

CONSTITUTIONAL RESERVES AND COVERT CONSTITUTIONS

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I. Basic Structures of Constitutional Systems; Essentiality and Constitutional Rigidity

A classical problem of constitutional law concerns the amendability of constitutions. A good constitution expresses the will of the people but also contains guarantees that cannot be set aside by a chance majority. On the other hand, a constitution should not unalterably fix the dictates of the chance majority of the founding fathers: it should also be possible to tailor constitutions to a certain extent to the political or other needs of their time.¹ Therefore most constitutions in the world are equipped with amendment procedures that require some form of qualified majority for actual amendments. The constraints many countries have put on constitutional amendments are not an end in itself but a means to protect the basic constitutional structure (system of government, democracy, independence of the judiciary, fundamental rights) against the whim of the day. In rigid constitutional systems – i.e. systems that require some form of qualified majority for constitutional amendment, it is believed that debates on this basic structure – constitutional debates, should involve the highest level of negotiations and be settled by qualified or supermajorities only. This rigidity, however, provides only a relative guarantee. It is only effective if the political actors concerned, are willing, when settling a constitutional issue, to take the front door of a constitutional amendment and the accompanying procedure. If a constitutional issue is regulated in another way, via a lower ranked legislative authority (e.g. the parliamentary legislator), the constitutional restrictions on amendability become idle. Regulating constitutional issues

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1. Cooter has expressed the dilemma neatly. According to him “a good constitution tilts without tumbling over.” Robert D. Cooter (2000), *The Strategic Constitution*, Princeton New Jersey; Princeton University Press, p. 372.

that are or should be the prerogative (or reserve) of the constitutional legislator by different means than the prescribed constitutional amendment procedure may then ultimately undermine or erode the value of a constitution.

In this contribution, I will try to address the difficult question how we can identify, in different constitutions, subjects or issues that can be settled only by way of a constitutional amendment (constitutional reserves). I will do so in two steps. After a brief discussion of the various shapes, sorts and sizes of constitutions and the concept of 'rigidity' of constitutions, I will examine, on the basis of examples from various countries, whether the constitutions involved contain constitutional reserves. To that end I will look into the concept of constitutional reserves and try to address the question whether or not rigid constitutions and constitutional reserves trigger the bypassing of laborious constitutional amendment procedures, resulting in covert constitution building. In conclusion, I will try to discuss the advantages and disadvantages of constitutional reserves in more general terms.

II. Prelude: What constitutes a Constitution?

Across the world, constitutions, as systems of government, come in a whole range of shapes and sizes. If we look only at the form they are cast in, we find that some countries have for the most part written constitutions (United States, the Netherlands, South Africa) whereas other countries have partly unwritten constitutions (United Kingdom).² Many countries with a written constitution have enshrined it in a single, separate document (*concentrated* written constitution), whereas other countries, such as Sweden, have a number of different constitutional documents (*dispersed* written constitution).³

If we take a more substantive view and ask ourselves what kind of rules constitutions normally express and what it is that constitutions do, other constitutional notions come to the fore. Generally, constitutions define a

2. It is often suggested informally that the United Kingdom does not have a written constitution. This is not strictly true; what it does not have is a single document setting out the legal framework and functions of the organs of government and the rules by which it should operate. In this, the UK currently differs from most other countries, for instance, the United States, Ireland, Germany, France and South Africa etc. The constitution is not exclusively enshrined in one or some documents. It is an organic system with an indeterminate content consisting of legal and non-legal rules, case law and customs, conventions and standing orders all governing government. S.E. Finer, Vernon Bogdanor and Bernard Rudden (1995), *Comparing Constitutions*. Oxford; Clarendon Press, pp. 40-41.

3. See J.M. de Meij, 'The Kingdom of Sweden', in Lucas Prakke & Constantijn Kortmann (eds.) (2004), *Constitutional Law of 15 EU Member States*. Deventer; Kluwer.

state's⁴ system of government.⁵ They embody the fundamental rules establishing state institutions, public bodies, and their mutual relations as well as the rules that determine the conditions under which these bodies are authorized to perform legal acts (including the control mechanisms which ensure that the rules will be enforced and the limits that have been drawn will be complied with).⁶ Most constitutions are framed by a deliberate act of a constituent power, which, in most liberal democracies, voices and/or represents the will of the people. Hence, many constitutions are believed to express the constitutional will of the people.

In modern constitutional literature the concept of 'constitution' is, apart from the form it is cast in, generally used in three meanings. In its first meaning, 'constitution' is equivalent to the act of constituting (performed by a *constituante*) i.e. making or giving a constitution. In that case, 'constitution' is the legal act whereby a constitutional order is established. This classical view could be called a *formal* concept of a constitution. In its second meaning, constitution is used to denote the system of rules aimed at the limitation of government power. In this *functional* view, a constitution aims to attribute and limit government powers, and regulate and limit the public exercise of it. In this meaning 'constitution' is often closely related to the central tenets of constitutionalism.⁷ In its third meaning, the *political* view, a constitution is exclusively linked with the national state and closely related to the idea of popular sovereignty. According to this widespread view, a constitution is

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4. We will confine ourselves to 'state' constitutions in this article. Regional and sub-state constitutions and constitutions of private organizations or bodies are not taken into consideration.
 5. In his classical book *Modern Constitutions*, Wheare draws a distinction between constitution in a broad sense and constitution in a narrow sense. In its broad sense, a constitution means the whole system of government of a country, the collection of rules (legal and non-legal) which establish and regulate or govern the government. In a more narrow sense, a constitution is understood as a set of legal rules which govern the government of a country and which have been embodied in a document. K. C. Wheare (1960), *Modern Constitutions*, 2nd Edition (fifth impression of the 1966 2nd edition), London, Oxford University Press, pp. 1-2.
 6. See Wim Voermans and Henk Griffioen (2007), 'The European Constitution and the Relation between European and Member State Powers', *Journal for Comparative Government and European Policy/Zeitschrift für Staats- und Europawissenschaften*, 5 (1), pp. 27-28. Some argue that it is virtually impossible to give an all-embracing, substantive definition of constitution due to the wide variety of types of constitutions in the world past and present. The counter argument is equally valid: 'why would one want to?' Henc van Maarseveen and Ger van der Tang (1978), *Written Constitutions; a Computerized Comparative Study*. New York/Alphen aan den Rijn; Oceana Publications/Sijthoff & Noordhoff.
 7. Although the concept of 'constitutionalism' has different meanings (especially depending on whether or not it is used in a descriptive or in a normative sense), the recurrent central element of the concept is that of limited government under a higher law (i.e. the constitutional law of a community). Alan Brudner (2004), *Constitutional Goods*, Oxford; Oxford University Press, pp. 38-39 and more in general, Part 1: Liberty.

particularly a political act: an expression of the will of a sovereign people or nation to manifest itself as an independent political entity (self-determination) and to organise itself for this purpose as a state (constitutional autonomy). This politically normative view of the concept of constitution is expressed, for instance, in the Preamble to the US Constitution and followed as an idea in a great many constitutions all over the world.⁸

A final characteristic feature of the concept of constitution is the notion that a constitution *cannot* be amended in the same way as any other piece of legislation. This is an essential notion that does not always receive the attention it deserves. In the literature a distinction is made between flexible and rigid constitutions. Rigid constitutions are difficult to amend (for example, because of a complex or difficult amendment procedure), whereas flexible constitutions can be amended more easily.⁹ This distinction is confusing to a certain extent. First of all, because most of the many constitutions we regard as 'flexible' in terms of their amendment procedure set extra requirements on constitutional amendments, when compared to ordinary statutes, for example.¹⁰ Even in countries whose fundamental constitutional rules are not enshrined in a single constitutional document, but in mere Acts of Parliament, there is usually a certain degree of rigidity due to *de facto* respect for these parts of their constitution. For example, it is almost inconceivable that the Westminster Parliament could amend the Bill of Rights from 1688. The rigidity of a constitution reflects the fundamental nature of it.¹¹ This is what distinguishes constitutions from ordinary statutes. Kelsen already understood that a constitution that can be amended in the same way as any other statute results in a curious paradox. This constitution would be a constitution only in name, because any 'unconstitutional' statute would, as a result of the operation of the maxim *lex posterior derogat priori*, lead to a change in the constitution, at least in terms of the sphere of validity of this

8. See Paul Cliteur and Wim Voermans (2008), *Preambles* (Preambles), a public report on a comparative study into preambles worldwide, commissioned by the Dutch Ministry of the Interior and Kingdom Relations, Leiden/The Hague (in Dutch).

9. Wheare (1960), pp. 15-19.

10. Wheare points out that 'flexible' is a relative concept. For example, the constitutions of France, Austria and Norway are sometimes regarded as flexible, because, compared to the Constitution of the United States, Denmark and Australia, they can be amended more easily. However, in France, for example, a constitutional amendment is also subject to a procedure that is much stricter than the procedure for ordinary legislative amendments (Article 89 of the French Constitution). Wheare (1960), p. 16.

11. Sometimes the distinction between rigid and flexible constitutions is also defined in terms of the difference between entrenched and non-entrenched constitutions. Even though there is a difference in nuance, the essential characteristic of an entrenched constitution is the same as that of the rigid constitution, i.e. that it is more difficult to amend than a regular statute.

statute.¹² Constitutions can be rigid not only in terms of their amendment procedure but also in terms of their enforcement. Merryman and Pérez-Perdomo draw an illuminating distinction between formally rigid constitutions, which specify limitations on legislative power and define special requirements for constitutional amendments (but make no provision for enforcing these rules) on the one hand, and functionally rigid constitutions, in which an organ (court, council) can review, in one way or other, the constitutionality of legislative action.¹³ This functional rigidity, too, reflects the fundamental nature of a constitution.

In brief, the quintessential characteristic of any constitution is its *fundamentality*, expressed by some form of rigidity and its relationship to regular statute (or parliamentary) law. In constitutional parlance, constitutions without any supremacy over regular statutes, in whatever form, are not regarded as a true 'constitution'.

III. What belongs in a Constitution? Thoughts on a Constitutional Reserve

The fundamentality of constitutions serves a purpose. It is designed to provide protection against whimsical amendments of essential parts of a system of government and against potential infringement of rights of minorities and individuals as a result of chance majorities.¹⁴ Fundamentality protects against the whim of the day and the capriciousness of political tides. As we saw above, the protection provided by constitutions in most countries consists in procedural safeguards (requirements concerning the constitutional amendment procedure or the possibility of constitutional review). In some countries, constitutional protection of specific rights is more far-reaching: there, the fundamentality of the constitution is protected on the basis of substantive criteria. An example can be found in Article 89(5) of the French Constitution, which provides the following:

"The republican form of government shall not be the object of any amendment."

12. Hans Kelsen (1945), *General Theory of Law and State*, Translated by Anders Wedberg. 1999 Reprint. Cambridge; Harvard University Press, pp. 263-266.

13. John Henry Merryman and Rogelio Pérez-Perdomo (2007), *The Civil Law Tradition*, 3rd edition. Stanford; Stanford University Press, pp. 136-137.

14. Schauer will not have any of this. He claims that there is nothing quintessential to a constitution. Nothing makes a constitution constitutional, to his mind, nor does or can anything make a constitution unconstitutional. Frederick Schauer (1995), 'Amending the Presuppositions of a Constitution', in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton University Press, p. 145.

A better known example is to be found in Article 79(3) of the German Constitution – Basic Law – which reads:

“(3) An amendment of this Basic Law affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20,¹⁵ is inadmissible.”

The system of government and the basic rights are inalterably fixed in these constitutions as a result of lessons learnt from the past.¹⁶ Even if the reasons for this fixation are often understandable, a constitution with such subject matter restrictions on amendments is somewhat rigid.¹⁷ Changes in these constitutional no-go areas can be made only through a revolution or as a result of unconstitutional conduct. For this reason, many constitutions in the world do not fix constitutional content but, apart from the constitutional amendment procedure itself, make a distinction between the constitutional domain and the domain of lower ranking legislators, such as the parliamentary legislator. For example, many of the world’s constitutions today permit the parliamentary legislator to restrict fundamental or other rights entrenched in the constitution, albeit subject to certain limitations. An example can be found in Article 19, Abs. 1 and 2, of that same German Basic Law, which reads as follows:

- “(1) Insofar as under this Basic Law a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case. Furthermore the law must name the basic right, indicating the Article.
- (2) In no case may a basic right be infringed upon in its essential content.”

The second part expresses the *Wesensgehaltgarantie*, i.e. the guarantee of essentiality, meaning that the exercise of the core of the fundamental

15. Containing the fundamental rights of German citizens.

16. The Japanese Constitution does not fix fundamental rights quite this strictly, but it has similar effects. Furthermore, it deserves mentioning here for its sheer poetic quality. Article 97 of the Japanese Constitution reads: ‘The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.’

17. See Russell Patrick Plato (2007), ‘Selective Entrenchment against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability’. *New York University Law Review*, Vol. 82, November 2007. Plato argues that subject matter restrictions on constitutional amendments create a significant risk that barriers to amendment are being employed, intentionally or otherwise, to entrench temporary political supermajorities against future constitutional change.

right cannot be limited.¹⁸ In addition, constitutions often define the limits of the powers to be conferred on the various state bodies and institutions under a constitution.¹⁹

As far as I can see, a constitution hardly ever includes explicit rules about subjects that are exclusively regulated by the constitutional legislator and subjects that may also be regulated by other legislators. The constitutions I know - admittedly, I do not know all of them in detail - do not contain explicit provisions that reserve the regulation of specific subjects to the constitutional legislator. Even so, such 'constitutional reserves'²⁰ exist by implication.

Taking an example, the Dutch Constitution provides for a system of limitations of fundamental rights, which is also found in other legal systems. According to this system, a fundamental right may be restricted only if the relevant article of the constitution includes a restrictive clause that expressly permits this limitation.²¹ Under the Dutch Constitution, a limitation of a fundamental right is possible only if there is a constitutional clause of this kind and only in accordance with the conditions set by the clause.²² Sometimes a fundamental right does not include any clause, which means that the right can be changed or restricted only through a constitutional amendment.²³ This is true of Article 3 of the Dutch Constitution, for example:

18. See Peter Haberle (1983), *Die Wesensgehaltgarantie des Artikel 19 Abs. 2 Grundgesetz : zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*, Heidelberg: C.F. Muller.

19. In federations, for example, they may define the division between the powers of states or member states and those of the federations; in unitary states, they may define the division of powers between central government and local government but also the division of powers between the branches of government itself (executive, legislature and judiciary).

20. In analogy to - what the Germans label - *Vorbehalt des Gesetz*. German constitutional doctrine, however, does not have a *Vorbehalt des Grundgesetz*, although one might argue that there is an implicit one: subject matter that is enshrined in Germany's Basic Law and cannot be limited, restricted or changed other than via constitutional amendment *de facto* constitutes a constitutional reserve.

21. This doctrine was introduced on the occasion of the 1983 Revision of the Dutch Constitution. The revisers of the Constitution rejected the system of implicit limitations of fundamental rights for a variety of reasons (e.g. legal certainty, foreseeability) and embraced the system of explicit limitations instead. See J. Chorus, et al. (eds.) (2000), *Introduction to Dutch Law*, The Hague/London/Boston: Kluwer Law International, pp. 296-297.

22. See, for instance, Article 8 of the Dutch constitution, which reads: "The right of association shall be recognized. This right may be restricted by Act of Parliament in the interest of public order." The last sentence expresses the clause, indicating that the right to free association can be restricted, but only by an Act of Parliament.

23. Another example can be found in Article 5 ("Everyone shall have the right to submit petitions in writing to the competent authorities.") of the Dutch Constitution.

“All Dutch nationals shall be equally eligible for appointment to public service.”

No more, no less. Due to the system chosen, this means that this right cannot even be changed or restricted through an Act of Parliament. The right can only be changed or restricted by the constitutional legislator itself.

If we consider the constitutional reserve in this way, we can draw the conclusion that this is not an uncommon phenomenon. A large number of provisions from the world’s constitutions can be amended or restricted *de facto* only through a constitutional amendment. I will call this phenomenon a ‘*negative constitutional reserve*’.²⁴ There is also such a thing as a ‘positive constitutional reserve’ which has already been briefly discussed above. A ‘*positive constitutional reserve*’ occurs when a constitution itself positively and explicitly (*expressis verbis*) provides that specific constitutional provisions or topics can only be regulated, changed or restricted by the constitutional legislator itself. We saw that there are not many constitutions that contain explicit provisions about the exclusive domains of the constitutional legislator. Occasionally, even the constitutional legislator itself is prohibited from changing something, as we saw in Article 89 of the French Constitution and Article 79 of the German Constitution. The American Constitution, too, has such substantive limits on the power of amendment. Article V, for instance, purports to prohibit a constitutional amendment that would deprive any state of its equal suffrage in the Senate.²⁵

Constitutional reserves are an interesting phenomenon, which has not yet been widely studied. That is a pity, because, on the one hand, constitutional reserves make it clear what belongs to the core of a constitution of a country or an organization and, on the other hand, they provide a legal handle to determine whether or not specific subjects may be regulated, restricted or changed through constitutional amendment exclusively. While many countries have defined theories about the question what subjects can only be regulated in a Parliamentary Act and what subjects can be regulated through delegated legislation or statutory instruments (e.g. the German

24. In all likelihood, Jacobsohn would call most of them ‘implied limits on constitutional amendments’. See Gary Jeffrey Jacobsohn (2006), ‘An Unconstitutional Constitution? A Comparative Perspective.’ *International Journal of Constitutional Law*, vol. 4, no. 3, pp. 460-487.

25. Tushnet argues that Article I of the US Constitution provides another example. See Mark Tushnet (2009), *The Constitution of the United States of America; a contextual analysis*, Oxford and Portland, Oregon; Hart Publishing, p. 239.

doctrine of *Vorbehalt des Gesetzes* or its equivalents in other countries), there is no such theory in the field of constitutions.²⁶ As a result, there is a lack of transparent criteria in legal and political practice and as a matter of fact, we also have an insufficient insight into the manner in which constitutional law is developing under or independent of the constitution proper (bypassing the constitutional route altogether). This also applies to fields in respect of which the constitutional legislator had determined that they could be changed only through a constitutional amendment.

Below, I will try to establish on the basis of a number of debates in various countries and at EU level whether a constitutional reserve is in play, of what type and sort, and how it is handled in practice. I will discuss a few examples from France, the Netherlands, India and Ireland and conclude by considering the European Union. It is a brief excursion with a limited purpose. I will not address the entire issue of deviations from a constitution, but confine myself to the (non) observance of constitutional reserves in proposed or adopted parliamentary acts in these countries. Due to the same self-restriction, I will not pay attention to the seriousness of non-observance of constitutional reserve nor to the question whether these deviations are perhaps justified.²⁷ Not because I do not have an opinion on the foregoing but simply because the issue is too wide-ranging and too complex to address in the context of this article. I will confine myself to the question whether the examples given reveal the existence of a constitutional reserve (and the type of constitutional reserve) and I will then highlight the debates this gives rise to. In the final section, I will try to draw some conclusions on the basis of the foregoing.

A. France

The first constitutional system under consideration is that of the French Republic. As seen earlier, Article 89 of the French Constitution contains a provision that forbids even the constitutional legislator to change the republican system of government. Now one might say that this is a meaningless provision, because if the constitutional legislator were to decide to repeal this article pursuant to the normal constitutional procedure, it would

26. This kind of theory is necessary and would be useful as a guideline for constitutional revision. Harris advocates that "it would be (...) advisable to develop essential principles that would guide a choice as to whether a particular Constitutional change were substantially invalid." William Harris (1993), *The Interpretable Constitution*, Johns Hopkins University Press, p. 188.

27. On this subject, see the fine paper by Thomas Poole (2008), *Constitutional Exceptionalism and the Common Law*. LSE Working Papers 14/2008; London School of Economics.

be very difficult for a court or any other government power to do anything about it. Even so, this article was included as a memento to impress the fundamental nature of the republican system of government upon posterity.

In addition to this positive reserve, the French Constitution includes negative reserves, like many other constitutions in the world. One of them became relevant in 1962, when Charles de Gaulle wanted to create the possibility of direct election of the *Président de la République* through an amendment of the young French Constitution from 1958.²⁸ Article 89 of the 1958 Constitution provides the procedure for amending the Constitution. It stipulates that constitutional amendments cannot be effected without the cooperation of the French parliament (both the *Sénat* and the *Assemblée nationale*). From the beginning, it was clear that de Gaulle's proposed amendment was not going to be supported by a majority in parliament. This is why de Gaulle tried to amend the Constitution using the procedure of Article 11 of that same Constitution, which provides for the possibility of subjecting bills to a referendum. Ignoring the constitutional amendment procedure of Article 89 of the Constitution, he wanted to submit the proposal concerning the direct election of the President direct to the French people. A storm of protest swept through the country as a result of this unconstitutional plan.²⁹ According to many, Article 11 of the Constitution had never been intended as a means to amend the Constitution. The President of the Senate and the opposition criticized the government for this 'outrageous breach of the Constitution' and even forced the government to resign. This, however, did not stop de Gaulle putting the bill proposing Presidential election by general suffrage up for a vote in a national referendum. In a five-hour meeting on 1 October 1962, the *Conseil Constitutionnel* was briefly consulted prior to the referendum. It advised against the use of the Article 11 procedure to amend the Constitution. De Gaulle proceeded anyway and gained a favourable result on 28 October 1962.³⁰ Still, not everybody agreed. The President of the Senate referred the *loi* to the *Conseil Constitutionnel*, claiming it was unconstitutional.³¹ In its decision of 6 November 1962, the *Conseil*³² held that it was not competent to entertain such a reference, since it was

28. The later '*Loi n° 62-1292 du 6 novembre 1962 relative à l'élection du Président de la République au suffrage universel.*'

29. On this subject, see the detailed discussion in John Bell (1994), *French Constitutional Law*, Oxford; Clarendon Press, pp. 133-135.

30. A reported 13 million voters were in favour, and 8 million voted against the bill. See C.J.A.M. Kortmann (2009), *Staatsrecht en raison d'Etat* (Constitutional Law and Reason d'Etat). Valedictory address at Radboud University Nijmegen. Deventer; Kluwer, pp. 8-10.

31. On the basis of Article 61(2) of the French Constitution.

32. *Conseil Constitutionnel* decision no. 60-662 DC of 6 November 1962, Referendum Law, Decision 14.

merely competent to judge *lois* voted on by Parliament.³³

This French example makes it clear that the French Constitution contained a negative constitutional reserve: Article 89 of the then French Constitution constituted the exclusive route for constitutional amendments and did not permit any constitutional amendment through a referendum initiated by a president. But this was exactly what De Gaulle did: bypassing the constitutional reserve of Article 89 of the French Constitution. Most observers and commentators (even the *Conseil Constitutionnel*, in its first opinion) agree on this point and value Article 89 for what it is: an implicit constitutional reserve with respect to constitutional amendments.

B. India

The second system to be considered is that of India. In a landmark decision from 1973 (*Kesavananda Bharti v. State of Kerala*)³⁴, the Supreme Court of India held that certain principles within the framework of the Indian Constitution are inviolable and hence cannot be amended by Parliament, even if the Indian constitutional amendment procedure provided for simple majority amendment by Parliament. The Supreme Court referred to this framework of inviolable principles as the ‘Basic Structure’ of the Constitution. This was a far-reaching decision of the Court because Article 368 of the Constitution of India grants the Indian Parliament the right to act as constituent power in the case of constitutional amendments.³⁵ In theory, the Indian Parliament could and can therefore amend the Constitution in every desirable way and in every sense. Amendments and additions to the Constitution duly enacted by Parliament are essentially immune to judicial review as well.³⁶ What induced the Court to rule on the face of things, in contrast to the letter of the Constitution?

The *Kesavananda*-case related to a constitutional amendment that sought to restrict fundamental rights (in particular, the right to property)³⁷, an issue highly controversial at the time. The Supreme Court considered

33. Bell (1994), p. 134.

34. AIR 1973 SC 1461.

35. Article 368 (1) reads: “Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”

36. This was the established position taken by the Supreme Court until 1967 (as is shown by the decision in *Sajjan Singh v. State of Rajasthan*, 1965 (1) SCR 933). In *I.C. Golak Nath and others v. State of Punjab*, AIR 1967 SC 1643, the Supreme Court changed its position because it ruled that duly enacted amendments could not be permitted to render basic constitutional rights unenforceable.

37. Jacobsohn (2006), pp. 473-474.

that even though Parliament is entitled to amend the Constitution and limit rights in the public interest, even the fundamental rights from Part III of the Constitution, these rights cannot be completely abrogated. The fundamental importance of the freedom of the individual has to be preserved for all times to come and it cannot be amended so as to render it out of existence. According to the Supreme Court, it follows from the nature of the Constitution, as expressed in the Preamble as well, that this Basic Structure of the Constitution must be protected.

The effects of the Indian *Marbury v. Madison*³⁸ seemed to be short-lived. The Constitution (Forty-second Amendment) Act, 1976 tried to reduce the ability of India's Supreme and High Courts to proclaim laws constitutional or unconstitutional. A new fourth clause to Article 368 of the Indian Constitution provides that no amendment to the Constitution (including the provisions of Part III) 'made or purporting to have been made under this article shall be called in question in any court on any ground.'

The Courts, however, stood their ground. In *Minerva Mills Ltd. v. Union of India*,³⁹ the Supreme Court held that this fourth (and the fifth for that matter) clause of Article 368 of the Constitution were unlawful. Consistent to its *Kesavananda*-ruling,⁴⁰ the Court took the view that since the power of Parliament to amend the Constitution is limited, it cannot, by amending the Constitution, convert its limited power into an unlimited power (as Parliament had tried to do by adopting the Forty-Second Amendment (Act, s. 55) resulting in clauses four and five of Article 368 of the Constitution).

The *Kesavananda* and *Minerva Mills* cases, too, provide examples of a negative constitutional reserve in the Indian Constitution. In arguing that specific parts of the Constitution, the Basic structure, cannot be amended in such a manner that nothing is left of it, the Supreme Court expresses the idea of 'structural essentiality', a concept which is also known to the German Constitution.⁴¹ Like the French example, this example reveals the controversy of court-imposed restrictions to constitutional amendments.

C. The Netherlands

The Netherlands does not have a constitutional court; the Dutch

38. 5 U.S. (1 Cranch) 137 (1803).

39. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

40. The ruling was reaffirmed in the case of *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 dealing with the imposition of the Emergency of 25 June 1975 through 21 March 1977. In this latter ruling, the Supreme Court struck down clause 4 of article 329-A, inserted by the 39th Amendment in 1975, on the ground that it was beyond the amending power of the parliament as it destroyed the basic structure of the Constitution.

41. My Indian colleague tells me that the Indian Courts took this concept from the German Constitution.

Constitution even prohibits constitutional review of Acts of Parliament.⁴² This constitutional system has resulted in the Dutch courts showing great reverence for the parliamentary legislator which expresses the will of the people.⁴³ Even when an Act of Parliament was enacted without due observance of the constitutionally prescribed procedure, the Dutch Supreme Court proved unwilling to review the contested Act, claiming Article 120 even forbids the courts to review the procedure.⁴⁴

The check on the constitutionality of constitutional amendment bills is for the most part performed by the Dutch Council of State, the chief advisory body of the Dutch government. The Council's opinion is influential and authoritative: it is published and attached to the bill it pertains to when this is submitted to Parliament.

In various opinions in recent years, the Council of State has defined a position about the limits the Constitution imposes on the legislator. For example, the Council has stated on various occasions that specific subjects, such as a binding referendum, cannot be regulated by the parliamentary legislator, but only through constitutional revision.⁴⁵ In a widely discussed opinion of September 2007, the question of the significance of the Constitution arises. On 1 June 2005, the Dutch electorate rejected the Treaty establishing a Constitution for Europe in a referendum organised for that purpose. Together with the French 'no', this triggered a crisis in the constitutional process of the European Union, a crisis that was resolved by the compromise of the Treaty of Lisbon of 2007. The Treaty of Lisbon bears a strong resemblance to this initial European constitution, although its state-like regalia, such as a flag, an anthem and a catalogue of fundamental rights, have been removed from it. In view of this strong resemblance, there were Dutch politicians who insisted that this new Treaty of Lisbon be subjected to a referendum as well. It seemed illogical to subject one draft treaty to a referendum, but not the other. The government was at a loss as to what to do next and decided to submit the question, whether or not to hold a referendum, to the Dutch Council of State. In its opinion of 12 September

42. Article 120 of the Dutch Constitution reads: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."

43. Wim Voermans (2003), *De bestuursrechter en artikel 120 Grondwet* (Administrative Courts and Article 120 of the Dutch Constitution). *Jurisprudentie bestuursrecht Plus* (Collection of Administrative Case Law) (Nov. 2003), pp. 142-151.

44. Supreme Court 27 January 1961, *NJ* 1963, 248 with a note by DJ. Veegens (Van den Bergh judgment).

45. See the opinion on the bill concerning temporary rules governing the advisory corrective referendum (Temporary Referendum Act), *Parliamentary Papers II* 1999/00, 27 034 B (opinion W04.99.0615/I).

2007,⁴⁶ the Council of State first observes that, in contrast to its predecessor, the Treaty establishing a Constitution for the European Union, the EU Reform Treaty (i.e. the later Lisbon Treaty), as foreseen at the European Council meeting in June, does not have a constitutional character. The Council draws this controversial⁴⁷ conclusion from matters connected with the character of the adoption method and the content of the Reform Treaty. The Lisbon Treaty parties do not seem to have the ambition to negotiate a constitution, as is shown by the absence of characteristic constitutional elements such as fundamental rights, constitutional symbols (flag, anthem, etc.) and a fundamental change in the division of powers between the Union and Member States. Moreover, the Reform Treaty does not repeal the earlier treaties, as the European Constitution did.

The Council of State does not confine itself to assessing the constitutionality of the Reform Treaty, but goes one step further and expresses its opinion on the possibility of holding referendums on the approval of treaties. The Council holds that the Dutch Constitution contains a closed system in relation to the approval of treaties, in which parliamentary approval is the basic principle (enshrined in Article 91 of the Dutch Constitution). That means two things. First, that there is no room for binding referendums as regards the approval of treaties and, second, that a special justification must exist for a consultative referendum about the approval of a treaty such as the Reform Treaty, which is not constitutional. “The mere precedent”, the Council holds, “is insufficient for holding a referendum, because this would essentially create a structural referendum facility (for the approval of treaties), which does not fit in with the *closed system* [my italics, WV] of the Constitution.”

Accordingly, the reasoning of the Council of State underlines the existence of a negative constitutional reserve in the Dutch Constitutional System. As elsewhere, it is a controversial one.

D. The European Union

On the face of it, it is not self-evident to search for constitutional reserves in the context of the European Union. The European Union is a treaty organization rather than a state and, on the face of it, again, it does not have

46. W02.07.0254/B (also published in *Parliamentary Papers II* 2007/08, 31 091, no. 4).

47. A.T.J.M. Jacobs (2008), ‘Het Verdrag van Lissabon en de Europese grondwet. Is er een “overtuigend onderscheid?”’ (“The Lisbon Treaty and the European Constitution; a Convincing Distinction?”) *Nederland Juristenblad* (Dutch Lawyers Journal), pp. 320 – 329.

a constitution, but two basic treaties (Treaty establishing the European Union, TUE and the Treaty establishing the European Community, TEC). Even so, this search is useful, because even though there is a debate on the question whether the primary law of the EC/EU is constitutional law,⁴⁸ it is now assumed that the EU and EC Treaties, and the case law the European Court of Justice has developed on the basis of that, does in fact *operate* as constitutional law.⁴⁹

According to the Court of Justice, the treaties constitute a Community which functions as a new legal order of international law (*Van Gend & Loos judgment* 1962)⁵⁰. Furthermore, the Community has created its own legal system which has become an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating this Community of unlimited duration, the Court of Justice observed in the *Costa/Enel* judgment of 1964,⁵¹ the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. Additional evidence of the constitutionality of the EU/EC is that the TEC/TEU can only be amended under qualified requirements, i.e. by the Treaty Powers themselves. And to round it up: the Treaties establish institutions, attribute powers to these institutions and limit them; fundamental rights apply;⁵² the institutions are subject to the rule of law and the principles of democracy (transparency and the partaking of the European Parliament in most of the lawmaking); the EU has an independent court and competitive branches of government.

The European Union has constitutional reserves as well. One of the most important principles of community law is the principle of attributed

48. See Armin von Bogdandy (2006), 'Constitutional Principles', in Armin von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law*. Oxford and Portland Oregon; Hart Publishing, pp. 3-4.

49. See Koen Lenaerts and Piet van Nuffel (Robert Bray, ed.) (2004), *Constitutional Law of the European Union*, Sweet and Maxwell.

50. European Court of Justice (ECJ) 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62.

51. ECJ 15 July 1964 *Flaminio Costa v E.N.E.L.*, C-6/64.

52. *ECJ International Handelsgesellschaft mbH v Einfuhr* etc. [1970] ECR 1125, where the ECJ declared that it would protect human rights as an integral part of EU law; *ECJ Nold v Commission* [1974] ECR 491, where the ECJ declared that international human rights treaties on which Member States collaborated, or to which they were signatories, also provided guidelines which should be followed within the framework of EU law. No measure could have the force of law unless it was compatible with the fundamental rights recognised and protected by the Member States' constitutions, and finally *ECJ Rutili* [1975] ECR 1219 and *Hauer v Land-Rheinland-Pfalz* [1979] ECR 321, where the ECJ confirmed that the rights protected by the ECHR form part of Community law. Admittedly, the fundamental rights did not make it into the Treaties. The idea of making fundamental rights part

powers or the principle of conferral (as it is also known). This principle means that the Union may exercise only those powers conferred on it by the Treaties. There is no such thing as general competence or implied powers – in the strict sense of the word – vested in the Union; the institutions may act only where the treaties expressly grant them permission to do so. In other words: this principle is the meta-constitutional reserve as regards the constitutional order of the EU.

The EU Court of Justice also applied it as such in *Germany v. Council (Tobacco Advertisement Directive)* case.⁵³ In this judgment, the Court annulled Directive 98/43 prohibiting the advertising and sponsorship of tobacco products⁵⁴ on the ground that it did not fall within the scope of competences to regulate the internal market (Article 100a). The Court was of the opinion that Article 100a, interpreted in the light of Articles 3(1)(c) (subsidiarity) and 14 respectively, permits the Community legislature to adopt measures intended to improve the conditions for the establishment and functioning of the internal market, but

“to construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 TEC) that the powers of the Community are limited to those specifically conferred on it.”

This is an important decision because the Court of Justice’s interpretation of the power to take measures for the purpose of promoting the internal market had been quite liberal until then. The Court of Justice followed a more restrictive line in 2000 and concluded from the conjunction of provisions, and, consequently, from the nature of the Treaty, where the limits of the legislative powers of the institutions with respect to the internal market lay. If the institutions should have additional powers, this would be possible only by amending the treaty.

of the Treaty lapsed together with the proposed Treaty establishing a constitution for the European Union. At this juncture, however, the EU has a Charter on Human Rights, which is not legally binding as such but serves as an important inspiration. If the Treaty of Lisbon will be ratified, the Union will – in all likelihood – join the European Convention on Human Rights.

53. ECJ Case C-376/98 (2000) ECR I-8419.

54. Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, *OJ EU* 1992, L 213.

The Court's decision in an environmental criminal case is just as fundamental. In these proceedings, the Court struck down a framework decision on criminal sanctions applying to environmental protection,⁵⁵ which had been adopted by the Council on a Third Pillar legal base.⁵⁶ First, the Court of Justice determined that the framework had actually been defined on the incorrect legal basis. It should have properly been adopted on the basis of Article 175 of the EC Treaty. In those circumstances, the entire framework decision, based on Title VI of the EU Treaty, encroaches on the powers Article 175 of the EC Treaty confers on the Community. The Court then renders a very fundamental decision on the question whether the Union may actually impose criminal penalties. While the Court confirms that, as a general rule, criminal law and criminal procedures are matters which do not fall within the scope of the EC Treaty, this does not

“prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”

This means that the competences of the institutions, particularly the legislator, of the Union have increased considerably here. This includes their power to sanction, even where Article 175 does not grant TEC any such power. And if there is no power, it is, according to the principle of conferral (acting as a negative constitutional reserve), not allowed to regulate.

Covert constitutional developments

The principle of the limited powers (principle of conferral) limits, as we have seen, the scope of action of the institutions. Apart from the blessings, such as the preservation of sovereignty for the Member States and entrenchment of the original intentions of the contracting parties, this entails significant restrictions. The principle of conferral sometimes poses an obstacle to flexible and decisive Union action. This very inability of the Union to take swift and effective action to meet such major challenges as climate change and environmental issues, internal financial market control and energy and foreign policy has aroused a great deal of criticism. This problem has been

55. 2003/80/JHA of 27 January 2003.

56. ECJ Case C-176/03, *Commission v. Council*.

recognised from 2001 on⁵⁷ and, subsequently, the Treaty establishing a Constitution for the European Union makes an attempt to define answers to it. The fate of this European Constitution from 2004 and the lengthy road leading to the Treaty of Lisbon which still has not been ratified by all Member States, reveals the difficult route of radical treaty changes and the corresponding deepening of the constitutionalization process in the EU. Within the 27 Member States there are major differences of opinion about the future development of the EU. And this will make it even more difficult to introduce treaty changes in the future, which, in turn may paralyse the decision-making process in the Union.

This pending constitutional stalemate (urgent need to improve the Union's decisiveness and the painstaking process of treaty change) has, over the past ten years led to quite a remarkable phenomenon: 'covert constitutional development'. This refers to the adoption of constitutional rules, such as fundamental rights; rules governing the relationship between the institutions involved in the legislative process; rules that govern the relationship between the European legislator and the executive; rules and customs that, in brief, concern the system of government of the EU. I call such rules 'covert' if these:

- (a) concern subjects that are included in the TEC/TEU, but where the treaties themselves do not give the institutions any explicit power to adopt further rules for these;
- (b) concern subjects that are not governed by the treaties.

In view of the scope of this article, I will mention a few. The first concerns the *trilogues*. Article 251 of the TEC enshrines the 'co-decision procedure', the Union's common legislative procedure involving the European Commission, the European Parliament and the Council of Ministers. The procedure provides for a system in which the Commission submits a legislative proposal to the Council and the Parliament, which may amend (or reject) the proposal in a first reading. If, after a first reading, the Council and the Parliament see eye to eye, they can enact the proposal; if this is not the case, the Council may present a common position, which in turn is submitted to Parliament. Again, Parliament may amend the common position in a second reading (or reject it altogether). If, after a second reading, Parliament and Council still fail to agree on an identical text, a conciliation committee, consisting of members of Parliament and from the Council, may

57. See e.g. *White Paper on European Governance* COM (2001) 428 final.

be called upon: the committee will try to come up with a compromise proposal, which in turn is submitted to both Parliament and the Council to be enacted or rejected. The *trilogues* system means that immediately after the first reading (or during the second reading), an informal conciliation committee is formed to present a compromise proposal.

Undoubtedly, this procedure, which has become quite popular by now, helps to speed up the legislative process, but it is not provided for in the treaties: these permit conciliation only after the second reading and do not provide for any Commission contribution.⁵⁸ This is not an isolated phenomenon; in the spirit of the treaties, the institutions involved in the legislative process make all kinds of arrangements with each other, which are not provided for in the treaties. One of them is the comitology procedure, under which implementing powers are conferred on the Commission by the EU's legislative bodies. In the process of drawing up these implementing measures, the Commission must act in conjunction with committees of national civil servants, who often have the power to block the Commission and refer the matter to the Council. This seems to be inconsistent with Article 202 of the TEC, which provides that the Commission bears sole responsibility for implementation measures after they have been conferred in a legislative act. Until recently, the comitology procedure was a matter of controversy, especially in relation to the position of the European Parliament, which was not involved as a partner in the comitology procedure. The comitology decisions of 1999 and 2006 solved many of these problems.⁵⁹ The above forms of covert constitutional engineering are only some of many examples. Even the *Van Gend & Loos*, *Costa/Enel* and *Handelsgesellschaft* judgments of the Court of Justice, discussed above, may be perceived as covert constitutional developments. Most present-day commentators and European experts do not, and may be rightly so, feel that most of the methods of sub-constitutional engineering I dealt with are very problematic.⁶⁰ Eiselt and

58. Shackleton and Raunio emphasize that *trilogues* have now become an uncontested part of the conciliation procedure. It would be fair to say that it is uncontested only among the institutions so far. M. Shackleton, & T. Raunio, (2003), 'Codecision since Amsterdam: a laboratory for institutional innovation and change' *Journal of European Public Policy*, 10(2), pp. 171-187. Keating and Hägen are more critical on *trilogues*: they highlight the informal and sometimes somewhat intransparent character of the procedure, as well as the backdrops for MEPs. Frank M. Häge, and Michael Kaeding (2007), 'Reconsidering the European Parliament's Legislative Influence: Formal v. Informal Procedures', *Journal of European Integration*, 29 (3), pp. 341-361.

59. Council decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (Comitology decision) (2006/512/EC).

60. Curtin argues that we should not be too dogmatic in our approaches to the Union. She notes that the EU is clearly still under construction. It is not premised on a fully fledged system of parliamentary democracy (and probably never will be), since there are no unbroken chains of delegation and of

Slominski, in discussing the phenomenon of inter-institutional agreements feel that, when such agreements specify a treaty provision without an explicit authorization, this may result in circumvention of the time-consuming procedure of Treaty amendment, and result in trading higher level negotiations in for lower level ones.⁶¹

If, however, we apply the principle of limited attribution (or conferral) very strictly and regard it as an actual constitutional reserve, incidentally, the ECJ seems to be doing just that in the *Tobacco Advertisement Directive* case, many of these practical and productive sub-constitutional arrangements suddenly appear to be problematic. These sub-constitutional developments are problematic not only at the technical level of EU law and the treaties, but, possibly, also in terms of the democratic deficit the EU is facing. Seen as a constitutional reserve, the principle of limited attribution is also designed to guarantee control of the European public over the content of constitutional law in the Treaties. Substantial covert constitutional activity contributes to the feeling of a bureaucratic, undemocratic, uncontrollable Union with an agenda of its own. This aspect was a significant factor in Dutch popular feeling leading up to the ‘no’ on the European Constitution in 2005.

IV. Conclusion: The Effects of Constitutional Reserves

In this contribution, I have discussed constitutional reserves, i.e. the phenomenon that constitutions sometimes provide that specific subjects or issues must exclusively be settled in the constitution itself. These types of provisions come in various shapes and forms. I divided these into positive ones (expressly defined in the Constitution) and negative ones (provisions – written or unwritten – that have the effect of a constitutional reserve). These provisions are not unusual. The list of examples of constitutional reserves in constitutional systems, which I gave above, can be added to effortlessly.⁶² Constitutional reserves, especially negative (or implied) ones, are common and not unusual. Constitutional reserves are in the splits between the requirements of law on the substance of a constitution on the one hand, and

accountability reaching (up and down) to the citizen. One of the main problems – in her mind – regarding the checks and balances under construction in the ‘undergrowth’ of legal and institutional practice is the chronic lack of transparency of the overall system. Curtin, D. (2007), ‘Holding (Quasi-) Autonomous EU Administrative Actors to Public Account’, *European Law Journal*, Vol. 13, No. 4, July 2007, p. 523–541.

61. Isabella Eisselt and Peter Slominski (2006), ‘Sub-Constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements in the EU’, *European Law Journal*, Vol. 12, No. 2, March 2006, pp. 209–225.

62. Jacobsohn gives a few examples from Peru and Ireland, and besides, he confines himself to countries that faced the problem of unconstitutional amendments; the theme of constitutional reserves is much more comprehensive than that. Jacobsohn (2006), pp. 462–463.

the demands of popular sovereignty on the other. These are methods to deal with the tension from these forces and create a balance in a constitution. Constitutional reserves may prevent rash amendments of specific essential elements from the constitution (fundamental rights, the basic structure of the government system, etc.) or prevent these essential elements from being regulated outside the constitutional amendment procedure. Further, the analysis shows that negative constitutional reserves that are unwritten and that the court infers from the constitutional system are controversial (India, the Netherlands). What is also striking is that even in countries with clearly identifiable constitutional reserves, there is hardly any theory formation concerning the question why specific subjects may be regulated only, in view of essentiality, for example, through the constitutional procedure. I agree with Harris that much can be gained by developing essential principles that would guide the choice as to what is fixed in those countries that have constitutional reserves, what is amendable and what can only be regulated through a constitutional procedure.

One last observation. The example of the European Union reveals a special, somewhat unsettling, effect of the constitutional reserve of the Union (the principle of conferral): covert constitutional developments. Because, according to a strict interpretation of the principle of conferral, specific essential institutional issues can be settled only through a Treaty amendment, this principle is, over the last decades, being applied in a creative fashion. The possible consequence is that substantive parts of EU constitutional law are elaborated without the involvement of the populations of the Member States or the Member States themselves as contracting parties. A process Majone had aptly labelled as 'integration by stealth'.⁶³ This involves a big risk for the future of the EU: establishing a constitution and losing the people.

Come what may for the EU, the possible covert constitutional practice raises a more general question. Is this a common effect of strict constitutional reserves? It would be very interesting to see and know whether rigid constitutions do typically trigger covert constitution building or – more often – not. A question we here at Leiden will be looking into in the near future.

63. G. Majone (2005), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press.