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 latters' 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]

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[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

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[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

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[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

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[70] Montesquieu 1998, 1, 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.

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[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.

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[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,

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[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*.