

Centre for Comparative Constitutional Studies Newsletter

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Welcome to the fourth 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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Centre Update

A New Centre Director

On 1 July we welcomed **Professor Adrienne Stone** as the new CCCS Director. Professor Stone researches in the areas of constitutional law and constitutional theory. She has published extensively on freedom of expression, the legal and institutional questions surrounding bills of rights and on judicial method in constitutional cases. She has held a Chair at Melbourne Law School since 2007. Her past positions include a Fellowship at the Research School of Social Sciences at the Australian National University, Associate-in-Law at Columbia Law School, a solicitor at Malleson Stephen Jaques in Sydney and Associate to the Hon. Justice M.H. McHugh of the High Court of Australia.

Professor Stone is a member of the Executive Committee of the International Association of Constitutional Law, the Council of the Australian Association of Constitutional Law and is a Vice President of the Australian Society of Legal Philosophy.



Left to right: Professor Saunders, Visiting Professor Aniceto Masferrer, Professor Adrienne Stone, Visiting Professor Christina Murray, Dr Michelle Foster.

A CCCS morning tea was held on Friday 1 August to welcome Professor Stone as the new CCCS Director. It was also an opportunity to extend our thanks to Professor Saunders, the CCCS Foundation Director, for her work as Director over the years, particularly the past year. The morning tea was a wonderful opportunity for CCCS members, JD students and international visiting scholars to catch up.

Professor Adrienne Stone, CCCS Director, was invited by the University of Auckland Faculty of Law to deliver the second of the Auckland Law School's "Heritage Lectures" marking 125 years of law teaching at Auckland: "Interpreting Rights in a Globalised World: Some Cautious Words of Praise for Comparativism." In the lecture, Professor Stone explored the issue of how far courts should be guided by foreign law when deciding constitutional rights cases. Judges throughout the world routinely refer to court judgments in other countries for guidance. Yet in constitutional law - especially where constitutional rights are at stake - the practice remains sharply contested. Justice Heydon of the High Court of Australia has been uncompromising in opposing comparativism. Professor Stone defended the practice and explored how and why judges should interpret rights by reference to foreign law in constitutional cases. At the same time she argued that judicial decisions on constitutional questions are problematic and the use of foreign law requires a deeper and wider study of the comparator jurisdiction than is commonly appreciated.

Associate Professor Carolyn Evans, CCCS Deputy Director, has been invited to join the steering committee of the Strasbourg Consortium on Freedom of Religion or Belief. The Consortium is a body established to further scholarship on religious freedom in international courts and tribunals. The invitation recognises Associate Professor Carolyn Evans' expertise in human rights and religious freedom.

In addition to her role as Deputy Director of the CCCS, Associate Professor Evans is the Law School's Associate Dean (Research). She has recently returned from Geneva, Switzerland where she attended a conference on Freedom of Religion and Belief and Protecting Vulnerable Identities: A Global Snapshot, speaking on 'Women's Consent to Discriminatory or Harmful Religious Practices'; and participated in a seminar on Religious Freedom in the European Court of Human Rights, debating the appropriate role of discrimination law in regulating religious organisations with Professor Cole Durham of Brigham Young University.

While in Geneva, Associate Professor Evans also participated in the development of guidelines for the Consortium. For more information click on the following link:
www.strasbourgconference.org.

In March **Professor Saunders**, CCCS Foundation Director, was invited by Liberty Victoria, in her capacity as a leading academic expert in Constitutional law, to participate in a recorded interview concerning the operation of the Australian constitution for a web-based video program entitled *The Gist of It*. The series of short videos is designed to promote awareness of social, political, environmental and justice issues.

Professor Saunders was invited by the Editor of the Thematic Edition 31(2) of the UNSW Law Journal to compose the Foreword to this year's Edition on the topic of Federal-State Relations including pieces dealing with the economics of federalism along with commercial and Indigenous perspectives on past and current developments in Australian federalism.

Professor Saunders was invited to take part in the 'Young Scholars' Summit' held at the University of Melbourne on Friday 4 July 2008 as part of the Kwong Lee Dow Young Scholars Program. Professor Saunders was the convenor of the Governance and Australia's Future in the World discussion stream.

In July Professor Saunders attended a major International Conference "The Future of Federalism" held in Brisbane. For more information on the conference see: <http://www.fedcon2008.net/> Professor Saunders spoke as part of the panel on Comparative Federalism - Global Trends. For more information on her paper "Co-operative arrangements in comparative perspective" click on the following link:
[http://www.fedcon2008.net/Professor Saunders%20Saunders.pdf](http://www.fedcon2008.net/Professor%20Saunders%20Saunders.pdf)

In late August, Professor Saunders travelled to Switzerland to teach in the eighteenth session of the University of Fribourg's Summer University, with the theme of "Federalism, Constitutionalism and Democratic Governance in Multicultural Societies" hosted by the Institute of Federalism. For more information see the following link:

<http://www.federalism.ch/index.php?page=717&lang=0>

In September, Professor Saunders travelled to Vanuatu to give the keynote address at the Australasian Law Reform Agencies Conference (ALRAC) hosted by the University of the South Pacific, School of Law USP, Port Vila from 10-12 September 2008. She then went to Barcelona to chair a meeting of IACFS and spoke at the IACFS conference. She also attended a meeting of the Advisory Committee to the Global Dialogue program, of which she is the co-chair. Discussion centred on volume 8 of the Global Dialogue series on Intergovernmental Relations, for which she is a joint international editor together with Johanne Poirier, of Belgium. This was followed by a weeklong workshop at the Rockefeller Conference Centre in Bellagio, Italy, on the extent to which national Constitutions reflect global values. This also relates to a book she is editing with Dennis Davis and Alan Richter. Professor Saunders then returned to Melbourne via Taiwan, where she gave a plenary speech on Asian constitutionalism in global perspective; gave a lunch talk to Justices of the Constitutional Court and took a seminar at the Law School.

Associate Professor Simon Evans published a paper in the July edition of the Sydney Law Review "Appointing Australian Judges: A New Model" which he co-authored with Professor John Williams. The article is available here: http://www.law.usyd.edu.au/slr/slr30_2/Evans.pdf.

Forthcoming events

A schedule of forthcoming events at the Centre for Comparative Constitutional Studies in 2008. Please check the CCCS [website](#) for further details.



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

Time: 1.00 pm – 2.00 pm

Venue: Melbourne Law School

The seminar will examine 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 asks 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
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

The seminar will explore 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, Germany
Date: Monday 17 November 2008
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

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 will focus 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 implementation of the Constitutional Reform Act in the UK.

Speaker: Professor Peter Leyland, Professor of Public Law, London Metropolitan University, United Kingdom
Date: Monday 24 November 2008
Time: 1.00 pm – 2.00 pm
Venue: Melbourne Law School

Professor Leyland will speak about the constitutional reform act and separation of powers including the change in the role of LC. Professor Leyland will address the particular issue of the revised approach to judicial appointments such as the Supreme Court replacing the House of Lords as appellate court.

Professor Leyland's research interests are mainly in UK Constitutional and Administrative Law and Comparative Constitutional and Administrative law with particular focus on France, Italy, Thailand and SE Asia. Subjects covered include devolution, local government, constitutional protection of human rights, regulation, law and governance. Peter is co-editor of the series: Constitutional Systems of the World (Hart Publishing). His recent publications include: The UK Constitution: A Critical Analysis (2007); 'Comparative Legal Studies in Constitutional Contexts' in Nelken and Orucu (eds) Comparative Law Handbook (2007); Textbook on Administrative Law (2005) with Gordon Anthony; 'The Ombudsman Principle in Thailand' (2007); 'The Railtrack Case: Mainly on the Wrong Track?' (2005); 'Civil Liberties and Human Rights: The Parliamentary Legacy Re-examined' (2005); 'Public Law in a Multi-Layered Constitution' (2003) with Nicholas Bamforth. His teaching positions abroad include: Bologna, Ferrara, Padua, Siena, Bangkok. At London Met he teaches modules in Administrative Law, Constitutional Law, LLM Research Methods, Penal Policy and Criminal Law.

2008 Protecting Human Rights Conference: Friday 3 October 2008

The Centre for Comparative Constitutional Studies will be hosting a National Conference on Australian Bills of Rights on Friday 3 October 2008 at the Melbourne Law School, 8.30 am to 5.00 pm.

The conference is being organised in conjunction with the Gilbert+Tobin Centre of Public Law (UNSW) and the Australian National University.

This one day event will discuss developments in the protection of human rights by Australian charters and human rights acts. The conference provides 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. Leading Australian and international speakers will address 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 day is aimed at both a legal and non-legal audience.

Key speakers include:

- 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

- Sally Sheppard, Partner, Clayton Utz
- 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
- 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

A registration form and program is available on the CCCS website: <http://cccs.law.unimelb.edu.au>.

Recent CCCS Events



Giving Teeth to International Human Rights Treaties: Commissions, Courts and Corporations - A Practitioner's Perspective.

Speaker: Professor Brian Burdekin, Visiting Professor at the Raoul Wallenberg Institute, Sweden

Date: Thursday 17 July, 2008

Time: 6.00 pm – 7.00 pm

In the last two decades the international order has changed dramatically - and institutions designed to protect human rights have evolved. New institutions, in particular National Human Rights Commissions, have (with Australia's assistance) been created in over 50 countries, in part to address the significant inadequacies of judicial systems in redressing violations by the Executive or forces it controls. Governments have increasingly "privatised" or "out-sourced" many essential services - but, in breach of international law, have frequently failed to ensure the private sector is appropriately regulated.

In this seminar Professor Burdekin considered recent international developments in protecting human rights with reference, in particular, to developments in Australia, Africa, Europe, China, India, Indonesia, Korea and other Asian countries where he has recently been advising Governments, Commissions and civil society.

Professor Brian Burdekin AO is a leading international expert on National Human Rights Institutions. He is currently Visiting Professor at the Raoul Wallenberg Institute in Sweden, teaches in the post-graduate programme at Melbourne Law School, and is International Adviser to a number of National Human Rights Institutions in Africa, Asia and Central and Eastern Europe.

From 1995 to 2003, as Special Adviser on National Institutions to the first three United Nations High Commissioners for Human Rights, he conducted over 200 missions to 55 countries in Africa, Asia, Europe and Latin America where governments or civil society had expressed interest in creating an independent Human Rights Commission or similar institution.

Previous positions include Federal Human Rights Commissioner of Australia (1986 to 1994) and adviser to a former Australian Prime Minister, Deputy Prime Minister and Federal Attorney General (1978 to 1986). Prior to this he was a diplomat and lawyer.



Thinking about "constitutional dictatorship".

Speaker: Professor Sanford Levinson, Professor of Government, The University of Texas at Austin, USA.

Date: Monday, 4 August 2008

Time: 5.30 pm – 6.30 pm

"Constitutional dictatorship" no doubt strikes most people as an oxymoron (at least if we are talking about liberal constitutions), inasmuch as the very definition of constitutionalism for most analysts is the creation of institutions designed to protect against tyranny or even arbitrary government. Yet there is a tradition of political (and constitutional) theory going back at least to ancient Rome that addresses the potential desirability of dictatorship, especially in times of emergency, and attempts in effect to "constitutionalize" it by embedding it within a variety of procedural constraints, including, very importantly, a time limit.

The most ominous defender of sovereign prerogative, of course, is the German (and Nazi) theorist Carl Schmitt, which for some people is enough to discredit the entire idea. Yet there are also less-theoretical examples of possible "dictatorship" within the American legal tradition, the most notable examples involving Abraham Lincoln during the American Civil War, though one can certainly point as well to more contemporary presidents from FDR to the current President, George W. Bush.

The American political scientist Clinton Rossiter argues that any complete theory of constitutional government must include a place for "constitutional dictatorship." From the perspective of constitutional designers, this obviously raises the question of 'suspension clauses' during times of ostensible emergencies. For established systems without suspension clauses, this involves questions of "constitutional interpretation," such as the fact that Article II, fails to include the magic words "herein granted" when specifying that the President holds "executive power," in contrast to Article I setting out "legislative power." In any event, "constitutional dictatorship" presents an important way of understanding the enterprise of constitutional government.

Professor Sanford Levinson, who holds the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, joined the University of Texas Law School in 1980. Previously a member of the Department of Politics at Princeton University, he is also a Professor in the Department of Government at the University of Texas. The author of over 250 articles and book reviews in professional and popular journals, Levinson is also the author of four books: *Constitutional Faith* (1988, winner of the Scribes Award); *Written in Stone: Public Monuments in Changing Societies* (1998); *Wrestling With Diversity* (2003); and, most recently, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (2006).



The party and the judges: Threats to the independence of the judiciary in South Africa.

Speaker: Professor Christina Murray, University of Cape Town, South Africa

Date: Wednesday 13 August 2008

Time: 1.00 pm – 2.00 pm

In 1993, when South Africa's transition to democracy was negotiated, there was agreement that the independence of the judiciary should be strongly protected in a future constitution. The contentious points were the appointment of judges, the jurisdiction of the top court and the structure of the courts. Once these matters were

settled it was assumed that, although legislation was needed to tidy up some details, the position of the judiciary and the independence of courts were secure. Since then, however, South African courts and particularly the Constitutional Court have been embroiled in controversy. The two central issues are (i) the promulgation of a draft constitutional amendment which seeks to regulate the relationship between the executive and the judiciary and which appears to give the executive undue control over the courts and (ii) the apparent failure of procedures for dealing with judicial misconduct (leading, inter alia to a Cape High Court judge instituting legal action against the Constitutional Court). A recent split in the governing African National Congress and criminal proceedings against the Jacob Zuma, the national "president-in-waiting" have complicated matters.

Christina Murray is Professor of Human Rights and Constitutional Law at the University of Cape Town. Between 1994 and 1996 she served on a panel of seven experts advising the South African Constitutional Assembly. Since then her work has focused on constitution making, constitutional design and the implementation of constitutions.



Codification system in the Anglo-American Legal Tradition: The case of New York.

Speaker: Professor Aniceto Masferrer, Professor of Comparative Legal History, University of Valencia, Spain

Date: Wednesday 27 August 2008

Time: 1.00 pm – 2.00 pm

Codification has been a perennial issue in the American legal tradition. However, the codification movement does not belong to the past centuries, particularly to the nineteenth and twentieth centuries. It is still a current issue which continues to concern both American law and American legal historiography. It is difficult, if not impossible, to find another topic in American legal history with so many and such different implications and consequences for the development of American law and jurisprudence.

The codification controversy arose in the nineteenth century at two different moments: the antebellum period (1820s and 1830s) and the postbellum period (1870s and 1880s). While the former constituted the first sustained challenge to the democratic legitimacy of the common law, in the latter the American legal profession engaged in a heated debate about the wisdom of replacing the substantive common law with a written civil code. Legal historiography has paid more attention to the postbellum codification debate rather than to the antebellum one, especially in the last two decades.

The seminar explored this controversy and how it arose. Some of the key issues that were discussed included who were the main protagonists, what their main views were and how they argued to defend their legal theories.

Aniceto Masferrer is currently Professor of Comparative Legal History, University of Valencia, Spain, and was a Visiting Scholar at Melbourne Law School. He is the author of four books and more than thirty articles published in Spanish, European and American law journals. Professor Masferrer's research focuses on legal reform in the Anglo-American legal tradition, and particularly on the Codification movement in Australia. This subject constitutes part of a wider research project which led him to work at the Universities of Cambridge (2005) and Harvard (2006), where he dealt with the Codification issue in the United Kingdom and the United States. At Harvard Law School he worked on the codification of American law.



The Evolution of a Revolution: The Singapore Constitution after 40 Years.

Speaker: Professor Li-ann Thio, Faculty of Law, National University of Singapore

Date: Wednesday 24 September 2008

Time: 1.00 pm – 2.00 pm

After seceding from the Federation of Malaysia in 1965, Singapore had the perfect opportunity to craft a popularly-endorsed constitution. Instead, bowing to the exigencies of nation-building, it pragmatically retained the 1958 State Constitution, augmenting it with Malaysian constitutional provisions. Distinct alterations representing a 'rupture' from the Malaysian model were made in relation to the constitutional management of race and state-religion relations. The general decision to retain the existing government structure, which favoured stability, belied the revolutionary changes to Singapore's Constitution over the next 40 years, transforming its erstwhile Westminster-style constitution into something quite unique. This included the creation of an elected presidency with limited executive powers, non-elective parliamentarians and a multi-member electoral constituency designed to guarantee legislative representation for racial minorities. None of the constitutional amendments have enlarged the scope of fundamental liberties and indeed, in an age of transnational judicial conversation, Singapore courts have exhibited a distinctive rejection of rights-oriented discourse in valorising public order arguments. Amendments have also substantially truncated judicial review in relation to national security, realigning institutional checks and balances in favour of the political branches of government.

In Hebrew tradition, 40 years marks the passing of a generation. It also marks the attainment of maturity and coming of age. With respect to Singapore, the passage of her first 40 years marks an evolution from a self-professed 'third world' state to a 'first world nation'. This seminar evaluated salient developments in the making, re-making and interpretation of Singapore constitutional law and practice, to shed light on the evolution/revolution of the Constitution, in the continuing project of developing an autochthonous basic law.

Professor Li-ann Thio teaches and researches public international law, international human rights law, constitutional and administrative law at the Faculty of Law, National University of Singapore. She holds a BA (Hons) from the University of Oxford, a LL.M from Harvard Law School and a Ph.D. from the University of Cambridge. She is a barrister (Gray's Inn UK) and is currently a Nominated Member of the Singapore Parliament (Eleventh Session). Formerly Chief Editor of the *Singapore Journal of International & Comparative Law*, she is currently General Editor, *Asian Yearbook of International Law*, Editor, *Journal of East Asia and International Law* and the *Australian Journal of Asian Law*, and sits on the Advisory Board of the *New Zealand Yearbook of International Law and International Human Rights and Legal Discourse*

Her publications include the leading casebook *Constitutional Law in Malaysia & Singapore* (Butterworths, 1997, with Kevin YL Tan) and *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Brill, 2005). She has published numerous law review articles in her fields of research.

Centre Visitors

Professor Aniceto Masferrer

Professor of Comparative Legal History, Law School, University of Valencia
15/07/2008 - 15/09/2008

Professor Masferrer used his visit to focus on legal reform in the Anglo-American legal tradition, and particularly on the Codification movement in the Australian legal tradition. This subject

constitutes part of a wider research project which led him to work at the Universities of Cambridge (2005) and Harvard (2006), where he dealt with the Codification issue in the United Kingdom and the United States.

Professor Christina Murray

Professor of Constitutional and Human Rights Law & Head of the Department of Public Law, University of Cape Town, South Africa

17/07/2008 – 15/08/2008

The focus of Professor Murray's research was on fundamental constitutional change and the processes by which it is achieved, with particular emphasis on constitution-making in divided societies, or those that have recently undergone protracted conflict.

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

November 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 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.

Comparative Constitutional Law News Update

Australia – *R v Tang* – sexual slavery – use of comparative law

A majority of the High Court (6:1, Kirby J dissenting) recently upheld the respondent's conviction for sexual slavery in *R v Tang* [2008] HCA 39. The principal issue on appeal related to the definition of the slavery offences. However, the respondent also cross-appealed against the constitutional validity of the *Criminal Code's* slavery offences (found in Div 270). The whole Court rejected this constitutional challenge, holding that Div 270 was supported by the external affairs power, despite differences between the *Code* and the *Convention* to which it gave effect. The definition of 'slavery' in s 270.1 differed in two ways from the *International Convention to Suppress the Slave Trade and Slavery*. First, the *Criminal Code* referred to the 'condition' of slavery only and not to the 'status or condition' of slavery. The Court explained this difference by the absence of any status of slavery in Australia (at [33]). Secondly, s 270.1 ended with the extra words: 'including where such a condition results from a debt or contract made by a person'. The Court found that this 'common drafting technique' did not *extend* the definition of 'slavery', rather, it made clear that the condition arising from a debt or contract did not for that reason alone fall outside the definition (at [33]). As a result, Div 270 was 'reasonably capable of being considered appropriate and adapted' to give effect to the *Convention* (at [34]).

Germany – Citizenship test introduced

Since 1 October 2007, Australia has required that those wishing to become an Australian citizen pass a citizenship test. On 1 September 2008, Germany introduced a multiple-choice citizenship test for those seeking a German passport. The German test consists of multiple choice questions (as does the Australian test) based on politics, history and culture, as well as questions relating to the specific region in which the person lives.

See: [Australian citizenship test](#); [News article on German citizenship test](#)

Malaysia – Report on the 1988 Judicial Crisis – Removal of judiciary members by national executive

In 1988, the Lord President and two other judges were removed from the Malaysian Supreme Court for 'judicial misbehaviour'. The political interference by the Malaysian executive in so doing escaped independent review at the time. The Malaysian Bar Council, on the 20th anniversary of the crisis, has established a Panel to review the actions undertaken at the time. That Panel has now released its first report.

See: [Report of the Panel of Eminent Persons to Review of 1988 Judicial Crisis](#).

South Africa – Judicial independence – Recent criticisms of the judiciary

Judicial independence in South Africa has received significant news coverage in recent times as a result of actions taken by the Constitutional Court against Judge President of the Cape High Court, John Hlophe.

The relevant factual background is as follows. In March 2008, the Constitutional Court heard a series of matters relating involving Jacob Zuma, president of the African National Congress (ANC). While judgments were pending, Hlophe visited the Judges Chambers of the Constitutional Court on two occasions, in particular visiting Jafta AJ and Nkabinde J. In May 2008, the Constitutional Court lodged a complaint against Hlophe with the Judicial Services

Commission (JSC), alleging that he had attempted to influence the Court's pending judgments in relation to Zuma. The Constitutional Court also released a press statement identical in substance to the complaint lodged.

In June 2008, Hlophe lodged a complaint with the JSC against the members of the Constitutional Court for their conduct in releasing a public statement and for, at the time, failing to provide particulars of their complaint. Both to the JSC and before the Full Court of the High Court, Hlophe claimed that the Constitutional Court's conduct was unlawful for infringing certain of his constitutional rights.

Before the Full Court, Hlophe succeeded on the grounds that his rights to be heard in relation to the complaint, dignity and equality had been unreasonably and unjustifiably infringed by the Constitutional Court's conduct in making a public statement and complaint to the JSC on the basis of ex parte representations by the two Constitutional Court Judges. His other claims, for example a claimed infringement of his right to privacy, were dismissed.

The members of the Constitutional Court can appeal from the decision, although an appeal has yet to be lodged (with the Constitutional Court) at the time of writing.

See: [High Court of South Africa judgment](#)

United Kingdom – *R (on the application of Wheeler) v Office of the Prime Minister, Secretary of State for Foreign and Commonwealth Affairs and Speaker of the House of Commons* – whether government had to hold a referendum on whether to ratify the *Treaty of Lisbon*

At the end of June, the British High Court found that it could not order the UK government to hold a referendum on whether to ratify the *Treaty of Lisbon* (a treaty concerning the constitutional arrangements of the European Union). In 2004, Tony Blair had promised a referendum on whether to ratify the Treaty establishing a Constitution for Europe (the *Constitution Treaty*). The claimant argued that the *Treaty of Lisbon* was essentially equivalent to the 2004 *Constitution Treaty* and that as a result, he had a legitimate expectation that a referendum would be held on whether to ratify the *Treaty of Lisbon*. By not holding a referendum, the government committed an error of law (at [18]) on administrative law principles.

The High Court ultimately dismissed the claim on the basis that the two treaties were different (at [32]). Of interest, the Court, in dicta, indicated that had the treaties been equivalent, there was nonetheless no enforceable legitimate expectation. According to the Court, '[t]he subject-matter, nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter.' (at [41])

See: [R \(on the application of Wheeler\) v Office of the Prime Minister, Secretary of State for Foreign and Commonwealth Affairs and Speaker of the House of Commons](#)

Thailand – President removed from office for accepting money to appear on cooking show

The Constitutional Court of Thailand has recently found that the Thai Prime Minister violated the Constitution by receiving payments for appearing on a cooking television program. The Thailand Constitution prohibits private employment while in the position of Prime Minister (s 267).

See: [New York Times news article](#)

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

Centre Members

Professor Saunders AO, Founding Director

Associate Professor Simon Evans

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