COURTS AND POLITICAL INSTITUTIONS

A Comparative View

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PREFACE

Authors may not always be fully aware why they write their books. When composing this book, I felt that my reasons were simple and compelling. When I returned to teaching law at a somewhat advanced age, I happened to rediscover how much comparative methods help to develop students' ability to define legal problems and to collect materials for solving them. Moreover, there is something exciting for them in being exposed to ways of reasoning they are not familiar with. I wrote the book in the hope that any serious reader of it would have the same experience.

The reader I had in mind was the senior student of law, history or political science, not necessarily British or American, with a certain interest in general problems of law or politics, or with a cosmopolitan view of life in society. However, other readers, whatever their background or their vocation in life, may also benefit from the methods I have used for making foreign constitutional systems accessible by comparing them to others. Constitutional law, if well explained, is not all that difficult to understand.

The book could not have been written without the help of a number of persons and institutions. I am thinking, in particular, of the Cambridge law faculty, which provided me in 1999–2000, when I was Goodhart Professor of Law, with a tiny little office in the heart of the Squire Law Library, very close to the law reports. My Utrecht academic friend Tom Zwart helped me to collect materials; he also contributed to the evolution of my ideas by identifying new constitutional developments. Other friends and colleagues encouraged me to keep trying my hand at mastering some basic issues of comparative constitutional law. Finally, the Cambridge University Press assisted me in finding my style of writing.

The first two chapters of the book elaborate some ideas I had already developed in some of my earlier works, written in Dutch. Chapters 3 and 6 rely heavily, though not exclusively, on (respectively) the American and the French literature. Chapter 4 is mainly based on earlier publications of

mine in English, French and Dutch, in particular on methods of human rights protection. Chapters 5, 9 and 10 are entirely original with regard to anything known to me in existing literature. The other chapters chiefly serve for giving cohesion to the book and transforming its text into a real *exposé*.

I owe the reader one final remark: it has been a great pleasure to compose this book.

T. K.

ABBREVIATIONS

AC	Law Reports, Appeal Cases
Adm. Besl.	Rechtspraak Bestuursrecht (cases on administrative law, Netherlands)
AG	Attorney General
AJIL	*American Journal of International Law*
All E R	All England Reports
AmJCompL	*The American Journal of Comparative Law*
Art.	Article
Bell	John Bell, *French Constitutional Law*
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BVerfGE	Entscheidungen des Bundesverfassunggerichts (decisions of the Federal Constitutional Court, Germany)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (decisions of the Federal Administrative Court, Germany)
CC	Conseil Constitutionnel (Constitutional Council, France)
CE	Conseil d'Etat (Council of State, France)
ch.	chapter
Ch	Law Reports, Chancery Division
cl.	clause
CLJ	*Cambridge Law Journal*
CMLR	Common Market Law Reports
Cmnd.	Command Papers (studies submitted to the British Parliament)
C of E	Church of England
ColLRev	*Columbia Law Review*

Cranch	Cranch, ed., *Reports of Cases of the US Supreme Court 1804–1816*
DC	District of Columbia
DLR	Dominion Law Reports (Canada)
EC	European Community (or: Communities)
ECHR	European Court of Human Rights
ECR	European Court Reports
EHRR	European Human Rights Reports
ESC	European Social Charter
EU	European Union
FLR	Law Reports, Family Division
GLC	Greater London Council
HarvLRev	*Harvard Law Review*
ICC	Interstate Commerce Commission (USA)
ICLQ	*International and Comparative Law Quarterly*
IRA	Irish Republican Army
KB	Law Reports, King's Bench Division
Kommers	Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*
LQR	*Law Quarterly Review*
MR	Master of the Rolls
NedJur	*Nederlandse Jurisprudentie* (Dutch Law Reports)
NJW	*Neue Juristische Wochenschrift* (New Legal Weekly, Germany)
NO	Nationale Ombudsman (Netherlands)
PM	Prime Minister
QB	Law Reports, Queen's Bench Division
Rabelszeitschr.	*Zeitschrift für ausländisches und internationales Privatrecht*
RDP	*Revue du Droit Public* (Public Law Review, France)
Rec.	*Recueil des décisions du Conseil Constitutionnel* (or, as the case may be: *du* Conseil d'Etat)
RFDA	*Revue Française de Droit Administratif*
RFDC	*Revue Française de Droit Constitutionnel*
RIDC	*Revue Internationale de Droit Comparé*
s.	section

Series	European Court of Human Rights. Judgments and Decisions
TulLRev	*Tulane Law Review*
UCLA	University of California, Los Angeles
US	United States Supreme Court Reports
WLR	Weekly Law Reports

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Introduction

1.1. Terminology

This book examines the legal relations between political institutions and the courts in some European countries and in the United States. The author happens to be interested in this theme and, particularly, in the boundaries between judicial and political activities.

At first sight, it is a somewhat unlikely subject. There seems to be little that judges and politics have in common. The dry atmosphere of the courtroom cannot be compared to the vividness of a debate in – say – the House of Commons or the American Senate. Judges are normally represented as somewhat elderly gentlemen, who try to look as wise as they are supposed to be; a gown and (in the case of English judges) a wig will strengthen that impression. Politicians, by contrast, radiate a cheerful kind of optimism, illustrated by a happy smile or a determined look on their faces; the image they evoke is one of willingness to tackle any problem humankind may find in its way. Two different worlds, one would be inclined to say. However, appearances are deceptive. I hope to show that it is far from easy to determine the borderline between the scope of judicial and political activities. To complicate things further, differences between legal systems also concern the exact location of this borderline. What is 'political' in some systems, for example in English law, may be the kind of problem to be solved by the courts in a different system, for example, under the Constitution of the United States. Capital punishment provides an example: its introduction, or reintroduction, is decided by political institutions in the United States, in fact by the state legislatures. And traditionally, the solutions adopted in the fifty states have not always been the same. The countries of Western Europe, on the contrary, have a hard and fast rule of law: the European Convention on Human Rights prohibits the application of the death penalty, except in

time of war.[1] Subject to that exception, capital punishment is a legal and not a political issue in Europe.

It is true that the very existence of this borderline between political and judicial activities has been denied by some academics, who consider that any judicial opinion, on whatever subject, must be considered as a 'political' statement. That theory, though presented as 'modern' and 'critical' in the early 1980s, has since lost its appeal. Professional lawyers usually preserve the distinction between legal and political arguments nowadays, in Europe as well as in the United States. And they are right: nothing is gained by giving the concept of the 'political' such a wide scope that it includes court rulings on matters like divorce or bankruptcy.[2] There may be a problem in certain cases, when political rather than legal arguments are put forward in court decisions; but this problem is not solved by denying the distinction between the two kinds of arguments. As we shall see in the course of this study, the problem is particularly important when legal rules on relationships between public authorities, or between those authorities and the citizens, are concerned, i.e. in the area of constitutional and administrative law.

At this point, a first question of terminology emerges. The part of the law governing the relations between courts and political institutions, such as governments and parliaments, is known as 'public law' in many legal systems. The term is, however, slightly confusing when used in a study which is not confined to one legal system. The problem is, in particular, that the expression 'public law' is not part of traditional legal usage among English and American lawyers. It is the ordinary name for constitutional and administrative law in Dutch (*publiekrecht*) and in German (*öffentliches Recht*). It is in this sense that the expression will be used in this book.

This little terminological problem illustrates already one of the recurring difficulties of comparative legal research. In different legal systems, dissimilar concepts may exist; and if the same expressions occur, they often have a different meaning, or at least a different scope.[3] Among French

[1] Art. 1-2 Protocol no. 6 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[2] See also Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, 1999), pp. 11–12.

[3] On problems of terminology in comparative legal research see David J. Gerber, 'Toward a language of comparative law', *AmJCompL* 46 (1998), 719; Geoffrey Samuel, 'Comparative law and jurisprudence', *ICLQ* 47 (1998), 817.

lawyers, for example, the expression 'public law' (*droit public*) has a more restricted meaning than among their Dutch and German colleagues, as it refers only to administrative law and not to constitutional law. That is not the only complication. In the United States, the concept of 'constitutional law' is used in a narrower sense than in Great Britain: it covers only the areas of law concerning the constitution which have given rise to judicial decisions. The relationship between President and Congress has not been the subject of any important body of case law, and the result is that it is chiefly examined in American books on 'government' or 'political science' rather than in those on constitutional law. I see no reason to adopt such a limited view of constitutional problems in this book. The comparatist has the advantage, however, that the case law of the United States Supreme Court on some constitutional matters, such as civil liberties and equal protection, is prolific. That circumstance, in itself, is a good reason to include American constitutional law in the analysis of problems concerning the relations between courts and political institutions.

According to this view, public law covers a large area of every national system of law. A respectable library could be devoted to American constitutional law, or French administrative law, alone. Consequently, it is an impossible task for one author to have a thorough command of this large area in more than one system of law; but he can nevertheless try to explore it.

As a lawyer, he is then faced with an additional difficulty. Frequently, it is hard to examine constitutional developments without taking a look at historical, social and political backgrounds. It is not possible to understand American case law on equal protection without some knowledge of the history of slavery and of racial inequality and oppression. Similarly, the peculiar characteristics of the French constitution of 1958 can only be fully grasped when they are considered as part of an evolution triggered by the political events of May 1958 and the ensuing birth of the Fifth Republic. It is an inadmissibly narrow conception of constitutional law, as Justice Frankfurter once put it in one of his individual opinions, 'to confine it to the words of the Constitution and to disregard the gloss which life has written upon them'.[4] The present author shares this broad conception of constitutional law, but he is aware that this does not facilitate his task. He

[4] Justice Frankfurter, concurring, in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 US 579 (1952). Felix Frankfurter was judge in the United States Supreme Court from 1939 to 1962.

feels, however, that he has hardly any choice: a true understanding of the role of the judiciary in its relationship to the political institutions can only be gained after a careful examination of the constitutional background.

1.2. Comparative approaches

If it is already hard to gain a good understanding of public law in one legal system, what then is the use of comparisons between two or more systems? In answer to this question, different theories have been developed, some of them less convincing than others.

There is first a utilitarian answer: by learning from others, you can improve the quality of your own legal system.[5] It is quite possible that a well-considered use of comparative materials may help to solve legal questions of a more or less technical nature, such as liability of the employer for damage caused to the employee during working hours, or the position of the mortgagee in case of bankruptcy of the debtor. Thus, many provisions of the new Civil Code of the Netherlands have been inspired by solutions found elsewhere, for example, in the German or Swiss codes. However, it is difficult to see how this approach could possibly work in the area of constitutional law. American constitutional law, interesting though it may be, is very much a product of American history; it is part of American culture and attuned to American society. Constitutions are not very suitable commodities for export. It is true that, in the years following the Second World War, Americans sometimes attempted to impose their own constitutional standards on some of the defeated countries, but this operation was not a great success. During the American occupation of Japan, rumour had it that the new Japanese Constitution had been drafted by the legal advisers to the supreme military commander; but however that may be, the interpretation of the Japanese Constitution has always been completely at variance with constitutional practice in the United States. Identical words don't have necessarily the same meaning in different legal cultures.

A second aim of comparative law is the purely academic interest. We tend to be curious about things we don't understand, and we will try to find an explanation. Pascal said long ago, half mockingly, that it was 'an odd kind of justice' ('plaisante justice') which found its boundaries in the course of a

[5] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn, trans. Tony Weir (Oxford 1998), no. 2–11.

river or a mountain range: 'true on this side of the Pyrenees, false on the other'.[6] In an intellectual climate affected by rationalism, academics will feel that there must be a justification for differences of this kind; their job is simply to find it. Montesquieu, also struck by differences among legal systems, made a fair attempt at discovering the reasons. He referred to elements like climate, religion, previous experience, morals and manners, and methods of government.[7] It is what we now would call a speculative generalization, more interesting to philosophers and sociologists than to lawyers. It is clear, for example, that democracy imposes its own requirements on legal evolution; but it is far from clear why some nations have a democratic tradition and others have not.

A third, and more idealist, vision of comparative law considers it as a modest means of fostering mutual understanding among nations and so, ultimately, of promoting peace. In the early nineteenth century, when comparative legal research began to develop as a special branch of legal science, there was much optimism that it would bring peoples together. A Dutch lawyer and politician expressed the opinion that it would bring about a new and international constitution, based on general principles of law growing into 'a world force'.[8] The evidence, sadly, does not support the idea that a better knowledge of the law and culture of other nations or groups will promote better relationships. The experience of the last quarter of a century can indeed be interpreted as showing the opposite: the mass killings in former Yugoslavia took place between ethnic and religious groups which knew each other only too well. At any rate, we are too sceptical nowadays to believe in easy methods of strengthening the forces of peace in the world.

The fourth view is based on educational considerations. One can only come to an understanding of a system of law by confronting it with a different system. The particularities of one system become apparent when other systems are found to be without them. This is, of course, part of a more general truth: having lived in the Amsterdam area during my childhood, I only discovered how flat the country was when I made my first

[6] Pascal, *Pensées*, no. 60 in the Krailsheimer translation (Harmondsworth, 1995); ed. Brunschvicq no. 294.

[7] *L'esprit des lois* XIX, 4; in L'Intégrale edn (Paris 1964) p. 641. Also in: Montesquieu, *Oeuvres complètes*, Pléiade edn (Paris, 1951), vol. II, pp. 396ff.

[8] Jan Rudolph Thorbecke, in 1841, in his 'notes' on the Dutch Constitution (*Aantekening op de Grondwet*).

trip to the Belgian Ardennes. This is the kind of experience which applies to the legal landscape as well as to the physical environment.[9] There is, however, a further perspective to the educational view of comparative law. The comparison shows us something about law and legal evolution generally. It allows us to develop ideas about the judicial interpretation of legal and constitutional provisions, about the use of broad and narrow notions and concepts, about the social and cultural factors influencing legal developments, about the relationship between law and politics, and half a dozen other fundamental problems. These problems can be analysed in the abstract – for example, on the basis of historical and sociological studies. They can also be concretized, by means of a study of constitutional practice, of case law on issues of constitutional and administrative law, and of the debates over those issues in various legal systems. This is, in the main, an empirical and inductive approach to important problems of public law and of the relationship between law, politics and administration.

It is this latter concept of comparative law which has provided the guideline for the composition of this book. Constitutional documents, statutes and legal principles are couched in words: for the lawyer, these words have their particular importance because of the possibility of human action they imply; they are, as one philosopher put it, 'guides to action'.[10] Often, this action follows its own course and develops its own dynamics; it may, therefore, give a meaning to the words the drafters of these words could not have imagined. The Constitution of the United States consists of words; but, as Justice Holmes once observed, these words 'have called into life a being the development of which could not have been foreseen by the most gifted of its begetters'.[11] We shall be trying to trace the processes which give rise to such developments in different legal systems.

1.3. Comparative methods

Much has been written about the 'methodology' of comparative law, and the debate is far from closed. Recently, a leading scholar wrote that this methodology is still at the experimental stage.[12]

[9] Zweigert and Kötz, *Introduction*, no. 2–IV.

[10] Karl Olivecrona, *Law as Fact*, 2nd edn (London, 1971), p. 252.

[11] *Missouri* v. *Holland*, 252 US 416 (1920). Oliver Wendell Holmes was judge in the US Supreme Court from 1902 to 1932.

[12] Zweigert and Kötz *Introduction*, p. 33. Further literature on page 32 of the work.

An additional difficulty is that contributors to the debate on comparative methods are usually interested in matters of private law. In that area, centuries of legal debate have helped to create a certain system of classification; the influence of Roman law and canon law is perceptible in many countries, particularly (but not exclusively) on the European continent and in Latin America.[13] That may provide a basis for comparative research. No such basis exists in the field of public law, where internationally accepted concepts and standards are much more difficult to find. There are only few common traditions, and public law often has a much more national character than private law. The notion of 'contract' in English law covers approximately – though not exactly – the same relations as those indicated by the concept of contract in French, Belgian or Dutch law. In contrast, the American expression 'separation of powers' and its French counterpart 'séparation des pouvoirs' concern entirely different matters. In the United States, the concept embodies not only the independence of the judiciary, but also the mutual autonomy of the legislative and executive branches of government, each of them having its separate tasks, powers and responsibilities. It is a general constitutional guideline, a fundamental principle underlying the American constitutional fabric. By contrast, the French expression refers only to the obligation of the courts to refrain from interfering in government and administration. From the French Revolution onwards, a rigid distinction has been drawn between the judicial and the administrative. Thus, similar expressions sometimes refer to different problems.

However, comparative study of public-law problems also has its brighter side: the number of fundamental problems is smaller than in private law. That is especially true if we limit our attention to States which are characterized as 'liberal democracies' in the literature on political science.[14] These States actually share some political and ideological traditions, which can briefly be summarized as democracy, rule of law, human rights protection and open government. Each of those traditions implies some of the basic assumptions which determine the working of the constitutional order: the role of representative bodies in legislation; the independence of the judiciary; protection of citizens against arbitrary government acts; participation of

[13] See Peter Stein, *Roman Law in European history* (Cambridge, 1999), ch. 5.

[14] Examples: S. E. Finer, *Comparative Government* (London, 1982), ch. II; Philippe Lauvaux, *Les grandes démocraties contemporaines* (Paris, 1990), ch. I-1; Arend Lijphart, *Patterns of Democracy* (New Haven, Ct., and London, 1999), chs. 1 and 14.

citizens in politics by free elections and public debate; autonomy in their own sphere of life. These States happen to have a similar economic order and an economic and social history with striking similarities: they were, until recently when these words went out of date, the 'Western', 'capitalist' and 'industrial' States, and most of them have been colonial powers. Within the scope of their basic assumptions, they encounter comparable problems. Questions arise, for example, as to the validity of legislation which violates human rights, or as to the rights of citizens to take action against irregular decisions by the administration. These questions do not arise in States under authoritarian rule: one-party States, States governed by a military junta, communist or fascist regimes. We shall restrict our inquiry to States of the liberal-democratic type.

Within this group of States I introduce a further restriction, by limiting my attention chiefly to the systems of public law of the United States, Great Britain, France and the Federal Republic of Germany. The reasons for this further restriction are mainly practical: materials are not always easily accessible, and my command of languages and appetite for reading have their own limits. The studies I actually did accomplish convinced me, however, that the comparison between American, British, French and German public law gives us the opportunity to discuss some basic problems concerning the relation between the courts and political institutions. I may, nevertheless, permit myself to make a few little excursions to places such as Italy, the Benelux countries and Canada.

If we take the basic assumptions of the liberal democracies for granted, further analysis will allow us to unearth a certain number of questions which are 'fundamental' in the true sense of the word: an answer to such questions *must* have been given before the system of public law could begin to operate. To give two simple examples: an Act of Parliament, a statute, is either unassailable or it can be struck down by the courts for violation of some higher law; Parliament and government either have their own independent powers or work together as interdependent bodies. The answers to such fundamental questions determine the way the system will be shaped. We can, therefore, try to invent two opposite answers to these questions, in order to create two extreme poles, linked by a continuum. For each question, some legal systems will be close to one of the two poles, but most systems find their place somewhere on the line between the two extremes. To study this, I shall use models: abstract solutions to general problems, sufficiently detached from reality to present the problem in a pure form, but close enough to reality to permit comparisons among actual systems of law.[15]

To put it another way, my method will consist in identifying some of the fundamental questions of public law in the four systems I propose to investigate; trying to find the opposing answers to each of these questions; and locating the four systems on the line between the two polar answers. The advantage of this method is that it can first give abstract answers, not encumbered by the compromises which characterize real life; but it then allows us to look into legal systems as they actually work and to measure the distance they keep from the abstract answers. The abstract model only serves as a yardstick for the comparison of the existing systems of public law; it does not express any value-oriented appreciation.

1.4. Legal approaches

The choice of method implies that certain subjects will not be discussed, although they might perhaps be considered as part of comparative public law and as having a link with our main theme, the relations between courts and political institutions.

First, I shall not seek to condemn or praise any legal system in particular, or any solution adopted in such a system. As far as possible, I shall refrain from assessing legal arrangements in terms of 'good' and 'bad'.[16] Assessments of that kind cannot be made without a profound knowledge of the relevant system of law and of the historical and social background. If 'native' lawyers have expressed their opinions, or even their moral judgments, it may be interesting to refer to these opinions and judgments, particularly when they are strongly held; but I shall not add my own appreciation. Some decisions of the US Supreme Court on the admissibility of abortion have given rise to a great political and moral debate in the United States; they also show something about the way the Court interprets the Constitution.[17] I intend to concentrate on the second aspect; the reader may benefit more from my reflections on the interpretation of constitutional provisions than from my

[15] See Claude Lévi-Strauss, 'Sens et usage de la notion de modèle', in *Anthropologie structurale deux* (Paris, 1973), ch. VI.

[16] See Philippa R. Foot, 'Approval and disapproval', in *Law, Morality and Society*, Essays in Honour of H. L. A. Hart (Oxford, 1977), ch. XIII.

[17] In particular: *Roe* v. *Wade*, 410 US 113 (1973); *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 US 833 (1992).

opinions about abortion. More in general, I feel lawyers should be reticent about moral issues arising in legal systems other than the one they are used to. But, of course, Oscar Wilde was right in saying that 'one should not carry moderation to extremes'.

A second consequence of my choice of method is my view that constitutional provisions, rules of law, powers of institutions, should be examined in the framework of the legal systems in which they have developed. It is quite feasible to adopt a different perspective in studies of detail, by isolating a certain legal arrangement from its constitutional or legal environment. A study comparing the composition and the powers of the British Parliament with those of the American Congress might adopt such an approach.[18] It is, of course, interesting to know that a refusal of Royal assent to a bill passed by the British Parliament means that the bill will not become law, but that a veto of the American President can be overruled by Congress deciding by a qualified majority.[19] For the lawyer, this kind of information is not very helpful: he wants to know, rather, why the position of the President in the legislative process is so different from that of the British monarch. But he can arrive at this kind of understanding only by examining the position of the head of State in American and British constitutional law; and a true understanding of the presidential powers under the US Constitution cannot be gained without a thorough analysis of the American concept of separation of powers.

Most legal arrangements, however, cannot be isolated from their constitutional and legal background. A comparative study of such a famous institution as the French Conseil d'Etat would soon reveal that this body has no counterpart in countries like Britain or the United States. In these countries, the judicial tasks of the Conseil d'Etat are done by the ordinary courts, or by special 'boards' or 'tribunals', or not at all; the advisory functions of the Conseil d'Etat are scattered over a great number of persons and advisory bodies. These organizational differences reveal, however, a more profound problem: the tasks, powers and jurisdiction of a body like the Conseil d'Etat are not perceived in British and American legal thinking as necessarily belonging together. Therefore, the concepts used in the Anglo-American world lack the categories appropriate for defining the activities

[18] Example: Kenneth Bradshaw and David Pring, *Parliament and Congress* (London, 1972, paper 1973).

[19] Art. I section 7(2) US Constitution.

of the Conseil d'Etat.[20] As a result, these activities can be properly understood only when examined in their French setting. In this view, comparative legal research should first examine materials as they are considered in the framework of the relevant constitutional or legal system, by patiently and fair-mindedly analysing that system; the second task is then to determine the main characteristics of these materials by comparing them with the results achieved by the study of other legal systems.

For each of the legal systems to be included in the comparison, we should therefore try to scrutinize the concepts it uses. We cannot really understand the meaning of these concepts except by determining the framework within which the concepts have developed and play their role. The construction of the framework, in its turn, is based on certain principles which constitute the foundation stones of the system of public law. And that brings us back to our point of departure.

1.5. Outline of the study

For the purposes of this study, I shall assume that each of the four constitutional systems to be examined has a legislative, an executive and a judicial power. I shall take these three concepts for the moment in the sense they have according to the US Constitution, which is based on a distinction and a separation between these three powers.[21] I shall rely on this version of the famous doctrine of *trias politica* for heuristic purposes: it presents one of the few systematic starting points in the area of public law, and it can be easily understood, especially in its American form. Our problem is, therefore, not whether the *trias politica* idea, as it has been developed over the centuries, is still a correct political theory; it is rather whether this idea can be a useful tool for purposes of comparative research.[22]

My second assumption is that you learn more from studying the relationship between these three powers than from examining each of them individually. The position of the judiciary can only be understood by contrast with the activities of the legislative and executive bodies. The relationship

[20] See L. Neville Brown and John S. Bell, *French Administrative Law*, 5th edn (Oxford, 1998), ch. 1 and ch. 3 nos. 1–2.

[21] See Art. I s. 1, Art. II s. 1 and Art. III ss. 1 and 2, US Constitution.

[22] Compare Eric Barendt, *An Introduction to Constitutional Law* (Oxford, 1998), in particular ch. 1.

between the legislative and the judicial power presents a striking example. We can develop two basic models: in the first, laws passed by the legislative bodies can never be challenged before the courts, because these laws are the very foundation of the constitutional system in question; in the second, the constitutional system is founded on a written constitution which defines or limits the powers of the legislature and allows the courts to check whether legislation tallies with constitutional provisions. The first model is very close to the British doctrine of the 'sovereignty of Parliament'; the second embodies systems characterized by judicial review of legislation, such as the American and the German. When elaborating and developing this comparison, we shall discover the existence of systems which do not conform to either of the models but must more or less be considered as mixed. This is particularly the case with France since 1958.

Since legislation is normally considered as essentially a parliamentary task, the study of the two models will raise some general questions as to what parliaments and courts can be reasonably expected to do. That will ultimately result in some general considerations on the relationship between democracy and the rule of law. Hence it will compel us to face some arduous questions, which are frequently evaded in legal literature. They concern the division of labour between law and politics, lawyers and politicians, legal and political science. Together, they constitute a recurring theme, which is one of the main threads ('the red thread', we say in Dutch) of our study. The study will show that similar problems occur when we shift our attention to other relationships than those between courts and legislatures.

We can also use models when we study the relationship between legislative and executive power. The American constitutional system is based on a strict separation of these powers, and the courts sometimes have to act as umpires in case of conflict. However, parliamentary regimes such as those of Great Britain, Germany, Italy and the Benelux countries are based on collaboration and mutual trust between these powers. France, again, does not fit either of the two models, as its system is located in a somewhat uncertain position half way between them.

The relationship between executive and judicial power will allow us to examine how far the action of government and administrative bodies is subject to judicial control. In this respect, French administrative law is close to the model of total subjection. Systems which have been influenced by the French experience, such as Italian and Belgian, and to a certain extent also German administrative law, show some marked differences, but common

law systems are still further removed from the model. The introduction of the general remedy for judicial review of administrative action in England and Wales in the late 1970s provoked, however, a new development which brought English law somewhat closer to the French model.

This use of a typological method for the relationship on each of the three sides of the triangle between the *trias* powers will, I trust, reveal something of the basic structure of the public law systems under consideration. It may, however, do more. If it works well, it may also constitute a useful tool for further comparative considerations. A simple example is the opposition between the completely centralized State and the State built on federal or confederal lines. Traditionally, France was considered as the prototype of the centralized State, the United States as the embodiment of federalism. Over the last fifty years, however, both systems lost something of their orginal clarity: France by regionalizing, and the United States by centralizing, tendencies. The typology may help to provide an appropriate analytical framework for a comparative study.

Likewise, and not surprisingly, the separation of Church and State lends itself to a typological approach. Such a separation has existed in the United States since Independence, and it is, as we shall see, strictly upheld by the US Supreme Court. There are interesting judgments on the implications of the separation, for example, for the admissibility of prayers in public schools. By contrast, England has an established Church ('the Anglican Church') headed by the British King or Queen. As a result, public life and ecclesiastical life are very much intertwined. France is again in an intermediate position: it considers itself as a 'lay republic' ('une république laïque'), but it used to be a Catholic nation under the monarchy, and it was only in 1905, more than thirty years after the founding of the Third Republic, that the last religious symbols disappeared from public buildings.

This method of using a typology and of founding it, in particular, on the old concept of separation of powers has not been taken from existing literature. The author developed this method when teaching comparative constitutional law, first to undergraduates, later to LLM students.[23] After his first experiences, he tried his hand at writing a comprehensive study based on this way of thinking. The book, written in Dutch in 1978, was well received – although the first review to be published thought it took the wrong subject – and it has facilitated the composition of the present

[23] At the universities of Leiden 1967–78, Utrecht 1998–99 and Cambridge 1999–2000.

study.[24] The book could not, however, simply be updated and translated into English. First, many important developments have since taken place in the area of public law: devolution in Britain; the introduction of judicial review of administrative action into English law; the changing role of the constitutional court in France; the 'cohabitation' which developed into one of the characteristics of French government; the 'conservative revolution' and its aftermath in the United States. One of the most conspicuous developments was the growth of the influence of judicial decisions on matters of public law, particularly in the European countries. In my view, that growth compels us to rethink the constitutional relationship between the courts and the legislative and executive bodies. The second reason for choosing a somewhat different focus is easier to explain: I am myself not the same person as twenty years ago, my ideas have evolved just as much as my subject matter. Moreover, my activities in the judiciary[25] may have had their effects on my opinions.

As a result, the present book is a completely new book, although readers of the earlier book in Dutch may occasionally recognise the tone of it.

[24] *Vergelijkend publiekrecht* (Deventer, 1978; 2nd edn 1986).

[25] 1978–1997: eleven years in the Court of Justice of the European Communities, eight years with the Dutch Supreme Court (Hoge Raad).

2

The sovereignty of Parliament

2.1. The parliamentary model

Relations between courts and political institutions cannot be properly assessed without a prior definition of the powers of the courts with regard to legislation. Do judges have to respect statutes validly approved by the competent political institutions in all circumstances, or are they, on the contrary, entitled to set aside or disregard statutes which, in their view, violate rules of higher law, for example, those of the constitution? This problem shows an interesting dissimilarity between the solutions adopted in British and in American constitutional law, which we shall consider first.

In nineteenth-century Britain, constitutional doctrine and constitutional practice came very close to what I shall call the 'parliamentary model'. In this model legislation adopted by Parliament is supreme: it cannot be challenged – not by the head of State, not by the government, not by the courts, not by the citizens.

The British doctrine of the sovereignty of Parliament embodied that rule: by issuing a statute, an Act of Parliament, the legislative bodies had the final say. No court was entitled to question the legal validity of a statute; and every law-making body in the country was subject to it.[1] For this doctrine, it is for the moment of no relevance that the term 'legislative bodies' includes not only both houses of Parliament – the House of Commons and the House of Lords – but also the Queen (or King), who must give the Royal Assent to a bill passed by both houses to sign it into law, under the responsibility of the Prime Minister. There is a debate among constitutional experts in Britain on the question whether the monarch is obliged to give assent after the bill has been passed in both houses; but we leave that question aside for the moment.[2] Dicey, who gave the British doctrine its classical

[1] See Finer, Bogdanor and Rudden, *Comparing Constitutions* (Oxford, 1995), ch. 3, nos. 10–12.

[2] See Geoffrey Marshall, *Constitutional Conventions* (Oxford, 1993), pp. 21–3.

formulation, explained the legislative procedure by defining the collaboration of Parliament and monarch as 'the Queen in Parliament' (this was in Queen Victoria's days), or just 'Parliament'. He went on to say that the sovereignty of Parliament 'means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make and unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[3] Thus expressed, the doctrine has a disarming simplicity, although a Scottish lawyer might object that, since the Anglo-Scottish Union of 1707, constitutional matters are not part of English law but of the constitutional law of Great Britain.

Dicey's theory was a descriptive theory when it was written down: originally it had no normative purpose, it just endeavoured to describe how the constitution had in fact developed. However, theories are deceptive things: gradually, the doctrine of the sovereignty of Parliament was taken to mean that the British constitution *ought* to be arranged on that basis or, to put it differently, that the British constitution could only work well when it operated in accordance with the theory. Proposals to introduce a written constitution in Britain have sometimes been greeted with the argument that such a plan could not be realized because of its incompatibility with parliamentary sovereignty. An extreme case was a cabinet minister in the Wilson government who said of a plan to introduce an entrenched Bill of Rights that it would destroy the sovereignty of Parliament and thus constitute 'the most comprehensive scheme for the destruction of Parliament as the centrepiece of the constitution since the time of Charles I'.[4] Leaders of the Conservative Party, who have been bickering about continuing membership of the European Union since about 1985, used the unassailable character of the sovereignty of Parliament as one of their arguments.[5] Dicey's doctrine may thus have become a symbol of 'Englishness': it developed from a descriptive into a normative theory, and subsequently into a political guideline, even into an emotional catchword.

The elevation of the effective powers of Parliament into constitutional doctrine was the result of a slow development. Under the Tudor kings, it

[3] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London, 1885, 10th edn by E. C. S. Wade, 1959), ch. 1.

[4] Michael Foot, quoted in *The Guardian*, 18 October 1976.

[5] See Hugo Young, *This Blessed Plot: Britain and Europe from Churchill to Blair* (London, 1997), chs. 9 and 11.

was difficult to see how the evolution of the law, since 'time immemorial' (as English courts put it) in the hands of the Royal Courts of Justice, could be influenced by the way the King and his counsellors governed the country. The common law of England (and Wales) and the powers of the monarch belonged, in a way, to completely different categories of thinking. That situation changed in the course of the seventeenth century, when it became more and more apparent that kings were beginning to do a lot more than just quietly conducting wars and subduing rebellious barons. In the early part of that century, the courts began to hold that the King could not, on the basis of his powers and prerogatives as a monarch, make any change in the general law of the land without the support of Parliament. Elaborating this idea, the courts soon found that punishable offences could only be defined by Act of Parliament: the King could not, by his proclamations, 'make a thing unlawful which was permitted by the law before'. Sir Edward Coke, the famous judge who spoke these words, risked a conflict with the King. His Majesty found his judges obstinate, but his angry words, though unpleasant enough for Sir Edward and his colleagues, could not prevent the courts from further developing their case law in this way.[6] They thereby created a piece of what we now would call 'constitutionalism' in a nutshell; this was to become part and parcel of the common law of England.

The second step in the direction of the sovereignty of Parliament derived from the vicissitudes of the monarchy. In 1688, King James II fled the country after having dissolved Parliament. His son-in-law, William of Orange, landed in southern England with his Dutch troops and was able to negotiate a compromise with the English notables, rebellious members of Parliament included. The English Crown was offered to him and his wife Mary Stuart, a new Parliament was elected by a direct vote in the boroughs and counties, and the new King agreed to a strengthening in the position of Parliament as an institution. One of the first acts of the new Parliament was to adopt of a 'Bill of Rights' which reinforced the powers of Parliament. The courts accepted the new institutions.[7] They also hardened their attitude on the limits of royal powers. Taxes could only be levied, they decided, based on an Act of Parliament.

[6] See Roscoe Pound, *The Spirit of the Common Law* (Boston, Mass., 1921), ch. III.

[7] See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 8th edn (London, 1998), ch. 4.