THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW

Comparative scholarship on judicial review has paid a lot of attention to the causal impact of politics on judicial decision-making. However, the slower-moving, macro-social process through which judicial review influences societal conceptions of the law/politics relation is less well understood. Drawing on the political science literature on institutional change, *The Politico-Legal Dynamics of Judicial Review* tests a typological theory of the evolution of judicial review regimes – complexes of legitimating ideas about the law/politics relation. The theory posits that such regimes tend to conform to one of four main types – democratic or authoritarian legalism, or democratic or authoritarian instrumentalism. Through case studies of Australia, India, and Zimbabwe and a comparative chapter analyzing ten additional societies, the book then explores how actually existing judicial review regimes transition between these types. This process of ideational development, Roux concludes, is distinct both from the everyday business of constitutional politics and changes to the formal constitution.

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The Politico-Legal Dynamics of Judicial Review

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For Hannah and Sarah

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Acknowledgments

Australia is a place where writing a scholarly treatise is generally thought to be a missed opportunity to do other, more important things, like investing in the property market or hitting a red ball across a green field. If you foolishly admit over the barbecue flame to being an academic, the look of puzzled confusion on your interlocutor's face can incapacitate you for a week.

If this is true of Australia generally, it is also true of its tertiary education sector in particular. The neoliberal, managerialist assault on the humanities and social sciences, which British universities have had the good sense to attenuate and elite American universities the private funding to ignore, is in the Antipodes still a topic of anxious conversation. Australian universities' usually very admirable desire to prove their international standing has made them particularly susceptible to the cult of the rankings lists, as though something as intrinsically important as the pursuit of truth could be reduced to a SNIP index. In this measurable-outcomes-oriented world, the writing of a scholarly treatise, and especially one that takes four years to complete, is generally seen as being akin to playing test cricket when all the money and crowd support is in the shorter versions of the game.

The word "generally," however, implies that there are exceptions, and it is in the community of the exceptional that a book like this gets written. First and foremost, I would like to acknowledge the support of my home institution, UNSW Law, which has fearlessly defended its research culture in the face of serious challenges. From the time of his appointment in 2016, George Williams has been a brave and exemplary Dean and the most committed democrat one could ever wish for. Carolyn Penfold and Andrew Lynch, as successive Heads of School, have been friendly puncturers of my surly disposition. My extraordinarily gifted colleague, Rosalind Dixon, has honored me with a sustained interest in my work. Her standing in the comparative

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Lastly, to my daughters, Hannah and Sarah, to whom this book is dedicated, I am sorry for what I have put you through, but I hope that reading this book, or just leafing through it, you will get some sense of the madness that possessed me.

Various iterations of this book have been presented at seminars in Australia, India, and the United States. The typology on which this study is based was first presented in a different form at a comparative constitutional law symposium organized by Rosalind Dixon at UNSW Law in November 2013. I presented an early draft of the Australian case study chapter at the Australian Political Studies Conference in Sydney in September 2014. In April 2016, Kevin Walton kindly invited me to present what turned out to be an initial version of Chapter 2 at the Julius Stone Institute at the University of Sydney. In October of that year, Erin Delaney and Rosalind Dixon hosted a Conference on Comparative Judicial Review at Northwestern University Pritzker School of Law at which I again presented the theoretical framework for this study. I presented the redrafted paper I eventually wrote for Erin and Rosalind's edited anthology at the Centre for Comparative Constitutional Studies *Constitutional Theory Workshop* at the University of Melbourne in July 2017. Chapter 6 was presented in near-final form at the UNSW Law *Comparative Constitutional Law Roundtable* in August 2017 (again organized by Rosalind Dixon) and at the Australian National University *Troubling the Rule of Law* Conference at Kioloa, New South Wales, in September 2017 (organized by Nick Cheesman). In November 2017, Alexander Fischer of Jindal Global Law School organized a workshop at which the Indian case study chapter was presented. Finally, in December 2017, Rosalind Dixon helped me to organize a book manuscript review workshop at UNSW Law at which I presented the penultimate draft of this book. I am grateful to the

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In the course of writing this book, I tested out parts of the argument in published papers. Some passages from these papers have been republished in this volume, as indicated in parentheses after the citation: "Reinterpreting the Mason Court Revolution: An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia" (2015) 43 *Federal Law Review* 1 (a couple of paragraphs from Chapter 4); "Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court" (2016) 17 *Australian Journal of Asian Law* 1 (sections of Chapter 7); "Comparative Constitutional Studies: Two Fields or One?" (2017) 13 *Annual Review of Law & Social Science* 123 (parts of Chapter 1); "How, When and Why Does Faith in Law's Autonomy Decline? A Comparative Constitutional-Cultural Analysis" in Erin F. Delaney and Rosalind Dixon (eds.), *Comparative Judicial Review* (Edward Elgar, forthcoming) (small portions of Chapter 6); and "In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review" in Ron Levy and Graeme Orr (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 203 (some of the argument in Chapter 7). I am grateful to the editors and publishers of these papers for permission to republish the relevant extracts here.