

## ***Constitutional Crossroads: Editorial Introduction***

**Hoi L Kong & Margot Young\***

At any moment over the course of a constitution's evolution, it is possible to say that key changes or questions are afoot. That said, there are particular times when pivotal crossroads appear. For instance, Westminster's enactment of the *Canada Act* in 1982 was one such distinctive moment. Currently, although perhaps of less historic foundational effect, the impact of dramatic climate change and governments' conflicting responses to it are forcing constitutional reckoning across both division of powers and *Charter* rights realms. In this regard, the greenhouse gas references<sup>1</sup> and the youth rights challenges in *La Rose* and *Mathur* have been, arguably, catalysts for key refining and rethinking of aspects of Canada's constitutional law.<sup>2</sup> One might also point to the increased resort by provincial governments to the *Charter's* override provision and the consequent intense examination of that provision by both courts and commentators<sup>3</sup> as another critical juncture.

The essays in this collection engage with instances of significance in current constitutional law, from different national and international perspectives. All but one of the pieces come out

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1 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

2 See Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34 J of Environmental L 195. See also *Mathur v Ontario*, 2023 ONSC 2316; *Cecilia La Rose et al v Canada*, 2020 FC 1008.

3 For recent academic commentary on this development, see Margot Young & Hoi L Kong, eds, "Special Issue: The Notwithstanding Clause" (2024) 32:3 Const Forum. This issue is available online at: <[https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/issue/view/1963](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/issue/view/1963)> [perma.cc/3N3P-7AN7].

of the two-day January 2023 conference, *Constitutional Crossroads in Canada and Around the World*, held at the Allard School of Law, UBC.<sup>4</sup> The Conference brought together a collection of scholars from around the world to discuss challenges for contemporary constitutional orders, including those posed by populism, pluralism, globalization, gender inequality, colonization, and climate change. The conference also profiled four public law groups at Allard Law: Indigenous Legal Studies, the Centre for Feminist Legal Studies, the Centre for Environment and the Law, and the Centre for Asian Legal Studies. Cosponsored by the law school and the University of Alberta's Centre for Constitutional Studies (CCS), the conference kicked off what has become an ongoing stream of collaborative constitutional events between Allard and the CCS, and successfully launched the Canadian branch of ICON-S. We co-convened the event along with Richard Mailey (CCS Director), and the three of us have shepherded publication of this issue of *Constitutional Forum*.

The net cast by this collection of papers is wide. Commentary ranges across doctrinal developments, the complex intersection of law and politics, comparative constitutional protections, and relationships between statutory administrative schemes and constitutional frameworks. Yet, all urge constitutional daring: engagement with the core challenges of our times demands innovative constitutional response and reform.

Four of these essays focus on substantive equality concerns and their complexity. Together, they locate critical argument about equality across courts, legislative assemblies, legal and administrative regimes, and private institutions. Systemic disability discrimination, sexism, and racism provide focus.

Caitlin Salvino leads off the collection with her argument that meaningful advocacy of mental and physical disability as an enumerated ground in section 15 of the *Charter* is threatened by the recent Supreme Court of Canada decision in *R v Sharma*.<sup>5</sup> For Salvino, the *Sharma* majority's elaborations of causation, context, and the distinction between negative rights and positive rights imperil the possibility of successful disability equality claims. Thus, chronicled is yet another u-turn in equality doctrine, one that, according to Salvino, augurs poorly for the meaningful protection of constitutional rights.

Joanna Erdman's essay tracks a parallel path of criticism of law's import for equality — here with respect to abortion access. With an eye to the post-*Dobbs* scenario in the United States, Erdman counsels a turn away from law.<sup>6</sup> Law has been, she argues, too dangerous, duplicitous, and, at best, limiting a terrain for the intimate complexities of reproductive freedom. At the same time, though, she ends on a provocative note: perhaps we could leverage emergent constitutional understandings in support of a novel abortion law, one that fosters liberated and multiple reproductive futures.

Vrinda Narain too takes up failure on the fronts of equality and diversity. Her focus is the enactment of Quebec's *Bill 21: An Act respecting the laicity of the state*, a law that, Narain argues,

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4 Support for the conference was gratefully received from the Centre for Constitutional Studies (University of Alberta), Allard School of Law, the Peter Wall Institute for Advanced Studies (UBC), Icon-S Canada, the Centre for Feminist Legal Studies (UBC), and the Centre for Law and the Environment (UBC).

5 *R v Sharma*, 2022 SCC 39.

6 See *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022), rev'g *Roe v Wade* 410 US 113 (1973).

leverages general public anxiety about a growing Muslim population, in general, and about the veil, in particular.<sup>7</sup> To combat systemic racism and sexism, Narain calls for an intersectional anti-racist policy that crafts remedies and institutional responses from the lived experiences of racialized women. Absent this, she suggests that democracy and the full equality on which it is premised are under threat.

Jie Cheng's comment moves the collection to China and reminds us that equality struggles, importantly, take their shape from specific contexts. She asks us to attend to a challenging paradox in Chinese legal and political attitudes towards LGBTQ+ individuals. On the one hand, no legal prescriptions against diverse sexualities and genders exist in China, yet no protections against discrimination on the basis of sexuality and gender exist either, leaving Chinese society marked both by tolerance of and by discrimination and violence against its LGBTQ+ population. Overlaying this is the growth of private economic power and the popularity, and profitability, of representations of LGBTQ+ characters in hit TV shows. Cheng draws contrast between cultural and ideological explanations for the contradictions of this situation, charting a more complex terrain across which the state, economic players, and private citizens interact.

Finally, Ran Hirschl's piece expands the collection's analytical lens, championing constitutional innovation and focusing on areas where the potential for constitutional change is especially great: climate change, urbanization, and democratic renewal. For insight and inspiration, Hirschl directs our attention to the constitutional universe of the Global South. Despite what he calls the renaissance of comparative constitutional scholarship, scholars routinely neglect this region, overlooking its creative constitutionalism and radical potential. Countering this neglect, Hirschl charts out some innovative constitutional features across the Global South, admonishing constitutional scholars to look southward as a catalyst for creating necessary change in Global North jurisdictions like Canada.

The community of constitutional scholars in Canada is vibrant and inspiring, bristling with debate about the meaning of justice and the role of constitutional scholarship in challenging orthodoxy and advocating for social change. Such scholarship is very much needed, given the challenges at hand. Like most democracies, Canada faces tough issues. The settler state struggles to right its relationship with Indigenous peoples and their communities. Our political and legal system is challenged by the growing diversity of Canadian society and the necessary task of dismantling systemic oppressions. And climate change, already hitting hard, must be addressed if any of these other challenges have a future in which to matter. This collection of essays pushes us to the kind of rich thinking scholars at their best can contribute to an enormously complex moment marked by so many critical tasks.

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7 Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12.

