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On the genesis and nature of judicial power

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RESUMEN

La naturaleza esencial del poder legislativo es hacer las leyes, la del poder ejecutivo es ejecutar las leyes. La diferencia entre los dos es a la vez sustancial y significativa; es la diferencia entre el imperio de la arbitrariedad y e imperio de la ley.

Este artículo busca trazar la génesis de un poder judicial independiente, tanto en la teoría y la práctica a través de un examen de las secciones de las Constituciones de Clarendon, el tribunal judicial de Clarendon, el Leviatán de Hobbes, el Segundo Tratado de Locke, el Espíritu de las Leyes de Montesquieu así como The Federalist Papers. Además, se tratará de establecer el carácter ejecutivo del poder legislativo y de explicar por qué es malentendido a menudo este poder.

PALABRAS CLAVE
Poder judicial, Locke, Hobbes, Montesquieu, Clarendon, poder legislativo, ley.

ABSTRACT

The essential nature of legislative power is to make the laws; that of executive power is to execute those law. The difference between the two is both substantial and significant; it is the difference between the rule of arbitrary power and the rule of law.

This paper will seek to trace the genesis of an independent judicial power, in both theory and practice, through an examination of sections of *The Constitutions of Clarendon*, *The Assize of Clarendon*, Hobbes' *Leviathan*, Locke's *Second Treatise*, Montesquieu's *Spirit of the Laws*, as well as *The Federalist Papers*. Moreover, it will seek to establish its executive nature and to explain why it is so often (at least presently) misunderstood to be akin to the legislative power.

KEYWORDS
Hobbes, Locke, Montesquieu, legislative power, law, Clarendon, judiciary.

The essential nature of legislative power is to make the laws; that of executive power is to execute those laws; what, however, is the essential nature of judicial power? Superficially we can say it is to judge; at bottom, it is to judge according to the laws. The difference between these two is both substantial and significant; it is the difference between the rule of arbitrary power and the rule of law. The refinement and moderation in the application of the laws that results from this difference was the product of the concerted work of both theory and practice over many centuries.

In *The Spirit of the Laws* (1748), Charles de Secondat, baron de Montesquieu, reapportioned the separation of powers made by John Locke in the *Second Treatise of Government* (1690) and, thereby, was the first to make the theoretical division within the executive necessary for the creation of an independent judicial power. That judicial power, properly understood, is executive in nature (and *not* legislative in nature, as is now maintained by adherents to the school of the legal realism inaugurated by Oliver Wendell Holmes), is demonstrated by English history, that is, by the jurisdictional conflicts between the independent courts of the baronies and ecclesiastics, on the one hand, and the centralized King's Bench, on the other.

The following will seek to trace the genesis of an independent judicial power, in both theory and practice. Moreover, it will seek to establish its executive nature and explain why it is so often (at least presently) misunderstood to be akin to the legislative power. I will begin with a brief discussion of the significance of both *The Constitutions of Clarendon* (1164) and *The Assize of Clarendon* (1166) in terms of refining and moderating the application of the laws in mediaeval England. I will then take up the question of absolute sovereignty as discussed by Thomas Hobbes in *Leviathan* (1651), paying particular attention to the needs that give rise to it. Locke's separation of powers, as detailed in the *Second Treatise*, will then be addressed. This survey will culminate in an examination of

Montesquieu's modification of Locke in *Spirit*, his motivation for making it, and its relationship to the American Constitution as expressed in *The Federalist Papers*, nos. 47-51 (1787-1788). As the foregoing will establish the executive nature of judicial power, it will conclude with a brief explanation of why its nature is so often misunderstood.

The Constitutions of Clarendon (1164) and *The Assize of Clarendon* (1166)

The Constitutions was not the contemporary title; in fact, given that it is "derived from a marginal entry in the earliest known manuscript version written in 1176" (Holt, 1993,23), seven years *after* they were repealed (Schlight, 1973, 122), the title provides little insight into the meaning and significance of the text when it was written. We must, therefore, take our guidance from the text itself. Immediately we see *The Constitutions* are a "record and recognition of a certain portion of the customs and liberties and rights of [the] ancestors" of Henry II (1154-1189). That is, they make the unwritten into the written.

The Constitutions are a unique and important document in English legal history; they are "the first rational code of laws in England, as opposed to either tribal custom or a rambling set of unrelated 'liberties', and [...] although the Constitutions came to almost nothing, they contain the seeds of some of Henry's most important reforms and innovations [...] [*e.g.*,] the use of the jury of accusation" (Appleby, 1962, 95). The text speaks of the "customs and liberties and rights" of the King (*i.e.*, the government), not those of the people; since we are accustomed to speaking and thinking of rights and liberties as things held against the government, not by it, this has a very peculiar – perhaps even tyrannical– ring to it. Moreover, in none of the three instances where the document recognizes it is not an exhaustive enumeration of rights and liberties (first sentence of the first

paragraph; first sentence of the second paragraph; last sentence of the last paragraph) is there mention of the people as rights holders.

The record was made necessary by the "disputes that had arisen between the clergy and the justices of the lord king and the barons of the realm" –each of which operated their own courts of law. What *The Constitutions* represents is not simply an attempt to subordinate the ecclesiastical courts to the royal courts, but ecclesiastical authority to royal authority *per se*– as such it presages the actions of Henry VIII in establishing the Church of England. *The Constitutions*, therefore, is a document that deals with the relations of Church and State. But to properly understand the significance of *The Constitutions* for the development of the rule of law we need to know about the events of the time.

Mediaeval England was not a place of concentrated political authority; rather, it was highly decentralized, with the king, the barons, and the Catholic Church having overlapping jurisdictions in the administration of the law. While there was an interdependent relationship among the lay, insofar as the barons relied upon the king for their honors and the king in turn relied upon them to maintain his rule, "the clergy were more and more separated from their lay fellow citizens; their rights and duties were determined on different principles; they were governed by their own officers and judged by their own laws, and tried in their own courts; they looked for their supreme tribunal of appeal not to the King's Court, but to Rome; they became, in fact, practically freed from the common law" (Green, 1888, 85).

The the practical implications of this, as well as the origins of certain provisions of *The Constitutions*, can be seen in the following example:

> When another clerk, Philip de Broi, who had been accused of manslaughter, was set free by the Church courts, the king's justiciar ordered him to be brought to a second trial before a lay judge. Philip

> refused to submit. The justiciar then charged him with contempt of court for his vehement and abusive language to the officer who summoned him, but the archbishop demanded that for this charge, too, he should be tried by ecclesiastical law. Henry was forced to content himself with sending a detachment of bishops and clergy to watch the trial. They returned with the news that the court had refused to reconsider the charge of manslaughter, and had merely condemned Philip for insolence; he was ordered to make personal satisfaction to the sheriff, standing (clerk as he was) naked before him, and submitting to a heavy fine; his prebend was to be forfeited to the king for two years; for those two years he was to be exiled and his movable goods were confiscated (Green, 1888, 89-90).

In the final analysis, as the ecclesiastics were, for all intents and purposes, wholly independent of secular authority, they were not fellow citizens of the lay; rather, the ecclesiastics formed a separate state within the state –a city of god in the city of man. In fact, insofar as the ecclesiastics had the authority to adjudicate not only their disputes, but those of the lay as well, it would not be unreasonable to consider them as the only true citizens in mediaeval England (*cf.* Book 3 of Aristotle's *Politics*).

In seeking to subjugate the ecclesiastics to his secular authority, Henry II sought to establish a common ground (*i.e.*, legal equality) upon which citizenship and, more importantly, justice could be founded. To so do meant to remove privilege; but as both the ecclesiastics and many of the people saw it, he sought to remove liberty.

The view of the people –seeing their liberty in the privileges of others– is puzzling; however, it arises from the fact that crimes could be punished in either of the three court systems – the royal courts of the king, the private feudal courts of the barons, or the ecclesiastical courts. These latter ones enjoyed wide popular support because "Their punishments were more merciful than the savage sentences of the lay courts; and they held out great advantages to the rich, since the penances they inflicted could

be commuted for money" (Green, 1888, 93). That is, there was leniency for both rich and poor –at least if they could gain access to the ecclesiastical courts. Those that could not were to suffer the "savage sentences" of the lay. For those who could obtain access, then, maintaining the existence of the courts of the ecclesiastics was in their interest.

It is important to note how the disparity in access to these more lenient courts would result in similar (even the same) crimes receiving dissimilar sentences –counter to justice. Thus, while Henry II sought to remove this arbitrary element from the decentralized application (or execution) of the laws, what many in the localities really wanted was not uniform and centralized administration of justice, but the freedom or "right to their own justice without interference from any higher power" (Green, 1888, 92). Understandably, then, this first attempt at purging idiosyncrasy (*i.e.*, arbitrariness) from the administration of justice was unsuccessful –too many individuals with independent sources of authority benefited from the preexisting situation. There is no harm free alternative in political life; to change the institutional structure of government is *always* to benefit some at the expense of others (*cf.* Book I, Chapter 16 of Machiavelli's *Discourses*).

The Assize was truly innovative. "For the first time in English history a code of laws was issued by the sole authority of the king, without any appeal to the sanction of binding and immutable 'custom.' Indeed, in all of Europe there was no instance of national legislation which could be compared with it" (Green, 1888, 116).

The purpose of *The Assize* is, in a sense, identical to that of *The Constitutions*. With it Henry II sought to consolidate the centralization of the administration of justice within the royal courts; this time, however, at the expense of the barony. "By reserving all cases of this type [*i.e.*, robbery, murder, thievery, and aiding and abetting] to the jurisdiction of the king's courts [...] a severe blow was struck at the private feudal courts, and,

incidentally, the security of the law abiding populace was much increased" (Salzmann, 1914, 185). Moreover, and perhaps more importantly for the purposes of this discussion, *The Assize* sought to standardize decisions and punishments within the realm and, thereby, both to remove an arbitrary element from the administration of justice and to further the principle of legal equality. "Instead of arbitrary and conflicting decisions, varying in every hundred and every franchise according to the fashion of the district, the judges of the Exchequer or Curia Regis declared judgments which were governed by certain general principles" (Green, 1888, 123).

The single most important provision of *The Assize*, at least from the perspective of the application of criminal law, is the first, that which provides for a jury of accusation –this is the first time such a jury was applied to criminal cases (Schlight, 1973, 113). Requiring sixteen lawful men (ostensibly with reputations as good men) publicly to accuse an individual of criminal behavior was an enormous advance over previous practice. To see why, one need only consider the following:

> If the murderer was known and his victim was not a stranger, one of the kinsmen of the murdered man would ordinarily accuse or 'appeal' the murderer at the county court. If the accused denied the charge, the court would sentence him to ordeal by battle with the accuser. In many instances, however, the murderer would be too great and too powerful for anyone to dare to accuse him; in other cases the murdered man might not have any relations or his kinsmen might not be interested in risking their lives to avenge his death. / Because of this cumbersome machinery of appeals and of trial by battle, many murderers escaped justice, although their guilt was known to all the neighborhood. many thieves and robbers whose guilt was likewise known went unpunished because of the difficulty of convicting them if they were not caught in the act or with the stolen goods in their possession (Appleby, 1962, 119-120).

Such a procedure is supposed to protect individuals from falsely being accused of a crime, for it is assumed that one will not put one's life on the line without due cause. While this assumption is valid for most individuals, especially those who fear they may or may not survive the battle, it fails to take into account the strong and skillful, that is, those who are quite certain they will prevail therein. Thus, the previous practice of ordeal by battle allows the strong to *accuse* another of a crime (perhaps even one that he had committed himself) and, then, lawfully to strike him down in battle. In other words, this ordeal allows the strong to cloak murder in the robes of justice (at least if their brawn is accompanied by brains). *The Assize*, then, like *The Constitutions*, promoted legal equality; it sought to eliminate the immunity that the powerful (either by strength or skill) enjoyed regarding criminal prosecution.

Taken together, *The Constitutions* and *The Assize* represent both the consolidation of three separate court systems into one and the standardization of the application of the laws therein. Notice, in consolidating these courts, Henry II is not consolidating the laws. That is, he is not bringing together and reconciling separate legal codes; rather, he is restricting where and by whom the laws are applied. As the consolidation of the administration of the laws this amounts to nothing other than the consolidation of executive power.

As was noted previously, the king relied upon the barons to maintain his rule. This was not merely a matter of relying upon their force of arms to repel foreign powers, but of also relying upon them for the maintenance of law and order within the kingdom –that is, for the domestic application of executive power. The king, who is a single man, cannot enforce the laws in person; of necessity he must have auxiliaries. But for them to be auxiliaries, and not merely others wielding executive power independently of him, they must be accountable to him –or more specifically, he must be able to hold them to account. That Henry II issued *The*

Assize solely on his authority is proof that the barons had come to depend upon him each individually more than he depended upon them collectively, or they on each other. Or, to put it another way, Henry II did not fear that the barons would organize against him – as the ecclesiastics had done when he first established *The Constitutions*.

Ultimately, the significance of both these documents for the refinement and moderation of the application of the laws is great. Taking as given the tripartite definition of the rule of law provided by A. V. Dicey in his *Introduction to the Study of the Law of the Constitution –i.e.*, the exclusion of "arbitrariness," equality before "the ordinary law of the land [as] administered by the ordinary Law Courts," and constitutional law as a consequence, and not a source, of the rights of individuals –we see that the actions of Henry II furthered the rule of law in at least the first two parts thereof. Moreover, we see that the only means of doing so was the concentration of the administration of the laws (*i.e.*, executive power).

To clarify this last point it must be mentioned that the concentration of the laws *per se* (or of legislative power) is of no use in furthering this cause. While might does not make right, right does need might. Laws of any kind, whether written or unwritten, have no force but that which is given to them; they are not self-enforcing. This is not to say that laws do not have a meaning, what one could call a rational force, that is independent of their application, for that is by no means true. In applying the laws one is guided by this meaning; to 'apply' them without this guidance is not to apply them at all, but rather to exercise arbitrary power.

The tenuous nature of the advance made by *The Constitutions* and *The Assize* is apparent when one looks at each of their foundations, and how they differ from Dicey's third element of the definition of the rule of law. The former is a record founded upon the "recognition of a certain portion of the customs and liberties and rights of [the] ancestors" of Henry II; the latter is

an ordinance founded upon the pleasure (and will) of the king –"the lord king wills that this assize be held in his kingdom as long as it shall please him." Neither of these foundations– tradition nor assertion –is stable. The inconstancy of assertion is the result of human frailty; the inconstancy of tradition has a similar origin. Human practice varies over time. What is typically meant by 'tradition' is former (or long established) practice that had good results. However, in using traditional practice to justify changing current practice (*i.e.*, in appealing to former practice) the possibility remains that current practice will later be appealed to as traditional practice, thus reversing the reforms made. Because it is irrational to seek to eliminate arbitrariness with arbitrary means, to consolidate the advances made by *The Constitutions* and *The Assize* a firmer foundation had to be found than the shifting sands of time. This firmer foundation was the rights of individuals, and Thomas Hobbes, to whom we now turn, made the first real attempt to establish constitutional law as a consequence, and not a source, of the rights of individuals.

Leviathan (1651)

To characterize Hobbes, *the* author of absolute sovereignty, as the first to seek to found the constitutional order on the rights of individuals may seem odd, for absolute sovereignty is established by the alienation of *all* alienable rights by the individuals that compose the society to the Sovereign –the only unalienable right being that of self-defense (Chapter 17; *cf.* Chapter 14). It is, then, up to the Sovereign whether or not to give back some (and if so, how much) of what has been ceded to him (Chapter 21). This makes the rights (or liberties) possessed by individuals within society dependent upon the laws made by their representatives, who can be one, few, or many (Chapter 19). These representatives, in turn, are dependent upon the constitutional law (*i.e.*, the law that defines the number of representatives), which is, in turn,

dependent upon the "consent" of individuals given under the condition of "absolute liberty" .

Absolute liberty is "the naturall condition of mankind" (Chapter 13). To be in the condition of absolute liberty is to possess,

> The Right of Nature, which Writers commonly call *Jus Naturale*, [which] is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto (Chapter 14).

All men are equal in possessing this Right of Nature, which is the foundation, both theoretically and practically, of the government to which the consent of the governed gives rise.

In addition to this 'merely' theoretical equality (as some might characterize it), the general and natural human condition is such that all men are more equal in fact than is apparent in society. More specifically,

> Nature hath made men so equall, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe (Chapter 13).

The absolute liberty of all, where we each exercise our own judgment in everything, when combined with our necessitous nature and natural scarcity, inevitably results in "a time of Warre, where every man is Enemy of every man" (*op. cit.*). It is to escape this war of all against all, that is, for the sake of security, that we

contract with each other to establish a Sovereign (Chapter 17).

It is of the utmost import that we make explicit the two reasons for which we establish the Sovereign that are implied in security –to protect us and to serve as a common judge. Protection is from threats both foreign (warfare) and domestic (criminal law); judgment is for our relations with each other (civil law). For Hobbes both these functions are executive, for they require that decisions be made in light of particular circumstances. Accordingly, Hobbes suppresses the deliberative aspect of judgment; deliberation implies equality and there is no equal to the Sovereign. The impossibility of deliberation given absolute sovereignty requires legislative power (which is the most deliberative) to be exercised by the sovereign as well (Chapter 26). The separation of powers is a critical difference between Hobbes and Locke, who we will discuss below.

That the need for security implies the need for protection from both foreign and domestic aggressors needs no explanation; how security implies a need for common judgment, however, does. The adjudication of and punishments for violations of the law (both criminal and civil) requires a common judge because an individual can be "presumed to do all things in order to his own benefit, [meaning] no man is a fit Arbitrator in his own cause" (Chapter 15). Without a common judge each would always be the arbitrator of his or her own cause. Moreover, none would recognize the judgment of another as legitimate, nor would they be open to persuasion –as Hobbes indicates when he says that a part of the individual's Right of Nature is the "doing [of] anything, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto" (Chapter 14). Anything I do I think I have reason to do. Without a common judge, the only arbitrator is the power of the sword; a common judge, therefore, prevents the return to the war of all against all from which we fled.

The connection of the power of the robe and that of the sword is a necessary one: we accept the power of the robe because we

would otherwise have to employ the power of the sword each of us individually holds. Furthermore, if we were to reject the judgment of our common arbitrator after agreeing to abide by it, it is the sword of the Sovereign that makes us accept it. The power of the sword both establishes and maintains that of the robe – the latter simply cannot exist without the former[1]. In light of this, it is natural that the one who wields the sword also wears the robe.

While Hobbes founds the constitution on the equal natural rights and consent of the individuals ruled by the government established thereby, his notion of absolute sovereignty, which encompasses all the powers of government, increases the risk of arbitrariness. In relying upon a unified Sovereign, the danger that arises from the inconstancy of men remains. In fact, a unified Sovereign spreads this danger to all aspects of the government. Inconstancy in the laws is as tyrannical as the arbitrary administration thereof. Given that all government is of men, it appears that a structural solution to arbitrariness is necessary. This recognition leads us to a consideration of the original separation of powers made by John Locke.

The Second Treatise of Government (1690)

Locke is the first to separate the powers of government; he identifies three such separable powers: legislative, executive, and federative (Chapter 12). Locke agrees with Hobbes that "there can be but *one Supream Power*," but this power is not the Sovereign, rather it is "*the Legislative*" (Chapter 13). When we

[1] President Jackson is supposed to have said, regarding a certain decision of the Supreme Court, "John Marshall made his decision, now let him enforce it." Such complications would not occur in Hobbes simple system; America, however, is characterized by Montesquieuan complexity, not Hobbesian simplicity. That Jackson was able to say this (or that it could be imputed to him) demonstrates the dependent nature of judicial power; moreover, the effect of the executive refusing to enforce a judgment of the judiciary substitutes in fact the executive's decision for that judgment.

compare Locke's supreme power to the absolute sovereignty of Hobbes a further difference can be seen: Locke's is limited and, thus, not truly supreme, for "there remains *in the People a Supream Power* to remove or *alter the Legislative*" (op. cit.). Hobbes, on the other hand, recognizes no such right of revolution, although he does recognize that such revolutions could (and would) occur, returning the people to the State of Nature.

Ignoring instances of revolution, however, Locke asserts that,

> In all Cases, whilst the Government subsists, the *Legislative is the Supream Power*. For what can give Laws to another, must needs be superior to him: and since the Legislative in no otherwise Legislative of the Society, but by the right it has to make Laws for all the parts and for every Member of Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed, the *Legislative* must needs be the *Supream*, and all other Powers in any Members or parts of the Society, derived from and subordinate to it (op. cit.).

Notice, insofar as the legislative power spoken of here can give "the power of Execution" (*i.e.*, executive power) it includes constitutional legislative powers, as such it can proscribe limits to itself too – a fact Locke recognizes when he speaks of the limits placed upon the exercise of legislative power by "the Original Constitution" (op. cit.; *cf.* § 153 and 154).

One can characterize constitutional legislative powers as extraordinary for they are exercised but infrequently; the executive power also has an extraordinary form –prerogative– which is the "Power to act according to discretion, for the publick good, without the prescriptions of the Law, and sometimes even against it" (Chapter 14). The extraordinary forms of legislative and executive powers, therefore, are mirror images of each other. The former is structured, defined, and limited; the latter is unstructured, undefined, and unlimited. The former defines the structure and limits of government; the latter operates entirely

outside of these boundaries. The end of each, however, is the same: the public good, which is the end of all government.

In dividing the powers of government Locke risks introducing disunity into the government –*the* problem Hobbes's notion of absolute sovereignty was supposed to solve. For, according to Hobbes, there are,

> rights which make the essence of sovereignty, and which [...] are incommunicable and *inseparable*. [...] [Foremost among these is] the power to protect his subjects [...] [for] if he transfer the militia, he retains the judicature in vain, for want of execution of the laws; or if he grant away the power of raising money, the militia is in vain; [...] And this division is it whereof it is said, a kingdom divided in itself cannot stand: for unless this division precede, division into opposite armies can never happen. If there had not first been an opinion received of the greatest part of England that these powers were divided between the King and the Lords and the House of Commons, the people had never been divided and fallen into this Civil War (*Leviathan*, Chapter 18, emphasis added).

To address the danger division of governmental powers represents (*i.e.*, civil war), Locke, then, must collect them together. This collection requires him to mix these separable and distinct powers, to integrate them together into (what should be, but may not be) a coherent totality –there can be only one government of the whole (*v.s.*, the actions of Henry II and the circumstances to which they were a response).

The first powers to be joined together are executive and federative. This is a result of their nature, for "though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* itself, upon all that are parts of it; the other the management of the *security and interest of the publick without*" (Chapter 13). In other words, the nature of these two powers, the end for which, and the means by which they are exercised are identical –in the final analysis, both are

executive power guaranteeing the security of the people (or the public good) by means of "the force of Society" (Chapter 12). The only difference is that the federative power (*i.e.*, externally exercised executive power) "is much less capable to be directed by antecedent, standing, positive Laws" (op. cit.). This results from the lack of any need to moderate the exercise of executive power against foreigners, for the interests of the latter simply do not matter. In other words, the people are concerned with how their government treats *them*, not others. This is not to say that the government would necessarily treat foreigners badly; rather, it will pursue the true interests of the people, doing what ever this may require. Consider the following, which is *the* definitive statement of the realist school: "The *right of nations* is by nature founded on the principle that the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests" (*De l'Esprit des Lois*, I.1.iii).

But to return to the topic at hand, having joined together executive and federative power, Locke, then, seeks subtly to mix legislative and executive power, not by giving the one a share in the other, but by making each dependent to some degree upon the other. To do this Locke, first, subordinates both to the Legislative power, that is, the people's supreme authority as expressed in the constitution; thus, he speaks of the separation of powers within a "Constituted Commonwealth" (Chapter 13; see especially § 152 and 153). He, then, makes the exercise of legislative and executive power each dependent upon (but *not* subordinate to) the exercise of the other. This is accomplished in the case of the former by providing the executive with "The Power *of Assembling and dismissing the Legislative*" (Chapter 13). The executive, however, is made dependent upon the legislative by the power of the purse, for

> 'tis fit every one who enjoys his share of the Protection, should pay out of this Estate his proportion for the maintenance of it. But still is must be with his own Consent, *i.e.* the Consent of the Majority,

> giving it either by themselves, or their Representatives chosen by them. For if any one shall claim a *Power to lay* and levy *Taxes* on the People, by his own Authority, and without such consent of the People, he thereby invades the *Fundamentla Law of Property*, and subverts the end of Government (Chapter 11).

The final sentence unmistakably refers to the executive; moreover, it hints at a limit to the legitimate exercise of prerogative, that 'power' that allows the executive to slip the bonds of legislative constraints. Just as the legislative lacks the authority to convene itself, so too the executive lacks the authority to appropriate money –for either to fulfill its function it must cooperate with the other.

Ultimately, it is the existence of prerogative that prevents the Executive from being completely subordinated to the Legislative (*i.e.*, the constitution). This does not mean, however, that the Executive is free from constraint; rather, it is bound by the approval of the People, who hold the supreme power and are the source of Legislative power. In other words, it is because Locke recognizes the necessity of prerogative that he must retain the right of revolution.

Prerogative is necessary because,

> Many accidents may happen, wherein a strict and rigid observation of the Laws may do harm; (as not to pull down an innocent Man's House to stop the Fire, when the next to it is burning) and a Man may come sometimes within the reach of the Law, which makes no distinction of Persons, by an action, that may deserve reward and pardon; 'tis fit, the Ruler should have a Power, in many Cases, to mitigate the severity of the Law, and pardon some Offenders: For the *end of Government* being the *preservation of all*, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent (Chapter 14).

First note that individuals are also granted a kind of prerogative, one the legitimacy of the exercise of which is to be

judged by the executive. Second, and related to the foregoing, notice that Lockean prerogative includes what is called "equity" by other authors (*i.a.*, Aristotle's *Rhetoric*; Bracton's *On the Laws and Customs of England*; Glanvill's *Treatise on the Laws and Customs of the Realm of England*) –that is, the power to make particular exceptions to the general application of the law so that the decision will accord with justice. Equity is greater than and includes the pardoning power. Finally, note what Locke emphasizes –that "the *end of Government* [is] the *preservation of all*, [...] even the guilty" (op. cit.). In other words, Locke makes the moderation of the domestic application of executive power an end of government.

However noble the goal of moderating government happens to be, and noble it is, the reliance on prerogative (which is arbitrary by its very nature) wielded by the executive charged with the application of governmental power domestically as the means of achieving it is problematic to say the least. It is the arbitrary (or potentially arbitrary) administration of the law that is to be feared by the people. It is precisely under such circumstances that an individual would hope for equity, and it is precisely under such circumstances that such hope would be for naught; it is unthinkable that the one who is exercising his power arbitrarily in administering the law will use his prerogative to check his own action. Note this situation is akin to that which led Locke to separate legislative and executive power, for when one exercises both one can "suit the Law, both in its making and execution, to their private advantage" (Chapter 12). It is this realization that opens the door for Montesquieu's modification of Locke's separation.

Finally, the right to revolution, or the right "to *appeal to Heaven*" (Chapter 14) is necessary because the exercise of prerogative cannot easily be condemned within the structure of government. Condemnation implies that an act of prerogative is arbitrary as opposed to necessary, for private benefit as opposed to for the public good. It is unlikely that an executive who is truly

behaving arbitrarily will alter his behavior as a result of a mere verbal reproach delivered by the representatives of the people, for the executive will assert that the silence of the people themselves represents approval of his action. "[T]here can be no *Judge on Earth*" (op. cit.) to adjudicate between these two competing claims. Either the people throw their weight onto the scale on the side of their representatives (*i.e.*, revolt) or they remain silent.

In the end the only choice provided within the governmental structure outlined by Locke is between revolt and acceptance. As a result, minor breaches in the legitimate exercise of prerogative will stand and, thereby, will provide a precedent legitimating further encroachments. As such, Locke's solution seems to contain the danger of a creeping tyranny. Providing a structural solution to this problem and, thereby, successfully moderating and softening the domestic application of governmental power is what Montesquieu seeks to accomplish in *The Spirit of the Laws* to which we now turn.

The Spirit of the Laws (1748)

Montesquieu begins with Locke's division of powers saying, "In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right" (II.11.vi). This one could anticipate, for Montesquieu's model for the separation of powers is the English Constitution (op. cit.). Later, he will make a second three-fold division when he says, "All would be lost if the same man or same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging crimes or the disputes of individuals" (op. cit.). Finally, he makes a third tripartite division: "As its legislative body is composed of two parts, the one will be chained to the other by their reciprocal faculty of vetoing. The two will be

bound by the executive power, which will itself be bound by the legislative" (op. cit.). That is, he divides the legislative power into two chambers and an executive veto.

The final structure of Montesquieu's three-fold tripartite division of governmental power is expressed in the diagram below.

First Division	Second Division	Third Division
Legislative	Legislative (making laws)	Upper House (Nobles)
		Lower House (People)
		Veto (Executive)
Executive (Civil Right)	Executive (public resolutions)	Executive (public resolutions)
	Judicial (crimes and disputes)	Judicial (crimes and disputes)
Executive (Right of Nations)	Executive (Right of Nations)	Executive (Right of Nations)

The end result of the three divisions is six separate powers (with both the legislative and executive powers divided into three) divided between three branches of government.

For our purposes the most important division is the central one, which gives rise to an independent judiciary. The first thing to note is that the judiciary is the result of a division with the executive power as it applies to "things depending on civil right." In other words, it arises from a separation within the domestic application of executive power.

What motivates Montesquieu's divisions? Generally speaking, it is a concern with moderating the domestic application of governmental power. More specifically, he seeks to cultivate "political liberty" within the citizenry, which "is that tranquility of spirit that comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen". "This *security* is never more attacked than by public or private accusations. Therefore, the citizen's liberty depends principally on the goodness of the criminal laws" (II.12.ii). It is when the force of the government bears (or threatens to bear) down on a citizen that

he is most fearful and, thus, least secure. As a result, a part of the solution is procedural, for example, the presumption of innocence, without which there simply is not security. It is for this reason that Montesquieu says –with little, if any, exaggeration– "the knowledge [...] concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything else in the world".

That said, the other part of the solution is structural –the separation of powers as outlined above. It is this structural arrangement that is the key to moderating government.

> In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce (I.5.xiv).

Thus, Montesquieu mixes powers, rather than merely making them dependent upon one another, as did Locke.

While the separation of powers *per se* is *a* masterpiece of legislation, "*the* masterwork of legislation is to know where properly to place the power of judging" (II.11.xi, emphasis added). This singular position is due to the fact that legislative and executive power "are exercised upon no individual" (II.11.vi). The placement of "the power of judging, so terrible among men" should be in "a tribunal which lasts only as long as necessity requires". The use of juries, which should be composed of peers, makes this terrible power, "so to speak, invisible and null. Judges are not continually in view; one fears the magistracy, not the magistrates". Judicial power, then, not only is "cloaked" (*cf.* Carrese's *The Cloaking of Power*), but it is also divided –the jury of one's peers sits in judgment; the judge merely determines the punishment according to the "precise text of the law" (II.11.vi). Montesquieu's judges, therefore, do not exercise equity; this 'judicial' (read executive prerogative *à la* Locke) is reserved to

the legislative – it is they who "moderate the law in favor of the law itself by pronouncing less rigorously than the law" (op. cit.). Moreover, it is the legislative that judges instances of prerogative, with the lower branch accusing and the upper sitting in judgment (op. cit.). In arranging it so, Montesquieu seeks to avoid the need for revolution, which Locke was incapable of dispensing with. The executive, however, maintains the power of pardoning (I.6.v), the exercise of which, the philosopher says, "is something better felt than prescribed" (I.6.xxi).

Dividing the powers ensures that they will not operate entirely efficiently. As a result, the citizens will not have to bear the weight of many laws, nor will they have to fear arbitrary prosecution and punishment. Note, however, that one power remains undivided – Locke's federative power, or what Montesquieu calls "executive power over the things depending on the right of nations" (II.11.vi). That this power remains unified is an indication that the force of governmental power is not to be moderated when applied externally.

Having examined briefly Montesquieu's theoretical separation of powers, as derived from the English Constitution, which is an example of "chance" (I.5.xiv), or rather "accident and force" (*Federalist*, no. 1), it is appropriate to take up the example par excellence of a regime of separation of powers produced by "prudence" (I.5.xiv), or rather by "reflection and choice" (*Federalist*, no. 1).

The Federalist Papers (1787-1788)

James Madison, writing as Publius, invokes "The oracle [...] the celebrated Montesquieu" (no. 47) in defense of the separation of powers established by the proposed constitution. He highlights the mixing and balancing of powers that originates in the English model and, furthermore, demonstrates that such mixing can be found in the state governments. Appropriately, Publius notes

that "parchment barriers" (no. 48), that is, precise boundaries specified in a constitution, cannot provide security "against the encroaching spirit of power". Or put more forcefully, "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands".

Following Montesquieu, Publius concludes, "the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places" (no. 51). Paying closer attention to the place of judicial power within this structure, it is important to note that the reason Publius provides to justify, in the case of the judiciary, the deviation from the principle that each branch "should be drawn from the same fountain of authority, the people". He says it would be "inexpedient [...] because the permanent tenure by which the appointments are held in that department, must soon destroy *all* sense of dependence on the authority conferring them" (Emphasis Added). This maxim applies not only to appointment made by the people, but also to those made under the current arrangement. Thus, we see that the constitution provides for the independence of the judicial branch, at least in this regard.

In fact, as is later made clear in the essays dealing with the judiciary as an institution, "The standard of good behavior for the continuance in office of the judicial magistracy is [...] the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws" (no. 78). In emphasizing that the judiciary will "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", Publius aligns the judiciary as set up in the constitution with that outlined by Montesquieu. It is not identical, however, for the American judiciary has the "duty [...] to declare all acts

contrary to the manifest tenor of the constitution void"; that is, they exercise judicial review, or rather, they share in the veto (*i.e.*, the legislative power) that Montesquieu assigns to the executive. It should be noted that while Montesquieu does not explicitly provide for it, he leaves open the possibility of judicial review when he speaks of the depositories of the laws in monarchies (Carrese, 2003, 52).

But perhaps the most significant difference is the restoration of equity to the jurisdiction of the American judiciary. The following extended quotation should suffice to establish that the American Founders appropriately modified, or rather refined, Montesquieu's separation of powers to better realize their shared goal of moderating government and securing to the people their security by returning equity (an executive prerogative) to a branch more attuned to its character.

> But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safe-guard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance *in mitigating the severity* and confining the operation of such laws. It not only serves *to moderate* the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and *moderation* of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or

> fortify that temper in the courts; *as no man can be sure that he may not be tomorrow the victim of a spirit of injustice*, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress (no. 78, emphasis added).

In the final analysis, it appears that Publius agreed with Montesquieu in equating the security of the citizens with their liberty and in seeing an independent judiciary as the best means of achieving this end.

Conclusion

As is evident from the treatment above, the judicial branch of government, in both theory and practice, arises from a division within the domestic responsibilities of the executive. That is, judicial power is a portion of the executive power that administers (or executes) the laws. In other words, judicial power, like executive power, deals with the law as it applies to particular circumstances. Why, then, is the character of judicial power now mistaken to be legislative? The reason is judicial precedent.

Precedent leads to this mischaracterization in two ways. First, insofar as the judiciary exercises judicial review, which is akin to the executive veto, it employs a part of the legislative power. Thus, in stopping legislation it seems to legislate in the negative, for it deems a particular piece of legislation to be null and void, never to be enacted again. This indeed looks like legislative behavior, and not, properly speaking, judicial activity. However, the judiciary does not, thereby, have the power to compel the legislative to enact laws that it deems necessary or desirable; that is, it does not have the power to legislate positively. That said the manner in which the judiciary exercises judicial review fundamentally is different than the executive veto. While the executive need not have a constitutional reason for vetoing a law, the judiciary must

have one. In other words, it is required to judge the particular law against the general tenor of the constitution, 'punishing' it if it is found to be disharmonious. As such, judicial review, when properly exercised, is the application of the constitution to a particular law and, thus, is analogous to the application of the laws to a particular individual and, therefore, is judicial in character, rather than legislative.

This brings us to the other way in which precedent places a legislative patina on judicial power. In applying the law over time, the judiciary gives a *de facto* meaning to that which was originally only *de jure*. But one should not mistake the meaning of the law that is derived from its application (*de facto*) for the independent meaning of the law itself (*de jure*). The latter is what must guide the former; furthermore, it is in light of the latter that the former will be corrected and reformed should the application and interpretation of the law prove to be erroneous. To mistake the particular application of the law for its general meaning is to substitute the rule of the law for the rule of the robe. As Montesquieu (1989, II.11.vi) observed in *The Spirit of the Laws*, "If judgments were the independent opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted". Without such knowledge there can be no security, for all rights, privileges, responsibilities, and duties would hang in the balance forever. Thus, the answer provided to the question with which we began proves to be correct: the nature of judicial power is to judge according to the laws.

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