precise. The Court was required early on in the history of the Republic to make sense of that constitutional directive.[2] The exercise of doctrine sits within the courts' recognised powers to interpret and apply law. Of course, the threshold issue for the courts remains their recognition of treaty terms as "law". And this explains—at least at the outset—the most obvious division among the US, France, and the Netherlands on the one hand, and the UK on the other. Even though the UK courts also have equivalent powers to interpret and apply law, treaties are not transformed into domestic law have no force of law. Nevertheless, among the three similar legal systems, only the Netherlands presents explicit constitutional recognition of directly applicable treaty terms. The 1956 amendment to the Constitution to particularise supremacy for directly applicable treaty terms alone, reduced the earlier and unlimited 1953 recognition of general priority. Even in its best light, this represented a limitation on the courts' powers. Whether the amendment was to clarify the scope of judicial power, or to restrict an over-active judiciary, this express narrowing of the rule of recognition intends to reaffirm the balance of law-making powers in favour of the political branches, with the courts remaining a subordinate, not co-ordinate, member. And thus in practice, while non-self-executing terms will assist interpretation, the courts will only give discernible legal effect (thus when contrary to extant domestic law) to directly enforceable treaty terms.[3] Unlike the Netherlands, the French constitution does not differentiate between directly applicable and non-directly applicable treaty terms. Yet in France, a like result nonetheless obtains after a fashion because of the strict reading given to the court's jurisdiction under separation of powers.[4]

Underlying the differentiation of treaty terms into those with "direct effect" and those without, is the further, and a liminal, issue of whether a treaty becomes transformed into domestic law or retains rather its character as international law though allowed to be enforced domestically. This constitutional point for the courts represents the quintessential question on the separation of powers. Not only must the courts articulate the respective roles and powers of Parliament and government as to law-making, but in so doing, the courts must also account for their own positions and powers relative thereto. Just because a constitution may in general terms enforce the priority of a treaty over domestic legislation does not of itself answer whether the priority extends to legislation passed subsequently. Nor does it answer whether the priority issues from the constitutional grant or from the constitution's conceding the inherent supremacy of international law over domestic legal prescriptions. In other words, to what extent does the government's importation of international law bypass the domestic separation of powers and compromise the sovereignty of parliament? These issues are not limited to

[2] *Foster v Neilson* 27 US 253 (1829).

[3] See, e.g., HR *Nyugat (No. 2)* 6 Mar. 1959, NJ 1962 2; *NATO Nuclear Weapons* 21 Dec. 2001 NJ 2002 217, and *Afghanistan* 6 Feb. 2004, NJ 2004 329.

[4] See, e.g., °108243 CdE 20 Oct. 1989 (*Nicolo*) and °200286, 30 Oct. 1998 (*Sarran*); Cass. *Jacques Vabre* (1975) [1976] CMLR 43 and °99–60274, *Fraiss* (2 June 2000).

constitutions having some form of supremacy clause. Even allowing for the enforceability of treaty provisions without any added complexity of a supremacy clause, the problem remains for the courts to ascertain whether the recognition of treaty-based law originates out of some constitutional grant of jurisdiction or out of an unexpressed acknowledgement of the immanent structure of national law within international law. It is a variation of this issue that arises concerning the function of parliamentary approval (if any be required) of treaty terms. Is Parliament's approval a mere formality, or can it mould the treaty obligations into domestic law as it sees fit? There is no consistency to be found approaching the matter from a separation of powers optic.

The situation of the US highlights this point and provides a neat counterpoint to that of France and the Netherlands. Treaties are brought into the US domestic legal system by Senate resolution (assent and direction to ratify) or by Congressional legislation (authorising or confirming). Applying as domestic law the treaties thus incorporated into the law corpus, the courts understand the interposition of the Senate or Congress, as converting an instrument of international law into ordinary domestic law. As the supreme law-makers for the courts (and of course as prescribed by the separation of powers), the Senate or Congress have the power to set conditions on the nature and scope of treaty terms processed into US law or indeed adjust their terms to suit US needs. These amendments and qualifications are determinative for internal purposes, whether or not they have any effect or relevance in international law or international relations. Despite an active academic debate, the courts and politicians take little or no issue with the (constitutional) practice of the Senate to determine actively a treaty as self-executing, or otherwise qualify its terms in advance and irrespective of any international interpretation and position. The Supremacy Clause has not been understood in practice to have restricted or qualified the role and function of the US Congress accorded by the separation of powers under the Constitution. The US Legislative Branch therefore exercises a control over the domestic appearance and effect of treaty terms analogous and equivalent to that of the UK Parliament. By contrast, the situation in France regarding treaties is completely the opposite. Yet it too finds its justification, rightly or wrongly, in the French interpretation of the separation of powers. The requirement for parliamentary approval of a treaty is in substance perfunctory, a mere formality. Because treaty matters originate out of the foreign affairs jurisdiction which is allocated to the Executive Branch, this situation necessarily excludes interference by the Legislative Branch. Even if the treaty is be given domestic law status, the purview of the Legislative Branch under the separation of powers. The Estates General of the Netherlands sits between these two poles. It does not remove itself from addressing the content of a treaty tabled for the necessary parliamentary approval, and may stipulate amendments or interpretation points to a treaty. Nevertheless, it does so within the framework of international law, rather than domestic law. That is, its desired alterations or interpretations take the form of reservations, declarations and such like treaty documents. In the result, the UK and US legislative bodies intervene far more decisively and actively in the domestication of treaties, well beyond anything

customarily and usually practised in the Netherlands and France. Hence, the separation of powers supplies the justification for both a robust defence for the determinative role of the Legislative Branch in transforming international agreements into domestic law, and a more timid or reserved approach.

This robust or reserved approach under the separation of powers also grounds in the four systems a differentiation in characterising the domestic law status of approved treaty terms. In both the US and UK systems, the active role of their legislatures in the domestication of treaty terms means that the courts recognise those terms as domestic, national law. As ordinary statutes, they have accordingly no special or priority status. They are subject to the normal rules of statutory interpretation (including the conciliatory approach, the "Charming Betsy canon") and to being amended or bypassed in subsequent legislation. In the Netherlands, the situation while not entirely certain seems to favour characterising approved treaty terms as international law having domestic effect. So too, it would seem, in France.

Notwithstanding this position, however, France tracks the US approach to subjecting treaty terms to constitutional powers. The Constitutions of both the US and France are supreme over treaties, meaning that the government cannot achieve a law result through a treaty which is contrary to extant constitutional provisions. A constitutional amendment to that effect must precede the implementation of those treaty terms. From the US perspective, the practical difficulties in passing a constitutional amendment generate an efficacious resilience and sturdiness to the US constitutional, domestic, position. There is no similar degree of resilience to the constitutional situation of the Netherlands. A special majority vote (Article 91 (3) of the Constitution, Article 6 of the *Assent and Publication of Treaties Act*) may approve and implement a treaty term which is inconsistent with or diverges from the Constitution. The term thus approved may apply in spite of the Constitution, while yet apparently not requiring any constitutional amendment. The constitutional provisions in question would thus continue to apply in other situations. The presence or absence of a written constitution does not matter. The UK might be said to resemble the Netherlands in having a degree of constitutional flexibility instead of resilience. The adoption of international obligations, such as those under the EU treaty constellation, or the EConvHR, have produced certain adjustments in the constitutional relationships among the *trias*. Arguments reasonably citing the residual sovereignty of Parliament aside, the question is unlikely to be resolved in and by the courts at any time soon. For example, attempts to address the constitutional ramifications of the UK's treaty position in the EU context have come up against the hitherto impenetrable defence of the prerogative power in foreign affairs, as well as that of the sovereignty of Parliament.

Indeed, this obvious distinction among these four legal systems of having a written constitution or not masks what is in fact their clearest common factor, and one common to all states. All four legal systems rely on their respective domestic constitution to recognise and transform treaty terms into domestic law. The constitution functions unmistakeably and incontrovertibly as the gatekeeper for the entrance to the internal legal system. International law must pass through the constitutional portal to be recognised as having legal effect inside the domestic

legal system. It places greater emphasis on the parliamentary fiat and power in law-making, to avoid an executive or judicial bypass of that constitutional function. Whether or not a parliament asserts itself is a different matter, as history and current affairs clearly demonstrate. For the court, this issue under the separation of powers becomes a matter of ascertaining where on the scale of a robust or reserved defence of law-making power the parliament finds itself. While courts will remain passive observers and take their cue from the relationship between the Legislative and Executive Branches, courts wielding a constitutional review jurisdiction can influence the balancing of powers in favour of one or other organ of government when recognising or dismissing of laws and claims to power. Whatever the case, the presence or not of a written constitution or of a supremacy clause has not served to bypass or transcend a presumptive dualism between international law and national law. It is dualism founded on the separation of powers conferring law-making power principally on the Legislative Branch.

5.1.3 Customary International Law and the Reflexive Strategy

Whereas for treaties, the separation of powers analysis concentrated upon the relative law-making powers of the Legislative and Executive Branches, Chap. 4 set customary international law as a matter engaging the powers of the Judicial Branch. Specifically, customary international law raises the separation of powers question whether courts may declare as domestic, positive law those rules made outside the strict bounds of the domestic legal and political system, and through the acts of different governments, express or implied. Moreover, for the courts of the civilian systems examined here, the Netherlands and France, this could presume too easily and uncritically some form of law-making or law-declaring power. Their jurisdiction to invoke general principles of law or generate specific rules of law is much more restricted and strictly controlled than that of their common law cousins, the UK and US. To a certain extent these problems have been sidestepped in all jurisdictions by expressly incorporating customary international law into statutes, as in the US with the Alien Tort Claims Act and the Uniform Code of Military Justice.[5] French courts can look to the Preamble of the 1946 Constitution, pledging conformity to international law, as incorporated into the Preamble to the 1958 Constitution. And there is the old chestnut of "international law is a part of our law". Yet a further question of jurisdiction also arises. Inasmuch as customary international law may be said to bind the government in function of the State, the domestic application of customary international law may require the courts to hold governments and public officials, domestic and foreign alike, accountable for

[5] Alien Tort Claims Act (also "Alien Tort Statute") 28 USC §1350, referring to the "law of nations" and see *Sosa v Alvarez–Machain* 542 US 692 (2004); Uniform Code of Military Justice 10 USC Ch.47, referring to the laws and customs of war: see *Hamdan v Rumsfeld* 548 US 557 (2006).

administrative and policy decisions contrary to international law. They may even be called upon to suspend or discount domestic law inconsistent with international law. There is an additional complexity to this problem where state powers are divided among national and regional organs in a federation, as in the US.[6] Unlike the situation with treaties where the courts were more observers in the duel between legislator and executive, the domestic application of customary international law draws thus the courts directly into the separation of powers fray.

Holding governments to account before national courts for breaches of customary international law hammers at three not inconsiderable pillars to the separation of powers. First, the conduct of foreign policy has largely remained exempt from subjection to judicial review on the grounds of its inherently and irrepressibly political nature and its core position to executive power. Nonetheless, as executive and administrative powers succumb to the continuing drive to subject them to the rule of law (broadly conceived), the resistance or defence of the foreign affairs power gradually will weaken as well.[7] But this attack—or perhaps "re-examination"—does not restrict itself to the national arena. So too is sovereign immunity subject to reconsideration. As with the foreign affairs power, the scope of sovereign immunity also is gradually narrowing under the pressures of commercial reality and the rule of law. It is particularly under the latter category where the rule of law mindset in international law has achieved the greatest inroads, on humanitarian and human rights grounds, to perforate the insulation of sovereignty and to bring public officials to account. Exercising jurisdiction to hold foreign governments and officials liable before national tribunals of course cuts against the longstanding foundations of international law. This is not to suggest that such is unwise or unnecessary, however. For a separation of powers analysis, it simply recalls the constant recalibrating of the equilibrium among the various powers and institutions of state that characterises political and legal society.

Second and following, not all courts may have jurisdiction to hear and decide cases against public officials and the government. Of course, as the range of judicial review expands over executive powers, such jurisdiction will presumable follow. Even so, this does not envisage simply a broader *in personam* sort of liability, as against an individual or the power to approve or invalidate an administrative decision or act. It also includes necessarily the jurisdiction to review domestic law for compliance with international law, in a fashion akin to constitutional review. That is, the courts will be evaluating the compliance or consistency of domestic legislation with (customary) international law. It seems incomprehensible or incoherent that domestic courts should have such jurisdiction respecting international law, and yet have no equivalent power to enforce the tenets and principles of their own constitutional order as against domestic law. *A fortiori* given the

[6] Involving reference to the much debated *Erie Railroad v Tompkins* 304 US 64 (1938).

[7] From a UK perspective, considering, e.g., *Buttes Oil v Occidental Oil and Hammer* [1982] AC 888; *R (Abbasi) v Sect. State FCO* [2002] EWCA Civ 1598 (6 Nov. 2002); *R (Al Rawi) v Sect. State FCO* [2008] QB 289 (CA), and *R (Bancoult) v Sect. State FCO* [2008] 3 WLR 955 (PC).

realisation that customary international law is the product of executive acts without any necessary legislative fiat, and that any domestic executive act without a legislative basis would be decried as undemocratic, arbitrary and such like.

The third pillar we have already mentioned. This is the courts' ability to incorporate or adopt customary international law as domestic law without express legislative fiat. Such a recognition of the domestic legal force of customary international law could rely on a number of justifications, broadly categorised into the three strategies, reflexive, institutional and presumptive. In the absence of any express institutional grounds, such as the statutory incorporation of international law by reference, it seems clear that the courts are generally uncomfortable with a clearly presumptive strategy even where rules of an arguable *ius cogens* or *erga omnes* character are at stake.[8] Their preference is to justify the national application of customary international law on institutional grounds, if not reflexive ones.[9] Even trading upon the apophthegm of international law being part of "our law" affords a court some institutional basis while circumventing the questions of how and why, which a bare presumptive strategy would engender.[10] Thus, as the UK cases make clear, the courts may serve to internalise rules of customary international law, but they do so from the established constitutional context and within its established limits: there is no automatic incorporation of international law suggested by that phrase.[11] Moreover, rather than supplanting national legal rules, customary international law would at best merely supplement those rules under the reflexive strategy: the courts interpret national law in a manner consistent with the state's international legal obligations, as far as possible.[12]

These three pillars are not insubstantial aspects of modern constitutionalism. To no great surprise, then, Chap. 4 outlined a picture of the Judicial Branch generally deferring to legislation and the law-making powers of the Legislative Branch in matters of customary international law. It might have been assumed that the absence of any constitutional direction regarding customary international law would have eased—rather than tightened—judicial apprehensions on this issue. Or that express constitutional openness to international law in the form of treaties would have modulated a similar openness to the domestic application of customary international law. Yet no significant differences exist among the four legal systems, whether the three whose constitutions are more receptive to the internal application of treaties or the fourth, the UK.

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[8] As with *Jones v Saudia Arabia* et al. [2007] 1 AC 270 (torture).

[9] As with, e.g., *Kuwait Airways v Iraq Airways (Nos. 4 and 5)* [2002] 2 AC 883 (domestic rules on the recognition of foreign law include, as a matter of public order and public policy, grave breaches of international law); CdE 6 June 1997, (*Aquarone*) and 28 July 2000, (*Paulin*), and HR *Cruise–missiles* 10 Nov. 1989 NJ 1991 248 and *NATO Nuclear Weapons* 21 Dec. 2004 NJ 2002 217.

[10] Following the critique of Goldsmith and Posner 2005, p 66ff.

[11] Thus, e.g., *Chung Chi Cheung v The King* [1939] AC 160 (PC); *R v Sect. State Home Dept. ex p Thakrar* [1974] QB 684 (CA), and *Philippine Admiral v Wallem Shppng.* [1977] AC 373 (PC).

[12] In the US, the "*Charming Betsy* canon": see, e.g., Bradley 1998a.

A separation of powers analysis can certainly begin to explain this judicial reserve and deference. As noted at the outset, the issue quickly assumes the character of judicial law-making powers. The courts are well aware of this, as well as the political risks associated with showing more a legislative than judicial hand. So the courts will favour the institutional, or even the reflexive, strategy to evidence acknowledging the constitutional ascription of law-making powers to the Legislative Branch. Thus the courts approach is at its highest one of moulding legal rules, by reconstruing extant legislation in light of any relevant customary international law. The separation of powers factor can also account for the slightly greater leeway enjoyed by UK courts—in contrast to the others—given the former's common law powers of declaring law, to apply customary international law in the absence of any legislation to the contrary.[13]

Underpinning the separation of powers explanation, however, is the same type of constitutionally generated dualism active on treaties. The constitutional order serves a gatekeeper function. Not merely ascribing and circumscribing the powers of the organs of state, the constitutional order also thereby distinguishes necessarily between law "inside" the constitutional order and that alien to it, on the "outside". International law sits on the outside, and must pass through the requisite constitutional channels and with the requisite constitutional authorisation to be recognised as having legal effect inside the domestic legal system. As much is clear in the distinction between the institutional and reflexive strategies, and the presumptive one. Even the attempt to skirt the discomfort of such questions by resorting to customary international law "being part of our law" belies its dualist origins. Its ostensible purpose is to incorporate rules of customary international law into domestic law, achieving in a sense the effects of the Preamble to the 1956 French Constitution. But the logic to accomplish this—clear from the phrase itself—works by attaching international law to domestic law, by basing the former's effect upon the latter's.[14] The logic of a truly presumptive strategy, where both are co-ordinate legal orders, would require no such invocation of domestic legal authority. Semantics aside, the courts' use of the phrase has never justified overriding or supplanting domestic law. Instead, it goes to the weight given to customary international law as a reason for extending or contracting existing rules and principles of domestic law. In other words, customary international law serves as reflective check upon domestic law.

5.2 What's Bred in the Bone

Whatever the presuppositions to and objectives of international law *per se*, its status and effect in a national legal system is, at its core, a constitutional question. Any claim for legal or other public authority is necessarily perceived and

[13] *In re Piracy Jus Gentium* [1934] AC 586 (PC); *Congreso del Partido* [1983] 1 AC 244; *R v Jones (Margaret)* [2007] 1 AC 136; *Ex p. Pinochet (No. 3)* [2000] 1 AC 147.

[14] As is clear from *Ex p Thakrar* [1974] QB 684, 701–2 (per Denning MR).

processed through domestic constitutional terms. The evolution of constitutional thinking has created in us a natural reaction to question the source of any exercise of coercive social power, and situate it somewhere within the polity. We demand in one form or other a justification and the authorisation for any instance of its exercise. And our conceptual inheritance furnishes us with the constitutional structure of a polity as the ultimate or final determinant. So when we question the validity and legitimacy of law and its application, we aim to identify the locus of law-making power in a polity. The undertaking directs itself both to the institutional aspect, which organ may duly issue rules and orders, and the worthiness aspect, whether the rules and orders reflect desired interests and values. Constitutional thought structures this assessment through the conceptual framework of the separation of powers. The genius to this way of conceiving social power is precisely its insight into differentiating the key aspects to power, focussing attention on their respective natures and thus proscribing their detrimental and unhealthy concentration in the hands of any one state organ. The separation of powers is bred in the bone of modern constitutional thought.

So it might reasonably have been expected that an explicit constitutional provision authorising the application of international law, treaty law more precisely, in the domestic legal system would represent the easiest and most direct way of answering the question. Taken simply as a validity matter, a constitutional provenance for the recognition and application of international law would seem to advance the matter a good way forward. But the simplicity of the solution masks a deeper problem of bringing international law into the constitutional framework. Such constitutional provisions inevitably and inextricably feed a logic of permission; that is, it is the constitution which determines standing and normativity. International law owes its domestic existence to the constitution, and is by implication subject and subordinate thereto. The treaty is no longer an independent international instrument of law, but has been instead processed through the (institutional) optic of the constitution. *A fortiori* if the treaty must be cloaked in domestic legislation. Hence the route of express constitutional provisions leads us inexorably and necessarily to a dualism between the national and the international legal systems.

This slippery slope to a dualism is generally bypassed for matters of customary international law, if only because constitutions never clearly address customary international law. But we nonetheless end up at that same destination. The lack of any specific constitutional instruction draws our attention all the more quickly to considerations of the separation of powers, in particular holding a public organ or official legally accountable and justifying any putative law-making powers of the courts (and the extent of the law-reviewing powers), as well as identifying the source of law more generally. All of those considerations require an appreciation of the existing constitutional order and therefore begin from a constitutional basis. And so we return to a logic of permission in which the constitution, as the ultimate source of authority, stands as the gatekeeper allowing the admission of international law on terms. A dualist perspective seems inescapable.

One strategy has been to circumvent the more difficult and awkward issues for customary international law in the domestic legal order by perfunctory reference to

international law being "part of our law". Let us put to one side in a charitable spirit the likely irony in underscoring that the international stands apart from the national when speaking in terms of "part of our law" in order to pursue their integration. Contracts, torts, criminal law, all are not "part" of our law: they themselves constitute "our law" itself. But for morality, ethics and other like systems which ordinarily sit outside the legal system, it remains an open question whether they are "part" of the law. In any event, and more importantly, reliance on the apophthegm would bypass questions of power allocation and sources of law by accepting simply international law as having a presence already in the domestic legal order and some character of domestic law, whatever that might be. The courts (among others) have been uniformly reticent in providing any concrete justification to that expression. The actual historical foundations to it leave no doubt that, on its face, it was never really so. If anything, the treatment of "international" law bears a greater resemblance to judicial appreciation of foreign law and the conflicts of law, where a dualism is clearly admitted. But entirely sidestepping the issue is not an option. International law practice will inevitably abut against some aspect of domestic practice, and thereby re-ignite the dualist controversy. For example, as we saw in Chap. 4, the need to reconcile the evolution of customary international law with its specific domestic application reiterates dualism, as does reconciling opposing domestic practice and customary international law in general. So too does the standing of customary international law, as bearing private rights and obligations or as tracing constitutional limits to power and so on. A dualism is inevitable.

5.2.1 A Second Look at Dualism

Let me clarify what I mean by "dualism". The term of course invokes the traditional "monism–dualism" or "incorporation–transformation" debates, and the third way of polycentrism/pluralism. I have no sizeable investment in any one of these, except obviously in their continued discussion because it offers evidence of a fundamental division between the national and international orders, and among national legal orders individually. There is no magic in numbers—whether there may be said to exist only two, three or more different legal systems. Qualitative differences, not quantitative ones, are at issue. The key concept to dualism is the differentiation of legal orders prompted in the first place by each and every constitutional identity. In that sense, there is a duality, a division, which exists between two or more national legal orders just as much as it exists between international law and national law. A constitution inevitably creates an alterity, an otherness or opposability, when establishing itself as an entity, as a self.[15] To have a constitutional identity means to differentiate between an "I" or "us", and a

[15] I must leave for another occasion a fuller exploration of the ideas of Levinas, Marcel, and Buber as applied to constitutional theory.

"thou" or "them". Put in perhaps less abstract terms, when a social and political grouping orders itself in some settled, formal and recognisable way, it creates a boundary between what is part of, inside, the group, and what is alien to, outside, that association. The social organisation, its organs, institutions and procedures, set the criteria for membership in the polity, for recognition of who is a member, a citizen and who is not. Belonging to a social and political grouping inevitably means excluding the possibility of associating with other like groups. Membership by definition carries privileges and benefits denied to non-members, and duties not burdening non-members in equal measure or at all. Indeed, the very nature of associating this way emphasises the dividing of members from non-members.

In so doing, a constitutional identity creates by its nature an internal and external perspective. The organs and procedures of a polity not only determine admission to it, but also the substantive characteristics supposedly held in common by members, their identity as members. Membership with the group means both drawing an identity from the supposed defining characteristics of the association (whatever they may be) and identifying with fellow members. At its highest, membership entails the sharing of certain value sets and value orientations, the commonality of ideas and interests. If the substance of those ideas are not fully shared, then at the very least there will be some commonality in the ways of thinking about and dealing with them, and of ascertaining for the group which interests ought to be accounted for (whether or not given any significant or determinative weight). That is, the social organisation, its organs, institutions and procedures of a polity will identify the source, the well-spring, of relevant ideas, values and interests. This grounds the presumption, whether made out in fact or not, that the citizens of a polity possess a common set of values and rules by which they can be judged by their peers. It follows that those values are reflected in the laws structuring interactions among its citizens; that is, in the legal system. The laws of a state are, on this view, the collection of certain mutual and reciprocal interests and values drawn from a particular community which arrange intersubjective conduct for that association and which have there formal and paramount status in and for that association. In sum then, a constitutional identity demarcates the necessary and sufficient source of general social values and interests which define and regulate a polity in the form of public laws. Ideals and rules outside that line of demarcation may be of interest, but they are certainly not necessary for the identity or coalescence of the polity.

This manner of defining the source of law, values and social administration reflects the Aristotelian adage of a state being self-sufficient. A state, a polity, is self-sufficient in the generation of norms, institutions, and processes, in the sense of origination, originality, and sufficiency. They do not depend upon the assent, concurrence or desires and interests of any other person or body. Whether or not that self-sufficiency also must extend to the material welfare of its citizens is not really pertinent here, nor has it been truly borne out by history. Indeed, the pursuit of material gain has never limited itself to boundaries other than those of practicability, cost, and return. The self-sufficiency relevant here adverts to the source of values, interest, and desires operating as the motive and connective force for the polity. It is and acts upon its own authority. The concept of sovereignty, as may

already be surmised, contains a substantial measure of this idea, reflecting principally the instrumental facets of independence and control. And like the associated concepts of "self-determination" and "self-governance", self-sufficiency posits therefore a "self", the kernel of which is the polity, which is supreme (and unique) in its settling of values.

What is crucial, of course, for all these related ideas is determining just what is the make-up of the so-called "self", who the constituents are of the polity.[16] For the most part, we are accustomed to demarcating, at least implicitly and initially, the bounds of a particular social and political group by the formal means of a constitution. A constitution has several components, the most obvious being the institutional and structural, which set out the organs of government and their interrelations. But it also defines the polity underlying that more formalised expression of social order. A constitution demarcates a particular constituency as the organised source of power and law. In this way we return to the notion of constitutional identity.

By dint of history, the conceptual foundation for this rests upon territoriality, and further, the institutions and powers which hold sway within that territory. Because we are dealing with associations characterised by regular and recurring interactions among people, and because people occupy space on the ground, our mindset necessarily implicates a territorially bounded framework. Our historical inheritance of political and constitutional-legal thought makes it difficult—if not impossible—here to detach people from place and time, to dislocate them. It was the simple, and self-evident, realisation that we see the world alike only because we have lived next to one another which produced out of the Romantic movement the persisting ideas of culture and nation. Our understanding of what is and what ought to be comes from a shared history grounded in a particular place. By this shared understanding and shared place, a more formal social order coalesces. Hence, the structures of social groupings can operate only insofar as the members remain in contact with one another and can exercise influence over one another. (Modern forms of communication may extend the range of our contacts the world over, but we are still tied to our own neighbourhoods for the bulk of our daily, usual interactions.) The practicable and effective range of those contacts and influence have always delimited a polity in territorial terms, directing thus the further debates on whether uniformity and intensity of contacts (as in "culture" or "nation") or administrative efficiency serve as determinative measures.

The institutional form to the territorial conception of a political and social constituency has been the primary focus of this study, as seen through the optic of the separation of powers. Every political and social group possesses in virtue of its being an organisation, an association, particular official bodies and institutions

[16] This is not to say that the polity itself stands as a conscious or self-conscious entity. Nor even that some sort of "group awareness" comes into play. True, it is the collection of individuals coalescing into that political and social association who each become aware of their ordering (in some way) into a community. But I am not convinced of taking that further step to posit some collective, actively shared group consciousness in which different individuals nonetheless participate in some central, coherent fund of group identity and selfhood.