these are 6-fold: (i) a treaty already provided for by law; (ii) a treaty implementing and executing an approved treaty; (iii) a treaty for 1 year or less and imposing no significant financial obligations; (iv) a treaty required in urgent and compelling circumstances to remain secret; (v) a treaty extending an expiring treaty; and (vi) a treaty amending integral execution annexes to approved treaties.[402] Express parliamentary approval is nevertheless required for all treaties, without exception, which do or may contain provisions inconsistent with the Constitution.[403] A 2/3 majority is required to pass the Act assenting to such a treaty.[404]

The absence of parliamentary assent does not necessarily prevent the application of a treaty terms in court. This is aside from those types treaties made exempt from approval. In the first place, the *Treaty Assent and Publication Act* allows for two situations in which treaties may have domestic effect prior to passage of an Act of Assent. The first, under Article 10, covers those extraordinary circumstances of urgency when it is in the interests of the state to be bound prior to, and subject to, assent. The second, under Article 15, permits the provisional application of treaties in the interests of the Netherlands.[405] Neither option is available for treaties which may or do contain rights and obligations inconsistent with the Constitution. Moreover, provisional application does not extend to treaty provisions which do or may conflict with current municipal laws. Yet the Administrative High Court ("*Centraal Raad van Beroep*", CRvB) gave serious consideration to permitting a pension treaty with New Zealand to have internal legal effect even though the procedures of Art 15 *Treaty Assent and Publication Act* were not complied with.[406] In its view, the legal force of treaties could not be avoided for lack of compliance with domestic legislative requirements. Pursuant to Article 46 VCLT, internal constitutional rules cannot be used to avoid the bindingness of treaties. Nevertheless—and perhaps fortunately—the Court's decision did not rest on this rather extreme example of the monist, presumptive strategy and a questionable conflation of internal legal effect with international legal effect: it found no contradiction between the treaty provisions and extant Netherlands law, triggering the assent requirements.

In the second place, it would appear that the courts may be willing apply a form of the doctrine of "legitimate expectation" to give legal effect to treaties awaiting parliamentary assent. In its 1992 *BOA* decision, the Hoge Raad was prepared to give effect to the 1980 Rome Contracts Convention (EU) on the basis that the Bill assenting to the treaty was before the Lower House, and no reason was evidenced

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[402] See further, Klabbers 1995, pp. 631–635, and Besselink 1996, pp. 19–27, also referring to additional qualifications in Articles 8, 9, 11, and 13 *1994 Treaty Assent and Publication Act.*

[403] Article 91(3) Constitution, and Articles 6, 7, 10, and 15 *1994 Treaty Assent and Publication Act.*

[404] See the examples referred to in van Dijk and Tahzib 1991, p. 427 and Nollkaemper 2009, p. 329.

[405] And for directly applicable provisions, subject to publication in the *Tractatenblad*: Articles 15(3), 17(d) *1994 Treaty Assent and Publication Act.* See also Article 25 VCLT.

[406] CRvB 27 Jan. 2006 LJN AV0802.

to doubt the Bill's due and foreseeable passage there and in the Upper House.[407] Two additional factors were, without doubt, of significance. First the Rome Convention obtained under the general cover of the EU framework and it various constitutive treaties.[408] Second, the Convention did not create or establish rules of private international law which differed in any material way from those currently in force in the Netherlands. The treaty represented a mere formal codification of extant, applied rules. Hence the decision can easily be read as in fact giving effect to those rules of private international law which happened also to be stipulated in a treaty pending imminent legislative approval.[409] This would also keep the Court's reasoning consistent with its refusal to apply the different rules presented in the as yet unsigned and not assented to 1985 Hague Contracts Convention, also invoked before the Court. Moreover, it recalls the 1967 *"Bonanza"* case, in which the Hoge Raad refused to apply an intellectual property rights treaty not yet assented to, in the face of Netherlands law.[410]

3.6.2.1 Approval and Judicial Review

Although a court may ascertain whether parliamentary assent has obtained for a treaty invoked in litigation before it, its jurisdiction does not extend beyond that mere fact, into determining whether the assent itself met the prerequisite statutory conditions and procedures, or any underlying constitutional requirements, such as guaranteed rights and freedoms. Article 120 of the Constitution would articulate this longstanding separation of powers facet to the Netherlands constitutional structure.[411] To begin, the Hoge Raad had already rejected an attempt to read into the treaty powers a qualification that it be used for important or significant changes to domestic rights and obligations. The 1954 *Cognac (No.1)* case occurred under the 1922 Constitution which distinguished treaties, requiring the assent of the Estates General form other international compacts which did not. In a 1935 trade agreement with France were restrictions on the use of "cognac" to label spirits. The treaty had entered into force by way of an exchange of notes, only published in 1953.[412] The Hoge Raad held that the Constitution neither enjoined nor mandated the government from pursuing either a formal treaty or less formal executive

[407] HR *BOA* 25 Sept. 1992, NJ 1992 750. This occurred prior to the *1994 Treaty Assent and Publication Act.* I have found no case under the current statutory regime.

[408] HR 2 Nov. 2004, NJ 2005, 80 (EU law applicable in the Netherlands but not via Articles 92, 93 Constitution).

[409] Likewise HR *Spoorwegstaking* 7 Nov. 1986, NJ 1987, 226 (Netherlands labour law (strikes) reflected in European Social Charter (ESC), assented to but not yet operative in the Netherlands; municipal law applied but referenced to the ESC).

[410] HR *"Bonanza"* 17 March 1967, NJ 1967 237.

[411] See, e.g., HR *Harmonisatiewet* 14 April 1989, NJ 1989 469.

[412] HR *Cognac* 10 Dec. 1954, NJ 1954 240.

agreement, such that the 1935 Treaty was in force and could ground an action against a Netherlands distiller.[413]

Then, turning from the executive's power regarding treaties to that of the Estates General, the Court made it clear in its 1961 *Van der Bergh* decision that judges had no jurisdiction to consider the domestic implementation of the treaty power.[414] It reasoned that because a judge is prohibited under the Netherlands model of the separation of powers from reviewing the constitutionality of a law, then likewise a judge is also barred by extension from considering whether the Estates General has adopted a law according to legislative and constitutional requirements. Such an enquiry would put the court to controlling parliamentary rules and procedures. The court is limited to ascertaining whether, on its face, the Estates General considered the statute as definitely passed, based on the official parliamentary journals. Thus the Court rejected there a challenge to a joint resolution alleged not to have passed with the necessary majorities. Likewise, in 1972, the Hoge Raad expressly refused to consider any question on the criteria of parliamentary approval to an extradition treaty with Serbia.[415] Contributing to this abundance of judicial deference here was no doubt the fact that the treaty had been enforced in previous cases without question of or attention to parliamentary assent.[416] A somewhat less rigid or strict view was adopted by the Court in 1995, when considering the enforceability of a 1987 side agreement to a 1977 treaty with Yugoslavia on social security and employment.[417] In the rare situation of an appeal from the Administrative High Court, the Hoge Raad adopted that court's conclusion based on a review of the side agreement's compatibility with the then constitutional exception for Estates General assent.

All these cases preceded the deconstitutionalisation of assent and publication requirements into the *1994 Treaty Assent and Publication Act.* By consequence it is arguable that the loss of any overt constitutional character may open a way for the courts to consider afresh whether a treaty met the necessary assent requirements.[418] But such a path, whether the courts do shed their longstanding reluctance and hesitation as instilled by the separation of powers, does not really offer much more or fresh grounds. At best, the issue would be whether an exception to assent was sustainable, or whether urgent or provisional application was improperly claimed for a treaty whose terms were inconsistent with extant domestic law or

[413] Besselink 1996, p. 31, and 2007, p. 69 reads the case as judicial review of a treaty's constitutionality.

[414] HR *Van der Bergh* 27 Jan. 1961, NJ 1963 248.

[415] HR 31 August 1972, NJ 1972 4 (based on the 1956 Article 60 precursor to Article 120).

[416] Nevertheless, it did not feel inhibited in examining the question of state succession, the treaty dating back to the Kingdom of Serbia.

[417] HR 8 Nov. 1995 LJN AA3133 affirming CRvB 29 Dec. 1992, LJN AK9924 and discussed in Besselink 1996, p. 37.

[418] As does Besselink 1996, pp. 41–42.

constitutional provisions.[419] In both situations, no Act of Assent[420] would exist to raise warning flags for the separation of powers; just executive action.[421] And executive acts are reviewable for compliance with rules of law.[422] Of course this would necessitate too a court distancing itself in the first place from the mindset and reasoning as evidenced in the 2006 Administrative High Court decision, where no distinction was to be made between bindingness on the international plane and on the domestic one.[423] Once the issue would come to revolve around explicit or tacit parliamentary consent—including whether the Act of Assent ought to have been passed by a 2/3 majority—the courts would likely once again perceive themselves at the outer limits of their constitutional jurisdiction under the separation of powers.[424]

But Article 120 and the general prohibition on constitutional review is not read to prevent the courts from checking a treaty for compliance with other treaties or the rules of international law.[425] This covers not only international law on treaties, led primarily by the VCLT, but also the general norms of international law, *ius cogens* (and per the VCLT), obligations *erga omnes* and so on.[426] In the 1989 *Cruise-missiles* decision, the Hoge Raad decided that nothing in Articles 91, 94, or 120, nor any other rule of municipal law impeded a judge from determining whether a treaty approved by the Estates General might be contrary to other treaty obligations or rules public international law binding on the Netherlands.[427] A public interest group had sought to prevent the stationing of US cruise-missile nuclear weapons in the Netherlands pursuant to what turned out to be a short-lived treaty. That compact was overtaken and made redundant by the 1987 US–USSR Intermediate Range Nuclear Force Treaty, coming into existence during the litigation. While the heart of the case had thus been rendered moot, the issue of liability for costs (based on the reasonableness of instituting proceedings) remained live. In addition the Court also ventured the opinion that no rule of public international law prohibited the stationing of the missiles, nor the existence or possible use of nuclear weapons in all

[419] Specifically Articles 10 (1), 15(1) (2) *1994 Treaty Assent and Publication Act.*

[420] And likely no preliminary Raad van State opinion, serving as a further instance of review.

[421] The input of the Estates General being a critical element to the internal working of treaty provisions: Schutte 2003.

[422] HR 1 Dec. 1993, NJ 1996 230. An argument recognised by Fleuren 1995, p. 260, and Schutte 2003, p. 36.

[423] CRvB 27 Jan. 2006, LJN AV0802.

[424] Considerations and arguments based on the niceties of the constitutional status and ranking of ordinary legislation, "*rijkswetten*", and the "*Statuut*" (organising the structure of the continental and overseas territories of the Netherlands) are not pursued here: see, e.g., HR *Harmonisatiewet* 14 April 1989, NJ 1989 469 (rejecting attempts to invoke the Statuut).

[425] Regarding conflicts among treaties, see Mus 1996.

[426] See, e.g., HR *Hecht* 3 March 1941, NJ 1942 20 (effect of war on a treaty); HR 31 August 1972, NJ 1972 4 (state succession), HR 24 Jan. 1984, NJ 1984, 538 (1958 Convention on the High Seas, and customary international law on maritime boundaries).

[427] HR *Cruise–missiles* 10 Nov. 1989, NJ 1991 248.

circumstances. It did not go further to consider whether and how potentially inconsistent self-executing treaty provisions could be reconciled. For the purposes of the decision, moreover, the Court also assumed without deciding that all the rules of public international law invoked could be relied upon by individual parties (particularly given that they were tied to Article 1401 Civil Code, creating state liability for state-caused torts). Foreshadowing this decision to some extent was the 1990 case on the extradition of US military personnel to the US for a murder committed in the Netherlands.[428] At issue was the possibility of a death sentence for the accused, contrary to the provisions of the EConvHR. Extradition to the US, however, was mandated by the NATO Status of Forces Treaty. The Court read the NATO treaty as consistent with the EConvHR so as to permit the imposition of conditions that no death penalty be amerced. Likewise, the extradition treaty with the US was read in conjunction and in concord with the Convention for the suppression of Terrorist Bombings, and the Protocol I to the 1949 Geneva Convention on the Protection of Victims of International Conflicts.[429] And, for example, the Hague Court of Appeal discounted the European regulation on the recognition and enforcement of judgments in matrimonial and custody proceedings, deeming it to conflict irreconcilably with the EConvHR, in order to permit a Dutch national to file for divorce from a Maltese national.[430] It has also weighed the UN Charter and the Convention of the Privileges and Immunities of the United Nations as against international law, the ICCPR and the EConvHR, finding there no grounds to relieve the UN of its immunity in a claim brought by an interest group and individuals against the Netherlands and the UN arising out of genocide-related murders in and around Srebrenica, Bosnia–Herzegovina under the supervision of the Dutch UN-PROFOR battalion "Dutchbat".[431]

Nonetheless it is one thing to admit the possibility of reviewing treaties for compliance with international law, and yet another to fashion a remedy.[432] The objective of any such litigation is clearly one of three possibilities. The first is to enjoin the government from entering into any binding international compact. The second would be to enjoin (domestic) application of the treaty directly or indirectly. The third might be to mandate the explicit approval process before the Estates General in order to bring greater and wider political pressure to bear, including the need for any constitutional amendment.[433] But several hindrances,

[428] HR 30 March 1990, NJ 1991, 249.

[429] Rb The Hague 19 Dec. 2006, LJN AZ4647.

[430] CA The Hague 21 Dec. 2005, LJN AV9650 (Reg. EC 1347/2000 establishing Maltese law as the governing law in the case, but Malta not recognising divorce in any circumstances).

[431] Rb The Hague *Dutchbat* 10 July 2008, LJN BD6796 (UN immunity) and 10 Sept. 2008, LJN BF0187 (liability of UN for Dutchbat faults) but *varied* CA The Hague 5 July 2011, BR53886 / BR 0133 (liability of the Netherlands).

[432] On the problem, see generally, Mus 1996.

[433] Another possibility might be suing the state in tort, for damages allegedly caused by its "illegal" entry into the treaty, as per HR *Cruise-missiles* 10 Nov. 1989, NJ 1991 248; and see Besselink 1996, p. 42.

not insignificant, lie in the way. Preventing the government from entering or ratifying a treaty certainly puts the court into the foreign powers domain, and further represents a constitutional control on the government's powers.[434] Likewise, compelling particular legislative attention or action draws the Judicial Branch into the domain of legislation and policy. Under the current separation of powers constellation in the Netherlands, none of these points presents appealing grounds, digestible by the courts. (Perhaps over time, a constitutional affinity and taste for judicial review may develop. But this is for the moment pure speculation.) Moreover, the 2003 Hoge Raad *Waterpakt* decision made clear that the Judicial Branch had no power to order the Legislative Branch to pass a law (here, one to comply with an EU Directive on nitrate fertilizers).[435] Nor could the EU set of treaties confer such jurisdiction on a domestic judge (or an EU court for that matter). The 1954 *Cognac* decision supplements this on a wider reading that the executive is unfettered in what treaties it may decide to conclude and how.[436] Remaining within their constitutionally prescribed role leaves the courts only with the route of interpretation. Here it would be a question of following some rule of (statutory) interpretation, such as the more recent rules override earlier ones; or the particular has priority over the general, or even accepting the strategy of interpretative amendment on the assumption that certain treaties have "constitutive" or "constitutional" value; like the UN Charter, or the ICCPR. In the rarest of cases, a treaty might be read to violate a norm of *ius cogens*, so as to invalidate summarily it according to Article 53 VCLT.[437]

If a court in the Netherlands should be willing to accept jurisdiction in such a matter, all this admittedly would put the judiciary in a peculiar position, one which flows in large measure from the monist character of the Netherlands constitutional order. Although the court, a national court, is wrestling with the issue of recognition for purposes of domestic legal application, it is doing so by pronouncing upon the normative stature of an international agreement, on the international plane. The criteria for recognition are thus, apart from Article 91 of the Constitution and the 1994 *Treaty Assent and Publication Act*, international in origin. The domestic separation of powers doctrine has ostensibly restricted jurisdiction over the executive's conduct in the foreign affairs domain, and over the legislature. That leaves only international rules. But under the classical conception of international law, a national court is not understood to have a determinative voice on the international standing of an international compact. Its national stature is an entirely different matter. So it seems that there are but two exit strategies. Either we accept

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[434] As held in Rb The Hague, *Ems–Dollard* 21 May 1984, AB 1985 12.

[435] HR *Waterpakt* 21 March 2003, NJ 2003 691. See also HR *Staat en SGP/Clara Wickmann* 9 April 2009, NJ 2010 388 (the courts may not compel the State to fulfil one particular way or other its obligations under the Convention against Discrimination of Women and the ICCPR and EConvHR to ensure that a political party admits women members and allows them to be elected, despite the party's conservative policies against just that).

[436] HR *Cognac* (No.1) 10 Dec. 1954, NJ 1954 240.

[437] Attempted and rejected: HR *NATO Nuclear Weapons* 21 Dec. 2001, NJ 2002 217.

the legal fiction that the courts' deliberations are directed to internal recognition and application, with only a collateral and incidental effect internationally, so as to conform to the classic conception. Or we begin to reorient our perception of the relation between national law and international law. Giving national legal systems a determinative voice in the validity (and thus legitimacy) of international law may render its claimed normative transcendence and objectivity, in many respects its essence as "law", unsustainable. And it is not without perceptible irony that it is a monist position which would lead to this result.

3.6.3 Interpreting Treaties

Turning from the issue of recognition of international law within the domestic legal system to that of its concrete application, the principal question for the courts, from a separation of powers perspective, is the disposition of national law where international law mandates a different, wider or narrower, solution. If both national and international norms are recognised as law, and the legal outcome mandated by the one seems to diverge from the other, which of the two takes precedence? On its face, resolving divergences and inconsistencies between international law and domestic law is simply a matter of interpretation: reading the potential conflict away by complementing a narrower or more generous construction of the treaty with a corresponding on for the statute.[438] Avoiding such conflicts by interpretation works easily and practicably for all types of treaty provisions, both self-executing and ones not so.[439] The treaty is understood to allow (within margins) that result prescribed by statute; the statute achieves (within reason) what the treaty aimed for. Hence no conflict may be said to arise.

At a deeper level however, the answer of interpretation is disingenuous in its constitutional simplicity. Interpreting the law as a necessary incident of applying it stands well within the limits of the judicial role under any conception of the separation of powers. But in determining the meaning of the nature and scope of statutory terms and provisions, the court obviously exercises control over the content of the statute. It can broaden or narrower to whom the statute applies, in what manner, and what results may be achieved. While an element in all statutory interpretation—even without the treaty issue—the reconciling of treaty terms with statutory terms brings this judicial power of giving form and substance to legal rules into the foreground. Depending on the degree of divergence, the courts may

[438] See, e.g., HR *Vreemdelingen en Rijnvaart* 9 Dec 2003, LJN AF7921 (Netherlands legislation applicable to foreign labourers on the Rhine; Revised Rhine Navigation Treaty, EC Treaty).

[439] See e.g., HR 18 Nov. 1981, NJ 1982 44 (*Election Act* & Article 25 ICCPR); 25 June 1982, NJ 1983 295 (Article 22 ICCPR, Article 11 EConvHR & *Prison Detention Law*); *Taxibus* 2 Feb. 2002, NJ 2002, 240; 5 Sept. 2006, LJN AV4149; Rb The Hague, *BARIN v Netherlands* 19 March 2008, LJN BC7128, and see too the cases collected in Brouwer 1992, pp. 149–50 (Convention on Road Traffic).

have to stretch or contract treaty or statutory provisions to such an extent that they are effectively revising or replacing the statute (or treaty). A separation of powers point cannot but arise. The courts have a duty to apply the law, which by the rule of recognition included both national and international legal rules. The courts, however, have no jurisdiction to set aside or ignore primary legislation for lack of constitutionality or otherwise.[440] But such an interpretative amendment of a statute[441] surely exceeds the powers of the court—without more—to interpret and apply the law. Whether a judge reads into the statute a treaty provision that effectively changes the statutory scheme, adding benefits or obligations, or such like, or whether the judge simply disregards the statute in favour of the treaty, the result is the same. By giving priority to the treaty directly or indirectly, a court exercises a form of judicial review over primary legislation.[442]

3.6.3.1 The Supremacy Clause

Article 94 of the Constitution would provide the additional element for the courts. Its immediate predecessor, Article 66 of the 1956 Constitution, came to be as the political and constitutional response to what was perceived as an unwelcome judicial intervention into the legislative domain following the 1953 amendments.[443] There, it will be recalled, the Constitution in Article 65 explicitly recognised the supremacy of treaty provisions over prior and subsequent legislation. The courts understood their powers henceforth generally to allow such an interpretative amendment of all statutory provisions, in all cases of inconsistency with treaties. By virtue of Article 94, then, the Constitution would restrict that power, authorising the courts not to apply legislation to the extent that it would conflict with directly applicable, self-executing, treaty provisions (and like regulations, directives, or orders of international organisations). Hence the court's interpretative task is twofold. First it must determine whether or not the treaty provisions at issue are indeed self-executing, and second, whether there is in fact an irreconcilable conflict between the statute and the treaty. Without such a directly applicable provision, the court would have no jurisdiction to supplant directly or indirectly the meaning an outcome of a national legal rule.

To be clear, the authority situated in Article 94 is a "negative power", one of discounting or ignoring otherwise valid, in force legislation in the case before it, much like the approach of the French courts. It is not a "positive power" in the sense of invalidating or voiding legislation, in the same vein as US courts striking

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[440] Not so for secondary legislation (regulations, etc.): see, e.g., HR 1 Dec. 1993, NJ 1996 230 and the discussion in Chap. 2 above.

[441] To borrow a phrase from Brouwer 1992: "*interpretatieve vervorming*"; in Brouwer 2005 he uses "interpretative transformation".

[442] Hence the limitations articulated in HR *Harmonisatiewet* 14 April 1989, NJ 1989, 469.

[443] See on the historical aspects, van Panhuys 1953, and van Panhuys 1964; Brouwer 1992 addressing same in Chaps. VI & VII.

down legislation as unconstitutional. Not unreasonably this suggests some caution in portraying this Article as a "supremacy" clause. The emphasis might then too heavily lie upon a normative hierarchy, ranking domestic and international legal norms. It would evoke an overriding tendency in the courts to set aside a statute in all circumstances once an inconsistency with a directly applicable treaty provision is identified. But that is certainly not the presumption nor invariable result.[444] Indeed, it might be argued that "priority", envisioned under Article 94, ought to be differentiated into either a ranking based on normative hierarchy, or one based on a sequence relative to timing or some other like criterion.[445] In other words, for the purposes of Article 94, the priority there can mean that international law has a greater or higher status as law than municipal law, in the same sense that constitutional law is understood to be of a higher order than ordinary legislation. Such a viewpoint—one consistent with the presumptive strategy—we have already encountered in earlier cases.[446] Or it can entail that the courts must first draw upon directly applicable treaty provisions to solve a dispute before turning to municipal rules. For those international provisions not directly applicable, they can only make up the difference after the courts have first drawn upon national law. This might be said to keep the courts duly grounded in the Constitution and the separation of powers. The rule and order of application derives from the Constitution. The rule is one of sequence of application, distinguishing directly applicable treaty terms from those not so (and covering also orders and rules issuing from international organisations, and customary international law), all as prescribed and approved by the Legislative Branch—which has the final say.

But such a differentiation may in fact draw a distinction without a difference. A normative hierarchy nonetheless exists as the basis for such a sequential application of legal rules. That treaty provisions (as per the 1953 amendments) or directly applicable provisions (from 1956 onwards) are first applicable begs the question why so, unless underlying that preference is the recognition of their normative higher standing. Indeed, that is consistent with the constitutional and judicial history of the Netherlands. Furthermore, nothing prevents a constitutional order from according normative priority to international law. That priority is duly integrated into the constitutional fabric as it pertains to the relationship between international law and national law. Like the situation in France, however, it says nothing about the relationship between international law and constitutional law. (If anything, like in France, constitutional law remains logically prior.) And a sequential application argument belies the fact that Article 94 applies in cases of inconsistency, so that the courts must give preference to treaty provisions by declining to apply domestic law. The courts are put to measuring how far a

[444] Especially given the need for caution and reserve to be exercised, according to the Hoge Raad: HR 12 May 1999, NJ 2000 170 (3.14, 3.15).

[445] Schutte 2003, p. 26, citing Prakke 1992, pp. 3, 27 (in the context of constitutional review of legislation, constitutional rights, and Article 120 Constitution).

[446] Eg, Bijz. R v C *Rauter* 19 Jan. 1949, NJ 1949 87, and *Röhrig*, 15 May 1950, NJ 1950 504.

domestic rule meets or departs from an international one: the international rule is the constitutionally prescribed standard or touchstone by which domestic rules are evaluated.[447] A hierarchy underpins the sequence. Such a constitutionally recognised hierarchy of legal rules likewise maintains the constitutional grounding of the courts and preserves the Netherlands reading of the separation of powers. And, in applying Article 94, the courts are indeed performing a sort of judicial review of domestic legal rules.

The motives for this examining of the nature of the supremacy or priority afforded to directly applicable treaty terms originate in working out boundaries to the jurisdiction and powers of the courts in a monistic context. Supremacy under Article 94 may be understood in two ways. Without reference to the constitutional and juridical history, it runs reasonably parallel to other supremacy clauses found in constitutions such as that of France or the US. In other words, Article 94 would establish and permit directly applicable treaty provisions a paramountcy over domestic laws, which priority but for that Article would not exist. Hence the national constitutional order is the source of the supremacy. But when taking that history into account, it is strongly arguable that Article 94 is better understood as presupposing supremacy.[448] Thus it originates in the nature of international law itself. The constitutional article is thus limiting the jurisdiction of the courts held in virtue of the law they administer. As with the general prohibition (under Article 120) in relation to domestic law, no courts in the Netherlands may exercise a general jurisdiction to adjust domestic law in accordance with international law, which power they are understood otherwise to have in virtue of (the precedence of) international law. Notwithstanding the higher normative order of international law pursuant to the Netherlands conception of law, the courts may only accord priority to directly applicable provisions duly published, pursuant to that Article.[449] It follows that Article 94 does not go so far as to prevent any review of a statute's compatibility with a treaty. Strictly, it only speaks to the domestic legal effect given to certain types of treaty clauses. Thus the courts may still consider the reconcilability of all treaty provisions with domestic law, but may only discount the latter which conflict with directly applicable treaty terms.[450]

So the Constitution is setting the boundaries, regardless of what seemingly may be allowed through international law. The Constitution has confirmed and made express in Articles 91–94 the courts' view on what it says about the status of international law and its relation to national law, but limiting the point to self-executing provisions so as not to undermine the longstanding *acquis* on the supremacy of the Legislative Branch. This represents of course the Constitution

[447] Thus, e.g., HR *Harmonisatiewet* 14 April 1989 NJ 1989, 469; *Bouterse* 18 Sept. 2001, NJ 2002 559.

[448] Brouwer 1992, p. 248; Fleuren 2004, p. 338.

[449] See, e.g., HR *Nyugat* (No.2) 6 March 1959, NJ 1962, 2.

[450] Brouwer 1992, p. 274 suggests that by remarking on inconsistencies not remedied by Article 94 Constitution, the courts nevertheless play an important signalling function.

reaffirming the separation of powers as understood in the Netherlands. That is, the courts have little if any power to make law or interfere with primary law. The Legislative Branch is charged with making law. It is comprised of the Estates General and the government, with the government taking the pole position in international law matters. The constitutional optic seems inescapably and necessarily that of the separation of powers, situating the authority for making rules which count as law within a polity. In other words, the language through which a constitution must conceive and speak of law-making authority within a polity cannot be but that of the separation of powers, of the trio of the Legislative, Executive, and Judicial departments of state.

By doing so, the Constitution is splitting or separating international law from national law, and raising inevitably a dualism, a dichotomy, between the two, particularly if we agree that Article 94 presupposes the supremacy of international law.[451] For the Netherlands, that does not flow from the recharacterising of international law as domestic through some constitutional process. Instead, the dualism would issue from the two ways of conceiving the separation of powers: form and function. On the one hand, the constitutional origins of the courts ties them to the institutional boundaries read from a strict understanding of the separation of powers. They are national courts, and are duty bound to observe constitutional precepts. Accordingly, they administer the law, but do not make law nor control the content of (primary) law, directly or indirectly by some form of judicial review. On the other hand, their role, their function, of administering the law imposes the logic of the system of rules which sets international law above national law. (Needless to say, it remains an unargued conclusion in the Netherlands' jurisprudence—weighted with the encrustation of habit and practice—that international law ought to have and deserves such precedence.[452]) To repeat, the formalist position under the separation of powers requires a judge to comply with the national criteria, notwithstanding the legal order's professed monism. The national legal order is distinct from the international, and the former institution determines the rules of recognition. The functionalist position should justify a court applying the treaty as directly applicable in spite of those criteria because the rules of recognition derive from the inherent character of law. There is a presumed unity between the two legal orders.

Consider the effect of the supremacy clause on treaty terms which fall afoul of the approval provisions of, *inter alia*, Articles 6 and 15(1, 2, 3) *Treaty Approval and Publication Act* and Article 91(1, 3) Constitution.[453] In the first example, a treaty not approved by the requisite 2/3 majority appears to mandate a legal solution diverging from the constitutionally and statutorily prescribed one. In the

[451] Thus the argument of Feuren 2004, Chap. VII to scrap the constitutional division between directly applicable and not directly applicable, and actively pursue monism by integrating treaties more completely into the judicial reasoning process as the lead premise.

[452] The academic literature was somewhat more attentive to the point: see, e.g., the survey in Van der Zanden 1952.

[453] See Fleuren 1995, pp. 259–260, and Schutte 2003, p. 34ff.