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

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[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

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[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

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[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.

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[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 constatation 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

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[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.

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[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., Zijderveld 2000 p. 37ff (distinguishing between institutions (conceptual) and institutes (organisational)) and MacCormick 2007, p. 11ff.