Published in:
European Public Law, vol 9, issue 4 (Kluwer Law International 2003), pp. 471-480

Report on the Netherlands

Becoming a Party to Treaties Which Diverge From the Constitution

Leonard F.M. Besselink

Many European countries have in the recent past been confronted with questions concerning the constitutionality of treaties to which they wished to become a party. This has happened particularly with regard to treaties in the field of European integration, such as the Schengen Agreements, Treaty of Maastricht, the Treaty of Amsterdam and the Statute of the recently inaugurated International Criminal Court.
In most countries, the assumption is that if a treaty diverges from the constitution, the constitution must first be changed before the country can be bound to such a treaty. The Netherlands provide an exception to this general rule. The Constitution of the Kingdom of the Netherlands makes it possible to become a party to a treaty which diverges from the Constitution, or necessitates such divergence, on condition that Parliament gives its prior approval to such a treaty with a majority of two thirds of THE votes cast:

> Article 91
> 1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. [...]
> 3. If a treaty contains provisions which depart from the Constitution or which lead to such a departure, it may be approved by the Houses [of the States General] only with a majority of at least two thirds of the votes cast.

Constitutional Background
This rather unique rule was introduced in 1953, when also other provisions of the Constitution on foreign relations were amended. Among these provisions were the celebrated provisions which grant direct effect to self-executing provisions of treaties and give them priority over conflicting provisions of national law.[1]Article 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone. It is on the whole accepted that this makes the status of such treaty provisions supra-constitutional. Thus, self-executing treaty provisions have priority also over conflicting constitutional norms. This goes a long way to explaining the possibility of binding the country to a treaty which diverges from the Constitution.
Less consensus exists over the question whether a court should assume treaty provisions to have priority over constitutional provisions if parliament has not made use of the procedure under Article 91 (3) of the Constitution.[2] Here, however, some problems immediately arise. For we shall see that this procedure has only been applied conditionally, and we do not know with any degree of certainty whether, in the view of Parliament, there has ever been any divergence.
Before we sketch the practice adopted so far with regard to Article 91 (3) of the Constitution, we should remind the reader of that other idiosyncracy of the Dutch Constitution: the prohibition for courts to review the constitutionality of acts of parliament and of treaties (Article 120 Constitution)[3]. This implies for our topic, that the question whether a treaty is in conformity

[1]Article 93: Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents shall become binding after they have been published.

[2]See C. Schutte, De stille kracht van de Nederlandse Grondwet: beschouwingen rond het verbod aan de rechter om verdragen aan de Grondwet te toetsen. [The silent strength of the Dutch Constitution: Reflections on the prohibition for courts to review the constitutionality of treaties]. In: RM Themis [Netherlands], 2003/1, 26-40.
[3]Article 120: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

with the Constitution can only be decided by the national authorities involved in the conclusion of treaties. These authorities are the government which represents the state in all negotiations, the drafting and the finalization and, ultimately, the binding of the country to a particular treaty; but a final say has Parliament, which after all, has to approve treaties (see Article 91 (1) quoted above).
Also, we should point out that pursuant to the Act for the Realm on the Approval and Publication of Treaties, parliamentary approval can be tacit or express. Express approval is by Act of Parliament. Tacit approval is according to the following procedure: a treaty is laid before Parliament, and is deemed approved if within 30 days none of the two Houses of Parliament or one fifth of its constitutional number of members have requested the express approval of the treaty.
Article 6 of this Act for the Realm provides:

> "1. If a treaty contains provisions which diverge from the Constitution or necessitate to diverge from the Constitution, the treaty shall be subject to express approval.
> 2. In the bill for the approval of such a treaty it shall be expressed that the approval is granted in compliance with Article 91, third paragraph, of the Constitution."

Finally, it should be noted that the bicameral system of the Dutch parliament works on the principle that in decision-making it must always first be the (politically more important) Lower House which decides over a proposed measure, and only if it has been adopted by the Lower House, the Upper House can consider that measure. If the Upper House decides to reject it, that is the end of the story.

Constitutional practice
So far, it is generally assumed that the procedure has been used four times in practice. Three times this was done by the legislature in an Act of Parliament, and once by the Upper House only.
The three times that the legislature allegedly applied the procedure of Article 91 (3) was, first, in the case of the approval of the European Defence Community;[4] second, with the approval of the Agreement with Indonesia concerning the transfer of sovereignty over New Guinea;[5] and finally, with the approval of the Rome Statute establishing the International Criminal Court.[6]
The one time that only the Upper House approved a treaty under reference to Article 91 (3) concerned the approval of the 'Lockerbie treaty', which established a Scottish Court in the Netherlands for the trial of two Libyan suspects of the Lockerbie attack. The approval of this treaty required a great deal of speed, at any rate by Dutch parliamentary standards, where legislative procedures are usually taken most leisurely - the approval of a treaty by act of parliament usually takes years. In the case of the Lockerbie treaty, haste also seemed to prevail in other respects. The Council of State, which always has to give its prior advice on pieces of legislation, also in the case of the approval of treaties, had only one day to give its advice. In its advisory opinion, it stated that the treaty diverged from the Constitution, but - as we shall see - quite contrary to its own interpretation of the provision of Article 91 (3), failed to give any indication of the constitutional provisions it diverged and why.
The government - which may well have had informal contact with the Council of State in order to receive a clarification as to which constitutional provisions were at stake - assumed that the Council had in view Articles 15 and 17 of the Constitution.
Article 15 is the provision concerning *habeas corpus*. It provides in its second paragraph that anyone who has been deprived of his liberty other than by order of a court, may request a court

[4]For the Act, see *Staatsblad* [Official Journal] 1954, 25.
[5]For the Act, *Staatsblad* 1962, 363.
[6]For the Act, see *Staatsblad* 2001, 343.

to order his release. In that case he shall be heard by the court within a period to be laid down by act of parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful.
Article 17 concerns the *ius de non evocando*: No one may be withheld access to the court to which he is entitled by law [*wet*] against his will.
The language of these provisions all seem to suggest that it concerns Dutch courts, but the government maintained that it refers to any court, either a national, foreign or an international court. It concluded that the Lockerbie treaty did not diverge from the Constitution in the sense of Article 91 (3). The Lower House seemed to concur in this view, and adopted the bill unanimously, without an explicit vote because no member of parliament requested a vote.[7] But the Upper House - which, as we said, always deals with legislation after a bill has been passed by the Lower House and is therefore always the last to be involved - rejected the government's view. This was mainly done through interventions by senator Jurgens - to whom we owe more constitutional practice in the field of international relations than only in this instance. The Upper House adopted the bill unanimously without a vote, but the Speaker of the House did this with the following words:

> "*Speaker*: As is evident from the fact that Mr. Jurgens has on the relevant point not been contradicted, not by interruption either, I conclude that this House takes the view that at the vote and decision on this Bill, Article 91, third paragraph, of the Constitution needs to be observed.
> Is there anyone who desires to take a vote?
> That is not the case.
> *Mr. Jurgens*: Mr. Speaker! I think there may arise a problem if you wish to conclude that there is a two thirds majority.
> *Speaker*: There are problems which I have thought of before Mr. Jurgens did so just now.
> *Mr. Jurgens*: I have been underestimating you, Mr. Speaker.
> *Speaker*: Does anyone wish an entry [in the proceedings that he is deemed to have voted against the Bill]?
> This is not the case. I conclude, that the bill has been adopted unanimously, and therefore with the required majority of at least two thirds of the votes."

Diverging opinions on divergence from the Constitution: some procedural complications
The approval of the Lockerbie treaty highlights the procedural complications which can arise in a bicameral system in which decision-making is always diachronic in the sense that one House can only decide after another House has taken a decision - which makes the last House always the decisive one. This is made more acute due to the absence of any mechanism of solving a conflict of views between Houses on substantive matters, neither internal to parliament nor externally, for instance in the form of a constitutional tribunal or normal court.
Various combinations of views as to the divergence or compatibility of a treaty with the Constitution can be conceived, in which either the government, or the Lower House, or the Upper House disagrees with one or both other actors in the decision-making process.
One can say that the government's position will be influenced by the principles of the parliamentary system. In the Dutch context, the government has ultimately to conform to the opinions of parliament on pain of loss of confidence, which forces it to resign. Within parliament, the emphasis in this respect is on the support which the government must have in the Lower House.
However, this state of affairs does not solve our problem in any definite manner. It is true that the government has to resign if the Lower House passes a motion of no confidence. But this ultimately political instrument cannot solve the legal issue as to who has the ultimate authority to decide on the constitutionality of treaty. In fact, both the government, the Lower House and the

[7]Handelingen [Proceedings]1998_1999, (15 October 1998) nr. 15, Tweede Kamer, p. 940.

Upper House are each bound to observe the Constitution in all their business. There is no indication whatever that the Lower House can bind the Upper House in any particular manner as to the answer to the question whether a certain bill which is to be adopted, or a treaty to be approved, is in conflict with the Constitution or not.
Article 6 (2) of the Act of the Realm concerning the approval of treaties, which we quoted above, stipulates that the bill for the approval of a treaty which diverges from the Constitution, must express that the approval is granted in compliance with Article 91 (3). But this particular provision only has the status of an act of parliament. As long as the approval is express and therefore by act of parliament, the latter and more specific act can simply ignore the earlier and general act of parliament. Also, the Lower House cannot, by including the clause that Article 91 (3) has to be observed in a bill approving a certain treaty, bind the Upper House to share its view, given the absence of authority to give a binding interpretation as to the constitutionality of a treaty. Moreover, a bill does not bind anyone, not the Upper House either. If this were so, the Lower House could also bind the Upper House to adopt a bill with any particular arbitrary majority it has inserted in a bill submitted to the Upper House - this is self-evidently impossible.
As the case of the Lockerbie treaty shows, it is possible that a treaty is approved which one of the Houses considers to diverge from the Constitution, but where this is not expressed in the Act of approval, because the government and Lower House found it not to diverge from the Constitution.

Substantive complications
Apart from the fact that disagreement is possible over the question whether a particular treaty diverges from the Constitution, questions have also been raised as to what "divergence from the Constitution" actually means.
When a treaty concerning the deployment of American cruise missiles was discussed in 1983, a debate ensued concerning the compatibility of such a treaty with the Constitution. One of the points of view put forward, was that the deployment of such weapons under foreign control constituted an infringement of the sovereignty and independence underlying the Constitution. The government consulted the Council of State on this issue. The Council of State held that Article 91 (3) concerns a divergence from the actual provisions of the Constitution. It has rejected the view that a divergence from "spirit, intention and system of the Constitution" can constitute a divergence from the Constitution in the sense of Article 91 (3).[8] Thus, all considerations of a possible divergence with fundamental notions like state sovereignty and other constitutional principles which have not actually been formulated in the Constitution, but which are inherent in the intention, system and spirit of the Constitution must be left aside.
This unusually rigid black letter approach to the text of the Constitution has led to a curious paradox, which has most recently been formulated by senator Jurgens[9]: a quite significant and major transfer of powers and competence by treaty to a foreign authority, or to a European or international organization cannot be considered to diverge from the Constitution if there does not happen to be any particular clause or phrase from which it can be said to diverge, and does not require any particular majority in parliament; whereas a comparatively less significant divergence from say the provision which happens to express the immunity of the King, does need a majority of two thirds of the votes in both Houses.
This example of the King's immunity is a good one, for three reasons. The first is that this was an actual problem in approving the Statute of the ICC, also in the view of the government. Hence, its Act of approval expresses that the Act was adopted in accordance with Article 91 (3).

[8]Parliamentary documents, TK 1983-1984, 17980 A, nr. 9. It repeated this view in TK 1999–2000, 26 800 VI, A, p. 3.
[9]I hasten to add that this paradox was by no means Jurgens's invention. Already F.J.M.Duynstee, *Grondwetsherziening 1953: De nieuwe bepalingen omtrent de buitenlandse betrekkingen in de Grondwet*, Deventer, Kluwer, 1954, in voce Artikel 63, p. 34, formulates the same paradox and deals with it extensively.

Secondly, it well illustrates the paradox that a significant transfer of power to the ICC, or rather to the conference of States party to its Statute, particularly to define a number of the delicts to be tried by the ICC, requires no special majority, whereas the King's immunity does.
The third reason much confirms this point. The provision on the King's immunity reads as follows:

> "The King is inviolable; the Ministers shall be responsible."

This provision was inserted in the Constitution in 1948, when general ministerial responsibility was introduced. Previously, the Constitution had no such provision. It was simply assumed that the King enjoyed immunity. Had we had a provision which merely stated ministerial responsibility without any mention of the King's immunity, or if we had based political ministerial responsibility on unwritten constitutional law - which it is in many respects anyway - the Council of State (and the government in its trail) would most probably have said that the King's immunity merely flows from the system of the Constitution and hence the Statute of the ICC would not diverge from the Constitution.
The Jurgens-paradox can arise most sharply from a quite literalist interpretation of the Constitution, such as the one the Council of State seems to propose. It is unlikely, though, that this was the intention of the framers of the Constitution when they included what is now Article 91 (3) in the Constitution. At the time, a number of senators raised the issue whether all and any constitutional arrangement could be changed or even wholly removed by treaty with the help of Article 91 (3). The government denied this. It stated that the Kingdom could not become a party to a treaty which sacrificed "the foundations and essentials of the national legal order, for instance the monarchic-parliamentary system, even if these were not embodied in provisions of the Constitution".[10] And in fact, even the Council of State, in a curious turn of mind, stated in one and the same advisory opinion which exhorted the literalist view, that there are constitutional provisions from which one ought not to diverge by treaty, not even with the use of the procedure of Article 91 (3); it mentioned the fundamental rights chapter of the Constitution.[11]

A precarious way out
The problems we adumbrated have so far not led to any unsurmountable deadlocks. This is due to the use of a strategems. We already saw which strategem the Speaker of the Upper House employed to circumvent conceivable problems with regard to this House's opinion that the Lockerbie treaty diverged from the Constitution, while the government and Lower House thought otherwise. The legislature has used another strategem since the approval of the European Defence Community Treaty. This consists in the use of a conditional clause in the bills for approval of treaties where doubts and controversy may arise as to their conformity with the Constitution.
This clause inserted in the bill takes the following form:

> "The approval takes place, in so far as necessary, in accordance with Article 91 (3) of the Constitution."

The words "in so far as necessary" leave it undecided whether there is an actual divergence from provisions of the Constitution, and which particular constitutional provisions are at stake. They make it possible that various branches of the legislature and government may have quite different opinions on this question. Thus, the government has always maintained that the transfer of sovereignty over New Guinea to Indonesia was in no way inconsistent with the

[10]Handelingen EK [Proceedings Upper House] 1952-1953, 480, left column.
[11]Parliamentary documents TK, 1999–2000, 26 800 VI, A, p. 6

Constitution and any of its provisions. Also, the government never admitted that there was a positive divergence between the EDC Treaty and the Constitution, and the government has retained its doubts on divergences between at least certain constitutional provisions and the ICC Statute.
We must conclude from this, that we do not even know whether the procedure of Article 91 (3) of the Constitution has ever been used. All treaties mentioned have received support from more than two thirds of the votes in both Houses. But whether this says nothing on whether the treaty provisions diverge from the Constitution - the conditionality of the formula used, leaves it undecided whether the qualified majority rule was actually applied.

Conclusion
There can be no doubt that the strategems just mentioned have avoided constitutional stalemates. But this has been contingent on the fact that in the four cases we have mentioned there was sufficient support living up to a qualified majority requirement. There can, however, be no guarantee that such stalemates cannot occur in future. As far as procedural matters are concerned, it is not inconceivable that sooner or later a Lower House which adopted a bill for approval with a simple majority of less than two thirds of the vote, is considered by the Upper House to have erred on the constitutionality of the treaty. In this case the Upper House must leave the bill for what it is: a bill which has not received the required majority of the Lower House, and therefore cannot deal with it any more. Other scenarios with similar deadlocks can be imagined.
There are solutions. A fairly simple one is to make the express approval of treaties which diverge from constitutional provisions a competence of a joint session of both Houses of Parliament. The joint session should be convoked if at least a certain number of members or a simple majority of one of the Houses alleges the presence of divergence between the Constitutional provision and a treaty provision. Other solutions are more drastic, such as creating competence for an external body (e.g. the Council of State, Supreme Court or other institution) to decide on divergences. Such proposals are not currently discussed. It is, therefore, uncertain whether any constitutional solutions will ever become law before such a deadlock occurs.