

Chapter 2

International Law and the Separation of Powers

2.1 Constitutionalism and International Law¹

2.1.1 *International Law and the External Perspective*

“International law” as a general appellation divides into two branches: private international law and public international law. The former covers the practice and procedure of a national legal system when dealing with foreign litigants, foreign elements to causes of action and foreign laws and legal process. “Foreign” here meaning simply that which originates and belongs to a legal order outside and other than the domestic one. It is thus a body of domestic, nationally developed rules being the particular response of the national legal system to elements outside its accustomed territorial and political jurisdiction. (Its alternate name, “the conflict(s) of law(s)”, offers in a nutshell perhaps a quicker sense of its purview.) As such, it is distinguishable in principle from public international law.

That second branch—the predominant focus of our study herein—pertains to the conduct of states together, in their capacity and functions of organised political power. And in what follows, I will follow Bentham² and use “international law” and “public international law” as synonyms. Its traditional sphere of operation is principally where the interests of different states abut against one another. Thus it has retailed the generally accepted limits to a state’s integral sovereign power among other states, in the boundaries to territory and legal power, the control and use of the high seas, and *terra nullius*. It coordinates the channels of communication and cooperation among states, in the exchange of ambassadors, diplomatic intercourse and sovereign immunity. It has promoted an orderly conduct of wars—

¹ Following generally the line of argument in Koskenniemi 2001, 2005, 2007. The nine symposium essays and response from Koskenniemi provide additional insight into Koskenniemi’s position: Symposium 2006a. See also Hoffmann 2009.

² Bentham is considered to have coined the term “international law”: Bentham 1843.

if only as a necessary evil—and a reciprocity and equality in a state's treatment of foreign interests. Indeed it has called for states to avoid or indemnify injuries done to foreign persons and their property. Broadly and traditionally considered, international law is that system of rules, rights and obligations said to regulate the interactions of states in times of peace and war. It is thus a body of law governing states, analogous to the body of national law governing individuals. Not necessarily always assuming opposition and antagonism, but also cooperation and mutual aid, international law has operated both at the fringes, the outer limits of a state's sovereignty—and by implication within its very core.

In its traditional, classic, presentation, international law extends the appearance that it relates almost exclusively to matters of the outward manifestations and exercise of sovereignty. Hence, it is “public” law in that it circumscribes the movements and motions of states among and around one another. Private law issues, and those relating to the internal structure and application of state sovereignty, generally fall outside its range of sight.³ Only insofar as private interests or private law matters, such as damages in tort or contract, expropriation, salvage or prize, and so on, might bear upon or be called to bear a wider public interest, might international law thereby be engaged. Until recently, little or no regard was paid to the internal exercise of sovereignty. It was hardly necessary or relevant, for international law addressed only state actors, the princes and not their subjects, on a completely different plane, and with a (seemingly) completely different set of objectives. And this apparent wilful blindness to obviously differing international arrangements was captured nicely in the presumption of “sovereign equality”. Consistent with the mere outward exercise and manifestation of sovereignty, it offered a supposed level start and status to all states in their encounters with one another.

All this goes towards characterising the “external perspective” of international law.⁴ It means simply that international law takes an outsider's view of state conduct, accepting and judging it on its face. The machinations and processes by which the state, by whichever representative official, ultimately came to do the acts in question do not factor into, nor weigh upon, any judgment passed by international law.⁵ Responsibility for an act attaches to the state irrespective of the official committing it, in the same way an individual is responsible for his acts. States, the principal and primary juridical actors within its sphere of operation, are in effect conceived of as single, unified entities, a Leviathan capable of willing, deciding and acting as a natural person. They were, in a manner of speaking, seen as the personification of the princes who crowned them. Of course, in reality, international law applied to the collection of state officials—heads of state, government

³ See, e.g., *Polish Nationals in Danzig* PCIJ A/B44 (1932), and *Rights of Minorities in Upper Silesia* PCIJ A15 (1928); also Shaw 2008, pp. 135ff, pp. 257–259.

⁴ Trading on Hart 1961. Hoffmann 2005, p. 222 ascribes the distinction “internal/external” sovereignty to Vattel, Wheaton, and thus, the positivistic period in international law.

⁵ See, e.g., *Polish Nationals in Danzig* (PCIJ); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) ICJ Reps 1986 p. 14; *Lagrand* (Germany v US) ICJ Reps 2001, p. 466, and *Avena and other Mexican Nationals* (Mexico v US) ICJ Rep. 2004, p. 12.

ministers, diplomats, judges and so on—in the discharge of their various offices, as agents and representatives of and in name of that Leviathan. In that way international law “bound” the state. But the actions or powers of functionaries could not detract from a decided emphasis in international law on the place and interactions of sovereign powers, undifferentiated in their peculiar constitution.

Like any viewing point, the external perspective implies standing and looking at something from some other vantage point. It also implies the existence of a corresponding “internal” perspective. For international law, this vantage point has been the sovereign state. The terms “sovereignty” and “state” obviously carry a sizeable amount of conceptual baggage with a considerable historical pedigree.⁶ How we identify sovereignty and a state, the criteria and manifestations, *situs* and powers, all these issues and more have sparked thought, debate, controversy and conflict over the ages. A rich and active intellectual history for political and legal theory, but not really for international law—at least until recently. Indeed, it was only with the draft 1933 Montevideo Convention on the Rights and Duties of States that we have the beginnings of a concerted effort at the international level to come to grips with the primary subjects of international law.⁷ Sovereign states have long served as the cornerstone for the international law system, and as the identifying marker for those acts and actors which concern it.⁸ At the risk of oversimplifying, a sovereign state an entity who is, and whose acts are, recognised have significance and relevance for the system of international law.⁹ In “sovereign state”, we have a boundary line, an optic by which to characterise or classify the subjects of international law and their actions. On the one side, there are acts of state which concern international law. These represent the usual, external, manifestations of sovereign state power as against other states, their officials and citizens. The interests of states abut where their respective sovereign powers collide. On the other side, we find the acts of private persons, matters of national law, and more importantly, the national constitutional order. So it follows that an “internal perspective” for international law attends to the constitutional construction and pedigree of a state act, rather than simply accepting it at face value from a recognised source. Here, the quality of the state act, as well as the capacity of the actor, are relevant.

⁶ See, e.g., Bartleson 1995, 2001 (questioning the modern need for and persistence of “state” and “sovereignty”); Poggi 1990; Philpott 2001 (the development of the concept “sovereignty”); O’Connell 1970, vol. I, p. 80ff; Brölmann 2007, p. 84 (deterritorialised actors establishing concurrent normative regimes to entrenched state concept), and Walter 2007, p. 191 (loosening connection of “constitution” from state concept); and Perkins 1997, p. 436ff (survey of “traditional canon”).

⁷ 165 LNTS 19.

⁸ See e.g., Brownlie 2008, pp. 105ff, 289ff; Koskeniemi 2005, Chap. 4. By contrast Shaw 2008, pp. 645ff, 697ff, frames the issues under “jurisdiction” and “immunities from jurisdiction”.

⁹ Tracking broadly the 1933 Montevideo Convention criteria in its Article 1 (viz. a permanent population, defined territory, effective government and capacity to enter into relations with other states). The further nuance of whether state recognition is constitutive for another sovereign state, or merely confirmatory, is not relevant here.

International law's apparent exclusive regard for the external presentation of sovereign power cannot avoid an implication of at least some minimal concept of internal sovereignty. That is, it cannot logically be said to recognise and coordinate in some orderly way the competing demands of abutting sovereignties without having some idea, however inchoate, of just what sovereignty entails as a whole. This should come as no great revelation or surprise. A goodly portion of international law involves discussions about the criteria for statehood, the recognition of states and their governments. The point here is not the actual conception of sovereignty, of state power. The problem is rather that once the subjects of international law have been established, international law withdraws any attention to the internal mechanisms driving state conduct on the international plane. The external perspective turns its back, so to speak, on the internal, and contents itself with an assumption of a national constitutional order as a monolithic, undivided and undifferentiated, block of political and legal power, irrespective of the particularities of internal constitutional arrangements and constitutionalism more broadly. Fairly seen, it is a rough default position to fill a conceptual vacuum. We can hardly accept this as a developed, analytic and systematic conception, let alone as a constitutionally informed one. A proper conception must entail some basic understanding of the legislative, administrative and juridical structure and function of a state—if not also its political, economic and social aspects too. Or put more simply: state constitutionalism.¹⁰

But the external perspective is deeply ingrained in international law. International law seemed oblivious to and unengaged by the great constitutional upheavals, discussions, and reconstructions during the eighteenth and nineteenth centuries.¹¹ As matters relating to the “internal perspective”, they largely and justifiably fell outside the scope of its attention. This began to change with increasing rapidity in the last decades of the twentieth century, prompted by the events of that century. Human and environmental catastrophes, economic and social pressures, all invited a reconsideration of the presumptions of “sovereignty” and “statehood”, and a calculating how to strengthen transnational mechanisms. International legal personality was conferred on entities and individuals for whom the concepts of sovereignty and statehood are inapplicable. These forces, broadly thus categorised, were seen as moving to disaggregate the state and state sovereignty.¹² Out of that could be constructed transnational or international constitutional systems, with national constitutional orders having a delegated or subordinate status—as opposed to an original one.¹³

¹⁰ A quick perusal of the earliest treatises on international law—aptly and accurately, the “law of nations”—reveals a goodly portion of their pages devoted to describing the exercises of ostensibly internal sovereignty.

¹¹ Philpott's “revolutions in sovereignty” which have arguable impacted upon international relations fall in fact into two categories: “Westphalian sovereignty” and the national political realities of the post-war twentieth century: Philpott 2001. See also Olsted 2005, p. 435 (definitions of the nation-state).

¹² As argued by, e.g., Slaughter 2004, pp. 12ff, 131ff.

¹³ See e.g., Walter 2007; Paulus 2007; Peeters 2007; and Kumm 2009 (attacking “sceptics” who, by misconstruing constitutionalism, find it inapplicable to international law).

The second observation speaks to the nature of international law as a legal system. Public international law is indeed presented as a system of law in the forensic sense—if not also read to include a social and moral sense as well (or whatever other types may exist). Its normative constructs are principally treaties and customary international law. The former category comprises agreements in writing between one or more states, by their heads of state or governments, to do or refrain from doing certain things otherwise within their respective powers and capacities, for their mutual and reciprocal benefit. Whether treaties are merely contracts, and at most evidence and rely on extant (but unwritten, customary) law, or whether they can stand in as a form of international legislation, remains a topic of debate.¹⁴ The real position is perhaps likely somewhere in the middle, dependent upon the precise terms of the treaty itself. The latter category, customary international law, comprises the collection of customs and practices of nations generally accepted as evidencing law. Article 38(1)(b) of the *Statute of the International Court of Justice*, one modern touchstone for defining customary international law, recognises “international custom as evidence of a general practice accepted as law”. This belies an inveterate obscurity. It reflects a conciseness, clarity, and certainty in theory and definition that is inversely proportional to identifying in practice the precise form and scope of what is given as its legal propositions.¹⁵

This may seem to bear rather uncharitable—if not mildly antagonistic—phrasing. But from its earliest scholarly representations, indeed a significant consequence of that exercise of analysis, international law has been dogged by a perceived absence of two fundamental elements to any legal system. These are briefly (1) settled institutions exercising those powers of lawmaking and enforcing, distributed amongst the former in some fashion, and (2) identifiable, public instruments issuing from those institutions declaring law, which in turn is obeyed and enforced generally over time and place. Naturally obvious and obviously natural, these represent the signal elements of any municipal legal system and form the backdrop to our understanding of what a legal system is. Any discussion of international law will either assume the two elements proven (even if only for the sake of argument) and proceed instead to discuss the desired concrete issues, or will expressly address the elements, demonstrating their presence or the irrelevance of their absence. That is, any presentation of international law must account in some degree for how international law is made, by whom, and how it may be enforced, even before any explication of its substantive content. If these criteria, the instrumental and the institutional, are necessary as well as sufficient constituents for any legal system, then perhaps their absence shows international law to be something other than “law” in a forensic sense. On the other hand, conceding

¹⁴ Aust 2007, pp. 13–14.

¹⁵ Thus the scores of academic works attacking or seeking to establish or buttress customary international law, in addition to the conceptual divide between international relations theory and international law theory, such as Boyle and Chinkin 2007; Byers 1999; Murphy 2010; Lepard 2010; Goldsmith and Posner 2005; Koh 1997; Kelly 2000; Guzman 2005; Trimble 1986 (and works cited therein) and see Perkins 1997, p. 461ff.

the existence of international law as a full legal system may have to accept these two criteria, obviously derived from and crystallised out of national legal systems, as perhaps exclusive to domestic law or, more generally, not necessary facts after all. Hence the perceived absence of these institutional and instrumental ingredients represents a defining framework for international law.

2.1.1.1 Institutional Frailty?

For international law, there exists no comfortable backstop or assumption of a state structure as an incontestable social and political fact, and to supply legislative, executive and judicial organs. There is a lack of a general international forum, and such standardised, common processes and mechanisms so as to generate, and ensure observance of, international norms. This vacuum may have been more palpable prior to WWI, namely before the creation of first the League of Nations and the Permanent International Court of Justice, and later, the UN, the ICJ, the ICC and diverse multilateral tribunals. But the need for some response or doctrinal position has nevertheless become more acute under the twentieth century's predominantly positivistic view of law. Driven in part by democratic constitutionalism, the exercise of all public powers must derive legitimacy from constitutionally validated institutional sources and processes, as in the "principle of legality" of continental legal systems. The test for valid and legitimate law is its institutional provenance rather than its moral weight. Legitimacy and validity are in effect conflated under the heading of "legality". And the ultimate expression of legality originates in legislation, deliberated upon and approved by a democratic parliament. The principle of legality also controls and guides the exercise of executive and judicial power. The demand for a like positivistic legitimation of international law is no less vigorous or pressing than the one called for at a domestic level.

But the international legal system, as presently constituted, has no real organs of positive constitutionalism. There exists no legislature which expressly generates instruments of general law. Of course, it has been argued that the UN Security Council (UNSC), and the General Assembly (UNGA) more broadly, could and potentially do serve just such a purpose.¹⁶ Yet the resolutions of the UNGA are not generally regarded as legislation. At the highest, they may be said to evidence customary international law.¹⁷ UNSC resolutions approximate legislation the most closely, not the least in light of Article 25 of the Charter of the UN conveying some sense of obligation, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Yet UNSC resolutions obtain in situations of crisis, rather than as ordinances of

¹⁶ As considered by, *inter alia*, Fassbender 1998, and his reconsideration, Fassbender 2009. As an alternate perspective, Doyle 2009, p. 113ff. Paulus 2009 approaches the same idea.

¹⁷ Shaw 2008, p. 114 (and works cited at n. 193); at p. 115 he refers to a suggestion found in *Paramilitary Activities in Nicaragua* ICJ Reps 1986 14. See also Brownlie 2008, p 15.

general application.¹⁸ Moreover, they too are open to interpretation as simply evidence of customary international law. Nor, secondly—as is transparently clear—is there anything remotely resembling an executive branch as such.

Third, there is the absence of a unified judicial branch. This however is less telling and problematic. In the first place, international law has always relied on the courts of national systems as its judicial arm.¹⁹ In the second place, prize courts (of long-standing practice), the ICJ,²⁰ the ICC, and assorted (multilateral) international tribunals such as the WTO Panels, lend themselves easily to proposals for the recalibration as a world judicial branch. Apart from any considerations arising from the treaties establishing these tribunals and stipulating jurisdiction, the more significant issue pertains to the “secondment” of domestic courts. Such courts are created within a particular constitutional order which prescribes and legitimates a particular distribution of law-making and law-enforcing powers among government organs, the “separation of powers” in other words. International law trades upon the status and powers of the domestic courts for its recognition and articulation, and thus opens itself for examination according to the principles of that constitutional order, including legitimacy and legality. This, of course, assuming that international law has validity and existence as a system of norms outside and independent of the domestic system. Reliance on domestic courts also invites reflection on the status of international law as a free-standing system, and its relation to constitutional order and sovereignty. Specifically, if international law emanates out of domestic courts deciding matters on the nature and limits of a state’s constitutional order and sovereignty, then perhaps international law is in fact merely an extension of domestic law. It is not an independent system of law, but merely a constellation of resemblances and points of contiguity among the separate and independent constitutional orders of sovereign states.

To these observations, a patient and perceptive internationalist will no doubt caution with the words (and arguments) of Henkin:

What matters is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in the relations between nations.... Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behaviour, whether international behaviour reflects stability and order.²¹

And inasmuch as nations do generally tend to observe precepts of international law, even without the existence of an institutional framework, Henkin argues, international law does exist as a forensic fact.²²

¹⁸ And Murphy 2010, p. 104ff suggests that they have not been effective.

¹⁹ As a leading proponent, Benvenisti 20081 and Benvenisti and Downs 2009; also Conforti 1993, p. 8 and Kumm 2003.

²⁰ Notwithstanding Article 59 of the ICJ Statute limiting effect of its judgments to the parties.

²¹ Henkin 1979, p. 26.

²² Henkin 1979, p. 329.

This proposition offers us several paths to follow. The first, and most immediate, would be to assess the instrumental criterion that international law does induce obedience among nations as a proposition of law. If no certain or definite rule existed by which to establish compliance or not, but perhaps some varying or shifting standard if anything, we could not truly speak of compliance. More importantly, if no proof could be offered that the obedience or compliance in question existed in spite of, or as against, present interest, then we could not truly speak of compliance. Unless we must compromise or discard our current will and wish according to the dictates of a rule, we cannot truly speak of compliance.²³ The second would be to argue that Henkin's position supports more a type of international relations theory, than international law proper. Law in a forensic and institutional sense is not necessary so long as a social or political norm—"international law"—achieves the same end.²⁴ The third would be to question whether the said observance of international law norms do spring from their internalisation as independently established and authoritative norms. If a state's observance actually reflects its own constitutional, legal and political exigencies, then international law might instead be better conceived as a reflective and reflexive national practice, under the domestic rule of law. In any event, underlying all three (if not more) options is the concern that the absence of that institutional component naturally associated with the presence of (modern) law points to a more serious shortcoming in international law as an instrument of law. The proposition is, in short, that the institutional frailties noted above cannot but produce or lead to instrumental ones. Those instrumental frailties speak to the quality of international law as law. In effect, this is the old shibboleth of whether international law is "law" or not.

2.1.1.2 Instrumental Frailties?

Law, at its most general and without any particular theoretic pretensions, is an instrument declaring behavioural standards, designed to control behaviour and effectively administered in doing so. Those behavioural standards prescribe the generally applicable limits of what is generally acceptable behaviour in any given society. Now, in the absence of central judicial and executive organs who declare and enforce public, uniform laws, each state is left to own devices to decide what the nature and content of the norms are, and if they will abide by them in the circumstances. And this produces uncertainty in whether a legal rule exists, if at all, and what it prescribes. There appears to be no generally applicable limits declared or recognised and enforced by any central authority.²⁵ The failure of the international law system to declare and articulate its norms, and to enforce them,

²³ Henkin's response to the "cynic's formula": Henkin 1979, pp. 49ff, 90ff.

²⁴ Henkin's response: Henkin 1979, pp. 88ff, 319ff.

²⁵ See e.g., Murphy 2010, esp. Chap. 3, concluding that the UNSC has often failed to accomplish its objectives of halting aggression and maintaining peace.

all in a manner analogous to and as customary in any national law system seemingly undermines its standing as law. The uncertainty in the institutional framework, namely, who declares the law, how, and in what form, together with the uncertainty whether state conduct reflects its obedience to the law or simply the state's own self-interest, translate into a perceived weakness in the normative force of international law, if not a complete absence of legal normativity.²⁶ In more forceful terms, international law is considered impotent, as unable to achieve its declared and intended ends. Likewise, it is considered irrelevant, as being ignored by a state when circumstances and policy objectives require otherwise. As a result, it is a short and unlaboured walk to join those in, say, the international relations camp who characterise international law as “non-law”.²⁷ It may well be “law” in the sense of moral standards, political conventions or social customs, but it is not law in a forensic sense.

So the first branch of the problem refers to law's declaratory function: international law has difficulties articulating clearly and with certainty its normative standards, and in promulgating or publishing them. The central offender here must certainly be customary international law, as opposed to written instruments of international law, the foremost example being treaties. As we will see in Chap. 4, the accepted standard criteria to establish rules of customary international law regarding both a qualifying act of state and its supporting normative element of *opinio juris* both present seemingly insurmountable obstacles to the easy and widespread creation of general and uniform rules. Not only is there often a paucity of basic facts to work from, but the evidence which does exist is often uncertain and indeterminate. So much so that the work of commentators can give the impression of being more a declaration of aspiration and objective, *de lege ferenda*, than a declaration of clear, certain rules, *de lege lata*. Even to invoke treaties as a counterbalance offers no reassurance, as we consider in Chap. 3. Treaties are just as easily construed as contracts between states, whose particular terms are supported by only one “real rule” of international law, that being the bindingness of formal promises, *pacta sunt servanda*.²⁸ At their highest, they are declaratory of underlying customary international law.²⁹ Given the negotiation process, especially for multilateral instruments, treaty terms rarely present shining examples of legislative drafting.³⁰ Moreover, the nature of the instrument, whether general treaty, bilateral investment treaty, memorandum of understanding, international agreement, convention or so on, will also affect the seriousness and attention

²⁶ As seen in the debates surrounding the critique of international law in Goldsmith and Posner 2005, such as Berman 2006, Symposium 2006b and Hart 1961, pp. 89–91 (yet see p. 208ff).

²⁷ Keohane and Nye 2000; also Byers 1999 (trying to reconcile international relations theory with international law theory) and see the historical overview of Knutsen 1997.

²⁸ Article 26 VCLT; Aust 2007, pp. 179–181.

²⁹ Aust 2007, pp. 13, 179–180; Shaw 2008, pp. 903ff.

³⁰ *Czech Republic v European Media Ventures SA* [2007] 2 CLC 908 (QB Comm) 917–18 (citing O'Connell, *International Law I*, p. 252; and an epigram “a Treaty is a disagreement reduced to writing”); and see Aust 2007, Chap. 13 and p. 230ff.

which a state will invest in the negotiation of and assent to terms. Yet accepting the more nuanced modern view of examining the terms of a treaty on a case-by-case basis only really works for matters remaining on a purely international plane. Where the terms of a treaty engage rules and procedures in the domestic legal system, the national, constitutional regime for law-making interposes itself. There is no presumptive legislative, law-declaring status for treaties arising from treaty terms and treaty making. Something more is required, being the constitutionally authorised transformation of treaty terms into law.

The second branch to the instrumental frailty refers to the law's normative effectiveness: international law has difficulties in enforcing its rules, and (just as importantly) in being seen to enforce them. This remains a problem even if we assume that not all laws, international and national alike, are obeyed all the time.³¹ International law has no institutional structure: it has few, if any, general law courts, and no centralised enforcement mechanisms.³² And contrast the position of international law with that of the European Union, and its cover of institutions. Nonetheless, Henkin and many other international law scholars like Franck and Brownlie, offer the counterexample of practice, and contend that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”³³ That is, the habitual observance of the norms of international law (not just counting the number of violations), and the prospect of rogue nations being shunned and isolated by others, suffice to overcome any objections these ostensible problems of institution and enforcement would offer.

But habitual or tactical observance of the precepts of international law cannot, without more, serve as dispositive evidence of the normativity of international law as law. As Goldsmith and Posner argue, there is nothing in the conduct of states to distinguish on that basis those acts arising out of transient self-interest or current policy, and those compelled by legal rule.³⁴ Obeying our desires of the moment is not the same thing as obeying the commands of law, at least not positive law. As Hart postulated, to distinguish habitual conduct from obeying a rule, we need the addition of an internal aspect.³⁵ This internal point of view reveals a “rule of recognition”, by which we acknowledge the bindingness of the rule over us notwithstanding our desires or interests to the contrary. Whether we actually obey the dictates of the rule or not may include other considerations, including enforcement, habit, and benefits and detriments, but these are weighted in function of the bindingness, the normative force, of the rule. And thus, *pace* Henkin, it is precisely

³¹ The enduring favourite of those who argue no general obligation to obey the law being the stop sign in the middle of a lifeless desert: see e.g., Edmunson 1998, 2004. This was not a significant issue for Hart 1961, pp. 211–215.

³² Rao 2004 (referring to the ICJ, ITLOS, ICTY, ECtHR and WTO).

³³ Henkin 1979, p. 47; Franck 1990 and Franck 1988 (perception of legitimacy through symbolism, coherence).

³⁴ Goldsmith and Posner 2005, p. 185ff.

³⁵ Hart 1961, pp. 54ff, 98ff. Echoing (with much greater impact) what Ehrlich 2002 had already observed.

in the violations of international law that we can identify whether it possesses normativity—the compulsion to obedience—and whether that compulsion is of a forensic, or merely of a social or moral nature.³⁶

A graduated, tripartite, response forms the usual rejoinder. At its most ambitious, the reply concedes the existence of a problem, and proposes reconstructing the institutional framework of both international law and national law. That is, it suggests a form of constitutionalisation at the international level, integrating current institutions (most notably the UN and the ICJ) and creating new ones. Moreover it would reconstrue statehood and sovereignty as permeable and fungible, instead of impenetrable monoliths. Thus it would meet and overcome directly the two frailties of international law. At the second level, the rejoinder distinguishes between treaties (and other written instruments under international law) and customary international law, and prefers the former over the latter.³⁷ The certainties and stability offered by a treaty regime, as given by many current examples from the EU to the WTO, and the receptiveness of states to maintain and observe treaty relations would seem to overcome the two frailties in large measure. The third level simply proposes altering or reinterpreting the criteria for making international law (customary international law in particular) so as to diminish the impact of or circumvent the frailties.³⁸ Thus the subjective element to customary international law, *opinio juris*, would not be a necessary ingredient, or could be discounted. Likewise, evidence of practice would not necessarily have to extend over any length of time, and could be justifiably expanded beyond traditional acts of state. Moreover, NGO's and other entities recognised in international law become constituent actors in the practice forming customary international law.

2.1.2 A Change of Perspective

So long as the objectives and perspectives of international law remained fixed at the level of purely interstate activities of a “public law” nature, these frailties might not be understood to pose any great problems. A continuing insulation or separation from national constitutional peculiarities would leave international law sturdy enough at an international level. But the twentieth century, right from its first decades, washed away the sand upon which this castle rested. Political, social agitation and action, matched by technological innovations, economic development and expansion, and increased ease of mobility all changed the internal arrangements of the states themselves. But they also led to significant changes to

³⁶ See Cohen 1996, pp. 177–181 an insightful and cogent reply to Korsgaard 1996a.

³⁷ Thus the tenor of Kelly 2000.

³⁸ See e.g., Guzman 2005; Shaw 2008, p. 74ff (and with the idea of “automatic international custom” as suggested by Bin Cheng for UN resolutions on outer space); and Lepard 2010, pp. 34ff, 224ff.

the circumstances and nature of interstate contact, prompting ultimately the neologism of “globalisation”.³⁹ Globalisation is of course more than the actual network of economic, social and political connections across state borders. It also carries with it a change in perspective, one whose impact is most significantly felt in international law. The transnational connections defining globalisation suggest a repackaging, a reconstruction, of how public power is organised and exercised. From the national viewpoint, it invites naturally more permeable borders, and greater efforts for standardisation and regulatory cooperation. Yet from the international side, globalisation offers international law a greater and deeper foothold in regulating directly or indirectly economic, social and political matters at an internal level. The portal of transnational cooperation opens these areas to the institutions and instruments of international law, by virtue of its promise of an autonomy and independence from any one particular national legal and political system.⁴⁰ The change in perspective for international law occasioned by the twentieth century is a reinvigoration of its claim for an active role in domestic law-making.

The historical progress to what we now comfortably refer to generally as “globalisation” is well-known and often rehearsed.⁴¹ The economic, intellectual and social momentum building up through the latter decades of the nineteenth century exploded into the political arena, demanding and producing changes to the ways political power was exercised inside the state. The perception of society and politics, as aggregated into the administrative state, sought both a greater democratic content to government while allowing it a greater managerial responsibility for all aspects of social welfare. At the same time, the more close and concrete link of social welfare and economic well-being to the political calculus required legal and political perspectives to change, as well as account for social and economic attachments traversing borders. The two world wars, and their consequences, demonstrated with clarity a lack of voice and vigour to prevent suffering instigated by political power, and on such a wide scale. This came hand in hand with a “disenchantment” (ever increasing as the century progressed), in effect the dissolution of broadly common, shared moral grounds based largely in religious (Christian) conviction, for what is in effect a sort of ethical republicanism, of a largely secular, local and subjective nature.⁴² The dissolution of this presumption is evidenced not only by resurgent scholarship into reconstructing and recalibrating what now might serve just as such a common foundation—predominantly

³⁹ Hoffman 2005, pp. 212–213, 226ff (suggesting that the decision of Judge Alvarez in PCIJ Lotus recognised at that early stage already the pressures of globalism on international law).

⁴⁰ Delbrück 2001 (emphasising the denationalisation of law).

⁴¹ See further, e.g., Steger 2009; Friedmann 2000 and Friedmann 2005; Stiglitz 2003, and Delbrück 1993.

⁴² Taken up in and explored in a vast swathe of legal and ethical philosophy, an extremely brief cross-section of which includes McIntyre 1984 and McIntyre 1988; Berman 1983; Habermas, 1996 (establishing “constitutional patriotism”); de Been 2008, and Forst 2002; see also Brudner 2004 and Alexy 2004 (both positing a general theory of (constitutional) rights).

a humanism articulated through human rights—but also an emphasis on value positivism through treaties. Further, new technologies facilitated the transport of goods and people on land, by air, at sea, as well as of ideas, by telecoms, radio and television, and all well beyond national borders. These technologies also assisted creating new types of goods and channels of transport, such as fax and internet. Transnational transport and communication obviously required cooperation and coordination at the very least among national regulatory organs. Economic expansion, driven by technology, population, diversification, and so on, spilled more heavily over borders. This expansion also was recognised to come at a cost to the environment, whether damage by accident or through longer term changes to climate, ecology, or biotope. As the frequency, immediacy, and intensity of contacts increased among nationals of different states, so too did the impetus and need for cooperation and coordination among their respective legal and economic systems.

2.1.2.1 The Rule of Law Mindset

These forces of “modernity” or “post-modernity” manifested themselves first within the respective constitutional orders of states. It would naturally be an unwarranted oversimplification to represent these forces of change as being the driving cause of constitutional change in the twentieth century. The interdependence and symbiotic coherence among political–constitutional, social, economic and legal forces, the one influencing the other in like measure, produce the far more complex realities. Nevertheless we can trace out in broad strokes three principal developments in constitutions and constitutionalism more generally. The first has been a redoubled pressure to expand and empower the various attributes of democratic governance. Beginning with broadening the franchise, the right to vote, there followed moves to stimulate and maintain public participation in political processes, and to develop new means (or refine extant ones) for public participation. This spans a whole array of mechanisms, from creating more opportunities to vote for local and other public officials, to public outreach and consultation, through to greater attention being paid to the influence exercisable by interest groups, lobbying, or civil society groups, legislative initiatives through referenda, and such like. With this drive for a greater voice in governance—making rules and administering them—comes a renewed emphasis on the responsiveness and responsibility of public officials and institutions. The second strand is an increased demand for public, collective, protection and support of economic and social security through the instrument and institution of government. What we experience and expect in the proper management of society, as the primary task of the government, has drawn it more deeply into and in more aspects of our everyday existence. The modern state’s orientation to social welfare and well-being has created the “regulatory state”, represented by a complex, ever-expanding constellation of rules and procedures.

The increased volume of regulation points to an emphasis and reliance on rule-making which colours modern constitutions and constitutionalism, the third strand.

The leading image and idea to twentieth century constitutionalism has been the “rule of law”, one tied very closely to active, justiciable human rights. Much has already been written, and is being composed, on the rule of law elsewhere.⁴³ For present purposes, a brief sketch will suffice. In its classic presentation, the rule of law serves to limit and control an orderly application of power in society. It has two branches: (1) the government ought to rule by law duly made, and (2) those making the law (specifically, the government) must comply with certain conditions and procedures in doing so. Invariably these conditions and procedures speak to democratic, representative and responsible governance. Both conditions together would check any arbitrary exercise of government power, and thus preserve individual rights and freedoms within an orderly society. In order to serve as a check and balance to public, administrative, power, the rule of law has necessarily translated or defined “state”, “government”, “sovereignty” and so on, in its own, legal, terms. Governments rule by instrument of law; they are themselves an instrument of law, and therefore subject to it. The ultimate source of law is prescribed by and through the constitution, as the basic, primary law.⁴⁴ So what is essential to the rule of law mindset is that power and its exercise (insofar as distinguishable) can be effectively framed in and by law. The structure of any relationship—most prominently the one of governor and governed—can be construed in terms of legal concepts and, importantly, controlled by legal process.

Indeed, what has emerged in the twentieth century is a strong tendency to juridify all social and political relations. This does not mean that society has necessarily become more litigious. It stands for more than simply an increased demand upon legislative and judicial resources by virtue of more complex, specialised regulations. It represents rather a mindset which translates constitutional, political, economic, and social issues into legal, justiciable terms. We tend to conceive of our various relationships with other individuals in private, business, and public life in terms of law and legal effect. Values and standards have public, social relevance in the measure which they are articulated and enforced by the courts. In many ways, the burdens of defining and validating socially important values which moderate conduct have been shifted to the courts. This is particularly evident in cases regarding judicial review of legislative and executive action on grounds of human rights and freedoms. The public articulation of political, social, and economic ideas speaks in the language of law and legal rules, in terms of rights and duties, obligations, liabilities and claims, and enforcement. Yes, we have the benefit of peaceful and orderly compulsion and obligation under authority and force of law, but it does come at the cost of requiring social values, mores, relations, and so on, to be reducible and reified into legal form.

⁴³ See, e.g., Haljan 2009, pp. 278–279, and works cited there.

⁴⁴ Whether further the constitution itself derives from a norm one level higher, or represents an irreducible or self-generating and self-standing political fact, remains live for debate between the schools conventionally headlined by Kelsen on the one hand, and by Schmitt, Hart, and so on, on the other. But even behind Kelsen’s ultimate norm there is the irreducible and self-standing political fact of a world comprised of states.

This is particularly the case with our relations to government and public administration. The creation of the regulatory state threatens, ironically, rights and freedoms by subordinating them to—or even submerging them under—the vast collection of duly enacted rules and regulations. Discretion, individuality, choice and freedom risk becoming minimalised and compressed under the weight of constricting and restrictive regulations in the regulatory state. To a degree, this is counterbalanced by pressures for greater transparency in government action, originating out of the current of democratic participation. This would serve to allow sufficient opportunity to question the necessity and scope of regulatory mechanisms, and modify or abolish them if necessary. The more sizeable weight, however, has been loaded upon the judiciary and judicial process. It is not necessary here to seek the now wide collection of examples at the apex of judicial control, constitutional review. The expanding body of civil law cases, of administrative law and of judicial review of government acts in domestic legal systems is example enough. Suffice it to say that the judiciary has come to bear a significant responsibility as the primary guardian of the rule of law.

2.1.2.2 The Rule of Law Mindset in International Law

Accompanying these changes in the internal structure of states was also an evolution in interstate relations. The efficiency and destructive powers of modern warfare created both an aversion to the casual use of force to determine international relations, and the realisation consequently of its persuasive force, as a threat and in reality, to compel state action.⁴⁵ Korea, Vietnam, Iraq and Afghanistan are but a handful of many more examples. With not a little irony, that cogency did not simply rest on the power of violence to attain desired ends, but also the widespread destabilisation it produced, and the very real potential for a costly and drawn out stalemate between opposing forces. The aftermath of the world wars also contributed to the collapse of nineteenth century colonialism and the dismantling of the remnants of those empires. Economic exhaustion occasioned by war produced a political exhaustion, and a desire to concentrate on rebuilding national welfare and wealth. Ideological motives, with their footing in the national mindset of the rule of law and human rights, expressed themselves internationally in terms such as “self-determination”, “the community of man”, and so on. The development of trans-national economic trade and cooperation generated not only the impulse to greater cooperation between foreign regulatory agencies, but the perception of a disaggregated and permeable state sovereignty.⁴⁶ The focal point for “modern” or “postmodern” international relations has been one peaceful coexistence, modulated

⁴⁵ Not to dismiss the impact of terrorism. In fact, the impulse to casual violence has shifted from states to non-state groups, working within and outside of established states, to destabilise them. See generally, Chadwick 1996.

⁴⁶ As in Moran 2007.

by reciprocity and economic cooperation. Violence and aggressive force are seen as an exception, a necessary evil or aberration.⁴⁷

The transposition into international law of these developments in the internal and external conduct of state business has altered the perception of what comprise the objectives of international law. In reaction to depredations and suffering, and in the name of preserving wider peaceful relations among states and peoples, international law in the twentieth century is understood actively to supplement or even supplant national legal and political situations seen as vulnerable, deficient, or in collapse.⁴⁸ Less negatively, perhaps, international law is seen as an instrument to strengthen and support domestic commitments to democratic institutions and processes, and the effective practice of human rights there.⁴⁹ Oppression and suffering in a state is seen to lead inevitably to instability and disorder at an international level, whether by attracting intervention (invited or not) from other states, an exodus of refugees or the like. Addressing problems and issues through collective, international action can provide material and other assistance; strengthen existing national devices under threat, and avoid the degeneration of circumstance and institutions. Collective state action can respond to specific, local crisis situations, in order to render humanitarian assistance and relieve suffering. Collective action can also be proactive, in the form of international organisations and institutions, which assist states and guide policy, by offering a measure of uniformity and neutrality.⁵⁰ Thus on the ostensible basis of preserving world peace, order and human rights, international law in the twentieth century would claim a greater role in the internal affairs of a state, directly or by influence, and seek thereby to assure peace and stability.

With this desire to play a greater and more proactive role in governance, international law would draw heavily upon the rule of law mindset. The rule of (international) law holds that (1) the conduct of states can be constrained and restrained by legal rules (state as a subject of law bound by law), such that conduct outside the limits so established is subject to some sanction and penalty,⁵¹ and (2) a defined, stable, objective process creates and enforces these binding rules of like character. The key is the compulsory, obligatory character of the law. Rather

⁴⁷ Hence the qualification added by Koskeniemi 2005, p. 497ff: a peace based on principles of which we can approve. And echoed in Chadwick 1996.

⁴⁸ Koskeniemi 2005, p. 476ff.

⁴⁹ See, e.g., Franck 1990; Benvenisti 2008; Slaughter and Burke-White 2007; Moran 2007; Gardbaum 2009, and Kumm 2009.

⁵⁰ See e.g., Raustiala 2006, p. 428ff; Boyle and Chinkin 2007. And hence the proliferation of treaty-based international bodies, such as the UN (1945, following upon the ill-starred League of Nations); the ICJ (1947, succeeding the PCIJ); the WTO (1948, 1995); the IMF (1944); the World Bank collection of bodies (IBRD 1947; IDA 1960; IFC 1956, MIGA 1988, and ICSID, 1966); NATO (1948); OECD (1961); OSCE (1975, successor to the CSCE); the CoE (1949, notably supporting the EConvHR and the ECtHR), and of course the predecessors to EU, the ECSC (1950) and the EEC (1957).

⁵¹ Not necessarily one of reprisal or aggression, but perhaps being ostracised, or being excluded from international dealings, and so on.

than by violence, states and other actors on the international plane are considered to desire achieving their objectives by the influence and compulsion of rules, that is, within a legal framework.⁵² It articulates the mutual and reciprocal interaction among states in the form of legal relations. As remarked in *Oppenheim's International Law*, “[E]very international situation is capable of being determined as a matter of law,”⁵³ whether or not an applicable, explicit rule is quickly at hand. That framework arises through the variegated ways in which states agree and cooperate, whether in a formal setting such as multilateral conference or treaty negotiation, or in an informal setting through exchanges of diplomatic notes or other conduct. The rules would transcend the peculiarities of any given situation so as to be regarded as having a general application. States thus comply with the rules of international law, expecting other states to do so as well, as elementary to their interactions. Indeed, states are considered bound to observe international law in their capacity as states, as “members of the world community” whose existence is owed to and creates the framework of international law.⁵⁴ In complying with those rules, states acknowledge thereby certain limits on and moderation of their sovereign powers, along the same lines as those limitations and processes imposed by domestic constitutional precepts. Complying with law on the international level thus begins to commingle and be conflated with a state’s obligations domestically. The rule of law domestically and the rule of law internationally are but two sides of the same coin. That is simply the normativity of law.

This reconstruction of international law into an activist and proactive regulatory system for states imposes substantially greater demands upon the latter’s internal architecture. The implementation of treaties, international rights, rules and obligations, the pressures to extend the depth and reach of international law within state systems, and the rule of law mindset generally, all require transposition into the domestic constitutional order in some fashion, even if the effort is directed merely to reciting certain historical precedents. Yet international law’s intervention in internal state affairs—albeit ostensibly with an eye to their external ramifications—retains largely the same concepts and mechanisms as its nineteenth century variant with the predominantly external perspective. The conceptual foundations and instruments of international law, customary international law and treaties, sovereignty and its attributes, remain the same, despite some attempts to widen the field of players to international bodies and NGO’s, and to reinvigorate attention on such concepts as obligations *erga omnes* and of *ius cogens*.⁵⁵

⁵² See e.g., Henkin 1979, p. 29.

⁵³ Jennings and Watt 1992, p. 13, and see O’Connell 1970, vol I, 1.

⁵⁴ Perkins 1997, p. 469ff.

⁵⁵ Most international law scholars would root the concept of “*ius cogens*” more deeply in international law, by virtue of latter’s natural law heritage. Hence its appearance in the 1969 Vienna Convention on the Law of Treaties represented merely a codification of a rule of longer standing, rather than the crystallisation of a new rule: see e.g., Byers 1997; Paulus 2005, pp. 300–301 (and works cited there). See also Weil 1983 and Tams 2005, p. 99ff. See also Lepard 2010, p. 243.

The focus remains bound to the classic categories of treaties, customary international law, decisions of courts and tribunals (international and national alike) and the observations of leading commentators. Even in their commendable recent attempt to shake free from this and identify “the processes, participants and instruments employed in the making of international law”, Boyle and Chinkin’s study remains firmly within its grasp.⁵⁶ The attention devoted to the influence and participation of non-state actors in negotiating treaties or in evidencing rules of customary international law, the extent to which state agencies may bind a state again in treaty negotiations or in customary international law, and the normative scope of ICJ decisions and other international tribunals remains clearly well within the traditional framework. Moreover, and perhaps characteristically of modern international law scholarship, the little that is said in fact about the transmission and force of international law rules in domestic law presumes without any explicit justification that international law occupies objectives and sphere coextensive with the domestic legal order.⁵⁷

For example, treaties such as bilateral investment treaties and human rights treaties do not really target interstate relations as such, except by fiction of convention and formality. They intend to establish directly specific legal rights in national legal systems for private actors. Other types of treaty, addressing state actors explicitly and solely, may nevertheless aim to adjust government policy or conduct and require amending current rights by legislation and duties or amending the constitution. By convention and practice, international law does not concern itself with the internal, constitutional and legal, mechanics of implementing a state’s obligations under a treaty. And as is long accepted, a state may not plead difficulties encountered in those mechanisms as a defence to breach of treaty terms.⁵⁸ But both types clearly engage a state’s constitutionally prescribed lawmaking process. The same inroads in that process are claimed for customary international law (whether based on treaty, UN instrument or practice) especially in the field of human rights. Treaties and customary international law are wilfully blinded by the external perspective to constitutional peculiarities.

The problem posed by international law for modern constitutional law is not some antiquated nineteenth century instrumentarium. Rather, the adoption of an internal perspective on law-making requires international law to recast its concept of law and law-making into a constitutional form. Or at least into a form recognisable by modern constitutional law. This follows from the rule of law mindset, which understands power and compulsion in terms of provenance and procedure. The provenance of a constitutionally prescribed rule-making procedure warrants the validity and legitimacy of any law. The constitution itself is the summum or origin to any legal and

⁵⁶ Boyle and Chinkin 2007, p. 1, and see also Hollis 2005.

⁵⁷ A notable exception, opening the presumption within a pronounced Australian context to scrutiny, is Charlesworth et al. 2005. Also, for example, Slaughter’s model of “transjudicial communication and network”: see e.g., Slaughter 1994.

⁵⁸ Codified in Articles 27, 46 VCLT.

political provenance. For international law to claim or to warrant a like stamp of validity and legitimacy within a state, it would seem reasonable and natural for the international law system to present its justifications in constitutional terms. Moving from an external perspective to the internal is a constitutional step.

But international law has booked no significant advance in developing concepts of constitutional order and law, and certainly not in its understanding and framing the nature and locus of lawmaking. Resistance from states (not unexpected) has generally hindered the aspirational moralities of scholars and interest groups, from the earliest of stages.⁵⁹ Recent work has begun to address the institutional side of this conceptual deficit. Some have suggested models for an international constitution, whether as a unified, integrated system, or one which merely coordinates national constitutional systems.⁶⁰ Yet others have avoided any wholesale reconstruction of international institutions, and have sought to draft extant national institutions—the courts in particular—to assist implementing international law, thus trading upon the former's history of legitimacy and validity. But whether preferring the more ambitious trajectory of a full integration of international and national law, or simply requiring more consistent and consequential implementation of its precepts, international law still faces the same problem. That problem is treating the rule of law as an institution, a given, rather than as an instrument, a process by which legitimacy and respect for law are generated. It takes the rule of law for granted, assuming what respect, validity, legitimacy, or such like term, has been created within a national legal system based on internal circumstances automatically apply or translated immediately to the international level. The problem originates out of the external perspective, of treating states as coherent entities without regard for their respective internal constitutional order. It seemingly ignores those relationships among national actors which go to fashioning law and the rule of law in a national setting. Those relationships are the product of a particular history, not some transcendent theory. That history is drawn up into the particular constitutional settlement of a state which assigns roles to the various actors. It is that constellation of relationships among organs of government which imbues or warrants the validity and social legitimacy of legal rules on the internal perspective. We are referring here of course to the separation of powers. That doctrine provides the necessary optic through which the legitimacy and validity of law is perceived.

2.2 Constitutionalism and the Separation of Powers

The separation of powers represents one of the cornerstones to modern constitutionalism and political thought. At its most basic and simple, the separation of powers doctrine holds that in each state whose purpose is liberty and the well-being

⁵⁹ Early examples being Lauterpacht 1933, and Kelsen 1944.

⁶⁰ See e.g., Allott 2007; Brölmann 2007, p. 93ff; Peeters 2007; Berman 2005; Picciotto 2008 (imposed co-ordination, but no formalised constitutional structure), and de Wet 2006.

of its subjects, the government exercises three discernible categories of power, which, in turn, are ascribed to three different, and separate, public organs. The categories of power divide into law-making, law-enforcing and law-applying. Hence the classic “*trias politica*”, of the legislative branch, the executive branch and the judicial branch. It has been the task of commentators, courts and constitutionalists following Montesquieu, the doctrine’s modern progenitor, to flesh out in workable detail which officials belong to which branch of government, and what specific, actual functions fall under which category—in whole or in part.

Crystallised in his *L’esprit des lois* into a doctrinal tenet,⁶¹ Montesquieu introduces the concept in the book section dealing with the relation of political liberty to the constitution.⁶² The separation of powers would thus trace out the necessary relations among the various arms of government, deriving from their nature, to assure political liberty. Separating functions ensures a balance among state organs, so that no one of them may arrogate to itself and wield all power. By consequence, the doctrine has become a cornerstone to (liberal) democratic political theory and its fashioning of modern constitutions.⁶³ Giving effect to and respecting the separation of powers in the constitutional structure of a state is understood to be the hallmark of a liberal, democratic constitution: the separation of powers represents the institutional guarantee of political liberty in a constitution. By dividing the functions of government, the separation of powers would seek to ensure a moderate government which respects the liberty of its citizens.⁶⁴ Each arm of government would balance the other, thereby avoiding the concentration of unchecked, absolute power in one person or organ. In particular, the law-making branch ought not be concerned with judging or executing the laws so as to concentrate upon deciding the great questions of public business and checking whether laws remain usefully and well executed. Similarly, the law-enforcing branch must not have the power to create and apply laws so as to avoid changing or manipulating the law merely to suit immediate needs, without the possibility of moderating (and external) limits or restraints. Nevertheless, in Montesquieu’s vision, three exceptions existed for the commingling of legislative

⁶¹ This phrasing accounts for the cogent demonstration by Vile that the (modern) doctrine of the separation of powers is in fact and *pace* Montesquieu an amalgamation of two different political features: balanced government and divided government: Vile 1998. And see also Gwyn 1966.

⁶² Montesquieu 1998, Book 11, Chaps. 1–6, 18, distinguishing it from political liberty in relation to the citizen, which he discusses in Book 12 following. The distinction, albeit not one without question and uncertainty, seems to separate the mechanism of making and enforcing the law (liberty in relation to the constitution) from the content of the law, in terms of certainty and its intrusive and restrictive nature (liberty in relation to the citizen). Hence a citizen’s political liberty is a function of his security from unclear, oppressive and overly restrictive laws. Suggesting this as some type of “rule of law” concept, complementing the constitutionalist first arm, is perhaps an overly eager and too hasty extrapolation.

⁶³ See, e.g., Hamilton et al. 1961, No. 47 (Madison); Vile 1998 and Gwyn 1966 (historical basis); Barendt 199; Tomkins 1999; Barber 2001; Craig and Brown 1990. See also Ackerman 2000 and Carolan 2007 (arguing for a redefinition of the separation of powers).

⁶⁴ Montesquieu 1998, XI, Chaps. 1–6.

power with the judicial.⁶⁵ First, the nobility ought to adjudged only by their peers comprising an upper or second chamber and not before ordinary tribunals. Second, it is for the legislative chamber to moderate and mitigate the effects of the law. Last, in cases of crimes against the state, the Commons would act as prosecutor, and the Lords as judge. Likewise, the serious and heavy tasks of judging require the law-applying branch to remain apart from the passions and demands of the moment which attend the executive function, and refrain from supplanting the legislature's will.

Yet despite such a foundational and fundamental role, the doctrine remains perhaps surprisingly one of the more flexible of political and constitutional concepts. Much of the reason for its flexibility, or dynamism, issues from its core idea and usage as a distributive calculus for political power. The (pure) doctrine stipulates that dividing powers and functions, with coordinate checks and balances, offers the best guarantee of a felicitous application of government power. But it does not itself specify how the categories of power should be divided, nor to what organs the powers ought to be attributed and in what measure. Rather, it merely warns that combining all or most of the functions into one organ entails a serious risk to liberty and order.⁶⁶ So a concrete articulation of the separation of powers necessitates an exercise in balancing official power operating in a state under cover of law among different instantiations of public. Defining and finding such a workable equilibrium in turn requires identifying what the constitutive organs of government are, what they do, and how they interact.

The conventional gateway to articulating the separation of powers in political constitutional terms are form/formalism and function/functionalism.⁶⁷ On the one hand, we can approach the entirety of government power as a collection of different acts, performed by government representatives in exercise of their office.⁶⁸ Thus our concept of the separation of powers must identify and distinguish functions, as well as prescribing which acts of government are regular and ordinary, and which, extraordinary. Likewise, it should differentiate between public acts properly belonging to an office, and those of a private nature or those undue and *ultra vires*. On the other hand, we can approach such power in terms of its extant, established institutional representatives. The question is not one of functions, but of functionaries. Thus it would define and identify the organs of government which in turn duly exercise the appropriate set of powers.⁶⁹ And it

⁶⁵ Montesquieu 1998, XI Chap. 6, 163. It is under the second exception of mitigating the rigours of the law, that the well-cited passage occurs of judges being the "mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour." On which, see the excellent article of Schönfeld 2008, taking issue with the passive "judge-automaton" reading of Montesquieu's phrase.

⁶⁶ As understood, e.g., by no less a figure than Madison, evidenced by his essay No. 47 in the *Federalist Papers*.

⁶⁷ See e.g., Magill 2000 distinguishing the two main camps (in the US) into formalists and functionalists; Strauss 1987, and Ackerman 2000.

⁶⁸ Montesquieu 1998, XI, Chap. 6.

⁶⁹ Montesquieu 1998, XI, Chap. 6.

would trace out the boundaries and relations among them, in order to show (in the words of Montesquieu) “the necessary relations deriving from the nature of things.”⁷⁰

This theoretical distinction is, however, hardly clear or definitive in practice. Form defines function as much as function determines form: they are by definition and nature interrelated and dynamic.⁷¹ We cannot begin to define and delimit organs of government without knowing what actually comprises the powers and functions of government. Nor can we prescribe and attribute powers without first understanding the structure of government and public administration.⁷² For it is only once we have an idea of what government is, that we can begin to parcel up what it should do, how and by what means. Even from Montesquieu, it has been clear that considerations of form and function must reflect and derive from the nature of a government and the principle which, by human hand, sets it into motion.⁷³ So the precise construction of the separation of powers along principally one or other of these lines, and the specific weighting given to their various constitutive elements, depends very much on our overall (and logically prior) concept of the state and its government. In other words, our antecedent political conception of what government is and does (or should be and should do) will determine our own particular ideal type for the separation of powers.

Moreover, the dynamism inherent in the political conception of the separation of powers extends not only to differences in political theories of government (and thus effectively across place) but over time in the same polity as well. As an exercise in balance, the separation of powers allows for different solutions in different political circumstances. What may present itself as an ideal separation of powers for one polity at a given time, place and situation, may not necessarily continue to be so for any other polity. Likewise, the doctrine’s articulation and application will also be seen to evolve over time. An earlier instantiation of the doctrine is not necessarily practicable or desired by the same polity at a different time, with different circumstances.⁷⁴ Judicial review of legislation for constitutionality, and the increasing presence of administrative regulation and tribunals are examples easy to hand of this evolution in the political conception of the state and its natural functions.

To no great wonder, therefore, the balancing exercise required to produce a practicable doctrine of the separation of powers will necessarily reflect the peculiar nature and understandings of diverse, independent polities, at particular times, in given circumstances. Moreover, a balance or equilibrium of powers among the

⁷⁰ Montesquieu 1998, I, Chap. 1.

⁷¹ Thus the conclusions of, e.g., Magill 2000, Strauss 1987 and Vile 1998.

⁷² Hence suggestions to build administrative agencies as a fourth estate to the *trias politica* given the development of the managerial state in the twentieth century, as in e.g., Carolan 2007; Strauss 1984 and Strauss 1987; McCutcheon 1994.

⁷³ Montesquieu 1998, III, 3, Chap. 1; XI, Chap. 5. Hence his survey of the various types and examples of government, which serves as the framework for *The Spirit of the Laws*.

⁷⁴ As seen, e.g., in the continuing call to establish formally the a-political administrative wing of government as a “fourth branch”: see, e.g., Carolan 2007 and Strauss 1984.

various branches of government does not necessarily stand for a complete equality in division, or in power. That is, the measure of balance rests not upon objective calculations, but on how it plays itself out in a polity, in creating and maintaining a durable, settled, and ultimately humane political organisation. Arguments from an efficiency rationale may offer a justification for how and what powers are attributed to any given public organ, or even suggest some better model.⁷⁵ But efficiency acts not for its own sake, but in the service of larger objectives. As Montesquieu noted in his *magnum opus*, the proper relation among political organs serves, through moderation, the well-being and liberty of their subjects.⁷⁶ Thus arguments from efficiency will also presume some particular conception of what government should be and do. In the end, most modern instantiations of the separation of powers doctrine present some degree of institutional independence among the three branches, and a functional interdependence or codependence between executive and legislative branches. The degree of functional independence of the judiciary from the other two also varies, according to the extent to which the courts may review executive and legislative acts for legality and constitutionality (broadly understood, to include administrative and “pure” constitutional grounds). In exercising that jurisdiction, a court is generally seen to be partaking in or interfering with the law-making function. Judicial review of executive (administrative) acts or decisions as being within the legal grant of power and within the bounds of relevance, reasonableness, proportionality and fairness, appears less objectionable because it concerns keeping executive power with its delegated legal power, rather than a review from some sort of public values and policy orientation. So, much like federalism, every instantiation of the separation doctrine quickly departs from the broad and generalised *trias politica* and becomes very much a *sui generis* example at a concrete, practicable level. Any attempt at a system or categorisation becomes more an effort of descriptive typology by country.

2.2.1 The United Kingdom: The Basic Positions

Great Britain was without doubt the crucible wherein the modern doctrine of the separation of powers was forged. Most prominently, the English system served as the paradigm for Montesquieu’s now classic formulation which were crystallising—more unwittingly than consciously—separate strands of political thought into one single proposition.⁷⁷ Nevertheless, it is the longstanding and well-argued conventional position to question the existence and operation of the separation of powers as a fully formed, coherent doctrine in the English constitutional system.

⁷⁵ As advanced by Barber 2001 and Carolan 2007.

⁷⁶ Montesquieu 1998, XXVI, Chap. 23; XXIX, Chap. 1.

⁷⁷ Vile 1998, Chap. 2.

This sceptical attitude towards the “jumbled portmanteau”⁷⁸ stretches from Bagehot and Dicey onwards. In its classic presentation at the hands of Dicey, the separation of powers does not even feature in the English constitution. It is one of two “leading ideas alien to the conception of modern Englishmen”.⁷⁹ Nevertheless, we only have to read further in his treatment of “the independence of judges”, “the rule of law”, and “Parliamentary supremacy” to identify the signal tenets underlying that “French doctrine” of the separation of powers. In truth, whether or not Montesquieu got it (mostly) right or (quite) wrong, is neither here nor there as a point of modern constitutional law and politics.⁸⁰ Of course, that assessment may well be pertinent from the perspective of history or other disciplines. But from a legal and political view, a constitutional perspective, the concept of the separation of powers has taken on a life of its own far beyond English shores, and well beyond those particular historical circumstances.

Doubts as to the factual correctness of Montesquieu’s observations on the UK situation of the time may, however, resonate in modern constitutional law by reiterating the inherently amorphous quality to the concept, moulding and adapting its articulation to meet the needs and values of any given polity at any given time. For example, in Montesquieu’s eyes, the primary separation drawn from the English situation obtained between the legislative and the executive (Crown). The balance is between making law and enforcing law. The judicial power he considered as an extension of the executive branch. This may reflect in general lines only the particular, historical, constitutional situation of Great Britain at the time, being the tension between Parliament and Crown (and executive power). Judging by current circumstances of expanding judicial review under administrative law and the *Human Rights Act 1998*, the principal dividing line in the UK would now seem to stretch instead between the judiciary, on the one hand, and the legislative and executive, on the other. After all, under the Westminster parliamentary system, the political party holding a majority of seats in the House of Commons forms the government, thereby exercising a controlling influence on both the executive and legislative branches.⁸¹ This control was perhaps less an issue—and potential

⁷⁸ Drawing upon Marshall 1971; see also Dicey 1967; Bagehot 1873; and Munro 1999. Taking the pragmatic approach, Jennings acknowledges the difficulties presented by the “pure theory”, and concentrates instead on the doctrine’s actual manifestation in UK (British) constitutional practice: Jennings 1967, Chap. 1, esp. 18ff. More recent efforts take up the same path: Barendt 1995; Tomkins 1999 and Barber 2001.

⁷⁹ Dicey 1967, pp. 336–338.

⁸⁰ See, e.g., Claus 2005 who, like Dicey, would capitalise upon Montesquieu’s misconception of the English situation at the time; Dicey 1967, pp. 337–339.

⁸¹ There are for the 2010 general election 650 MP’s elected (per the *Parliamentary Constituencies Act 1986* c.56); previous elections also having about the same number, thus giving around 350 seats as the start of a comfortable majority: 1992: 336 Conservative, 271 Labour; 1997: 418L, 165C; 2001: 412L, 166C; 2005: 355L, 198C; 2010: 306C, 258L, 57 Liberal Democrat. Sec. 2 of the *House of Commons Disqualification Act 1975* c.24 prohibits more than 95 MP’s from holding ministerial office—as a means of avoiding the perception of executive dominance of the legislature, per Loveland 2006, p. 140.

problem—at a time when party politics had not yet crystallised, and the creeping intervention of government management into most facets of daily life was beyond all comprehension. Modern circumstances present a much different picture. Faction and fraction in UK parliamentary politics disappeared in the late nineteenth and early twentieth centuries with the consolidation into two (at most three) large, formally organised and centrally controlled political parties.⁸² These have an interest and tendency to submerge factional differences within their ranks, and to present a unified and organised policy front. Not only through the system of “whipping”, but simply through the managing of advancement in political office.⁸³ Likewise the growth and expansion of government administration since the nineteenth century, to produce the modern social welfare state, has also entailed a corresponding demand for and increase in administrative regulation. So while the balance may remain one between law-making and law-enforcing as perceived originally by Montesquieu, the modern articulation of the separation of powers will emphasise different constitutional fault lines.

Those fault lines can vary and shift more in the UK system without the constraints and restraints of a written constitution. The lack of a written constitution, a familiar stalking horse, may keep the UK constitutional settlement in a state of healthy flux, but it represents no hindrance to a developed, enduring and stable constitutional order.⁸⁴ Nor to a “UK doctrine” of the separation of powers. Like the UK constitution, the current form of the separation of powers is immanent and implicit in the UK legal and political order. The separation of powers doctrine arises not directly as a principle of law and politics, but obliquely and by implication in the practical terms of individual issues regarding jurisdiction, rights, statutory interpretation, and the historical powers of the Crown (the prerogative), and so on.⁸⁵ We can assert comfortably, as Jennings did, that there does indeed exist a “separation of powers” in the UK, in the broad sense of a predominant legislative branch, Parliament; an executive power separate and responsible to Parliament, and an independent judiciary, and that at foundation, the system aims at the liberty of the subject. But any attempt to demonstrate either that this general philosophical position was actually enforced and applied as such, or that the current system conforms in all its complexity and detail to the pure theory, is both unattainable and misconceived. Rather than

⁸² Echoed in Loveland 2006, p. 171.

⁸³ Loveland 2006, pp. 132–134, 157, 250.

⁸⁴ See e.g., Loughlin 1999, pp. 43ff.

⁸⁵ E.g., *R (Abbasi) v Sect. State FCO* [2002] EWCA Civ 1598 (6 Nov. 2002); *M v Home Office* [1994] 1 AC 377; *R (Jackson) v AG* [2006] 1 AC 262; *R v. Sect. State Home Dept. ex p. Fire Brigades Union* [1995] 2 AC 513 (decision not to legislate not reviewable) *Magor and St Mellons Rural DC v Newport Corp* [1952] AC 189; *Buchanan v Babco* [1977] QB 208 (CA); *Buttes Oil v Occidental Oil and Hammer* [1982] AC 88; *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Div. Ct.) (17 Dec. 2002); *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 375; *R (Bancoult) v and Commonwealth Affairs* [2008] 3 WLR 955; *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142 (HL) and *Hinds v The Queen* [1977] AC 195 (PC Jamaica).

proceed “top–down” from some preconceived notion of how state powers should be assigned and to which organs, the English manner is to proceed inductively and reflectively, identifying the elements of that theoretical construct inasmuch as they exist. “Theory, as usual, followed upon fact.”⁸⁶

This is not to say that the UK version of the separation of powers is a transitory, indeterminate equilibrium, depending upon the political compromise of the day. Despite the changing articulations, the central pillars to the framework within which the doctrine operates, have remained constant. They supply in turn the terms or optic in which the separation doctrine is expressed. Taking an obvious cue from Dicey, the dominant theme to the UK version of the doctrine has always been the supremacy, the sovereignty, of Parliament. Together with the “rule of law”, it has framed the understanding and debates concerning the institutional and functional divisions of power in the UK.⁸⁷ These central pillars frame the issue in terms of the power of government to affect private rights absent legislative authority and its attendant scrutiny, and the limited abilities of the judiciary to counterbalance the executive–legislative diarchy with effective judicial review. Hence the constitutional fault lines have aligned themselves principally along the legislative–executive axis and the judicial–executive axis. Moreover, the UK’s membership in the European Union appears to have reopened a fault line between Parliament and the courts, where the latter must resolve conflicts and inconsistencies between European and domestic rules.

2.2.1.1 Executive Law-making

Under the traditional, theoretic view, the legislative–executive axis weighs law-making decidedly in the favour of Parliament. In the UK, of course, there is no real, effective institutional separation of government and legislature, as for example, in the US and France. Bagehot’s “efficient secret” to the English constitution, the enduring “near complete fusion” of executive and legislative,⁸⁸ entails that the separation of powers has manifested itself in an ebb and flow of parliamentary controls over executive law-making power: gradual and conventional restrictions, met with an occasional resurgence of claims for executive independence. Nevertheless, early on it was established that the government could not interfere with or affect private rights, either by their creation or diminution, without the participation and assent of Parliament.⁸⁹ In brief, private rights and duties were subjects of law; Parliament superintended the law-making process, and the courts administered that law as against official and citizen alike.

⁸⁶ Jennings 1967, p. 20.

⁸⁷ See e.g., Campbell and Goldsworthy 2000; Forsyth 2000 and Allan 2001 (liberalism perspective).

⁸⁸ Bagehot 2001, p. 48.

⁸⁹ Across English constitutional history, through the Civil War and Interregnum, the Restoration and Glorious Revolution, to the *Act of Settlement 1700* and even the *Parliament Act 1911*—and not to be tied unrealistically to a larger than life *Magna Carta*.

Three important qualifications exist, being (1) executive law-making power (secondary legislation); (2) executive law-making power (prerogative) and (3) judicial law-making power. First, although primary legislation remains within the monopoly of parliamentary powers and process, it represents a gradually shrinking portion of the entire UK legal universe. Primary legislation comprises statutes, Acts of Parliament, and originates from both public and private member's bills passed by Parliament. It represents formal law in the paradigmatic sense, of proposals being openly and publicly put to consideration and debate in Parliament, approved in some form by vote, and then assented to by the Monarch, the Head of State.⁹⁰ While the legislative agenda and timetable, as well as the standing committees which examine bills after second reading, may be substantially in the hands of the ruling government party—and hence the successful passage of a bill—the parliamentary process offers some measure of scrutiny and control to opposition parties, backbenchers, and importantly, the public, even if not the full and frank debates upon which participatory democracy models are predicated.⁹¹ Nevertheless, primary legislation represents the more and more narrow apex of the UK legal pyramid. Underlying it is the much larger footing of executive branch rule-making, in the form of administrative regulations and exercises of the prerogative.

In the UK (and in many other states, including the US, France and the Netherlands), the vast bulk of everyday regulatory business is conducted through subordinate legislation, “delegated legislation”, comprising the various denominated statutory instrument, regulations, rules, directives, orders, Orders in Council, byelaws, sub-delegated regulations and so on.⁹² These all have some readily discernible statutory authorisation. At one further degree of remove are, those other administrative publications in the nature of guidelines, handbooks, circulars,

⁹⁰ By convention and tradition, a bill is introduced in the Commons on first reading, and by bare majority vote (usually a formality) then passes to a second reading which is a more substantial Parliamentary debate. By bare majority vote approving the bill's contents, it moves to a more detailed consideration before a (standing) committee. Next the bill returns to the Commons in the report stage, where committee amendments or government ones are debated. The bill (as amended) moves to third reading, which a bare majority vote suffices to send the bill for consideration by the House of Lords. The House of Lords may also propose legislation, but its success in the Commons is very much in the hands of the government and its desired Parliamentary timetable. The passage of the bill there mirrors in general terms that in the Commons. If amended in the Lords, the bill must return to the Commons for approval. If the Commons then amends the bill further, these amendments must in turn be approved by the Lords. The bill is not ready for assent by the Queen and promulgation until both the Commons and the Lords consent to a single text.

⁹¹ See e.g., Loveland 2006, p. 137ff; and generally Adonis 1993.

⁹² In practice, the variety of usages shows that it matters little what precise title the regulation bears: what counts is who made the rule, on what authority and for what purpose. This said, there is nonetheless some distinction to be made between “Orders in Council” (representing both significant regulations prescribed by statute to issue from the Crown, and the formal exercise of the Crown prerogative not pursuant to a statute), and byelaws (regulations issued by municipal authorities). See generally, House of Commons Information Office 2008 and the *Statutory Instruments Act 1946*.

policies, codes, and rules issuing from administrative agencies, tribunals, ministerial departments, and supervisory bodies. These come about as part of the daily business and internal administration of these bodies. They do not have express statutory backing; they are not prescribed by the relevant constitutive statutes. Yet they may affect quite profoundly private rights and interests by determining when, where and how an agency responds.⁹³ Both sets of regulations, the statutorily prescribed and the internal and administrative, form the web of regulatory authority spun directly or indirectly by the “government” in all its manifold and expansive complexity.

Deserving particular note in the UK regulatory framework are the delegations of Parliamentary authority and power to a minister to amend or repeal existing statutes by way of statutory instrument, on certain terms and conditions, and perhaps also subject to a particular procedure. So rather than engaging the standard parliamentary mechanisms to amend or repeal Acts of Parliament, the government of the day may change them by executive order. These delegations of power, known as “Henry VIII clauses” are becoming less of a statutory and constitutional rarity, as governments recognise their usefulness not merely to correct omissions and errors in primary legislation, but also adjust legislative programmes in the face of quickly changing circumstances, or implement policy programmes.⁹⁴ Three leading examples of the extent to which such powers may extend are the *European Communities Act 1972*, the *Human Rights Act 1998* and the *Legislative and Regulatory Reform Act 2006*. The first allows for Orders in Council and regulations to give effect to Community Law over present and future Acts of Parliament, subject to certain exceptions. The second allows a Minister to amend by “remedial order” any Act subject to or affected by a “declaration of incompatibility” with the rights and freedoms set out in the *Human Rights Act 1998*. Remedial orders must be approved, however, by Parliament. The third establishes a general grant of Henry VIII clause powers, allowing a minister to amend any legislation for the purposes of relieving “any burden”, defined widely to include financial costs, administrative inconvenience and obstacles to efficiency. Recognising, however, the extent of the power conferred, the Act imposes a series of conditions and Parliamentary scrutiny upon a proposed reform order. Of relevance to the present study, and as we will see in the next chapter, this type of delegated legislative power is used in connection with implementing into domestic law the UK’s

⁹³ While statutory backing to administrative act certainly and presumptively grounds their judicial review, the absence of that backing does not exclude the possibility of judicial review. The difficulties or reserve expressed in Wade and Forsyth 2009 reflects a formalistic approach which does not account for the more substantialist approach of the courts: i.e. who made the rule, for what purpose and how was it actually used; hence the cases cited in Wade and Forsyth 2009, pp. 741–744, and see also *R v Dir. Pub. Prosecutions Ex p. Kebilene* [2002] AC 326 (ECHR, referenced by the Minister in making his decision, though having no legal force), and *R (Abbasi) v Sect. State FCO* (Foreign & Commonwealth Office Circular on Diplomatic Assistance to Citizens Abroad, now Foreign & Commonwealth Office 2011a and Foreign & Commonwealth Office 2011b).

⁹⁴ See e.g., Loveland 2006, pp. 152–153, and Wade and Forsythe pp. 734–7; Barber and Young 2003.

various treaty obligations and other less formal international agreements—as indeed both the *European Communities Act* 1972 and the *Human Rights Act* 1998 clearly exemplify.

Strictly speaking, the separation of powers doctrine would frown upon such commingling or delegations of legislative power from the legislative to the executive branches. Practically speaking, it is inevitable. In many ways, the democratic impulse and rule of law mentality which emphasises the legitimacy and validity of rulemaking through a parliamentary process has become the victim of its own success. At issue is not simply the reach and quantity of legislation, but also the level of technicality and responsiveness to change required of statutes. The parliamentary process seems too cumbersome to accommodate effective and timely evaluation of changing circumstances and technical detail to all its statutory output. Concentrating instead on the broad policy principles, modern legislative practice in the UK has been to shift a greater proportion of working out the technical details of a legislated framework and principles to the executive arm of the state. For its own account, Parliament retains instead a broader mandate of general scrutiny and of serving as a platform for public awareness.

Parliamentary scrutiny of secondary legislation is not generally required by any law or convention in the UK. Express provisions are necessary. A particular statute or a regulation under the *Statutory Instruments Act* 1946 may mandate that proposed regulations be laid before Parliament. Equally the latter Act may also exempt certain measures under s.8 from printing and publication, or being designated as “statutory instruments”. Depending upon what the relevant legislation actually says, the statutory instrument may require a parliamentary vote, or simply be laid before Parliament by way of information and notification (and questions may be asked about it in the House). Where a vote is required, the resolution may fall under the more common “negative procedure” (voting a motion to reject the measure) or the “affirmative procedure” (voting a motion to pass the measure). In both cases, the statutory instrument will pass through committee review whose objectives are only to draw the attention of the Houses to possible problems concerning the operation, scope, legal foundations or authority of measure. The substantive vote occurs in the Commons. Despite this procedure and continual reforms, the effectiveness of Parliamentary scrutiny and control over secondary legislation remains questionable.⁹⁵ The issue goes beyond the actual powers to accept or reject proposed regulations. It concerns the paucity of time, resources and the interest of parliamentarians for addressing measures substantively. The “constitutional fiction” of Allen,⁹⁶ that Parliament offers any real control over secondary legislation, has in part reallocated some of the burden for scrutiny along the judicial–executive axis in the UK separation of powers constellation.

The second exception to an exclusive parliamentary power to create, qualify and abrogate private rights derive from the executive and regulatory powers

⁹⁵ Craig 2008, p. 725; Loveland 2006, p. 140ff.

⁹⁶ Allen 1965, p. 136 cited in Craig 2008, p. 725.

traditionally and originally held by monarchs of the *ancien regime*, prior to the interposition of a representative and responsible legislator and government.⁹⁷ These are the “prerogative powers”. In Dicey’s phrasing, they are “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”.⁹⁸ The prerogative has a constitutional—as opposed to a statutory—foundation, and inheres by convention and custom in the office and body of the monarch as head of state.⁹⁹ Ancient usages aside, it is primarily the ministers and other notional “servants of the Crown” who exercise these prerogative powers in the name of the Crown. Typically, the specific range of prerogative powers are enumerated by category, rather than extrapolated from a general and abstract definition.¹⁰⁰ The core to the prerogative are the powers to summon and dissolve Parliament; to grant honours, mercy and pardons; to confer corporate personality; to act in times of emergency to preserve the peace; to declare and wage war and to conclude peace; to conduct foreign relations, receive and send diplomatic embassies; to conclude treaties; to control and manage the civil service, and the military; to control entry and exit from the country.¹⁰¹

Attempts to synthesise all this into a general definition are not uncommon and help focus discussion, but do face much and persuasive criticism. Blackstone, and as reprised more recently by Wade, suggested that the prerogative was any power unique to the Crown, as distinct from those powers which it shared with Parliament or its subjects.¹⁰² Dicey, on the other hand, favoured the executive with his view of the prerogative as the basis or justification for all government acts done lawfully without the authority of an Act of Parliament.¹⁰³ Both essays encounter cogent criticism for being substantially incomplete or too narrow.¹⁰⁴ Be that as it may, they illuminate the central feature to the prerogative, that it enjoys in principal a significant measure of immunity from Parliamentary and judicial control. Laski was correct at least in the vantage point to his far-sighted 1919 observation

⁹⁷ See e.g., Maitland 1961, pp. 195–196, 418–430; and Dicey 1967, pp. 423–427, 464ff.

⁹⁸ Dicey 1967, p. 425.

⁹⁹ Incidentally, like arguments can be made for presidents, albeit whose constitutional inheritance and basis renders an equivalent position much less justifiable: see Martinez 2005–2006.

¹⁰⁰ For the leading and recent listing, see *Council of Civil Service Unions v Min. Civil Service* [1985] AC 374 (per Lord Roskill), and *Burmah Oil v Lord Advocate* [1965] AC 75 (per Lord Reid); *R v Sect. State Home Dept. ex p. Northumbria Police Authority* [1988] 1 All ER 556 (CA).

¹⁰¹ See generally, e.g., Sunkin and Payne 1999 covering different aspects of the prerogative powers; Jackson 1964; Markensis 1973; and see also e.g., *AG v De Keyser’s Hotel* [1920] AC 508; *Laker Airways v DTI* [1977] 2 All ER 182 (CA); *Council of Civil Service Unions v Min. Civil Service* [1985] AC 374; *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Div. Ct.).

¹⁰² Blackstone 1979, vol. I Chap. 7, pp. 231–232; and see e.g., Wade 1999, p. 29ff, and Wade 1985. see also Payne 1999, p. 77.

¹⁰³ Dicey 1967, p. 425, and generally pp. 423–427, 464–469 (echoing Locke, *Two Treatises*, as per Payne 1999, pp. 88–90).

¹⁰⁴ See e.g., Loughlin 1999, p. 64ff.

that the government “has for some time kept the realm of administration beclouded in the high notions of prerogative”, is which both legally unnecessary “because in fact no sovereignty, however conceived, is weakened by living the life of the law” and morally inadequate “because it exalts authority over justice”.¹⁰⁵

This broad range of discretionary powers held by the executive branch can certainly have an impact upon private rights, even if only tangential or indirect.¹⁰⁶ Their impact and reach were more widely felt in earlier at the beginning of the twentieth century, as derived from the Laski quote. In matters of war, including the management of resources (including prize) and troops, of maintaining foreign relations and administration throughout the Empire and beyond, and in running the growing civil service. But with such powers came the desire for increased scrutiny, especially and the rule of law mindset took hold. The scope and range of prerogative powers free from parliamentary or judicial checks and balances have considerably narrowed. Those checks and balances have divided between Parliamentary reclaiming its law-making supremacy, and most significantly an expanding review jurisdiction for the courts. First, Parliament has legislated in most areas of prerogative jurisdiction, affecting how the executive may conduct itself. The actual range of powers exercised under the prerogative has narrowed considerably, having been attenuated by statutory absorption, overlap, and restriction. In such cases, the statutory regime governs the scope and nature of the power: the prerogative power is understood to be supplanted by a statutory one.

Where no legislative direction yet exists, constitutional convention and law require parliamentary authorisation in the form of legislation insofar as the exercise of those powers makes direct claims upon public finances or directly affect established rights, duties and property interests.¹⁰⁷ By the same token, a private individual cannot in principle claim in the courts benefits from, or seek redress based upon, an exercise of the prerogative power unless it were somehow brought into the domestic legal order by law or by express Crown consent.¹⁰⁸ So, for example, the conduct of foreign affairs and the concluding of treaties, the declaration of war and peace, are all prerogative powers. Inasmuch as blood, steel, and treasure are needed to complete or effect these various transactions at home and

¹⁰⁵ Laski 1918–1919 quoted in part in Loughlin 1999, pp. 64–65, and also echoing Locke: see Payne 1999, pp. 88–89.

¹⁰⁶ For example, *Walker v Baird* [1892] AC 491 (PC); *Rustomjee v The Queen* (1876) 2 QBD 69 (CA); *AG v de Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil v Lord Advocate* [1965] AC 75; *Nissan v AG* [1970] AC 179; *The Zamora* [1916] 2 AC 77 (prize claim during war time); *Council of Civil Service Unions v Min. Civil Service* [1985] AC 374; *R (Gentle) v The Prime Minister* [2008] 1 AC 1356.

¹⁰⁷ Following from *Case of Proclamations* (1611) 12 Co Rep 74.

¹⁰⁸ *Rustomjee v The Queen* (1876) 2 QBD 69 (CA); *Civilian War Claimants v The King* [1932] AC 14, and more recent authority confirming the established position: *Republic of Italy v Hambros Bank* [1950] Ch 314; *JH Rayner (Mincing Lane) v DTI* [1990] 2 AC 418; *R v Sect. State Home Dept ex p. Brind* [1991] 1 AC 696; *R v Lyons* [2003] 1 AC 976; *In re McKerr* [2004] 1 WLR 807 (HL).

abroad, an Act of Parliament appropriating the necessary resources and defining rights and duties is required.

Moreover, the characterisation as a statutory power presumptively opens its exercise to judicial review on administrative law grounds. Statutory direction over the erstwhile prerogative power replaces its authorisation in the Act of Parliament, so that its exercise and effects must correspond to the statutory authorisation. That appraisal is conducted by the courts. What the grounds of review may be, and the detail of scrutiny or width of deference applied, is a separate issue, not relevant here.

The third and last qualification—one defining of common law countries—is judicial law-making. Common law jurisdictions, rooted in English legal practice, invest the courts with powers to declare and elaborate on legal rules as articulated in their reasons for judgment. Courts are obliged by convention to follow the precedents of higher courts and those of coordinate jurisdiction, unless the nature of the facts and evidence justify distinguishing the case and its rule. Equally, distinguishing a case also allows room for the rule to develop and adjust. The rules confirmed or enunciated by the highest court, the Supreme Court (formerly the Appellate Committee of the House of Lords), bind that court as well. It has maintained a long-standing custom to resist its reconsidering or reversing the law as stated in its prior judgments, although the firmness to that resistance has relaxed somewhat of late.¹⁰⁹

Of considerable significance and yet mostly overlooked, the process of reasoning and judging does not occur in some rarefied, introspective atmosphere. Judges are in principle limited to what facts, evidence, and law are set before them by counsel. The arguments presented by counsel draw upon not only bare law and fact, but also more widely upon current social practice and ideas, to advocate and justify what legal rules are in fact at play in society and thus govern (or ought to govern) social relations. Judges render judgment based on and in function of these arguments within that framework constructed for them by counsel. In effect, the courts channel and give articulation to the law extant or reflected in the community. This may form the basis of a legal rule expressed in a judgment, or reflect a point of friction or consonance with established rules and legislation. Thus the idea that law-making by the courts is somehow illegitimate or undemocratic is misplaced or unnuanced, conflating an institutional concern of representativity with the instrumental function of responsiveness and responsibility. Indeed, this applies to all courts both in common law and civilian systems, provided they have reasonable discretion to mould and fashion legal rules in response to the social conditions and values argued before them. And most do, notwithstanding doctrine to the contrary, the unrealistic presumption of simply calculating outcomes in the cold logic of matching fact to stated rule. And this reflection brings us to the next arm of the separation of powers, that of the judicial–executive and judicial–legislative axis.

¹⁰⁹ Practice Statement [1966] 1 WLR 1234, and for the Court of Appeal, see e.g., *Young v Bristol Aeroplane* [1944] KB 718 (CA).

2.2.1.2 Judicial Checks and Balances

The brief survey of the legislative–executive axis would show that the executive arm of the state holds substantial law-making powers in the form of secondary legislation, and prerogative powers which can impact (indirectly) on private rights and interests. The commingling of law-making between the legislative and executive branches, in separation of powers terms, does not also reveal an equivalent series of Parliamentary checks and balances to scrutinise and control executive lawmaking. The nature of the Westminster parliamentary system, setting the government within Parliament (“parliamentary monism”) means that Parliament may be seen to be complicit in executive law-making. Moreover, the quantity of business before the Houses, the deliberative nature of the parliamentary process, including the committee structure, and limitations on time and resources, means that what control and scrutiny do exist is not perceived as fully efficacious or comprehensive. Compensating for this has been a shift of attention to the courts to supplement effective control and scrutiny. Feeding and feeding off the twentieth century rule of law mindset, the UK courts have seen their jurisdiction to review legislation, both primary (judicial–legislative axis) and secondary (judicial–executive axis), expand.

At common law, UK courts do not directly and expressly review legislation for compliance with constitutional standards, rights and freedoms. Parliament is sovereign. The internal workings and procedures of Parliament are not justiciable, nor are the conventional and traditional privileges and immunities of Parliament subject to judicial scrutiny and appraisal.¹¹⁰ The courts may not go behind an Act of Parliament to determine whether it has passed through all normal and usual phases before being receiving royal assent and promulgation or was passed by way of fraud, bad faith or misrepresentation.¹¹¹ Only an Act of Parliament merits this reserve and deference; Parliamentary resolutions do not, nor carry force of law.¹¹²

There are two qualifications to the general rule that the courts will not appraise primary legislation. The first is an explicit statutory authorisation to do so, for example in the nature of the *Human Rights Act* 1998. But even there, the courts’ remedial jurisdiction under ss.4, 6 and 7 does not extend much beyond a declaration of incompatibility (of legislation with an incorporated Convention right), and relief in the immediate case providing that the legislation in question does not clearly require the act or effects complained of (s.6(2)). A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the subject legislation (s.3(2)). The declaration simply engages the government’s responsibility to propose and seek passage of a remedial order, amending the affected legislation accordingly.

¹¹⁰ *Stockdale v Hansard* (1839) 112 ER 1112 (HL); *Bradlaugh v Gossett* (1884) 12 QBD 271 (CA).

¹¹¹ *Pickin v British Rwy* [1974] AC 765; *Edinburgh and Dalkeith Rwy Co v Wauchope* (1842) 8 ER 279 (HL); and see also, e.g., *Fletcher v Peck* 10 US 87 (1810) from the US standpoint.

¹¹² *Bowles v Bank of England* [1913] 1 Ch 57.

The second qualification is the courts' power of statutory interpretation, allowing them to adjust and attune the application of legislation (primary and secondary). As Lord Diplock remarked in *Fothergill v Monarch Airlines*, "The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of parliament'; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable."¹¹³ Of course the courts must work within the framework and actual words of the enactment, neither going beyond or outside its terms, nor ignoring or contradicting clear, plain meaning. That said, there remains nevertheless enough opportunity in the everyday application of statutory provisions to mould their meanings by reference to the various juridical canons, principles, presumptions, and rules of construction developed over time.¹¹⁴ For example, recognising that Parliament—indeed any national legislator—may clearly and specifically provide otherwise, the courts will endeavour within reasonable limits to interpret domestic law in conformity with, or at least not inconsistently with, public international law.¹¹⁵ This principle does not go so far as to allow the courts to supplement the law or apply treaties where Parliament has refrained from legislating accordingly.¹¹⁶

Unlike primary legislation, secondary, subordinate legislation and administrative decisions are in principle subject to judicial review. The courts may appraise all those types of administrative act, broadly categorised, under a number of tests. They may determine whether those administrative acts remain within the limits and for the purposes prescribed by the empowering enactment. The act must be reasonable and proportional in scope and effect, and not be the product of any error. Only relevant factors must be considered, without significant omission, and be applied in a reasonable and proper manner. Any discretion must be used appropriately and without improper constraint or restraint.

And following the GCHQ case in the House of Lords through to its decision in *Bancoult*,¹¹⁷ a large proportion of prerogative, nonstatutory, discretionary powers

¹¹³ *Fothergill v Monarch Airlines* [1981] AC 251, 279–280 (in contrasting the desirability and accessibility of *travaux préparatoires* for domestic legislation and international instruments).

¹¹⁴ On which see Bennion 1984.

¹¹⁵ See *Re Queensland Mercantile and Agency* [1892] 1 Ch 219 CA; *Salomon v Commrs Customs and Excise* [1967] 2 QB 116 CA; *Collco Dealings v IRC* [1962] AC 1; *Kuwait Airways v Iraq Airways (Nos 4 & 5)* [2002] 2 AC 883; and see also Bennion 1984, s134 and cases cited therein.

¹¹⁶ *Malone v Commr Metropolitan Police (No 2)* [1979]; *Corocraft v Pan Am Airways* [1968] 3 WLR 1273 (CA) per Diplock LJ (Denning MR advocating a much more activist stance).

¹¹⁷ *Council of the Civil Service Unions v Min. Civil Service* [1985] AC 374 ("the GCHQ case"); *R (Bancoult) v Sect. State Foreign and Cmwth. Affairs (No 2)* [2008] 3 WLR 955 (PC).

of the government are subject to judicial scrutiny on those administrative law grounds. The former case established that prerogative powers were in principle subject to judicial review on the basis of their substance and effect, and could not enjoy immunity merely by virtue of their immediate origin and their form as a prerogative power. Hence the Orders in Council regulating the civil service may arise under the prerogative, but were (no longer) insulated from scrutiny on that basis. Other prerogative powers remained non-justiciable because their content involved more so considerations of political discretion and balancing, policy, national security and expediency all of which were unsuited for appraisal in the judicial process on their merits or process.¹¹⁸ The courts have taken the GCHQ case to establish a flexible and evolving standard to the justiciability of prerogative powers, attending to substance of the power rather than its form. Counsel and the courts must reassess deference or immunity from review engaged by any particular use of a prerogative power. Hence those powers regarding pardons and diplomatic assistance to nationals abroad were not necessarily immune from judicial scrutiny.¹¹⁹ And in *Bancoult*, the House of Lords considered legislative and regulatory prerogative orders over a British overseas territory which were directly applicable without any Parliamentary intervention—executive primary legislation in effect—to be reviewable.¹²⁰ Those laws concerned the resettlement and removal of Chagos Islanders from their islands to accommodate a US military base.

Despite this general encroachment into certain prerogative powers, a hard kernel of decision making resists judicial scrutiny. This core comprises foreign policy, including war and peace, and control of the armed forces (where not already absorbed under statute). Decisions in these areas, while potentially or actually affecting an individual's rights and interests, remain primarily and inherently of a political nature. These domains have so far resisted pressure to draw them, or aspects of them, into the GCHQ stream. Thus the decision to commit troops to the recent Iraq conflict as part of the "Coalition of the Willing", fell within these protected domains by reason of their overriding political character.¹²¹ The defence and foreign policy domains reflect, in turn, the broader and longstanding principles of "sovereign immunity" or "Act of State" doctrines. That is, English courts will not implead a sovereign, nor adjudicate on the legality or validity of a foreign state's actions (in effect, those of its official representatives) done in the exercise of its sovereign, public capacity.¹²² In many ways, the one

¹¹⁸ The listing by Lord Roskill in the GCHQ case being taken as definitive.

¹¹⁹ *R v Sect. State (Home Dep ex p. Bentley)* [1993] 4 All ER 442; *R (Abbasi) v Sect. State FCO* [2002] EWCA Civ 1598.

¹²⁰ See further Cohn 2009 and Elliott 2009.

¹²¹ *R (Gentle) v The Prime Minister et al.* [2008] 1 AC 1356; *R (Campaign for Nuclear Disarmament) v The Prime Minister* [2002] EWHC 2777 (Div. Ct.) (17 Dec. 2002).

¹²² See, e.g., *The Parlement Belge* (1879–1880) LR 5 PD 197 (CA); *Luther v Sagor* [1921] 3 KB 532 (CA); *Chung Chi Cheung v The King* [1939] AC 160 (PC); *Blackburn v AG* [1971] 1 WLR 1037 (CA); *Philippine Admiral v Wallem Ship'g* [1977] AC 373; *Buttes Oil v Occidental Oil and Hammer* [1982] AC 888.

arm (foreign policy) represents the inverse or obverse of the other (sovereign immunity). Both pertain to the sovereign character of the state, the former represented internally, and the later, extending beyond domestic boundaries.¹²³ But even here, however, the exemption from scrutiny is not unconditional. It has been qualified insofar as the foreign state pursues commercial rights and interests acting to all extents and purposes as a private party.¹²⁴ Second, it is being qualified insofar as states adopt common legislation to prosecute officials for grave breaches of fundamental human rights.¹²⁵ And third, it is qualified insofar as the state's conduct pertains to rights and duties enforceable as domestic administrative law matters, or as matters of public order.¹²⁶

2.2.1.3 Summary

Following Montesquieu's lead, this rather lengthy outline to the UK separation of powers is intended to set a baseline, a basic position for understanding that doctrine and highlighting national variations to it. We might then summarise the modern UK situation as an ever-growing accretion to the executive of rule-making powers, balanced and checked primarily by the judiciary, and then by Parliament. Of the three initial axes, judicial–legislative, judicial–executive and legislative–executive, the primary balancing occurs along the first two. In fact, the UK situation suggests that we ought to revise our perspective on the separation of powers. Instead of institutional axes, we might see it more clearly and usefully as a series of counterweights to the law-making function, distributed across a number of government organs. Hence the question is not which organ exercises what power, law-making in fine, but what checks and balances do all the others offer to any abuse of that power? And especially given the close and institutional associations between the legislature and the government, what effective checks and balances can the judicial arm of government offer to ensure the validity and legitimacy of law-making by those other branches?

By way of contrast, and to reveal varying degrees of judicial control, we turn next to France, the Netherlands, and the United States.

¹²³ See, e.g., *The Schooner "Exchange" v McFaddon* 11 US 116 (1812), cited with approval by Lord Atkin in *Chung Chi Cheung v The King* [1939] AC 160 (PC).

¹²⁴ See, e.g., *Sovereign Immunity Act 1978* c.33 (as amd.); *Playa Larga (Owners of Cargo laden on) v I Congreso del Partido (Owners of)* [1983] 1 AC 244.

¹²⁵ *R v Bow St. Met. Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

¹²⁶ *R (Abbasi) v Sect. State FCO* [2002] EWCA Civ 1598 (6 Nov. 2002); *R (Al Rawi) v Sect. State FCO* [2008] QB 289 (CA); *Kuwait Airways v Iraq Airways (Nos 4 & 5)* [2002] 2 AC 883.

2.2.2 France: Strict Separation Yet with a Judiciary Resurgent?

Although England may have provided inspiration and the foundations for the doctrine, it was in France and the US in the late eighteenth century where the separation of powers first took actual constitutional form. And while the US Constitution has endured more or less intact in its original form—albeit with the addition of some 21 amendments—the French constitutional order has undergone since 1789 multiple phases and revisions, each having its own particular constitutional form.¹²⁷ Beginning with the French Revolution and the Declaration of the Rights of Man in 1789, through the Napoleonic regime, the abortive restoration and the “Second Empire”, the “Third Republic” and the World Wars, it might be said that France has only now begun to enjoy a relatively stable, enduring constitutional settlement under the 1958 Constitution, the “Fifth Republic”.

French constitutional history in its various revolutionary and evolutionary phases leading up to the present Fifth Republic, revolves principally on an executive–legislative axis. As of 1791, the courts of ordinary jurisdiction were effectively disengaged from the constitutional and political construct.¹²⁸ Instead of a *trias politica*, with the courts offering some measure of checks and balances, the French constitutional order was until 1958 very much a diarchy. Attempts at a counterbalancing of powers between the two arms of government proved unsuccessful. The enduring constitutional and political difficulties to find a workable, sustainable equilibrium between the executive branch and the legislative produced continual administrative and legislative gridlock. Each of the constitutional periods reflects the formal dominance of the one or other branch, and the attempts by the other to break or balance that dominance.¹²⁹

So the continuing success of the 1958 constitutional settlement in delivering relative political and constitutional stability has attracted much attention and study.¹³⁰ At its widest, that success has been attributed to a consolidation of executive power under Presidential management, and a rationalisation of the parliamentary system: a “*régime parlementaire à correctif présidentiel*”.¹³¹ This follows from the French experience during and between the two World Wars. The French position during that time was perceived as weakened by lack of decisive, central (presidential) power, able to focus and coordinate the great acts of state.

¹²⁷ The constitutional periods are as follows (simplifying by omitting the various intermittent constitutional phases within each bloc): monarchical deconstruction (1789–1791); First Republic (1793–1804); First Empire (1804–1815); Restoration (1815–1848); Second Republic (1848–1851); Second Empire (1852–1870); Third Republic (1870–1940); Occupation and Reconstruction (1940–1946); Fourth Republic (1946–1958); and Fifth Republic (1958–present). See generally, e.g., Favoreu et al. 2008; Chantebout 2008; Ardant and Mathieu 2008 and Gicquel and Gicquel 2008.

¹²⁸ Favoreu et al. 2008, pp. 405–406, and for recent English language examinations, Lassser 2004, and Neuborne 1982.

¹²⁹ Following Favoreu et al. 2008 and Gicquel and Gicquel 2008.

¹³⁰ As noted in Gicquel and Gicquel 2008; and see Vile 1998, and Bell 2008.

¹³¹ Jean-Claude Colliard, cited in Gicquel and Gicquel 2008, p. 486.

In particular, the French constitutional arrangements up to the present were seen to tie politics too closely to the actual administration, such that the business of governing was often impeded by a government subject to parliamentary gridlock, and its inherent weakness to the political process. Hence the objectives of General de Gaulle and the postwar reformers may be described as a shift of constitutional perspective, moving the Fifth Republic to a form of constitutionalism which detached politicking from the constitutional business of governance.

The 1958 Constitution contains the expected basic constructs for the separation of powers, beginning with its invocation in the preamble of the 1789 Declaration of the Rights of Man. This, in turn, provides at Article 16 that, "Every society in which rights are not guaranteed, nor the separation of powers delimited, has no reason for a constitution."¹³² It then divides the organs of state into the government, led by the Prime Minister, having charge of the administration of the state (Articles 20, 21, 49), Parliament (composed of the National Assembly and Senate), passing legislation and supervising government action (Articles 24, 34, 53, 67 and 68) and an independent judiciary (Article 64). Overarching all three is the President, as Head of State (Article 5), who appoints the Prime Minister (Article 8), conducts foreign affairs and the negotiation of treaties (Articles 14, 15, 52) and dissolves Parliament (Article 12).

The Constitution also contains a number of express and unexpressed checks and balances. Upon recommendation of the government or joint resolution of Parliament, the President may put to public referendum proposed changes to the organisation of or delivery of public services, or other economic, political, or social reforms (including those occasioned by a proposed treaty) touching upon them. The President chairs the Cabinet (Article 9) and in due crisis circumstances, may exercise emergency regulatory powers, subject in turn to consultation with and review by Parliament and the Constitutional Court (Article 16).¹³³ The government, too, has legislative powers under Article 38, whereby it can issue "*ordonnances*" in domains otherwise reserved for statute, providing Parliament gives its authorisation in advance for a certain period, and thereafter duly ratifies the "*ordonnances*".¹³⁴ This in effect legislates by incorporation and confers on the ordinances the standing of a statute insofar as their subject matter falls within legislative competence; otherwise they have the character of regulations.¹³⁵ Failing ratification, they lose force and effect.

¹³² "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la separation des pouvoirs determine, n'a point de constitution."

¹³³ Invoked once to date, by De Gaulle during the Algerian Crisis.

¹³⁴ Expressly (typically in a "non-obsolescence Act"), or implicitly/by necessary implication: see, e.g., 72–73 DC (29 Feb. 1972), (implicit); 86–224 DC (23 Jan. 1987) (implication).

¹³⁵ See e.g., 62–20 DC (4 Dec. 1962) (election law); 72–73 DC (29 Feb. 1972) (salaried employees); 77–101 DC (3 Nov. 1977) (reform of expropriation laws), and 96–179 DC (14 Oct. 1999) (immigration control).

2.2.2.1 Régime parlementaire à correctif présidentiel?

The reference to “legislative competence” points to one final peculiarity in the new checks and balance system of the 1958 Constitution for the legislative–executive axis. Article 34 prescribes what subject matter falls within the legislative competence of Parliament—that which may form the content of a statute. Outside this statutory domain, legislative instruments have the character of secondary legislation, of regulations (Article 37). Delimiting legislative jurisdiction, while essential for a federation, seems strange or out of place for a unitary state such as France. But in the French situation, it represents the change in perspective from raw parliamentarism to a constitutionalism mediated by law. This bears upon the separation of powers in two ways. First, it adds a sort of explicit delimitation of relevant functions to the extant institutional separation. The message is clear: legislating, making primary law, has its proper domain; all else is administration. Second, and more significantly, it confirms the resurgence of the judicial arm as an effective third branch, and the reconstitution of an effective, real *trias politica*. While the sanctity and inviolability of a statute is preserved (and thus the primacy of the legislative branch), secondary law—regulations or other forms of regulatory instruments (such as ministerial circulars)—is owed no such deference and may be reviewed by the administrative courts (headed by the Conseil d’Etat) for conformity with existing statutes and certain “general principles of law”.

2.2.2.2 Judicial Checks and Balances

One of the consequences of a vigorous and doctrinaire approach to the separation of powers in the late eighteenth century was to have separated fully the ordinary courts from the other branches of government. Since the 1791 *Law on Judicial Organisation*, the selection, training, and professional career of the judiciary has been independent of and apart from any overt political connection and involvement.¹³⁶ This entailed not just political interference with the judiciary and judicial decision making, but also its converse: the judiciary was to have no role in the making of law. The courts should not have the power, so the inheritors of Montesquieu’s theoretic legacy maintained, to override or supplant the legislative will of the people, as expressed through their elected representatives and government. What may seem a rather severe and restricted view of the role of the courts was nevertheless very much fuelled by the conduct of the courts themselves up to the French Revolution. They hampered and delayed reform measures, playing off the monarchy against the legislature and “will of the people”, and seeking all the while to maintain their own (political) authority.¹³⁷ Thereafter

¹³⁶ Lasser 2004 and Neuborne 1982, p. 384ff.

¹³⁷ See, e.g., Capeletti 1985 (as well as Capeletti 1980). Vile 1997, Chaps. 7–9 reviews clearly and thoroughly the historical aspects.

isolated and restricted in function, the ordinary judiciary was unavailable to temper the tensions between the other two branches, nor arbitrate their differences as in the US, nor check government acts against citizens.

Steps to subject the administration to the rule of law—beyond leaving it to its own recognisance—were taken in 1872 with the establishment of the tribunal (judicial) division of the Conseil d'Etat. Already in existence since the Constitution of 22 Frimaire an VIII (1799), the Conseil d'Etat acted as an advisory body to government, and whose decisions were not mandatory. From 1872, the Conseil d'Etat could adjudicate administrative law matters and have its decisions enforced.¹³⁸ Problems of delay and backlog led to institutional reforms in 1953, with the creation of administrative tribunals of first instance, and then in 1988, of appeal tribunals. The Conseil d'Etat sits atop this judicial hierarchy in administrative law, as well as retaining some trial level jurisdiction for certain matters. In terms of the separation of powers then, the administrative law courts led by the Conseil d'Etat, represent a significant power in the checks and balances equation.

The administrative courts have jurisdiction to determine whether government acts are *ultra vires*. That is, whether the government official or body acted within and pursuant to a statutory mandate, or whether it exceeded those limits, or had misapplied those powers it did have, or caused undue damage in their application.¹³⁹ The acts span the range of administrative deeds to government regulations. Underlying this is, as may be expected, the principle that the executive branch may not act without statutory backing and authorisation, or some express constitutional basis. Executive actions, including any lawmaking powers, are subordinate to the legislative (and constitutional) framework. Nevertheless, the French administrative courts do not have jurisdiction beyond controlling executive acts and rules for conformity with law. That is, they do not engage in any constitutional review. The Conseil d'Etat neither possessed nor sought to exercise powers of direct or indirect constitutional review, so much so that until the 1989 *Nicolo* case, it refused to declare subsequent domestic law inconsistent with EU law for fear of being seen to engage in just such a constitutional review exercise.¹⁴⁰ Its stance has softened somewhat, recognising that in order to give due priority to the 1958 Constitution as supreme law, it must engage on constitutional points. Thus it has subsequently declared without reserve or hesitation that the Constitution is paramount over ratified treaties (Article 55) and further that constitutionally enacted domestic legislation has priority over inconsistent customary international law.¹⁴¹

¹³⁸ As confirmed in, e.g., CdE 13 Dec. 1889 (*Cadot*) (rejection of residual review jurisdiction held by Ministers (*minister-juge*) in competition with or superior to the CdE). See generally (for an English language account of French administrative law), Bell and Neville Brown 1998, esp. Chaps. 2 and 6.

¹³⁹ See Neuborne 1982, p. 385ff; and generally, Bell and Neville Brown 1998; and Auby and Cluzel-Métayer 2007.

¹⁴⁰ CdE 20 Oct. 1989 (*Nicolo*); see the case comment of Bothwell 1990.

¹⁴¹ CdE 30 October 1998 (*Sarran*); CdE 6 June 1997 (*Aquarone*); see also the comment on *Sarran* of Reestman 2002 (reviewing the state of French law on the matter).

The administrative courts led by the Conseil d'Etat have gradually broadened their review jurisdiction beyond, say, a mere technical correspondence between act and authorising law. The courts will also now examine for compliance with unwritten “general principles of law”. This evolution is all the more significant given the judiciary’s unhappy history in the run up to the French Revolution. As an explicit, express principle in Conseil d’Etat judgments, it is difficult to locate prior to the 1950s (and prior to the current court system). Yet the argument could reasonably be made that, while not expressly articulated, “general principles of law” did represent a discernible undertone in earlier Conseil d’Etat judgments. Be that as it may, reliance on general principles of law obtained definitive legitimacy by virtue of their mention in the preamble to the 1946 Constitution and further incorporation by reference in the 1958 Constitution. Hence there exists a firm textual basis. As the supreme legal authority, the Constitution—itself a “general principle of law”—delimits the powers of the State. These substantive, but unwritten, norms serve to check government power. Of course, consistent with the revolutionary origins of the French constitutional settlement, the will of the people as expressed in and through legislation passed by their elected representatives may override existing general principles. And with obvious importance, the Conseil Constitutionnel has followed the Conseil d’Etat position and also considers general principles of law. Thus within the boundaries set out by the 1958 Constitution, the administrative courts act as a check and balance to the exercise of executive power. In doing so, they have some measure of power to advance and develop the law.¹⁴² This is nonetheless nowhere as broad and influential as in common law jurisdictions. Nor is the jurisdiction so wide as to trench upon the legislative powers of the National Assembly, as is the case for the US courts engaged in constitutional review.

The final piece to the rule of law puzzle in the French constitutional order placed itself in the 1958 Constitution with the creation of the *Conseil Constitutionnel*. Under its interpretation of the Constitution, in particular Articles 64 to 66–1, the Conseil Constitutionnel does not consider itself a “court” in that conventional sense.¹⁴³ Such “courts” belong either to the administrative stream or the jurisdiction in ordinary stream, with the Conseil d’Etat and Cassation at their heads, respectively.¹⁴⁴ On its face, this strict interpretation makes sense. In light of the French constitutional articulation of the separation of powers doctrine, the Conseil’s powers of legislative review and constitutional supervision would put it outside the ordinary judicial domain, in contrast to, for example, the US position stemming from *Marbury v Madison*. Not fully suited as a legislative organ, nor at all an

¹⁴² See e.g., CdE 20 Oct. 1989 (*Nicolo*). And as do their non public law colleagues in the other judicial streams: on which, see Lasser 2004.

¹⁴³ Pfersmann 2010, p. 224 (arguing that the Conseil was intended at the outset to keep Parliament within a limited jurisdiction, but has now regrettably grown into more of a constitutional court).

¹⁴⁴ 2009–595 DC (3 Dec 2009).

executive one, the Conseil Constitutionnel represents on its face a sort of *tertium quid*. It combines aspects of an advisory function, and of a judicial one.

Under the first arm, the advisory character is defined by its power to review proposed legislation, statutes not yet in force. Any review of legislation for compliance must occur before the law is promulgated, otherwise the Conseil has no jurisdiction.¹⁴⁵ Thus it may review proposed legislation for compliance with the constitutional attributions of power and limits on their exercise. Laws constituting state organs, those falling under the referendum procedure, and parliamentary regulations must be submitted for review (Article 61). Other proposed legislation may be referred to the Conseil prior to promulgation, at the instance of the President, the Prime Minister, the presidents of either chamber, or by resolution of 60 deputies or senators. A declaration of unconstitutionality prevents the promulgation and implementation of the affected law as it stands. Second, it supervises and adjudicates on irregularities in presidential, deputy and senatorial elections (Articles 58, 59), as well as supervising the legislative referenda (Article 60). Third, by Article 54, international obligations can be referred to the Conseil by the President, the Prime Minister, the presidents of either chamber, or resolution of 60 deputies or senators, to determine whether those obligations contravene the Constitution and require a constitutional amendment prior to ratification. The one exception to this advisory character is the newly instituted “*question prioritaire de constitutionnalité* (QPC)”, a preliminary constitutional reference issuing from proceedings before the administrative courts and the courts of ordinary jurisdiction. The 2008 constitutional amendment empowered the Conseil to decide constitutional questions arising in ongoing litigation and remitted to it by the Conseil d’Etat or Cour de Cassation, in which existing legislation in force is alleged to contravene constitutionally guaranteed rights and freedoms. A declaration of unconstitutionality results in the repeal of the impugned legislation.

Under the second arm, the judicial character of the Conseil’s work appears not only from the QPC, but also from the juridical form of the proceedings before it, the nature and articulation of its decisions, and from its basic function of supervising the division of powers among the organs of state, and between the state and its overseas territories. It also applies the doctrine of *res judicata* to its decisions, excluding the possibility of reconsideration and reversal, inherent to policy decisions and legislative amendment which respond flexibly to changing needs and circumstances.¹⁴⁶ It would appear, then, that the Conseil Constitutionnel is moving gradually towards becoming a fully fledged constitutional court—with due regard to the rule of law mindset of the twentieth century.

¹⁴⁵ 80–116 DC (17 July 1980); 92–312 DC (2 Sept. 1992); 2007–560 DC (20 Dec. 2007).

¹⁴⁶ See e.g., 97–394 DC (31 Dec. 1997) (relating to 92–312 DC and 92–308 DC) and 2007–560 DC (20 Dec. 2007) (relating to 2004–505 DC); and all relating to fundamental changes to the treaties constituting the EU.

2.2.3 *The Netherlands: The International System as the Fourth Branch?*

Like its continental and Anglo-American counterparts, the Constitution of the Netherlands reflects broadly the classic division of government powers into the three estates of the executive (Crown and ministers), the legislative and the judicial branches. In structure, the constitutional order is naturally more closely allied with European constitutional systems, the UK in particular, than the American. But in the actual provisions of the Constitution, it resembles more the US. The articles of the Constitution are all cast in fairly general terms, and there are no broad statements of aspirations and social principles. Perhaps it is because the particulars of working these out have been left to legislative prescription that the Netherlands constitutional structure has remained more or less undisturbed and intact since 1848. By that time, the constitutional order had finally stabilised and digested its post-Napoleonic creation in 1815 and unification with (what is now) Belgium, the secession of Belgium (1831), settling the division by treaty (1840), and the last grasp at monarchical government. Of course, the text of the Constitution (dating from 1815) and the political order have undergone changes of varying degrees of intensity since then. There have been about 20 amendments introduced into the Constitution.¹⁴⁷ The evolution of the Netherlands Constitution from 1815 through 1848 up to the present, and the corresponding balance of powers, tracks in general terms the same paths as most other states, the US, UK, and France included. These are, briefly, (1) representative democracy, (2) responsible, parliamentary government, (3) effective human rights, and (4) developing the rule of law and judicial review. But the basic order and text have accommodated these political and social adjustments by way of a relatively calm evolution and progression (constitutionally speaking).

By way of the briefest of sketches, its constitutional order may be described as follows.¹⁴⁸ The Netherlands is a unitary constitutional monarchy.¹⁴⁹ The monarch (Articles 24, 33) and appointed ministers (Article 43) form the government (Article 42), which together with the elected and representative Netherlands parliament, the “Estates General” (Articles 50, 54) pass legislation (Articles 81 and 87).

¹⁴⁷ Namely, 1840, 1848, 1884, 1887, 1917, 1922, 1938, 1946, 1948, 1953, 1956, 1963, 1972, 1983, 1987, 1995, 1999/2000, 2002, 2005, 2006 and 2008, and depending on how one counts them.

¹⁴⁸ See generally, Elzinga and De Lange 2006; Kortmann 2005, and the English language works Heringa and Kiiver 2007 and Kortmann et al. 2002.

¹⁴⁹ For the sake of technical completeness, there is also some decentralisation of powers (Chap. VII, Articles 123–136), having been spun off to provinces, “*waterschappen*” (Water Management Boards), and municipalities. Accounted for must also be the provisions made for the Imperial Kingdom of the Netherlands (pursuant to the Act *Statuut voor het Koninkrijk der Nederlanden*) which encompasses its overseas territories as well, and whose complex status (in some ways a style of federalism) is continually being reviewed and adjusted. Unless otherwise specified, “the Netherlands” in what follows refers only to the continental state.

The elected arm of government, comprising the Prime Minister and all ministers (including junior ministers/secretaries of state and ministers without portfolio), is drawn from the Second Chamber (akin to a House of Representatives) of the bicameral Estates General. The First Chamber is an indirectly elected senatorial type of body. Its 75 members are elected by the members of the 12 provincial parliaments along party lines reflecting those of the Second Chamber, and also through a system of proportional representation. More specifically, members of the government are drawn from those political parties holding sufficient seats in the Second Chamber to form a working and durable coalition that can maintain the confidence of a majority of the 150 members of that Chamber. Like the French and US political systems, government ministers do not simultaneously hold parliamentary seats. The government is of course responsible to the Estates General, the Second Chamber in particular. Nevertheless, because the coalition reflects the party political distribution in the Second Chamber, the government exercises a strong influence over deliberations and debate on government policy and accountability.¹⁵⁰ This has occasioned some debate and consideration, in terms of the monist (dependence) and dualist (independence) aspects to the power relationship between parliamentary parties and their government representatives.¹⁵¹ In terms of the separation of powers, the independence of the Chambers allowing members to take government ministers to task on policy and legislation whatever their respective party affiliation is clearly more desirable, so to ensure appropriate parliamentary controls and supervision over the executive branch. The reality of the situation, however, discloses both monist and dualist aspects. The bonds of coalition government necessarily attach less securely and forcefully between the parties on the floor of the Chamber. Yet government ministers retain significant power and position within their respective political parties, which they can deploy to ensure support and favour on the floor of the Chambers for government policy and their standing in the Cabinet.¹⁵²

The power dynamic between government and Estates General takes on significance because, as with the UK and France, the government directs domestic and foreign policy, and controls the legislative agenda. Its conduct of foreign policy includes importantly the power to conclude treaties and international agreements which may, in appropriate circumstances, have paramount authority over domestic law—even the Constitution (Articles 91, 93, 94, 95). The right to initiate legislation lies with the government and members of the Second Chamber.¹⁵³ In practice,

¹⁵⁰ See Bovend'Eert and Kummeling 2004.

¹⁵¹ Bovend'Eert and Kummeling 2004, p. 351ff.

¹⁵² “*Ministerraad*”, distinguished from the Inner Cabinet (of select senior ministers) which has no explicit constitutional foundation, but rather originates in parliamentary/constitutional convention.

¹⁵³ While bills must also pass in the First Chamber, this assembly does not have the right to amend or propose bills. Bills must be submitted to the Raad van State (Conseil d'Etat) for nonbinding preliminary review and advice, and thereafter are reviewed in committee and approved by majority vote, with or without amendments, before moving to the First Chamber for consideration. That consideration is either to accept or reject the bill: the Chamber has no power

however, it is the government who initiates the bulk of legislation.¹⁵⁴ Like the UK Parliament, and unlike the French National Assembly or even the US Congress, the Estates General has a non-particularised, general jurisdiction over which to legislate. The Constitution does of course prescribe expressly that certain matters are to be regulated by statute, but it does not specify, and hence restrict, the legislative jurisdiction of the Estates General. In addition to the general range of primary and secondary legislation (the latter including rules made under a delegation of powers), there also exist rules made under executive prerogative (Article 88), whose historical origin lies in the Crown prerogative.¹⁵⁵ The scope of law-making power under the prerogative is generally considered to be very narrow and limited, and reserved for exceptional and temporary circumstances. All primary and secondary legislation and generally applicable prerogative rules must be countersigned by Crown and relevant Minister alike (Article 47). Since 1983, the Constitution also now sets out in Articles 1 to 23 a number of rights and freedoms, and explicitly directs a number of areas, such as public health, social welfare and education, to the care and concern of the government for legislation and management.

2.2.3.1 Judicial Review

The judiciary is entrusted with original jurisdiction over civil law disputes and criminal matters (Articles 112(1), 113(1)). For other types of dispute not falling hereunder (such as administrative law issues and disciplinary matters), legislation may refer them to those courts or can create special tribunals to deal them (Articles 112(2), 113(2)). As with many of its continental counterparts, the judiciary divides principally between the administrative law courts and the ordinary courts of general jurisdiction. This duality reflects a rather intricate distinction made in the law of the Netherlands between administrative law matters (including what

(Footnote 153 continued)

of amendment. Because of what is effectively a right of veto, the practice has developed that, if the First Chamber desires amendments in order to pass the bill, it will advise the Second Chamber which will then pass the necessary supplementary amendment, and the First Chamber will adopt both instruments as a whole.

¹⁵⁴ Bovend'Eert and Kummeling 2004, p. 177.

¹⁵⁵ Article 89(3) and (4) refer to “*algemene maatregelen van bestuur*” and “*algemeen verbindende voorschriften*” respectively, which translate into “general rules of governance” and “generally binding precepts”. The latter is understood as the general class, *qua* “law” and subsuming the former. The former refers to two further categories of regulation: those issuing from the Crown, government ministries or government departments (see *Orde in de regelgeving*) and those issuing independently through the residue of the Crown prerogative. By constitutional convention, the latter class of prerogative regulation is generally reserved (subject to the impact on a person and the potential for criminal sanction) for urgent, emergency situations, rules internal to government administration, and temporary, subsidiary measures: *Jaarverslag Raad van State* 2002, p. 25. See generally, Elzinga and de Lange 2006, pp. 673–677, and Kortmann 2005, pp. 351–358. See also van der Burg 1995, p. 313ff.

questions would be typically represented in Anglo-American eyes, as well as the domains of education, the civil service, social security and so on), and ordinary civil (including the differentiated “commercial”) and criminal matters. There is also an allied set of courts for corporations matters. At the head of the administrative side sit the Tribunal Division of the Raad van State and the Administrative High Court (*Centraal Raad van Bestuur*).¹⁵⁶ On the “ordinary law” side sits the Hoge Raad (the “High Court” or effectively, “Supreme Court”), at the top of a hierarchy of appeal courts and trial courts organised into judicial districts.¹⁵⁷ While it exercises principally an appellate jurisdiction for the ordinary courts, it also has a limited first instance jurisdiction in specified matters, an appeals jurisdiction in tax matters, and an advisory jurisdiction.¹⁵⁸ While it is not my intention to spell out in any detail the structure and jurisdiction of the Netherlands judiciary, some short comments are pertinent here.¹⁵⁹

The rights and freedoms found in Articles 1 to 23 of the Constitution are not directly justiciable as such. The US model of judicial review, of testing legislation for conformity with human and civil rights does not apply, in keeping with the general spirit of the classic—and European—conception of the separation of powers. Broadly stated, the judiciary has never exercised jurisdiction over the constitutionality of primary legislation (since 1815), nor over treaties (since 1953), pursuant to what is now Article 120.¹⁶⁰ That article provides, “A judge may not decide on the constitutionality of laws and treaties.”¹⁶¹ And by “constitutionality” is meant not simply that legislation is validly passed, but also its conformity to constitutionally guaranteed rights and general principles of law and justice. Moreover, Article 11 of the General Provisions Act 1829 provides, “The judge must decide according to the law: in no circumstances may he determine the worth or propriety of the law.”¹⁶²

These explicit prohibitions must also be read together with Articles 93 and 94 of the Constitution. These provisions give force of law in the domestic legal system to treaties directly applicable according to their terms, and further, priority over conflicting domestic legislation. In the result, while constitutionally

¹⁵⁶ I omit here the courts dealing with corporate matters.

¹⁵⁷ See, for the organising statute of the ordinary courts, including the Hoge Raad, *Wet op de rechterlijk organisatie* (as amd).

¹⁵⁸ Articles 74, 76–80 *Wet op de rechterlijk organisatie*.

¹⁵⁹ See further Elzinga and de Lange 2006, p. 595ff; Kortmann 2005, p. 256ff; Damen et al. 2005; Seerden and Stroink 2007.

¹⁶⁰ For recent consideration, see, e.g., Verhey 2005; also Bellekom et al. 2002, p. 270 and Mok 1984, p. 55.

¹⁶¹ An amalgamation and recasting in 1983 of what was originally Article 115 in the 1848 Constitution, providing that legislation is inviolable, and Article 60 in the 1953 Constitution, that the courts may not rule on the constitutionality of international agreements (*scil.*, in general terms, treaties).

¹⁶² “De regter moet volgens de wet regt spreken: hij mag in geen geval de innerlijk waarde of billijkheid der wet beoordelen.”

prescribed rights are not justiciable, their equivalents in the EConvHR and the ICCPR, as well as in other treaties (such as the ICESCR and ESC) generally are enforceable. I consider this further in [Chap. 3](#).

It should not be assumed, however, that this longstanding aspect of the separation of powers in the Netherlands has tempered or quelled academic and political interest. Curiosity and interest in broadening or in developing such a jurisdiction has remained equally active in academic and political circles, just as has the opposition to that constitutional change.¹⁶³ For the moment, the weight of constitutional history and tradition, as well as the practicable alternatives offered through the EConvHR, ICCPR and through the ECtHR (and more recently perhaps the ECJ as well), have carried the arguments against expanding the courts' jurisdiction in the direction of their US counterparts.

Thus framing the scope of the review jurisdiction of the courts is Article 120 of the Constitution (subject to Articles 93 and 94), together with seven leading Hoge Raad judgments. In effect, that general prohibition has not hampered the judiciary acting as a check and balance to executive action. The 1879 *Meerenberg* decision held the Crown's legislative power to be subject to the Constitution: its power to make law must derive either from an independent prescription in the Constitution or from specific statutory authorisation.¹⁶⁴ The Constitution did not limit or restrict free-standing powers of the Crown; rather, it conferred them. Thus "general rules of governance" had to have a constitutional or statutory foundation. This decision provides an early and general foundation for the jurisdiction of the courts to review secondary legislation for conformity with primary legislation.

Second, the 1986 *Landbouwwliegers* case expressly confirmed the jurisdiction of the courts to review secondary legislation (and including "general rules of governance" and "generally binding precepts") for compliance with general principles of law and justice, such as arbitrariness, equality, generality and certainty).¹⁶⁵ The Court found that no rule of law barred the courts from declaring invalid a law (other than primary legislation), based on the unreasonableness or irrationality (in its administrative law sense) of its tenor and operation. This remained a "marginal" control, in that the courts were nonetheless prohibited from deciding on the actual merits or necessity of the law by Article 11 of the General Provisions Act.

Third, the 1989 *Harmonisatiewet* decision provided added clarity and certainty to the limits of judicial review espoused in *Landbouwwliegers*. Relying on a perceived relaxation in the approach to jurisdiction, and comfort in assessing legislation according to treaty rights, the claimants launched a challenge to a statute altering the conditions and availability of student financial aid for higher

¹⁶³ Specifically Prakke 1992, Koopmans 1992, and Barendrecht 1992; Prakke 1972; Schutte 2004; Hirsch Ballin 2005; de Lange 2006, and Schutgens 2007.

¹⁶⁴ HR 13 Jan. 1879, W 1879 4330.

¹⁶⁵ HR 16 May 1986, NJ 1987 251. See also HR 24 Jan. 1969 (*Pocketbooks II*); HR 1 July 1983, NJ 1984 360 (*LSV*), and HR 1 Dec. 1993, AB 1994 35.

education, on the basis of an infringement of fundamental principles of law and justice. The Court rejected the challenge. Primary legislation remained outside the review jurisdiction of the courts by virtue of Article 120 and the constitutional traditions and separation of powers in the Netherlands. Although Article 120 mentioned only “constitutionality”, Parliamentary and other commentary demonstrated that it was to be construed, in accordance with constitutional history, as barring all forms judicial review.

The 1994 *Valkenhorst* case articulated the law-making capacity, albeit limited, of the courts, so as to fill in certain gaps or omissions in the fabric of current legislation on the basis fundamental principles of law and justice. Specifically, the Court directed a private charity institution which assisted unwed mothers through the father. The institution had refused on confidentiality grounds. Moreover, the mother had refused consent; the consent of the father in the circumstances was not required. The right to know of one’s parents flowed from the collection of fundamental rights and principles of justice. It was not absolute, requiring consideration of any competing and overriding rights of others (such as the biological father).

The 1999 *Arbeidskostenforfait* decision set out the limits to the remedial jurisdiction of the courts when applying directly applicable treaty provisions to statutory schemes.¹⁶⁶ I discuss this further in [Chap. 3](#). But briefly, the Court outlined a test, based on the constitutional history and separation of powers in the Netherlands, for rectifying statutory infringements or omissions in the face of directly applicable treaty obligations. The central feature to the test was the necessary restraint or abstention from entering the realm of policy, from weighing political and social interests to arrive at a remedy. Unless the necessary relief was readily apparent from the legislative history and context, or from the scheme it established, the court should not be seen to usurp the legislative function and choose from a number of possible options and interests.

The sixth case, *Waterpakt*, stands for two propositions.¹⁶⁷ First, the courts must interpret and apply legislation according to its terms, even if it expressly contradicts or omits full implementation of treaty terms not enforceable under Articles 93 and 94 of the Constitution. Certainly the courts do interpret and apply legislation in accordance with the international obligations of the Netherlands, where they are able to do so. But express language in the statute will override the treaty. Second, a judge does not have the jurisdiction to compel the state to enact legislation implementing treaty terms.¹⁶⁸ The jurisdiction under Articles 93 and 94 is “negative”, in the sense of not enforcing enacted legislation, and not “positive” in the sense establishing law.

The last case, the 2004 decision in *Afghanistan*, articulates clearly the “act of state” or “Crown prerogative” doctrine, that foreign affairs policy is not justiciable.

¹⁶⁶ HR 12 May 1999, NJ 2000 271.

¹⁶⁷ HR 21 March 2003, NJ 2003 691.

¹⁶⁸ In a complementary decision, HR 19 Nov. 1999, AB 2000 387, the Court held that it has no jurisdiction to forbid the passage of such legislation.

Nor is Article 90 of the Constitution, the duty to promote the international order, justiciable. Thus the decision to commit troops to the conflict in Afghanistan was intricately related to defence and foreign policy. These engaged considerations of political and social interest whose appreciation fell outside the legal forms and jurisdiction typifying the abilities of a judge.

Hence the power dynamic to the separation of powers in the Netherlands remains primarily between the legislative and the executive branches. Yet it is clear that the courts exercise a monitoring function which is grounded on a not so modest review jurisdiction. In particular, the strength of that position derives from the constitutional grant of power to hold directly applicable treaty terms paramount to ordinary legislation. And it bears emphasis in the general appreciation of the separation of powers, that it is an express constitutional grant of power, not one arising inherently or by imputation.

2.2.4 *The US: The Judiciary as a Full Member of the Trias*

Although the UK may have furnished the initial blueprint for the doctrine of the separation of powers, it was the US and France that first consciously and expressly built it into the foundations of their respective constitutional frameworks. Indeed, the US represents the most developed expression of the doctrine, arising from continuing debate and consideration in legal, political and academic circles.¹⁶⁹ The US version of the doctrine articulates a dynamic equilibrium, a continual balancing of powers—or perhaps better: a refining of the balance—among the three principal branches of government.¹⁷⁰ It very much takes to heart the Montesquieu aspiration of checks and balances, of moderation, for the well-being and liberty of the polity.

The dynamism owes much to circumstances peculiar to the US. First is the nature of the US Constitution, a modest document of some seven articles, drafted in 1787 and with the addition of some 27 amendments since then.¹⁷¹ In brief, the US Constitution establishes a republican (presidential) federation, and is the supreme and paramount law (as stipulated in Article V) by which are constituted the three branches of government which are further attributed certain defined and

¹⁶⁹ To give just a small sampling from the academic camp: Goldwin and Kaufman 1986; Redish 1995, esp. Chap. 4; Gwyn 1989; Merrill 1991; Brown 1991; Nourse 1996 and Nourse 1999; Flaherty 1996 (the executive being the “most dangerous branch”); Magill 2000 (and the sizeable listing of separation of powers Articles at nn. 34 and 35, pp. 1136–1137) and Magill 2001; Ackerman 2000 and Colburn 2004.

¹⁷⁰ On the “balancing” nature to the US version, see, e.g., *CFTC v Schor* 478 US 833 (1986); *Morrison v Olson* 487 US 654 (1988); *US v Mistretta* 488 US 361 (1989) 381; see also *Bowsher v. Synar* 478 US 714 (1986).

¹⁷¹ The first 10 amendments were adopted by states’ ratification between 1789 and 1791, and include the “Bill of Rights”. The last amendment, the 27th, was first proposed in 1789, and only received the last necessary state’s ratification (that of Michigan) in 1992.

limited powers. All three branches may only exercise such power to the extent prescribed by the Constitution. Of course it does not explicitly stipulate a separation of powers, nor mandate a system of checks and balances among the branches of government it identifies, nor even require strict observance of those institutional boundaries.¹⁷² What it does do, however, is allocate certain powers to the legislature, the President (the executive) and the courts, in its first three articles. Thus Article I, section 1, provides that all legislative powers listed therein shall be vested in Congress (the Senate and the House of Representatives). Sections 7 to 9 itemise the powers. Article II, section 1, vests the executive power in the President and specifies in sections 2 and 3 the powers and duties of the office. Those include, of relevance hereto, the making of treaties and international agreements, the conduct of foreign relations, and being the chief law-enforcement officer. Indeed, the Constitution gives the President a more or less unfettered right to conduct foreign relations and conclude treaties and international agreements.¹⁷³ All aspects regarding foreign relations are strictly speaking federal jurisdiction. Treaties can create private rights and duties providing the constitutionally prescribed formalities have been satisfied, and by extension and implication, international executive agreements as well. These all bind every branch of government, including at the states level even though the subject matter apart from the international aspect strictly falls under states' legislative jurisdiction.¹⁷⁴ And Article 3 vests in section 1 the judicial power of the US in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That jurisdiction is particularised further in section 2, the "case or controversy" clause. And in the penultimate Article VIII, the second paragraph reads,

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the united States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The rest, it leaves to the ingenuity and fidelity of its citizens and officials, to adapt and interpret its broad lines so as to fit evolving circumstances and demands into the eighteenth century text.

As a mere sketch of government, yet having a perfection of practicable conciseness and of creating a stable, enduring constitutional order, the US Constitution places a heavy burden on later generations of working out the details. Hence the vibrant tradition of US constitutional interpretation, with its historical investigations, the continual rehearsal of the arguments in *The Federalist Papers*,

¹⁷² On the history of the separation of powers in the US, see esp. Vile 1998, esp. Chaps. 6, 10, and 11; and Gwyn 1966.

¹⁷³ *Curtiss Wright v US* 299 US 304 (1936) 318–320 (per Sutherland J).

¹⁷⁴ See e.g., *Missouri v Holland* 252 US 416 (1920); *American Insurance Assoc. v Garamendi* 539 US 396 (2003) and *Dames Moore v Regan* 453 US 654 (1981) (executive agreements), and see *Curtiss Wright v US* 299 US, at 316ff.

and the theories of “originalism” and “textualism” and so on. This phrasing may perhaps belie its seemingly bottomless disputational character, and transient nature of the consensus on most major points (until the next Supreme Court decision), just because of the burden of interpretation which the US Constitution imposes.

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.¹⁷⁵

Moreover, that burden of interpretation—and as reflected in the various schools it has created—also appears to assume or invoke a backdrop of shared understandings or presumptions. For example, the US Constitution does not expressly create the federation of states and national government, nor does it mention “federation” or “federal government” or such like anywhere. It tacitly assumes this central and determinative characteristic of the US constitutional settlement in its allocation of powers, references to “states”, and prescribing the supremacy of US laws. Even in the 10th Amendment, as a 1789 afterthought, the assertion that residual powers not allocated or denied to the Congress remain in the states is but a roundabout way of confirming a basic federalism principle. “The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified.”¹⁷⁶

All this has, nonetheless, not exempted the US from major constitutional crises and upheavals.¹⁷⁷ But the innate flexibility and power of accommodation (together with burdensome amending procedures) of the US Constitution may have preserved its text, and the framework it establishes, from the kinds of wholesale revision undergone in, for example, France, the Netherlands, and Belgium. In many ways, in is not so much interpreting the US Constitution to address current situations, but rather the obverse: an interpretation of those modern conditions in terms of the Constitution. Instead of changing the text to address comprehensively new political circumstances, the debates and controversies have sought rather to fit into, or draw out of, the text the desired adaptations and extensions, or conversely prevent same.

¹⁷⁵ *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952) 634–635, per Jackson J.

¹⁷⁶ *US v Sprague* 282 US 716 (1931) 733; and *US v Darby* 312 US 100 (1941) 124, “The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.” And see *Fry v US* 421 US 542 (1975) 547.

¹⁷⁷ On which, see Ackerman 1991 and Ackerman 1998.

2.2.4.1 Presidential Power: Waxing and Waning

Such an interpretative exercise and evolution to constitutional roles and meaning appears so very clearly along the legislative–executive axis, in delimiting presidential power to create, extinguish or otherwise compromise legal rights and duties. Although Article I of the Constitution vests particular legislative powers in the Congress, and other powers as well as the residue in the various states of the Union, successive US Presidents have sought to broaden and strengthen the independence of executive decision and rulemaking. This claim to power includes not only the direct creation of rules, but also the indirect, by diverging from applying legislation or treaties in ways or situations preemptively declared inconsistent with constitutionally attributed powers.¹⁷⁸

This [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it... is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.¹⁷⁹

As a general observation, while the courts have applied more careful scrutiny to the exercise of presidential power in domestic situations, they have been more generous and reluctant to interfere in situations with a significant foreign, international component. Of course, more careful scrutiny does not necessarily translate into a more restrictive interpretation of presidential, executive power.¹⁸⁰ An indicator than black letter law is, perhaps, the political mood and situation of the country itself.

While the basic principle is clear, the devil is in the details. Presidential power must be rooted either in the Constitution or in a statute. The acknowledged touchstone for that separation of powers analysis is the opinion of Jackson J in *Youngstown Sheet and Tube v Sawyer*.¹⁸¹ Although only one opinion among six other concurring Justices (with three dissenters), history and constitutional litigation has preferred the tripartite test for justifying presidential action.¹⁸² The case turned upon justifying President Truman's 1952 executive order during the Korean War and the Cold War ordering the seizure of steel factories to avoid the paralysing effects of a general strike by steel workers, as an exercise of the President's emergency powers albeit inconsistent with Congressional legislation on the matter. The majority were not persuaded of the existence of such emergency

¹⁷⁸ See e.g., Cooper 2002; Strauss 1997; Fleischman and Afuses 1976; Cash 1963. Consider also the (debated) legal implications of the presidential use of signing statements (comments issued with legislation at the time of presidential signing) to declare how aspects of particular legislation will or will not be enforced, consistent with the President's views on its constitutionality and constitutional application: see e.g., Lee 2008; Thompson 2007; Skrodzki 2007, and Bradley 2003; and see generally Cleary 2007.

¹⁷⁹ *McCulloch v Maryland* 17 US 316 (1819) 405.

¹⁸⁰ See, e.g., Monaghan 1970; Sunstein 2005; Hansen 2009; Devins 2009 and Blomquist 2010.

¹⁸¹ *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 637–660.

¹⁸² Black, Burton, Jackson, Clark, Frankfurter, and Douglas JJ concurring; Vinson CJ, Reed and Minton JJ dissenting. See Swaine 2010 (and commentaries cited therein).

powers (of expropriation) inherent in and innate to the office of the President, and yet unexpressed in the Constitution. Indeed, such powers independent of Congressional scrutiny and control carried with them the great risk of abuse. The test for justifying presidential authority is as follows: [footnotes omitted]

1. When the President acts pursuant to an express or implied authorisation of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power....
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility....
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinised with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁸³

The four principal sources of independent—constitutional—presidential power are (1) as commander-in-chief; (2) in the control and direction of foreign affairs; (3) an unenumerated, general and implied power to issue orders in times of national emergency (whether or not requiring *ex ante* or *ex post* Congressional approval) and (4) to take care that the laws be faithfully executed. Statutory authorisation may be explicit or implied, and the scope and breadth of the authorisation depends upon the particular statutory language.¹⁸⁴

Presidential rule and decision making powers take the form of “presidential orders”—to follow Stack¹⁸⁵—an umbrella term covering a wide and diverse range of nominate instruments from executive orders, executive agreements, through signing statements, to declarations, proclamations, directives, and so on. The Constitution does not mention presidential orders anywhere, but Presidents have nevertheless made use of them since the Founding.¹⁸⁶ They have tracked important constitutional and political events across US history, such as *Marbury v Madison* (order interfering with Marbury’s judicial commission); the Civil War (Lincoln’s

¹⁸³ *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 637–638.

¹⁸⁴ See e.g., *Chevron v NRDC* 467 US 837 (1984) and *US v Mead* 533 US 218 (2001) (test for judicial deference to regulatory policies).

¹⁸⁵ Stack 2005, p. 546 (arguing for a broader coverage for judicial review of presidential orders, and narrower grounds for constitutional exemption from that review).

¹⁸⁶ Following Stack 2005; Strauss 1997, and Cash 1963.

use under cover of the emergency powers); internment of Japanese–Americans during WWII, through to the Iran Hostage Crisis, and beyond to the presidencies of George W. Bush and Barack Obama.

Presidential orders serve primarily to declare and initiate policy positions and to structure the administrative arm and implement administrative policies. They represent presidential declarations as the head of the Executive Branch, and as Head of State. Presidential orders are not by definition intended to determine (private) legal rights, and may contain declarations to that effect. This may render them unenforceable as law, and thus nonjusticiable. However, by design and effect, they may well interfere with private rights, such as imposing criminal penalties or even having retroactive effect,¹⁸⁷ and thus become justiciable. To that end, they also benefit from the Supremacy Clause and may preempt state laws.¹⁸⁸ It is worthy of emphasis, however, that most presidential orders having legal effects would claim in addition some Congressional, statutory authorisation, and do not necessarily rely on independent powers alone. The lessons learned in *Youngstown Sheet and Tube* remain fresh. There are no fixed procedural requirements for issuing presidential orders—including any Congressional scrutiny—except perhaps the publication requirements in the *Federal Register* for those entitled “executive orders”.¹⁸⁹ Moreover, the courts have been more generous and observed greater deference to presidential orders executed within the President’s independent constitutional authority, in particular in the conduct of foreign affairs, and those exercising a statutorily granted discretion.¹⁹⁰

The significance of this may be highlighted in contrast to the more strictly controlled process of issuing secondary legislation by agencies (as delegates of the presidential power to take care that the laws be faithfully executed under Article 2 (3)). By Chap. 5 of Title V to the US Code, proposed rules are subject to various degrees of public and bureaucratic scrutiny, through public consultations, legal review and cost–benefit analyses.¹⁹¹ Proposed agency rules are also subject, at least in principle, to Congressional review pursuant to V US Code §8 (“*Congressional Review Act*”). This is a default procedure in which a rule will take effect within the prescribed time absent a joint resolution of disapproval (subject to a presidential veto thereof). Copies of the rule, together with explanatory notes and other

¹⁸⁷ As in *Youngstown v Sawyer* 343 US 579 (1952); *Curtiss Wright v US* 299 US 304 (1936); *Dames & Moore v Regan* 453 US 654 (1981), and *Sealand Serv. Inv. v ICC* 738 F (2nd) 1311 (DC Cir.) (1984) (retroactive effect permissible).

¹⁸⁸ See e.g., *American Ins. v Garamendi* 539 US 396 (2003) (executive agreement) and *Old Dominion Branch 496 Nat. Assoc. Letter Carriers v Austin* 418 US 264 (1974) (executive labour relations order pre-empts state libel laws).

¹⁸⁹ *Franklin v Massachusetts* 505 US 788 (1992) (*Administrative Procedure Act*—V US Code §5—not applying to executive orders).

¹⁹⁰ *Dalton v Spector* 511 US 482 (1994) (review for abuse of discretion not available). Also *Curtiss Wright v US* (export restrictions); *Dames & Moore v Regan* (staying civil claims).

¹⁹¹ Note also V US Code §6 which echoes the rule and burden reducing objectives of the UK *Legislative and Regulatory Reform Act*.

comments, are provided to the leaders of each House, and to the Committees for whose legislative work domain they are relevant. And less deference is shown by the courts in determining their validity and constitutionality.¹⁹²

2.2.4.2 The Job of Interpretation

In working out the details to the institutional separation of powers, the interpretative exercise alternates its favour for the two dominant US analytic paths of “functionalism” and “formalism”.¹⁹³ The formalist school assesses the horizontal structure of government with a set of fixed rules gleaned from the face of the US Constitution and without reference to any larger purposes served by those rules. It sees the separation of powers doctrine as an institutional separation with clear and discernible rules to characterise organs and their functions. The functionalist school, as its name would suggest, approaches separation of powers questions as characterising the function according to the flexible standards modulated by the larger framework of maintaining a balance of power and other associated objectives. Neither is clearly required or discouraged by the text of the Constitution and the accent of the Supreme Court in its judgments shifts over time from the one to the other.

Whichever analytic technique may currently find favour with the justices, the objective of each remains ostensibly the same. The central tenet to the US doctrine is a preventing of one branch improperly encroaching upon the constitutionally prescribed powers of the others, and aggrandising itself at their expense.¹⁹⁴ In effect the Constitution is read to establish and preserve a tension and competition among the branches, thus promising a doctrine perpetually in flux and debate.¹⁹⁵ In holding the various branches to their attributed powers, the underlying premise is obviously the primacy and supremacy of the US Constitution. Any and all powers which an organ of government seeks to exercise must originate in the Constitution or be conferred through it. No explicit provision is required there for all possible types and sorts of state power: certain powers may be derived by necessary implication from those conferred by the Constitution.¹⁹⁶

¹⁹² *Chevron v NRDC* 467 US 837 (1984) and *US v Mead* 533 US 218 (2001) (review whether EPA legislation allows agency to fill definitional gaps, but no review of the wisdom of regulations if they are not otherwise unreasonable).

¹⁹³ Overview based on Magill 2000.

¹⁹⁴ See e.g., *Reid v Covert* 354 US 1 (1957); *Bowsher v Synar* 478 US 714 (1986) (legislation limiting federal budget intrudes into executive function), and *CFTC v Schor* 478 US 833 (1986) (primacy of federal agency regulating commodities trader over state adjudicative powers).

¹⁹⁵ See e.g., *Myers v US* 272 US 52 (1926) 293 (“... by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy” per Brandeis J dissenting).

¹⁹⁶ *McCulloch v Maryland* 17 US 316 (1819) (federal vs state power); *Missouri v Holland* 252 US 416 (1920) and *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952) (foreign affairs powers, executive orders, and treaties).

The constitutional origin of powers and the prohibition on “encroachment and aggrandisement” can translate into very narrow, finely detailed—if not highly institutionalised and formalist—understandings of the separation of powers. For example, the directness and immediacy of the President’s executive power over the appointment, control and removal of officials is a decisive aspect in determining whether Congress imposed standards for officials and agencies encroaches on presidential power by retaining undue supervisory control over the conduct of government.¹⁹⁷ Nor can Congress create a right of action to compel the federal government to execute Congress imposed duties in the absence of specific injury, being an improper encroachment on presidential powers and transfer of those powers to the judiciary.¹⁹⁸ A House of Representatives veto of the Attorney General’s suspension of a deportation represented an impermissible intrusion into the executive branch,¹⁹⁹ and presidential “line item” budget veto powers—although conferred by statute—in effect gave the President powers to amend active legislation outside the constitutionally prescribed legislative process.²⁰⁰ And whilst Congress can create new tribunals and courts having specialised jurisdiction and closely integrated in a publicly regulated scheme which are not necessarily bound by the constraints and restraints applying to the constitutionally established courts of original jurisdiction (Article III courts), it may not encroach upon the ability of citizens to have private rights and duties determined by the Article III courts.²⁰¹

These reflections point us to the next aspect of the US constitutional situation. Constitutional debates and controversies are fuelled in no small measure by the second feature, being the jurisdiction of the courts of general jurisdiction to review legislation and executive acts for constitutional compliance. The constitutional jurisdiction of the courts has transformed them into the foremost constitutional forum and testing grounds. In many respects the articulation and application of a separation of powers doctrine in the US is the product of, and is driven by, the courts. Of course, we must be mindful of the caution that—and to quote Jackson J. again from *Youngstown v Sawyer*—“The actual art of governing under our Constitution does not

¹⁹⁷ *Buckley Valeo* 424 US 1 (1976); *CFTC v Schor* 478 US 833 (1986); *Bowsher v Synar* 478 US 714 (1986) (if retains legislative character, must still comply with legislative functions per Art I); *INS v Chadha* 462 US 919 (1983); *Morrison v Olson* 487 US 654 (1988); *Metro Washington Airport Auth v Citizens for Abatement of Aircraft Noise* 501 US 252 (1991), and see also *Free Enterprise Fund v CFAO* 551 US _ (2010).

¹⁹⁸ *Lujan v Dept Wildlife* 504 US 555 (1992).

¹⁹⁹ *INS v Chadha*.

²⁰⁰ *Clinton v City of New York* 524 US 417 (1998).

²⁰¹ *American Ins. v Canter* 26 US (1 Pet.) 511 (1828); *Gordon v US* 69 US (2 Wall.) 561 (1864); *Northern Pipeline v Marathon* 458 US 50 (1982) (bankruptcy courts); *Thomas v Union Carbide Agri. Prods* 473 US 568 (1985); *CFTC v Schor* (orders of commodities trading commission enforceable in federal courts, not contra Art III guarantees), *Mistretta v US* 488 US 361 (1989) (sentencing commission issuing guidelines binding on federal judges); *Granfinanciera SA v Nordberg* 492 US 33 (1989) (id., jurisdiction of bankruptcy courts).

and cannot conform to judicial definitions of power of any of its branches based on isolated clauses over even single Articles torn from context.”²⁰²

In the US version, institutional insulation does not translate into functional isolation, as perhaps may characterise largely the French and Dutch systems, even the UK. That the separation of powers means more than a mere institutional separation of government powers has been decried as an archaism from the very beginnings of US constitutionalism.²⁰³ The precedents and legal history of constitutional review in the US, from *Marbury v Madison* onwards, is well-known and has been amply rehearsed in great detail elsewhere. The very essence of the judicial duty being to determine what legal rules govern a case, it follows that the courts must include consideration of the Constitution, treating it superior to any ordinary act of legislation, and disregarding same insofar as the latter is contrary or in conflict with the Constitution. It is the responsibility of the courts, in particular the Supreme Court as having the final legal say on what the Constitution means, to ensure that the three branches (including itself) neither encroach upon the others nor aggrandise their powers at the expense of the others.²⁰⁴ Hence by the powers of judicial review, the Supreme Court—and lower courts of ordinary jurisdiction—plays an active and integral role in checking the balance underpinning the US version of the separation of powers.

The judicial branch stands as a coequal, coordinate branch of active government. With the courts not participating as a voice in the social and political debates of the time, they are compelled by litigants to account for those debates in their interpretation and application of the law, especially through constitutional review. The separation of powers in the US articulation reinforces the element of checks and balances as a critical aspect to the doctrine, in addition to the mere institutional separation and insulation from interference from the other branches. Thus, this second factor allows the Constitution to evolve not as a doctrine but as the political and legal framework of an evolving polity.

But the involvement of the courts on political and social controversies through judicial review is not unbounded or unrestricted.²⁰⁵ The US separation doctrine limits the courts’ jurisdiction to “cases and controversies” by virtue of Article V of the Constitution. Hence Article III courts do not render advisory opinions on questions of law or interpretation, nor do they review orders of tribunals where the hallmarks of judicial process and order, namely the administrative nature of the proceedings and the lack of finality to the decision, are absent.²⁰⁶ The Article III

²⁰² *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 635, and see Elliott 1989, pp. 506–507.

²⁰³ *Marbury v Madison* 5 US 179 (1801–1803); *Mistretta v US* 488 US 361 (1989) 360 citing *US v Nixon* 418 US 683 (1974).

²⁰⁴ Recited in, e.g., *Marbury v Madison* and *Mistretta v US* 488 US, 380ff. *Nixon v Admin Gen Services* 433 US 425 (1977) 443 (three branches of government not hermetically sealed).

²⁰⁵ *US v. Lopez* 514 US 568 (1995) 577–578; *US v Morrison* 529 US 598 (2000), and see *US v. Harris* 106 US 629 (1883) 635.

²⁰⁶ *Mistretta v US* 488 US, 385ff; *Northern Pipeline v Marathon Pipe* 458 US 50 (1982); *DC Crt of Appeals v Feldhaver* 460 US 462 (1983), and *Glidden v Zdansk* 370 US 530 (1962).

courts may also refuse jurisdiction over matters considered to be “political questions”. The origins of the political questions doctrine are traceable to *Marbury v Madison* and *Ware v Hylton*.²⁰⁷ Its modern statement is usually attributed to Brennan J in *Baker v Carr*²⁰⁸ who identifies a test of eight criteria:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The doctrine has nevertheless aroused considerable controversy in US academic circles with arguments against its existence, for its existence—generally or in limited circumstances, for or against its practicability, and so on. Indeed, a central criticism is simply that its lack of objective standards allows the courts an easy out from important cases considered too politically charged for legal resolution. Be that as it may, the political questions doctrine is a facet of the separation of powers doctrine. In particular and more significantly to this piece, matters touching upon foreign affairs and foreign policy are generally caught under the political questions doctrine.²⁰⁹ Legal challenges to decisions and policies taken under the presidential powers over military resources and foreign affairs have usually been held to be nonjusticiable.²¹⁰ And inasmuch as the Constitution confers legislative power on Congress, subject to any delegation, treaties and executive agreements, the separation of powers (and thus too the rule of law) would require the courts to limit their regard (or rule of recognition, in Hart’s terms) to binding sources of law of congressional/states origin.

And as with the UK situation, the political questions doctrine shades into the domain of acts of state, for which foreign states obtain immunity from domestic judicial scrutiny. “Every sovereign state is bound to respect the independence of every other state, and the courts of one country will not sit in judgment on the acts of government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by

²⁰⁷ *Marbury v Madison* and *Ware v Hylton* 3 US 199 (1796).

²⁰⁸ 369 US 186 (1962); see also *Nixon v US* 506 US 224 (1993).

²⁰⁹ See e.g., *Oetjen v Central Leather* 246 US 297 (1918); *Chicago & S Airlines v Waterman Steamship* 333 US 103 (1948); *Luther v Borden* 48 US 1 (1849) and see *Japan Whaling Assoc v American Cetacean Soc* 478 US 221 (1986).

²¹⁰ *Goldman v Weinberger* 475 US 503 (1986) 507, and see *Powell v McCormack* 395 US 486 (1964); *Gilligan v Morgan* 413 US 1 (1973).

sovereign powers as between themselves.”²¹¹ The principle is in part codified under the FSIA (28 USC 1604) which prescribes under what circumstances a state or state agent may lose or maintain immunity from judicial proceedings. As in the UK the doctrine implicates the separation of powers by recognising the division of labour between executive and judiciary, and importantly, the division between internal and external constructions of sovereignty. Justice Harlan, for the majority in *Banco Nacional Cuba v Sabbatino* held, “The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.”²¹²

2.2.4.3 Federalism and Pre-emption

The third feature of US constitutionalism bearing upon the separation of powers is federalism and the interplay between the central, national executive and legislative branches and those of the various states. Not only is there a “horizontal” separation of powers into the *trias* among organs of government, federal and state, but also a “vertical” one, dividing legislative, judicial and executive powers between the federal level and the state level.²¹³ Now technically speaking, the only real resemblance between the two is a dividing of power in such a way to avoid or minimise concurrent, overlapping fields of action. The one does not presume the other, and the limits and objectives of the one do not necessarily engage or interfere with those of the other.²¹⁴ Nevertheless, both are understood to stand guarantee ultimately for freedom and liberty.²¹⁵ And it might also be suggested that federalism not only introduces a certain degree of familiarity and acceptance of judicial review on legislation, but also brings a heightened sensitivity to problems of delimiting and maintaining jurisdictional boundaries among competing organs of state.²¹⁶

More importantly, however—and relevant to this piece—the separation of powers will have to account for federalism where the vertical division of powers

²¹¹ *Underhill v Hernandez* 168 US 250 (1897) 252 (per Fuller CJ); and likewise to individuals acting as agents of state: *Oetjen v Central Leather*.

²¹² *Banco Nacional Cuba v Sabbatino* 376 US 398 (1964) 423, and 427–428 (with reference to the vertical separation of powers).

²¹³ Discounting federally administered territories.

²¹⁴ As recognised, e.g., in *Metro Washington Airport Auth v Citizens for Abatement of Aircraft Noise*, and *South Dakota v Dole* 483 US 203 (1987).

²¹⁵ See, e.g., *Arizona v Evans* 514 US 1 (1995); *Gregory v Ashcroft* 501 US 452 (1991), and *Garcia v. San Antonio Metropolitan Transit Authority* 469 US 528 (1985).

²¹⁶ As recognised in the longstanding practice of the Supreme Court: see e.g., *Mistretta v US* 488 US 361 (1989) 380–383 (“encroachment and aggrandizement” animating separation of powers jurisprudence); *US v Nixon* 418 US 683 (1974) 693, 703–5; and *US v Lopez* 514 US 549 (1995) 575 (Kennedy and O’Connor JJ conc.); aff’d *US v Morrison* 529 US 598 (2000) 607ff.

and the horizontal one intersect. One set piece here is *Erie Railroad v Tompkins*.²¹⁷ Just as a matter of internal, US constitutional law, the question what powers the federal courts have to make federal common law based on some constitutional or legislative authorisation (or at large) and binding on the various states, opens the way for a long complex digression. Of more immediate relevance is the use of federal common law as a portal to integrate customary international law into the domestic legal system. The debate, one carried on primarily at the academic level, generates particular heat because at its foundation, it concerns whether human rights recognised and applied internationally have an entry portal in the US, to be enforceable alongside or by adjusting domestic constitutional rights.

A second set piece for the separation of powers revolves around the legislative–executive axis when transposing international obligations into the domestic sphere. First, the legislative power and authority that is divided internally, remains without more an undivided whole externally in the hands of the federal government in its capacity as international representative of the US, and for those external purposes. Remitting international obligations to the domestic sphere engages the federal division of powers, whether by way of claiming domestic legal effect for international agreements in areas otherwise reserved to states jurisdiction, or individual states giving legal effect to international rules, rights and obligations without express or implied federal approval.²¹⁸ This is the pre-emption doctrine. Second, inasmuch as the federal executive branch directs and controls international relations, any recognition by federal or state courts of the legal, normative status to internationally rights, rules and duties without state legislative or congressional approval may be understood to attribute legislative power to the executive, contrary to the Constitution. Equally, for that reason, courts may consider themselves justified for that reason in ignoring the international commitments of the US, as was the case in *Medellin v Texas*.²¹⁹

2.2.5 From Separating Power to Supervising Power

All this goes to the flexible, dynamic nature of the separation of powers. But this dynamism—or indeterminacy—does not necessarily suggest the doctrine is problematic or weak.²²⁰ Apart from assuring the doctrine's continuing constitutional relevance, it has made the separation of powers a complex, and in modern parlance, a decidedly contestable concept.²²¹ It is worth recalling that the separation of

²¹⁷ 304 US 64 (1938).

²¹⁸ As in *Missouri v Holland* 252 US 416 (1920).

²¹⁹ 552 US 491 (2008), discussed below in Chap. 3.

²²⁰ Yet see Carolan 2007, pp. 22ff, 253–254, suggesting that the indeterminacy of the concept (in its current formulation) deprives it of any practical, active efficacy in structuring the state, thus prompting his revised conceptualisation.

²²¹ See, e.g., Gwyn 1989 and J. Colburn 2004.

powers doctrine—at least in its Montesquieu articulation—does not begin with, or regard, separating legal or law powers from non-legal or political powers. Rather, it conceives of, or perhaps presumes, the powers of government as manifesting themselves in the form of laws. This usage of “law” does not refer to some generalised concept of norms or maxims, as in divine law, moral law, the law of nature, or the laws of physics. Montesquieu was quite clear from the outset of his *The Spirit of the Laws* that his observations and investigations pertained to “legal” laws, positive acts of human reason designed to govern people.²²² Thus, while the separation of powers doctrine may be generally considered a principle of constitutional and institutional design, it speaks more precisely to the aspect of identifying and administering the law of a state. Needless to say, it is an important, if not determinative, aspect of constitutionalism. To set this in a wider, modern canvas, the separation of powers implicates the rule of law, which conditions the exercise of any public power on the due observance of a law authorising the former. Hence, under modern constitutionalism, public powers and public organs are to be defined in terms of, and as subject to, law. The legitimate exercise of any public power is dependent upon its legality, its legal provenance. The separation of powers doctrine, as one of the constituent elements to the rule of law, prescribes that provenance: who does what regarding law-making, -enforcing, and -interpreting.

2.3 The Disjunction Between National Law and Public International Law

2.3.1 *The Separation of Powers as the Hart of the Matter*

Every legal system establishes its own criteria for the validity and legitimacy of the laws applied in it.²²³ Indeed, it is a feature of any such normative system to ascertain what shall count as binding rules for its purposes, and how they come about. All laws are tested for validity and legitimacy in every legal system, whether they are domestic in origin or not. Naturally the assessment for those of domestic origin is more likely to be perfunctory and implicit, arising out of habit, unless their validity or legitimacy are intentionally or explicitly brought into question for some reason. The criteria for validity identify what propositions or commands serve as rules for the system. These criteria therefore pertain to the mechanics of rulemaking, taking into account the persons issuing the commands and the powers ascribed to them. The criteria for legitimacy indicate the factors which condition the content of valid rules and the process by which valid rules are formed. Hence the latter are distinguishable from validity criteria by virtue of their positing (logically

²²² Montesquieu 1989, I, Chaps. 3 and 4, XI, Chaps. 1, 6, 18.

²²³ Although we refer here to “laws”, we could just as easily expand the scope to “acts intended to have consequences in domestic law”.

prior) conditions for validity. In other words, even if the rule in question is valid on its face, there may be other reasons for discounting or limiting its effect.

Questioning a law's validity or legitimacy or both works on two levels. The first level obviously addresses the immediate provenance of the law in question: did it issue in the prescribed manner from the required person, within the limits of his attributed powers? A failure to comply with the required procedure, having no power or jurisdiction to issue rules of that kind or with that effect, or acting *ultra vires* all represent standard, well-travelled grounds to invalidate legal rules. And beyond that, at work implicitly here is a second level of questioning, testing the institutions and principles called upon to review the law in the first place. Implied in the first level is thus the recognition that the appropriate institution has been engaged to review the law, and that the required review principles appropriate for the institution have been invoked. Because validity and legitimacy apply within and by virtue of a system, they represent not only an appeal as to form and content, but also an appeal as to institutional capacity.

This represents another way of conceiving Hart's compelling technique of analysing rules in a legal system. Briefly, he divided laws into "primary" and "secondary" rules.²²⁴ The former are quite simply the laws themselves, regulating human interaction within society. The latter are rules about understanding and dealing with those laws. Hart proposed a threefold typology for secondary rules. Rules of recognition determined what constituted primary rules. Rules of change determined how rules could be made and changed. Finally, rules of adjudication determined who decided what the primary rules meant and how they were to be applied. The differences between Hart's approach and that of validity and legitimacy criteria here are really only of perception and emphasis, not of substance. The criteria for validity and legitimacy constitute the "secondary rules". Both contain the same elements, yet organised in another way.

What is important, however, is the conception of a legal system composed of two levels of rules with separate status, where the one—rules about law—prescribes and governs the existence of the other—rules of law.²²⁵ Put another way, the conception crystallises around rules of law and law-making. Hence what Hart has shown us is the inextricable connection between law and constitutional power.

²²⁴ Hart 1961, Chap. 5.

²²⁵ This conception comes with the obvious risk of succumbing to an infinite regress. If secondary rules prescribe primary rules, it would follow that tertiary rules ought to prescribe the secondary ones; quaternary, the tertiary and so on. But an endpoint, the "final cause", is invariably postulated for each legal system's chain of rules. And it consistently rests on a simple constataion of fact: "that just the way it is". For each state legal system, the endpoint is the political reality of its particular constitutional settlement. A myriad of historical factors, spanning the full range from accidental, catastrophic, economic, social, religious and much more, combine to produce a constitution. This in turn leads to the debate whether the political constitution precedes the legal constitution (following Schmitt, in the majority) or vice versa (following Kelsen, in the minority). To the extent relevant, I choose neither: both are, in the phrasing of Habermas, "co-original". The formation of any association through intersubjective relations necessarily implies the contemporaneous, coextensive organisation of structured relationships represented in and through law.

A concept of law means also having a concept of constitutional order. So the criteria for the validity and legitimacy applied by every legal system thus comprise a constitutional test for authority. Any command or proposition seeking standing in a legal order must therefore obtain constitutional validation and legitimacy.

This constitutional optic through which we conceive law and law-making brings us back neatly to the separation of powers. From the Hart perspective, the secondary rules that delineate valid and legitimate laws articulate the current separation of powers doctrine. At its simplest, when a particular command or order claims recognition and enforcement as law, we resort to the separation of powers criteria to test it and its author. Does it issue from a public or private authority able to issue commands? If so, are the commands binding, and to what extent? And so on. But there is more. When we prove a rule this way, our recourse to a reviewing body and principles also implicitly or explicitly relies on their binding authority. In other words, the separation of powers also determines, through checks and balances, which other organ of government may limit the powers of the others, and on what grounds. From another (doctrinal) angle, the analytical framework through which any given command is characterised as law or not is ultimately the constitutional structure of a state. A state's constitution creates the legal order and defines what is to be considered as law. And the constitutional order is in turn represented by the separation of powers. From another (practical) angle, as soon as domestic laws and legal institutions are invoked, so too is the constitutional framework and thus its separation of powers doctrine. Hence the doctrine is unavoidable in assessing whether a particular command or proposition is law. In sum, the separation of powers doctrine serves as the means of identifying the criteria of valid and legitimate law in the domestic legal system, by situating or attributing aspects of law-making power in an organ of government.

2.3.2 A Disjunction

In the domestic system, the questioning law-making authority for domestic laws may be more implicit and perfunctory, than explicit. But when claims invoke international law or foreign law, commands by definition alien to the domestic legal order, the situation is much different. The legal nature and effect of those alien precepts are the first order of business. And the situation is not simply limited to active litigation addressing rules on a case by case basis. If a domestic court admits a rule of international law in the legal system, the issue is what status that rule has within the domestic system. Is the rule transformed into ordinary, general, domestic law, subject to the domestic rules on validity, legitimacy, amendment, precedential authority, and such like? In whole or in part? Does it enjoy preferential or paramount status over extant or future domestic laws? These questions address effects extending beyond the particular case which happens to invoke the rule of international or foreign law. Moreover, modern international law, through commentators, tends to make a more general claim to its automatic recognition

and enforcement within national legal systems. Pursuant to the internal perspective, states are bound by it not only at an international level before international bodies and tribunals, but also internally, within and for the purposes of its own legal system. That is, international law is understood to make claims to have general normative, compulsory, force irrespective of particular constitutional niceties.²²⁶ International law is declaring more than that its own laws are binding within and for the purposes of the international legal system and relations and irrespective of the principles and rules of national systems.²²⁷ That proposition is incontrovertible. Each system determines what is valid or legitimate for its own use. Instead, what is sought for international law is a legal authority beyond the limits of its own system.

I want to pause here for a moment to highlight a significant aspect to this claim of international law for legal effect within a domestic legal system. The point is not that litigants should have the right to advance arguments based on international law in their cases before domestic courts. Litigants, governments and private parties alike, do invoke treaty terms or rules of customary international law as effective to determine the outcome or the interpretation of domestic law, or at the very limit, to attack the legitimacy of domestic laws. That is indisputable. Equally so is that courts do appear to engage directly with those norms as rules of law. The issue instead is locus of normative authority for international law as a body of legal rules. On the one hand, we can conceive of international law as the product of governments dealing with one another, so that the constitutional optic is implied in the scope and range of their power to act on the international stage as agents of the constitutional state. When the effects of their actions directly or indirectly seek entry into the domestic sphere, the constitutional presumptions underlying them become live issues. Those presumptions also define those external actions in terms of internal law. We would then say that international law is in fact the self-regulation of a constitutional order's international relations. If we present international law as a separate, delimited system, we would then say that international law is derived from and dependent upon the authority of national law, constitutional law in particular. On the other hand, and treating international law as a separate, delimited system, we can conceive of international law as positing its own rules out of its own, free- and self-standing authority. In other words this is a "top-down" view of international law, as opposed to the first, a "bottom-up" view. The requirement to apply its rules therefore is independent of any particular constitutional presumptions, dependence or deference. So the application of international law is not an internal articulation of the limits to a government's power, but the assay of government action according to standards imposed from

²²⁶ *Locus classicus*: *Danzig Courts* PCIJ B15 (1928); *Polish Nationals in Danzig* PCIJ A/B44 (1932); *Exchange of Greek & Turkish Pops* PCIJ B10 (1925); *Chorzow Factory* PCIJ A17 (1928); see also *Elettronica Sicula SpA* (US v Italy) ICJ Reps 1989 15 (illegality under domestic law not entailing illegality under international law).

²²⁷ *Applicability of Obligations to Arbitrate* (Adv. Op.) ICJ Reps 1988 12; *Lagrand* (Germany v US) ICJ Reps 2001 466, and *Avena and other Mexican Nationals* (Mexico v US) ICJ Rep. 2004 12.

outside the kernel of government power (the constitution). This is the prevailing image of the authority of international law, with its own proper criteria for validity and legitimacy. And it is this image which underlies the claim of international law for legal effect within a domestic legal system.

But modern international law, advancing both an internal and external perspective, should not expect that its own requirements for valid law-making and legitimate law have equal force and effect at a national level. What may generate its authority at an international level does not immediately or seamlessly translate into an authority, a normativity, at the national level. Just because state officials or agents agree to something among themselves on the international stage, does not automatically and without more entail that what is agreed to has force of law for and within a national legal system. The executive branch does not have general jurisdiction to make law under most modern constitutions. Indeed, the entire history of the separation of powers and of western constitutionalism traces the continuing struggle to detach law-making powers from the executive branch, or at least limit and control those powers through various parliamentary and judicial mechanisms. We can disregard that history no more than disregard all of constitutional law and practice. Moreover, international law itself, through the external perspective, continues to regard the sovereignty of states as a foundation stone (I daresay, *ius cogens*) to its entire system. And in that notion of sovereignty sits the fundamental idea that states have the capacity freely and independently determine how they are constituted; that is, how to organise and articulate the political situation they represent.²²⁸ It follows that states are free to determine their own legal order and further, what shall count as law therein. That is the nature of the “external perspective” held in the traditional, older view on international law. Lastly, any such expectation of crossover validity would create a curious asymmetry requiring a fuller explanation. Municipal law does not prevail over international law before an international tribunal.²²⁹ What then requires the converse to be the case? Hence international law cannot bypass the separation of powers doctrine, if it seeks a voice within a national legal order. It must justify its claim of normative force by finding its place within the current constitutional structure of a state, through the separation of powers doctrine.

Yet, it is self-evident that the claim to validity and legitimacy within a national legal system cannot rely on any seamless application of the separation of powers doctrine. There does indeed exist a commensurability between the two systems. The common institutional basis is the participation of the executive in the

²²⁸ Thus it follows—*Land and Maritime Boundary* (Cameroon v Nigeria) ICJ Reps 1998 275—no general obligation in international law for one state to follow developments in the internal law of other states which may have a bearing on the conduct of mutual, international relations (unless perhaps specific, important mutual or internal interests at stake: *Fisheries* (UK v Norway) ICJ Reps 1951 116.

²²⁹ *Memel Territory* PCIJ AB 49; and see also *Applicability of Obligations to Arbitrate* (Adv. Op.) ICJ Reps 1988 12; *Lagrand* (Germany v US) ICJ Reps 2001 466, and *Avena and other Mexican Nationals* (Mexico v US) ICJ Rep. 2004 12.

lawmaking of both systems. At an instrumental level, both systems rely on what might be broadly and nontechnically termed a “social contract”: those who are subject to the law also have a say in its making. But this obtains only at a generalised, abstract level, applicable in fact to the laws of every legal system. The details reveal a much different picture.

Valid international legal rules are not created in the same way and under the same conditions as valid domestic law legal rules. Law-making in international law arises out of customary international law and treaties. States, as the primary subjects of that system,²³⁰ make international law by signifying their consent to certain practices and written instruments. The relative clarity of this proposition masks underlying institutional and instrumental frailties, some of which were noted above.²³¹ In effect the key is the consent of the government, the required evidence and articulation of which remains surrounded by some uncertainty and subject to lively debate. Nevertheless, in short, law-making rests on the will of the executive.

By contrast, law-making in modern national legal systems invariably rests on the will of the legislature, whether or not there is “cohabitation” as in the French and US systems, or is dominated by the party of the executive as in the Westminster system. Legislative procedures for law-making are usually specified in constitutional or legislative texts, or parliamentary rules. Any government rule-making—administrative law writ large—is subject to parliamentary (legislative) control and authorisation, and may be further subject to judicial review. And in common law countries, courts too may declare legal rules as reasoned out of the arguments of counsel based on evidence and past decisions. Thus the separation of powers doctrine requires that we look elsewhere to substantiate the claims for international law within municipal legal systems.

So the interaction between international law and national legal systems is experienced at first glance as a disjunction between the validity and legitimacy of each system’s rules. The result is that rules of international law are less likely to be recognised and enforced as national law in any perceptibly consistent or coherent manner. And the disjunction becomes more perceptible as international law intrudes more pervasively and more actively in areas of jurisdiction traditionally reserved for states and their national legal systems.

²³⁰ Non-state entities recognised by international law may also stand as subjects of international law and contribute to the formation. What bodies and associations have that status, apart from UN organs and other treaty-based bodies, is unsettled. Like other commentators, Boyle and Chinkin 2007 refer to a number of “emerging” trends, which by definition therefore have not yet crystallised into hard and fast rules.

²³¹ As a system of law-making, international law is at best byzantine, at worst, a process by default. And it is highly dependent upon the archival efforts and opinions of academic commentators, who, in spite of best efforts and intentions, often leave it unclear what is actual established practice, *lex lata*, and what is desirable, *lex ferenda*.

2.3.3 *Bridging the Gap?*

Modern international law, with its “top–down” imagery, seeks a more pervasive and more commanding voice. To achieve that goal, it would not only address its institutional and instrumental frailties as systemic issues, but also co-opt the authority and legitimacy national legal orders. The separation of powers doctrine would resist any automatic recognition and enforcement of international law as law for the purposes of a domestic legal system. Some further justification is required, and commentators and scholars have obliged with ingenuity and quality. I suggest distinguishing the various strategies for justifying international law’s binding force with a domestic system under three broadly defined categories. These are (1) the institutional, (2) the presumptive and (3) the reflective.

2.3.3.1 Institutional Strategy

The most straightforward route is an appeal to institutional authority. This first strategy simply invokes the authority of an institution within the domestic legal system to declare international law to be valid law, or more generally, to have normative force. It relies on the ostensible position and function of the particular institution in the constitutional order. And what degree of normativity is attributed will depend upon the position of that institution in the legal hierarchy. This, in turn, emphasises that validity criteria are primarily relevant. As an appeal to authority, the institutional strategy principally engages the criteria of valid law-making, of passing the norms of international law through the appropriate channels. So validity criteria are applicable in the ordinary course: the right body, exercising the right powers, within the right limits. The “institutions” in question are, as might be expected, the courts, the legislature and the executive. The reference point is the constitution. Indeed the constitution itself, along with “the rule of law” and other fundamental constitutional doctrines—the separation of powers included—are also reasonably understood as “institutions” here.²³²

In pragmatic law terms, all this is naturally little more than highlighting constitutional power to recognise and apply international law. As such, there can be no question of going behind the decision that authority. The declaration should be accepted at face value in virtue of the authority the institution represents within the domestic legal order. Any application of the legitimacy criteria, the “secondary rules” in Hart’s terms, raises a different issue at this level. Here legitimacy criteria are directed at the power and function of the body itself, not at the substance of the decision as with primary rules in the ordinary course. Because the appeal to authority focuses upon the powers and position of constitutional organs, or constitutional doctrines, questioning the legitimacy of a decision to incorporate

²³² On “institutions” as bodies and concepts, see, e.g., Zijdeveld 2000 p. 37ff (distinguishing between institutions (conceptual) and institutes (organisational)) and McCormick 2007, p. 11ff.

international law into the municipal system in fact questions the powers of that body. More precisely, it addresses place and function of that body in the larger structure of the state, which are fundamentally constitutional and separation of powers issues.

Institutional authority can be explicit or implicit. The first, explicit authority, originates in an express clause in a statute or in the constitution itself, at the apex of the legal hierarchy. For instance, the constitutions of France, the Netherlands, and the US all confer status of binding law upon the terms of treaties.²³³ Of course the attribution of legal status only obtains providing certain formalities have been met, invariably including some form of legislative assent. A statute, too, may incorporate certain rules of international law for application within that legislative framework.²³⁴ This obviously presumes also that the legislative body is acting within the limits of its constitutional jurisdiction. The legal effect of the rules depends upon the nature of their reference in the statute itself, which in turn relies on the operative doctrine of statutory interpretation. It should not escape notice, however, that apart from the requirement of legislative assent, all this applies only to treaties, or more generally, written instruments in international law. Customary international law is not included. Instead implicit authorisation conventionally serves as its widest portal into the national system.

2.3.3.2 Presumptive Strategy

The second form of authorisation, the implicit, originates by way of implication from powers ordinarily conferred under the constitution. Those powers must, of course, specifically and necessarily include jurisdiction to make or declare law. This poses less of a (constitutional) problem under the doctrine of the separation of powers for the judicial branch than for the executive branch. As the institutions conventionally charged with declaring and interpreting the law, the courts exercise considerable responsibility in deciding what constitute the rules of recognition. By relying upon such (judicially developed) doctrines as direct effect/self-executing treaties, legitimate expectation, reciprocity and comity, and statutory interpretation, the courts can introduce both written and conventional rules of international law as domestic law. And coupled with the doctrines of *stare decisis* and

²³³ France: Article 55 (“*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.*”); the Netherlands: Article 93 (“*Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud een ieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt.*”), and the US, Article VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

²³⁴ E.g., the Refugee and Asylum Convention Rules incorporated into the UK *Refugee and Asylum Act*, or the Warsaw Conventions, in the UK *Carriage by Air Acts*.

precedent, the courts can exercise a significant institutional authority. The government's powers, on the other hand, abut against the doctrine of the separation of powers. Accordingly, the executive branch must extract its constitutional authority by (necessary) implication either from express/implied grants of jurisdiction or from (historically held) prerogative powers.

As a strategy to justify the application of international law within the domestic legal system, the appeal to authority offers little more than a superficial solution. If an exercise of jurisdiction is to represent something more than arbitrary power, it should be supported by reasons explaining why and how it is being used. Yet beyond referring to the constitution, and any clause for transforming treaty provisions into national law in particular, an appeal to authority cannot itself offer any substantive grounds for transforming international law as a whole into national law. For example, the UK courts often refer to customary international law as being part of their legal order, and will cite a line of cases for that proposition deriving from *Triquet v Bath* at the source.²³⁵ There exists a rather peculiar irony here, without considering the sketchy reasoning to the case. The issue in the case concerned diplomatic immunity. It applied by consequence the 1713 Statute of Anne dealing with diplomatic immunity. Moreover, the Act only came into existence as a result of foreign pressure threats—Prussian in particular—upon the English government to ensure protection of diplomatic immunity in the face of the rule's hitherto indifferent and inconsistent recognition before English courts.²³⁶ Likewise, from the perspective of US law, *The Paquette Habana*²³⁷ represents the US source authority for the seamless integration of (customary) international law into US law. Putting to one side any nuances possibly arising from prize jurisdiction, the case primarily discussed whether a rule of international law existed that exempted coastal fishing vessels from wartime capture. The majority simply declared, without more, that international law was part of US law. The three dissenting judges took issue not only with the establishing of the rule, but also its application within the US constitutional order without due constitutional authorisation. In particular, they cited *Brown v US* in which the majority held that

[t]his argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign, and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

²³⁵ See, e.g., *R v Jones (Margaret)* [2007] 1 AC 136. The Scottish Court of Sessions in *Lord Advocate's Reference No. 2* (nuclear weaponry in Scotland not contrary to international law as applied in Scotland) did not even cite authority.

²³⁶ Adair 1963, p. 290.

²³⁷ *The Paquette Habana* 175 US 677, 700 ("international law is part of our law"). See also *Murray v Schooner Charming Betsy* 6 US 64 (1804) 118 (construing US statutes so as not to be inconsistent with or violate the law of nations).

The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary....

...Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.²³⁸

Trading upon the legitimacy and validity of the local constitutional system, we have not moved much past the need for a constitutional explanation, one in conformity with the current separation of powers. Indeed, if anything, the appeal to authority shows that international law may not claim normative authority in a municipal legal order except by its voluntary constitutional transformation into national law. Without that process, it remains simply rules applicable externally between states and other bodies having standing in international law, but without relevance or effect internally. So in effect we need to delve deeper than mere validity, into questions of legitimacy.

The second strategy presumes crossover validity because both sets of law derive from the same source: the general principles of (natural) law, of right, wrong and the good. National law and international law share a common substrate of fundamental principles, the larger rubric or collection of “general principles of law”.²³⁹ Indeed, this is prominently reflected in the Statute of the ICJ, at Article 38(1)(c) requiring the Court to apply the “general principles of law recognized by civilized nations”.²⁴⁰ Certainly this facilitates the borrowing of principles found in municipal legal systems, where the institutional and instrumental frailties of international law otherwise risk leaving a legal vacuum, the problem of “*non liquet*”.²⁴¹ But nothing requires or mandates borrowing in the other direction, where municipal systems do not suffer like frailties. The basis lies deeper in the conceptual foundations of the law. In a reprise of the natural law underpinnings to the former “law of nations”, the modern conception sees international law as the second branch, a fraternal twin, of municipal law. But it is no simple restatement of the natural position. Instead it presents a rather more sophisticated argument based on the functional uniformity of law. The reliance on a postulated single source of authority for the good, the right, has moved offstage. In its place in the limelight comes the conception of law as means of resolving conflicts among people based on a sense of cohesive and common obligation.²⁴² The rules of the various legal orders may reflect their different formal sources, but they all aim, in

²³⁸ 12 US 110 (1814) 128–129.

²³⁹ O’Connell 1970, vol. I, pp. 9–13 (and p. 11, citing Judge Tanaka’s dissenting opinion in *International Status of South West Africa* (Adv. Op.) ICJ Reps 1950 128 regarding “general” to mean “common to all branches of law”); Shaw 2008, p. 98ff.

²⁴⁰ And repeating the same text found in the 1920 constituting statute of its predecessor, the PCIJ, at Article 38.

²⁴¹ Shaw 2008, p. 98.

²⁴² Relying here on O’Connell’s outline of argument: O’Connell 1970, vol. I, p. 43ff.

their totality, at the orderly and beneficial conduct of human affairs. For law, in its totality and divested of any particular formalities, is just that: a means of resolving disputes based on rules of behaviour. Human nature and interaction remains basically the same over time and place. Likewise, the same sorts of conflicts recur at different times and in different places. No individual lives exclusively in on single legal order, national or international. There is inevitably and naturally an overlap. So it would be expected that law would seek and demonstrate an internal consistency in resolving disputes across formal boundaries and a harmony among the diverse statements of rules for behaviour. If it cannot avoid inconsistent particular rules testing its fundamental unity, law may nevertheless insist that no one or other rule be treated as necessarily void. Nor is it sufficient merely to avoid the problem by declaring the two legal orders—national and international, more often than not—as mutually exclusive and wholly separate. Hence an international or domestic court of law may not simply assume the rules of one system as paramount or voidable, but must seek to do justice by ensuring a harmony among those collections of rules. “It is one of the principal functions of juristic reasoning to eliminate contradiction by harmonising points of collision, not by pretending that they do not exist, nor by crushing the one with the other.”²⁴³

This perceived conjunction of the two systems might therefore seem to permit an easier and greater interlacing and integration of the two, modulated of course by the rule of law mindset. On a practical level, then, the rules of international law are generally available to a judge. Of course, a judge is bound by jurisdictional rules, such that if they so dictate, the judge must comply with the latter. But it is important to note the nuance following upon the conjunction: a judge may resort to international law *except where the constitution prohibits*, and not *only where the constitution permits* (expressly or by necessary implication). When the two legal orders meet, in the words of Niboyet, “[T]hey are not like a gear [*scil.* on two separate drive shafts], but like two wheels revolving upon the same axis.”²⁴⁴

But any such amalgamation of international law with national law oversimplifies the nature of the conjunction. The conjunction obtains only because the “general principles of law” are drawn at an impracticable, high level of abstraction and generality. That law is pitched at this level arguably justifies conjoining social laws, moral laws and religious laws as well, as well as all other rules regulating conduct in a society and derived from human thought. There is no reason to restrict “law” here to a forensic sense, a result which hardly advances progress towards a definitive, workable solution.²⁴⁵ It would lead to the peculiar, awkward, and likely objectionable result of requiring courts *ex mero motu* to harmonise domestic laws

²⁴³ O’Connell 1970, vol. I, p. 44.

²⁴⁴ Quoted in Preuss 1950, pp. 413–415 (from J.P Niboyet, in *Melanges R. Carré de Malberg* (Receuil Sirrey, 1933), discussing the interaction of French law and treaty provisions).

²⁴⁵ Of course, there are those who obviously would find no issue or fault in that proposition. The interpenetration of all those normative systems is a feature of natural law and of systems invoking a Kant-inspired categorical imperative as revealed through human conduct. But there are equally those who are not so persuaded, and thus controversy persists.

with not only international law, but also the laws of other legal systems, and other value systems more widely. And this apart from abstract principles rendering no assistance or facility in solving basic legal issues in practice, where details and nuances are determinative, even allowing for the possibility of interpenetration in theory. Moreover, that abstraction seems to discount in a perfunctory way the significance of differences, contradictions and inconsistencies, and fails to account for why they do exist. The functional assumption only suppresses the controversial basis to natural law, a single, unified conception of “right”, “good” and “true”, but does not discard it at all. The variations among laws and legal systems hardly appear cosmetic or accidental. They reflect serious differences in the substance of the law and in the process of law-making, in the same way that they also point to differing social conceptions of what is good, and right.

In reality, each system under the supposed conjunction has its own criteria for validity and legitimacy of laws, international law no less than national laws. And the one set cannot be presumed to apply with equal force and effect in any other normative systems but its own. The conditions for normative validity and legitimacy are neither presumptively nor inherently transferrable. The heterogeneity of national laws and legal systems is produced by, and is a reflection of, the relevant, specific constitutional settlement in operation at the time. We come full circle back to the demands imposed by the separation of powers doctrine.

2.3.3.3 Reflexive Strategy

Rather than treating the normativity of international law primarily or entirely in terms of binding law, the last strategy considers international law as principles which should resound perceptibly in the understanding and application of domestic law. Rather than treating international law as binding law equivalent in some way to domestic legal rules, a “morality of duty” in Fuller’s wording, it provides instead an interpretative framework, a “morality of aspiration”. In other words, international law is a persuasive authority, rather than a mandatory authority for the domestic legal system, whatever its own status may be in the international legal system. Its application a rule of interpretation, rather than as a rule of decision, acts as a means of tuning national law to the harmonies evidenced from coordinated legal systems. This can occur in two ways. The first sees international law reflecting the underlying goods and values of established national law, so that resort to international norms ensures that national legal rules remain properly calibrated in terms of those goods and values. Citing international law serves to reiterate and reinforce those innate values. The second route views international law as reflecting the common goals and values of other legal and social systems (the “general legal principles” of Article 38 ICJ Statute), so that resorting to international norms would seek to orient and calibrate national rules in line with international standards. For example, then, argument before the US Supreme Court in support of overturning Texas criminal convictions for homosexual conduct, and for overturning death penalty convictions made extensive reference to

international and foreign legal materials.²⁴⁶ In both aspects it is vital to recognise that the “international” character resounds in a comparative law sense of the collective wisdom or folly of other legal systems, and not as a unity or block of collected wisdom (so presumed) representing universal social value. The strength or weakness of that package will depend on the relative quality of the compared legal systems and their judicial decisions.

That reorientation obviously may only obtain within the limits of the domestic constitutional structure. Effecting a “paradigm shift” in the basic principles, rules and values of the domestic legal system is not the objective. The municipal legal and social systems will already be receptive to those ideals, containing some expression or kernel of them. Their articulation at the international level, the persuasive weight generated by their (ostensible) practice in manifold legal systems, would motivate local authorities to adjust or alter current practice by discovering or emphasising these ideals within their own system. The difference between the two branches to this strategy is really a matter of degrees.

The internalising of international law norms can occur through various channels. Interest and pressure groups, professional lobbyists and others will invoke the principles of international law to adopt and advance certain policy objectives in government and legislation. Government officials and advisors will refer to international law materials in developing legislation and policy. Lawyers and judges will draw upon foreign judgments and commentary (and perhaps also, albeit rarely or exceptionally, foreign legislation) in order to articulate how domestic legal rules ought to be understood and applied. Courts will use international law in cases to expand or narrow the scope and range of rules, limiting or broadening aspects of a rule’s coverage and operation. I should hasten to emphasise that, at least in the common law world, the courts do not draw upon foreign and transnational materials *ex mero motu*. They are provided with those materials, usually and in the ordinary course, by counsel seeking to buttress and support the arguments in favour of their client’s position. Strictly speaking, counsel are responsible (at least at the outset) for internalising international norms, and convincing the judiciary to make use of them. In civilian systems the responsibility tends to fall in general upon the judicial branch itself to resort to international law where relevant and necessary, even if counsel have not adverted to it.

The strategy relies on a process of “internalisation” of international law norms. There is no need to crystallise this into some formal institution of “transjudicial” or “transnational” legal networks. Formalisation and formalities suggest the need and presence of organisation, structure and rules, all at an international level. This simply posits a further level of international obligations and structures between national and international legal systems. The reflective strategy is better seen as an informal practice arising out of each individual legal system according to its own needs and procedures.

²⁴⁶ *Lawrence v Texas* 539 US 558 (2003).

2.3.4 Where We Go from Here

Now, by engaging domestic legal standards, mechanisms, institutions, and so on, international law thus invites a more searching evaluation of its validity and legitimacy criteria from the constitutional law perspective normally reserved for national laws. It would seem only reasonable and logical that, with the widened perspective of international law to include the internal, international law would have some practical and practicable idea of how law is made at a national level, how its own precepts might intersect with national law: in short, an understanding of how its own concept of law-making might be reconciled to that of national systems. To that end, I turn next to a consideration of treaties and thereafter, customary international law.



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