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Recalibrating the roles of the Dutch Parliament and Dutch judges when engaging with international law?

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Two proposals are currently pending before the Dutch Parliament that purport to enhance its role in managing the relationship between domestic law and international agreements. Both were introduced as private-member bills by MP Taverne, a member of the liberal party (VVD) that is in coalition government with Labour (PvdA).

The first proposal was introduced in September 2012 and seeks a constitutional amendment that would deprive Dutch courts of their competence, granted under [Article 94 of the Constitution](#), to disapply statutes that they have found to be contrary to self-executing Treaty provisions in the specific dispute before them. (The Netherlands adheres to a monist conception of international treaty law). In the background lurked discontent, shared among some factions in Dutch politics and society and inspired by the vociferous debate in the UK, about the perceived undue interference of the European Court of Human Rights of the ability of national legislatures to make policy in line with their reading of (international) human rights. Rather than await further movement towards a ‘juristocracy’, the bill aims to re-assert Parliament’s superiority vis-à-vis the courts, with the former’s democratic credentials cast as warranting protection from incursion by countermajoritarian forces.

It is important to point out that at present, the Article 94 power is an essential weapon in the judiciary’s arsenal when ruling on claims by individuals alleging that their rights and liberties have been breached by the legislature. This is because Article 120 of the Dutch Constitution prohibits courts from examining statutes for conformity with that text, the catalogue of rights included. The corollary is that international human rights treaties, first and foremost the ECHR, take on the role of a substitute constitution in judicial decisions involving claims that legislation is not fundamental-rights proof.

There have been attempts in the past to make inroads into, if not fully abolish, the prohibition contained in Article 120. The most recent effort took place in 2002, when another MP (Halsema, then member of the Green Party and since retired from Parliament) introduced a bill to empower all judges to refrain from applying legislation that has been found, in a concrete case, to breach one of the constitutional provisions guaranteeing classic fundamental rights. Despite initial political enthusiasm, the momentum for this proposal appears to have dissipated and the Taverne bill aims to have the pendulum swing the other way by making statutes inviolable under both constitutional and international law.

This bill has drawn considerable ire from academic circles and when it was sent to the Council of State for advice, this body too expressed its disquiet. The Council opined that it was not clear how the proposed means – eliminating judicial scrutiny – would without more bring about the desired end of Parliament taking more seriously its role of vetting new laws for their conformity with international norms. The Council further saw no pressing need for the suggested change, noting that the cases where judges actually used the power that the bill sought to remove were far and few between. It bears pointing out that UN committees have even condemned the judicial reticence to label international treaty provisions as self-executing as overly cautious. Following a comparative survey of legal developments in other jurisdictions in this area, the Council finally highlighted that this proposal would entail the Netherlands bucking the international trend of facilitating the domestic implementation of international rules. For these reasons, it urged the author to reconsider the proposal.

MP Taverne initially gave short shrift to these concerns and objections: he offered a summary rebuttal of only some of the points raised by the Council of State, after which the file was forwarded to the parliamentary committee for home affairs for preparatory examination. In early 2014, this committee issued its report that – like the Council of State’s opinion – was very critical in tone, calling for additional evidence and concrete examples to substantiate the

bill's underlying assumptions. The representatives of several parties on the committee, including those belonging to the other coalition party, indicated that they would not support stripping Dutch courts of their Article 94 review powers. MP Taverne was invited to address the committee's comments and concerns as a precondition for the bill being tabled for plenary debate. As of this writing, no such explanation has been forthcoming. This is in all likelihood because the author of the bill realizes that this would be a futile effort since he simply will not be able to garner the requisite political support to move the proposal to the next stage – with the government also having declined to endorse his judicial-power-curbing plan. While the bill is officially still listed as 'under discussion', it is extremely unlikely to go anywhere before the next parliamentary elections, slated to be held on 15 March 2017. It remains to be seen whether MP Taverne will be returned to Parliament to try his luck with his amendment bill in a newly constituted Lower House. Even if he does – and there are rumours that his party is not too keen on Taverne continuing his parliamentary career – successfully navigating the arduous Dutch constitutional amendment procedure (requiring parliamentary consent in two consecutive legislative periods, separated by elections) may possibly throw a spanner in the works.

With his first proposal effectively having become a political chimera, MP Taverne introduced a second reform proposal in 2015, which is premised on a similar conception of the trias politica and intends to augment Parliament's stature vis-à-vis the other branches when it comes to regulating the influx of international treaties in the domestic legal order. It obliges the government to seek Parliament's express assent in the form of an 'approval law' whenever an international agreement contains self-executing provisions, unlike the current practice which allows for implicit or silent assent. Judges should assume that treaties that have not gone through this process do not include such provisions. If they would exceptionally think otherwise, they would only be able to nevertheless use those provisions as yardsticks for judicial review on the condition that they provide 'explicit and thorough reasoning' on the matter, on the basis of 'very weighty arguments'.

The response from the academic community and the Council of State to this second proposal has been more favourable, notably as regards enhancing the democratic quality of a process that culminates in the State being bound to international treaties. Again, however, doubts have been raised about the proposed means of achieving this end. The Council of State has pointed out that Parliament need not acquiesce to the government's decision to opt for silent approval and that any perceived defects in the use of its powers to demand explicit approval would be best remedied by Parliament itself – rather than looking to the government to take the lead in this. Moreover, fettering judicial discretion in determining whether a provision is self-executing would fly in the face of the constitutional relationship between the courts and the legislature as it stands at present, and ignores the value of judges being able to revisit any such findings *rebus non sic stantibus*.

Thankfully, these latter comments appear to have had the desired effect. The requirement of 'very weighty reasons' has been dropped to avoid the impression that judges are bound by the legislature's assessment that a treaty does not contain self-executing provisions. They will still be required to explicitly address this issue, however, with the author of the proposal now speaking of thereby bringing about a 'constitutional dialogue ... about complex questions of treaty law'. Such a development is most welcome: it should improve the quality of the deliberations and the soundness of the position eventually adopted. It also fits nicely with the growing (academic) interest in conceiving Parliament and the courts as true partners who continuously engage with each other on how to tackle constitutional quandaries. If, however, MP Taverne is as enamoured of constitutional dialogues as this newer passage suggests, it would do for him to formally withdraw his first proposal and continue to allow courts to have their say, alongside Parliament, on whether the latter's statutes comport with international (rights) treaties.