In light of this arrangement of authority between Legislature and Executive, the application of separation of powers considerations to international law tends to play itself out at that political level. The French courts, administrative and general jurisdiction, have been content with their passive role, along the sidelines, under the conventional, strict French reading of the separation of powers. As to the place of the *Cour Constitutionnel*, we will come to that presently. In general both streams of judicial power have confined themselves to identifying and interpreting valid law. Inasmuch as the process of identifying whether treaty provisions or those of an international agreement are properly "French law" draw the courts close to constitutional considerations, the courts have taken care to emphasise formal criteria and avoid thereby any substantive considerations. That is, both streams of judicial power will consider whether the preconditions for law have been met, but will go no further in examining the content of the law or the international compact as it may bear upon its enactment or incorporation into the French legal system. Stepping beyond mere formalistic criteria into the substantive domain presents the tangible risk of overstepping (or being seen to overstep) the boundaries set by strict reading of the separation of powers.

### *3.5.1 The Limits of the Institutional Strategy*

In the French administrative and general jurisdiction courts, the liminal question of whether a treaty or compact establishes judicially enforceable rights and obligations is answered by publication of the instrument in the *Journal officiel de la République française*, the Official Journal. Article 3 of the *Decree on Ratification and Publication* mandates publication for those international instruments which, by their application "might affect the rights and obligations of individuals".[300] Since 1986, the publication requirement extends equally to reservations, interpretative declarations, denunciations, deletions, and so on with like effect. The Decree exempts from this rule of publication certain rules and decisions of international organs. The exception is conditioned upon the treaty, binding on France and by which the entity is created, stipulating that publication of those in the organ's publicly accessible, official bulletin is sufficient to implement them as binding upon individuals.

Beginning with the *Dame Caraco* decision in 1926, the Conseil d'Etat has considered publication in the Official Journal to be a critical element validating the legal force of a treaty provision. It reiterated and confirmed that position in 1965 with its *Société Navigator* decision, and subsequently.[301] Likewise, the courts of ordinary

[300] Decree No. 53–192 of 14 March 1953 on the Ratification and Publication of International Agreements concluded by France (as amd. by Decree 86–707, 11 April 1986). Relying on the translation given in Eisemann and Kessedjian 1995, p. 23. And see also Burdeau 1986, pp. 836–856.

[301] CdE 13 July 1965 (*Société Navigator*) (failure to publish a 1954 France–Monaco Accord on War Reparations). See also CdE 23 Dec. 1981 (*Commune de Thionville*) (1978 France–Luxembourg Treaty on Nuclear Facilities along the Moselle River).

jurisdiction have emphasised the requirement of publication.[302] Hence instruments not published, or not yet published, have no legal effect in proceedings, either for or against any of the parties. Legal effect in the French legal order commences on the date of publication in the Official Journal, and not on the date specified by the international instrument for entering into force.[303] It is the constitutional element of publication which governs the entry into force. Bound as it is to the Constitution and its reading of the constitutional order including the separation of powers, the Conseil d'Etat considers the Constitution, Article 55 in particular, definitively to prescribe when and how an international compact should have force in the national legal order. This runs consistently with its position in *Sarran* (considered below) that the Constitution trumps international law and accords, for the Constitution is the determinative source of authority conferring legal effect on executive acts, legislation, and treaties alike. This position on the date of publication also accords with the stance of the Cour Constitutionnel, articulated in its 1992 decisions on the Schengen Treaties.[304]

The inevitable interval between publication and international entry into force will obviously lead to a gap between the compact's binding force internationally and nationally. The current position of the Conseil d'Etat holds that no presumption of or automatic retroactive domestic effect obtains in the case of earlier international effectiveness.[305] This follows from the interposition of the constitutional screen. The implementing act and publication decree are determinative. Accordingly, the Conseil d'Etat can also allow for the possibility of an exception where the provisions of the international accord expressly contemplate such a result. Thus in *Procopio* the Conseil d'Etat read the European Convention on Extradition to allow for implementation retroactive to its internally stipulated entry into force (11 May 1996) despite later publication (15 May 1996).[306] The courts of ordinary jurisdiction generally pursue the older position of allowing retroactivity according to the terms of the instrument, albeit a position decidedly influenced by the non-retroactivity provisions in the EConvHR.[307]

But the question of validity extends beyond a mere publication requirement by virtue of Article 53 of the Constitution. As outlined above, that Article necessitates legislative approval for any treaty affecting (or potentially affecting) legislation, private rights, public finances, or the territory of the state. This implies two further

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[302] Cass. *Le Breton v Delle Loesch* (16 May 1961), CA Paris, *Dame Klarsfeld v Office Franco-Allemand de la jeunesse* 18 June 1968.

[303] °213461 CdE 7 July 2000, reversing prior decisions (see e.g., the decisions cited by Eisenmann and Kessedjian 1995, p. 39 at n. 54) allowing for retroactive effect. From the perspective of the Conseil d'Etat, it reflected its previously strict position of withdrawing from any question other than the literal black-letter interpretation of legislation.

[304] °92–307 DC, 25 February 1992 and °92–308 DC 9 April 1992.

[305] °213461 CdE 7 July 2000.

[306] CdE 8 April 1987 (*Procopio*). Apart from possible rationalisation along the lines of *de minimis*—a mere 4 days—the overlay of its specific character and origin in the EU constellation also plays a part.

[307] °09–15044 Cass (26 Oct. 2010).

criteria: (1) interpreting the compact before the courts to determine whether it meets those features and (2) ascertaining whether a parliamentary statute exists approving that compact. On any reading of the separation of powers, strict or otherwise, it seems hardly debatable that determining the existence of an authorising statute (behind a presidential decree for publication) is part and parcel of the court's jurisdiction to ascertain valid law. Confirming that necessary parliamentary statute exists does not require a court to check the constitutional foundations or limits of the government's prerogative in foreign affairs, or check the valid and legitimate exercise of Parliament's jurisdiction to pass laws. It merely asks for evidence of the existence of a constitutionally mandated condition for publication. Yet the Conseil d'Etat did consider for a period that going behind the publication decree itself to determine if properly granted in law represented an unwelcome judicial intrusion on government and legislative prerogative.[308]

A greater problem arises, however, in the absence of any approbative Act. The French courts then find themselves in the position of having to decide whether the treaty engages Article 53; that is, whether the government's interpretation of the compact is justified as not requiring legislative fiat, or whether the government exceeded its jurisdiction, and Parliament ought to have legislated. So uncomfortable a position this is not. French courts must interpret treaties in order to apply them, with the result that the courts do already form some view on the legal effect of a compact's provisions, and its compatibility with extant legislation. (Indeed, the mere fact that parties invoke a treaty as affecting their rights and obligations before the court brings the treaty presumptively under Article 53.) The Conseil d'Etat was the first to loosen its interpretation of validity controls. Its 1998 *Blotzheim* decision recognised the jurisdiction of an administrative judge to determine whether a treaty provision was in fact supported by the necessary legislative approval in light of the requirements of Articles 53 and 55[309]. The question before the Conseil d'Etat (and the administrative law judiciary more broadly) is likely framed as whether the publication decree ought to be annulled for lack of legal grounding, rather than a simple declaration of the invalid effect of a treaty provision for lack of parliamentary approval. The Conseil d'Etat has repeatedly affirmed this position and jurisdiction to ascertain the existence of legislative underpinning in subsequent cases, so as to guard the legislature's jurisdiction against intrusion by the executive. The courts of ordinary jurisdiction were slower to follow this lead. The Court of Cassation aligned itself with the Conseil d'Etat position in 2001, with its *ASCENA v N'Doye* decision holding a 1994 France—Senegalese accord unenforceable for lack of due parliamentary authorisation.[310]

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[308] CdE 13 July 1965 (*Société Navigator*). See also Cass. *Reyrol* (25 Jan. 1977) and CA Paris, *Dame Klarsfeld* (18 June 1968).

[309] °181249 CdE 18 Dec. 1998.

[310] °99–16673 Cass. (29 May 2001). See also °157922 CdE 23 Feb. 2000 and °246794 CdE 16 June 2003. In both, publication decrees were annulled for lack of Art. 53 supporting legislation.

But this jurisdiction to review for compliance with the Article 53 requirement of authorising legislation does not extend beyond simply establishing the existence of such an Act. It goes no further than a mere evidentiary criterion. That is, the Conseil d'Etat does not consider the jurisdiction of the administrative law courts to extend into testing such legislation for compliance with other constitutional requirements. The court's review ends once it has established that an Act has approved the relevant international compact, directed publication, and such publication has occurred. Within four years of *Blotzheim*, the Conseil d'Etat began to set clear boundaries to its powers of review consistent with its older jurisprudence, and of course, stricter, more traditionally French reading of the separation of powers. In the 2002 decision *Porta*, the Court reinvigorated its 1936 "*loi–écran*" doctrine, stipulating that a judge may not go behind the "screen" of legislation to enquire after its regularity or constitutionality.[311] Hence court was not entitled to question further the legal force of a treaty with Andorra, which in part ceded French territory to Andorra, nor the legislation approving it, otherwise duly passed, notwithstanding claims that Article 53 nor Article 72 had been complied with, and that the treaty and legislation violated Article 17 of the French Declaration of Rights and Freedoms. It was not for the courts to consider the legitimacy and validity of legislation or a treaty by constitutional standards or those of other French international engagements. This represents the current position of the Conseil d'Etat.[312]

To many, the *Porta* decision seemed an unfortunate retreat from the robust and vigorous stance taken in 1998, and its promise of an active, mature judicial participation in the French constitutional settlement. The *Blotzheim* case, as many commentators note, ought to be understood in conjunction with the Court's 1998 *Sarran* decision, itself a landmark case.[313] In *Sarran*, French citizens recently resident in New Caledonia were excluded from voting in referenda on its constitutional future, following a 1998 agreement with the French government, a 1998 statute on the matter, itself expressly taken up into and referred to in Article 76 of the Constitution. Those seeking to overturn the decree on the referendum sought via Article 55 to invoke the ICCPR and the EConvHR as establishing rights paramount to the statutory/constitutional scheme. The Court held that the incorporation of that statutory scheme into the Constitution conferred constitutional status thereupon. One part of the Constitution (Declaration of Rights and freedoms, Article 3) could not trump another (Article 76). The supremacy accorded international engagements under Article 55 applied only to legislation, and not to tenets and precepts of constitutional status. Article 55 did not allow international agreements to trump the Constitution, for it was only by virtue of that Article that international commitments had any domestic standing. In short, the Constitution

311 °239366 CdE 8 July 2002. In the context of EU law, °287110 CdE 8 Feb. 2007 and Dreyfus 1992.

312 °169219 CdE 3 July 1996; °244043, 7 Feb. 2003; °245255, 28 April 2004, and °327663, 9 July 2010 (2008 Accord with the Vatican on recognition of higher education degrees).

313 °200286 CdE 3 October 1998.

was supreme over treaties. The Court of Cassation followed the lead of the Conseil and held, likewise, in the *Fraiss* decision of 2000 that treaty provisions could not by virtue of Article 55 override statutory provisions taken up into the Constitution and having thereby constitutional status.[314] *Sarran* stands as a clear example of judicial recognition and application of the institutional strategy.

### 3.5.2 Interpretation and the Role of the Courts

It was the long-established, classic position of the Conseil d'Etat that it would defer to the government's interpretation of a treaty provision. It only takes jurisdiction in cases where the international agreement or provision thereof was clear and certain in what it prescribed. This is the doctrine "*acte clair*" or "*sens clair*".[315] Such was the constrictive, restrictive interpretation of the separation of powers held by the Conseil d'Etat, that in case of potential doubt or question, it would refer the matter to the Ministry of Foreign Affairs for a binding opinion on the meaning of the provision in issue.[316] The "*acte clair*" doctrine enabled the Conseil to refer to the government those matters considered delicate or of potential embarrassment, and even avoid preliminary references to the European Court of Justice regarding the Community treaties.[317] While the separation of powers might justify the doctrine, it is by no means a clear case. Presumably, the contractual nature of the international compact required the parties to assert what the terms and conditions meant, rather than a court substituting its own view. Added to this was the overlay of the foreign affairs power, firmly and decidedly entrenched with the executive branch. Be that as it may, referring such questions to the government raised the risk of, or perception of, bias in favour of the government. It could interpret the provisions at issue so as to favour the specific outcome it desired. And indeed, research on the point tended to support that perception.[318]

In 1990, however, the Conseil d'Etat reversed itself and assumed jurisdiction to interpret treaty provisions in first instance, while leaving open the possibility of consulting the Ministry for a non-binding opinion. In the 1990 *GISTI* decision, the Conseil took it upon itself to interpret a set of Franco–Algerian treaties on entry, stay, study and work permission in France for Algerians in relation to a government circular purporting to add and adjust conditions relating thereto.[319] The Conseil did not refer the question of the meaning of the treaty terms in issue to the

[314] °99–60274 Cass. *Fraiss* (2 June 2000).

[315] See e.g., CdE 23 July 1823 (*Veuve Murat*) and 14 Nov. 1884 (*Szanianski*). Dupuy 2008, pp. 435–6; de la Rochere 1987, p 52; Buffet–Tchakaloff 1991.

[316] E.g., °20230 CdE 16 May 1980.

[317] de la Rochere 1987, pp. 50–4, citing CdE 18 June 1965 (*Chatelaine*) on the former point.

[318] Dubuis 1971 and Chretien 1960 (and cited by de la Rochere 1987, pp. 52–3).

[319] °78519 CdE 29 June 1990.

government, but rather interpreted them in the context of and reconciling them with, relevant French legislation. In the substance of the case, the decision is perhaps less remarkable because for the most part, the claims of the GISTI association against the circular were rejected because the provisions were construed as advisory and without regulatory, law character. This interpretation jurisdiction was firmly set as the standard in 1993, with the Conseil d'Etat reiterating and affirming its position, by interpreting (without preliminary reference to the government) *inter alia* the 1963 VCCR as creating certain directly enforceable rights in the French legal order.[320]

The Conseil will interpret actively, rather than passively as it had done formerly, and supply meaning and definitions where the treaty is ambiguous or has left the matter open.[321] It can go quite far in seeking a reconciliation between statute and treaty. Because the Constitution and constitutional principles remain paramount, treaties and international engagements must be interpreted in conformity with the former.[322] Aside from constitutional implications for treaties, for example, in *CGT* the Conseil construed ILO Convention 158 (in light of the European Social Charter) to allow states a discretion to exempt under certain circumstances parties otherwise covered. Nothing in the Convention directly prohibited the French employment initiatives, nor directly addressed the type of employment contracts in issue. And where the administrative courts face divergent provisions arising from different international engagements, they must endeavour to reconcile those provisions based on a harmonious construction, to the extent possible, rather than based on some sense of validity or normative hierarchy.[323] This active interpretation nonetheless meets its limits (and limitations) in addressing the Article 55 supremacy provisions.

On the other hand, the courts of ordinary jurisdiction have always asserted jurisdiction to interpret treaties where private rights are in question.[324] When a public interest, or an international public order question intervenes, they decline jurisdiction.[325] Hence, as might be expected, the practice of the criminal side of the courts was to refer matters on a regular and frequent basis to the Ministry of

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[320] °111946 / 111949 CdE 29 Jan. 1993.

[321] See e.g., °236096 CdE 30 Dec. 2002 and °230530, 20 Nov. 2002.

[322] °169219 CdE 3 July 1996 (interpreting an extradition treaty with Mali not to allow for extradition for offences of a political nature).

[323] °28347 CdE 19 Oct. 2005, and see also °206902 CdE 21 April 2000, and °206594, 28 July 2000.

[324] de la Rochère 1987, pp. 49–50, and citing as an early example Cass. *Duc de Richmond Estate* (24 June 1889), and °74–15246 Cass. (6 April 1976) (justiciability of contractual obligations involving state succession in Franco–Algerian conventions).

[325] Cass. (30 June 1976); °87–14212 Cass. (7 June 1989); °93–12668, (7 February 1995); °08–81266, (18 March 2008), and CA Paris *Société Egyptair* (5 Dec. 1984) (amendments to IMF Charter non–justiciable). This has tended also to cloud what the courts understand precisely as a putting into question a matter of "public international law" or "international public order". Moreover, the civil side of Cassation does not exactly parallel the criminal side in answering the point.

Foreign Affairs. In more recent times, however, the criminal courts have reduced the number of situations in which they submit a preliminary reference.[326] For example, the scope and range of diplomatic immunity are within the interpretative purview of the criminal courts.[327] Yet the determinations of the relevant ministry to allow or decline extradition are not susceptible to review as against the treaty, because such treaties are seen by the courts as high-level administrative compacts which may only be interpreted by the parties thereto.[328] The civil side has referred matter less frequently to the government for preliminary interpretation. Its practice was to rely on its jurisdiction to interpret and apply law, whilst simultaneously avoiding any express reference to public order questions. In its 1995 *African Development Bank* decision, the Court of Cassation rejected arguments that any interpretation of the 1963 Khartoum Agreement creating the Bank had to be submitted to the government.[329] The Court emphasised that it was the duty of the court and within its jurisdiction to interpret treaties submitted to it, without having to solicit the opinion of a non-judicial organ on meaning. If the scope and meaning of the treaty did come into serious question, by way of being unclear or ambiguous, the courts would then refer to question to the Ministry of Foreign Affairs. Thus a France–Vietnam Treaty on nationality was clear enough on its face so as to avoid putting the courts to investigate the scope of application of the Treaty, a matter of public international order.[330]

Similar to the practice in the Netherlands and the US, both the French administrative law courts and those of ordinary jurisdiction recognise that international agreements (as with rules of customary international law) may have in principle "direct effect" within the legal system, providing they have been duly incorporated there. That is, no further national implementing legislation is required above and beyond the publication decree and parliamentary resolution or statute of consent, for private parties to invoke or be bound by relevant treaty provisions. The critical factor is what the agreement provides. If the court finds the terms too vague or advisory in nature, or that they direct themselves clearly to states and public officials, the terms can have no direct effect in law.[331] The courts are not hesitant in considering whether a particular international covenant has direct effect or not under these conditions. Thus, for example, the unwavering position of the Conseil d'Etat is that the UN Declaration of Human Rights has no direct effect

[326] Following Cass. *Glaeser* (30 June 1976).

[327] °03–83452 Cass. (12 April 2005); °09–88675 Cass. (8 April 2010).

[328] °80–94835 Cass. (19 Jan. 1982); °04–84470, (13 October 2004); °02–80787, (18 Jan. 2006) (European Extradition Convention).

[329] °93-20424 Cass. (19 Dec. 1995).

[330] °93–12668 Cass. (7 Feb. 1995).

[331] CdE 18 April 1951 (*Elections de Nolay*) (resolutions of the UN General assembly and Security Council are not directly enforceable) – but see by contrast °97–19742 Cass. *Soc. Dumez* (15 July 1999) (Security Council Resolution 687–1991 against Iraq invoked); °78519 CdE 23 April 1997; °99PA02934 CA Paris *Société Barry Callebaut* (16 Sept. 2002) (1986 UNCTAD Accord on Cocoa applies only to states).

within the French legal order, not only because it does not comply with the constitutional requirements in Articles 53 and 55, but also because it is more an aspirational text than document of law.[332] Likewise, the 1966 ICESCR is not directly enforceable (at least its Article 11); whereas the 1951 Geneva Convention on Refugees and Asylum Seekers has direct effect.[333] On the side of the courts of ordinary jurisdiction, the Rennes Court of Appeal held that the procedures and criteria relating to the acceptance and payout of claims issued by the international commission administering the Convention on Civil Liability for Oil Pollution[334] were mere guidelines with political force, but no legal force.[335] Accordingly, they could not justify rejecting a claim by a supplier to the tourist industry affected by marine pollution caused by the MV "Erika" as being too remote or beyond the purview of the Convention.

Yet the division of the judicial power into the administrative and ordinary streams can lead to inconsistencies or differences of view concerning treaties. The best and clearest example of such a divergence in view is seen in the judicial appreciation of the 1990 Convention on the Rights of the Child.

The Conseil d'Etat has adopted a floating standard, considering individual articles on a case-by-case basis. Thus Article 3–1 has direct effect, but not Article 3–2.[336] Likewise, Articles 5, 7, 8, 9 and 16 have no direct effect.[337] Cassation had, on the other hand, maintained that the Convention, by its Article 4, is directed at states and requires implementing legislation: the Convention has no direct effect.[338] Recent Cassation decisions suggest, however, that the Court is aligning itself more closely to the approach of the Conseil d'Etat, namely the case by case, article by article assessment.[339]

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[332] °214919 CdE 7 July 2001; °234929, 3 May 2002, and °249482, 2 April 2004.

[333] °03–10068 Cass. (25 Jan. 2005);– yet see °06–43124 Cass (16 Jan. 2008) *contra*, and °204784 CdE 6 Nov. 2000 (Art 24 1951 Geneva Convention). See also generally, °204756 and °205241 CdE 8 Dec 2000; °188159, 30 Dec 1998 (1979 Berne Convention on Wildlife Habitat Preservation not enforceable); °213882, 31 May 2000 (1994 Marrakech Annex to the ILO Convention not enforceable) – but see °28347 CdE 19 Oct 2005 (ILO Convention 158 has direct effect).

[334] Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 UNTS A–14907, under the auspices of the International Maritime Organisation.

[335] °RG04/00528 CA Rennes (25 May 2004).

[336] °161364 CdE 22 Sept. 1977 (Art. 3–1 justiciable); °249369, 24 March 2004 (id.); CAA Paris *Neggaoui* (5 Dec. 2000) (id.); and see °216901 CdE 6 Oct. 2000 (Arts 3–2, 5 not justiciable).

[337] See e.g., °214664 CdE 18 Jan. 2002; °232599, 27 May 2002; °261675, 8 July 2005; °265199, 26 Oct 2005; °265003, 29 Dec 2004. Nonetheless, the Conseil has perhaps left some room for some applicability of Article 9–1 (avoiding the separation of child from parents): °269653 CdE 18 Feb. 2005.

[338] °91–18735 Cass. (15 July 1993).

[339] °02–20613 Cass. (18 May 2005); °04–16942, (14 June 2005); °05–10519 and 05–10521, (13 July 2005); °03–17912, (22 November 2005); °07–11273, (16 April 2008); °08–11033, (25 February 2009), and °9–10439, (15 December 2010).

### 3.5.3 Treaties Paramount over Legislation

Where a treaty provision is irreconcilable with national legislation, Article 55 confers priority on that provision. As noted above, the primacy over ordinary legislation of an international commitment duly incorporated into the French legal system follows from this constitutional legitimation and not from any primacy inherent in the international rule itself.[340] Article 55 is now understood by both the administrative law courts and those of ordinary jurisdiction to attribute supremacy as against legislation both subsequent in time and antecedent as well. The suggestion that discounting prior statutes in the face of inconsistent treaty obligations approached too closely a form of constitutional review, one beyond the jurisdiction of the courts, did not hinder Cassation in 1975 from holding that supremacy covered statutes passed both prior to and after a treaty.[341] But that constitutional perception did hinder the Conseil d'Etat until 1989. Up to that point, it held firm to its position, expressed in *Semoules de France* (1968) that any question of resolving an enduring inconsistency between statute and treaty was for the Conseil Constitutionnel.[342] Discounting a statute, rather than reading it down to conform to a treaty, constituted a review of the statute's validity, prohibited to the courts under the strict French reading of the separation of powers. But in fact it was only the Conseil d'Etat (the administrative courts more generally) who could properly deal with the jurisdictional and conflicts issues, and not the Conseil Constitutionnel nor the courts of ordinary jurisdiction.[343] This realisation, with appropriate encouragement, persuaded the Conseil d'Etat to reconsider its position in the 1989 *Nicolo* case.[344] The revision to the Conseil's stance was no doubt eased in *Nicolo* because the inconsistency involved the Treaty of Rome and a question of EU law. But it also reflected a changing perception by the Conseil d'Etat, expressed again in *Sarran* and *Blotzheim*, of its role in the evolving French constitutional order and the balance of powers.

But this willingness to control the internalisation of international law, its meaning, and ranking, in the domestic legal system does not extend the power of (administrative law) judges to control as well how and where national law is—or ought—to be adjusted to accommodate those international rules.[345] That remains a matter of policy, of legislative and executive concern. The supremacy terms of Article 55 and the requirements of Articles 52 and 53 do not combine to redraw completely the French reading of the separation of powers. The French courts

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[340] °200286 CdE 30 Oct. 1998 (*Sarran*) and °99–60274 Cass. *Fraiss* (2 June 2000).

[341] Cass. *Soc de cafes Jacques Vabre* (1975) [1976] CMLR 43.

[342] CdE *Semoules de France* (1968) [1970] CMLR 395, and see e.g., Bothwell 1990, p. 1660.

[343] °74–54 DC, 15 Jan. 1975 (a statute incompatible with a treaty is not necessarily void *ab initio*; but the Conseil Constitutionnel does not have jurisdiction to assess the conformity of statutes with treaties).

[344] °108243 CdE 20 Oct. 1989.

[345] °262645 CdE 7 July 2004 (departmental circular and local measures).

remain bound to their jurisdictional limits. Hence, while ordnances under Article 39 (a type of primary executive legislation subject to legislative approval) are administrative acts subject to administrative court review in substance and for compliance with treaty obligations, once they are confirmed by Parliament they obtain the status of primary legislation, and the courts are limited to checking their conformity with duly incorporated international commitments.[346] By the same token, it remains beyond the jurisdiction of the courts to determine whether the reciprocity condition for supremacy under Article 55 has been met by the other treaty parties. This remains a political question also, within the exclusive jurisdiction of the executive branch.[347] If reciprocity presents a live issue, both the administrative law courts and those of ordinary jurisdiction will refer the question to the Ministry of Foreign Affairs for its opinion.[348] Of course, it always remains open for the courts to circumvent the issue through active interpretation.

This discussion of Article 55 and the primacy of treaties over legislation bring us neatly to the role of the Conseil Constitutionnel.

### *3.5.4 The Conseil Constitutionnel as Guardian of the Constitutional Order*

The jurisdictional remit of the Conseil Constitutionnel is the correspondence of (proposed) laws with the Constitution. With respect to treaties and international agreements, Article 54 of the Constitution confers jurisdiction on the Conseil to review whether an international compact or term thereof conflicts with the Constitution. The power of the Conseil review in this matter is discretionary, voluntary, unlike the mandatory powers of review under Article 61 for laws establishing state organs ("organic laws"), referendum proposals and the rule and regulations of Parliament. It is invoked on petition of the President, the Prime Minister, the president of the National Assembly or Senate, or 60 members of either body. The Conseil must be petitioned before the law authorising ratification, adoption or implementation is decreed in force; otherwise, it will declare itself without jurisdiction.[349] Thus an attempt failed to reopen its jurisdiction to review the Treaty on European Union on the basis that French ratification, otherwise due and

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[346] °201816, 212081, 199601, and 199072 CdE 8 Dec. 2000 *Hoffer* (1968 treaty with Tunisia overriding 1945 ordnance on entry and stay in France), and see also °232359 CdE 17 May 2002 (legislation can ratify ordnances not expressly but by necessary implication or consequence).

[347] Even to the extent of excluding Parliament. See generally, Pinto 1987, pp. 1079–1083 (and works cited therein).

[348] °82–14008 Cass. (6 March 1984) (RCDIP 1985, 108); °15408 CdE 29 May 1981, and °180277 CdE 9 April 1999 and °257682, 11 Feb. 2004 (regarding the EConvHR), and connected therewith *Chevrol v France* 13 Feb. 2003 (ECtHR). Reciprocity is not an issue upon evidence that the government has denounced or withdrawn from the treaty.

[349] See e.g., °80–116 DC, 17 July 1980; °2007–560 DC, 20 Dec. 2007.

proper, was a nullity or not yet in force because of the absence of unanimous ratification.[350] It misconstrued the nature of international law (in fine, ratification) referred to in the Preamble of the 1946 Constitution and incorporated by reference in the 1958 Constitution. Should the Conseil find a conflict, no law authorising ratification, adoption or implementation may be promulgated until the Constitution has been amended accordingly. Of course, it goes without saying that such a situation also implies the ability of France not to proceed further with the international agreement and withdraw.

The Conseil Constitutionnel is in effect assessing the constitutional compatibility of the substance of a treaty, even though its jurisdiction is limited technically to a review of the statute authorising ratification or implementation of the treaty.[351] To the extent a treaty is contrary to the Constitution, so too is the law introducing it into the domestic constitutional and legal order.[352] The Conseil does not examine whether the law authorising or implementing the treaty, or government acts regarding same, conform in substance to what is contemplated by that treaty.[353] Nor, when it is seized under Article 61, will it review the law as against treaties in force within the domestic legal order.[354] In other words, it is the responsibility of the executive and legislative branches to ensure due compliance with treaty obligations. The Conseil's responsibility extends only to ensuring those branches of state power act within the limits and powers prescribed by the Constitution.

From the other perspective, that of the international accord in issue, the Conseil Constitutionnel will only considers engagements of an international character creating obligations binding on an international level. As to the international character, tax and monetary conventions between France and its overseas (Polynesian) territories are not treaties within the meaning of Article 53.[355] Inasmuch as their implementation obtains by statute, the Conseil nonetheless retains jurisdiction in respect of Article 34 (legislative jurisdiction of Parliament) and Article 72 (institutional jurisdiction of the overseas possessions of France). As to internationally binding obligations, the Conseil has considered an interpretative declaration appended to a treaty by the government as a unilateral act having no binding, normative force. Because it reviews only international obligations binding France, the Conseil discounted the declaration accordingly.[356] Where the issue addresses (laws implementing) amendments to a treaty by the parties, the Conseil

[350] °92–312 DC, 2 Sept. 1992.

[351] °76–71 DC, 30 Dec. 1976; °80–116, 17 July 1980.

[352] °2010–614 DC, 4 Nov. 2010.

[353] °89–268 DC, 29 Dec. 1989. Nonetheless, the Conseil Constitutionnel will take into account other treaty obligations already binding on and in France, when assessing a treaty's overall compliance with the French Constitution: °80–116 DC, 17 July 1980.

[354] °2006–535 DC, 30 March 2006 (here, ILO Convention No. 158 and European Social Charter).

[355] °83–160 DC, 19 July 1983. See also °93–318 DC, °93–319 DC, 30 June 1993 (id.).

[356] °94–412 DC, 15 June 1999 (1999 European Charter on Regional and Minority Languages in conflict with the Constitution).