2010 POSTGRADUATE CONFERENCE

ABSTRACTS OF PRESENTATIONS

Monday 12 July
Venue: Lecture Theatre G02, Ground Floor Law Faculty Building

9.30 – 10.30 am    Keynote Address: “Proportionality in Perspective”

Dr Thomas Poole, London School of Economics

The paper focuses on proportionality, the principle that now lies at the core of cases involving human and constitutional rights in much of the common law world. It questions the received genealogy of proportionality, which locates the origins of that principle in continental, particularly German, administrative law. The paper goes back to Plato and Cicero, defining writers on law and politics in the classical world, in order to uncover that richer ancestry. Analysis of these writers reveals a richer and more complicated role for proportionality in visions of public law, and how deeply that idea is embedded in classical conceptions of justice. Returning to the present, I argue that the proportionality principle applied by courts and discussed by commentators, while certainly attenuated when set against its classical forebears, shares some of the same features. In particular, modern conceptions of proportionality involve, whether explicitly nor not, the phenomena of 'rounding off' and 'reaching out', a point that I demonstrate by referring to two different attempts to make sense of proportionality in common law judging. One, like Plato, turns inward to the (perceived) structure and values of the state. The other, following Cicero, turns outward in a search for more global standards of justice.
What Constitutional Restraints Fetter the Power of the Executive Government to Detain People Indefinitely?

Susan Clement

Rhetoric is not merely a ‘device’ or ‘method’, but a process—of inquiry, of understanding—indeed of human intellectual evolution. Invention, the first canon of classical rhetoric, is never static, but perpetually changing with the times, asking us to adapt to a shifting context of ‘reality’, ‘truth’, and ‘knowledge’. As Quintilian proposed, and as Lincoln and Obama demonstrate, rhetoric is more than a theory of persuasion or style. It is episteme, a way of knowing, and a philosophy of our time.¹

As the opening quote suggests, the Australian citizen’s episteme—its way of knowing—has been altered—shifted in context as the ‘philosophy of our times’, following the September 11 terrorist attacks has become one in which reality and truth are based on fear of the unknown in a frustratingly abstract sense. This altered ontological landscape was reflected in the Howard government’s relatively unopposed legislation of its 2002 anti-terrorism laws. The Howard government’s response was to evoke ‘the particularly problematic use of “exceptional powers”, as its justification for the questionable derogations to civil liberties contained in the 2002 laws.’²

I am attempting to expose the extent to which ‘the exceptional aspects of anti-terrorism laws have become normalised’,³ to a dangerous level—a level which I term jurispathetic. In a very real sense this simply means that the Australian public and/or the parliament are passively and/or naively supporting the breaking down of the checks and balances that were intentionally built into the Constitution (Cth) by its founders to ensure a clear separation of powers between the three arms of government.

Although, as stated by ‘various judges in Kable’, and more so in Fardon, this type of ‘public confidence’ in the judiciary must be maintained’,⁴ it is argued in this paper, that: the distinct nature of modern terrorism (the national/international, and, abstract notions of truth and justice) supports the premise that: It is singularly [not] inappropriate to place undue emphasis on the fiction of public perceptions in this context.⁵ as the High Court’s decision in Thomas v Mowbray is a testament. The High Court’s majority decision to overturn the Victorian Court of Appeals decision to quash the control orders against Joseph Thomas, deemed it to be ‘the

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² See abstract by Professor George Williams in which he provides ‘Information about the Project’ for which he was awarded an (ARC) Laureate Fellowship for his project entitled ‘Anti-Terror Laws and the Democratic Challenge, http://www.gtcentre.unsw.edu.au/projects_afldc/index
³ Ibid, 1
⁵ Ibid.
most significant case handed down in the High Court in 2007’. The fact that the decision fell directly behind the hooves of public outcry in Victoria, gives leverage to the accusation that: the High Court have, indeed, become ‘red herrings for public and/or executive; not necessarily parliamentary approval’. Just how politically aligned with the executive’s agenda have the most influential members of Australia’s judicial system become—or is this a necessary means to achieving national security in a time of exceptionalism?

Preventative Detention and the State

Rebecca Welsh, University of New South Wales

In 2002, preventative detention orders (PDOs) and control orders (COs) were introduced into the Australian legal landscape to allow for the detention or restraint of innocent individuals in the interest of national security. COs are issued by courts, whereas PDOs are issued by AFP officers (in the case of initial PDOs) or by retired judges, certain Administrative Appeals Tribunal members or personae designata (in the case of continued PDOs). The design of these regimes raises important constitutional questions concerning the involvement of the judiciary in the imposition of preventative or protective restraints on liberty. The High Court addressed some of these issues in its 2007 decision upholding the constitutional validity of COs: Thomas v Mowbray (2007) 233 CLR 307.

My postgraduate research aims to examine judicial power under Chapter III of the Constitution by analysis and comment on the constitutionality of PDOs and COs. This seminar will outline my research plan by: providing a brief overview of the PDO and CO regimes; tracing the development of Chapter III jurisprudence on judicial power and specific relevant doctrines (including the rule in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, and taking a particular focus on the persona designata doctrine and incompatibility rule); and commenting on directions for my research regarding the validity of the PDO and CO regimes and the implications for the continued independence and integrity of the judicial arm of government.

Rethinking Preventative Detention from an International Human Rights Perspective: a Comparative Research of Australia, Hong Kong, Malaysia and Singapore

Wenwen Lu

This thesis tends to address the ways in which preventative detention measures have unduly in violation of international human rights standard by conducting a comparative search among four common-law jurisdictions – Australia, Hong Kong, Malaysia and Singapore.

The four jurisdictions differ in the ways of implementing preventative detention in their domestic laws. Both Malaysia and Singapore have included preventative detention in their Internal Security Acts since 1960s, which were enacted in the times of domestic emergency. On the contrary, neither Australia nor Hong Kong has any preventative detention measures before 11 September. Nevertheless, the four jurisdictions are common in that the authorities are granted with extensive power of detaining person without trial. These powers allow a person to be detained without trial for a period of up to 14 days (in Australia), up to two years

and can be extended to a potentially unlimited amount of time (in Malaysia and Singapore), or the persons’ activities can be monitored by the authority for up to three months (in Hong Kong). They seek to deprive several fundamental rights of human beings recognized in international human rights law, for instance, the rights to personal liberty and the right of prohibition against arbitrary and unlawful detention.

In the process of ascertaining the laws of preventative detention, the thesis will first compare and analyze domestic definitions of “terrorist act” in the context of international law. Not only the definition of “terrorist act” is the threshold issue in any discussions of anti-terrorism laws, but also the definition serves as the backbone of preventative detention. The comparisons of definitions and preventative detention will be conducted first in “vertical level” – whether they fit within the international law or international human rights law, and then in “horizontal level” – the distinctions among the four jurisdictions.

The thesis argued that although after September 11, all four states have made some efforts to promulgate or amend anti-terrorism laws in accordance with international standard; they shall further shape their laws of preventative detention according to international human rights standard. Most important of all, much stronger safeguards with respect to the preventative detention should be developed by all four states.
A marriage of strangers: the *Wednesbury* standard in tort law

*Greg Weeks*

The recent process of legislative reform has seen the public law *Wednesbury* standard grafted onto the law of tort. Can these concepts operate together or are they fundamentally incongruous? Eminent jurists, most notably Brennan CJ and Lord Hoffmann, had previously proposed the *Wednesbury* standard as an appropriate measure of whether a public authority owed a duty of care in negligence. While this approach has never commanded the support of a High Court majority, tort law reforms have adopted the use of the *Wednesbury* standard as a means of restricting the liability of public authorities. This paper will analyse the interaction between *Wednesbury* and tort law both at common law (in Brennan CJ’s judgment in *Pyrenees Shire Council v Day* (1998) 192 CLR 330) and under the *Civil Liabilities Act 2002* (NSW), with particular reference to *Firth v Latham* [2007] NSWCA 40. I will argue that the fact that there are different purposes behind the public law *Wednesbury* standard and its application to tort law is productive of anomalies in the latter sphere. These anomalies are best addressed by greater legislative specificity.

Human Rights and the hollowed-out State: How have human rights charters responded to the rise of new public management and the hollowed-out state, where key public services are delivered under contract by non-state actors?

*Louis Schetzer*

The role of Government has undergone a significant transformation over the last thirty years. Traditional hierarchical government and Weberian bureaucracy became increasingly unpopular in several OECD countries, being seen as inefficient, inflexible and costly. Combined with increasing concerns over national debt and deteriorating global economic prospects, several governments in western democracies have resorted to market-based mechanisms in the administration of government and the delivery of public services. The rise of New Public Management, with its constituent elements of privatisation, outsourcing, contracting-out, and public-private partnerships, has been a feature in several OECD countries. As part of this phenomenon, in the pursuit of economic efficiency and fiscal restraint, governments have increasingly resorted to a myriad of arrangements and processes to devolve their responsibility for the provision of public services to non-state entities, whether private, charitable or community-based. Activities that were traditionally viewed as the responsibility of government are now being outsourced or contracted-out to non-government actors. These include the provision of vital utility services, the management and operation of prisons and immigration detention facilities, the use of private security in public areas, and the provision of vital care and accommodation services for the disabled. In these areas the role of government has diminished, with it being replaced by a constellation of non-state actors traversing private, community and charitable sectors.
At the same time, over the last thirty years, several national and domestic legislatures have acknowledged the need to better protect and promote human rights in legislation, policy development and the delivery of public services by government. The enactment of human rights charters has resulted in obligations on government bodies and public authorities to consider human rights in their decision-making, and to comply with human rights standards in their conduct.

It is therefore appropriate to question how the imposition of human rights obligations on government and public bodies intersects with the increasing role played by non-state actors involved in delivering vital public services on behalf of the State. Should statutory human rights obligations also apply to these non-state actors? How have human rights charters sought to address this question? Given human rights charters are often seeking to inculcate a ‘human rights culture’ and the way public services are delivered, how have the non-state actors involved in public service delivery considered their human rights obligations under these charters?
People of the territories – a part yet apart?

Elisa Arcioni

Every constitution contains a reference to membership of the constitutional community. That community often has privileges or protections and is a way of understanding the identity of the nation in question. How is the constitutional community understood in Australia? The Constitution is silent on Australian citizenship but contains several references to ‘the people’. In my work I examine what ‘the people’ means and whether it is a reference to the constitutional community. One way to consider who ‘the people’ are, is to look at the edge of that group. The people of the Australian territories sit at that edge. The varying and shifting legal and political status of Australia’s territories indicates that allegiance, self-identification, cultural connection and subjection to paramount control all play a role in determining the status of the people of the territories. Understanding how this works throws light on the meaning of ‘the people of the Commonwealth’ and thus the wider or core identity of the constitutional community. This paper will take the historical and jurisprudential status of the people of the Australian territories as a lens through which to consider what it means to be identified as a member of Australia’s constitutional community.

UNHCR and Accountability in the Global Space

Niamh Kinchin

Calls for greater accountability of global decision making are a reminder that decisions that affect our interests are being made in the global space by decision makers who are rarely subject to the same kinds of democratic controls that apply to public decision makers in the domestic context. But it is not enough to claim that global decision making bodies need to ‘be more accountable’. The diversity of the nature of global decision making bodies requires that careful consideration be given to how accountability is to be achieved. The pluralistic nature of the global space taken together with the lack of a cohesive global constituent and a fragmented legal order speak against an expectation of uniform procedural standards. Instead, procedural standards must be tailored to individual global decision making bodies to reflect their particular accountability obligations – obligations that are revealed through the body’s institutional structure, legal constitution and substantive norms and decisions.

The United Nations High Commissioner for Refugees (UNHCR) is a global decision making body whose decisions affect both the interests of states and the rights of individuals. As part of its mandate to protect refugees, UNHCR conducts Refugee Status Determination (RSD). RSD is the process of determining whether an individual meets the definition of a refugee as outlined in Article 1(a) of the 1951 Convention Relating to the Status of Refugees. The procedural standards of UNHCR RSD are a product of its accountability obligations, which are shaped by its position within the UN system, its relationship with states, the affect of its substantive decisions and the way that international law and in particular, human rights obligations, contribute to its legal constitution.
Mainstreaming Corporate Social Responsibility Norms in the major Public Law stream: an option for ensuring corporate legitimacy and liabilities in societies

*Mia Mahmudur Rahim*

Corporate Social Responsibility (CSR)- an ever growing and accepted paradigm in the corporate world- holds that corporations can legitimize their activities more if they could perform their extra legal liabilities in societies. Along with profit generation, this paradigm urges that corporations have liabilities for the people and environment surrounded them. These are important issues for ensuring sustainable development in societies too. In this backdrop, this paper argues that related public laws could guide the initiatives for ensuring corporate legitimacy and liabilities in societies if the basic CSR principles and their standardized notions are incorporated into the main streams of public laws. In the era of deregulation and the surges of globalisation, other than authoritative regulatory mode, public laws have scope to meta-regulate corporate self regulations and management. In conformance with this view, the underlying notion of stakeholder, social and environmental dimension of CSR could be incorporated in major business related public laws so that these laws could extend corporate governance beyond their legal responsibilities and encompass the economic, ethical and environmental needs of societies into their core strategies.

Justiciability of economic and social rights in Bangladesh: New interpretation

*Muhammad Ekramul Haque*

International human rights law recognized economic and social rights initially as different from civil and political rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, which embodied economic and social rights, requires necessary steps to achieve progressively the full realization of those rights, while the International Covenant on Civil and Political Rights (ICCPR) 1966 enclosed a mechanism for the immediate enforcement of the civil and political rights embodied therein. The division of human rights into two different categories made by the two Covenants of 1966, which has been seen as a result of the cold war between socialism and capitalism, influenced the incorporation of human rights provisions in the Constitution of Bangladesh. The constitution of Bangladesh sets up civil and political rights as fundamental rights and regarded them as judicially enforceable, while economic and social rights have been recognized as fundamental principles of state policy which are not judicially enforceable.

It is submitted that the international human rights law has shifted from its earlier position and the traditional assumption regarding judicially unenforceable nature of economic and social rights (ESR) has become outdated. The paper will explore arguments for the extension of the current scope of judicial enforcement of economic and social rights under the Bangladeshi Constitution. It will be argued that there is enough room to reinterpret the constitutional principles on economic and social rights in the light of the contemporary international human rights law within the scope of the constitutional law itself. The paper will argue that in spite of clear constitutional prohibition regarding judicially unenforceability of the principles, there is enough room open to enforce them judicially in Bangladesh.
Working Women and their Rights in the Workplace: International Human Rights and its impact on Libyan Law

Naeima FA Abdulatif

The thesis explores the relationship between the rights of women at work and their rights as mothers. It considers how these two sets of rights, as protected under international human rights law, can and should be recognised and promoted within the Libyan legal system. The project will examine the theoretical and practical operation of relevant Libyan laws in the context of the standards set by international human rights law, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) as well as the International Labour Organization (ILO) Maternity Protection Convention and the Discrimination (Employment and Occupation) Convention, C111.

The project is an attempt to explore, and where applicable suggest some solutions to the problem of conflict, between work and motherhood. The thesis will assess the adequacy of existing Libyan laws and, where warranted, recommend amendments and reforms to ensure the protection of both rights. The goal is to facilitate the enjoyment by working women of their rights as both independent workers and as mothers, without requiring a choice of one role over the other.

This project will examine the Libyan employment Law with regard to the issues of working mothers. Moreover, it will investigate the steps that have been taken within the Libyan legal system to prevent discrimination and to encourage participation, and also examine how and why participation continues to be limited. his research will include a review of primary and secondary materials on relevant international human rights law in order to determine what is expected of state parties in regard to respecting both rights at work and motherhood rights (including maternity leave).

The ‘qualitative research approach’ will be used to conduct the study and collect the research data. It is claimed that the data collected by this method can provide rich and in-depth understanding of the area under investigation. One form of the qualitative research approach or method is the semi-structured interview. This approach will be used in this study. It is defined as a flexible type of interview in which the interviewer ‘starts with a few defined questions’ but is ‘ready to pursue any interesting tangents that may develop’. It uses mainly open-ended questions. Material collected will be analysed to provide a view of the contemporary experience of Libyan women, particularly as it relates to the intersection of pregnancy and motherhood and their working lives.

This study attempts to make radical and practical contributions to the current Libyan legal regime. It is hoped that its findings and recommendations can lead to the improvement of employment laws and other Libyan legislations, where it relates to maternity leave and other issues affecting the lives of working mothers. In this way, the study will make a contribution to the scholarly literature in this area of human rights norms, and can also offer some practical steps to strengthen the Libyan laws and regulations in this field as they relate to working women’s rights. These changes will be beneficial to Libyan women and provide them with ways to possess and enjoy their rights both as mothers and as independent working women who can have an effective role in the broader Libyan society. If implemented the changes put forward will have a positive effect on the Libyan economy, including an increase in women’s participation rates in the workforce that will achieve the country’s desired goal of increased national productivity and also raise the standard of living for many families.
Tuesday 13 July

Venue: Boardroom, Level 2, Law Faculty Building

9.00 – 10.00 am Session Five: Public Law and Free Speech

Chair: Dr Katharine Gelber

Constitutional Theory: Can one take a pragmatic approach to regulating hate speech?

Julian Ligertwood

Many people claim to take a ‘pragmatic’ or ‘realistic’ approach to resolving legal issues. But how do and how should judges decide constitutional issues in areas that lack a clear public consensus such as whether or not it is legitimate to regulate hate speech or the practices of certain religious sects? Is it possible for legislators and judges to assume a ‘pragmatic’ or ‘realist’ approach in relation to these issues? In particular, how would it be possible for a judge to justify hate speech laws on pragmatic grounds? Surely the very requirement of justification from first philosophy is anathema to the pragmatist project, so is it indeed possible to decide these issues in a pragmatic way?

In this paper I set out two pragmatic approaches to law, those of Posner and Rorty and test whether or not their pragmatist theories are ‘thick’ enough to account for deciding these issues one way or the other, or whether it is indeed necessary to resort (heaven forbid) to first philosophy in deciding these issues.

(This paper is part of my PhD thesis which examines the relationship between philosophical pragmatism and law. One of the key questions I want to examine is whether or not the anti-foundationalist project, which includes legal and philosophical pragmatism, renders what David Luban calls ‘first philosophy’ obsolete, or whether philosophical inquiry and argument has a genuine role to play in the law).

Is there a valid theoretical basis for the Crown’s ownership of copyright?

Dilan Thampapillai

The Crown is a peculiar copyright owner and might even be regarded as something of an accidental monopolist. History has bequeathed to the Crown in Australia a set of copyright privileges which gives it the right to control information that it produces pertaining to the laws and governance of the nation. Given that most copyright owners exploit their ownership in relation to a particular market the position of the Crown in relation to copyright is remarkable because its potential impact upon Australian democracy. Accordingly, there must be a sound theoretical basis, and not just a historical tradition, that supports the Crown’s ownership and exploitation of copyright.

This paper examines the traditional theories that support copyright and questions whether they would extend to supporting Crown copyright. These theories; the incentive theory, the tragedy of the commons, natural rights and Locke’s labour theory, fail to fully account for Crown copyright. Traditional copyright theory is prefaced on the basis of an author who exploits his work for profit, whereas the Crown is a copyright owner in the course of its duties of
governance. As such the Crown must find some other theoretical basis, one that does justice both to its position as keeper of the national and interest and also to its responsibility for maintaining Australian democracy. There are important free speech concerns at play in relation to Crown copyright. Cases such as *Attorney-General (Cth) v John Fairfax* and *Ashdown v Telegraph Group Ltd* demonstrate the ability of the Crown and other government-related entities to rely on copyright to suppress information from the public domain.

If the suppression of vital information is recognised as undesirable, the theoretical basis for Crown copyright must accommodate the need for freedom of speech alongside the valid reasons for the Crown’s ownership of copyright. Such a theory would be more akin to a free speech theory of copyright wherein copyright could exist to the extent that it supports valid public policy purposes but could not extend beyond a point of democratic legitimacy.
Orang Asli are the Indigenous minority group of Peninsular Malaysia who account for around 0.5% of the population of Malaysia. Despite their special status as wards of the State under the Malaysian Constitution, Orang Asli continue to be politically, economically, culturally and socially marginalized. Thus far, ‘top-down’ developmental policies for the entry of Orang Asli into the market economy have contributed to the dispossession of Orang Asli from their customary lands and economic marginalization. Due to the strong affiliation that Orang Asli have with their customary lands, these lands play a pivotal role in the survival and vitality of the Orang Asli as a special and distinct community within the Malaysian ethnic landscape. Continued observance of these policies would adversely impact Orang Asli culture and identity within the nation state yet do little to alleviate their deprived socio-economic status.

Despite these threats, current legislation remains archaic and more importantly, offers no security of tenure over Orang Asli customary lands. At the international level, international organizations have responded to the predicament of Indigenous peoples by setting standards for the effectual protection of Indigenous peoples and their lands. This paper contends that there are compelling reasons why Malaysia should have regard to international standards contained in the United Nations Declaration on the Rights of Indigenous Peoples 2007 if it is to embark on the reform of Orang Asli customary land rights. Recent developments including the recognition of Indigenous title by domestic courts and the emerging influence of human rights in Malaysia suggest that it is opportune to consider the non-binding, contemporary and flexible standards of the UNDRIP in addressing Orang Asli issues. This approach would also function to complement the Malaysian Government’s need to be seen as a progressive nation on the international stage particularly in respect of human rights.

The Relationship between Customary Law and Human Rights: A Possible approach to the Situation in Vietnam

Phan Nhat Thanh

What are the positive or negative impacts of customary law to human rights? This question may lead to many answers. Many people argue that customary law may be the best instrument for dealing with conflict in the community and, more importantly, for protecting and developing human rights for minority groups and Indigenous people. Customary law is considered as an instrument for cultural preservation, bringing about the respect for cultural identity and democracy for ethnic people. In addition, it contributes to the solution to the difference and conflict between state law and Indigenous laws.

Nevertheless, some others claim that customary law sometimes leads to violation of human rights because it provides different laws for people with regard to the same issues or disputes. One thing seems to be a paradox; on the one hand, human rights, individual rights and equal rights mainly refer to individuals but on the other hand, it also supports the rights of
Indigenous people and minority groups. Many scholars argue that the state should not give any special privileges to any subjects in order to protect equality in society.

How should customary law be applied so that it is in harmony with human rights protection? Vietnam is searching for a suitable solution. This study will examine this issue. In particular it will explore whether human rights could have impacts on customary law, what the obstructions of customary law to human rights might be and how such a complex relationship could be settled to benefit the country’s development.

**Aboriginal land rights – a new consensus?**

*Leon Terrill*

One of the remarkable things about the Aboriginal Land Rights (Northern Territory) Act was that when it was passed by the Commonwealth parliament in 1976 it received bipartisan support. This would not have been possible a few years earlier. Due to the leadership of key individuals there had been a significant shift in the consensus towards an acceptance of the ‘simple justice’ of providing land rights for Aboriginal people.

Thirty years later, the Coalition Minister for Indigenous Affairs, Mal Brough, described the Land Rights Act as one of the ‘two single things [which] did more to harm indigenous culture and destroy it than any two other legislative instruments ever put into the Parliament’. The Land Rights Act, he argued, had left Aboriginal people ‘land rich but ... absolutely poor in every other way’.

Under Brough’s leadership, the Coalition government then introduced a number of reforms to Aboriginal land in the Northern Territory. While the Labor party criticised certain of those reforms at the time, since taking office in November 2008 they have continued to implement substantially similar policies. It appears that once again the consensus in relation to Aboriginal land rights has shifted.

But where has it shifted to? This presentation will consider how the emerging new consensus on Aboriginal land rights might be described.
Judicial Biography and the High Court of Australia: What difference might lives make (to public law)?

Katherine Lindsay

“Histories do rather set forth the pomp of business than the true and inward resorts thereof. But Lives, if they be well-written propounding to themselves a person to represent, in whom actions both greater and smaller, public and private, have a commixture, must of necessity contain a more true, native and lively representation.”

Francis Bacon (1605)

There is but a sparse tradition of biographical writing in Australia about High Court Judges, especially those without any experience in the legislative and executive branches of government. Whilst a minority of High Court Judges have full length biographies, even fewer have been the subject of “judicial biographies”. There is some evidence that the tide may be turning, with a contemporary florescence of interest in biographies of judges, and the judging role of their subjects.

Judicial biography, as explored in this work, is a species of life writing which consciously engages with and interrogates the judicial persona of its subject. It may ask hard questions about the craft of judging as practised by its subject. It is advocated in this work that it must also engage with questions surrounding the judicial reputation of the subject. Judicial reputation is an underexplored field and has natural sympathetic connections with the biographical enterprise.

This research also asks some interrelated questions about this sub-genre of professional biographies, including how judicial biography might complement other types of legal scholarship and what role it might play for the future in Australian legal culture more broadly. One of the methods used to explore these questions has been to interview contemporary judicial biographers about how and why they practise this craft.

Sir John Latham: Judicial Reasoning in Defence of the Commonwealth

Kevin Widdows

Sir John Latham (1877-1964) enjoyed lives in Australia’s academic, legal, intelligence, diplomatic and political worlds before his elevation to Chief Justice of the High Court, 1935 to 1952.

Throughout, Latham never concealed his solid conservative values nor his nationalist leanings. However, he was above all a committed Rationalist over whom religion had no hold. Neither had Communism nor political radicalism, towards which he manifested a fierce and deep antagonism.

Given Latham’s public stand on the importance of protection of the Commonwealth polity from both internal and external threats, the question of his independence as a judge in cases
raising such issues has been aired in the past, particularly in relation to his “lone, vehement and incredulous” dissent in the Communist Party Case (1951).

The purpose of my enquiry is to ascertain the extent to which Latham’s nationalist ideology and conservative outlook are discernible influences affecting his judicial reasoning in cases which came before him on national security issues.

An attempt will be made to identify the extent of Latham’s convictions on these issues through his statements and activities in public life and from his private papers. The conclusions of this study will then form the background to a thorough comparison of his judgements in such cases with those of his fellow judges so as to understand how his reasoning deviated from theirs and on what form of reasoning any such deviation was based. Later judgements of the Court and academic commentaries should also throw light on the roots of his reasoning, which has been the subject of judicial speculation in recent years.
Session 8: Contemporary Issues in Public Law

Chair: Dr Ben Golder

To what extent should citizens be subject to laws they cannot easily access?

Soula Papadopoulos

Lord Bingham has written that “to be bound by a law a person must be able to find it without undue difficulty”. Yet the legal system assumes that people do know the law and that ignorance of it is no excuse. This paper examines these assumptions and considers whether, if the law is to be fair, it must be reasonably easy for ordinary citizens to access and, specifically, whether the state has a duty to make official, reliable, up-to-date information on legal rights and responsibilities publicly available at minimal cost. The paper considers (i) how freer access would be consistent with the rule of law by providing transparency and promoting certainty, (ii) the extent to which courts have imposed a responsibility on governments for making laws accessible to citizens, and (iii) the limited judicial recognition of what amounts to a legal right to public access, and accordingly, whether inaccessibility could be an excuse for non-compliance. The paper uses “cooperative legislative schemes” – increasingly used by the nine Australian jurisdictions to achieve legislative consistency – to illustrate the hurdles that need to be overcome if the law is to be more accessible.

The Constitutional Basis of Paper Money in Australia

Andrew Dahdal

In 1901 the colonies that federated to form the Commonwealth of Australia did not enjoy a single currency. In fact what prevailed in the Australian colonies was a system of competing private paper money issued by joint stock private banks. It was not until a decade into the 20th century that a national Australian paper currency was introduced. When the convention debates of the 1890s are examined closely it can be seen that the idea of a single national paper money issued by the state did not feature prominently, if at all, amongst the considerations surrounding the drafting of the currency provisions of the Australian Constitution. The introduction of a Commonwealth government bank and a national paper money currency immediately prior to the First World War undoubtedly helped fund the Australian war effort. The utility of the Commonwealth bank and the paper money system during the war, however, may have obscured the less than firm constitutional foundations on which state issued paper money is based in Australia. This paper provides a detailed examination of that basis as understood in the Australian context prior and during the First World War.

Religion, Politics and Asylum Seekers

Mitchell Landrigan

From time to time politicians - including Australia’s former Prime Minister Kevin Rudd – publicly express their religious beliefs.

This paper considers the then Shadow Foreign Affairs Minister Kevin Rudd’s foray into religion in essays he wrote in The Monthly in 2006, written not long before he became
Opposition Leader and later Prime Minister. More specifically, we examine Mr Rudd’s claims to support the plight of asylum seekers by reference to the “... biblical injunction to care for the stranger in our midst” – and we compare this claim with Government policy on asylum seekers under Mr Rudd.

When contrasted with the then Rudd Government’s position on asylum seekers, his writings suggest the former Prime Minister was more adept at engaging in religious-political rhetoric than developing the kind of compassionate policies that would ordinarily be implied by a biblical injunction to care for strangers.

Is it appropriate to criticise a Prime Minister for failing to adhere to his expressed religious beliefs? Put differently (and hinting at notions of church-state separation), are a politician’s religious beliefs private, and a matter for a politician’s own reflection, and not the stuff of political criticism? I propose that it can be legitimate to scrutinise and comment upon a political figure’s religious beliefs.

In *The Monthly* Mr Rudd used religion for political purposes, namely to distinguish his compassionate brand of Christianity from the stoic conservatism of his predecessor, former Prime Minister John Howard – with asylum seekers as a religious differentiator. Mr Rudd drew religion into the public sphere for political purposes. Having done so, political commentators may analyse whether Mr Rudd’s expressed religious beliefs were consistent with his political actions.

3.30 – 5.00 pm  
**Methodology Discussion**  
*Chair: Professor Theunis Roux*

*Discussants:*

Paul Kildea  
Dr Christopher Michaelsen  
Professor Denise Meyerson  
Professor Prue Vines

5.00pm  
**Conference Concludes**