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THE SEPARATIONS OF POWERS, THE RULE OF LAW AND ECONOMIC PERFORMANCE

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Abstract

Markets work best when the rules of the game are stable, property rights are secure and contracts are observed. These conditions are promoted by the rule of law in the classical liberal sense of the supremacy of general laws over public and private authority. Devices such as mixed government and the separation of powers are believed to be conducive to the rule of law. However, the degree of formal separation of powers in a constitution does not always co-relate to rule of law conditions and hence to economic performance. Hence the speculation that the separation of powers is not a necessary condition to the rule of law. The paper argues against such a conclusion by developing an account of the separation of powers that focuses on its methodological thesis in addition to its better known thesis of the diffusion of power.

An overview

I start with the following assumptions. Market oriented economies perform better than planned economies. Markets work best when the rules of social life are stable, property rights (to acquire, hold and dispose of things) are secure and contracts are freely made and kept. These conditions are promoted by government under the rule of law and conversely deteriorate under arbitrary government. The final assumption, which is the subject of this inquiry, is that the separation of powers is a necessary though not a sufficient condition for government under law. However, it is observable that the degree of formal separation of powers in a constitution does not always co-relate to rule of law conditions. Therefore there is speculation that the separation of powers is not a necessary condition to the rule of law. The paper argues against such a conclusion by developing an account of the separation of powers that focuses on its methodological thesis in addition to its better known thesis of the diffusion of power. I reach the conclusion that although the benefits of the separation of powers can be maintained under certain conditions by methodological means alone, without the aid of a diffusion of powers they are likely to be short lived. However, history has shown that methodological separation of powers may be promoted by diffusions of power that are not necessarily along the lines of the tri-partite division epitomised in the US Constitution.

My assumption that rule of law conditions promote economic progress may be questioned by some who have observed the rapid economic growth and prosperity of the so-called Asian Tigers, South Korea, Taiwan, Singapore and Malaysia in particular. All these countries achieved impressive economic advancement under varying degrees of authoritarianism although in the case in South Korea, and Taiwan they continue to perform well after their transition to democratic constitutionalism. Malaysia and Singapore have always practiced a limited form of democratic government. It will be my argument that while these countries endured (and in the case of Malaysia and Singapore continues to endure) a substantial democratic deficit, they enjoyed stable rules of the game, property rights and a large measure of individual freedom under the law. The so called 'Chinese paradox' on closer scrutiny reveals a similar story. China's rapid economic rise coincided with the creation of property rights including land rights in urban areas, the introduction of regular courts, partial deregulation of commerce and consumer choice and generally the promotion

of a private sector economy. I will return to these issues in the course of this essay.

Since Montesquieu's classic description of the post revolution English constitution, the doctrine of the separation of powers has been identified with the constitutional system of checks and balances. The vesting of legislative, executive and judicial powers in separate organs (the tripartite separation of powers) is a proven means of inhibiting the absolutist tendencies particularly when combined with other devices such as representative democracy and the geographical dispersal of power under federal arrangements. However, the logic of the tripartite separation of powers is only partially revealed by its presentation as a system of checks and balances. It does not explain fully how the separation of powers secures the rule of law or constitutional government. The aim of this paper is to examine some of the critical moments in the history of the idea of the separation of powers as a means of understanding the reasons for its persistence in political thought and to illuminate its central role in securing the rule of law and constitutional government. The essay leads to an assessment of the health of the doctrine in the conditions of contemporary parliamentary democracy.

The doctrine of the separation of powers subsumes two distinct theses. The first thesis, which I will call the methodological thesis of the doctrine, is about the nature of each power and the way in which the power must be exercised. The second thesis that I will term the diffusion thesis is about the allocation of power. The methodological thesis holds that the legislative, executive and judicial power each has its own character that requires the power to be exercised in a manner appropriate to the power. The theory postulates that the failure to exercise each power accordingly results in failure of the rule of law. In the seventeenth century England, the two fold separation of powers between law making and executive functions was well known.[1] However, the classic statement of the methodological thesis is found in Locke's *Second Treatise of Civil Government*. In Locke's theory of government the great evil in the state of nature is that persons are their own lawgivers, judges and enforcers. People escape the state of nature by

[1] M J C Vile, *Constitutionalism and the Separation of Powers*, (1967), 51

entrusting their powers to a supreme authority, the Legislative who must secure the common good 'by providing against those three defects above-mentioned that made the State of Nature so unsafe and uneasie'. Hence the supreme authority 'is bound to govern by establish'd standings Laws promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by those Laws; And to employ the force of the Community at home, only in the execution of such laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion'.[2] The legislative power is the power to make laws of general application and does not include the power to make decrees for the particular case. Executive power is the power to defend the realm, police the law and conduct the affairs of state. Judicial power is the power to impartially determine disputes concerning the rights and liberties of persons according to standing law.

It is possible to imagine an omnipotent ruler entrusted with all three powers who exercises each power in keeping with its character. This super-endowed Lockean ruler will personally or through officials make general and impersonal laws in the public interest, enforce the law equally and adjudicate disputes impartially. Sadly, such rulers are rare exceptions,[3] history being instead the testament of Acton's famous epigram that 'power corrupts and absolute power corrupts absolutely'. Hence the diffusion thesis that the rule of law and constitutional government is secure only when legislative, executive and judicial powers are reposed in different agencies of the state which are independent of each other to a substantial degree. The diffusion thesis is born out of the mistrust of omnipotent authority memorably expressed by James Madison's observation in *Federalist No 51* that 'If men were angels, no government will be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary'.[4] The classic exposition of the diffusion thesis is found in James Madison's

[2] J Locke, *Two Treatises of Government*, (1970)

[3] Emperor Asoka of India comes to mind, whose emblems of strength (the Saranath Lions) and of righteousness (the Asokan Chakra) are guiding symbols of the modern Indian Republic.

[4] J Madison , Federalist Paper No 51' in A Hamilton, J Madison and J Jay *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* (1982) 262. Compare the previous observation of David Hume: '…on contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest'. D Hume, *Essays Moral, Political and Literary* (1987) 42.

Federalist Papers, particularly Nos 10, 47 and 51. where he concludes that 'The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced as the very definition of tyranny'.[5]

It takes little reflection to notice that neither the methodological thesis nor the diffusion thesis is capable by itself of explaining the logic of the doctrine of the separation of powers. The vesting of each power in a different agency does not prevent agencies from acting arbitrarily unless the nature and the methodological constraints on each power are recognised and observed. History is again our witness. Legislatures sometimes make law for the case without laying down general rules of conduct. The executive, usually with authority delegated by the legislature, arbitrarily creates or sets aside the rights of citizens. The judiciary disregards the law through excessive creativity in adjudication. These are commonplace incidents even in states that take the constitutional division of powers seriously. The indispensability of the methodological thesis is most evident in parliamentary systems where the executive has a large share of the legislative power.

In many parliamentary democracies including Australia, executive law making even on matters of public policy is considered constitutionally acceptable provided that such laws are subject to repeal or revision by the legislature. The logic of this view is seriously weakened by the fact that the legislature in parliamentary systems usually obeys the executive which is in office precisely because it commands the loyalty of a majority in parliament. In unicameral parliamentary systems the will of parliament is mostly the will of the executive. In bicameral parliamentary systems, upper houses may check executive ambitions from time to time but they have little time or capacity to police the vast amounts of discretionary power accumulated by the executive branch under permissive legislation. Under these circumstances, parliamentary democracies rely heavily on judicial oversight of executive action. Courts and administrative review tribunals remedy individual grievances but cannot address the general problem which is the

[5] J Madison,Federalist Paper No 47' in , A Hamilton, J Madison and J Jay *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* (1982) 244.

systemic arbitrariness of government resulting from the revision of the separation of powers doctrine.

The ancient and medieval constitutionalism placed greater emphasis on the methodological thesis. In period following the Glorious Revolution of 1688, the diffusion thesis came to prominence and was embraced by the founders of the US Constitution. In England, the classical two-fold division of powers developed into the tripartite separation that was famously described by Montesquieu in *The Spirit of the Laws*. While the tripartite division stabilised in the United States with the help of its written constitution and an assertive Supreme Court, in Britain, the model metamorphosised into the asymmetrical form associated with parliamentary sovereignty and ministerial responsibility. The current model of governance under parliamentary democracy blurs the executive-legislative divide while accentuating the separation of judicial and non-judicial powers. It is the reverse of the ancient form of the doctrine where the executive-judicial division was unclear while the legislative-executive separation was paramount. The history of the separation of powers as it has culminated in modern parliamentary systems reveals the transformation of doctrine from the classical two-fold separation to the tripartite separation and thence to the 20th century version of the two-fold division.

Phase	**Division**		
Classical and medieval theory	Legislative	Executive-Judicial	
19th century English theory and US model	Legislative	Executive	Judicial
20th C parliamentary democracy	Legislative-Executive		Judicial

I am not suggesting that the divisions were or can ever be as clear cut as this diagram indicates. Classifications of social phenomena are always imperfect and constitutions never fully live up to the models that we construct to explain them. Thus in modern parliamentary democracy, though the executive dominates the parliamentary agenda, the legislators provide critical

feedback from the electorate and pressure groups that help shape executive decisions. In the past when judges served in royal courts at the monarch's pleasure, they were not entirely subservient to the regal will. Discerning readers will treat the diagram as a helpful broad brush presentation of the doctrine's mutations.

Separation of powers and the rule of law

Separation of powers is inextricably linked to the rule of law as understood in the classical sense. The ideal of the rule of law has been at the centre of political theory ever since Aristotle posed his famous question whether it is better to be governed by the best men or by the best laws.[6] Aristotle argued: 'He is a better ruler who is free from passion than he who is passionate. Whereas the law is passionless, passion must ever sway the heart of man.'[7] Despite its long history in political thought, the rule of law remains an imprecise concept and a subject of frequent and impassioned debate. The common element in all 'rule of law' theories is the proposition that acts affecting the rights or obligations of a person must be authorised by law. That is the easy part. The hard question is: what do we mean by 'law' in relation to the rule of law? The extreme positivists say that whatever the ruler commands is law, whether it takes the form of a general rule of conduct or a specific decree directed at an individual. According to this view, the executioner who hangs a prisoner condemned without trial by an omnipotent dictator will be upholding the rule of law. In classical theory, where the law takes the shape of the momentary will of an absolute ruler, there is no rule of law but rule of a person. The rule of law by this way of thinking means the supremacy of general laws (Aristotle's passionless law) over all authority, public or private. It is the *Rechtstaat* of German jurisprudence. The rule of law in this sense is an ideal and, like all ideals, it is achievable only in approximation. Constitutions do not and cannot eliminate all forms of arbitrariness in governance.

If the rule of law is defeated when the law is identified with the momentary will of the ruler, then the separation of the law from the ruler's unilateral will is a necessary condition for the achievement of the rule of law. The participation of a ruler in law making (legislative) and law applying (judicial) functions is not fatal to the rule of law

[6] Aristotle, *Politics*, (B Jowett tr), (1916 [359 BC]) 136.
[7] Ibid.

provided that in governing he is compelled to observe the laws and judgments of the realm of which he is himself an author. The ruler's observance of law and judgments cannot be assured unless there are institutional checks on his power. Hence it is impossible to extricate the rule of law from the separation of powers in both the methodological and the organisational senses. The corollary of this proposition is that the achievement of the rule of law conditions naturally separates powers to some degree. In a sense the rule of law and the separation of powers are two sides of the same coin.

Aristotle and the Hellenic laboratory

The idea that the ruler did not make law but ruled according to law has ancient origins and is the immediate source of the theory that in the constitutional state the power of government does not include the power to make law. In the natural history of humankind, legislative power is a recent occurrence. The great law givers like Ur-Nammu, Hammurabi, Solon, and Lykurgus did not claim to make law but to state the law.[8] Rulers made law, but rarely confessed to it, pretending rather to be ridding the law of its corruptions. The systematic practice of legislation is first observed in the organised city-states of classical Greece. Different models of statecraft emerged among the Greek states. Aristotle noticed, three beneficent models: monarchy, aristocracy and polity (disciplined democracy) and also their corruptions: tyranny, oligarchy and democracy. The beneficent models were distinguished from their corrupt counterparts by the prevalence of the rule of law. He saw in the corrupted forms of government the ascendancy of the idea that the public good is served by the best men whether they be absolute monarchs, elite groups or popular majorities. Hence, in the *Politics*, Aristotle posed the famous question whether it is better to be governed by the best men or by the best laws. Aristotle concluded that the 'The law ought to be Supreme over all, and the magistracies and the government should judge only of particulars. So that if democracy be a real form of government the sort of Constitution in which all things are regulated by decrees is clearly not a democracy in the true sense of the word, for decrees relate only to particulars'.[9] Aristotle observed that when a popular assembly decides every detail, it ceases to

[8] S N Kramer, *History Begins at Sumer* (1952) 52.
[9] Ibid 157.

express the popular consensus but becomes the tool of demagogues.[10] He perceived that genuine popular consensus is possible only on general principles and not on particular outcomes. The hallmark of a polity is that it is governed by laws and not passion. In the *Nichomachean Ethics,* Aristotle translated this insight into a theory of politics wherein he asserted that 'legislative science' must control the science of administration. Administrators bear the same relation to the law giver as workmen to the master craftsman.[11] This is the essence of the methodological thesis.

Separation of law and government in the Roman Republic

Apart from Cicero's two treatises the *Republic* and the *Laws*, and what remains of Polybius' *Histories*, there is little that represents a constitutional theory of republican Rome. The pragmatic jurisprudence of the Romans was not given to theorising. Roman constitutionalism is found in the actual practices of government about which, fortunately, there are reliable records. The constitution of the later Roman Republic is an outstanding example of a pronounced division of functions achieved without an articulated theory of government. Polybius and Cicero attributed the success of the republic to its mixed government, a system thought to have been perfected in the Spartan Constitution of Lycurgus. There is however more to the success of the republican constitution than its mixed nature. It is instructive to look at Rome's constitutional structures at the zenith of its republican evolution in the late second and early first century B.C, approximately the period between the Second Punic War and the tribunate of Tiberius Gracchus.

The legislative power of Rome was in the hands of the popular assemblies, the *Comitia Centuriata* and the *Comitia Tributa* (with its variant the *Consilium Plebis*). This happened after the *Lex Publilia* and the *Lex Hortensia* dispensed with the requirement of ratification of laws (p*actum auctoritas*) by the patrician Senate and granted the plebeian tribunes power to initiate legislation which, when approved by the *comitia* gained the status of *leges.* The executive powers of the Republic were exercised by officials (*magistrati*) the chief of who were the two consuls. Among the other magistrates were the quaestors (responsible for finance) the censors (who, apart from conducting the quinquennial census, were responsible for public works), the praetors (the

[10] Ibid.
[11] Aristotle, *Nichomachean Ethics* (1955) 181.

principal judicial officers) and the *aeidiles curules* (responsible for city administration and police functions). All the magistrates were elected by the popular assemblies. Consuls, praetors and censors were elected by the *comitia cencuriata* and the *curules aediles,* quaestors, tribunes and certain other lower ranking officials, by the *comitia tributa.* The Roman senate has lost most of its early powers but wielded much influence over all branches of government. The magistrates were senators *ex officio.* Its predominantly patrician composition produced a concentration of administrative experience and knowledge in the senate. The pre-occupation of the consuls in the imperial campaigns increased their reliance on the senate's advice. The rapid expansion of Rome's territorial jurisdiction, increased the importance of the senate's privilege of creating temporary magistracies by the *prorogatio imperii.* Above all, the senate played the role of an executive council, in the absence of any form of cabinet owing to the independence of the directly elected officials.[12]

The position regarding the judicial power of Rome is more confusing because of terminological imprecision, the multiple roles of magistrates and the appellate jurisdiction of the legislative assemblies. The praetors dealt with civil cases and original jurisdiction in criminal cases was exercised by other magistrates, in particular, the *quaestors* and the *curule aediles.* Later, the popular assemblies gained appellate jurisdiction in respect of crimes and serious disobedience to magistrates. The few recorded instances of the exercise of original jurisdiction by the assemblies are probably cases where the magistrates chose to prejudge guilt and to dispense with the formalities of trial and condemnation in view of the inevitability of appeal.[13] Further confusion is caused by the key term *imperium*, the power that belonged to the Roman consuls and later the emperors. *Imperium* in its broader sense signified the comprehensive power that encompassed *coercitio* and *iurisdictio* roughly corresponding to executive and judicial powers. In its alternative narrower sense, *imperium* referred to military command.[14] Supreme command of the military belonged unquestionably to the consuls but they enjoyed the wider *imperium* only nominally. In the later republic, the whole of criminal and civil justice (with the minor

[12] On these aspects, see K von Fritz, *The Theory of the Mixed Constitution in Antiquity* (1954) 177-183.
[13] G W Botsford, *Roman Assemblies: From their Origins to the End of the Republic* (1968) 259, 266.
[14] W Kunkel, *An Introduction to Roman Legal and Constitutional History* (1973) 15.

exception of market disputes decided by the *curule aediles*), was exercised by the judicial magistrates, the *praetor urbanus* and the *praetor peregrinus*.[15] The *praetors* were nominally executive officers but methodologically they behaved more like common law judges than members of modern quasi-judicial tribunals. [16] There was one interesting difference in their methods. Whereas the common law judges make adjustment to legal principle in the course of deciding cases, the *praetors* exhausted their discretion beforehand by issuing the famous praetorian edicts on the law. These edicts, issued on the assumption of office, stated the law that would guide the *praetor* in deciding cases that he would hear during his term of office. More importantly, they served as precedents to successors in office. Consequently, a body of stable and known edictal norms developed providing a high degree of stability and predictability of decisions.

Polybius, a contemporary Greek historian, found in the Republic a mixed-constitution in the sense of a mix of monarchy, aristocracy and democracy. He wrote:

> The three kinds of government that I spoke of above all shared in the control of the Roman state. And such fairness and propriety in all respects was shown in the use of these three elements for drawing up the constitution and in its subsequent administration that it was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic or monarchical. This was indeed only natural. For if one fixed one's eyes on the power of the consuls, the constitution seemed completely monarchical or royal; if on that of the senate it seemed again to be aristocratic; and when one looked at the power of the masses, it seemed clearly to be a democracy.[17]

Although Polybius portrayed the Roman Republic in terms of the Greek theory of the mixed government, his description of the Republican Constitution revealed a system of separation or distribution of powers. The consuls, we are told, lead the armies and are in control of the administration of all public affairs. The other magistrates are treated as subordinates. Their functions in relation to the summoning of assemblies and the preparation of the legislative agenda are

[15] Ibid 84.
[16] C H McIlwain, *Constitutionalism Ancient and Modern*, (1947) 52-55.
[17] *Histories* Bk VI, Ch 11.

mentioned but it is their military and executive roles that are emphasised.[18] The senate's functions are mainly the control of finance and diplomacy. (Bk VI, Ch 13). And the people are identified as the most important constitutional organ with its electoral, appellate and legislative powers. (Bk VI Ch 14).

These constitutional arrangements did not result in a clear tripartite separation of powers but produced a *Rechststaat*, a law governed state in which, according to historian Loewenstein, the 'citizen enjoyed a security of existence equal to any modern constitutional order' being 'protected against illegality by the scrupulous observance of the rule of law enjoined on all officials'.[19] The citizen was protected from arbitrary arrest and punishment and her property was secure to the extent that mighty Augustus preferred to change the original design for his forum to avoid expropriating private property'. [20] The diffusion thesis alone cannot explain Roman liberty. Although the Republic achieved an extensive dispersal of powers it did not effect an elegant tripartite division. Officials and assemblies had dual roles and above all the senate's influence was in inverse proportion to its constitutionally established prerogatives and spanned all branches of government. It controlled the magistrates who were *ex* officio senators and after the inclusion of the plebeian aristocracy in the senate it was able to manipulate the legislative assemblies. Loewenstein observes that 'In all history there is hardly a more telling illustration of the cleavage between constitutional nominalism and political reality'.[21] McIlwain says, that 'the constitutional difference and inter-relation of the senate and populus were roughly analogous to those existing between a modern English government and an English parliament.' [22] Like the modern parliamentary executive the Roman senate, had a hand in both administration and legislation. The critical difference was that unlike the modern cabinet, it did not confuse the methodologies of law making and administration by procuring for the executive, law making power. Nor did the senate promote the making of law for the individual case as the modern executive does under delegated authority. The recognition of legislation as a distinct function that could be performed only in the legislative assemblies was at the heart of republican constitutionalism. Not even the *dictator* appointed to govern in

[18] Bk VI Ch 12
[19] K Loewenstein, *The Governance of Rome* (1973) 190-191.
[20] Ibid.
[21] Ibid 160-161.
[22] McIlwain, above n 14, 45.

emergencies could legislate.[23] The promulgation of the *Twelve Tables* epitomised the idea that the law should be known and stable and invulnerable to executive manipulation. The code was compiled following plebeian complaints that the knowledge of the law was withheld from them and that its administration was consequently arbitrary and tyrannical.[24]The fact that a separated judiciary was not of paramount concern to the ancients is at least partly due to the clarity with which they understood the methodological thesis that whosoever holds power must exercise the power in the manner appropriate to it. In the Roman Republic there was no authority above the law and there was no person or group whose unilateral will (*voluntas*) was the law. Although the Republic was short lived its constitutional legacy endures.

The Republic ended with the principate of Augustus. The principate maintained republican forms but the successors of Augustus created the dominate, an authentically totalitarian system. Under the doctrine adopted by the Roman emperors, the monarch was immune from the law (*princeps legibus solutus est*) and by the fiction of popular consent his will was the law. (*Quod principi placet legis habet vigorem cum lege regia populus ei et in eum omne suum imperium et potestatem conferat*). The idea that the monarch ruled by the grace of God (*Rex Dei gratia*) came to prominence during the papacy of St Gregory and it was inevitably employed in the service of royal absolutism. The dominate lasted in the east until the fall of the Byzantine Empire. The absolutist theory went into abeyance in Europe with the fall of the Byzantine Empire. Its re-emergence roughly coincided with the formation of territorial kingdoms and the rise of absolute monarchies in western Europe. It was used to legitimise the abrogation of feudal rights and the consolidation of royal authority.

The ideal of government under law achieved by the methodological separation of legislative and executive functions did not die with the dominate for three major reasons. Firstly, the ideal was central to the organisation of the Germanic kingships that the Roman empire never fully controlled. The ouster of Romulus Augustulus by Odovacar in 476 and the re-emergence of barbarian autonomy resuscitated the legal tradition of the Germanic tribes. The central idea in this tradition was the antithesis of *voluntas principi.* The German emperors never had

[23] Ibid 79.
[24] R W Lee, *The Elements of Roman Law* (4th ed, 1956) 7.

the capacity to impose absolute rule over its principalities. Secondly, the disintegration of the Western Empire and the pre-occupation of the succeeding German emperors with affairs north of the Alps enabled a few great cities of Italy to create republics in the image of Rome. Thirdly, the cause of constitutionalism and the separation of powers found a remarkable champion in Marsilius of Padua who challenged the theological case for royal absolutism expressed in its most sophisticated form in the writings of St Thomas Aquinas. I will consider these causes in reverse order.

Theocratic monarchy and the *Defensor Pacis* of Marsilius of Padua

According to the theocratic conception of monarchy, the king derived his authority directly from God. Scriptural support for the theory was drawn from the account of the founding of Jewish kingship, the duty of obedience to authority and the Pauline declaration *Gratia Dei sum id quod sum.* [25] There is no fundamental inconsistency between the grace of God and republican institutions as Marsilius argued in the *Defensor Pacis*. However, the Roman emperors, the Imperial Popes and the absolute monarchs of later Europe claimed legitimacy of their authority from God without the mediacy of human agencies. The theocratic view was the undisputed doctrine of the later Empire after the ecclesiastical endorsement of St Gregory.[26] Gregory regarded the rulers of his time as being set above the people by God. Authority for this position was almost certainly *Romans*, 13, 1-5. Resistance to rule was resistance to God. It is not for man to judge the ruler, for the guilty ruler misuses God's power, not man's. The association of law with the unilateral will of the ruler came at the expense of the institutional diffusion of legislative and executive organs of government. The methodological distinction was not altogether abandoned as the monarch under the theocratic political theory was bound to rule justly and justice required the rule of law. However, the new limits on power were different from the old. Whereas the old limitations were derived from the idea of law as folkways and the feudal bonds, the new limits were to be found in the divine nature of authority. The early patristic doctrine of the Church held that coercive authority is the result of sin. Obedience is a part of Christian

[25] Sabine, *A History of Political Thought*, 3rd ed, 1961, H Holt, New York, 181-182; W Ullman, *Principles of Government and Politics in the Middle Ages* (2nd ed, 1966) 118-119.
[26] R W Carlyle and A J Carlyle, *A History of Medieval Political Theory in the West* (1903-1936) vol 1, 152.

duty, as authority is installed as a penalty (and remedy) for sin. However, with the reception of Aristotle into ecclesiastical scholarship, the conception of the state became more positive and the ruler was attributed the moral goals of the church. The theocratic view of the state found its fullest expression in the writings of Thomas Aquinas (1224-1274) who argued that political hierarchy is not retributive but natural. (*Summa Theologica* 3-4)[27] The government played the role of the rational mind, directing the body of the multitude to its common good. This was the reversal of the traditional idea that government's first duty is to enforce the law that exists independently of the ruler's will. Form the theocratic viewpoint the ruler's function is not only to apply the law but to determine its content for in the natural order of things the ruler is to the people, what the mind is to the body and what the Creator himself is to the universe.

Aquinas considered the rule of one man as the best form of government. 'A plurality of individuals will already require some bond of unity before they can begin to rule... So it is better for one to rule rather than many who must first reach agreement.' (*De Regimine Principum* 1:2). [28] He placed no constitutional limitations on the power of the prince. His promise to discuss precautions against tyranny never materialises. Where the prince is elected he may be likewise deposed. But when there is no such hope, 'recourse must be made to God the King of all, and the helper of all who call upon Him in the time of tribulation'. (*De Regimine Principum* 1:66)[29] Aquinas rejected rebellion as a cure worse than the disease. The safeguard and remedies against tyranny were not constitutional but spiritual. The King was to rule justly because of divine reward. 'So great is the reward of heavenly blessedness promised to kings for the just exercise of their power, that they should strive with all care to avoid tyranny ... Nobody, however foolish and unbelieving they may be, can fail to see the stupidity of losing so surpassing and eternal a reward for such fleeting and material satisfaction.' (*De Regimine Principum* 1:10).[30] The prince is the source of human law. And as shepherd and protector of the flock was entitled to 'complete plenitude of power'. (*Commentary on the Sentences* 4:24)[31] 'The interpretation of laws and dispensation from observance belongs to him who

[27] Aquinas, *Selected Political Writings*, (1965) 103
[28] Ibid 11.
[29] Ibid 33.
[30] Ibid 55.
[31] E Lewis, *Medieval Political Ideas* (1974) 353.

made the law.' (*Summa contra Gentes* 3:76)[32] Elsewhere: 'it pertains to the king to be over all human offices and to direct them through the authority of his rule'. (*De Regimine Principum* 1:15)[33] Aquinas thus unequivocally rejected the diffusion thesis of the separation of powers doctrine without explicitly rejecting the methodological thesis. Elsewhere Aquinas is equivocal when he speaks in favour of mixed government closely followed by the re-iteration that *regnum* is best 'if not corrupted.' (*De Regno* I:II).[34] Yet his explicit statements did little to help the cause of the separation of powers.

The ascendancy of the theocratic conception of government failed to extinguish constitutionalism from medieval thought and practice. The theocratic conception remained under challenge from philosophical opposition, the force of tradition and the pressures to make government predictable and accountable. The philosophical challenge materialised out of the significant political issue of the times, the conflict between papal and secular authority, which reached its decisive phase in the controversy between Phillip the Fair of France and Boniface VIII. The claims to papal sovereignty were met by counter claims of independent royal authority in secular matters, derived from the will of God, but mediated by the people. More importantly resentment at papal absolutism provoked a challenge to the idea of sovereign power 'on the ground that it was intrinsically tyrannous whenever it existed and need to be tempered and limited by representation and consent'.[35] The great champion of this view was Marsilius of Padua (1280-1343), whose extraordinary religious-political tract *Defensor Pacis* has earned him the reputation of an architect of the reformation, the Machiavellian republic and even modern democracy.[36]

Marsilius, physician, soldier, scientist, theologian, Italian patriot and for a period Rector of the University of Paris regarded papal power as the cause of Italian disunity. Owing to his resentment of the papacy, he was not satisfied with the separation of the spiritual from the temporal but sought to justify the subjection of the church to civil government. This he could do only be redefining the concepts of state and law. Marsilius was an Aristotelian but unlike Thomas Aquinas thought in the Averroist tradition of empirical rather than theological

[32] Ibid 251.
[33] Ibid.
[34] See coomentary in J Finnis, *Aquinas* (1998) 261.
[35] G H Sabine, *A History of Political Thought* (3rd ed, 1961) 285.
[36] See the *Encylopaedia Brittanica* entry on Marsilius of Padua.

naturalism. He adopted from Aristotle, the organic view of the state and the causes of its evolution but unlike the Thomists regarded these causes as earthly and demonstrable and therefore outside the purview of philosophy.[37] As a man of faith, he did not deny the undemonstrable but maintained that matters known only by revelation cannot be included in the science of government. In politics, the Church is not superior to human authority. The function of the Church is no more than 'to ensure the goodness of human acts both individual and civil, on which depend almost completely, the quiet or tranquility of communities and finally the sufficient life in the present world'.[38]

Marsilius denied the theocratic justification of absolutism claiming that in God's design, it is the people who are the effective cause of government. 'God does not always act immediately; indeed in most cases, nearly everywhere, he establishes governments by means of human minds, to which he has granted the discretionary will for such establishment'.[39] Likewise, Marsilius denied the ruler's authority to legislate by grace although he acknowledged that laws, such as the Mosaic code were sometimes handed to man directly by God. 'The primary and proper efficient cause of the law, is the people or the whole body of citizens, or the weightier part thereof, through its election or will expressed by words in the general assembly of the citizens, commanding or determining that something be done or omitted with regard to human civil acts, under a temporal pain or punishment.'[40]

In chapter XIII of his first discourse, Marsilius advances his theory of legislation. In the Aristotlean tradition he regards legislation as a science that involves 'investigation, discovery and examination of the standards, the future laws or statutes'.[41] He commends therefore the election of prudent and experienced citizens to the legislature but maintains that the ultimate legislative authority must remain with the whole body of citizens. The institutional and methodological separation of legislative and executive powers is central to Marsilius' theory of the state. It reflects the pre-modern lack of emphasis on the separation of executive and judicial power. A ruler's task is to govern

[37] Marsilius of Padua, *Defensor Pacis*, (1956) 12-13.
[38] Ibid 19.
[39] Ibid 29.
[40] Ibid 44.
[41] Ibid 54.

according to the law made by the legislator. 'Such a thing is the law when the ruler is directed to make civil judgements in accordance with it.' [42] In the idealised scheme of the state, the legislator leaves nothing to 'the discretion of the judge, because the judgement of the legislator, that is, the law, is not partial, that is, it is not made on account of some one particular man, but is concerned with future and universal matters'.[43]Marsilius thus made a radical attack on the dominant theory of his times which reposed all embracing power in the ruler by divine right. By denying the ruler legislative functions, he restored to political thought, the Aristotelian concepts of the rule of law and the separation of the functions of governing and legislating.

Italian republicanism

After the fall of the Western Empire parts of Italy fell under the suzerainty of German emperors of the north while imperial Popes rules Latium and Romagna. During the twelfth century, the German emperors' preoccupation with affairs north of the Alps allowed the communes of Northern Italy and Tuscany to gain autonomy gradually. They began to appoint consuls and establish councils who gradually gained ascendancy over the bishops. The communes ultimately became city states. Although most of them ended in despotism, a small group of cities including Florence, Venice, Sienna, Lucca and Pisa survived as republics. The wealth and influence of Florence and Venice ensured that the republican ideal continued to challenge the absolutist theories of the time.

The Florentine republic survived to the end of the 15th century despite periods of conflict between rival oligarchies. Florence swayed between popular republicanism and aristocratic republicanism but on the whole, it is fair to say that the pendulum favoured the latter and that under Medici rule Florence resembled at times a principate more than a republic. The Medicis though were too astute to claim absolute power and preferred to influence the council and senate while maintaining republican forms. The troubles of Florence do not detract form its successful resistance to imperial, papal and local despotism. These troubles ironically produced an intellectual legacy for the cause of

[42] Ibid 37.
[43] Ibid 38.

republicanism and hence for the separation of powers in the form of the great historical-political commentaries of Leonardo Bruni (*Laudatio Florentinae Urbis.*), Niccolò Machiavelli's (*Il Principe* and *Istorie Florentine* and Francesco Guicciardini (*Storia d'Italia*) .[44]

It was Venice that most successfully revived republican government and its stability, freedom and prosperity were attributed to the imitation of Rome. Before the *Serrata* in 1297, the government consisted of the *arengo* (the assembly of all people), the 300 strong *Consiglio Maggiore* (the Great Council)selected by the assembly, the Senate of Forty, a ducal council of six and the *Doge* elected for life. The Great Council appointed other councils, passed legislation and through the Senate served as the highest court. The Senate also was primarily responsible for drafting and presenting legislation. The ducal council ensured that the *Doge* acted according to law and advice. The scheme was one of mixed government that minimised the potential for arbitrary rule by ensuring that legislative and executive functions remained methodologically and institutionally separate. After the *Serrata* the *Consiglio Maggiore* became a wholly patrician body while the senate became the place of real power taking on the functions of the old Council. Although the democratic element declined, Venice continued as a stable and prosperous society by maintaining its system of divided powers.

Medieval constitutionalism

The Germanic peoples in the manner of most tribes regarded the law as residing in the collective wisdom of the people. The law was the inherited body of rules by which the peaceful life of the tribe was carried on.[45] It represented folkways and not the will of rulers. Three consequences flowed form this concept of law. Firstly, the law could not be made but was there to be discovered and declared. Secondly, since the ruler could not make law, he was obliged to administer the kingdom according to its laws. Thirdly, since the law was an emanation from the people (*volk*) its alteration

[44] For discussion of Venetian and Florentine liberty, see M Sellers 'Republican Liberty' in S Ratnapala and G Moens (eds), *Jurisprudence of Liberty* (1996) 19-24.
[45] Sabine, above n 31, 200.

required the consent of the people.

The folk law inevitably became modified in the process of articulation and application but the theoretical legitimacy of positive enactments required the actual or nominal participation of the people, or of those traditionally speaking on their behalf. Royal edicts commenced with such words as 'because the law is made with the consent of the people and by the declaration of the king'.[46] Charlemagne's recitation was 'Charles the Emperor together with the bishops, abbots, counts, dukes, and all the faithful subjects of the Christian Church, and with their consent and counsel, has decreed the following .... in order that each loyal subject, who has himself confirmed these decrees with his own hand, may do justice and in order that all his loyal subjects may desire to uphold the law'.[47] Early medieval thought in the Germanic and Frankish territories sharply distinguished the function of ruling from that of legislating. The king participated in both functions. The first was within his exclusive jurisdiction, but the second he performed in a wholly distinct, cooperative manner. Theoretically, the king's role was even less, being confined to the application of the law whereas the law itself was determined by the people, with the king providing the authentication of the people's will. Thus Archbishop Hincmar was able to write to Lewis III in 879 that: 'You have not chosen me to be a prelate of the Church, but I and my colleagues, with the other loyal subjects of God and your ancestors, have chosen you to rule the kingdom on the condition that you shall keep the law'.[48]

Law as folkways did not mean democracy. Consent of the people to legal change was in practice the consent of the barons. The institutional framework was not democracy but feudal obligation. The baron by bond of fealty was the protector and spokesman of his tenants. He received in return their loyalty and traditional services. The barons were by similar bond entitled to the monarch's protection in return for loyalty and services. Mutual obligations and rights could not be unilaterally changed. When obligations were dishonoured, entitlements were forfeited giving rise to the right of resistance, a right that belonged not only to the barons but also to every freeman.[49] As Kern observes the fundamental idea was that 'the ruler and ruled alike are bound to the law; the fealty of both parties is

[46] Ullman, above n 21, 205.
[47] Sabine, above n 31, 204.
[48] Carlyle and Carlyle, above n 22, vol 1, 244.
[49] Ullman, above n 21, 22.

in reality fealty to the law; the law is the point where the duties of both of them intersect. If, therefore, the king breaks the law, he automatically forfeits any claim to the obedience of his subjects'.[50]

The judicial power of the community was as yet indistinct from executive power as the law was applied and enforced through the royal courts. Consequently it was natural, that the folk law that was unalterable by royal will should nevertheless change gradually through judicial interpretation and application to cases in the manner of the English common law.[51] To look for the separation of executive and judicial functions in order to locate the historical antecedents of the doctrine, is to misdirect the inquiry. Theoretically, as well as historically, the separation of law and government preceded the creation of judicial independence. Judicial power serves to ensure that actions accord with the law and is consequential to the separation of law and action. What we observe in the early middle ages is the pronounced methodological differentiation of lawmaking and governance and the beginnings of a diffusion that leads to the evolution of a distinct judicial organ. The early medieval conceptions of law and monarchy were eclipsed for a period by theocratic political theories. Yet those concepts, being part of the popular culture, persisted throughout the period of regal absolutism, and were eventually harnessed to the constitutional movement of modern Europe. As Ullmann observes they 'provided a living bridge between the primitive European period and the new Europe'. [52]

The Ancient Constitution of England

The most important feature of medieval constitutionalism is identified by Mcllwain as the distinction between *gubernaculum*, the government of the realm and *jurisdictio*, the power to determine the rights of subjects. This distinction was at the heart of the Ancient Constitution of England. McIlwain states on the authority of Bracton that only the 'acts of government strictly defined are in the hands of the king alone.'[53] Within the narrower field of government, 'the king is not only the sole administrator, but he has of right and must have all powers needed for an

[50] F Kern, *Kingship and Law in the Middle Ages*, (1968) 87.
[51] Lewis, above n 27, 243.
[52] Ullman, above n 27, 24.
[53] McIlwain, above n 14, 77.

effective administration.'[54] Definition of right on the other hand, share the character of immemorial custom and these, Bracton says, 'since they have been approved by the consent of those using them and confirmed by oath of kings, can neither be changed nor destroyed without the common consent of all those with whose counsel and consent they have been promulgated.'[55] Elsewhere, Bracton had stated that the king 'has it in his power in his own person to observe and to make his subjects observe the enactments and decrees and assizes provided, approved and sworn to in his realm.' The implication here that the king had the discretion to exempt himself from the laws puzzles Mcllwain. He thinks that the words '*leges et constitutiones et assisas*' used by Bracton refer only to administrative orders as Bracton notably did not include within the king's power consuetudo (custom) which at the time was the class of law that determined rights.[56] The king's authority pertained to the administration of the realm (*pertinet ad regni gubernaculum*). It was only within the sphere of government that the king could disregard the law as being merely the *vis directiva* of Thomas Aquinas or the moral inhibition implied in the *Digna vox*. In jurisdiction, the king was bound by his oath to proceed according to law. The Ancient Constitution may have been partly mythical, but its influence on politics was real.[57] Monarchs claimed their powers from immemorial custom and the rival theory of the king as a source of law by divine right did not emerge as a significant force until the claims of James I. When it did, it created decades of civil strife before being extinguished by the revolution of 1688.

The Ancient Constitution was essentially an incarnation of the constitutionalism of feudal kingships. In England, the law as local folkways became the common law through centralisation of the administration of justice by Henry II. The monarch was bound by this law and indeed owed his authority to this law. The courts were royal courts and judges served at royal pleasure. However, as the monarch was bound by oath and custom to proceed according to law, the royal courts had to do the same and in theory and practice (evidenced by the plea rolls surviving from the period) they were not directed by the royal will. [58] The highest court of all was the High Court of Parliament which was the *curia regis* of the Norman kings.

[54] Ibid.
[55] Ibid, 83.
[56] Ibid, 76.
[57] Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1967), 46.
[58] Ibid, 85-86.

It was the royal court in the old sense, the council that advised the monarch on matters of state and served as the highest court of justice. The idea of the law as custom left little need for legislative activity in the modern sense and whatever democratic element that was present in Parliament served only to safeguard customary rights. There is a weak diffusion of powers but a strong methodological separation of governance and adjudication. The law is associated not with the legislature but with the courts. Parliament's legislative power is rudimentary arising from its status as the high court. William Lambard wrote in 1591, 'It hath jurisdiction in such cases which have need of helpe, and for which there is no helpe by any Law, already in force'.[59] The rise of the House of Commons responsive to popular aspirations and the establishment of other superior courts combined to transform Parliament into a legislative assembly although it never lost its judicial power. Law as custom gave way to the still medieval idea of law that is alterable, but only with the consent of the people's representatives assembled in Parliament. Royal assent was necessary to make new law but the crown lacked the prerogative to make law unilaterally except in extraordinary situations and as authorised by customary prerogative. Conversely, the legislative power of Parliament did not extend to the administration of the realm which remained exclusively in the hands of the monarch.

The Ancient Constitution prevailed until the end of the 16th century despite the so called Tudor despotism of Henry VIII and Elizabeth. It drew great strength from the common law that had no parallel in feudal Germany. The reforms of Henry II and the establishment of the Courts of Common Pleas, King's Bench and the Exchequer were instrumental in the creation of an authoritative well documented body of laws applying throughout the realm. The subject's rights were no longer based on uncertain custom but on recorded precedents. There was also the spectacular irony of Parliament's powers being enhanced even as it succumbed to the will of the Tudor monarchs. The success that Henry had in bending Parliament to his will by force of personality rendered the formal usurpation of power unnecessary. Henry made Parliament do what was unimaginable at the time including the enactment in 1539, of the infamous *Statute of Proclamations* which clothed the king with the authority to override the laws of Parliament by royal proclamation. The Tudors left Parliament stronger than they found it. Stewart Fay

[59] Quoted in C H McIlwain, *The High Court of Parliament and its Supremacy* (1910) 124-125.

was not far off the mark when he wrote that 'Ironically enough, Henry the Despot must stand god-father to the modern doctrine of the supremacy of Parliament.'[60] Henry (and Elizabeth after him) by making Parliament the vehicle of his will, strengthened Parliament's own claims to sovereignty.

The unravelling of the Ancient Constitution and its causes

The seventeenth century crisis of the constitution was hastened by the Stuarts who unlike their Tudor predecessors relied for their ambitions on prerogative and not Parliament. However, even without the Stuart excesses, the Ancient Constitution was not likely to survive the religious conflict and the gathering tide of social and economic change in the country. The equilibrium of the Ancient Constitution was based on the stability of the agrarian society connected by the feudal tenancy system. The limits of *gubernaculum* were always imprecise but this was not a major problem in feudal conditions where the concerns of government rarely touched the daily lives of the people. The growth of commerce created a new property owning class and made the cities much more important in the political equation. The new economy expanded the range of private interests and also the government's regulatory role, bringing the spheres of *gubernaculum* and *jurisdictio* into frequent conflict. There was a need for a clearer constitutional demarcation of authority than the old separation of powers based on ancient precedent. A creative interpretation of the distinction between *gubernaculum* and *jurisdictio* could have led to the establishment of the right of Parliament to legislate generally on matters of public concern whilst reserving to the king the function of governing in the narrower sense of administering the realm and providing justice through independent courts. Such a resolution was prevented by the irreconcilable religious and political aims of the Stuart monarchy and the protestant majority in Parliament. The settlement was eventually achieved by the Glorious Revolution of 1688 but not before decades of often bloody strife. In the century leading to the revolution, the uncertainties concerning the limits of *gubernaculum* precipitated conflicts on four fronts – monopolies, prerogative courts, taxation and the use of the power of dispensation and suspension.

Monopolies

[60] S Fay, *Discoveries in the Statute Book*, (1939) 71.

A major confrontation regarding monopolies had erupted in the closing years of Elizabeth's reign. The grant of monopolies was a royal prerogative justified as a means of regulating national trade and as patents for promoting innovation but unsurprisingly it became a method of rewarding friends and raising royal revenue through sale to merchants. Parliament regarded the latter practice as one of unauthorised taxation. It was also clear that indiscriminate creation of monopolies was interfering with common law rights, of which Parliament regarded itself the guardian. These practices raised the classic problem of executive discretion to vitiate the law - a problem which throughout history invited the solution of separating government from the function of making law. So long as this prerogative remained within the bounds of its original purpose it did not appear to undermine the supremacy of the law. Perhaps more significantly, Parliament's perception of what constituted an interference with rights was changing with its new composition. Earlier Parliaments comprised mainly of landowners whose interests were largely unaffected by monopolies. The entry of wealthy traders into the national political life brought corresponding changes to Parliament and its areas of concern. Monopolies became a contentious issue. Elizabeth astutely realised that the prerogative itself was threatened and at the eleventh hour, as Parliament debated action, she proclaimed the cancellation of many of the offending monopolies and submitted others to judicial review. However, under James I and Charles I, the sale of commercial monopolies became a revenue source for the Crown whose financial requests were strenuously questioned and often denied by a hostile Parliament.

Prerogative courts

The incompatibility of the old prerogatives with new rights was evident on a wider scale in the use of prerogative courts. The king's prerogative was considered absolute in foreign relations, in matters of war and peace, and in times of civil turmoil and insurrection. The last mentioned subject was treated by the Tudors as sufficiently elastic to include matters which today would fall within the general field of law and order. It was in this area, that the *gubernaculum* made its greatest inroads into what may be described as the strict province of legislation. These incursions for the most part were not effected by royal decree but by the 'judicial' activity of the king's council, sitting in the starred chamber of Westminster Palace. The Star Chamber as it came to be known derived its jurisdiction, not from

the common law, but from prerogative. It was official in composition and its methods were inquisitorial, often involving torture. It was effectively a policing arm of the king restrained only by its own opinion of the limits of prerogative. The Star Chamber legislated into existence numerous offences against governmental authority and public order. Many present day offences against established authority, the processes of the law and the public tranquility originated in the Star Chamber. Treason and sedition were punished as direct challenges to royal authority. Counterfeiting was made an offence to safeguard the king's prerogative to coin money. Perjury was recognised to cleanse the judicial process and blasphemy for the avoidance of religious strife and the protection of the established Church. Even libels were punished on the grounds that it would protect the king's peace by removing a common cause of duelling. The religious counterpart of the Star Chamber was the Court of High Commission. Like the Star Chamber, the High Commission exercised the monarch's ill-defined prerogative, in this case her powers as head of the Church. Initially the legislative activity of these 'courts' and their unusual methods of dispensing justice caused no public concern. In fact, the Star Chamber proved popular for fighting crime and its willingness to punish even the powerful. So long as government occupied a narrow space summary justice was unlikely to interfere with property rights or religious freedom. It was inevitable though that the increasing sophistication of the state would bring the administration of the realm into conflict with rights. The first major collision occurred, not with proprietary rights, but with religious rights. The king considered the regulation of religion as a matter of high prerogative whereas for the puritans the religious freedom was not negotiable. The religious schism hastened the inevitable conflict between the uncertain prerogative and citizen's rights and freedoms. The Star Chamber and the High Commission were put to use in enforcing religious conformity and so became dreaded instruments of royal tyranny. The authority of the Star Chamber and of the High Commission combined the power to make law, to adjudge persons, and to execute sentences, the very hallmark of tyranny.

Parliament abolished the Court of High Commission in 1640 and the Star Chamber in 1641 and prohibited the re-establishment of similar courts. The prohibition was confirmed later by the Ecclesiastical Causes Act, 1661. However, when James II revived the Court of High Commission with very similar

powers it was evident that the monarch did not hold himself bound by Acts that curbed the prerogative.[61] The constitutional precedents did not support Parliament's power to abrogate prerogatives or to define its boundaries. The court proceeded to implement the king's religious policy in disregard of legislation. Henry Compton, the Bishop of London, was suspended by the court for refusing to discipline summarily John Sharp accused of giving anti-Catholic sermons[62] and Dr John Peachell, the Vice-Chancellor of Cambridge was dismissed when the university senate refused to admit Alban Francis, a Benedictine Monk, to a higher degree.[63] In each case, the charge concerned disobedience of royal instructions and not the law of the land.

Extra-parliamentary taxation

The next major area of contention regarding the prerogative concerned extra--parliamentary taxation. This particular use of the prerogative was partly a reaction to parliamentary intransigence. If the uncertainty of the limits of prerogative power invited royal inroads into the domain of the law, the converse proved true of Parliament's power to control the king's finances. In the 12th chapter of the *Magna Carta* King John had agreed that 'no scutage or aid shall be imposed on our kingdom unless by common counsel of our kingdom except for ransoming our person, for making our eldest son a knight and for marrying our eldest daughter once; and for them there shall not be levied more than a reasonable aid'. This rule requiring the consent of the barons (and later the commons) for taxation was one which no monarch successfully defied. In feudal conditions the king was expected to finance government through private revenue. Public authority was akin to private possession.[64] The king's revenue was derived from his personal wealth and from feudal dues paid to him as the real and ultimate owner of all land in the kingdom. 'The King enriched himself at the expense of his lords and the lords recompensed themselves at the expense of their tenants'.[65] A demand made outside the feudal contract was a violation of rights and therefore required consent of the barons for satisfaction. This system was complemented by the organisation of government which left significant responsibility for local administration and law enforcement in the hands of the local manors.

[61] For the terms of the two commissions, see *Compton's Case* St Tr XI 1123, 1131-1155.
[62] *Compton's Case* XI ST 1123
[63] XI ST 315
[64] J R Strayer, 'Feudalism in Western Europe' in R Coulborn *Feudalism in History* (1965) 17.
[65] A Babington, *The Rule of Law in Britain form the Roman Occupation to the Present* (1978) 53.

With the centralisation of government and the disintegration of the feudal system owing to economic causes, the royal revenue rarely matched expenditure. When England became a commercial and political power in Europe with inevitable military involvements, taxation became a regular necessity. Taxation was a clear violation of proprietary rights and hence required consent. But the right to withhold consent was hollow without the right to question the need and purposes of taxation. The more dependent the king became on Parliamentary subsidies, the more he exposed the government to scrutiny. he Tudors obtained subsidies from Parliament by persuasion and intimidation. In contrast, irreconcilable differences between king and parliament became the order of the Stuart period. James' neglect of the Protestant cause in Europe, his attempted rapprochement with Spain and his policy of toleration at home were matters which the puritan majority in Parliament found impossible to ignore although they were within the province of the prerogative. James' Spanish policy also affected the Indies trade, a prize sought by English merchants. (Masse 1968:108) Nor did James help his own cause by alarming Parliament with his claims to absolute sovereignty. These claims were rejected by Parliament in the *Form of Apology and Satisfaction*, and in the protestation of 1610, Parliament asserted its privilege to debate any matter concerning 'the public and his right or state'. Parliament, as yet without permanent existence, was summoned and dismissed at royal will. As the mutual mistrust grew, the king sought to govern without Parliament, and Parliament whenever summoned, resorted to the practice of demanding the redress of accumulated grievances before discussing subsidies. Parliament was gradually perfecting its capacity to frustrate policy. The king's response was to turn to the prerogative as a means of raising revenue. These measures, of which the most notorious were the Impositions, created further grievances and completed the vicious cycle which was eroding the balance of the Ancient Constitution. The pattern continued in the reign of Charles I as the government sought independence from Parliament through prerogative action. Tonnage and Poundage, the forced loan, free billeting of troops and the exaction of ship money in peace time entered the Parliament's growing list of grievances. The problem of the uncertain limits of the prerogative concerning revenue was illustrated in *Bates Case, Darnel's Case* and the *Ship Money Case.*

In *Bates' Case*,[66] the Exchequer Court upheld the legality of the infamous Impositions (charges added to customs duty without the authority of Parliament), reasoning that customs duties concerned trade and foreign relations and so were within the exclusive preserve of the king. *Darnel's Case*[67] and the *Ship Money Case*[68] were decided on technicalities though they each involved a flagrant abuse of the prerogative. Darnel, who was imprisoned for refusing to pay the forced loan, was denied the Habeus Corpus on the ground that the court could not look behind the king's writ. Hampden was refused relief against the exaction of ship money in peace time on the ground the court had no competence to question the king's judgement that an emergency existed. These cases demonstrated that the prerogative was operating in areas and in ways that were no longer compatible with the new expectations in a changing society.

Dispensation and suspension

An effective weapon in the king's armoury was the power of dispensation which had been left unaffected by the restoration settlement. This power was generally considered limited to cases where dispensation had no effect on the rights of third parties or the public interest.[69] However, its amplitude was demonstrated when in 1686 the Kings Bench upheld the power to dispense with the *Test Act*. The *Test Act* disqualified from civil and military office any person who failed to take the oaths of Supremacy and Allegiance and had not received the sacrament of the Church of England. The king used his power of dispensation to appoint Roman Catholics to public office. When Edward Hales, the Lieutenant of the Tower became a Roman Catholic and the king gave him dispensation from the Test Act, he was prosecuted and convicted at the Assizes but was acquitted by the King's Bench. In his judgment, the Chief Justice overruled the reservations on this power expressed in *Thomas v Sorrel* and in the strongest possible terms endorsed the king's power to dispense with the law. The king, he proclaimed was a sovereign prince and the laws of England were his laws. Therefore it is 'an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases, and upon particular necessary reasons … and of those reasons and those necessities, the king himself is sole judge: and then, which is consequent upon

[66] Mich. 4 Jac., Lane, 22
[67] III ST 1.
[68] III S 825.
[69] *Thomas v Sorrel* [1674] Vaughan 330.

all'. He insisted that 'this is not a trust invested in, or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet was taken from them, nor can be'. [70]

A clearer rejection of the principle of the ancient separation of powers was hardly possible. The ruling emboldened James to use the wider and more contentious prerogative of suspension. In April 1687 he issued his first Declaration of Indulgence which effectively suspended the penal laws against Catholics and dissenters. In April 1688, he re-issued the Declaration and ordered it to be read from pulpits. When seven bishops protested this measure in a petition to the king, they were accused of challenging the royal authority and prosecuted for seditious libel. The scope of the prerogative was not before the court as the main issues were whether the subject could question the king's action outside Parliament and whether the bishops acted with libellous intent. Of the four judges, only Justice Powell ventured to deny the existence of the prerogative and to place the case squarely on that issue. A partisan London jury acquitted the bishops but the case failed to overturn *Gedden v Hales*. [71]

The king's prerogatives as the head of the church survived the restoration and remained critically important to the main political issue of the time which was the independence from Rome. James intended to restore in the longer term the episcopal authority to the Roman church Roman Catholics, and in the shorter term, to ensure ecclesiastical conformity with his religious policy. The control of the clergy was also crucial for the reason that the great centres of learning, which alone supplied credible candidates for high office, were ecclesiastically governed and therefore under Protestant control. James therefore set up a Court of High Commission with power to discipline all clergymen and academics and to make and re-make the statutes of universities and colleges.

The threat posed by the legislative prerogative was accentuated by the absence of constitutional protection of judicial independence. Judges served at the king's pleasure, a fact which had great bearing on the outcomes of politically significant cases as illustrated by the sacking of Francis Pemberton. As Holdsworth observed, 'it was quite certain that a judge, who was both learned and honest, would hold his

[70] *Gedden v Hales* XI ST 1195 cited from W C Costin and J S Watson, *The Law and Working of the Constitution: Documentsn1660-1914* (1952) vol, 258.
[71] *Seven Bishop's Case* XII ST 183. On the partisanship of London juries, see W Holdsworth, *A History of English Law* (1924) vol IV, 213.

seat on the bench by a very precarious tenure; and that, in cases of great importance, very extraordinary means would be taken to ensure a favourable decision'[72]. Pemberton who had shown judicial restraint in the trial of Lord Russell was considered unreliable for the royal cause in the *Quo Warranto* proceedings against the City of London. He was dismissed and Saunders, who had drawn up the crown's pleading in that case, was appointed to hear it!

In the prelude to the civil war, Parliament led by Pym rolled back prerogatives by abolishing prerogative courts and prohibiting many of the extra parliamentary revenue practices. After Charles' defeat in the civil war, the pendulum of power swung to Parliament with the abolition of the monarchy and the rule of the Rump. Parliament, or what remained of it, exercised both the legislative and executive powers. Royal excesses gave way to parliamentary excesses. Public disenchantment led first to the establishment of the Protectorate and eventually to the restoration of the monarchy with those powers left unaffected by Pym's sweeping legislation. The remaining royal powers, however, were substantial and undefined and hence the causes of instability persisted to the Glorious Revolution of 1688.

The fundamental weakness of the constitution, exposed by the events of the sixteenth and seventeenth centuries, was its lack of an underlying abstract principle - a principle with sufficient generality which could resolve the new conflicts. The constitution was cast in the feudal mould adapted to the protection of rights and liberties in feudal society. It remained anchored to the past by precedent even as the structure of society changed. The final collapse of the Ancient Constitution does not diminish the significance of its historical achievement. At a time when nation after nation in Europe succumbed to absolute rule, the Ancient Constitution of England ensured that authority remained subject to law.

Revolution Settlement and the restoration of the separation of powers

The new constitutional order that emerged from the Revolution of 1688 is considered to have established the supremacy of Parliament. Yet, Parliament's supremacy was established only in the field of law making. The revolution's greater achievement was

[72] Holdsworth, n 67 above, 503.

the establishment for the first time in modern history of a tripartite separation of powers that substantially satisfied both the diffusion thesis and the methodological thesis of the doctrine. (Cromwell's Instrument of Government of 1653 arguably was a tripartite division but was never fully implemented and ended in military government in 1655.)

The revolution of 1688 seems in hindsight to have been unavoidable. Certainly it was the only means of removing the cancer that had invaded the polity. The basic problem of the Ancient Constitution was that prerogative powers were ill-defined and in the context of the religious division and the circumstances of the post-feudal society their continued exercise by the king was untenable. It was not a problem that could have been legislatively resolved even in the unlikely event that the king assented to such legislation. James II himself had demonstrated that, when it came to the exercise of prerogatives sanctioned by ancient usage, the legislation approved by his predecessors did not stand in his way. The constitutional crisis could have been resolved only by a decisive revolutionary act. As McIlwain observed, 'Whether right or wrong the judgements of the courts had to be reversed by the nation, if not by the courts, or English liberty would have been lost entirely and possibly for ever'.[73] The revolutionary act was effected by the departure of James II, and the enactment of the Bill of Rights by the Convention Parliament. The convention enthroned William and Mary on its own terms. Despite the declaratory language of the Act, it was clear that the monarchs were appointed and the succession settled in violation of the existing law of succession and that their powers had been redefined by political act. It was a true Kelsenian revolution establishing a constitution derived from a new Grundnorm.

Legislative power

Apart from settling the succession to the throne, the Bill of Rights abolished the powers of suspension (s.1) and dispensation (s.2). The Court of High Commission and all other commissions and courts of like nature were declared 'illegal and pernicious' (s.3) and extra-parliamentary levies were declare illegal (s.4) The freedom of speech in Parliament was enshrined bringing to an end the danger of prosecution or civil suit for criticising the monarch. (s.9) Finally there remained the question of the king's power to summon and dismiss Parliament at will,

[73] McIlwain n 14 above, 128.

which had been used to defeat legislative initiatives and even to rule without Parliament. The Bill of Rights declared that 'for the Redresse of all Grievances and for the amending strengthening and preserving of the Lawes Parlyaments ought to be held frequently'. (s.13) This principle was given practical effect by the Triennial Act, 1694. The Bill of Rights thus established a clear division of powers between the executive and the legislature, by eliminating the uncertainties of the Ancient Constitution.

Judicial power

The insecurity of judicial tenure and the resulting exposure of the courts to royal manipulation was a significant cause of the conflict over the prerogatives. The crown won most of the judicial battles over prerogatives. The dismissal of the fiercely independent Chief Justice Sir Edward Coke by James I in 1616 made this painfully clear. Charles II followed this precedent in dismissing Chief Justice Crewe of the Kings Bench in 1627, Chief Baron Walter of the Exchequer in 1630, and Chief Justice Heath in 1634. The separation and independence of the judiciary from the executive was completed by the *Act of Settlement 1701* that established the constitutional principle (since adopted by most constitutional democracies) that judges do not serve at executive pleasure and the may only be removed by the representative assembly for good cause. However, the Bill of Rights addressed several legal deficiencies that allowed the crown to use the judicial process for its political ends. The judicial practice of requiring excessive bail often used as a means of nullifying the protection of the *Habeus Corpus Act* was made illegal as were the imposition of excessive fines and the infliction of cruel and unusual punishments. (s.10) James II had resorted to the remodelling of municipal corporations, not only to influence Parliamentary elections but also to ensure the empanelling of juries loyal to the crown. The Bill of Rights declared that 'Jurors ought to be duely impannelled and returned and Jurors which passe upon Men in Trialls for High Treason ought to be Freeholders'. (s. 11) The immunity of jurors from prosecution had been established earlier in *Bushell's Case* where Chief Justice Vaughan established for all time the principle, that jurors are the sole judges of fact and therefore no judge can find them guilty of perjury by erroneous decision.[74] The crown practice of intervening in criminal proceedings by promising the reimbursement of fines and

[74] VI ST 999.

forfeitures before conviction was prohibited by s.12. The most crippling procedural and evidentiary obstacles faced by defendants in political trials were removed by the *Trial of Treasons Act 1696*.

Separation of Executive and legislative powers

The provisions of the revolutionary settlement addressed specific abuses of the prerogative, and decreed specific solutions. Cumulatively, they created a pronounced separation of the power to administer the realm, the power to make law and the power to dispense justice. The power of government (*gubernaculum*) remained with king in both law and fact. The power to make laws resided in Parliament. The judicial power vested in royal courts that were now royal in name and appointment but had independence from Crown and Parliament.

The Crown was undoubtedly pre-eminent in foreign policy but depended on Parliament to finance its conduct. He was left many prerogatives but almost none of a legislative character. With respect to domestic affairs this position could have left him with nothing but a police function. But that was not the intention of Parliament or of the nation. As Maitland observed, 'It was no honorary president of a republic that the nation wanted, but a real working, governing king - a king with a policy - and such a king the nation got'.[75] The royal executive was nothing like the current form of cabinet government. It was not until the Whig administration of Sir Robert Walpole that ministers were drawn from a single party and even thereafter exceptions occurred. How did the king conduct the government without formal legislative powers? There is always an area within which state policy could be made and implemented without transgressing rights but increasingly, the conduct of public policy required the adjustment of established rights and duties and the creation of new ones by Parliament. Above all, policy had to be funded by Parliament which alone could impose taxes and appropriate revenue. Given the extinction of the legislative and financial prerogatives, Parliamentary cooperation became not an occasional but a continuing necessity. The monarch retained the power to refuse assent to legislation and William III employed this prerogative on several important occasions. However it was last used by Anne who withheld assent to the Scotch Militia Bill in 1707. The great royal asset on the contrary, was the

[75] F W Maitland, *The Constitutional History of England* (1911) 388.

prerogative to appoint, direct and dismiss officers of the state, to create sinecures and dispense government contracts. All of this carried the power to dispense patronage with which he could persuade parliamentary leaders to support policy. Thus, although the stick had been wrested from the king's hand, the carrot remained with him. Lovell writes 'The extent to which the ruler was willing to allow a politician to allocate jobs and contracts made all the difference in the world to the loyalty he could command from his supporters, to his power as a parliamentary manager and hence as a minister. Without royal confidence, therefore, a politician had little hope of building a following in Parliament to support his claims to office'.[76] The officers of the state therefore had to deliver Parliamentary support to the king and in that respect the king arguably had a measure of control over legislation. But that control was far removed from the powers of suspension, dispensation, proclamation and political trial which the king previously enjoyed. Not until the electoral reforms and adult franchise did public opinion completely displace the king's confidence as the determinant of political power. What did this mean to the separation of executive and legislative powers? The Crown's *de facto* capacity to persuade parliament in its legislative function moderated the organisational separation of these two organs of government. However, the two powers remained methodologically separated. The focus of the methodological thesis of the doctrine of separation of powers is not on the separation of the people who exercise powers (which is the focus of the diffusion thesis) but the distinction of the modes of legislation and executive action. Diffusion is the best way of achieving this object but is not the only means. The Greeks and Romans were partial to mixed government, in which the sharing of each power among the different classes was considered to prevent one class gaining a monopoly of all powers. The fact that the ruler was among the legislators was not considered fatal to the distinction between lawmaking and government or to the rule of law. Nevertheless, it had also never been doubted that where the ruler could unilaterally legislate without reference to any other body or assembly, the distinction between law and government is likely to disappear.

There was hardly a doubt in England as regards the distinction between the Crown and the Crown in Parliament. The Crown in Parliament did not legislate in the

[76] C R Lovell, *English Constitutional and Legal History: A Survey* (1962) 419.

manner in which the old monarch legislated by prerogative. It was evident at least from the latter part of Elizabeth's reign, that on matters of vital concern to the general populace or perhaps more accurately, to those sections of the public represented in Parliament, the monarch had little chance of persuading the Commons, whether by threat or by promise. This was why the Stuarts turned to extra-parliamentary devices of lawmaking and taxation. What the Tudors and the Stuarts could not do with their great prerogatives, the less endowed William and Mary and the Hanoverians after them certainly could not. The enormous patronage on offer and its unreformed composition could not alter the character of Parliament. When the monarch influenced Parliament, she did so as legislator and not as dictator. The Crown decreed but the Crown in Parliament legislated. The monarch as the supreme executive was subject to the law.

Relative to modern times, statutes of general character were few in the eighteenth century. The infrequency of such enactments did not reflect a misunderstanding of the nature of legislation. Legislation on the modern scale was simply not necessary. By the same token, what appears to be a disproportionate share of statutes dealing with particulars was not an indication of Parliament's desire to engage in day to day government. Rather, it was evidence of Parliament's continuing mistrust of discretionary government and its desire to ensure that the law of the land was not disturbed except by its own action. The fact that this concern led to unnecessary incursions into the executive province was not indicative of an intention to subvert the separation of executive and legislative powers but rather, reflected Parliament's excessive caution in preserving it.

The separation of powers under parliamentary government

The nineteenth century has been described as the classical period of the British constitution. The Reform Acts of 1832, 1867 and 1884 expanded suffrage (though not to women) and eliminated the infamous ‘rotten boroughs’ and ‘pocket boroughs’. The capacity to corrupt the electorate was drastically reduced. While the monarch was the real executive, Parliament could call ministers to account, impeach them or otherwise force them out of office. Removal of ministers did not disrupt the administration of the realm. There was a real separation of powers between the executive monarch and the legislature and each balanced the other. The independence of the judiciary had been secured by the *Act of Settlement 1701*. This is the constitution that Baron de

Montesquieu observed and described in his *The Spirit of the Laws* as the epitome of a state where liberty is secured by the tripartite separation of powers. Montesquieu's account was profoundly influential in the founding of the US Constitution to the extent that Madison in *The Federalist No 47* spoke of him as 'the oracle who is always consulted and cited' with respect to the doctrine of the separation of powers and added that 'the British Constitution was to Montesquieu, what Homer had been to the didactic writers on epic poetry'.[77] It is fair to say that the fundamental features of the classical constitution of England were entrenched in the written US constitution with the notable difference that the chief executive was elected.

Three factors helped stabilise the classical constitutional model in the United States. One was the formal adoption of a written constitution that articulated the limits of the powers of each branch of government and which specified a special procedure for amending the constitution. The second was that the executive powers vested in a person elected and removable by the people. The third was the early assertion by the Marshall Court of the power of judicial review over legislation and by implication over executive actions.[78] The Supreme Court thereby established itself as the protector and enforcer of the constitution. The great controversies of its jurisprudence notwithstanding, the Court has succeeded in maintaining the fundamental features of the constitution to this date.

In England, the *Bill of Rights 1688*, the *Act of Settlement 1701* and associated legislation did not add up to a written constitution. While the victorious Parliament was happy to place strict limits on the executive power, it was not about to set down the limits of its own power. It was doubtful for historical reasons that the courts would have ventured to strike down legislation. Even if they were so inclined, they had no frame of reference by which to judge legislative excess. Yet, the separation of powers remained remarkably stable throughout the 19th century owing to the capacity of the Crown and Parliament to counter-balance each other. It was though a precarious balance. If one side was weakened the balance would be lost and the system was bound to gravitate to a new equilibrium. The likelihood was that the balance would tilt from the unelected monarch to the elected House of Commons..

The catalyst for the shift of power was the Great Reforms. The electorate

[77] A. Hamilton, J Maison and J Jay *The Federalist Papers* (2nd ed, 1966) 139.
[78] *Marbury v Madison* 1 Cranch 137 (1803)

became much too big to be manipulated by patronage. With mass democracy, politicians had to sway the electorate with popular promises. In order to make and deliver on promises politicians had to combine into disciplined parliamentary factions or parties. As Crown patronage lost its electoral significance the direction of responsibility was reversed. Ministers of the Crown, of necessity, had to be drawn from the parties that commanded majority support in Parliament. The convention was established that the ministry which lost the confidence of the Commons had to resign, Parliament for the most part, could not express its lack of confidence in the ministry without actually ending the government's life and often that of the Parliament itself, as it would usually require a general election to produce another viable government. This situation meant that only political parties that could secure the unquestioning obedience of its parliamentary group had any chance of forming an effective government. In one of the great ironies of political history the growth of Parliament's legal power to remove a government from office actually reduced its political power to hold a government to account.

The executive branch gained a degree of power over the legislature not enjoyed even by the Tudor monarchs. It became the master of the legislative agenda. The key difference of course is that new executive unlike the old can be removed by the electorate. Although the idea of collective responsibility of a government to a parliament it controls is a laughable fiction, a government's responsibility to the electorate is real and palpable. This is the case in stable parliamentary democracies despite all the imperfections of electoral systems. The greatest casualty of these developments is the separation of executive and legislative powers regarded in classical theory as the cornerstone of the rule of law. Under the new constitutional equilibrium, the executive not only has control over laws passed in Parliament but also can and does make Parliament delegate to the executive branch vast amounts of legislative and quasi judicial powers. Ironically the very notion that governments are responsible to elected parliaments became a justification for entrusting arbitrary powers to the executive branch. In the case of *Victorian Stevedoring and General Contracting Co v Dignan*, the High Court of Australia upheld Parliament's power to enact Henry VIII Clauses infamously used by Henry VIII to confer upon himself poer to make law by proclamation notwithstanding Parliament's own laws to the contrary. Justice Evatt stated that ministerial responsibility to Parliament militates against the

contention that Parliament alone may exercise legislative power.[79] It has been always accepted as unavoidable and unobjectionable for the executive to make subordinate legislation under the authority and subject to principles laid down by Act of Parliament. However, under the new constitutional order, the executive increasingly gained power not only to determine policy and principle outside Parliament but also to make law for the particular case without the guidance of principle.

The new constitutional equilibrium is an apparent negation of both the diffusion thesis and the methodological thesis of the separation of powers doctrine in so far as it concerns the executive-legislative divide. However, the dire consequences for liberty and constitutional government feared by scholars have not come to pass. The reasons for this are many. Some are legal and others social and economic. The legal reasons can be stated with confidence but social and economic causes are speculative and remain to be investigated by the methodologies of social and economic sciences.

The steady expansion of judicial review of executive action is the most visible legal cause that can explain the arrest of the feared descent to despotism. Administrative law has seen a phenomenal growth through the 20th century. Through doctrines such as patent unreasonableness, procedural fairness, fundamental justice, legitimate expectations, constructive malice, non-discrimination and many other refinements of the traditional grounds of judicial review, superior courts in common law countries have tamed the executive discretionary power to an extent unimagined by 19th century jurists. Although constitutional principle does not allow courts to make administrative decisions themselves, they have entered the administrative arena in the virtual sense to limit the excesses of executive discretion. In Australia, the High Court has derived limitations on power from the judicature provisions and the democratic structure of the constitution.

A probable second cause relates to efforts of parliaments to intensify the review of administrative actions by the simplification of judicial remedies and the establishment of administrative review tribunals. Australia's enactment of a package of remedial laws including the *Administrative Decisions (Judicial Review) Act 1977* (imitated by State legislation) and the *Administrative Appeals Tribunal Act* provided a template for similar initiatives across Commonwealth jurisdictions. More recently,

[79] (1931) 46 CLR 73, 114.

Australian legislatures have awoken to the need to discipline themselves. Consequently they have enacted laws that set rigorous standards for the making and approval of executive legislation. (See for example, *Subordinate Legislation Act 1989 (NSW),* particularly s.9, the *Legislative Standards Act 1992 (Qld)* and the *Legislative Instruments Act 2003 (Cth)*). The Queensland Act seeks to establish a set of 'fundamental legislative principles … relating to legislation that underlie a parliamentary democracy based on the rule of law' and prescribes precautions that the drafters of legislation should observe in preparing bills delegating power to the executive branch. (S. 4). The Commonwealth legislation establishes statutory machinery to regulate the making, registration, parliamentary scrutiny and periodic repeal of legislative instruments which are rules made by the executive branch under delegating legislation. The effects of these laws are mainly directory and they do not formally change the constitutional position. It is also too early to measure the impact of these laws on governance. What is clear is that the damage to the rule of law by the steady fusion of legislative and executive functions through delegated power has been recognised by governments, judges and legislators. This is a constitutional development of great significance.

A third cause is the steady deregulation of economies over the past two decades in the common law developed countries. As the state withdraws from sectors of the economy, contract takes over. The power of determining rights and duties under the law passes from the state to the parties themselves and in cases of disputes to private arbitrators and the courts. The process leads to the restoration of the old division where the legislature (under executive leadership in parliamentary systems) laid down the general rules of the game, the executive restrained itself from arbitrary intervention in individual transactions and the judiciary resolved disputes that the parties themselves could not, in that process declared clarified and adapted the law to changing conditions. This transformation has happened piecemeal and in some areas of social and economic life, state arbitrariness has actually increased. Laws on conservation, affirmative action and various forms of speech offer examples of the opposite trend. Even so, economic forces cannot be discounted as a cause of the stabilisation and the revival of the rule of law and the separation of powers.

What then is the current constitutional equilibrium in common law parliamentary systems? The picture we see is of a government with vast formally

vested powers with respect to both legislation and administration. The potentially catastrophic effects of such fusion of powers is checked by an active judiciary and a matrix of institutions (political parties, media, interest groups and such like) that keep governments under intense scrutiny. In Australia, the Senate has also provided balance to executive pre-eminence. The evolution of parliamentary democracy in England and the colonies occurred in denial of the fusion thesis of the separation of powers doctrine. The maintenance of the rule of law in the new equilibrium owes much to the practical survival of the methodological thesis despite continuous pressures generated by an executive branch fired by the exigencies of electoral politics. The methodological thesis has a precarious hold without the aid of the fusion thesis. Yet hold it must if constitutional government is to survive in parliamentary democracies. In 1958, Professor Arthur Goodhart wrote a stirring but all too neglected essay in defence of the unwritten limitations on the powers of Parliament. It was in essence a defence of the methodological thesis. I can do no better than to close this essay with his words.

> I believe that its is true to say that the legislative powers of Parliament are limited by certain fundamental principles which are universally accepted even though there is no other body in the Constitution which can prevent Parliament from exceeding these limitations. It is in the defence of such principles that men have been prepared to die in the past and will be prepared to die in the future.[80]

[80] A Goodhart, 'Rule of Law and Absolute Sovereignty' (1958) 106 *University of Pennsylvania Law Review* 954.