the human element to the relationship between value, power, office and law. It treats a constitution as an end in itself, rather than as a means to an end.

5.3.3 Redefining International Law?

To the extent we wish to avoid any such comprehensive undertaking in the field of constitutional law and constitutionalism, our other option for addressing the integration of international law and national law is to reconsider the purpose and role of international law. Specifically, the reorientation to an internal perspective for international law ought to spark the question why we understand international law to be, and why it is needed in and as part of domestic law. Of course, it represents no less a comprehensive undertaking in the field of international law. My objective in this section, far from the temerity of suggesting a new direction or conception of international law, attempts merely to sketch out very briefly one analytic approach.

Re-evaluating international law implies reconsidering why we need international law integrated into domestic law at all. Specifically, we need to identify what international law is and ought to do within a national legal system, and that preferably with sufficient transparency to declare any underlying philosophical, ideological or political attachments. There would likely be two poles. If we accept a Koskenniemi type hypothesis that international law acts a sort of conscience for state authorities, then we are using international law as a sounding board for domestic policy and law. We rely then on international law not as law *per se* but as a moment of sober second thought instead. International law would not strictly require the character of law to accomplish this. And it could still offer courts additional reasons why a given case ought to be decided one way or another. On the other hand, we might prefer a Kant inspired view which accords international law legal compulsion and moral conscience.

Let us put to one side the important question why such a further legal or policy check is in fact desirable or necessary. Whichever side we choose, we must press yet further and ask whose conscience international law represents, and who is charged with determining or identifying its central elements. Drawing upon our constitutional inheritance, we have every right to be deeply sceptical, if not suspicious, of any proposals which deprive us or dilute our voice in forming the rules governing us. Likewise, we should be suspicious of any attempt to undo constitutional history by returning greater law-making powers to executive bodies, or special interest groups, under the guise of administration or social management. This assumes that any law ought to reflect our conscience, or interests and values, at the very least. But the "we" and "us" at issue here cannot be defined by region or (political) nation if international law is to transcend the bounds of dualism. Yet once we venture into more widely sourced pools of value and interest, we compound the central problem of identifying any one particular value, sense of good or right, in sufficiently practicable detail beyond idle ruminations sauced with

self-assuring generalities. Equally, we must ensure that these values are not merely our own specific ideas and preferences tarted up as universals. All this of course presumes we have some process of locating and articulating transcendent good and right.

Perhaps we need not venture just so far. This route continues to assume a direct applicability of international law, formed independently, in a domestic legal system. If we add to the mix of issues that of the need for and nature of an international check upon the national, another possible approach to international law arises. Recalling its origins as that governing the conduct of states, international law depends upon a convergence or divergence of interests ascribed to states. In short, it structures a *modus vivendi* among states as represented by public officials and private individuals alike. Just as domestic law addresses the mutual and reciprocal bounds of individual conduct, so too does international law commend to a state the recognition of and respect for other states. By this recognition, state actors ought to adjust and moderate their conduct to account for those others, whether by reining in claims of jurisdiction, readjusting policy and executive acts, and so on. Disputes of an international character, whether between states or a state and private individual, do represent therefore matters of sovereignty. But the concept of sovereignty would here be defined in function of the existence of other states of co-ordinate, equal stature. Not to go so far as to suggest that stated sovereignty be conceived of as interdependent or interlaced; rather the idea here is the use of international law by domestic organs of government as a reflective practice of self-limitation and self-restraint, based on reciprocity and mutuality, in the exercise of public power. The sober second thought for which international law serves, would operates thus on a constitutional level—albeit as policy, not law.

Presenting international law as a form of constitutional check, if only regarding the exercise of state powers affecting foreign interests directly, does not necessarily end the enquiry into the form and function of modern international law. Left aside was the conception of international law as a set of compulsory rules, which can equally function as type of constitutional check. Indeed, the rule of law mindset has done just that, seeking to measure state conduct as against all individuals, national and foreign alike, based on international humanitarian and human rights norms. The clear and fundamental difference separating the two poles pertains to what law—national and international—is and should do. It brings us again to the very start of these enquiries. In order to make sense of the interrelationship between national and international law, we need to have some grasp of what is that law is. This remains the central, basic question, one yet lacking in a coherent, clear and systematic answer. All these issues, and more, have been asked and assayed in diverse works, yet a single, coherent, constitutional approach to law-making on the national and international levels remains elusive for the moment. We are reminded that much more work remains to be done.

5.4 Conclusion

Whatever merits or demerits to all this, the fact remains that the treatment international law in the domestic legal order must necessarily proceed from—and not prescind—a constitutional perspective. The separation of powers is inescapable and determinative of the question. It is an ineluctable institutional facet to (national) law-making, grounded in the long and bloody history of constitutionalism. To ignore the separation of powers or treat it in a purely instrumental way is to discount or ignore the history and practice of constitutionalism. Certainly, that may be a theoretical option to achieve a seamless unity of international and national law, whatever constitutionalism might prescribe. Modern constitutionalism, the rule of law and the separation of powers, these may be overcome or transcended, I do not doubt. But it will inevitably require a redefinition and retooling, not only of law and legal systems, but also of the state and constitutionalism as they all now exist—a veritable paradigm shift.

And having begun with Montesquieu, it is perhaps just as fitting to end with his considered insights as applied to the project of globalising law:

> Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit the other.
>
> Laws must relate to the nature and the principle of government that is established or that one wants to establish, whether those laws form it as do political laws or maintain it, as do civil laws.
>
> They should be related to the *physical aspect* of the country; to the climate, be it freezing, torrid or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator and to the order of things on which they are established. They must be considered from all these points of view.[27]

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[27] Montesquieu 1989, Part 1, Book 1, Chap. 3, pp. 8–9.

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