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Foreword

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Foreword

Abstract

The theme of this special edition, ‘The Law and Politics of Control and Power’, is drawn from the 2017 Interdisciplinary Conference of the *Global and Comparative Law and Policy Network* (then known as the *Transnational, International and Comparative Law and Policy Network*) held at Bond University, Australia. Many of the papers included here had their genesis at that event. Bond University is situated on the traditional lands of the people of the Yugambeh language group and, to that end, sincere acknowledgements are offered to the traditional custodians, as are deepest respects to elders past, present and emerging.

Keywords

law, politics, control, power

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Law and politics are both connected with the way power is exercised and the way control is achieved. ‘Power’, as a noun, is the ‘capacity or ability to direct or influence the behaviour of others or the course of events’,¹ and/or ‘the ability or capacity to do something or act in a particular way’.² ‘Control’, as a noun, is ‘the power to influence or direct people’s behaviour or the course of events’.³ Notably, synonyms of control include: jurisdiction, sway, power, authority, command, dominance, domination, government, mastery, leadership, rule, reign, sovereignty, supremacy, ascendancy, predominance, and hegemony.⁴

Each of these words describes aspects of a legal system influenced by politics and power. In that context, this special edition asks: how do law and politics influence the way power and control are exercised? Is the legal regulation of power in particular contexts effective? How can law and politics be better regulated? How can law and politics be kinder? Does a particular law adequately reflect and control the intended relevant political intent? How does an understanding of power assist us in understanding legal and political discourse?

The contributions provide interdisciplinary legal perspectives. This is because solutions to legal and political questions will rarely be found in silos. Human communities are not one-dimensional. Dialogue on different power paradigms leads us to better understand the way in which law achieves, and fails to achieve, its intended outcomes and the mechanisms by which power and control are wielded. The contributions included in Part I present broad and thematic assessments of law, politics, control and power in modern society.

¹ *Oxford English Living Dictionaries* (Dictionary) (online ed, at 23 August 2018) ‘Power’. See also Bruce Moore (ed), *Australian Concise Oxford Dictionary* (Oxford University Press, 5th ed, 2009) 1115.

² *Oxford English Living Dictionaries* (Dictionary), above n 1, ‘Power’.

³ *Ibid* ‘Control’. See also Bruce Moore (ed), *Australian Concise Oxford Dictionary* (Oxford University Press, 5th ed, 2009) 303.

⁴ *Oxford English Living Dictionaries* (Thesaurus) (online ed, at 23 August 2018) ‘Control’. See also Ann Atkinson, Susan Butler and Richard Tardif (eds) *Macquarie Concise Thesaurus* (Macquarie Dictionary Publishers, 2nd ed, 2008) 173.

Irene Watson, a descendent of the Tanganekald, Meintangk and Boandik Peoples of the South-East of South Australia, reflects upon the significance and legacy of the Commonwealth of Australia's 1967 referendum. She does so from a critical First Nations perspective. Watson notes the way power has been used against First Nations, including even now through Australian states continuing to determine the future and balance of Aboriginal interests as against development and industry. She argues that fracking for natural and unconventional natural gas development, uranium mining and coal mining pose wide-scale threats to the territories of First Nations across Australia. In so doing, Watson also considers the issue of the constitutional recognition of First Nations peoples through the analogy of a birth certificate. She asks: 'If we have been here forever and we have an ancient constitution through our ancient connections to law and country, why would we want to be re-born again? Why be reborn again when our claims to our country have been confirmed forever and indeed, acknowledged in non-Aboriginal discourses as extending for more than 65,000 years? Why be re-born on the certificate of the Australian state, which has initially excluded our very existence as Peoples and when it did include reference to us, made sure to limit our own being as Aboriginal?'

Kim Rubenstein, well known for her work on citizenship, also turns our minds to First Nations peoples. She recalls the *Uluru Statement from the Heart* and considers the issues it raises for conceptions of citizenship in modern Australia. In her view, the *Uluru Statement* is a commitment to the importance of recognising the nature of the proper relationship between the law giver and those subject to the law: the citizenry. Rubenstein argues that if the Australian government chose to embrace the Uluru Statement as a statement of 'active citizenship', Australia would have a better chance of creating a more democratic community. In so doing, reconciliation would not only be a meaningful and restorative act, but also one that recalibrates the exercise of power in Australia to benefit all Australians by affirming a commitment to all Australian's equal citizenship as 'active' agents.

Nick James considers 'power' through the lens of Michel Foucault. Foucault insisted that most claims that are presented as 'truth' can be viewed as expressions of power by the maker of the claim that seek to shape the knowledge and understanding of those to whom the claim is made and/or to subvert or undermine competing claims. On this premise, James advocates against binary approaches to truth and suggests that viewing competing truth claims as 'vectors of power that are intersecting and interacting' allows for a more informative and realistic understanding of reality. He observes the powerful temptation to choose a side in 'culture wars', but argues the more useful approach is to understand the power-dynamic in any given debate. In his view, a particular kind of empathy and compassion emerges when we loosen our grasp upon a preferred discourse. James then identifies ten insights into the nature of power and its relationship with law that can be derived from the work of Foucault. In so doing, he provides an accessible account of post-modernism.

Jonathan Crowe also engages with ideas of empathy in his assessment of modern political discourse. The core problem with modern political discourse, Crowe argues, is that it is beset by three pervasive and harmful illusions: the illusions of control, desert and revenge. Each of these reinforces a narrative in which vulnerable people are constructed as an ‘other’. By way of redress, Crowe posits a radically new form of political discourse based on accepting that we are not in control, people don’t get what they deserve and coercion is not the answer. In drawing on the work of Emmanuel Levinas, he advocates the idea of ‘small justice’, which focuses on the other not as an abstract person, but rather as a concrete individual. For Crowe, this situates politics not in an institutional landscape, but rather as a personalised relation primarily concerned with how we treat those to whom we are directly and personally accountable.

The articles in Part II follow on from these broad and thematic explorations to present us with analysis of the way in which law, politics, control and power manifest in specific regulatory contexts.

Elizabeth Greene and Jodie O’Leary consider the legal regulation of domestic violence—violence against family members being a perverse exercise of power and control. Greene and O’Leary consider whether disclosure schemes aimed at informing potential victims of domestic violence of acts of past violence committed by a partner are helpful and effective. They suggest that while well-intended, such schemes may do more harm than good. Greene and O’Leary also suggest that such schemes are likely a manifestation of male-dominated power structures and patriarchal conditioning. This is because such schemes impose the burden of protection on victims themselves, rather than placing the responsibility for such acts on perpetrators, and on the social climate that cultivates capacity for such violence in the first place.

Umair Ghori alerts us to the ways in which power and control can be misused by developed countries over developing countries in resolving investor disputes. In his view, current systems of investor–state dispute settlement require reform in order to address such power imbalances. In considering a number of possible remedies for this, Ghori poses a number of questions, including whether ‘neutrality’ is really a desirable characteristic for individuals called on to decide questions of governance, public health, environment, domestic public policy or national interest in foreign investment regulation. Does a person instead require an element of subjective understanding of a particular society and national climate in order to make such enquiries? Does the appointment of an adjudicating body nominated by government functionaries (e.g., trade ministers) remedy the inherent unfairness of government regulation being debated and adjudicated upon by an unelected body of, quite possibly, unrelated individuals? In exploring these questions, Ghori challenges the presumption that neutral decision-makers make better decisions.

Narelle Bedford, following on from her existing work on public interest standing, here considers the implication of cost orders on access to justice in administrative matters. In considering the capacity of individuals to

exercise ‘power’ by challenging decisions made by governments in court, Bedford points out that fear of an adverse cost order can prevent potential applicants from seeking judicial review in court. In her analysis, Bedford draws on examples from Queensland, considers the distinct advantages of tribunals in alleviating the burden of costs, and points to modern developments such as crowd-funding. She considers the role of these in balancing power relations as between the state and the individual, and in better ensuring access to justice.

Michael Krakat takes up the theme of citizenship introduced by Rubenstein, and he does so from a transnational investment perspective. Specifically, he considers the issue of the ‘sale’ of citizenship through ‘Citizenship by Investment’ (‘CBI’) schemes. Krakat explains that CBI schemes exist in isolation from other conceptions of citizenship, largely because access to such schemes is generally limited to the ultra-wealthy. He points out that ordinarily, citizenship is acquired by way of birthplace under the territorial principle, by descent under the parental principle, or a naturalization process requiring years of physical presence in a country. CBI programmes, however, in effect, offer individuals the opportunity to directly ‘purchase’ the citizenship of the selling state for a large, one-off monetary contribution. For these reasons, and others, Krakat argues that CBI schemes are complex and powerful agents of change. In his view, CBI schemes are the reorganizing principle of our times and warrant further investigation.

In light of these diverse perspectives on law, politics, power and control, it is hoped that this special edition makes a worthwhile contribution to a broader dialogue on the way in which exercises of power are influenced by both law and politics, and, in turn, have tangible impacts on the existence, or otherwise, of just outcomes. As Martin Luther King famously observed: ‘Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.’⁵ In the same vein, power anywhere can affect law and politics everywhere.

In that context, sincere thanks are owed to the contributing authors for their insights and hard work. Given current statistics on gender equality in academia,⁶ I point out that five of our nine contributing authors are female. My co-guest-editor, Professor Jonathan Crowe, and I are also grateful to the peer-reviewers who willingly gave of their time, to the general editor

⁵ Letter from Martin Luther King Jr to the Birmingham News, August 1963 in ‘The Negro is Your Brother’, *The Atlantic* (Boston), August 1963.

⁶ See, eg, Mathias Wullum Nielsen, *New and persistent gender equality challenges in academia* (PhD Thesis, 2015, Aalborg Universitet); Katherine Gregory, ‘Women remain underrepresented in academia; new funding model will exacerbate problem, experts say’, *ABC News* (Online) 8 October 2016 <<http://www.abc.net.au/news/2016-10-08/women-remain-underrepresented-in-academia-research-finds/7915130>>; Kate Galloway, ‘The Male Professoriate in Law’, on Kate Galloway, *KatGalloway* (24 August 2017) <<https://kategalloway.net/2017/08/24/the-male-professoriate-in-law/>>; Stina Powell, Malin Ah-King and Anita Hussénus, ‘“Are we to become a gender university?” Facets of resistance to a gender equality project’ (2018) 25 *Gender and Work Organisation* 127.

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Special Issue Editor
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