# INTRODUCTION

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1 It was with great delight that we accepted the invitation from the Honourable Justice Judith Prakash and the Honourable Justice Choo Han Teck, Chair and Member, respectively, of the Publications Committee of the Singapore Academy of Law to be the Co-Guest Editors of a special issue on public law in the Singapore Academy of Law Journal.

2 We have chosen "Public Law Doctrines in Global and Local Dimensions" as the main theme of the special issue. The courts in most jurisdictions play a fundamental role in the oversight of the constitutional validity of legislation enacted by the legislative arm of government, and in the exercise of discretionary powers by the executive arm of government. In *Sharp v Wakefield*,[1] Lord Halsbury said: "[w]hen it is said that something is to be done within the discretion of the authorities [then] that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour".[2] It is well-acknowledged that the courts, when called upon to adjudicate disputes in the public law arena, have often invoked a number of doctrines or principles to assist their determination of matters before them. Denis Galligan said: "[a]ny official exercising power does so within a framework of legal and political principles, and that these principles are important in the justification and legitimation of decisions".[3] This observation of Galligan is, likewise, applicable to the exercise of lawmaking powers by a parliament. In this special issue, we have invited a number of distinguished scholars to provide exegeses on some of these doctrines. Given size limitation, it is not possible to cover every conceivable doctrine at work in the public law realm. However, the contributions to this special issue have touched on a number of very significant doctrines which are commonly invoked.

1 [1891] AC 173.
2 *Sharp v Wakefield* [1891] AC 173 at 179.
3 D J Galligan, *Discretionary Powers* (Clarendon Press, 1986) at p 4.

3 Black's Law Dictionary defines legal doctrine as "[a] rule, principle, theory, or tenet of the law".[4] It is significant to note that legal doctrine is created judicially. Nonetheless, doctrines are the law's governing rules, as it determines the course of interpretation and development of substantive norms. It is notable that outside of law, "doctrine" is defined as "[a] belief or set of beliefs held and taught by a Church, political party, or *other group*" [emphasis added].[5] When we talk of public law doctrines, this "group" that we are speaking to consists of lawyers, judges and legal academics.

4 The critical embeddedness of doctrines within a group setting should also direct our minds to the locality or universality of that group. Public law doctrines, as part of law, operate within local contexts, shaping the law, legal thinking and legal outcomes. They also operate within global contexts, as they constitute the common language that public lawyers share across different jurisdictions, different constitutional arrangements, and sometimes even across legal traditions.

5 The globalisation of public law doctrines is, in a way, the result of the spread of constitutions and constitutionalism in the last century of state-making. All new states now adopt constitutions partly as a marker of independent statehood and partly to establish new governance structures. As Michel Rosenfeld observed, the internationalisation of constitutional law resulted in "two distinct dimensions", namely, "a convergence of constitutional norms and values across a multitude of nation-states" and "a migration of such norms and values into transnational orderings encompassing several nation-states and/or non-state actors operating across national borders".[6]

6 To the extent that this special issue interrogates the operation of public law doctrines in global dimensions, it is the former that we are concerned with. Thus, while there is a dimension of global constitutionalism that speaks to the constitutionalisation of international law,[7] this is not our focus here. Furthermore, globalisation or internationalisation of public law has not led to any clear patterns of convergence of divergence. In this respect, while various accounts have been provided.[8]

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4 Bryan A Garner, *Black's Law Dictionary* (Thomson West, 2014).

5 *Oxford English Dictionary* (Oxford University Press, 2017).

6 Michel Rosenfeld, "Is Global Constitutionalism Meaningful or Desirable?" (2014) 25(1) EJIL 177 at 178.

7 See, *eg*, Anne Peters, "The Merits of Global Constitutionalism" (2009) 16(2) Ind J Global Legal Stud 397.

8 See, *eg*, Mark Tushnet, "The Inevitable Globalization of Constitutional Law" (2009) 49 Va J Int'l L 985. For instance, using empirical data, David Law and Mila Versteeg concluded that while there is a degree of constitutional convergence,

(*cont'd on the next page*)

7 The real picture, as it often is, lies somewhere in between or, shall we say, somewhere in flux. One can identify judicial decisions cross-referencing one another, particularly in jurisdictions sharing the same legal traditions. Indeed, many of the jurisdictions examined in this special issue share a common-law tradition, attesting to a common observation that the constitutional migration of ideas typically occurs within legal traditions, though that is by far not the only factor for the globalisation of public law doctrines.[9]

8 For instance, the article of Alec Stone Sweet and Jud Mathews is especially illuminating as their article examines the spread of proportionality doctrine across Asian jurisdictions, which includes those within civil and common-law traditions, namely, South Korea and Taiwan. This attests to the normative force of this doctrine, which the authors allude to in their opening sentence: "[o]ver the past 50 years, the most powerful supreme and constitutional courts in the world have converged on a doctrinal procedure for adjudicating rights claims: proportionality analysis ('PA')". The global spread of this doctrine points to the globalising phenomenon of public law doctrines, as well as its limits arising from localised contexts.

9 Thus, it is not possible to definitively identify a trend of convergence or divergence for all public law cases. What is often present is a mix of convergence and divergence of public law doctrines.[10] As Vicki Jackson noted, albeit in the context of the US, the US Constitution[11] should not be viewed in dichotomous terms of *convergence* or *resistance*, but "as a site of engagement with the transnational, informed but not controlled by consideration of other nations' legal norms".[12]

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there is also evidence of constitutional divergence, or what they consider to be constitutional polarisation, whereby the world's constitutions are increasingly divided into two distinct clusters – one libertarian in character and the other statist. While there is convergence within each cluster, there is increasing divergence between the two clusters. David S Law & Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism" (2011) 99 Cal L Rev 1163. See further Rosalind Dixon & Eric A Posner, "The Limits of Constitutional Convergence" (2011) 11(2) Chi J Int'l L 399 and Tom Ginsburg, Zachary Elkins & Beth Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice" (2013) 54(1) Harv Int'l LJ 61.

9 See, *eg*, Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law" in *The Migration of Constitutional Ideas* (Sujit Choudhry ed) (Cambridge University Press, 2006) at p 13.

10 See, *eg*, H P Lee, "The Judicial Power and Constitutional Government – Convergence and Divergence in the Australian and Malaysian Experience" [2005] JMCL 1, reprinted in (2005) 8(3) *Constitutional Law & Policy Review* 45.

11 The Constitution of the United States (1787).

12 Vicki Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119(1) Harv L Rev 109 at 112.

10 Indeed, local–global engagement reverberates throughout this special issue, not least in the following three ways.

11 First, several articles take the position that contextualisation is important to understanding the spread of public law doctrines as well as in understanding how the same "doctrine" applies in different constitutional environments. David Tan's contribution highlights the importance of understanding the political context in which public law doctrines operate. As he points out, courts in Singapore and Australia approach rights adjudication within the context of a strong culture of adherence to parliamentary sovereignty. He uses free speech jurisprudence and the employment of balancing as an adjudicatory technique to illuminate upon how judges negotiate fidelity to the written text and a commitment to their role as guardians of fundamental rights and liberties. Social and political contexts could also have explanatory force for why the spread of public law doctrines may be limited. Stone Sweet and Mathews' contribution provides a fascinating engagement with cultural resistance although they conclude that cultural differences by themselves are not sufficient to justify a rejection of proportionality analysis.

12 Furthermore, while courts may refer to the same doctrine in terms, the actual content of those doctrines may differ. Yvonne Tew's contribution looks at the diversity of approaches to using constitutional history in constitutional interpretation and explores its practice across various Asian constitutional contexts. As such, while the term "originalism" may be applicable to describing judicial approaches in these jurisdictions, the exact manner in which constitutional history is employed sometimes diverges. Marilyn J Pittard's article examines the rise and fall of the doctrine of legitimate expectation in Australia. She notes that while Australia derived the doctrine from cases decided in the UK, it has not embraced the doctrine to the same extent as the courts there and has eventually rejected the doctrine as being ambiguous and uncertain. Instead, the Australian courts have adopted a more practical test based on notions of procedural fairness. Similarly, Swati Jhaveri examines how Singapore courts have localised administrative law doctrines. She further argues that an understanding of the Judiciary as a co-equal branch of government could further influence the autochthonous development of administrative law principles in Singapore.

13 Secondly, at the same time, public law cannot escape from the search for foundational norms and foundational doctrines. Part of the search has been for a governing principle to justify approaches to judicial review. Eugene K B Tan's contribution illuminates upon this question from the central concept of deference where he observes that judicial review in Singapore emphasises the green-light approach in

facilitating good governance, and is sensitive to the political, socio-cultural and economic context.

14 More broadly, Jaclyn Neo's article is an exposition on the principle of legality as a "basic" norm of constitutional and administrative law in Singapore. She considers how this principle has provided a substantive basis for reviewability and what effect an even more robust application of this principle would have on substantive constitutional and administrative law. Indeed, she argues that the principle of legality could be the governing norm for a constitutional theory of judicial review in Singapore. Similarly, Sarah Murray's article explores the idea of "the people" as a source of constitutional norms in Australia. She argues that the mandate that the Commonwealth Parliament be "directly chosen by the people" has provided normative basis for the High Court's expansive reading of the Constitution of the Commonwealth of Australia,[13] but it remains an elusive concept.

15 Thirdly, public law doctrines, ultimately, speak to the relationship between the State and individuals, the allocation of power within the State, as well as the limits of that power. All the contributions in this special issue address this question, whether directly or indirectly. Thus, Yap Po Jen's article reflects upon this issue of the allocation of power through an exposition on the political question doctrine in Hong Kong. By determining that courts do not have jurisdiction to review certain "political questions", judges are delineating judicial competence from what they consider to be the proper remit for the political branches. And yet, as Yap argues, the application of this doctrine, or rather doctrines, has been inconsistent. This suggests that the proper boundaries in the allocation of powers is not always easy to determine.

16 The Honourable Senior Judge Chan Sek Keong's contribution forcefully argues that the Constitution of the Republic of Singapore must be recognised as having a basic structure, which cannot be destroyed by Parliament through ordinary constitutional amendment procedure but can only be changed through a referendum. Specifically, he argues that Parliament may exclude, by constitutional amendment, judicial review of detention without trial on national security grounds, but on no other ground. This engagement with the well-known basic structure doctrine, first developed by the Indian Supreme Court, contains a former Chief Justice's reflections on the relevance of such a doctrine and the judicial role in upholding certain foundational aspects of the Singapore Constitution.

13 Commonwealth of Australia Constitution Act 1900, s 9.

17 Furthermore, both Peter Gerangelos and Kevin Y L Tan directly grapple with the doctrine of the separation of powers in their articles. Gerangelos' contribution argues that the separation of powers has to be understood and supported by the principle of responsible government adapted to Australia's federal structure. He situates this within a broader discussion on accommodating Australia's dual inheritance of American and British constitutional principles.

18 Kevin Y L Tan's reflective piece similarly argues for a more complex understanding of the doctrine of separation of powers, particularly beyond the Montesquieuan division. His article is a rejection of a formulaic understanding of separation of powers into the usual branches of government, and advocates identifying all legitimate forms of power within a polity in the constitutional framework. It is a call for reconsideration of certain entrenched assumptions within public law, and for this reason, an apt bookend for this special issue.

19 Before we end, we wish to record our heartfelt appreciation to all the contributors to this special issue. Their timeliness in submitting their contributions and in responding to our queries greatly assisted us in the preparation of the manuscript. We have found the many contributions highly interesting, meticulously researched and containing valuable insights. We thank them and the Publications Committee for the privilege of editing this special issue. Finally, we would like to place on record our heartfelt thanks to Elizabeth Sheares, Managing Editor of the journal, and Constance Chu for their efficient and meticulous assistance in the production of this special issue.