**2016 POSTGRADUATE WORKSHOP IN PUBLIC LAW**

**ABSTRACTS**

**Thursday 14 July**

**10.30 – 11.30 am** **Session One: Apex Courts**

**Byron Karemba**, University of Leeds

**An Unorthodox Constitutional Court? Placing the Supreme Court of the United Kingdom within the Existing Taxonomy of 'Top' Courts.**

The constitutional settlement within the United Kingdom has historically engendered a reluctance to think about the most senior courts in that country in constitutional terms. The idealisation of the principle of Parliamentary sovereignty as 'the dominant characteristic of our political institutions' has traditionally natured a complacency among British scholars about the constitutional role of the most senior appellate courts. However, the transition of the Lords of Appeal in Ordinary from the upper chamber of Parliament to the Supreme Court of the United Kingdom has generated a particular interest in the constitutional role of the apex Court. This paper contributes to this growing commentary by attempting to place the United Kingdom-wide institution within the existing taxonomy of top courts around the world. The paper investigates whether the United Kingdom Court conforms to the orthodox conception of a 'common law supreme court', or whether it exhibits some elements associated with the civilian or 'Kelsenian' model of a constitutional court. In this regard, the paper analyses the role of the Supreme Court in three particular areas. Firstly, it examines the role of the top court in the determination of fundamental rights. Thereafter, the paper examines the Court's relationship with the legislative and executive branches of government from the Court's own perspective. Thirdly, the paper looks at the Supreme Court's adjudicative role within the 'evolving' devolution settlement in the United Kingdom. The paper concludes by examining the broader constitutional implications which flow from classifying the Court within either existing model.

**Purush Purushothaman**, Victoria University of Wellington

## The Constitutionalism-Democracy Dilemma in India: The Necessity of Constitutionalizing the Constituent Power

The framers of the Indian Constitution expected that future generations would be able to exercise their right to self-determination through their parliaments. Hence, the Constitution contains only procedural limits to the power of amendment. However, in the circumstances of authoritarian politics that posed a threat to Indian democracy, the procedural limitations to constitutional change appeared insufficient, and the court invoked substantive limitations to the power of the parliament. Judicial entrenchment of the 'basic structure' and the strong judicial review based on it, helped to protect democracy in those circumstances. The basic structure doctrine nullified the potential of the power of parliament to bring in 'revolution by legal change' as envisaged by the framers. However, the court failed to compensate this loss by identifying an instrumentality through which future generations could exercise their right to self-determination. The Court couldn't provide an opening for the power of the people at the critical point of radical constitutional changes through the instrumentalities either of representation or direct interventions. It committed future generations forever to the basic norms set by the founding generation. In effect, fundamental constitutional changes have become impossible without revolutions. Having failed in explaining the mechanism for fundamental constitutional changes, the Court moved towards a concept of shared sovereignty. The Court claimed to share the constituent power with Parliament and as the ultimate interpreter of the constitution, all the decisions as to fundamental changes are to be finally taken by the court. This account acknowledges the sovereign power of the people as a fiction and presents an alternative account of shared sovereignty that recognizes the political authority of judges. The unconstrained system of judicial review which could not be limited even by constitutional amendment leads to a situation of "government by judges". The failure of the Court to base the basic structure doctrine on the sound basis of the concept of popular sovereignty intensifies the constitutionalism-democracy dilemma. It further raises concerns about dead hand constitutionalism, judicial supremacy and further hijacking of the constituent power by incompetent actors. The absence of the constituent power within the constitution contains a frightful potentiality that the organs of the State may style themselves representatives of the constituent power and abuse it. The Constitution-democracy dilemma appears in the models either of a constitution of the government or that of the Court. The dilemma vanishes only in a model of the people's constitution which constitutionalize the constituent power.

**11.30 am – 12.30 pm Session Two: Court-Based Remedies**

**Ellen Rock**, ANU

**Accountability as a Core Value in Public Law**

Accountability is a key public law value that explains and justifies the courts' role in engaging in judicial review. Notwithstanding its perceived value, an analysis of the concept reveals that the Australian public law system is not in fact a comprehensive accountability regime. One way of extending the regime would be to provide a public law remedy in damages. Before taking this step, however, we must consider what other adaptations to public law principles might be necessary to support this extension, and take into account any potential constitutional barriers. This paper focuses on one aspect of this argument, namely, what a comprehensive accountability regime demands, and how those demands are met by the current public law remedial framework.

Accountability serves three interrelated goals. The first is to place controls on the exercise of power, the second is to punish abuse of power, and the third is to restore interests that are harmed as a consequence of the excess of power. Absence of any of these three functions in an accountability regime leaves it open to criticism as being hollow or incomplete.

In the context of a *legal* accountability regime, the three goals of accountability can be aligned with the courts' three potential remedial responses, being regulatory, punitive and reparative. Regulatory remedies typically involve defining the limits of power and confining the exercise of power within those limits. These remedies are clearly linked to the accountability goal of control. Punitive sanctions, which mark public disapproval of an official's conduct, are linked to the accountability goal of punishment. Finally, reparative remedies involve an obligation to restore damage or injury, and are clearly linked to the accountability goal of restoration.

An analysis of the currently available public law remedies reveals that they fall largely into the regulatory category of remedial responses. They do not play any meaningful role in the punishment of wrongdoing, and to the extent that they have the effect of repairing damage, this is largely co-incidental rather than the objective of the remedy. An award in damages, by comparison, serves both the goals of punishment and restoration. Punitive damages are capable of marking disapproval and condemnation of official misconduct, while compensatory and restitutionary damages can restore losses and reverse shifts in resources. Therefore, an award in damages might potentially play an important role in extending Australia's public law accountability regime.

**S M Atia Naznin**, Macquarie University

**Adjudicating Social Rights for the Poor: the Reality of Judicial Enforcement of Basic Necessities of Life through Public Interest Litigation in Bangladesh**

Despite the worldwide evolution of human rights and constitutional norms towards the judicial enforcement of social rights, in Bangladesh, constitutionally these rights exist as 'basic necessities of life' in the chapter on fundamental principles of state policies. In addition to this recognition of social rights as mere directives, the constitution is explicit about the non-justiciablity of these necessities. However, over the last two decades, mostly through public interest litigation the judiciary has been enforcing the provisions of basic necessities relating to housing, health, medical care, social security, education, and food by liberally interpreting them as the core components of right to life. But, public interest litigation is often criticized for missing the opportunity to redress the violation of basic necessities of the poor. Current paper argues that this failure of public interest litigation is deeply rooted in the incrementalist

approach of the court. For a comparative study, the paper focuses on India where social rights also exist as directive principles of state policies. By analysing the landmark judicial decisions, it reveals that although in both the countries social rights have same constitutional status, the Indian judiciary has been showing more activism in its approach and remedial decision in the public interest litigation on basic necessities and thereby producing positive impact upon the poor litigants. The paper then finds out the reasons that influence the conservative tendency of the Bangladeshi judiciary and sheds light on the Indian judiciary as well to explore the causes of its activist approach. Hence, various factors that act behind the role perception of the court, for example, constitutional status of social rights, separation of power concern, scope of judicial review, judicial independence, inter-institutional cooperation, and judicial willingness is critically examined. The aim of this paper is not to debate over the efficacy of public interest litigation on basic necessities in Bangladesh. It rather suggests that pro-poor adjudication of basic necessities requires a strong judicial role and Indian experience indeed can be a guiding example for the Bangladeshi judiciary in this context.

**1.30 – 3.00 pm** **Session Three: The Intersection of Public Law and Public Policy**

**Jenny Duxbury**, University of Canberra

**Exceptional Trust? The Expert Role of Federal Government Lawyers in the Policy Process**

The literature on government lawyers has to date largely been focused on problems associated with the ethical and professional responsibilities of government lawyers. This literature locates the role of government lawyers within the context of the legal profession at large. Much of debate in the literature considers questions associated with this legal professional identity. Can government lawyers be "independent" and "impartial"? What is the appropriate advisory approach for a government lawyer? Who should government lawyers' consider to be the client? Do government lawyers have a "higher" ethical responsibility than other lawyers? Underpinning this literature is an assumption that the advisory role of government lawyers is ideally to provide "apolitical" legal advice.

Successive government reviews have struggled to explain the role and value of government lawyers within the Australian Federal bureaucracy. Like the academic literature, the authors of these reviews consider lawyers as legal professionals and compare them with external legal providers. This paper looks at government lawyers from a different perspective. I examine government lawyers as "experts" in the policy process. Here, policy is understood as part of a wider political process in which different values are contested. In this context, the role of experts and the way their expertise contributes to the policy process is not politically neutral. How experts engage with and contribute to policy is dependent on the values at play in the policy question. The more highly contested the values and therefore the higher the political stakes, the less likely that expert advisors can influence the outcome. Drawing from Roger Pielke's model for scientific experts (Pielke 2007) and case studies from three policy controversies, I show how the expertise of government lawyers is deployed in different policy contexts. This paper argues that in defining the role and value of government lawyers we need to play closer attention to how their legal expertise is deployed to achieve policy outcomes.

**Genna Churches**, UNSW

**The Mandatory Retention of Metadata in Australia under the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth) and the Resulting Infringements upon the Rights to Privacy and Freedom of Expression**

This thesis examines the mandatory retention of metadata in Australia under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth)* ('*DR Act*') and the resulting infringements upon the right to privacy. Drawing upon EU law and *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl (C-594/12)*, international materials, such as the *ICCPR*, and US case law, this thesis will establish how and why data retention under the *DR Act* infringes upon the right to privacy.

The Attorney-General, George Brandis, attempted to downplay the revealing nature of metadata, by comparing it to the address on an envelope, not the content of the letter itself. The first chapter of the thesis scrutinises this comparison. It explores historical postal and telecommunications legislation and Parliamentary debates in order to determine if legislators were prepared to infringe privacy and freedom of expression rights to remedy mischiefs. Mischiefs included the prevention

immoral acts such as gambling and fortune-telling facilitated by the Postal Service resulting in the Postmaster General's Czar-like powers under the *Post and Telegraph Act 1901* (Cth) to open mail and prevent delivery. Other mischiefs included the fear of espionage, sabotage or subversion during the 50s and 60s, which resulted in powers vested in the Attorney-General under the *Telephonic Communications Interception Act 1960* (Cth) to issue a warrant for the interception of telephonic communications. Historically, both letter and telephony have endured varying degrees of privacy invasions.

The chapter draws conclusions as to the balancing of rights versus mischief to ascertain whether there has been an historical shift, protecting one form of communication over another or simply providing a remedy which infringes the right to privacy. Ultimately, the chapter determines whether the address and the envelope really have afforded protection to the letter, and whether telephony has been able to shield itself from the uninvited ear.

**Sarah Moulds**, University of Adelaide

**Balancing Security and Liberty: An Evaluation of Parliamentary Scrutiny of Anti-Terrorism Laws**

The Australian parliamentary committee system serves as a way of reviewing, scrutinising and improving proposed laws before they are enacted. These committees can consider whether the proposed law is effective at meeting its objective, as well as its impact on individual rights or on other important Australian values or legal principles. Parliamentary committees are complemented by other mechanisms designed to promote formal scrutiny of proposed laws, such as the requirement to accompany Bills with Explanatory Memorandum and Statements of Compatibility with Human Rights.

A number of commentators have looked closely at aspects of this scrutiny system and its capacity to protect and promote human rights in Australia. My research aims to evaluate how well this formal scrutiny system is working from a broader perspective, and looks particularly at the experience of Australia's counter-terrorism laws as a way to identify the impact this system has on the content of the law, the way the law is publicly debated and discussed and the 'behind the scenes' development of future laws and policies in this area.

To do this, I intend to employ methodology based on the framework articulated by the Dickson Poon School of Law, which draws upon 'organisational effectiveness theory', as well experience from a range of jurisdictions that have undertaken assessments of existing parliamentary oversight mechanisms. It focuses on identifying three tiers of 'impacts' that can be used to measure the effectiveness: 'legislative impacts'; 'public impacts' and 'invisible impacts' (such as the behind the scenes impacts on the development of new laws and policies). The last of these impacts will be determined by reference to proposed interviews with a range of participants in the scrutiny process, including parliamentarians, committee secretariat staff, parliamentary counsel and public servants.

An assessment of each of these impacts in the context of formal scrutiny of ten selected counter-terrorism bills will provide a unique and robust foundation from which to identify common themes within the broader parliamentary scrutiny system, and to draw conclusions as to what these themes may mean for improving the effectiveness in the future.

**3.30 – 4.30 pm** **Session Four: Transforming Public Law Discourse, Effecting Fundamental Change**

**Gordon Chalmers**, Queensland University of Technology

**Aboriginal is not aboriginal is not Yanyuwa, Turrbul, Meriam, Martu, Tanganekald, Yorta Yorta …: Contesting Colonial Constructions of Indigeneity in the Constitutional Recognition context**

Since the multiple British invasions of this place now called Australia the different peoples who were originally present in this continent have been variously constructed so as to enable the continuation of the colonial project. McCorquodale (1997) notes that there have been no less than 67 different legal definitions of these peoples that have provided a justification for the various control measures in support of what McCorquodale tentatively suggests was for the purpose of "land dispossession" and the control of its "ownership/usage". I am less tentative than McCorquodale and state with conviction that these provisions were a part of enacting continent-wide genocides and epistemicides for the ultimate aim of providing the colonisers with the ability to exercise absolute and uncontested control of this place called Australia.

Regardless of our tentativeness to say things as they really are, and our supposed concerns with "objectivity", "neutrality" and substantiating "evidence", there is one indisputable fact: never have the different First Nations peoples of this place called Australia been afforded the respect and right to engage in relations with the British/Australian nation state in accordance with their own legal constructions of themselves. The relationship between First Nations peoples and colonial and Australian governments has always been predicated upon the legal construction of first Nations peoples by colonial and Australian governments – and for the purposes of colonial and Australian governments.

The present Constitutional Recognition Campaign has once again brought to light this same dynamic and, in interrogating the numerous proposals for constitutional change, this presentation will be concerned with discussing how the colonial Australian nation state is again seeking to maintain its ability to legally construct the many First Nations peoples with the aim of maintaining the supposed legitimate ability to legislatively control this group.

**Jessica Burn**, University of Cape Town

**Participatory Evaluation of the Girl Child Movement in Collaboration with the Children's Resource Centre (Cape Town): Strengthening Children's Awareness of their Rights and Involvement in Realising Them**

It has been twenty years since the inception of the South African Constitution and yet there remains a clear disjuncture between a constitutionally enshrined utopia and a deeply flawed reality. The post-apartheid South African generation requires a platform to bring entrenched and overlooked prejudices into consciousness, to address them and break them down. If genuine transformation in society is sought, then we should be encouraging children to evaluate the status quo from a younger age and prioritise their role in re-imagining a society which values and promotes genuine equality and dignity. This dissertation will focus on children as agents of change with a feminist perspective.

The road to achieving the full realisation of women's human rights is unrelenting. Although undeniable gains have been made, particularly in legal acknowledgements of women's human

rights, there remain beliefs, biases and stereotypes perpetuated by social and institutional structures that hinder transformation in South Africa and around the globe. It is submitted that the underlying challenge to attaining gender equality and women's empowerment is the historically preserved notion of patriarchy. Patriarchy can be defined broadly as:

> "a system of social structures and practices in which men dominate, oppress and exploit women".

Former Constitutional Court Justice Sachs claims that patriarchy is "one of the few profoundly non-racial institutions in South Africa" as it is a phenomenon which exists within all racial groups. However, to avoid essentialism, Sachs also recognises that there are layers to oppression. It is important to realise that the intersectionality of patriarchy with other social constructs creates specific and nuanced experiences of patriarchy.

The most evident manifestation of patriarchy is violence against women. It is common knowledge that domestic violence, rape and sexual assault are rife in South Africa. To combat this social ill, a mechanism to turn legal ideals into moral ideals is required. In recognising the limited and ex post facto nature of legal redress, the power of human rights education will be evaluated. Articles 29 and 42 of the United Nations Convention on the Rights of the Child require children to be educated about their rights and following the World Conference on Women in Beijing in 1995, the Beijing Platform for Action prioritised 'The Girl Child' as one of its strategic objectives. Hence, it will be considered how international commitments may be implemented at the grassroots level.

**4.30 – 6.00 pm** **Session Five: Textualising and Entrenching Rights**

**Uchechukwu Ngwaba**, Macquarie University

**The Constitutional Text and Underlying Values on the Right to Health**

Although constitutional guarantees of the right to health are widely accepted as essential to the protection of that right in the domestic legal system of many states, little attention has been paid to understanding how the constitutional text (and its framing of the right to health) impacts positively or negatively on the situation of that right within a state. This paper argues, that constitutional guarantees are only useful to the extent that they enable positive underlying values on the right to health to flourish; secondly, the paper argues that underlying values on the right to health, which can be found in policy or legislation, can either progress or stymie the fulfilment of the right to health – either manifestation depends on the manner the constitutional text has framed the right to health; and thirdly, the paper argues that while health policies and legislation are underpinned by underlying values, it is the constitutional text that provides the overarching framework for positive underlying values on the right to health to emerge. In substantiating these claims, the paper will engage in a comparative analysis of four constitutional systems, namely, Brazil, India, South Africa and Nigeria. The focus of this analysis is to ascertain how constitutional guarantees of the right to health in each of these states have impacted on the kind of values (on the right to health) that have been protected in policy and legislation. The findings of this paper have serious implications for current efforts at transforming the health care system of Nigeria.

**Asmaa Khadim**, University of Queensland

**Constitutional Solutions for Protecting Indigenous Cultural Heritage**

Kakadu National Park in Northern Territory, Australia, is known to house one of the world's greatest concentrations of Indigenous rock art. The region is also home to some of Australia's most significant uranium deposits. While less than 2% of Australia's land mass is currently subject to a mining lease, it has been argued that more than 80% of mining projects take place on historically Aboriginal land. However, the relationship between mining and local Indigenous interests has been anything but symbiotic. Uranium mining in Northern Territory has frequently led to clashes with local Indigenous groups, such as the Mirarr. The mines at Jabiluka and Koongarra, in particular, have been at the heart of a great deal of social and political controversy since their discovery, and the preservation of cultural heritage sites as well as the sensitive ecosystem has been wrought with difficulty. Uncertainty persists as to the long-term security of these rock art complexes, in part due to the failure to include Jabiluka, Koongarra and Ranger mines within the protection of Kakadu National Park.

While much has been written about the conflicts surrounding uranium mining in Kakadu, only limited research has been conducted on the legal protections available to the Mirarr in support of their environmental and cultural heritage rights. Existing literature seems to indicate that the Mirarr have compromised and secondary property rights, and incomplete legislative mechanisms for decision-making with respect to management of their lands.

This paper explores the existing legal framework for the protection of Indigenous cultural rights as well as some of the challenges faced by the traditional owners of the land. In addition, there will be a consideration of the potential benefits of constitutional entrenchment of rights, in order to address the existing difficulties relating to protection of Indigenous rights. The political and economic implications of potential Aboriginal claims might play a part in reticence towards constitutional entrenchment of Indigenous rights, particularly in relation to land rights.

However, the constitutionalization of rights often gives those rights a level of protection that might be resistant to majoritarianism and the changing tides of the political landscape, and it has served as an effective way of balancing competing interests in other jurisdictions. Constitutional law has historically been utilized to advance human rights, such as the rights to life, equality and suffrage, and there may be an argument for turning to it now to offer solutions with respect to this contentious category of legal rights.

**Andrew Dyer**, University of Sydney

## (Grossly) Disproportionate Sentences: Can the European Convention on Human Rights and the UK Human Rights Act Make a Difference?

In my thesis, I am considering whether courts in jurisdictions with a human rights charter and/or other strong human rights protections are better able than courts in jurisdictions without such measures to withstand penal populism. In particular, I am concerned to discover whether the *Human Rights Act 1998 UK* (HRA) and the *European Convention on Human Rights* (ECHR) have improved, or at least can improve, the position of those targeted by irrational and ill-considered criminal justice legislation.

In a recent article in the *Human Rights Law Review*, which will double as a chapter of my thesis, I concluded that the HRA and the ECHR have caused the UK law concerning irreducible life sentences to differ desirably from that in Australia. Now, I consider the further question of whether Article 3 of the ECHR means that there less scope in the UK than there is in those Australian jurisdictions that lack a charter or rights for the state successfully to impose a (grossly) disproportionate prison sentence on an individual.

The answer to this question seems to be 'yes.' While it might at first glance be thought that mandatory sentencing laws infringe the constraints imposed by Chapter III of the Commonwealth *Constitution*, the Australian judges have deployed dubious reasoning to support their conclusions that there are virtually no restrictions on the state's ability to enact mandatory sentencing laws in those jurisdictions that lack a charter of rights. By contrast, the UK and Strasbourg courts have now made it clear that grossly disproportionate sentences cannot be imposed compatibly with Article 3 and that mandatory sentencing provision are particularly likely to produce breaches of that guarantee. Moreover, we can be cautiously optimistic about the further development of the law in this area if the UK and Strasbourg courts learn from the relevant North American jurisprudence. Specifically, they should avoid the excessively deferential approach evident in many of those authorities and embrace the Canadian Supreme Court's more interventionist stance recently in *The Queen and Attorney General of Canada v Nur and Charles* [2015] 1 SCR 773. In turn, the *Nur* decision provides further evidence that, when they are armed with a charter of rights, ultimate courts of appeal can make a difference if they are courageous enough to do so.

**9.00 – 10.30 am** **Session Six: Interpretive Significance of Core Principles I: Legality, Finality, and Proportionality**

**Bruce Chen**, Monash University

**The Rationale and Application of the Principle of Legality in Modern Statutory Interpretation**

The author's thesis is about the similarities and differences, and the likely interrelationships, between two mechanisms of statutory interpretation – the common law principle of legality and section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), which is a statutory bill of rights.

This paper will focus on the principle of legality. The principle of legality is a 'unifying concept' which encompasses the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, and depart from the general system of law. This paper will draw and build upon the author's published work in 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329. This paper will discuss the competing rationales of the principle of legality, its potential scope for expansion in the near future, and the methodological issues arising under the principle's scope and operation.

**Sarah-jane Morris**, UNSW

**The Principle of Finality in Administrative Law Adjudication**

In recent years the High Court of Australia has emphasised the centrality of the 'principle of finality', explaining that it finds reflection in various aspects of the Australian legal system.

It is arguable that the principle of finality, however described, is better conceived as a normative conclusion about the relative importance of finality in a legal system. To the extent it can be considered a single concept, as opposed to a collection of interests, finality is not absolute. Rather, it is in tension with, and so must be balanced against, competing considerations. The most prominent of these is a desire to ensure judicial determinations are just and correct. Reconciliation of this tension between finality and 'revisionism' is evident in the structure of a legal system's appeal and review mechanisms, as well as some of its legal rules.

My thesis will consider whether a subset of those rules – closure rules (res judicata, common law estoppel and abuse of process) – has, and should have, differential operation in Australian administrative law adjudication. More relevantly for present purposes, it will also address the extent to which the reconciliation of the tension between finality and revisionism is evident in the general structure and principles of Australian administrative law adjudication.

A potentially useful starting point to explore these issues in the Australian constitutional context is the High Court's analysis of the scope of the supervisory jurisdiction of a State Supreme Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531. The paper I will present to the workshop will consider the contribution of *Kirk* to understanding the role of the principle of finality in contemporary Australia.

**Lynsey Blayden**, UNSW

**The Constitution and proportionality in judicial review of administrative action**

This paper will provide an overview of my thesis. It will explore the influence of the Constitution on the scope of judicial review of administrative action in Australia. This will be done by reference to recent developments in case law, including the tentative steps taken towards the introduction of a style of proportionality analysis for review of unreasonableness or irrationality in administrative action.

These developments have cast a spotlight on the long-acknowledged impossibility in drawing a 'bright line' between legality and merits review. The difficulty in defining what 'the merits' are means that review of administrative action is always a balancing exercise carried out by a court, one informed by conceptions of which decisions are appropriate for judges to make, and which are not.

This paper will argue that the central question is not whether courts are doing or can do qualitative review, but rather a more straightforward one of how we determine what a jurisdictional error is. It may be the case that such an exercise requires some form of qualitative assessment. However, in Australia, such an assessment will be confined by the constitutional structure and the underpinning values that inform the approach of courts to it. This not only includes the separation of judicial power required by Ch III, but also wider considerations, including that the Constitution, in providing for responsible government, thereby provides for a form of political scrutiny. Where this kind of scrutiny is available, courts will be less likely to intervene in administrative decision-making, meaning that the scope of a decision-maker's power is drawn more broadly. This kind of approach seems to form a common link between foundation cases and more recent developments in judicial review.

Asking whether a step taken by an administrator is proportionate to the scope of the power they had to take it can be said to be part of the judicial function, which is to determine whether action is confined to the limits set by the law. Once this is accepted, the remaining question is how will what is 'proportionate' be determined. My thesis will argue that this will be done in accordance with already existing common law and constitutional principles. It will then examine what an expanded conception of unreasonableness might mean for judicial review of administrative action in Australia.

**11.00 am – 12.30 pm** **Session Seven: The Interpretative Significance of Core Principles II: Proportionality (Revisited), Separation of Powers, and Nationhood**

**Shipra Chordia**, UNSW

**Proportionality and Tiered Scrutiny: Convergence or Divergence?**

In a series of recent cases, the High Court of Australia has grappled with the question of how to structure its analysis when faced with conflicts between the implied freedom of political communication and legislative enactments. The contours of two alternative approaches have been marked. In the first approach, the methodology elsewhere known as 'structured' or European proportionality has been expressly amalgamated into existing tests of validity. Here, a single standard of review is applied regardless of the degree of imposition on the implied freedom. Under the second approach, tiered scrutiny is preferred. That is, the degree of justification required to establish the validity of an impugned law is calibrated, at the outset, to the burden imposed by it on the implied freedom.

Two questions arise in the context of this emerging dichotomy. The first is whether one approach is preferable over the other. The second is whether the approaches mark an insurmountable divergence in methodology or whether they are reconcilable. These questions echo, and therefore provide a useful lens for examining, elements of the global debate on the relationship between European proportionality and US-style balancing in rights-based adjudication.

In this paper, the competing approaches are considered and evaluated. On one hand, tiered scrutiny attempts a sophisticated resolution of the tension between the judiciary's supervisory role and the restraint it must exercise, particularly within systems that give primacy to democratic institutions. Yet the contextual dependency and corresponding complexity generated in balancing cases means that the 'categorisation' required by tiered scrutiny may be problematic. On the other hand, while structured proportionality offers certain benefits of transparency and flexibility in judicial decision-making, its framework does not articulate any guiding standards of review. As a consequence, its application has the potential to become decoupled from considerations of judicial restraint.

In light of these considerations, it is suggested that neither approach is clearly preferable over the other. Instead, this paper argues in favour of a convergence between the approaches by requiring that standards of review be clearly articulated and applied within the framework of structured proportionality. Such a convergence would preserve the benefits of transparency in judicial reasoning while also enabling concerns regarding judicial restraint to be accounted for. In making this argument, the paper acknowledges that the philosophical, cultural and historical underpinnings of structured proportionality and tiered scrutiny differ. The paper concludes, however, that these differences do not preclude convergence at a conceptual level.

**Tyler Fox**, UNSW

## What is Punishment?: the Separation of Powers Doctrine in the Commonwealth Constitution

The separation of powers doctrine in the Commonwealth Constitution safeguards and separates the judiciary and judicial power. Only the judiciary in an exercise of judicial power can adjudge and punish for criminal guilt. Punishment is not defined in the Constitution.

The High Court has not yet formulated a definition for punishment. If punishment is not defined, the judicial power to punish is left uncertain in both its role and scope. If a particular consequence is found not to be punishment then it may not be exercisable by the courts as part of the judicial power. Defining punishment would safeguard the judiciary's constitutional role, particularly the function of the criminal justice system. Even though the separation of powers doctrine applies differently in State Constitutions, the development of a definition of punishment will assist in the understanding of the constitutional limits that apply to their criminal justice systems.

While the Court has not defined punishment, it has taken a number of approaches to the concept. One approach – the 'purposive/functional approach' – arises from *Chu Kheng Lim v Minister for Immigration* ('*Lim*'). In that case the Court decided involuntary detention could only be the result of an exercise of judicial power for the adjudication and punishment for criminal guilt, subject to non-exhaustive categorised exceptions, such as preventative detention for immigration processing, quarantine, mental health and other forms of detention like arrest and custody pending trial as well as contempt. The *Lim* approach requires that the detention be 'reasonably capable of being seen as necessary' for the non-punitive purpose to be fulfilled. In terms of the purposive/functional approach, punishment can be defined as when the period of detention goes beyond what is 'reasonably capable of being seen as necessary' to achieve the purpose of the categorised exception.

Another approach – the 'consequential approach' – involves analysis of the nature of the consequence of a legal breach and its purpose. A consequence, like forfeiture, can be preventative depending on the purpose attached to it.

The last approach is one of 'self-definition' where, in the Court's words, 'punishment is punishment'. This self-definition has not been endorsed to apply particularly in constitutional disputes, which makes its utility questionable in resolving the meaning of punishment in the separation of powers doctrine.

**Peta Stephenson**, University of Queensland

## Measuring the Metes and Bounds of Commonwealth Executive Power: Nationhood and Section 61 of the Constitution

The High Court has recognised that s 61 of the *Constitution* incorporates an implied executive 'nationhood' power. The nationhood power has its roots in early decisions of the High Court, which suggested that the Commonwealth was conferred with an implied power of self-protection. This power was recognised by Dixon J in the *Communist Party Case* as supporting Commonwealth legislation necessary to 'protect its own existence and the unhindered play of its legitimate activities'.

The scope of the nationhood power underwent considerable expansion in the *AAP Case*. In what has proven to be an influential dissent, Mason J held that it not only supported executive activities 'necessary' for the protection of the Commonwealth, but activities 'peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.

The High Court has applied Mason J's 'peculiarly adapted' test in cases concerning non-coercive executive activities, such as spending, undertaken by the Commonwealth without statutory authority. It has not, however, been applied in cases involving coercive action carried out by the Commonwealth in the national security and immigration contexts. In this paper, I contend that different tests have been applied in the cases because coercive and non-coercive executive activities engage different 'aspects' of the nationhood power.

I argue that the 'primary' aspect of the nationhood power supports coercive action which has as its purpose the protection of the Commonwealth. This aspect of the nationhood power is derived from, and intimately connected to, the sovereign status of the Australian polity. As the primary aspect of the nationhood power may interfere with the rights of individuals, Australian Courts have, in these cases, applied proportionality to ascertain the legality of the Commonwealth's actions. The 'secondary' aspect of the nationhood power, on the other hand, is derived from the character of the Commonwealth as the national government. It supports non-coercive executive activities which are 'appropriate' to a national government, as determined by the application of Mason J's 'peculiarly adapted' test.

**1.30 – 3.00 pm** **Session Eight: Justice in Substance and Procedure**

**Arran Gerrard**, Murdoch University

## The Relationship of the Hearing rule to Visa Cancellations on Character Grounds

The *Migration Act* provides for two separate regimes in respect of cancellations on character grounds. If a decision is cancelled by a delegate of the Minister the person has the right to apply to the Administrative Appeals Tribunal (AAT) for merits review. If the Minister personally cancels a person's visa, there is no right of review in the AAT. There have been starkly contrasting views expressed by recent Ministers as to whether the Ministerial power should be used rarely or exclusively. This has significant implications in respect of the rights of persons who have their visas cancelled or refused on character grounds.

The vast majority of persons cancelled under s501 are cancelled on the basis of their serious criminal record and the provision tends to capture two classes of convicted persons: those who have received a significant sentence because of the nature of their offence and those who have a lengthy criminal record. Frequently, persons convicted under s501 have no legal representation and little formal education. English is often their second language and ordinarily they are incarcerated at the time they are provided with an opportunity to respond in writing to foreshadowed cancellation. Their responses in writing are often limited in content, inarticulate and rushed. Thus, the opportunity to attend an AAT hearing is perhaps the only opportunity for these persons to be able to respond to specific issues such as the seriousness and nature of offences and the risk of recidivism. Clearly the genuineness and extent of remorse, the commitment to rehabilitation, the closeness of any connection with family members, particularly children: these are all issues which are far more reliably assessed in the context of a merits review hearing.

This paper explores the requirements of the hearing rule in the context of character cancellations. It will ultimately be argued that if the Act persists in requiring a person to demonstrate something as intangible as their character, then that person must be offered a real opportunity to demonstrate and defend their character. Given the significant consequences that an adverse character decision will have and the considerable disadvantages a person has in attempting to respond, it will be argued that only an independent merits review hearing can constitute a proper opportunity and that attempts to circumvent this constitutes a violation of the hearing rule.

**Shelley Eder**, Charles Darwin University

## Analysis of the Regulatory Framework Relating to Dispute and Complaint Resolution in Australian Prisons in Accordance with Procedural Justice Theory

Scholars have long theorised that factors relating to procedural justice (namely factors relating to complaint handling, perceptions of fairness and bias of prison administration and prison officers and perceptions of 'legitimacy' of prison administrative regimes) will have an effect on rates of prison violence in any given institution. Biere, for example, found a correlation between the fairness of complaint handling processes and overall rates of serious violence in prisons throughout the United States.

Procedural justice has some basis in broader jurisprudential theory. For legal positivists, procedural justice can be seen as one important means of maintaining and justifying the legitimacy of a legal system. Even in the prison setting, it has been recognised that legitimacy does have a role to play in the maintenance of order:

> Despite the coercive methods of control available to prison authorities, it remains the case that order in prison depends on the acquiescence and cooperation of the prisoners themselves. Without the active cooperation of most inmates, most of the time, prisons could not function effectively.

It has been further noted:

> … prisons can play a causal role in terms of building or diminishing legitimacy in the eyes of inmates, and those changes are likely tied to perceptions of staff or policies in terms described by Procedural Justice scholars.

**Contribution to knowledge**

Whilst there is much literature on procedural justice in the Australian context, little has been written on procedural justice in the context of Australian prisons. This presentation will outline the theoretical framework of procedural justice, explain why it is important in the prison setting, and further explore how it may be used to improve the processes of dispute and complaint resolution mechanisms within a given prison institution. The presenter will invite questions, comment and suggestions in relation to the proposed research.

**Bill Swannie**, Monash University

**Taking Racial Vilification Seriously: A Proposed New Regulatory Framework**

This thesis examines Australia's current legal framework regarding racial vilification, and looks at how it could be improved. Specifically it argues that although s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) sets an appropriate standard in terms of the types of conduct caught, the enforcement method which it uses (primarily, private conciliation) is no longer appropriate.

In particular, s 18C applies only to 'public' conduct, and many of the reported decisions involve very public statements made by prominent public figures (such as politicians, popular radio presenters, and newspaper and internet publications). However, the RDA currently treats these matters as private disputes, and victims of racial abuse are currently required to bring individual complaints forward for conciliation or resolution by a court.

The thesis will argue that racial vilification is a particularly harmful form of discrimination (often against minority groups). The thesis will deconstruct 'free speech' and libertarian arguments, and will examine the social harms caused by racial vilification.

My research will examine racial vilification laws in countries such as Canada and New Zealand (which also have domestic human rights legislation). In these jurisdictions the relationship between freedom of expression and freedom from discrimination has been explored through parliamentary debate and judicial decisions. The legitimacy and importance of prohibitions on racial vilification has been thoroughly considered and upheld in these jurisdictions.

This thesis will consider alternative regulatory approaches to racial vilification in Australia. One option is to establish an independent statutory body responsible for investigating and prosecuting incidents of racial vilification. This body would have similar functions to that currently performed by occupational health and safety regulators. This is an area in which a purely private law approach has been recognised as no longer appropriate.

This thesis will consider the proper role of the State in relation to the issue of racial vilification, particularly in a multicultural society which values diversity. Should the State merely provide the legal framework and institutions through which individual 'complaints' of racial vilification may be resolved? Or should the State play a more active role in promoting equality, particularly for members of racial and ethnic minorities?

**3.30 – 4.30 pm** **Session Nine: Representation and Self-Determination**

**Harry Hobbs**, UNSW

## Democratic Theory, Counter-Majoritarian Constraints and Indigenous Peoples

Although a contested term, 'democracy' connotes ideas of political equality and self-rule. With this in mind, considerable attention has been focused on the means through which collective self-rule can be instrumentalised. Despite problems at the edges, majority rule is generally considered to express the fundamental political equality of citizens, or to maximise the number of people who exercise self-rule. However, concern that majority rule can place the rights of a minority in danger, lead many to contend that counter-majoritarian constraints are necessary to protect equal access to the political process. While Bills of Rights are the paradigmatic counter-majoritarian constraint, many states adopt alternative mechanisms. For example, Australia distributes political power horizontally across a bicameral parliament with (almost) equal powers, and vertically via division of competencies between the federal government and eight states and territories. Additionally, overlaying this arrangement is a separation of powers between the legislature, executive and judiciary. This complex structure appears to balance the value of majority rule against the danger of 'tyranny of the majority'.

The position of Australia's Indigenous peoples suggests this view is misstated. Indigenous Australians are 'an extreme minority', territorially dispersed across the continent. This precarious demographic position weakens Indigenous Australians' ability to effectively participate in the democratic system and influence its institutions towards their aspirations. The absence of constitutional protection of Indigenous interests has left Indigenous Australian's particularly vulnerable to the 'wavering sympathies of the Australian community'. This is not an academic concern; in 2007, for example, the government suspended the *Racial Discrimination Act* in order to pass discriminatory legislation in Aboriginal communities across the Northern Territory.

The United Nations *Declaration on the Rights of Indigenous Peoples* affirms that Indigenous peoples have the right to maintain their own autonomous institutions, and to participate fully in the life of the State. Institutional structures promoting Indigenous participation are diverse, including, dedicated parliamentary seats, representative organisations parliament must consult with, and representative bodies with jurisdiction over defined areas. No such institutions exist in Australia. The absence of Indigenous-specific counter-majoritarian structures in Australia suggests that democratic theory needs to be updated. I intend to explore whether reserved seats or Indigenous parliaments, can—similarly to 'ordinary' counter-majoritarian mechanisms—be grounded in democracy itself. An affirmative answer to this question will be a powerful argument for structural change in Australia.

**Shireen Morris**, Monash University

## Whether Mechanisms for Increased Indigenous Representation, Participation and Self-Determination Could Form Part of a Revised Package of Reforms for Indigenous Constitutional Recognition

Over recent years, the debate on Indigenous constitutional recognition has tended focus on judicially adjudicated mechanisms for Indigenous rights protection. Representative, political and participatory forms of Indigenous constitutional recognition have not been extensively explored. This paper addresses that gap. It examines whether mechanisms for increased Indigenous representation, participation and self-determination could form part of a revised package of reforms for Indigenous constitutional recognition that may be capable of engendering the necessary bipartisan support for a successful referendum.

In particular, the paper suggests and explores the possibility of a constitutional amendment establishing an Indigenous representative body, to constitutionally guarantee Indigenous peoples a non-binding voice in Australia's law and policy making processes with respect to Indigenous affairs. I propose that such an amendment could be designed to fully respect parliamentary supremacy, while also giving effect to long-standing Indigenous advocacy for increased self-determination, representation and authority in their affairs. Further, I analyse whether and how such an amendment could be drafted to be non-justiciable, thereby avoiding risk of judicial intervention and laws being struck down, but still carrying authoritative political force. I also seek to distinguish the potential effectiveness of such a constitutional body from the failed Interstate Commission and ATSIC.

The paper suggests that a mechanism guaranteeing the Indigenous voice in Indigenous affairs would be particularly in keeping with Australia's essential constitutional nature and design, which protects citizens' rights mostly though institutional, democratic and federal power-sharing mechanisms rather than through judicially adjudicated rights clauses. It would also be more likely to win bipartisan support than a new, judicially adjudicated rights clause.