

Contents

1	Making Introductions.	1
1.1	Transnational Law and the Courts	1
1.1.1	The Story So Far.	1
1.1.2	The Issues	5
1.2	Frame of Reference	7
1.2.1	Judicial Power and Function.	7
1.2.2	Comparative Study	8
1.2.3	Exclusion of European Legal Framework.	10
1.2.4	... And the Story to Come.	10
2	International Law and the Separation of Powers.	13
2.1	Constitutionalism and International Law.	13
2.1.1	International Law and the External Perspective.	13
2.1.2	A Change of Perspective	23
2.2	Constitutionalism and the Separation of Powers	31
2.2.1	The United Kingdom: The Basic Positions.	35
2.2.2	France: Strict Separation Yet with a Judiciary Resurgent?	49
2.2.3	The Netherlands: Is the International System as the Fourth Branch?	55
2.2.4	The US: The Judiciary as a Full Member of the <i>Trias</i> . . .	61
2.2.5	From Separating Power to Supervising Power	72
2.3	The Disjunction Between National Law and Public International Law	73
2.3.1	The Separation of Powers as the Heart of the Matter . . .	73
2.3.2	A Disjunction	75
2.3.3	Bridging the Gap?.	79
2.3.4	Where We Go from Here.	86

3	Treaties and Law-Making Powers	87
3.1	A Compact Outline	87
3.1.1	Treaties and Other International Agreements	87
3.1.2	Treaties as a Source of Law	90
3.1.3	Monism, Dualism and the Separation of Powers	92
3.2	Treaties, Laws and the Rule of Recognition	95
3.3	The United Kingdom: The Parliamentary Optic	98
3.3.1	The Separation of Powers: Parliament	99
3.3.2	The Separation of Powers: The Judiciary	100
3.3.3	Judging the Bounds of Recognition	116
3.4	The United States: Constitutional and Congressional Controls	133
3.4.1	From the Outside In: Transposing the International to the National	133
3.4.2	Article II Treaties, Senate Ratification and Internal Effect	141
3.4.3	Treaties, Executive Agreements and the Allocation of Legislative Power	149
3.4.4	Interpretation	156
3.4.5	<i>Hamdan</i> and Interpretative Incorporation	165
3.5	France: Executive Power	165
3.5.1	The Limits of the Institutional Strategy	169
3.5.2	Interpretation and the Role of the Courts	173
3.5.3	Treaties Paramount over Legislation	177
3.5.4	The Conseil Constitutionnel as Guardian of the Constitutional Order	178
3.6	The Netherlands	182
3.6.1	Pillars of the Establishment	184
3.6.2	Parliamentary Approval	187
3.6.3	Interpreting Treaties	195
4	Customary International Law and Judicial Power	211
4.1	The Basics	211
4.1.1	State Practice	214
4.1.2	<i>Opinio Juris</i>	216
4.2	Customary International Law and the Separation of Powers	217
4.3	The United Kingdom and Constitutional Presuppositions	220
4.3.1	The Internal Perspective: Constitutional Powers in Check	221
4.3.2	Sovereign Immunity: Constitutional Powers Supreme?	232
4.3.3	The External Perspective: The Limits of Sovereignty	242
4.4	The United States: It's Academic, Really	243
4.4.1	Recognising the Rule	243
4.4.2	Ruling Recognition	248
4.4.3	And the Rule?	249

4.5	France and Inscrutibility.	251
4.6	The Netherlands and the Constitution Supreme?	254
4.6.1	Nyugat (No. 2) and a Change of Optic?	254
4.6.2	Sovereign Immunity	258
4.6.3	A Role for the Executive?	260
5	Separating Powers?	261
5.1	In Review.	261
5.1.1	Constitutional Asymmetry and Systemic Disjunction.	261
5.1.2	Treaties, Constitutions, and Dualism	267
5.1.3	Customary International Law and the Reflexive Strategy	272
5.2	What's Bred in the Bone	275
5.2.1	A Second Look at Dualism	277
5.3	Separating Powers and Legal Orders	281
5.3.1	A Transnational Separation of Powers?	281
5.3.2	Redefining Constitutionalism?	285
5.3.3	Redefining International Law?	289
5.4	Conclusion	291
	Table of Cases.	293
	References	309
	Index	323