

ROUNDTABLE with Associate Professor Adam Perry University of Oxford, Faculty of Law

on

“The Executive in the Constitution”

BY Assistant Professor Swati Jhaveri, NUS Law

02 APRIL 2019, TUESDAY

5.00PM – 7.00PM (TEA RECEPTION STARTS AT 4.45PM)

NUS LAW (BUKIT TIMAH CAMPUS)

FEDERAL BUILDING LEVEL 1, FEDERAL CONFERENCE ROOM

ABSTRACT

The debate in common law systems over whether the advancement of constitutionalism is primarily a task for the judicial or political branch has been an ongoing and protracted one. Political constitutionalists reject the delegation of important constitutional questions – which are considered essentially political in nature (which, in turn, may also involve characterising rights claims as political claims to be balanced against other political, social or economic claims) – to the judiciary. Conversely, legal constitutionalists doubt the capacity of the political branches to properly accord respect to constitutional norms, especially rights, in a way that sufficiently protects individual liberty. This is a role for the common law and the courts instead. Some theorists propose moving past this binary view of constitutionalism. Instead, we should embrace the fact that constitutions are now mixed. Others emphasise the need for a cooperative exchange or “dialogue” between the judicial and political branches of government on constitutional questions. This paper aims to take these debates even further, by focusing specifically on the need to recognise the role of the executive as a constitutional actor. Thus far, theorists have considered the relative advantages of legislative bodies and the judiciary in advancing constitutionalism. Indeed, commentators have critically noted this skewed focus on *parliamentary* politics. With this vision of political constitutionalism, the focus of the critique of the judicial branch is a discussion of the relative advantages of the deliberative and electorate-responsive approach to constitutional questions that is part of parliamentary politics. Any discussion of the executive is generally restricted to those constitutional actions and decisions that have been reviewed and ruled on as constitutional by judges or that have been subject to validating deliberation or codification by the legislature and then it is the latter judicial or legislative norm that is the authoritative source of the relevant constitutional norm. This paper aims at moving the constitutionalism debate beyond one that pits the legislature and the judiciary against each other, to reflect the constitutional activities of the executive. This push to look beyond the judicial and legislative context is not triggered by skepticism about either branch but by the need to better reflect in constitutional theory the way that government is organised and the way constitutional solutions are initiated and operationalised. Rather, the objective is to acknowledge the executive as an additional and under-theorised contributor to the advancement of constitutionalism. There is a significant amount of constitutional activity taking place outside of the legislature and courts: it is occurring in the polycentric, nuanced and negotiated decision-making environment of the executive. This paper looks at what kinds of decisions by the executive may be constitutionally significant and authoritative and why. This paper is unique in its ambition. It does not seek to set out a definitive theory of executive constitutionalism. Rather – as a prelude to a theory – it sets out the different anatomical components of a prospective theory.

ABOUT THE SPEAKER



Adam Perry is an Associate Professor in the Faculty of Law and Garrick Tutor and Fellow at Brasenose College. He holds a BA in economics from the University of Winnipeg, an LLB from the University of Victoria, and BCL, MPhil, and DPhil degrees from the University of Oxford. He was a law clerk at the British Columbia Court of Appeal, and has held academic positions at the European University Institute, the University of Aberdeen, and Queen Mary University of London. He joined the Faculty of Law at Oxford in 2015.

ABOUT THE AUTHOR



Assistant Professor Swati Jhaveri joined NUS Law in August 2012. She teaches the Law of Torts and Constitutional & Administrative Law. She previously taught at the Chinese University of Hong Kong (CUHK) Faculty of Law. Her areas of research are comparative constitutional and administrative law, with a focus on the latter. She has published in these areas in *Public Law*, the *Tort Law Review*, *Singapore Journal of Legal Studies*, *Asian Journal of Comparative Law*, *Federal Law Review* and the *International Journal of Constitutional Law*. She obtained her Bachelor of Arts in Jurisprudence (First Class Honours) and Bachelor of Civil Law (Distinction) from the University of Oxford. She previously practiced law at Allen & Overy, specialising in international commercial arbitration. She is a Solicitor of the High Court of the Hong Kong SAR and England & Wales and is a Member of the Chartered Institute of Arbitrators. She was awarded the Faculty and University's Annual Teaching Excellence Awards for three consecutive years and has been placed on the University Honour Roll for Teaching Excellence.

Participation is by Invitation Only

Registration commences at 4.45pm and light refreshments will be served.

For more information, please contact Ms Atikah Shaftee at atikah.shaftee@nus.edu.sg