2.2.2 France: Strict Separation Yet with a Judiciary Resurgent?

Although England may have provided inspiration and the foundations for the doctrine, it was in France and the US in the late eighteenth century where the separation of powers first took actual constitutional form. And while the US Constitution has endured more or less intact in its original form—albeit with the addition of some 21 amendments—the French constitutional order has undergone since 1789 multiple phases and revisions, each having its own particular constitutional form.[127] Beginning with the French Revolution and the Declaration of the Rights of Man in 1789, through the Napoleonic regime, the abortive restoration and the "Second Empire", the "Third Republic" and the World Wars, it might be said that France has only now begun to enjoy a relatively stable, enduring constitutional settlement under the 1958 Constitution, the "Fifth Republic".

French constitutional history in its various revolutionary and evolutionary phases leading up to the present Fifth Republic, revolves principally on an executive–legislative axis. As of 1791, the courts of ordinary jurisdiction were effectively disengaged from the constitutional and political construct.[128] Instead of a *trias politica*, with the courts offering some measure of checks and balances, the French constitutional order was until 1958 very much a diarchy. Attempts at a counterbalancing of powers between the two arms of government proved unsuccessful. The enduring constitutional and political difficulties to find a workable, sustainable equilibrium between the executive branch and the legislative produced continual administrative and legislative gridlock. Each of the constitutional periods reflects the formal dominance of the one or other branch, and the attempts by the other to break or balance that dominance.[129]

So the continuing success of the 1958 constitutional settlement in delivering relative political and constitutional stability has attracted much attention and study.[130] At its widest, that success has been attributed to a consolidation of executive power under Presidential management, and a rationalisation of the parliamentary system: a "*régime parlementaire à correctif présidentiel*".[131] This follows from the French experience during and between the two World Wars. The French position during that time was perceived as weakened by lack of decisive, central (presidential) power, able to focus and coordinate the great acts of state.

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[127] The constitutional periods are as follows (simplifying by omitting the various intermittent constitutional phases within each bloc): monarchical deconstruction (1789–1791); First Republic (1793–1804), First Empire (1804–1815); Restoration (1815–1848); Second Republic (1848–1851); Second Empire (1852–1870); Third Republic (1870–1940); Occupation and Reconstruction (1940–1946); Fourth Republic (1946–1958); and Fifth Republic (1958–present). See generally, e.g., Favoreu et al. 2008; Chantebout 2008; Ardant and Mathieu 2008 and Gicquel and Gicquel 2008.

[128] Favoureu et al. 2008, pp. 405–406, and for recent English language examinations, Lassser 2004, and Neuborne 1982.

[129] Following Favoureu et al. 2008 and Gicquel and Gicquel 2008.

[130] As noted in Gicquel and Gicquel 2008; and see Vile 1998, and Bell 2008.

[131] Jean-Claue Colliard, cited in Gicquel and Gicquel 2008, p. 486.

In particular, the French constitutional arrangements up to the present were seen to tie politics too closely to the actual administration, such that the business of governing was often impeded by a government subject to parliamentary gridlock, and its inherent weakness to the political process. Hence the objectives of General de Gaulle and the postwar reformers may be described as a shift of constitutional perspective, moving the Fifth Republic to a form of constitutionalism which detached politicking from the constitutional business of governance.

The 1958 Constitution contains the expected basic constructs for the separation of powers, beginning with its invocation in the preamble of the 1789 Declaration of the Rights of Man. This, in turn, provides at Article 16 that, "Every society in which rights are not guaranteed, nor the separation of powers delimited, has no reason for a constitution."[132] It then divides the organs of state into the government, led by the Prime Minister, having charge of the administration of the state (Articles 20, 21, 49), Parliament (composed of the National Assembly and Senate), passing legislation and supervising government action (Articles 24, 34, 53, 67 and 68) and an independent judiciary (Article 64). Overarching all three is the President, as Head of State (Article 5), who appoints the Prime Minister (Article 8), conducts foreign affairs and the negotiation of treaties (Articles 14, 15, 52) and dissolves Parliament (Article 12).

The Constitution also contains a number of express and unexpressed checks and balances. Upon recommendation of the government or joint resolution of Parliament, the President may put to public referendum proposed changes to the organisation of or delivery of public services, or other economic, political, or social reforms (including those occasioned by a proposed treaty) touching upon them. The President chairs the Cabinet (Article 9) and in due crisis circumstances, may exercise emergency regulatory powers, subject in turn to consultation with and review by Parliament and the Constitutional Court (Article 16).[133] The government, too, has legislative powers under Article 38, whereby it can issue "*ordonannces*" in domains otherwise reserved for statute, providing Parliament gives its authorisation in advance for a certain period, and thereafter duly ratifies the "*ordonannces*".[134] This in effect legislates by incorporation and confers on the ordnances the standing of a statute insofar as their subject matter falls within legislative competence; otherwise they have the character of regulations.[135] Failing ratification, they lose force and effect.

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[132] "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la separation des pouvoirs determine, n'a point de constitution."

[133] Invoked once to date, by De Gaulle during the Algerian Crisis.

[134] Expressly (typically in a "non-obsolescence Act"), or implicitly/by necessary implication: see, e.g., 72–73 DC (29 Feb. 1972), (implicit); 86–224 DC (23 Jan. 1987) (implication).

[135] See e.g., 62–20 DC (4 Dec. 1962) (election law); 72–73 DC (29 Feb. 1972) (salaried employees); 77–101 DC (3 Nov. 1977) (reform of expropriation laws), and 96–179 DC (14 Oct. 1999) (immigration control).

2.2.2.1 Régime parlementaire à correctif presidential?

The reference to "legislative competence" points to one final peculiarity in the new checks and balance system of the 1958 Constitution for the legislative–executive axis. Article 34 prescribes what subject matter falls within the legislative competence of Parliament—that which may form the content of a statute. Outside this statutory domain, legislative instruments have the character of secondary legislation, of regulations (Article 37). Delimiting legislative jurisdiction, while essential for a federation, seems strange or out of place for a unitary state such as France. But in the French situation, it represents the change in perspective from raw parliamentarism to a constitutionalism mediated by law. This bears upon the separation of powers in two ways. First, it adds a sort of explicit delimitation of relevant functions to the extant institutional separation. The message is clear: legislating, making primary law, has its proper domain; all else is administration. Second, and more significantly, it confirms the resurgence of the judicial arm as an effective third branch, and the reconstitution of an effective, real *trias politica.* While the sanctity and inviolability of a statute is preserved (and thus the primacy of the legislative branch), secondary law—regulations or other forms of regulatory instruments (such as ministerial circulars)—is owed no such deference and may be reviewed by the administrative courts (headed by the Conseil d'Etat) for conformity with existing statutes and certain "general principles of law".

2.2.2.2 Judicial Checks and Balances

One of the consequences of a vigorous and doctrinaire approach to the separation of powers in the late eighteenth century was to have separated fully the ordinary courts from the other branches of government. Since the 1791 *Law on Judicial Organisation*, the selection, training, and professional career of the judiciary has been independent of and apart from any overt political connection and involvement.[136] This entailed not just political interference with the judiciary and judicial decision making, but also its converse: the judiciary was to have no role in the making of law. The courts should not have the power, so the inheritors of Montesquieu's theoretic legacy maintained, to override or supplant the legislative will of the people, as expressed through their elected representatives and government. What may seem a rather severe and restricted view of the role of the courts was nevertheless very much fuelled by the conduct of the courts themselves up to the French Revolution. They hampered and delayed reform measures, playing off the monarchy against the legislature and "will of the people", and seeking all the while to maintain their own (political) authority.[137] Thereafter

[136] Lasser 2004 and Neuborne 1982, p. 384ff.

[137] See, e.g., Cappeletti 1985 (as well as Cappeletti 1980). Vile 1997, Chaps. 7–9 reviews clearly and thoroughly the historical aspects.

isolated and restricted in function, the ordinary judiciary was unavailable to temper the tensions between the other two branches, nor arbitrate their differences as in the US, nor check government acts against citizens.

Steps to subject the administration to the rule of law—beyond leaving it to its own recognisance—were taken in 1872 with the establishment of the tribunal (judicial) division of the Conseil d'Etat. Already in existence since the Constitution of 22 Frimaire an VIII (1799), the Conseil d'Etat acted as an advisory body to government, and whose decisions were not mandatory. From 1872, the Conseil d'Etat could adjudicate administrative law matters and have its decisions enforced.[138] Problems of delay and backlog led to institutional reforms in 1953, with the creation of administrative tribunals of first instance, and then in 1988, of appeal tribunals. The Conseil d'Etat sits atop this judicial hierarchy in administrative law, as well as retaining some trial level jurisdiction for certain matters. In terms of the separation of powers then, the administrative law courts led by the Conseil d'Etat, represent a significant power in the checks and balances equation.

The administrative courts have jurisdiction to determine whether government acts are *ultra vires*. That is, whether the government official or body acted within and pursuant to a statutory mandate, or whether it exceeded those limits, or had misapplied those powers it did have, or caused undue damage in their application.[139] The acts span the range of administrative deeds to government regulations. Underlying this is, as may be expected, the principle that the executive branch may not act without statutory backing and authorisation, or some express constitutional basis. Executive actions, including any lawmaking powers, are subordinate to the legislative (and constitutional) framework. Nevertheless, the French administrative courts do not have jurisdiction beyond controlling executive acts and rules for conformity with law. That is, they do not engage in any constitutional review. The Conseil d'Etat neither possessed nor sought to exercise powers of direct or indirect constitutional review, so much so that until the 1989 *Nicolo* case, it refused to declare subsequent domestic law inconsistent with EU law for fear of being seen to engage in just such a constitutional review exercise.[140] Its stance has softened somewhat, recognising that in order to give due priority to the 1958 Constitution as supreme law, it must engage on constitutional points. Thus it has subsequently declared without reserve or hesitation that the Constitution is paramount over ratified treaties (Article 55) and further that constitutionally enacted domestic legislation has priority over inconsistent customary international law.[141]

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[138] As confirmed in, e.g., CdE 13 Dec. 1889 (*Cadot*) (rejection of residual review jurisdiction held by Ministers (*minister–juge*) in competition with or superior to the CdE). See generally (for an English language account of French administrative law), Bell and Neville Brown 1998, esp. Chaps. 2 and 6.

[139] See Neuborne 1982, p. 385ff; and generally, Bell and Neville Brown 1998; and Auby and Cluzel–Métayer 2007.

[140] CdE 20 Oct. 1989 (*Nicolo*); see the case comment of Bothwell 1990.

[141] CdE 30 October 1998 (*Sarran*); CdE 6 June 1997 (*Aquarone*); see also the comment on *Sarran* of Reestman 2002 (reviewing the state of French law on the matter).

The administrative courts led by the Conseil d'Etat have gradually broadened their review jurisdiction beyond, say, a mere technical correspondence between act and authorising law. The courts will also now examine for compliance with unwritten "general principles of law". This evolution is all the more significant given the judiciary's unhappy history in the run up to the French Revolution. As an explicit, express principle in Conseil d'Etat judgments, it is difficult to locate prior to the 1950s (and prior to the current court system). Yet the argument could reasonably be made that, while not expressly articulated, "general principles of law" did represent a discernible undertone in earlier Conseil d'Etat judgments. Be that as it may, reliance on general principles of law obtained definitive legitimacy by virtue of their mention in the preamble to the 1946 Constitution and further incorporation by reference in the 1958 Constitution. Hence there exists a firm textual basis. As the supreme legal authority, the Constitution—itself a "general principle of law"—delimits the powers of the State. These substantive, but unwritten, norms serve to check government power. Of course, consistent with the revolutionary origins of the French constitutional settlement, the will of the people as expressed in and through legislation passed by their elected representatives may override existing general principles. And with obvious importance, the Conseil Constitutionel has followed the Conseil d'Etat position and also considers general principles of law. Thus within the boundaries set out by the 1958 Constitution, the administrative courts act as a check and balance to the exercise of executive power. In doing so, they have some measure of power to advance and develop the law.[142] This is nonetheless nowhere as broad and influential as in common law jurisdictions. Nor is the jurisdiction so wide as to trench upon the legislative powers of the National Assembly, as is the case for the US courts engaged in constitutional review.

The final piece to the rule of law puzzle in the French constitutional order placed itself in the 1958 Constitution with the creation of the *Conseil Constitutionel*. Under its interpretation of the Constitution, in particular Articles 64 to 66–1, the Conseil Constitutionnel does not consider itself a "court" in that conventional sense.[143] Such "courts" belong either to the administrative stream or the jurisdiction in ordinary stream, with the Conseil d'Etat and Cassation at their heads, respectively.[144] On its face, this strict interpretation makes sense. In light of the French constitutional articulation of the separation of powers doctrine, the Conseil's powers of legislative review and constitutional supervision would put it outside the ordinary judicial domain, in contrast to, for example, the US position stemming from *Marbury v Madison*. Not fully suited as a legislative organ, nor at all an

[142] See e.g., CdE 20 Oct. 1989 (*Nicolo*). And as do their non public law colleagues in the other judicial streams: on which, see Lasser 2004.

[143] Pfersmann 2010, p. 224 (arguing that the Conseil was intended at the outset to keep Parliament within a limited jurisdiction, but has now regrettably grown into more of a constitutional court).

[144] 2009–595 DC (3 Dec 2009).

executive one, the Conseil Constitutionnel represents on its face a sort of *tertium quid.* It combines aspects of an advisory function, and of a judicial one.

Under the first arm, the advisory character is defined by its power to review proposed legislation, statutes not yet in force. Any review of legislation for compliance must occur before the law is promulgated, otherwise the Conseil has no jurisdiction.[145] Thus it may review proposed legislation for compliance with the constitutional attributions of power and limits on their exercise. Laws constituting state organs, those falling under the referendum procedure, and parliamentary regulations must be submitted for review (Article 61). Other proposed legislation may be referred to the Conseil prior to promulgation, at the instance of the President, the Prime Minister, the presidents of either chamber, or by resolution of 60 deputies or senators. A declaration of unconstitutionality prevents the promulgation and implementation of the affected law as it stands. Second, it supervises and adjudicates on irregularities in presidential, deputy and senatorial elections (Articles 58, 59), as well as supervising the legislative referenda (Article 60). Third, by Article 54, international obligations can be referred to the Conseil by the President, the Prime Minister, the presidents of either chamber, or resolution of 60 deputies or senators, to determine whether those obligations contravene the Constitution and require a constitutional amendment prior to ratification. The one exception to this advisory character is the newly instituted "*question prioritaire de constitutionalité* (QPC)", a preliminary constitutional reference issuing from proceedings before the administrative courts and the courts of ordinary jurisdiction. The 2008 constitutional amendment empowered the Conseil to decide constitutional questions arising in ongoing litigation and remitted to it by the Conseil d'Etat or Cour de Cassation, in which existing legislation in force is alleged to contravene constitutionally guaranteed rights and freedoms. A declaration of unconstitutionality results in the repeal of the impugned legislation.

Under the second arm, the judicial character of the Conseil's work appears not only from the QPC, but also from the juridical form of the proceedings before it, the nature and articulation of its decisions, and from its basic function of supervising the division of powers among the organs of state, and between the state and its overseas territories. It also applies the doctrine of *res judicata* to its decisions, excluding the possibility of reconsideration and reversal, inherent to policy decisions and legislative amendment which respond flexibly to changing needs and circumstances.[146] It would appear, then, that the Conseil Constitutionel is moving gradually towards becoming a fully fledged constitutional court—with due regard to the rule of law mindset of the twentieth century.

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[145] 80–116 DC (17 July 1980); 92–312 DC (2 Sept. 1992); 2007–560 DC (20 Dec. 2007).

[146] See e.g., 97–394 DC (31 Dec. 1997) (relating to 92–312 DC and 92–308 DC) and 2007–560 DC (20 Dec. 2007) (relating to 2004–505 DC); and all relating to fundamental changes to the treaties constituting the EU.

2.2.3 The Netherlands: The International System as the Fourth Branch?

Like its continental and Anglo-American counterparts, the Constitution of the Netherlands reflects broadly the classic division of government powers into the three estates of the executive (Crown and ministers), the legislative and the judicial branches. In structure, the constitutional order is naturally more closely allied with European constitutional systems, the UK in particular, than the American. But in the actual provisions of the Constitution, it resembles more the US. The articles of the Constitution are all cast in fairly general terms, and there are no broad statements of aspirations and social principles. Perhaps it is because the particulars of working these out have been left to legislative prescription that the Netherlands constitutional structure has remained more or less undisturbed and intact since 1848. By that time, the constitutional order had finally stabilised and digested its post-Napoleonic creation in 1815 and unification with (what is now) Belgium, the secession of Belgium (1831), settling the division by treaty (1840), and the last grasp at monarchical government. Of course, the text of the Constitution (dating from 1815) and the political order have undergone changes of varying degrees of intensity since then. There have been about 20 amendments introduced into the Constitution.[147] The evolution of the Netherlands Constitution from 1815 through 1848 up to the present, and the corresponding balance of powers, tracks in general terms the same paths as most other states, the US, UK, and France included. These are, briefly, (1) representative democracy, (2) responsible, parliamentary government, (3) effective human rights, and (4) developing the rule of law and judicial review. But the basic order and text have accommodated these political and social adjustments by way of a relatively calm evolution and progression (constitutionally speaking).

By way of the briefest of sketches, its constitutional order may be described as follows.[148] The Netherlands is a unitary constitutional monarchy.[149] The monarch (Articles 24, 33) and appointed ministers (Article 43) form the government (Article 42), which together with the elected and representative Netherlands parliament, the "Estates General" (Articles 50, 54) pass legislation (Articles 81 and 87).

[147] Namely, 1840, 1848, 1884, 1887, 1917, 1922, 1938, 1946, 1948, 1953, 1956, 1963, 1972, 1983, 1987, 1995, 1999/2000, 2002, 2005, 2006 and 2008, and depending on how one counts them.

[148] See generally, Elzinga and De Lange 2006; Kortmann 2005, and the English language works Heringa and Kiiver 2007 and Kortmann et al. 2002.

[149] For the sake of technical completeness, there is also some decentralisation of powers (Chap. VII, Articles 123–136), having been spun off to provinces, "*waterschappen*" (Water Management Boards), and municipalities. Accounted for must also be the provisions made for the Imperial Kingdom of the Netherlands (pursuant to the Act *Statuut voor het Koninkrijk der Nederlanden*) which encompasses its overseas territories as well, and whose complex status (in some ways a style of federalism) is continually being reviewed and adjusted. Unless otherwise specified, "the Netherlands" in what follows refers only to the continental state.

The elected arm of government, comprising the Prime Minister and all ministers (including junior ministers/secretaries of state and ministers without portfolio), is drawn from the Second Chamber (akin to a House of Representatives) of the bicameral Estates General. The First Chamber is an indirectly elected senatorial type of body. Its 75 members are elected by the members of the 12 provincial parliaments along party lines reflecting those of the Second Chamber, and also through a system of proportional representation. More specifically, members of the government are drawn from those political parties holding sufficient seats in the Second Chamber to form a working and durable coalition that can maintain the confidence of a majority of the 150 members of that Chamber. Like the French and US political systems, government ministers do not simultaneously hold parliamentary seats. The government is of course responsible to the Estates General, the Second Chamber in particular. Nevertheless, because the coalition reflects the party political distribution in the Second Chamber, the government exercises a strong influence over deliberations and debate on government policy and accountability.[150] This has occasioned some debate and consideration, in terms of the monist (dependence) and dualist (independence) aspects to the power relationship between parliamentary parties and their government representatives.[151] In terms of the separation of powers, the independence of the Chambers allowing members to take government ministers to task on policy and legislation whatever their respective party affiliation is clearly more desirable, so to ensure appropriate parliamentary controls and supervision over the executive branch. The reality of the situation, however, discloses both monist and dualist aspects. The bonds of coalition government necessarily attach less securely and forcefully between the parties on the floor of the Chamber. Yet government ministers retain significant power and position within their respective political parties, which they can deploy to ensure support and favour on the floor of the Chambers for government policy and their standing in the Cabinet.[152]

The power dynamic between government and Estates General takes on significance because, as with the UK and France, the government directs domestic and foreign policy, and controls the legislative agenda. Its conduct of foreign policy includes importantly the power to conclude treaties and international agreements which may, in appropriate circumstances, have paramount authority over domestic law—even the Constitution (Articles 91, 93, 94, 95). The right to initiate legislation lies with the government and members of the Second Chamber.[153] In practice,

[150] See Bovend'Eert and Kummeling 2004.

[151] Bovend'Eert and Kummeling 2004, p. 351ff.

[152] "*Ministerraad*", distinguished from the Inner Cabinet (of select senior ministers) which has no explicit constitutional foundation, but rather originates in parliamentary/constitutional convention.

[153] While bills must also pass in the First Chamber, this assembly does not have the right to amend or propose bills. Bills must be submitted to the Raad van State (Conseil d'Etat) for nonbinding preliminary review and advice, and thereafter are reviewed in committee and approved by majority vote, with or without amendments, before moving to the First Chamber for consideration. That consideration is either to accept or reject the bill: the Chamber has no power

however, it is the government who initiates the bulk of legislation.[154] Like the UK Parliament, and unlike the French National Assembly or even the US Congress, the Estates General has a non-particularised, general jurisdiction over which to legislate. The Constitution does of course prescribe expressly that certain matters are to be regulated by statute, but it does not specify, and hence restrict, the legislative jurisdiction of the Estates General. In addition to the general range of primary and secondary legislation (the latter including rules made under a delegation of powers), there also exist rules made under executive prerogative (Article 88), whose historical origin lies in the Crown prerogative.[155] The scope of law-making power under the prerogative is generally considered to be very narrow and limited, and reserved for exceptional and temporary circumstances. All primary and secondary legislation and generally applicable prerogative rules must be countersigned by Crown and relevant Minister alike (Article 47). Since 1983, the Constitution also now sets out in Articles 1 to 23 a number of rights and freedoms, and explicitly directs a number of areas, such as public health, social welfare and education, to the care and concern of the government for legislation and management.

2.2.3.1 Judicial Review

The judiciary is entrusted with original jurisdiction over civil law disputes and criminal matters (Articles 112(1), 113(1)). For other types of dispute not falling hereunder (such as administrative law issues and disciplinary matters), legislation may refer them to those courts or can create special tribunals to deal them (Articles 112(2), 113(2)). As with many of its continental counterparts, the judiciary divides principally between the administrative law courts and the ordinary courts of general jurisdiction. This duality reflects a rather intricate distinction made in the law of the Netherlands between administrative law matters (including what

(Footnote 153 continued)
of amendment. Because of what is effectively a right of veto, the practice has developed that, if the First Chamber desires amendments in order to pass the bill, it will advise the Second Chamber which will then pass the necessary supplementary amendment, and the First Chamber will adopt both instruments as a whole.

[154] Bovend'Eert and Kummeling 2004, p. 177.

[155] Article 89(3) and (4) refer to "*algemene maatregelen van bestuur*" and "*algemeen verbindende voorschriften*" respectively, which translate into "general rules of governance" and "generally binding precepts". The latter is understood as the general class, *qua* "law" and subsuming the former. The former refers to two further categories of regulation: those issuing from the Crown, government ministries or government departments (see *Orde in de regelgeving*) and those issuing independently through the residue of the Crown prerogative. By constitutional convention, the latter class of prerogative regulation is generally reserved (subject to the impact on a person and the potential for criminal sanction) for urgent, emergency situations, rules internal to government administration, and temporary, subsidiary measures: *Jaarverslag Raad van State* 2002, p. 25. See generally, Elzinga and de Lange 2006, pp. 673–677, and Kortmann 2005, pp. 351–358. See also van der Burg 1995, p. 313ff.

questions would be typically represented in Anglo-American eyes, as well as the domains of education, the civil service, social security and so on), and ordinary civil (including the differentiated "commercial") and criminal matters. There is also an allied set of courts for corporations matters. At the head of the administrative side sit the Tribunal Division of the Raad van State and the Administrative High Court (*Centraal Raad van Bestuur*).[156] On the "ordinary law" side sits the Hoge Raad (the "High Court" or effectively, "Supreme Court"), at the top of a hierarchy of appeal courts and trial courts organised into judicial districts.[157] While it exercises principally an appellate jurisdiction for the ordinary courts, it also has a limited first instance jurisdiction in specified matters, an appeals jurisdiction in tax matters, and an advisory jurisdiction.[158] While it is not my intention to spell out in any detail the structure and jurisdiction of the Netherlands judiciary, some short comments are pertinent here.[159]

The rights and freedoms found in Articles 1 to 23 of the Constitution are not directly justiciable as such. The US model of judicial review, of testing legislation for conformity with human and civil rights does not apply, in keeping with the general spirit of the classic—and European—conception of the separation of powers. Broadly stated, the judiciary has never exercised jurisdiction over the constitutionality of primary legislation (since 1815), nor over treaties (since 1953), pursuant to what is now Article 120.[160] That article provides, "A judge may not decide on the constitutionality of laws and treaties."[161] And by "constitutionality" is meant not simply that legislation is validly passed, but also its conformity to constitutionally guaranteed rights and general principles of law and justice. Moreover, Article 11 of the General Provisions Act 1829 provides, "The judge must decide according to the law: in no circumstances may he determine the worth or propriety of the law."[162]

These explicit prohibitions must also be read together with Articles 93 and 94 of the Constitution. These provisions give force of law in the domestic legal system to treaties directly applicable according to their terms, and further, priority over conflicting domestic legislation. In the result, while constitutionally

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[156] I omit here the courts dealing with corporate matters.

[157] See, for the organising statute of the ordinary courts, including the Hoge Raad, *Wet op de rechterlijk organisatie* (as amd).

[158] Articles 74, 76–80 *Wet op de rechterlijk organisatie*.

[159] See further Elzinga and de Lange 2006, p. 595ff; Kortmann 2005, p. 256ff; Damen et al. 2005; Seerden and Stroink 2007.

[160] For recent consideration, see, e.g., Verhey 2005; also Bellekom et al. 2002, p. 270 and Mok 1984, p. 55.

[161] An amalgamation and recasting in 1983 of what was originally Article 115 in the 1848 Constitution, providing that legislation is inviolable, and Article 60 in the 1953 Constitution, that the courts may not rule on the constitutionality of international agreements (*scil.*, in general terms, treaties).

[162] "De regter moet volgens de wet regt spreken: hij mag in geen geval de innerlijk waarde of billijkheid der wet beoordelen."

prescribed rights are not justiciable, their equivalents in the EConvHR and the ICCPR, as well as in other treaties (such as the ICESCR and ESC) generally are enforceable. I consider this further in Chap. 3.

It should not be assumed, however, that this longstanding aspect of the separation of powers in the Netherlands has tempered or quelled academic and political interest. Curiosity and interest in broadening or in developing such a jurisdiction has remained equally active in academic and political circles, just as has the opposition to that constitutional change.[163] For the moment, the weight of constitutional history and tradition, as well as the practicable alternatives offered through the EConvHR, ICCPR and through the ECtHR (and more recently perhaps the ECJ as well), have carried the arguments against expanding the courts' jurisdiction in the direction of their US counterparts.

Thus framing the scope of the review jurisdiction of the courts is Article 120 of the Constitution (subject to Articles 93 and 94), together with seven leading Hoge Raad judgments. In effect, that general prohibition has not hampered the judiciary acting as a check and balance to executive action. The 1879 *Meerenberg* decision held the Crown's legislative power to be subject to the Constitution: its power to make law must derive either from an independent prescription in the Constitution or from specific statutory authorisation.[164] The Constitution did not limit or restrict free-standing powers of the Crown; rather, it conferred them. Thus "general rules of governance" had to have a constitutional or statutory foundation. This decision provides an early and general foundation for the jurisdiction of the courts to review secondary legislation for conformity with primary legislation.

Second, the 1986 *Landbouwvliegers* case expressly confirmed the jurisdiction of the courts to review secondary legislation (and including "general rules of governance" and "generally binding precepts") for compliance with general principles of law and justice, such as arbitrariness, equality, generality and certainty).[165] The Court found that no rule of law barred the courts from declaring invalid a law (other than primary legislation), based on the unreasonableness or irrationality (in its administrative law sense) of its tenor and operation. This remained a "marginal" control, in that the courts were nonetheless prohibited from deciding on the actual merits or necessity of the law by Article 11 of the General Provisions Act.

Third, the 1989 *Harmonisatiewet* decision provided added clarity and certainty to the limits of judicial review espoused in *Landbouwvliegers*. Relying on a perceived relaxation in the approach to jurisdiction, and comfort in assessing legislation according to treaty rights, the claimants launched a challenge to a statute altering the conditions and availability of student financial aid for higher

[163] Specifically Prakke 1992, Koopmans 1992, and Barendrecht 1992; Prakke 1972; Schutte 2004; Hirsch Ballin 2005; de Lange 2006, and Schutgens 2007.

[164] HR 13 Jan. 1879, W 1879 4330.

[165] HR 16 May 1986, NJ 1987 251. See also HR 24 Jan. 1969 (*Pocketbooks II*); HR 1 July 1983, NJ 1984 360 (*LSV*), and HR 1 Dec. 1993, AB 1994 35.