EDITORIAL

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I. Introduction: Separation of Powers

We were delighted to receive the invitation from Professor Anton Cooray to be co-guest editors of this issue of the Journal of International and Comparative Law. We have chosen separation of powers as the special theme. The reasons are obvious. The separation of powers is today an integral part of constitutional theory and practice, and is at the core of the democratic polity. Montesquieu articulated a now self-evident proposition when he wrote that when all powers are concentrated in the same person it gives rise to a dictatorship: “There would be the end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”¹

By no means was Montesquieu the only theorist with the insight that dividing powers is crucial to prevent absolutism and tyranny. John Locke, for instance, was also concerned with separating powers, although his attention was focused on dividing a particular power, which is the law-making power.² The separation of powers has thus been associated with the idea of limited government. MJC Vile said: “The long history of the doctrine of the separation of powers reflects the developing aspirations of men over the centuries for a system of government in which the exercise of governmental power is subject to control.”³

The archetypical model identified in Montesquieu’s proposal separates legislative, executive, and judicial powers,⁴ whereby each branch has a corresponding identifiable function of government.⁵ This has become the basic architecture of most constitutions around the world. Nonetheless, Montesquieu’s proposal for a tripartite scheme of government has been criticised on several levels. On one level, critics take issue with what they consider to be Montesquieu’s flawed understanding and description of the English constitution. Scholars like de Smith

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⁴ See Montesquieu, The Spirit of the Laws (n.1).
⁵ See Vile, Constitutionalism and the Separation of Powers (n.3) p.13.
have argued that Montesquieu’s theory is irrelevant to Britain. On another level, the criticism goes beyond the specifics of the case study and engages with his theory on its own terms. This critical engagement raises important questions about constitutionalism and its pursuit of limited government. There are several strands of such criticism, but we will here only identify two.

The first is what Aileen Kavanagh says relates to “the perceived stringency of the separation requirement”. Here, critics argue that a complete separation of three mutually exclusive functions is not only unrealistic but also unworkable. Complete autonomy would render the country ungovernable instead, intersecting institutional engagement is necessary for government. This criticism however presumes what Vile calls a “pure doctrine of separation of powers”, where the division of functions is strictly policed. In practice however, such strict delineation is not possible, especially in the context of modern states where governments engage in many more complex activities with overlapping functions. For instance, the rise of executive law-making in the form of administrative regulations is in part due to necessity as legislatures often do not have the capacity in terms of time and expertise to engage in the level of specificity required in such law-making functions. Accordingly, the administrative state has come to be understood as one in which the Montesquiean functions were fractured and allocated among different institutions.

The second line of common criticism relates to the inadequacy of the tripartite proposal; this is because the arrangement does not take into account institutions, powers, and power-holders that do not neatly fall into one of the three identified powers. James Landis, for example, has described administrative agencies as a fourth branch of government. Similarly, Bruce Ackerman has proposed that the bureaucratic government be constitutionally constructed as a distinct branch of government so as to “[redeem] its central claims to integrity and expertise in regulating for the public interest”. Indeed, a failure to take into account certain important functions and institutions in the separation of powers could have important consequences. Kevin Tan argues that “for a separation of powers to

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10 The American founders had an early understanding of this fracturing, when they described the US President’s power to veto legislation as a legislative rather than an executive function. See The Federalist Papers, No 47, available at http://avalon.law.yale.edu/18th_century/fed47.asp.
13 See Ackerman, “The New Separation of Powers” (n.11) p.641.
work, the constitution must first recognise and then encompass all legitimate forms of political power in a given polity.”

II. Critical Issues in the Separation of Powers

With these issues in mind, this volume brings together eminent public law scholars to engage in an exegesis of the separation of powers in a number of selected jurisdictions. The inter-relationships between the three organs of government are canvassed by these scholars to provide insights into the theory and practice of the doctrine of the separation of powers in a contemporary context. Reflecting the dominance of the tripartite formula, all the articles in this volume adopt this as their starting point. Many of the essays examine how the separation of powers can be used as an important framework to analyse constitutional developments. In doing so, they complicate the tripartite formula by providing analytical accounts of how constitutional practices have defied or undermined this simple formulation. In addition, we identify four important themes arising from the articles in this volume.

A. Complicating the Westminster versus Washington framework

A key framework in separation of powers scholarship is the division between the United Kingdom’s form of parliamentary government and the United States’ presidential government. The parliamentary government is characterised by a concentration of law-making power within Parliament, and where the higher executive (cabinet) is fused with the legislature insofar as cabinet ministers are also members of Parliament. However, this Westminster model separates the office of the head of state from the office of the head of government. The prime minister, who is the head of government, is an elected member of Parliament who must command the confidence of the majority in Parliament. The British constitutional monarch is the head of state in the United Kingdom as well as in certain Commonwealth countries like Australia and New Zealand. In other former British colonies that have adopted the Westminster system of parliamentary government, like in Singapore and Malaysia, a local president or constitutional monarch serves as the head of state. Thus, separation of powers in the Westminster system of parliamentary government involves some degree of overlap and fusion than in the model against which it is often contrasted, the United States’ presidential system.

Indeed, the United States’ presidential system appears to take the separation of powers among the three branches of government more seriously. There is no overlap of personnel between the executive and the legislature. The bicameral

Congress has law-making authority but the president, as both the head of state and the head of government, has the power to veto legislation. Despite clearer divisions among the different branches of government, the American model has arguably been less successful in realising Montesquieu’s primary aim of preventing tyranny. Juan Linz, for instance, has heavily criticised the export of the American model of separation of powers, especially to Latin America; where the separation of powers has not stopped the rise of powerful president-dictators and may in fact have facilitated their rise.15

This common juxtaposition however belies the complexities of the various models. Not only do countries around the world not strictly adhere to either the Westminster or Washington models but the differences between them may also be less stark than is often assumed. This is especially since there is no such thing as a “pure doctrine” of the separation of powers. Vile formulated this “pure doctrine” in the following manner:

“Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.”18

Indeed, as Wayne McCormack points out in his article, even in the United States, where the separation of powers is often seen as functioning in more distinctive terms, the principle “pertain, in reality, to a complex web of interlocking checks and balances”. Furthermore, he observes that “[i]n practice, at the federal level, cases generally reflect the flexible theme of checks and balances rather than strict separation.”

This emphasis on interconnection rather than strict separation has already frequently been emphasised in parliamentary systems based on the UK model. It has been argued that the doctrine of separation of powers did not apply neatly to England because of its “mixed constitution”. The Westminster model shows a high degree of intermingling of legislative and executive powers: delegation of

16 As Ackerman puts it, “Latin liberals have taken Montesquieu’s dicta, together with America’s example, as an inspiration to create constitutional governments that divide lawmaking power between elected presidents and elected congresses — only to see their constitutions exploded by frustrated presidents as they disband intransigent congresses and install themselves as caudillos with the aid of the military and/or extraconstitutional plebiscites.” Ackerman, “The New Separation of Powers” (n.11) p.645.
17 Borrowing a formulation by Ackerman: Ibid., pp.641, 645.
18 See Vile, Constitutionalism and the Separation of Powers (n.3) p.13.
law-making powers to the executive to enact subordinate legislation is recognised as acceptable given the complexities of governance in today’s world. Thus, while Westminster and Washington are often seen as distinctive models, they should be regarded as existing within a complex spectrum of separation rather than as diametrically dichotomous approaches.

Recent developments in the United Kingdom further suggest a convergence between the Westminster and Washington. As Venkat Iyer’s article shows, constitutional reforms and judicial interpretation reflect a strong commitment towards the separation of powers in the United Kingdom. The principle of separation of powers was employed to justify removing the judicial function of the Lord Chancellor as well as to justify establishing a new Supreme Court. It also formed the backdrop against which the Brexit litigation was conducted and decided. Thus, even while the Westminster model has typically emphasised “efficiency over abstract concerns about tyranny”, the principle of separation of powers has also pervaded its constitutional imagination.

B. Autochthony and permutations of separation

Another interesting observation from many of the articles in this special issue is that while many post-British colonial states have adopted a parliamentary system based on the Westminster model, many have done so on a modified basis. India, Malaysia and Singapore, for example, have adopted the Westminster parliamentary system but with written constitutions that serve to impose legal limits on political power including the entrenchment of a bill of rights and the establishment of a supreme court. This coincides with a model that Bruce Ackerman has called “constrained parliamentarianism”, whereby “normal lawmaking authority is focused in a Westminster-style assembly”, but “legislative output is constrained by substantive political principles that are legitimated by a higher lawmaking process, which is constructed out of different constitutional materials.” Thus, there is a certain amount of constitutional borrowing by Westminster-style constitutions from the American constitution.

This act of constitutional borrowing and mixing is also obvious in the context of Japan, where Shigenori Matsui observes that the 1946 Constitution of Japan borrowed the principle of separation of powers from the American constitution while adopting a Westminster system of parliamentary government. Matsui’s article introduces a further dimension in the analysis concerning the mixing of American and British influences, which is their interaction with existing legal doctrines. As he points out, German doctrines of administrative law were adopted by the Japanese even before the adoption of the constitution. These doctrines were adopted voluntarily, and continues to have a significant influence on how the separation of powers is understood in Japan.

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Among the Westminster progenies, the question of how to resolve the Westminster practices with the constitutional doctrines of separation of powers interposed from the American tradition remains a live issue. In Australia, as Peter Gerangelos argues in his article, the High Court of Australia’s embrace of a legal separation of powers sits “uneasily” within a constitutional framework which also provides for responsible government and a parliamentary executive. The working out of the contours of responsible government and the separation of powers sits at the intersection of the Australian constitution’s English and American influences. Gerangelos argues for a “uniquely Australian” and “autochthonous resolution”.

Kent Roach’s article on Canada highlights that although the Canadian constitution recognises that it is “similar in principle to the United Kingdom”, its approach to the separation of powers is flexible and resists bright lines. In particular, he examines the Supreme Court of Canada’s use of suspended declarations of invalidity and prospective rulings to allow the legislature to devise more creative remedies to the constitutional issues raised in court. Roach argues that this practice can be made consistent with Canada’s “flexible and pragmatic approach to the separation of powers” so long as courts provide successful litigants effective and immediate remedies at the same time.

In line with the modification of the principle of separation of powers to accommodate autochthonous needs and developments, Philip Joseph, in his article on New Zealand, further argues that the separation of powers should be reconfigured into a “binary relationship denoting the political and judicial branches”. According to Joseph, the separation of powers in New Zealand is “at its most meaningful in relation to the judicial branch”, and should be emphasised even within the Westminster system.

The intersection of American and English influences on constitutional government also arises as a clash of traditions and/or culture with the written text. Jaclyn Neo’s article highlights the persistence of constitutional traditions; as she points out, although Singapore operates under a constitution which is declared the supreme law of the land, its constitutional ethos remains influenced by British parliamentary traditions and mindsets, which gives priority to the notion of parliamentary supremacy. This is further augmented by a culture of trust in the political branches of government. Thus, in her article, she shows that the separation of powers has also been used to justify judicial deference to the other branches of government, rather than to assert a robust application of judicial review powers.

### C. The distinctiveness of judicial power

Joseph’s observations on judicial power in New Zealand raise another important aspect of the separation of powers, which is the possibly greater need to protect judicial power. While Montesquieu’s theory identified three branches of government,
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it placed a strong emphasis on the need for judicial power to be distinctive and protected from the other two branches. As he puts it:

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”

Similarly, Alexander Hamilton wrote in The Federalist Papers, No 78, that the judiciary is the least dangerous branch, and perhaps the weakest. He says:

“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

Thus, he argues, agreeing with Montesquieu that “liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments”, and that the judiciary “is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches”. Protecting judicial independence and judicial power is seen to be of utmost importance in ensuring limited government.

These claims about the judiciary bears further interrogation. For sure, judicial activism has not been a common feature in many countries which emerged as independent entities post World War II. The Singapore and Hong Kong experiences, for instance, reflect a circumspect judicial approach. However, in some countries where the political branches have been characterised by a certain degree of inefficiency or weakness, it is the judiciary that has arguably become the most

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21 See Montesquieu, The Spirit of the Laws (n.1).
22 The Federalist Papers, No 78, available at http://avalon.law.yale.edu/18th_century/fed78.asp.
23 Ibid.
powerful branch of government. In South Africa, as Hugh Corder’s article points out, there was heavy reliance on and great hope that the judicial branch would play a prominent role in not only regulating the exercise of public power but also in “advancing the transformative ethos of the Constitution”. Indeed, as he argues, the judiciary has been expected to play a crucial transformative role in enforcing socio-economic rights and to hold the government accountable for its constitutional duties in the face of “lethargy, incompetence, and corruption in the other branches of government”. This has led however to backlash against the judiciary.

Similarly, in India, the higher judiciary has also played an outsized role in constitutional transformation seemingly in response to what they perceive as executive or legislative failures to provide according to constitutional requirements. In their article, Rehan Abeyratne and Didon Misri take a critical view of the role that Indian judges have played, arguing that the “more nebulous” challenge to the separation of powers in India is the expansive role that the higher judiciary has appropriated for themselves. Their article examines how judges in the Supreme Court and High Courts, through constitutional interpretation, have expanded their legal oversight over an ever-expanding range of governmental action, thus acting in both quasi-executive and quasi-legislative roles. Abeyratne and Misri observe that such intervention can result in various unintended consequences, including impeding capacity-building in regulatory institutions. They also question whether judges have the necessary expertise to formulate policy. Thus, they argue that judges should “retrench” their jurisdiction over public interest litigation, focusing instead on directing public attention to the most egregious executive failures and retreat from active law-making, which should be within the domain of Parliament. Their suggestion is for a more dialogic relationship among the three branches of government.

D. The executive: The most dangerous branch of government

A crucial phenomenon that several articles in this volume highlight is the concentration of powers in the higher executive and thereby the emergence of an “elective dictatorship”. Richard Foo and Amber Tan’s article on Malaysia examines precisely the process by which power is concentrated in the hands of the prime minister and the corresponding erosion of powers and independence of the other branches of government. Indeed, even in the United States, a key problem McCormack identified is with the “steady accretion of executive power” and the corresponding decline in legislative power.

Furthermore, PY Lo and Albert HY Chen’s article on Hong Kong provides a further critical perspective on the separation of powers and the drive for executive government. As they observe, Hong Kong is a former British colony whose legal and judicial system is based on English common law. Accordingly, the Hong Kong courts have conceptualised “separation of powers” as part of its constitutional architecture and as part of the rule of law. However, this separation of powers doctrine operates in the context of Hong Kong as a Special Administrative Region
of the People’s Republic of China where the mainland Chinese government has doubted the existence of such a doctrine, advocating instead the idea of “executive-led government”. This essentially rejects the idea of judicial supervision of government, arguably even in the limited way that the Hong Kong judiciary has generally conceptualised separation of powers as “an operative valve” for deference to the political branches. This raises questions about the future of separation of powers as a key constitutional principle in Hong Kong.

III. Conclusion: Future Trajectories for Research

In conclusion, this special volume provides insights into a variety of key constitutional issues implicating the separation of powers that have emerged in a range of jurisdictions. It is not meant to be comprehensive and indeed, while it raises many important issues and developments for consideration, it also leaves out important questions for future research, particularly from a comparative perspective. For instance, in most of the countries considered in this special volume, it is clear that a truly independent judiciary with a “wall of protection” around the judicial power is vital for the rule of law and the protection of fundamental rights. One crucial focus for the advancement of the separation of powers therefore should be on constitutional safeguards relating to the appointment and the dismissal and discipline of judges. How the contents of judicial power are defined to prevent encroachment upon judicial power by Parliament or the executive requires further analysis and research.

Another area to further examine is the relationship between the separation of powers and political change. As constitutional systems undergo important political shifts, important questions will be raised about how a political structure based on the separation of powers can possibly defend against encroachments on constitutional democracy. The role of bureaucratic institutions and other institutions not typically captured by the tripartite formulation becomes particularly important in such times of political change, including when democracy is being challenged by autocratic practices by the executive. This demands a more expansive view of the separation of powers. It is hoped that the insights from the various jurisdictions in this special volume would not only deepen our understanding of the theory and practice of the separation of powers, but also further contribute to the enterprise of constitutional design and reform around the world.