Australian National University

Centre for International and Public Law

ANU College of Law

I•CON AUS/NZ CONSTITUTIONAL THEORY GROUP PLENARY CONFERENCE

1946 75 2021

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Welcome

We are pleased to announce the first Plenary Conference of the Constitutional Theory Group of the I·CON-S Aus/NZ branch, to be held Friday 1 April from 10:00 am to 5:30 pm at the ANU College of Law Moot court.

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In 2021, we inaugurated the Group with the aim of developing and deepening the constitutional theory academic community in Australia and New Zealand. In our first year we held over a dozen workshops across the Group's various sub-streams.

Plenary conferences are opportunities for members of the various streams to come together and share recent scholarship — including both published books and articles.

This will be a hybrid online/in-person event. Presentations are open to non-members and there are no conference fees. There will be an informal dinner at Walt & Burley after the conference.

Schedule

10:00 am – 10:15 am	WELCOME	Jelena Gligorijevic and Ron Levy, ANU
10:15 am – 10:45 am	BOOK SESSION 1	Reforming Age Discrimination Law Alysia Blackham, Melbourne Discussant Tarunabh Khaitan, Oxford)
10:45 am – 11:45 am	ARTICLES SESSION 1	Constitutional Salience of the Community Farrah Ahmed, Melbourne, Anne Macduff, ANU and Mareike Riedel, Macquarie Chair Adrienne Stone, Melbourne
11:45 am – 12:15 pm	BOOK SESSION 2	The Judicial Function: Joe McIntyre, UniSA Discussant Marcelo Ferrere, Otago
12:15 pm	LUNCH	
1:15 pm – 2:15 pm	ARTICLES SESSION 2	Constitutional Deliberation Dominique Dalla-Pozza and Mark Fletcher, ANU and Sarah Sorial, Macquarie Chair Gabrielle Appleby, UNSW
2:15 pm – 2:45 pm	BOOK SESSION 3	Beyond the Republican Revival Eric Ghosh, UNE Discussants Jelena Gligorijevic and Joshua Neoh, ANU
2:45 pm – 3:15 pm	BOOK SESSION 4	Australian Constitutional Law: Principles in Movement Jonathan Crowe, Bond Discussant Elisa Arcioni, Sydney
3:15 pm	BREAK	
3:30 pm – 4:30 pm	ARTICLES SESSION 3	Constitutional Change Zim Nwokora, Deakin and Ron Levy, ANU Chair Scott Stephenson, Melbourne
4:30 pm – 5:30 pm	ARTICLES SESSION 4	Accommodating Difference Alex Deagon, QUT and Vito Breda, USQ Chair Eddie Synot, UNSW
6.30 pm	DINNER	Walt & Burley (70/17 Eastlake Parade, Kingston ACT)

Books

Alysia Blackham, Reforming Age Discrimination Law: Beyond individual Enforcement (OUP)

Age is a critical issue for labour market policy. Both younger and older workers experience significant challenges at work. Despite the introduction of age discrimination laws, ageism remains prevalent. This book offers a roadmap for the future development of age discrimination law in common law countries, to better address workplace ageism. Drawing on theoretical, doctrinal and empirical legal scholarship, and comparative perspectives from the United Kingdom, Australia and Canada, the book provides a grounded critique of existing age discrimination laws and their enforcement, and puts forward concrete suggestions for legal reform and change. It examines the challenges and limitations of existing legal frameworks and the individual enforcement model for addressing age discrimination in employment, mapping the stages of claiming, negotiation or alternative dispute resolution, and hearing and judgment, using mixed method case studies of the enforcement of age discrimination law in the United Kingdom and Australia. The book puts forward a four-fold model of reform to strengthen age discrimination law, to improve the individual enforcement model, strengthen positive equality duties, bolster the roles of statutory equality agencies, and enhance collective enforcement. The book critically considers how these options might address the limits of existing laws, and the practical measures necessary to ensure their success.

Jonathan Crowe, Australian Constitutional Law: Principles in Movement (OUP)

This book surveys the core doctrines of Australian constitutional law through the conceptual lens of constitutional movement. This concept expresses the idea that the Australian Constitution is founded on certain organising principles to which the High Court consistently returns in its reasoning. Constitutional decisions often represent attempts by legal officials and judges to balance these principles and understand their role in the Australian system of government. They function as centres of gravity to which the High Court is drawn when deciding constitutional cases. They therefore provide a useful framework for understanding how constitutional law has evolved over time, as well as predicting where it is likely to go in the future. In this talk, I introduce the organising themes of constitutional movement and centres of gravity. I explain how legal officials and judges circle back to certain key values in their decisions, illustrating this by reference to prominent constitutional doctrines such as the rule of law, the separation of powers, federalism and representative government. I also consider the increasingly prominent role of proportionality as a tool in balancing these considerations.

Eric Ghosh, Beyond the Republican Revival: Non-domination, Positive Liberty and Sortition (Hart)

This is the first book-length treatment of both the non-positive- and the positive-liberty strands of the republican revival in political and constitutional theory. The republican revival, pursued especially over the last few decades, has presented republicanism as an exciting alternative to the dominant tradition of liberalism. The book provides a sharply different interpretation of liberty from that found in the republican revival, and it argues that this different interpretation is not only historically more faithful to some prominent writers identified with the republican tradition, but is also normatively more attractive. The normative advantages are revealed through discussion of some central concerns relating to democracy and constitutionalism, including the justification for democracy and the interpretation of constitutional rights. The book also looks beyond republican liberty by drawing on the republican device of sortition (selection by lot). It proposes the use of large juries to decide bill-of-rights matters. This novel proposal indicates how democracy might be reconciled with constitutional review based on a bill of rights. Republicanism is not pitted against liberalism: the favoured values and institutions fit with liberal commitments.

Joe McIntyre, The Judicial Function: Fundamental Principles of Contemporary Judging (Springer)

Judicial systems are under increasing pressure: from increasing litigation costs and decreased accessibility, from escalating accountability and performance evaluation expectations, from shifting burdens of case management and alternative dispute resolution roles, and from emerging technologies. For courts to survive and flourish in a rapidly changing society, it is vital to have a clear understanding of their contemporary role – and a willingness to defend it. This book presents a clear vision of what it is that courts do, how they do it, and how we can make sure they can perform that role well. It argues that courts remain a critical, relevant and supremely well-adjusted institution in the 21st century. The approach of this book is to weave together a range of discourses of surrounding judicial issues into a systemic and coherent whole founded on the articulation of the judicial function. It begins by articulating the dual roles at the core of the judicial function: third-party merit-based dispute resolution and social (normative governance). By expanding upon these discrete yet inter-related aspects, it develops a language and conceptual framework to understand the judicial role more fully. The subsequent chapters demonstrate the explanatory power of this function, examining the judicial decision-making method, reframing principles of judicial independence and impartiality, and re-conceiving systems of judicial accountability and responsibility. The book argues that this function-driven re-conception provides a useful re-imagining of some familiar issues as part of a coherent framework of foundational, yet interwoven, principles. This approach not only adds clarity to the analysis of familiar concepts and the concrete mechanisms by which they are manifest, but helps make the case of why courts remains a superbly well adapted social institution. Ultimately, this book is an entreaty not to take courts for granted, nor to readily abandon the benefits they bring to society.

Articles

Farrah Ahmed, Fraternity and the Law

Despite its appearance in prominent constitutions, fraternity rarely appears in accounts of public law in the common law world. This is generally considered both unsurprising and unproblematic: the law is often thought unsuitable for promoting fraternity; and fraternity is often thought to sit uneasily with individualistic liberal commitments. This paper argues that, contrary to common assumption, fraternity played and continues to play an under-appreciated role in constitution-making and that public law ought to be re-imagined with greater attention to fraternity as an ideal.

Vito Breda, Constitutionalism and Regionalism

Citizens in a multinational state might not speak the same language or they might not share deeply held beliefs over life choices, yet they commit to the rules that are approved by the majority of their representatives. These rules represent an overlapping consensus over shared values. A small minority might completely reject the validity of such assumptions and yet others may develop a sense of attachment to these values which motivates them to go to extraordinary lengths to protect the rest of the community against pandemics, crimes and foreign invasion. The majority sit somewhere in the middle between these two extremes, showing a silent commitment to their community by complying with laws and regulations. This sense of loyalty to the rules is shared by individuals who belong to a regional or national group. However, and given that national and sub-state national identities are dynamic, regionalism also requires a system of rules for change in a way that is fair. If the procedure that inserts regionalist claims is too restrictive, regional groups might perceive themselves as being dominated by the majority. This presentation provides a comparative overview of these procedures.

Dominique Dalla-Pozza and Mark Fletcher, The Emergent 'Dual Mechanism' of the Parliamentary Joint Committee on Intelligence and Security: Implications for Deliberative National Security Lawmaking in Australia

Alex Deagon, State (non-)Neutrality and Conceptions of Religious Freedom

This paper argues that there is no truly 'neutral' conception of religious freedom which can be assumed by states when they determine how best to regulate religion. Secularism itself is a religious idea. Narrow, strict secular approaches which entail both institutional and political separation of religion and government are predicated upon theological assumptions and frameworks, as are more avowedly neutral secular or accommodationist approaches which institutionally separate church and state but allow some interaction between religion and government. Obviously, weak or strong establishment approaches also involve more overt religious frameworks which variously allow more or less religious freedom in a particular state. The chapter consequently proposes that the fundamental question is not which approach is neutral (for none are), but which approach is most desirable and best suits the cultural, political and legal arrangements of the specific state.

Forthcoming in Jasper Doomen and Mirjam van Schaik (eds.), Religious Ideas in Liberal Democratic States (Rowman & Littlefield, 2021).

Ron Levy, Fixed Constitutional Commitments: Evaluating Environmental Constitutionalism's "New Frontier"

Forthcoming in Melbourne University Law Review.

Constitutional protections for the environment typically exhort governments, in broad terms, to pursue objectives such as mitigating climate change. This article identifies a species of environmental constitutional provision that, by securing quantified or otherwise absolute commitments, departs markedly from past approaches. The numeric precision of these 'fixed constitutional commitments' is intended to curtail vagueness, open-endedness and interest-balancing – features that, though standard in contemporary constitutional procedure, are poorly suited to chronic emergencies requiring unwavering policy responses over the extreme long term. Fixed constitutional commitments on the environment have been enacted in Australia (Victoria), Bhutan, Kenya and the United States (New York). Yet they raise both pragmatic and normative concerns. The article focuses on (and refutes) a significant normative objection: that taking foundational questions of substantive policy offline unduly curtails democratic deliberation.

Anne Macduff and Mareike Riedel, Legislating for Social Cohesion?

The term 'social cohesion' has become a buzzword of public policy discourse. Over the past decade, federal governments have justified the introduction of a diverse set of laws and programs as 'enhancing social cohesion'. The funding of various sports programs, the development of initiatives to reduce racial discrimination, and the ratcheting up of anti- terrorism and national security laws have all have been justified in the name of social cohesion. Yet, despite its frequent use what is meant by social cohesion and how the law relates to social cohesion remains unclear. This presentation traces the term 'social cohesion' in explanatory memoranda and the way it has been deployed for justifying legislation to explore the shifting meanings of social cohesion in Australian law making.

We suggest that definitional choices, even if they are not made explicit, have consequences for what is identified as a threat to social cohesion and what measures are recommended to remedy this threat. Lurking behind these choices are longstanding theoretical and ideological debates about what makes a good society, what generates well-being and prosperity, and what poses a risk to society at a certain time. We identify three periods of 'threats' to social cohesion in

Australian legal discourse: intolerance and discrimination in a diverse society, the supposed fragmentation of a diverse society and the dangers of radicalisation, and, more recently, a more diffuse sense of threat in relation to biosecurity and the world wide web. Moreover, contrasting government uses of the term 'social cohesion' with insights from the social sciences literature on the various dimensions and preconditions of social cohesion, we discuss how legislation has disproportionately focussed on certain dimensions of social cohesion, while neglecting crucial others. We conclude by discussing the usefulness of mobilising the term social cohesion for legislation.

Zim Nwokora, Constitutional Design for Dynamic Democracies: A Framework for Analysis

Over time, a constitution may become suboptimal for the political system that it is meant to support and yet remain in place, largely unchanged. Thus, we might ask how a constitution can be designed to remain ideal for a democracy as it evolves, and indeed whether this is even possible. This practical dilemma has not been rigorously analysed in the literature on constitutional design, however, because this research agenda has tended to downplay the potential for democracies to transform over time. To remedy this gap, this article sketches an explicitly temporal approach to design, which takes account of a wide range of political system dynamics. The framework contributes insights into: the various ways that constitutional structures can be designed to operate over time; the alignment between these setups and different political system dynamics; and the means by which a constitutional design process might be reconfigured to give more weight to the prospect of fundamental political change.

Forthcoming in International Journal of Constitutional Law

Sarah Sorial, Mini-publics and the Legitimacy Dilemma: Balancing the Tension between Deliberation and Participation in Deliberative Theory

This paper explores the so-called legitimacy dilemmas as it arises in deliberative theory. The dilemma is that the higher the number of people participating in deliberation, the lower the quality of deliberation is likely to be, but the outcome might be more legitimate. The more restricted deliberation is, the higher its quality, but the outcome might lack legitimacy. Mini-publics have been proposed as one way out of this dilemma, however, there have been recent criticisms that mini-publics are not an adequate solution because they are not suitably representative of ordinary citizens; nor are they accountable to them. Drawing on analogous debates in the procedural justice literature on the difference between descriptive legitimacy and normative legitimacy, and the ways they converge, I offer an alternative way out of the legitimacy dilemma. I suggest that the perception by ordinary voters that mini-publics are legitimate is both a necessary and sufficient condition for normative legitimacy. I draw on recent empirical evidence from the Irish Constitutional Convention on marriage equality and the Irish CA on the repeal of the 8th Amendment to develop this claim.

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