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*.

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 Forsythe 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

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[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.

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[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.

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[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 larger proportion of prerogative, nonstatutory, discretionary powers

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[113] *Fothergill v Monarch Airlines* [1981] AC 251, 279–280 (in contrasting the desirability and accessibility of *travaux prépartoires* 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

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[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. Crt.) (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.

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[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.

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[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] Favoureu et al. 2008, pp. 405–406, and for recent English language examinations, Lassser 2004, and Neuborne 1982.

[129] Following Favoureu 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-Claue Colliard, cited in Gicquel and Gicquel 2008, p. 486.