Constitutional forum constitutionnel

Introduction: Pluralism, Contestation, and the Rule of Law

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I. Introduction

Around the world, the current political conjuncture is one of profound challenges for constitutionalism and the rule of law. In the United States, the executive has willfully engaged in a prolonged attempt to weaponize the machinery of the state and radicalize public opinion in order to undermine a democratic election. In the European Union, the increasingly authoritarian relationship between the executive and the judiciary in Poland and Hungary is posing the most profound threat to European constitutionalism in decades. In Hong Kong, the Chinese state is actively seeking to undermine legislative and judicial independence in the face of unprecedented pro-democracy mobilizations. In India, Lebanon, Bolivia, and elsewhere mass mobilizations are challenging, and being suppressed in the name of, the rule of law. Here in Canada, the Wet'suwet'en and their supporters, as well as the Tsleil Waututh, Haudenosaunee, L'nu (Mi'kmaq), Inuit, and members of countless other Indigenous nations are contesting the very nature of the rule of law, as they assert Indigenous laws against the law enforcement of the colonial state. Around the world, the use of emergency powers in response to the COVID-19 pandemic is also raising profound constitutional concerns.

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I would also like to acknowledge the generous financial support of the Killam Foundation, the Centre for Global Studies at the University of Victoria, and the Centre for Constitutional Studies at the University of Alberta where I have worked as a postdoctoral fellow with Assistant Professor Josh Nichols and Patricia Paradis for the past year.

In this context, the Centre for Constitutional Studies invited Dr Jacob T Levy to deliver its 31st McDonald Lecture, focusing on the separation of powers, the rule of law, and the future of constitutionalism in liberal democracies. Recognizing the profound need for such discussions in the present political conjuncture, the Centre then hosted four outstanding scholars, Arjun Tremblay, Mary Liston, Hillary Nye, and Yann Allard Tremblay to further reflect on the themes Dr Levy raised. The following special issue is comprised of papers which grew from this discussion.

The full text of Dr Levy's talk is available in the *Review of Constitutional Studies* and the recorded video is available through the Centre's website.[1] Nevertheless, because each of the authors in this issue engages deeply with the themes Dr Levy raised, we have chosen to begin this collection with a brief summary of the talk so that readers can engage more directly with Dr Levy's ideas and critically compare their own readings to those presented by our authors. I will therefore begin this introduction with a very brief recap of Dr Levy's talk in Section II. Then, in Section III, I broaden the field in anticipation of the papers that follow, situating Dr Levy's theses in relation to an expansive, agonistic understanding of constitutionalism and briefly describing the four papers in this special issue. Finally, I conclude by offering a modest contribution of my own to the discussion, pointing to how popular contestation and international pressure can both help to constitute the rule of law, enacting or undermining the principles of constitutionalism in practice by imposing or failing to impose extra-legal costs on the exercise of lawless executive authority.

II. A Very Brief *Precis* of Dr Levy's McDonald Lecture: *The Separation of Powers and the Challenge to Constitutional Democracy*

Levy begins his lecture by emphasizing the importance of the separation of powers in contemporary constitutional thought and practice. Indeed, for Levy, the separation of powers is the defining feature of constitutional systems of government — it is the feature that distinguishes properly constitutional regimes from all others. At a minimum, Levy argues that constitutional governance requires an independent judiciary capable of holding legislative and particularly executive branches to constitutional principles. This separation between law-making and law-enforcing lies at the heart of the rule of law as we understand it today. Having thereby positioned the rule of law, and the separation of powers that guarantees it, at the center of constitutionalism, Levy offers a genealogy of the separation of powers as an idea and practice of government in Western law.

Beginning in ancient Greece, Levy roots the separation of powers in ongoing contests between monarchic, aristocratic, and democratic forms of rule — the rule of the one, the rule of the few, and the rule of the many. Aristotle, writing in reaction to the struggles between these forms of rule, introduced the idea of the "mixed constitution," which mobilizes all factions of society by combining elements of the rule of the one, the few, and the many.

1 Jacob T Levy, "The Separation of Powers and the Challenge to Constitutional Democracy" (2020) 25:1 Rev Const Stud 1. A video of Dr. Levy's lecture is available online: *Centre for Constitutional Studies*, <www.constitutionalstudies.ca/2020/11/31st-annual-mcdonald-lecture-in-constitutional-studies-with-professor-jacob-t-levy/>.

The mixed constitution therefore arises as a solution to division, a way to unite various social classes and ideologies in order to pool their powers together to facilitate effective, durable, and united government. In fact, this practice arises again and again in European history. In Roman constitutionalism, the consuls, the Senate, and the tribunes worked to operationalize each part of the mixed constitution. Likewise, in European kingdoms the concept of various estates participating in government reflects a similar principle. Thus, political actors in Europe consistently turned to mixed forms of rule as a pragmatic solution to social division and contestation.

However, at this point, the mixed constitution was largely understood as a means of pooling the power of different social classes together. The idea is not for those powers to act as checks on one another, but rather for them to facilitate shared rule together. As such, the mixed constitution does not necessarily produce judicial independence and thus does not necessarily guarantee the rule of law as we understand it today.

This begins to change with Montesquieu and his widely influential interpretation of the British Constitution. Montesquieu effectively maps the participation of different social classes in government onto distinct branches of government. The legislative function rests with "the many" through the popularly elected[2] House of Commons; the executive function rests with "the one" embodied by the monarch; and the judicial power rests with "the few" through the aristocratic House of Lords in its capacity as the nation's highest court of appeal. In so doing, Montesquieu helps recast the mixed constitution as not a pooling of powers, but a separation of powers — a way for each class to wield its own authority to check the absolute power of the others — and thus as a guarantor of the rule of law in the modern sense.

This interpretation of the British Constitution was a profound influence on the American founding fathers. However, the nascent American nation lacked the raw ingredients from which the mixed constitution had traditionally been constructed — it had no monarchy, and no traditional aristocracy either.[3] As a result, America could not simply map existing social classes onto the different branches of government. Instead, the Americans worked to simulate the missing social classes through the use of government offices — "the one" is constituted through the presidency, "the many" through the House of Representatives, and "the few" through the senate and judiciary. While these bodies would not possess coherent class interests in the traditional sense, they would nonetheless possess a coherent institutional interest, in that each branch would be concerned with protecting and extending its own powers, status, and privileges. In this way, America forwarded a more rigorously institutional conception of the separation of powers as primarily a separation of governmental functions, rather than a separation of social classes.

With this reformulation, American practice, drawing on Montesquieu, transformed the mixed constitution into a modern separation of powers — a doctrine that is centrally concerned with divorcing the judicial power from the legislative and especially executive powers,

2 Though "popular" elections at the time included only property-holding white men, thereby excluding the vast majority of the actual population.

3 Which is not to say that the US lacked a class of elites. Wealthy landowners dominated, and continue to dominate, American politics in many ways. However, this is a bourgeois class whose power and influence flows primarily from their wealth, rather than from an inherent social status like a traditional nobility.

and that therefore guarantees the rule of law as we understand it today. Having explored the foundations of modern constitutionalism, Levy then calls our attention to two contemporary phenomena that threaten the separation of powers and, by derivation, the rule of law itself.

The first threat comes from partisan politics. In a partisan system, it is possible for both legislative and executive powers to be held by the same party. In such situations, the dominant party can often influence the composition of the judiciary as well. Thus, branches which are institutionally separate become united through the apparatus of the party. When officials are more concerned with the interests of their party than the long-term interests of the institution in which they serve, branches may stop checking each other effectively and the rule of law can be thrown into question.

Moreover, when the various branches of government are controlled by different parties, a different sort of threat can emerge. Although each branch may continue to check the others, the public at large may understand these contests in a partisan light, as one party competing with another, rather than one branch checking the other. So understood, the separation of powers and the actions needed to maintain it become delegitimized and the conceptual and normative force of the rule of law can be eroded. Regardless of which parties control which branches then, partisan politics presents a potential threat to the separation of powers.[4]

The second threat to the rule of law that Levy identifies comes from nationalist populism. Because nationalist populism presents an image of a homogeneous, united "people" in contrast to narrow, parochial interests, Levy argues that it lends itself to a particular style of partisan politics whereby a political actor, typically the executive, can present itself as *the* voice of the people. In this way, a single branch can claim to represent the entire people, rather than each branch making its own claim to represent a certain subsection of the population, as in the mixed constitution. In such a context, all constraints on the executive can be interpreted as constraints of the will of the people themselves, and can thus be presented as inherently illegitimate. This creates fertile ground to undermine the institutional autonomy of other branches, endangering the separation of powers and, in turn, the rule of law.

As a result of these two threats, Levy tells us that we are now seeing an increasingly executive-dominated style of government in both parliamentary and presidential systems around the world, that executives are increasingly seeking to consolidate their power further, that they are finding discursive and political strategies which facilitate this movement, and that this has the potential to undercut the rule of law and thus, the very constitutional character of our democracies. This is the political conjuncture with which this special issue engages.

III. Agonistic Constitutionalism, the Separation of Powers and the Rule of Law

As the summary above suggests, Levy's lecture demonstrates the profound importance of the separation of powers as an institutional feature of contemporary constitutions and as a shifting, contested idea that structures the practice of constitutionalism over time. In so doing,

4 Levy makes clear, however, that he sees political parties as a pragmatic necessity of representative governance, despite the challenges they pose to institutional separation.

Levy provides an opening for us to engage with what Jeremy Webber has called "agonistic constitutionalism"[5] — a broad view of constitutionalism which embraces not only formal constitutional documents and judicial decisions, but also the contested practices of political and social actors as they navigate, implement, challenge, and shape the broader principles of constitutionalism in their everyday lives. Similarly, the papers in this special issue engage with the separation of powers, the rule of law, and the future of liberal democracies in their broadest sense, as contested practices of governance situated in real and ongoing political struggles. This approach allows each paper, in its own way, to consider alternative sources of resiliency for the rule of law, thereby providing a deeper, more multi-faceting understanding of the current conjuncture, and of the steps we might take to address it.

As a window into these alternative sources of resiliency, Arjun Tremblay takes up the puzzle of why "English as a national language" bills failed to pass even in a highly favorable political climate where unified Republican control of both the executive and legislative branches of the American government made traditional checks and balances ineffective.[6] Tremblay explores how underemphasized features like the makeup of the electorate, the role of veto players like committee chairs, interpersonal relations between legislators, changing societal norms, and other factors can constrain hyper-partisan activity even when unified government threatens the separation of powers as it has traditionally been understood.

Mary Liston expands this conceptual opening by turning her attention to the role of the administrative state in relation to the rule of law.[7] While acknowledging that administrative bodies often blend roles associated with legislative, judicial, and executive functions, Liston argues that the diffusion of power to administrative bodies can be one way to decentralize power, creating a different sort of check and balance, not through strict separation, but by ensuring interpretative pluralism and preventing partisan domination. Grounding her analysis in a careful reading of Canadian constitutional law, Liston encourages us to think about the rule of law in ways that transcend a strict separation of powers, and that implicate a much broader array of institutions than is often presumed relevant.

In his contribution, Yann Allard Tremblay explores a complimentary vein.[8] Whereas Liston expands traditional concepts of the institutions responsible for the rule of law, Allard Tremblay takes up the role of social groups as checks on lawless authority. Drawing on older conceptions of the mixed constitution as an amalgamation of social classes, Allard Tremblay argues that cultural groups, Indigenous peoples, minorities, and social classes could all be institutionally empowered to check government authority, permanently preventing any party from claiming to speak for "the people" as an undifferentiated whole and thereby preventing the total concentration of authority that concerns Levy.

Finally, Hillary Nye's intervention shifts our attention away from the capacity of various actors and institutions to check one another's power, and focuses instead on actors' ability to

5 See e.g. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015).

6 Arjun Tremblay, "Are there "Sources of Resilience" When the Separation of Powers Breaks Down?"" (2021) 30:4 Const Forum Const 25.

7 Mary Liston, "Bringing the Mixed Constitution Back In" (2021) 30:4 Const Forum Const 9.

8 Yann Allard Tremblay, "Harnessing Distrust and the Power of Intercession for the Separation of Powers" (2021) 30:4 Const Forum Const 37.

check themselves through role-morality.[9] Nye shows how an understanding of what is proper to each role, and a level of personal identification with that role, can meaningfully constrain exercises of power. Thus, the rule of law is buttressed not only by "external" checks but by "internal" ones as well. On this view, building robust and shared cultural understandings of each branch and its "role" constitutes an essential element of the rule of law as well.

Together, these contributions challenge us to expand our understanding of the rule of law beyond the relationship between executive, legislative, and judicial branches. They reveal how a much wider array of institutions and social relationships are implicated in the rule of law and indeed, that preventing abuses of power is as much about pluralism as it is about role-separation. In so doing, they reveal additional sources of constitutional resiliency and suggest additional sites of potential intervention and reform as we safeguard the practices of constitutionalism in these challenging times.

IV. The Separation of Powers, Popular Contestation and International Contestation

In the final section of this introduction, I would like to briefly offer my own modest contribution to the discussions that follow. As Levy has shown, the mixed constitution and the separation of powers are themselves innovative responses to social contestation and international struggle. They are born of, and constituted through, such struggle. It would seem then, that the level, character, and quality of contestation are central to the rule of law.[10] In particular, I want to draw attention to two sites of contestation which are external to the constitutional system as it is normally understood, yet which are nevertheless capable of checking the power of various branches of government. I argue that both the people themselves, acting outside of the structures of formal government, and other actors in the international system, can and do act as constraints on the lawless executives that Levy warns us of. Seen in this light, the rule of law inheres not just in the contests between institutions within a constitution, but also in the contests between those constituted institutions and other centers of power with which they co-exist.

Popular Contestation and the Rule of Law

In her discussion of constitutionalism, Nootens, drawing on Loughlin, distinguishes between constituted authority — the authority of the institutions constituted by the present political order — and constituent authority — the permanent and inalienable power people hold to found new constitutional orders.[11] In so doing, they draw our attention to the role of people as an independent source of constitutional authority capable of acting independently of, outside of, and even against their governing institutions. Like many constitutional scholars, Nootens

9 Hillary Nye, "Checking the Other and Checking the Self: Role Morality and the Separation of Powers" (2021) 30:4 Const Forum Const 45.

10 For a convincing and in many ways analogous case that contestation is a key criteria of legitimacy in international law, see e.g. Antje Wiener, "*A Theory of Contestation* — A Concise Summary of Its Argument and Concepts" (2017) 49:1 Polity 109.

11 Geneviève Nootens, "Constituent Power and People-as-the-Governed: About the 'Invisible' People of Political and Legal Theory" (2015) 4:2 Global Constitutionalism 137 at 144.

limits her analysis to those rare moments when people choose to found an entirely new constitutional order. However, others see a more expansive role for constituent power.

As Ouziel succinctly explains, "for Gandhi, 'consent through elections' is never enough to govern the conduct of elected representatives. In addition, people have to be ready to exercise mass nonviolent civil disobedience in order to 'govern their governors' whenever they abuse the power conditionally delegated to them."[12] Thus, Gandhi presents a picture where people exercise constituent power on an ongoing basis, regularly acting outside of their constituted institutions to protect or intervene in their constitutional order through mass civil disobedience and other forms of direct action.

Seen in this way, the robustness of the rule of law depends not only on contestation between branches of government, but also upon the capacity of individuals, groups, organizations, and movements to contest these relationships effectively. In other words, the separation of powers inheres not only in the separation between governing institutions, but in the separation between those institutions and the collective political agency of ordinary people.

Picking up on Nye's point, this suggests that how citizens and, following Allard Tremblay, social groups, understand their own role relative to the rule of law is of crucial importance. James Tully's distinction between civil and civic citizens is useful here.[13] Where civil citizenship is defined by engagement with formal institutions (voting, etc.), civic citizenship inheres in the bottom-up practices of self-government and political contestation that take place outside of official channels (protest, direct action, prefigurative institution building, etc.). The presence of robust concepts of civic citizenship, as well as for the capacity of individuals, groups, and civic organizations to exercise political agency in ways that transcend the bounds of existing institutions, are therefore essential components of the rule of law. Ironically, constitutionalism may be most secure when constituted institutions do not exhaust the possibilities for political agency within a society, and we might take the level and quality of social contestation as one key indicator of the health of a constitutional regime.

International Recognition and the Rule of Law

Michaels argues that the authority of a state is also constituted, both legally and practically, in part by the recognition of other states — and, we might add, other international and even subnational actors.[14] By offering or withholding their cooperation, these actors enable or constrain national governments. In this sense, recognition is actually a constitutive element of constitutional authority.[15] Consider, for example, how the long-standing exclusion of Indig-

12 Pablo Ouziel, *Democracy Here and Now: The Exemplary Case of Spain* (Toronto: University of Toronto Press) at 176 [forthcoming]. For a discussion more grounded in legal theory, see e.g. Luigi Corrias, "Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity" (2016) 12:1 Eur Const Law Rev 6; Andreas Kalyvas "Popular Sovereignty, Democracy, and the Constituent Power" (2005) 12:2 Constellations 223.

13 For discussion of the distinction, see James Tully, *Public Philosophy in a New Key. Volume 2: Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), especially Chapters 4 and 9.

14 See e.g. Ralf Michaels, "Law and Recognition — Towards a Relational Concept of Law" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 90.

15 For thoughtful discussion, see Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

enous peoples as voting members of international institutions has shaped their ability to exercise effective authority.[16]

Though the extension and denial of international recognition are often shaped by self-interest, they can be, and sometimes are, mobilized precisely to contest the authority of lawless executives or other threats to a constitutional order. For example, both Hungary and Poland are experiencing a brand of hyper-partisan nationalist populism which threatens to undermine the rule of law in precisely the ways that Levy suggests. However, the European Union, the European Court of Human Rights, and others are exerting leverage in ways that complicate the efforts of national governments to undermine their domestic political orders by imposing geopolitical costs, creating economic costs, triggering legitimacy crises for the regime, and bolstering the efforts of the domestic opposition. As Liston and Tremblay demonstrate in their consideration of administrative bodies and committee roles respectively, the range of actors relevant to contests over executive, legislative, and judicial powers is much broader than first meets the eye.

The robustness of a given constitutional order is therefore partly a function of that order's place within ongoing geopolitical and global economic contests, how the regime's survival aligns with other powerful corporate and state interests, the regime's relationship with other countries and institutions, the level of connection with international civil society, and a host of related factors normally considered as being within the realm of international relations or political economy, rather than constitutional law. While these factors are not, of themselves, properly constitutional, they can dramatically affect the durability of a constitutional order, the presence of the rule of law, and the potential for abuses of power, and are therefore germane to a holistic consideration of threats to, and defenses of, the rule of law.

V. Conclusions

The preceding section is my modest way of illustrating a larger theme that permeates this special issue — that by taking an expansive interpretation of Levy's focus on the separation of powers as a guarantor of the rule of law, we can begin to analyze the plurality of different sites of authority and contestation in our society and how they contribute to, challenge, or shape the rule of law in practice. So understood, the separation of powers becomes a useful analytical tool not only for understanding contests between branches within the state, but also as a means of focusing on the state's relationship with the various normative orders with which it co-creates the normative, political, and legal environment.

The papers that follow explore both of these uses of the separation of powers and many more, opening space to engage with an expansive, contested, and pluralistic conception of the separation of powers, the rule of law, and constitutionalism itself. In so doing, the contributions to this volume partake in the ongoing reformulation and refinement of the rule of law that Dr Levy has traced, allowing us to more deeply and creatively analyze and respond to the myriad challenges facing constitutional democracies today.

16 For discussion, see Keith Cherry, *Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in Europe and on Turtle Island,* (PhD Dissertation, University of Victoria, 2020) [unpublished] especially at 87-90.