/hart\\_fuller.asp](http://law.anu.edu.au/JFCALR/hart_fuller.asp)

**Associate Professor Carolyn Evans**, CCCS Deputy Director, gave a presentation 'Religious Freedom and Equality: Principled Approaches to Religious Exemptions from Discrimination Law' at the Research Unit for the Study of Society, Law and Religion, Roundtable on the Relationship between Law and Religion in Contemporary Society, held at the University of Adelaide on 3 November 2008. A/Prof Evans also joined the Board of Management of the Research Unit.

Associate Professor Evans brought out a co-edited book: Cane, P, Evans, C M & Robinson, Z (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) to which she also wrote the Introduction.

Associate Professor Evans has been asked to prepare a supplemental paper on Freedom of Religion and Belief and the Law for the Australian Human Rights Commission's National Report on Freedom of Religion and Belief in Australia. The report will cover issues such as Australia's international obligations, the constitutional protection of religious freedom, the relationship with discrimination law, religious vilification law and religious law in the Australian legal system. The Report is due for release in 2010.

**Professor Cheryl Saunders**, CCCS Foundation Director, together with Professor Adrienne Stone, attended the meeting of the International Association of Constitutional Law (IACL) in London, 14-15 November. Professor Saunders participated in the executive committee meeting, the roundtable on regulation and participated in the meeting of the interest group on the use of foreign law in constitutional interpretation.

Together with CCCS Member **Dr Michelle Foster**, Professor Saunders wrote a joint report for the meeting of the IACL in Mexico. The 1st Intermediate Congress of the International Academy of Comparative Law concerning "The Impact of Uniform Law on National Law. Limits

and Possibilities" hosted by the Mexican National Committee took place in Mexico from November 13 to 15. Further information regarding the congress in Mexico can be found on the website: <http://www.congresointernacionalderechouniforme.com/>

In late November Professor Saunders gave a paper 'The Direct Election Model' at the Western Australian Constitutional Centre's conference *Planning for a Republic – the Legal Mechanic's Perspective*.

On 1 December Professor Saunders met with a delegation from the Iraqi Council of Representatives organised by AusAID. The purpose of their visit was to examine federal-state government relations.

On 2 December Professor Saunders attended International IDEA's first Advisory Board meeting in Stockholm and on 9-12 December she took part in an Administrative Law Conference held in Hong Kong.

**Associate Professor Simon Evans** attended the Australian Association of Constitutional Law's Annual General Meeting held on 31 October during the Centre for International and Public Law's 13th Public law weekend conference *Public Law: Public Leadership*, held at the National Museum of Australia in Canberra.

Associate Professor Evans also attended the Western Australian Constitutional Centre's conference *Planning for a Republic – the Legal Mechanic's Perspective*.

**Associate Professor Jeremy Gans** had two publications: "Evidence Law Under Victoria's Charter: Rights and Goals – Part 1" in the Public Law Review and "Charter of Frights" at [inside.org.au](http://inside.org.au) which asks the question 'Has fear of upsetting the public caused Victoria's new human rights charter to lose its way?' A/Prof Gans argues that it's a question with national implications.

A/Prof Gans also gave two speeches: "The Fear Factor: Criminal Justice in the Charter's First Year" at the Protecting Human Rights conference at Melbourne Law School on 3 October and "Litigation under Victoria's Charter of Human Rights" at a Deakin Law School conference held in Warrnambool.

## **Forthcoming events**

A schedule of forthcoming events at the Centre for Comparative Constitutional Studies in 2009 will be available shortly. Please check the CCCS [website](#) for further details.

### **Forthcoming National Conference on Australian and Comparative Constitutional Law: Friday 27 November 2009**

The Centre for Comparative Constitutional Studies will mark its 21<sup>st</sup> Birthday with a major Conference in late 2009. Consistently with the Centre's focus on Australian and comparative constitutional law, the Conference will provide a forum for reflection on the central themes of Australian constitutional law, upon the international context in which Australian law is developing and upon broader themes relating to constitutionalism throughout the world. In addition, it will provide an opportunity to acknowledge the contribution of its former directors, Professor Cheryl Saunders and Associate Professor Simon Evans. Chief Justice French will give the keynote address.

## Recent CCCS Events



### **Bicameralism and the British House of Lords.**

**Speaker:** Dr Meg Russell, Reader in British and Comparative Politics, Constitution Unit, Department of Political Science, University College, London, United Kingdom.

**Date:** Tuesday 21 October 2008

The seminar examined the changing role of the British House of Lords since a reform in 1999 which changed its composition by removing most hereditary peers. The chamber remains wholly unelected, and so should be expected to still be weak and lacking in democratic legitimacy. However since the reform it has grown stronger and more assertive. The seminar asked why, and what this tells us more widely about bicameralism.

Dr Meg Russell is a Reader in British and Comparative Politics and has been a Senior Research Fellow at the Constitution Unit, University College London, since August 1998. She is largely responsible for the Unit's research work on parliament and has a particular interest in bicameralism. In 2000 she published *Reforming the House of Lords: Lessons from Overseas* (OUP). She has also written on political party organisation, candidate selection and women's representation in politics. Dr Russell has worked closely with policy makers throughout her career, including spells working in parliament, for the Labour Party and as a government adviser. In 1999 she was a consultant to the Royal Commission on Reform of the House of Lords, and she has given evidence to several parliamentary committees. From 2004-2007 she led a major project investigating the impact of the 1999 reform on the House of Lords.



### **Political responsibility for rights protection in New Zealand.**

**Speaker:** Dr Petra Butler, Associate Director of the New Zealand Centre for Public Law at the Victoria University of Wellington, NZ

**Date:** Tuesday 28 October 2008

Dr Petra Butler and Visiting Professor Graeme Austin.

The seminar explored the Attorney-General's duty to report to Parliament under section 7 of the New Zealand Bill of Rights Act 1990.

Dr Petra Butler is qualified as a lawyer in Germany and New Zealand. She obtained her LLM from Victoria University of Wellington, New Zealand, in 1992 and her PhD from Goettingen, Germany, in 1998. She was a judge's clerk at the South African Constitutional Court in 1995/1996 and has worked as an advisor in the Bill of Rights/Human Rights team at the New Zealand Ministry of Justice. Dr Butler started her academic career as a researcher at the Institute for Private International Law and Comparative Law at the University of Goettingen, Germany, and worked later as a researcher at the Research Centre of Public Administration at the University of Speyer, Germany. Since 2000 she teaches and researches at Victoria University of Wellington, New Zealand. Her main research interest is human rights. She has

co-authored the Law of New Zealand part on the New Zealand Bill of Rights Act 1990 and a commentary on that 1990 Act. Since 2007 she is the Associate Director of the New Zealand Centre for Public Law.



### **Disintegration through Law? - On the Decomposition of Citizenship in Europe.**

**Speaker: Professor Dr Alexander Graser**, Professor of Comparative Public Law and Social Policy, Hertie School of Governance, Berlin

**Date:** Monday 17 November 2008

The law is widely seen as contributing to the integration of political communities and to the legitimation of political power. The concept of citizenship has long been said to play a vital role in this respect. In recent times, however, the legal content of citizenship has undergone significant changes – a “decomposition”, as will be argued, which may in turn undermine the law’s integrative and legitimatory capacity. This development is particularly advanced in “postnational” Europe, and the talk focussed on this region. But the same concerns may also become relevant outside of Europe, as similar trends are discernible in other regions, as well.

**Professor Alexander Graser** teaches Comparative Public Law and Social Policy at the Hertie School of Governance. He completed both German state exams in law and holds degrees from the Oxford University and Harvard Law School. Before he joined the Hertie School, he had for nine years been a research fellow at the Max Planck Institute for Foreign and International Social Law in Munich. During this time he obtained his doctorate and his postdoctoral lecture qualification for the fields of public law, comparative law, legal sociology and theory, both from the Ludwig-Maximilians-Universität, Munich. He was awarded the Max Planck Society’s Otto-Hahn Medal for outstanding achievements by young scholars in 2001 and the Bavarian prize for the advancement of postdoctoral theses (Bayerischer Habilitationsförderpreis) in 2003.



### **The Office of Lord Chancellor, the Judiciary and the Constitutional Reform Act 2005: '... a new and original plan'?**

**Speaker: Professor Peter Leyland**, Professor of Public Law, London Metropolitan University, U K

**Date:** Monday 24 November 2008

The UK government decided in 2003 to change the role of the Lord Chancellor, introduce a Supreme Court in place of the Appellate Committee of the House of Lords, and radically reform the system of judicial appointments. After a short period of consultation these proposals in amended form were enacted as the Constitutional Reform Act 2005. Against the backdrop of a wider debate over the increasing judicialisation of the UK constitution there will be an attempt in this talk to consider the significance of these changes especially in regard to the following questions: What is the significance of creating a Ministry of Justice in place of the Lord Chancellor’s department/Department of Constitutional Affairs? Will the new judicial appointment procedure based on a Judicial Appointments Commission provide a relatively independent bench at all levels and at the same time broaden the membership of the higher

judiciary? How will the new Supreme Court when it begins its work in 2009 differ from the House of Lords? Finally, to what extent have these changes taken as a whole consolidated the principle of separation of powers in the United Kingdom?

**Professor Leyland** is currently Professor of Public Law at London Metropolitan University and visiting Professor of Public Law at the School of Oriental and African Studies, University of London. Peter has published widely in the field of UK constitutional and administrative law, comparative constitutional law and on Thailand's constitutional system. The subject matter of his research has included: devolution particularly in comparative perspective, freedom of information, utility regulation, executive accountability. He has written the first volume on the Constitution of the United Kingdom (2007) in the Hart series 'Constitutional Systems of the World', which he co-edits with Professor Andrew Harding.



**Inaugural Professorial Lecture: Foreign Law and Constitutional Interpretation: Cautious Comparativism or Judicial Activism?**

**Speaker:** **Professor Adrienne Stone**, Director of the Centre for Comparative Constitutional Studies, Melbourne Law School

**Date:** Wednesday 26 November 2008

Judges throughout the world routinely refer to the judgements of courts in other countries for guidance however the practice remains sharply contested. Some judges and scholars go so far as to claim that reference to foreign law amounts to an unethical activism. In her inaugural Professorial lecture, Professor Stone defended the practice against claims of judicial activism and considered the following questions:

- Is it legitimate to refer to foreign law in interpreting the Australian Constitution?
- Is foreign law relevant to the Australian Constitution?
- How should judges use foreign law in constitution cases?

**Professor Adrienne Stone** is the Director of the Centre for Comparative Constitutional Studies at Melbourne Law School and an elected member of the ACL Council. She researches in the areas of constitutional law and constitutional theory. She has published extensively on freedom of expressions, the legal and institutional questions surrounding bills of rights and on judicial method in constitutional cases.



**PhD Confirmation Seminar: Pakistan's Islamic Identity, its Blasphemy Law and the International Law of Human Rights.**

**Speaker:** **Ms Hajrah Saboor**, PhD candidate, Melbourne Law School

**Date:** Wednesday 3 December 2008

Left to right: A/Prof Carolyn Evans, Ms Hajrah Saboor and Dr Amanda Whiting

Pakistan's blasphemy law incorporated in the Pakistan Penal Code 1860 has been extensively criticized for its vague language and faulty procedure that leaves it wide open to misuse and abuse. The offence of blasphemy in Pakistan carries a harsh penalty that includes hefty fines

and up to ten years imprisonment. But the position became worse when in 1990 the Federal Shariat Court of Pakistan declared that penalty for desecrating the name of the Holy Prophet is death, and the law was thus amended accordingly. This notorious law is considered to affect the minorities the most. However, over the years, it appears that it has become a source of concern for Muslims as well. There has been an unfortunate growing trend where the number of blasphemy cases has risen against the Muslim citizens of Pakistan as well as the minority citizens. The period from 1979 to 1989 is a time when 'islamization of laws' was declared to be a prime objective of the state by General Zia ul Haq's regime and laws were promulgated to that effect. Although the process of islamization began as early as the creation of Pakistan, General Zia's government brought some significant amendments to Pakistan's legal system, including the blasphemy law. This has resulted in some grave violations of human rights that continue to date. However, when looking at Pakistan's blasphemy laws, it is important that these laws are not seen and analyzed only in the context of the Zia era, in isolation from other political forces in Pakistan. These laws are not part of an abrupt islamization process. They must be understood in the backdrop of the history of Pakistan and the religious, social and political trends that followed after its creation. Pakistan's blasphemy laws must be analyzed within the broader context of its religious politics and islamization for a better understanding of the political and legal realities that surround the law and for a practical and realistic recommendation for its reformation.

**Hajrah Saboor** is a law graduate from the International Islamic University Islamabad, Pakistan (2004). She completed her LLM in International Law from the same university in July 2007. In February 2006 she joined the faculty of law at the International Islamic University as a visiting lecturer and continued to teach LLB courses till June 2007. She is currently a PhD candidate at Melbourne Law School, working under the supervision of CCCS Deputy Director Associate Professor Carolyn Evans and Dr Amanda Whiting on Pakistan's blasphemy law.



### **Real Constitutional Dialogue: From Canada to Australia.**

**Speaker: Assistant Professor Rosalind Dixon, University of Chicago Law School**

**Date: Tuesday 16 December 2008**

In the seminar Rosalind Dixon will discuss her recent paper on Canada, and the implications of the approach developed in this paper for constitutional design and the bill of rights debate in Australia. The idea of dialogue has become ubiquitous in Canadian constitutional discourse, yet still largely fails to persuade skeptics about the compatibility of judicial review under the Charter with broader constitutional commitments to democracy. The reason for this is the subject of this paper, which argues that existing accounts of dialogue tend to take either radically too "strong" or "too weak" an approach to the scope of judicial review: they assume either much too narrow a scope for reasonable disagreement about court decisions, or take too narrow a view of the proper role for courts in enforcing the Charter, from a Canadian perspective. This paper offers an alternative "real" theory of dialogue, based on a truer compromise between these extremes.

**Rosalind Dixon** is Assistant Professor at the University of Chicago Law School. She earned her B.A. in government and economics, and her first law degree (with highest honors) from the University of New South Wales, Sydney, in 2001. She earned her L.L.M. and S.J.D. from Harvard Law School in 2004 and 2008, respectively. While at Harvard, Rosalind served as a Fellow in the Justice, Welfare, and Economics Program, and a Teaching Fellow in Constitutional Law, Constitutional History, Comparative Constitutional Law, and Comparative Constitutional Engineering. Before her time at Harvard, she clerked for the Chief Justice of Australia, the Hon. A. M. Gleeson A.C., taught at the University of New South Wales, and practiced as a solicitor in the dispute resolution group at Mallesons Stephen Jaques. Her teaching and research interests include constitutional law, comparative constitutional law and design, international human rights, and law and gender.

## 2008 Protecting Human Rights Conference: Friday 3 October 2008

The 2008 *Protecting Human Rights Conference*, co-hosted by the CCCS, was a very successful and well attended event. This one day event discussed developments in the protection of human rights by Australian charters and human rights acts. Over 220 people including many MPs from the states' legislative review committees, all of the Commissioners



The Rt Hon Chief Justice Dame Sian Elias

for Equal Opportunity and Anti-Discrimination Commissioners from around Australia, members of the legal fraternity, academia, government and human rights and indigenous communities attended. They listened to leading Australian and international speakers discuss the role of judges in assessing limitations on rights and the use of international and comparative law, the intersection of anti-discrimination laws with human rights legislation, the

effect of human rights protection on the private sector and the relevance of human rights in criminal trials. The conference provided an important opportunity to examine the Victorian Charter of Human Rights and Responsibilities and the Australian Capital Territory's Human Rights Act and other charters of rights.

### Papers presented at the conference discussed:

- Human Rights Acts in Australia: Current Developments
- The Victorian Charter of Human Rights and Responsibilities
- The ACT Human Rights Act
- The State of Play in other Australian Jurisdictions
- Limiting Rights under Human Rights Acts
- A New Zealand Perspective
- A United Kingdom Perspective (via DVD)
- A Comparative Law Perspective on Human Rights Acts
- Human Rights Acts in Practice
- Equality Rights and the Relationship with Anti-discrimination Legislation
- Human Rights in the Criminal Trial

### Featured speakers included:

- The Right Hon Chief Justice Dame Sian Elias, New Zealand
- Lord Justice Sir Stephen Sedley, Judge of the Court of Appeal of England and Wales (via dvd)
- Professor Johannes Chan SC, Dean of the Faculty of Law, University of Hong Kong
- The Hon Justice Marcia Neave, Court of Appeal, Victoria
- Debbie Mortimer SC, the Victorian Bar
- Joanna Davidson, Special Counsel Human Rights, Victorian Government Solicitor's Office
- Associate Professor Carolyn Evans, Deputy Director CCCS, Associate Dean (Research), the Melbourne Law School



The Hon Justice Marcia Neave



Left to right: Edward Santow, A/Prof Carolyn Evans, Professor Hilary Charlesworth, the Hon Robert McClelland MP



Joanna Davidson, VGSO and Professor Johannes Chan SC

- Associate Professor Jeremy Gans, the Melbourne Law School, Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee
- Professor Hilary Charlesworth, RegNet and Director of the Centre for International Governance and Justice (CIGJ), ANU
- Edward Santow, Senior Lecturer, Faculty of Law and Project Director, Australian Human Rights Centre, Gilbert + Tobin Centre of Public Law, UNSW



Left to right: A/Prof Jeremy Gans, Debbie Mortimer SC, John Tobin

Most of the papers presented at the Conference are available from the Centre's [website](#).

## Centre Visitors

### Ms Kylie Evans

*Human Rights Specialist*

11/08/2008 – 22/12/2008

During her visit Kylie will be researching some aspects of the Charter of Human Rights and Responsibilities including the obligations it imposes on public authorities in the Human Services context.

### Professor Graeme Austin

*J Byron McCormick Professor of Law, University of Arizona, USA.*

08/09/2008 – 28/02/2009

Professor Austin's principal project is a book-length study, *Human Rights and Intellectual Property: Analysis and Sources* (co-authored with Prof. Larry Helfer (Vanderbilt); under contract with Cambridge University Press). The study examines the integration of international human rights norms into the international law of intellectual property - both at the systemic/institutional level, and also through a number of case studies, including: freedom of expression, education rights, the right to an adequate standard of health, and the right to participate in cultural life.

### Dr Harshan Kumarasingham

*Research Fellow, School of Government, Victoria University of Wellington*

12/10/2008 - 9/11/2008

Dr Kumarasingham will examine how Westminster constitutional Conventions operate at executive level compared to South East Asian and New Zealand.

### Professor Peter Leyland

*Professor of Public Law, London Metropolitan University, U.K.*

12/11/2008 – 27/11/2008

Professor Leyland will be conducting research for a number of comparative constitutional law projects including a book entitled 'Thailand's Constitutions: A Contextual Analysis.' and another book on the 'Great Reform Act of 1832.'

### Professor Alex Graser

*Professor of Comparative Public Law and Social Policy, Hertie School of Governance, Berlin, Germany*

17/11/ 2008

Professor Graser will pursue two projects during his visit. One is called "Regimes of Equality" and should evolve into a comparative study of different kinds of equality-oriented policies. The other deals with the decomposition of citizenship in Europe and its potential effects on social integration and legitimation.

**Professor Brice Dickson**

*Professor of International and Comparative Law and Director of the Human Rights Centre  
Queen's University Belfast*

24/11/2008 - 19/12/2008

Professor Dickson will be comparing the factors that need to be taken into account when assessing what kind of Bill of Rights, if any, would be appropriate in the United Kingdom and Australia.

**Professor Janet Hiebert**

*Department of Political Studies, Queen's University, Canada*

15/12/2008 – 16/2/2009

Professor Hiebert will be conducting research on Bills of Rights and developments in Australia.

**Assistant Professor Rosalind Dixon**

*Assistant Professor, University of Chicago Law School*

16/12/2008

Professor Dixon will discuss her recent paper on Canada, and the implications of the approach developed in this paper for constitutional design and the bill of rights debate in Australia.

## Comparative Constitutional Law News Update

### **Australia – *Cesan v The Queen* – sleeping judge – miscarriage of justice**

The appellants had been convicted of conspiracy to import ecstasy into Australia. They appealed to the New South Wales Court of Appeal on the basis that the trial judge had been asleep for significant parts of the trial. A majority of the Court of Appeal (2:1) dismissed the appeal. The High Court unanimously overturned the Court of Appeal, ordering a retrial on the basis that the trial constituted a substantial miscarriage of justice within the meaning of s 6(1) of the Criminal Appeal Act 1912 (NSW). The High Court did not consider the 'trial by jury' requirement of s 80 of the *Constitution*.

French CJ held that the significant periods of sleep or inattention by a trial judge itself constituted a miscarriage of justice. [93]. The other members of the Court instead found that there was a miscarriage of justice because by being asleep, the judge had distracted the jury ([105] Gummow J, [118]-[121] Hayne, Crennan and Kiefel JJ).

See: [Cesan v The Queen](#)

### **Canada – constitutional 'crisis' – Governor-General prorogues parliament**

There has been significant media coverage in Canada on a recent constitutional 'crisis'. In the recent October election, Conservative government led by Prime Minister Stephen Harper was returned to office. As in its previous term, it formed a minority government. On 8 December, Harper was due to face a no confidence motion in Parliament that many thought would succeed. However, the vote never occurred because the Governor-General Michaëlle Jean, on Harper's advice, prorogued Parliament until late January 2009. The Governor-General's actions are unprecedented in Commonwealth countries, and raises the issue (amongst others) whether the Governor-General should have either acceded to the Prime Minister's request, as per convention, or declined to do so perhaps on the basis that the Prime Minister was facing a vote of no confidence.

See: [Globe and Mail article](#)

### **Fiji – Qarase case – presidential actions during military coup – prerogative power**

During the military coup of 2006, the President dismissed the then Prime Minister, Laisenia Qarase, dissolved Parliament and appointed a new Prime Minister and Ministers. Qarase subsequently brought an action to determine the legality of the President's actions. The High Court of Fiji upheld those actions as a valid exercise of prerogative powers. The Court first found that a relevant prerogative power existed: 'on grounds of extremity, gravity, and ensuing expediency, extraordinary powers are allowed to a Head of State to find a way out of crisis' ([147]), at least as long as the actions taken are not done in bad faith or arbitrarily. Second, that prerogative had not been abrogated by the *Constitution* ([136]). Finally, on the facts of the case, 'exceptional circumstances' did exist, and the President's actions were 'reasonably necessary in the interests of peace, order and good government' ([162]). The case makes further comments on the royal prerogative that merit further consideration.

See: [Qarase v Bainimarama](#)

### **South Africa – Constitutional Court – Geldenhuys – age of consent for same-sex sexual relations**

The Constitutional Court of South Africa has confirmed a decision of the Supreme Court of Appeal that declared unconstitutional ss 14(1)(b) and 14(3)(b) of the *Sexual Offences Act 23 of 1957*. These provisions established the age of heterosexual sexual relations to be 16 years of age, and 19 years of age for same-sex sexual relations. Those provisions have been repealed by subsequent legislation, but the constitutionality of the provisions remained relevant because some persons, including the applicant Geldenhuys, had been convicted for indecency under those provisions. Mokgoro J, writing for a unanimous Constitutional Court, confirmed that these provisions were contrary to s 9 of the *Constitution*, and that the appropriate remedy was to lower the age of consent for same-sex sexual relations to 16 years of age.

See: [Geldenhuys v The National Director of Public Prosecutions and Others](#)

### **Thailand – Electoral Fraud – Dissolution of ruling party – banning of Prime Minister**

In early December, the Constitutional Court of Thailand unanimously dissolved the ruling People Power Party and two other electoral parties for electoral fraud. The leaders of the parties, including Prime Minister Somchai Wongsawat, were also banned from politics for five years.

See: [BBC article](#). The decision will be available from the [Constitutional Court's website](#).

### **United Kingdom – Bancoult – judicial review - prerogative**

A majority of the House of Lords overturned a decision of the Court of Appeal by finding that s 9 of the *British Indian Ocean Territory (Constitution) Order 2004* was valid. That section provided that no person has the right of abode in that Territory, the effect of which was to exclude the Chagossian people from living on those islands as they previously did. A majority (3:2) of the House of Lords held that no common law right of abode had been infringed (eg [45]) by the Order, and that the Order were rational and not contrary to a legitimate expectation (eg [61]-[63]). The House of Lords was unanimous, at least, on the point that legislative orders made under the prerogative are not for that reason alone non-reviewable by the judiciary.

See: [R \(on the application of Bancoult\) \(Respondent\) v Secretary of State for Foreign and Commonwealth Affairs](#)

### **United States – al-Marri v Pucciarelli – review of indefinite detention**

On 5 December 2008, the US Supreme Court agreed to hear a case brought by Ali al-Marri, a Qatar native who was seized and held in the United States as an alleged al-Qaeda agent. The issue before the Court is the legality of 'the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government

assertions that the detainee conspired with al Qaeda to engage in terrorist activities' pursuant to the *Authorization for Use of Military Force*, 115 Stat 224.

See: [US Supreme Court docket 08-368](#).

### **United States – *Pleasant Grove City v Summum* - religious monument in public park**

On 12 November 2008, the United States Supreme Court heard argument in *Pleasant Grove City v Summum*. In this case, the Summum religious group donated a monument depicting its 'Seven Aphorisms of Summum' to the Pleasant Grove City, to be placed in Pioneer Park. In that Park, there is a monument of the Ten Commandments, similarly donated by a private group in 1971. A three member appeals panel of the Tenth Circuit ordered that Pleasant Grove City could not reject the Summum donation after having accepted the Ten Commandments one, and a full appeals panel split 6-6. The case raises issues of freedom of religion and freedom of speech. Judgment has yet to be handed down by the Supreme Court.

See: [oral argument in \*Pleasant Grove City v Summum\*](#); legal documents and news reports from the [American Center for Law & Justice](#)

## **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

Pamela Tate SC, Solicitor-General for Victoria, resigned from the CCCS Advisory Board on 16 October 2008. We are very grateful to Ms Tate for her service to the Centre.

Professor Adrienne Stone

Director

## Centre Members

Professor Saunders AO, Founding Director

Associate Professor Simon Evans

Associate Professor Beth Gaze

Associate Professor Kristen Walker

Associate Professor Jeremy Gans

Professor Michael Crommelin

Dr Joo-Cheong Tham

Dr Michelle Foster

Dr Pip Nicholson

Dr Fiona Hanlon

Mr Glenn Patmore

Ms Katy Le Roy

Mr John Waugh

Ms Alison Duxbury

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