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The constitutional revision process in the Netherlands: Sensible security valve or cause of constitutional paralysis?

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13 The constitutional revision process in the Netherlands

Sensible security valve or cause of constitutional paralysis?

Wim J. M. Voermans

How an established society's fundamental institutional rules are revised ultimately determines the degree of liberty retained by its people.

Charlotte Twight, 1992

Introduction

The Kingdom of the Netherlands has one of the oldest written constitutions in Europe.¹ It rode the crest of the first wave of post-revolutionary constitutions in Western Europe at the beginning of the nineteenth century. The Dutch Constitution dates back to 1814, with a first major revision in 1815 when what is now Belgium joined the Kingdom of the Netherlands following the Allied Congress of Vienna. The document is restorative in nature as well as post-revolutionary (Napoleonic), a typical example of the first wave of liberal constitutions in the West.² The Dutch Constitution of 1814 did not (and does not) have a preamble,³ only a very limited list of fundamental rights, an institutional design based on the ideal division of powers (a checked and balanced legislative branch, a distinct executive, and an independent judiciary), an embryonic parliamentary system, and a firmly enshrined system of constitutional monarchy.⁴ The restorative elements are to be found in the restored powers of self-government of municipalities and provinces, and the freedom of religion and conscience.

From the start in 1814, the Dutch Constitution has had a very rigid regime for constitutional revision. Article 142, through Art. 144 of the 1814 version, required a statute expressing that there was a need to amend (parts of) the Constitution and then a subsequent second reading, beginning with the convention of adjunct Members of Parliament (MPs) recruited from the Provinces (doubling the number of MPs—the “States General”) to consider the proposal put forward by the statute. Only a two-thirds majority in this enlarged Parliament could then adopt and pass the amendment: a formidable double threshold indeed in a country famous for its many denominations, creeds, and factions.⁵ There is no real explanatory note with the original Constitution so one can only speculate as to the reasons the founding fathers may have had to come up with a revision procedure like this one. It may have been to do with the experience of the volatile political situation at the end of the eighteenth century when, after the original Patriotic insurrection had been quashed,⁶ the Batavian Republic was proclaimed in 1795 as the outcome of

another popular revolution.⁷ This revolution was brought about with the support of the French revolutionary army who invaded the Netherlands, at intervals, between 1793 and 1795. The end result of the French intervention was that, after a series of domestic coups, the Batavian Republic became a client state of France. After 1806, the Republic turned into a monarchy (Kingdom of Holland) under direct French rule, which in 1810 became part of the French Empire. Thorbecke, on the other hand, points out that Van Hogendorp, principal framer of the original Constitution of 1814, believed that a constitution that could not be revised was flawed. Actually, Van Hogendorp got the inspiration for the revision procedure, Thorbecke's notes, from an annex to the Batavian Constitution of 1798.⁸

This contribution will deal with the constitutional revision procedure in the Netherlands as such, but will also consider the wider perspective of the relative position of the Dutch revision procedure amidst other types of revision procedures, and will also discuss the effects of this kind of revision procedure and recent proposals to amend the revision procedure. To my mind, this wider perspective is needed if we want to be able to compare revision procedures in different jurisdictions.

Shapes and sizes of revision procedures: an overview to set the stage⁹

Constitutional revision: balancing flexibility and rigidity—theory and practice

One of the classical problems of constitutional law all over the world concerns constitutional revision. Modern constitutions are believed to express the political will of a people as regards the conditions and terms for political society. The received theory in our day and age is that a constitution is a consensual act by a sovereign nation or people empowered to do so¹⁰ (a so-called *constituante*), resulting in one or more¹¹ written documents.¹² The rationale behind this theory is that of a temporary (mythical¹³) communion of individuals with different interests into one body with a common identity (nation or people) at a single moment, resulting in a balanced packaged deal. Most modern constitutions are based on this underlying notion of what I will call *constitutional singularity*. According to this theory, the revision of a constitution by a different body other than the *constituante* itself is problematic, and even then, revision is controversial because the *constituante* is not a mere body—it is an historic moment as well.¹⁴ That may be the reason why they have annexed amendments to their Constitution in the United States rather than changing the original text itself. The revision of a constitution is not only problematic from the perspective of constitutional singularity, it may also compromise the balance and trade-offs in the package deal of the constitution itself. Modern contract theorists and political economists alike have pointed out that amendments or revisions to the original package deal of the constitution may render a post-constitutional state unstable, even reverting to anarchy, if rights in practice came to diverge substantially from people's "renegotiation expectations."¹⁵

Compared to the theories on constitution-making, there are virtually no theories on constitutional revision (apart from it being considered problematic).¹⁶ What is the rationale or the justification for constitutional revision? According to one line of thought, it is not possible for a *constituante* to foresee everything, and therefore the work of this body is unfinished, or at least not perfected. Future legislators are therefore delegated by the *constituante* to finish the job and to perfect the constitution, within—of course—the confines of the mandate laid down by the *constituante*.¹⁷ A second line is based on Fukuyama's theory of adaptation: political institutions need to adapt to changing circumstances in order to survive.¹⁸ Constitutions as platforms and frames for political life need to adapt in order to keep the original will of the *constituante* intact.

Once we are clear on the *why* of constitutional revision, the question of *how* to revise presents itself. If a constitution is over-adaptive, it may risk compromising the original (package) deal and constitutional consensus (thus becoming futile as a constitution). On the other hand, too much rigidity may fossilize the constitution, or (as a result) trigger forms of bypass¹⁹ or non-compliance. Balancing rigidity and flexibility (i.e. adaptation) is of course a question for political actors and not a theoretical consideration, although Cooter's "Minimax Constitution" strategy (originating from game theory),²⁰ in which a constitution and its revision procedure are set up in such a way that they minimize the harm when the worst political possibilities materialize, seems to explain the bulk of constitutional revision procedures in democracies.

Revision types

Most *written* constitutions in the world, to which I will limit my treatise, are equipped with revision procedures.²¹ Classical constitutional doctrine makes a distinction between two types of constitutions based on the ease of a revision. *Rigid* constitutions are, according to this distinction, constitutions that are difficult to revise (e.g. because of a complex or difficult amendment procedure involving more than one reading, or qualified majorities or supermajorities), whereas *flexible* constitutions can be amended more easily.²² This distinction, however, 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 do set extra requirements on constitutional amendments compared with ordinary statutes, for example.²³ Even in countries where the fundamental constitutional rules are not enshrined in a single constitutional document, but in mere Acts of Parliament, for example, there is usually a certain degree of rigidity due to *de facto* respect for these parts of their Constitutions. For example, it is almost inconceivable that the Westminster Parliament would amend the Bill of Rights of 1688.

Moreover, the rigidity of a constitution involves more than the mere revision procedure. The rigidity of a constitution also reflects its fundamental nature.²⁴ This is in fact what distinguishes constitutions from ordinary statutes. Hans 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 statute.²⁵ Some jurisdictions, like India for instance, have expressed this by acknowledging that there are elements in their constitution that make up the “basic structure” of the document and, therefore, cannot be amended according to the normal (up to 1976 very flexible) revision procedure.²⁶

A constitution may also impose different levels of amendability on different subject matter. The German Constitution, for instance, is famous for its *Ewigkeitsklausel* (eternity clause), which prohibits the amendment of the fundamental principles enshrined in Art. 1 and Art. 20 of the Constitution, and the division of powers between states and the federation.²⁷ Other countries have differing revision regimes for different subject matter/provisions in their constitutions.²⁸

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 another—the constitutionality of legislative action on the other hand.²⁹ This functional rigidity also reflects the fundamental nature of a constitution.

More or less “rigid” revision procedures come in a wide variety of shapes and sizes. Procedural revision rigidity seems, however, to be the most common type.³⁰ Most of the time, qualified or supermajorities are required before an amendment to the constitution can be adopted, or there are procedural extras like a double parliamentary reading, new elections between the readings (e.g. the Netherlands), parliamentary enactment followed by a referendum (e.g. France), and adoption by Parliament and ratification by (a qualified majority of) territorial subunits (USA).

Heringa and Kiiver note that the formal rigidity of a constitution (the procedures) is not always a clear indicator of its substantive rigidity.³¹ Changing customs and conventions in political practice may give, for instance, a different meaning to constitutional provisions. In the same way, judicial interpretation—notably that of constitutional courts—can play a crucial role in determining the substantial flexibility of a constitutional text.

The overview of revision types presented above is more or less classic textbook material. Recent literature seems to focus more on the actual ways constitutions are amended. A distinction between formal and informal revisions of constitutions then emerges. Formal revisions are, in this line of thinking, changes to a constitution brought about by amendments to the text of the entrenched written constitution, which have passed through a special procedure (that may include a qualified majority in Parliament or a referendum), or brought about by other written acts that can be regarded as of a fundamental nature.³² Informal revisions, on the other hand, are changes made to the constitution (or impacts on it that yield the same result as change) that have not followed the path of the formal amendment procedure. Constitutional interpretation by courts, for instance, may (have the effect of)

change the constitution, as may legislation or international treaties. On occasion, modern constitutional theory labels formal textual changes to a written constitution as “amendments” and informal changes as “revisions.”³³ Donald Lutz has come across an interesting pattern while studying different amendment processes. He observes that in jurisdictions where it is “too difficult” (according to his Index of Difficulty) to formally amend the constitution, those jurisdictions will develop alternatives, including amendment by purported interpretation.³⁴

The Dutch revision procedure

Chapter 8 of the Dutch Constitution deals with the revision procedure. In view of the procedural requirements it sets on revision, the Dutch Constitution qualifies as a rigid constitution. Any revision to the Constitution involves two parliamentary readings (with general elections in between), and a qualified two-thirds majority in both Houses of Parliament in the second reading.

There are different triggers for proposals for constitutional revision in the Netherlands. Proposals for relatively small amendments are commonly the result of incidents or the specific program of a political party. Major revision proposals are mostly preceded by studies and proposals by specially established government committees, although this is not mandatory. The role of experts is quite small. Proposals for revision are, almost always as a rule,³⁵ prepared by one or more ministerial departments.³⁶ The required skill and expertise is pooled within a special unit of the Ministry of the Interior. The Bureau of Constitutional Affairs and Legislation (*Constitutionele Zaken en Wetgeving*, or CZW for short) has a regular staff of a dozen expert civil servants who look into constitutional affairs. This central unit within government is consulted on constitutional issues that arise in the different ministerial departments; when it comes down to constitutional revision, this unit is responsible for drafting the proposals. Once a proposal is made by the Minister of the Interior, it needs to be discussed and agreed by the Council of Ministers: major legislation is a collegiate matter in the Dutch political system. After clearance by the Council of Ministers, the proposal is sent to the Council of State for consultation. The consultation must not be confused with judicial review of amendments as we know it in other constitutional systems (e.g. France or Italy). The Dutch Council of State gives a non-binding opinion; no more, no less. The Council of State’s opinion is discussed in the Cabinet, and a subsequent report reacting to this opinion is added to the dossier (*nader rapport*). The proposal, the explanatory memorandum, the opinion of the Council of State, and the additional report with comments are then tabled before the Dutch House of Representatives (*Tweede Kamer*), the Dutch variant of a House of Commons in its bicameral Parliament (*Staten-Generaal*). The Houses at this stage deal with the bill proposing to amend the Constitution in a first reading. Since the bill after its first reading does not, in fact, amount to a constitutional revision (a subsequent second reading is necessary), we call this sort of first-reading bill a “consideration proposal” after the text of Art. 137 para 1 of the Dutch Constitution, which provides that a revision of the Constitution starts with the passage of a bill “stating that an amendment to

the Constitution in the form proposed shall be considered." The consideration bill is debated as a regular bill in the first reading in the House of Representatives. Amendments can be made to it, and it is subject to regular voting procedures (i.e. a simple majority suffices for adoption). However, in most cases, constitutional revision in the Netherlands is an uphill battle.

Constitutional amendments tend to touch on principles, and the Dutch have a tradition going back more than 400 years of discussing (and most of the time disagreeing) on principles at length. This has resulted in a fragmented religious³⁷ and political landscape.³⁸ Political and ideological fragmentation combined with a rigid revision procedure has made it very difficult to amend the Constitution. It proved equally difficult to amend the revision procedure itself. A major revision to the Constitution in 1983, however, brought one innovation that tried to make constitutional amendment somewhat easier. Article 137 para 2 of the Constitution makes it possible to break up a bill proposing to amend the Constitution, which in turn makes it possible to save and readily pass uncontroversial parts of a proposal as a separate bill. Only the Government and the House of Representatives have this power to divide a first-reading consideration bill, not the Senate. After the House of Representatives has adopted the bill (the first reading stops upon rejection), it is tabled before the Dutch Senate, the other Chamber of Parliament. Under the Dutch Constitution, the Senate does not have the power to amend or break up the bill in its first reading. The senators have to deal with the bill as it stands, but they can try to persuade the Government to use its powers to alter or divide the proposals put forward in the bill. If the Government succumbs to this, an alteration or division has to travel the whole route again (Council of State and House of Representatives), before it can be dealt with again within the Senate. This method of "*novella*" to rally support in the Dutch Senate is controversial because, in the eyes of some, it is an extra-constitutional usurpation of the power to amend.³⁹ If the consideration bill is passed by the Senate, it becomes an Act of Parliament.⁴⁰

When the Act becomes effective, by way of publication, Art. 137 para 3 of the Dutch Constitution provides that both Houses of Parliament have to be dissolved. The underlying idea is that of a plebiscite: the people need to be consulted on the proposed amendment. By ordering new elections, people can make up their mind as regards the proposed amendments and vote for the candidates who voice the position on the proposed amendment they prefer. This plebiscite theory has, however, been overhauled by the actual practice of the dissolutions for reason of constitutional amendment. The general practice throughout the last century or so has been to wait for the moment of the general election for the House of Representatives and only then to publish the Act putting forward the proposal to amend the Constitution. In this way, general elections and public consideration of the proposal to amend the Constitution can coincide. As we will see in the next paragraph, this method has resulted in the common practice that the general election totally overshadows the debate on pending proposals to amend the Constitution. The majority of voters are unaware of constitutional amendments during the general elections.⁴¹

After a series of changes in the way the Senate was elected and composed in the latter half of the twentieth century, the dissolution of both Houses of Parliament for the purpose of constitutional reform created problems. Because the members of the Senate are indirectly elected by representatives of the provinces, and (thereby) the terms of the House of Representatives and the Senate were no longer synchronous, even minor constitutional amendments could trigger mid-term provincial elections. This is indeed a very drastic consequence, and it is why the 1995 Act revised the dissolution procedure somewhat: only the House of Representatives has to be dissolved in the event of an Act proposing an amendment to the Constitution.⁴²

After the election, the House of Representatives in its new composition convenes and considers the Act to amend the Constitution laid before it by the former session. The Houses of Parliament can no longer amend or divide this proposal during the second reading. The motion to amend the Constitution as put forward in the Act can only be carried if adopted in both Houses with a two-thirds majority of the votes cast. This way of conducting a second reading has proven to be a "killing field" for many proposed amendments, as one might imagine. The procedure gives 26 senators with a very indirect popular mandate the power to block any proposal.

If the proposal is adopted in second reading, it has, once again, to be ratified by the Government before it can come into force. Constitutional revisions, however, do not usually take immediate effect.⁴³ The amendments made to the Constitution may conflict with existing law, and, although Art. 140 of the Constitution enshrines a general transitory regime providing that existing legislation in conflict with an amendment to the Constitution remains in force until provisions are made in accordance with the Constitution (a form of deferred application), the Government generally tends not to let it come to this. Existing legislation is quite often tailored to the new constitutional amendments before the amendments themselves take effect. Constitutional amendments are promulgated by Royal Decree.

Processes and practices of constitutional revision in the Netherlands: past and present

Looking superficially at its history, one would not immediately conclude that the Dutch Constitution is very difficult to revise. Since its inception in 1814, there have been 23 revisions⁴⁴ to the Constitution. These revisions were not all equally important. Some are major in the volume of amendments (1848,⁴⁵ 1887,⁴⁶ 1983⁴⁷) or major considering the political or constitutional impact of the amendments (1848⁴⁸, 1917⁴⁹ and, arguably,⁵⁰ the ones of 1956⁵¹ and 1983⁵²). The bulk of the amendments, however, represents minor changes and largely stem from the last 75 years.⁵³

The nature of the revisions has changed over time as well, as Burkens notes. In the nineteenth and early twentieth centuries, debates on constitutional revisions were at the very heart of the political arena, and amendments to the Constitution acted as autonomous drivers for political change. After the major revision of 1917, which solved the stalemate debate over universal suffrage and equal treatment of

public and private schools, there has been a tendency to leave the Constitution intact and only revise it after the political settlement of an issue. This is a transgression, in other words, from the Constitution as a driver of political change into a consolidating mechanism of political change after the fact.⁵⁴

What has caused this deflation in the importance of constitutional revision in the Netherlands? There are two main explanatory perspectives here, expressing two different lines of thought. One group of commentators looks for the causes within the Constitution itself. They feel that the combination of the partial ban on constitutional review (Art. 120 of the Constitution); the nature of the constitutional provisions themselves;⁵⁵ the internationalization of human rights protection over the last 50 years, combined with the custom of submitting proposed amendments to the voters on the occasion of general elections (when the amendments get overcast by other political questions); and the rigid revision procedure have led to a steady decrease in the normativity of the Constitution, bordering on constitutional paralysis.⁵⁶ In 2006, the Dutch National Convention (a commission invited to reflect on constitutional and political modernization and reform) concluded that, if the Constitution is desired to be a "living instrument," the revision procedure and practice need to be reconsidered.⁵⁷

Other commentators are less pessimistic and point out that the sober Dutch Constitution aligns well with the present political culture that the revision procedure is doing what it ought to do: protecting against whimsical change, protecting minority rights and the constitutional structure against chance majorities, and creating and maintaining political stability.⁵⁸ In this same vein, the most recent Dutch Government Commission on Constitutional Reform held that, at present, there is no real pressing need for constitutional revision to uphold the Constitution.⁵⁹

Apparently, on the face of it, the Dutch seem content with their Constitution and the revision procedure. There is, however, somewhat more than meets the eye here, one could argue. First of all, the line of reasoning is a sort of conservative, self-fulfilling prophecy: the Dutch Constitution is not a living instrument, it is not critical for the political order, nor in any danger, so we are content with a procedure that effectively blocks change. Second, due to the complex revision procedure, a lot of constitutional settlements and regulation have taken place outside the Constitution itself. I have labeled this "covert constitution building."⁶⁰ This form of extra-constitutional settlement of issues is not unique to the Netherlands, but perhaps the volume is. In the Netherlands, some of the principal constitutional norms are largely unwritten (the rule of confidence governing the relationship between Parliament and Government, the principle of the rule of law, and the principles of legality, legal security, etc.). A lot of norms that curb present-day government action are not enshrined in the Constitution but in lower-ranking Acts of Parliament like the important General Administrative Law Act and the Act on the organization of the Judiciary. Acts of Parliament have been the instrument of choice for constitutional innovations and experiments, such as nationwide referenda,⁶¹ over the past few decades. The long and winding road of constitutional revision has been deliberately evaded over the last 30 years. Only when an issue cannot be settled without compromising existing constitutional provisions or

reserves⁶² is the royal route of revision considered, but circumventing it seems to be preferred.⁶³

Assessing the Dutch revision procedure and processes

In his book "Patterns of Democracy," Arend Lijphart discusses two important variables that have to do with the presence or absence of explicit restraints on the legislative power of parliamentary majorities:⁶⁴ first, the presence of a (rigid or flexible) constitution, and second, judicial review. The combination of the two variables characterizes the democratic system of a country. In the pure consensus model, a constitution is rigid (requiring supermajorities for amendments) and protected by judicial review. In the pure majoritarian model, a constitution is flexible and there is no system of judicial constitutional review. Analyzing 36 democracies between 1945 and 1996, Lijphart has found an empirical relationship between the two variables. The correlation co-efficient is 0.39—not exceptionally strong, in his view, but still statistically significant at the 1 percent level.⁶⁵

Every Dutchman (including Lijphart, who is Dutch) would be suspicious of, or surprised by, a result that rates the country at the bottom of the league of majoritarian systems. Indeed, the Dutch constitutional system has—as discussed above—a ban on constitutional review of Acts of Parliament and Treaties (Art. 120 Constitution), and a rigid Constitution, but domestic observers would all stress the fact that the Dutch democratic system is an outstanding example of a true *consensus* democracy (which, by the way, is something a little different than a consensual system). Maybe this counter-intuitive outcome is (one of) the reason(s) why Lijphart concludes that the Netherlands present a *deviant* case as concerns this correlation.

The interplay between the variables combined with Dutch political culture is, however, to a high degree explanatory for the Dutch system. And the Netherlands do rate as a consensual system, if we take a closer look. We already saw that the Dutch Constitution is a rigid constitution. Any amendment needs to pass through two different Houses of Parliament, in two readings, with a plebiscite in between. Lijphart places the amendment procedure in the middle category of rigidity, among those requiring a two-thirds majority. Actually, the Netherlands could be placed in the highest category of rigidity that Lijphart adopts, among those requiring more than a two-thirds majority. The Dutch political system, for instance, has been highly fragmented for more than a century and was polarized until 30 years ago, which has resulted in a strong consensus culture. Political minorities do punch above their nominal electoral weight in everyday Dutch politics, due to this engrained culture of consensus and respect for minorities. There is even an official word for this consensus culture: *polderen*.⁶⁶ The flip-side of this culture is that a mere two-thirds majority in itself will not suffice for a constitutional amendment. This explains why the major revisions of the Dutch Constitution have been the result of significant trade-offs in package-deal amendments after decades of political discussion on the issue. It also explains why major constitutional innovations

only succeed if there is a near total consensus. And it explains why most of the recent revisions concerned minor details of little importance: they were utterly non-controversial, and could therefore rely on (near) total consensus.

Consensus systems couple the rigidity of their constitution with judicial review, according to Lijphart's theory. The Dutch system, on the face of it, does not have judicial constitutional review. There is, however, more than meets the eye here. The ban on constitutional review enshrined in Art. 120 of the Constitution is only a partial one. Dutch courts are not allowed to review Acts of Parliaments and Treaties on their constitutionality, but they are free to review any other regulation. On the other hand, however, Dutch courts *are* allowed to review all domestic legislation—Acts of Parliament included—as to their compatibility with international Treaties and European Union (EU) law, and they do so very actively and frequently. The human rights catalogue of the European Convention on Human Rights (ECHR) and its protocols, which has direct effect and is directly applicable in the Netherlands, is invoked and applied frequently; actually, Dutch judges seem to favor the European catalogue over the constitutional domestic catalogue. It would be no exaggeration to say that—especially in view of the, normatively, relatively “weak” Dutch Constitution—the actual Dutch Constitution is comprised of the ECHR and EU Treaties as well. The Dutch Constitution presents a textbook example of a compound constitution. If we look through this lens, there is actually more judicial review, even constitutional review, in the Netherlands than meets the eye at first glance. And if we accept this, the Netherlands case would nowadays move towards a consensual-type system in Lijphart's characterization, rather than a more or less majoritarian system.

Revising the revision procedure: recent attempts

Is the Dutch revision procedure too rigid? Who is to say? The paradox, of course, is that the revision procedure itself is very difficult to change due to the rigidity of that very revision procedure. There have been initiatives to that end, though. In 1946, the Beel Cabinet proposed to elect a separate body for the second reading. It was believed that, with a dedicated Chamber for Constitutional Revision, the problem of general elections overshadowing the second reading of constitutional revision could be overcome. The House of Representatives, however, rejected the proposal during the second reading. In 1951, the Cabinet considered a reprisal of the idea of a dedicated Constitutional Revision Chamber, but the proposal was withdrawn at the first reading when it became clear that there was no majority to be found. In 1971, the influential Government Commission Cals/Donner, which came up with many of the proposals that found their way into the 1983 revision, floated the idea of a combined session of both Chambers of Parliament on the occasion of the second reading. The suggestion did not make it to an actual proposal.

A recent suggestion referred to above was put forward by the National Convention of 2006. During the first reading, the Convention proposed, the bill with the proposals for amendment to the Constitution should be debated in both

the House of Representatives and the Senate, with the requirement of a two-thirds majority in both Houses. Upon adoption in both Houses, the Chambers would be dissolved and the proposed amendments then put up for a referendum, separate from the general election. If the proposal was adopted after the referendum, the Government would then ratify it, and thus it could come into effect. The suggestion was short-lived, however, and never made it to an actual proposal.

In conclusion, one might say that, in view of recent Dutch constitutional history, the chances for successful revision of the revision procedure seem very slim indeed.

Conclusion

The Dutch Constitution is equipped with a rigid revision procedure that has more or less withstood the test of time for over 150 years. The procedure involves two readings in the two Houses of the Dutch Parliament, with dissolution of the House of Representatives in between, in order to consult the electorate on the proposed changes. In the second reading, after the election, a proposal needs to collect a two-thirds majority in both Houses to be adopted.

Although the revision procedure seemed a formidable threshold at the outset, it has permitted 23 revisions in nearly 200 years, which amounts to more than one every decade. The nature of the revisions, however, has changed over time. Whereas in the nineteenth and early twentieth centuries, constitutional revisions were debated at the heart of the political arena and the revisions themselves were triggers of political change, the revisions of the last century followed and consolidated political change rather than spurring it on.

It is not easy to assess the effects of the Dutch revision procedure itself, since it is so intertwined with the political and constitutional culture. Causalities are difficult to define. Has the rigidity of the Dutch revision procedure caused a political culture that does not seem to overvalue the Constitution, or is it the other way around? If we try to assess the Dutch revision procedure in terms of effects, we can distinguish two different patterns. On the one hand, one might say that the revision procedure has been successful in protecting the basic constitutional structure against whimsical change of chance majorities. It has—in the eyes of many observers—created a level of political stability in a historically fragmented political landscape governed as a rule by essentially frail coalitions. Playing it down, especially on constitutional principle, seems to have paid off, with stability being the dividend. The revision procedure can also be perceived as successful due to its persistence: attempts or suggestions to revise the Dutch constitutional revision procedure seem to have a lot of trouble getting off the drawing board. Those that did have failed.

On the other hand, one might argue that the revision procedure suffocates the Dutch constitutional debate and paralyzes the Constitution as a living instrument. Evidence for this line of reasoning can be found in the lukewarm sympathy the Dutch have for their Constitution (if they know it at all), and their inclination to bypass the Constitution for constitutional change in the last decades. But then again, on a brighter note, one might argue that the Dutch political system in recent

years has produced a revision procedure that already exists in other systems: a two-tiered revision procedure according to which changes to the constitutional core are governed by rigid revision procedures with supermajority requirements, and subsequent readings and run-of-the-mill adaptations that can be made by simple majorities in regular parliamentary Acts. But perhaps this perception is much too apologetic and conciliatory, because, from whatever angle we look at it, the Dutch *constituante* was never consulted on it.

Notes

- 1 The original Republic of the United Netherlands (1581–1795) did not have a written constitution in the modern sense of the word, although there were several constitutional documents and charters (e.g. The Union of Utrecht of 1579 and the Act of Abjuration of 1581). These documents typically had the character of medieval charters, edicts, or declarations and—by virtue of their character—they cannot be revised or amended.
- 2 The Norwegians boast that their Constitution is the oldest single-document national constitution in Europe, and the second oldest in the world, still in continuous force. But is it? The Norwegians adopted their present Constitution on 16 May 1814. The Dutch Constitution was adopted on 29 March 1814. It does not require “Dutch arithmetic” to see that this is more than a month before the Norwegian one. Admittedly, the Dutch Constitution had already been revised substantially in 1815 to implement the outcome of the Vienna Congress of that same year. But still, it was a revision of the existing Constitution of 1814, not a new one that came into force on 24 August 1815.
- 3 Recently (2009–2010), some scholars and politicians have lobbied for a preamble to introduce the Dutch Constitution as a means to boost and communicate Dutch identity, and the constitutional and political values underpinning Dutch Society. As of yet, these proposals have not been embraced by the majority of political parties.
- 4 C.A.J.M. Kortmann and P.P.T. Bovend’Eert, *Dutch Constitutional Law*, Kluwer Law International, 2000, pp. 17–18.
- 5 See R.B. Andeweg and G.A. Irwin, *Governance and Politics in the Netherlands*, Palgrave Macmillan, 2002, pp. 17–26.
- 6 With the aid of a foreign power – the Prussians. The Patriotic insurrection (or even “revolution”) and its background have been depicted in an unparalleled way by S. Schama in his 1977 (first big) book, *Patriots and Liberators: Revolution in the Netherlands 1780–1813*, Harper Perennial, 1992.
- 7 On 19 January. The Batavian Republic replaced the Republic of the United Netherlands (originally the seven Provinces). Prince William IV of the House of Orange Nassau, Governor of the Republic of the United Netherlands, was deposed and had to flee.
- 8 Reglement Letter E. Bijlage bij de Staatsregeling van 1798, artikelen 27 e.v. See J.R. Thorbecke, *Aanteekening op de Grondwet (Comments to the Constitution)*, Part II, 2nd edn, Johannes Müller, 1843, pp. 305–7.
- 9 Some of elements of this paragraph have been taken from an article I wrote for the *Indian Journal of Constitutional Law*. W.J.M. Voermans, “Constitutional Reserves and Covert Constitutions”, *Indian Journal of Constitutional Law*, 2009, vol. 3, p. 84ff.
- 10 By (pre-existing) law or in fact (by way of a declaration or political statement). In many preambles preceding constitutional texts, one may find declarations that try to justify why a nation or a people are entitled to define themselves as a political community and therefore empowered to constitution-making as well, especially when a legal title is missing. See P.B. Cliteur and W.J.M. Voermans, *Preambles (Preambles)*—a comparative study written at the request of the Dutch Ministry of the Interior and Kingdom Relations, Kluwer, 2009.

- 11 Sweden, for instance, has a constitution that consists of more than one single document.
- 12 This is the default method of sovereign constitution-making. There is also the method of post-sovereign making, in which the constituent power is not embodied in a single organ or instance with the plenitude of power, and all organs participating in constitutional politics are brought under legal rules. A. Arato, "Post Sovereign Constitution-making in Hungary: After Success, Partial Failure, and Now What?", *South African Journal on Human Rights*, 2010, vol. 26, pp. 19–44. I will not discuss this method separately in the rest of the contribution.
- 13 Perceived from a natural-law point of view, the constitutional moment is not merely a consensual moment, but also a moment of enlightenment and revelation, resulting in a common understanding of what natural law dictates.
- 14 According to some thinkers like Carl Schmitt, amendments cannot change the fundamental decision of the original revolutionary constituent power. Arato, op. cit., pp. 19–44, citing C. Schmitt's *Verfassungslehre* from 1928.
- 15 J.M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, University of Chicago Press, 1975.
- 16 See C. Twight, "Constitutional Renegotiation; Impediments to consensual Revision", *Constitutional Political Economy*, 1992, vol. 3(1), pp. 89–112.
- 17 E.g. S. Levinson, "Introduction", in S. Levinson (ed.), *Responding to Imperfection—The Theory and Practice of Constitutional Amendment*, Princeton University Press, 2003.
- 18 F. Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution*, Profile Books, 2011, pp. 452–4.
- 19 For instance, in the form of what I have called "covert constitution building", Voermans, op. cit.
- 20 R.D. Cooter, *The Strategic Constitution*, Princeton University Press, 2000, pp. 11–12.
- 21 In 1978, only five of the then-existing 142 national constitutions lacked a provision for an amending process. H. van Maarseveen and G. van der Tang, *Written Constitutions: A Computerized Comparative Study*, Oceana Publications, 1978, p. 80. Although the data are more than 30 years old, it is highly unlikely that, in this day and age, more constitutions than back in 1978 will be without an amendment procedure, since the number of constitutions has grown since then, and most of the new constitutions tend to copy-cat best practices. See C. Saunders, "Towards a Global Constitutional Gene Pool", *National Taiwan University Law Review*, 2009, vol. 4(3), pp. 1–38.
- 22 K.C. Wheare, *Modern Constitutions*, 2nd edn (fifth impression of the 1966, 2nd edn), Oxford University Press, 1960, pp. 15–19.
- 23 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 Constitutions 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 much stricter procedure than that for ordinary legislative amendments (Art. 89 of the French Constitution). Wheare, op. cit., p. 16.
- 24 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).
- 25 H. Kelsen, *General Theory of Law and State*, translated by A. Wedberg, 1945, reprint Harvard University Press, 1999, pp. 263–6.
- 26 In 1973, *Kesavananda Bharti v. State of Kerala* case (AIR 1973 SC 1461) the Indian Supreme Court ruled 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.
- 27 Article 79 para 3 of the Basic Law of Germany (Constitution). Van der Tang calls this "supra-constitutionality", i.e. parts of the constitution that are not amenable to amendment, even not from changes by the *constituante*; G.F.M. van der Tang, *Grondwetsbegrip en grondwetsidee (Constitutional concept and idea)*, PhD thesis Erasmus University, Gouda Quint, 1998, pp. 344–5.
 - 28 See for instance Art. 441 through Art. 444 of the Constitution of Ecuador, which entails different procedures for different sorts of revisions.
 - 29 J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition*, 3rd edn, Stanford University Press, 2007, pp. 136–7.
 - 30 At Leiden University we are currently analyzing and comparing all the constitutions of the world to see how different constitutions try to protect their "constitutional core", i.e. the essence of the constitutional order as it was, for instance, perceived by the *constituante*, the principal interpreter(s), or (constitutional) courts. We have restricted ourselves to merely looking at the text of the constitution itself, not the political or legal culture which are—evidently—equally important or even more important than the letter of the constitution itself.
 - 31 A.W. Heringa and P. Kiiver, *Constitutions Compared*, Intersentia, 2009, pp. 6–7.
 - 32 D. Oliver and C. Fusaro, *How Constitutions Change; A Comparative Study*, Hart Publishing, 2011, p. 4.
 - 33 D.S. Lutz, "Toward a Theory of Constitutional Amendment", in Levinson (ed.), *op. cit.*, p. 242.
 - 34 *Ibid.*, pp. 268–74.
 - 35 Only very rarely is a proposal for an amendment to the Constitution tabled by a Member of Parliament. And it is even more rare that such a proposal survives the first reading. But very recently one proposal did actually survive. It was the proposal by the former member, Femke Halsema, to lift some parts of the ban on constitutional review of Acts of Parliament. See Private Members Bill 32334 (the number it has in the Dutch Parliamentary Papers). The initiative is now tabled for a second reading, but it is at this moment unlikely that it will gather a two-thirds majority in both Houses.
 - 36 The Ministry of the Interior has a specialized section for constitutional affairs (CZW).
 - 37 There are some 70 religions in the Netherlands, with more than 60 Christian denominations alone and more than 40 Protestant denominations to boot.
 - 38 The House of Representatives in 2011 consists of 10 political groups, of which three support the coalition Cabinet of Prime Minister Rutte. To complicate matters, one party (the *Geert Wilders Party for Freedom*) is not fully committed to the coalition agreement but has only agreed to condone the Cabinet for its duration (on the basis of a separate agreement). Together, the three parties supporting the Cabinet hold a minute majority of 76 in the 150-member House of Representatives. This situation of tiny minorities supporting coalition Cabinets is not really unique in Dutch parliamentary history (although a minority Cabinet with a condoning partner is). It is an obstacle, though.
 - 39 Heringa and Kiiver, *op. cit.*, p. 4.
 - 40 After the adoption by the Chamber, it still needs to be ratified by the Government (Art. 87 Dutch Constitution), but this is a mere formality.
 - 41 E.A. Alkema, "Constitutional Law" (Chapter 16), in J.M.J. Chorus, P.H.M. Gerver, E.H. Hondius and A.K. Koekkoek (eds), *Introduction to Dutch Law*, 3rd edn, Kluwer Law International, 1999, p. 293.
 - 42 *Official Journal* (Stb.), 1995, p. 403.
 - 43 Kortmann and Bovend'Eert, *op. cit.*, p. 30.
 - 44 In 1815, 1840, 1848, 1884, 1887, 1917, 1922, 1938, 1946, 1948, 1953, 1956, 1963, 1972, 1983, 1987, 1995, 1999, 2000, 2002, 2005, 2006, and 2008.

- 45 238 amendments.
- 46 169 amendments.
- 47 Almost all of the 142 provisions.
- 48 The introduction of the parliamentary system, its attributes, the direct election of the House of Representatives, and the curtailment of the powers of the King as head of the executive.
- 49 The introduction of male suffrage (to be followed by universal suffrage in 1919 and the introduction of universal suffrage in the Constitution by 1922), the simultaneous introduction of a system of proportional representation to elect the House of Representatives, the States-Provincial, and the municipality councils. The religious parties traded the constitutional introduction of male suffrage—a long-standing demand of the socialists—for constitutional equality in state funding between public and denominational schools, ending the bitter Dutch School Wars, which had up until that moment antagonized Dutch political life for decades.
- 50 Kortmann and Bovend'Eert argue that only the 1848 and 1917 revisions were of “any real significance”; Kortmann and Bovend'Eert, op. cit., p. 30.
- 51 Accommodating the independence of Indonesia, introducing a new system of reception of international law (giving priority to some forms of international law over domestic law), enshrining a structure for semi-public collaborations that constitutes the basis of the consensus economy (the Dutch *Poldermodel*), the number of the House of Representatives members was increased to 150, and Senate members to 75.
- 52 As the result of a continuous modernization project starting in 1966, the Constitution was almost entirely rewritten (effective as of 1983). Many antiquated articles were abolished. Almost all of the provisions were redrafted (with the exceptions of Art. 23—the ever-controversial freedom of education—and other parts of Articles such as Art. 89) using new uniform legal terminology. The structure of the Constitution was also revised. There were also substantive amendments. Notably, the Bill of Rights was expanded with the prohibition of discrimination, the prohibition of the death penalty, the general freedom of expression, the freedom of demonstration, and the general right to privacy and social rights were added to the list too.
- 53 M.C.B. Burkens, “The Complete Revision of the Dutch Constitution”, *Netherlands International Law Review*, 1982, vol. 29, p. 324. In his contribution Burkens discusses the revision of “1982”. At the time of writing, in 1982, he could not know that the revision would only take effect as of 1983, so what he actually means is the 1983 revision.
- 54 Ibid., pp. 324–5.
- 55 Focused on institutions, and “shallow” according to some. Van der Tang, op. cit, pp. 91–7.
- 56 J.A. Peters, *Wie beschermt onze grondwet? (Who protects our Constitution?)*, Inaugural lecture, University of Amsterdam, Vossiuspers UvA 2003, pp. 7–17.
- 57 Nationale Conventie, *Hart voor de publieke zaak (Commitment to the public cause)*, Dutch Ministry of the Interior—National Convention, 2006.
- 58 T. Barkhuysen, A.L. Dimitrova, M.L. van Emmerik, J.H. Gerards, H.M. Griffioen, M.M. Groothuis, T. de Jong, J.P. Loof, H.M. ten Napel, B. Steunenberg and W.J.M. Voermans, *De Nederlandse Grondwet geëvalueerd; anker – of verdwijnpunt? (The Dutch Constitution evaluated: anchor or vanishing point?)*, Kluwer, 2009. This report, based on literature and interviews in the public sector, shows that a majority of the respondents believes that the Constitution and its revision procedure perform quite well.
- 59 Staatscommissie Grondwet (Government Commission on the Constitution), *Rapport Staatscommissie Grondwet (Final Report of the Government Commission on the Constitution)*, Government Publisher, The Hague, 2010, p. 13.
- 60 Voermans, op. cit., 2009.
- 61 W.J.M. Voermans, “Voting for Europe: Lessons from Dutch Referendums”, *Journal of the Japan-Netherlands Institute*, vol. X, 2010, pp. 220–43.
- 62 Voermans, op. cit, 2009.

63 Peters, op. cit.

64 A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, Yale University Press, 1999, p. 216ff.

65 Ibid., p. 229.

66 Meaning the inclination for prolonged negotiations until a compromise is reached that satisfies all parties. Derived from the word *Polder*.