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Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision

Reijer Passchier^{*} and *Maarten Stremmer*^{**}

Abstract

The issue of unconstitutional constitutional amendments is extremely topical in the field of national and comparative constitutional law. In a recent article (2013), Roznai signals that ‘the global trend is moving towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power’. But what about the ‘supranational’ EU? Would there be room to argue that substantive limitations of amendability—explicit or implicit—also exist as regards the EU Treaties? Furthermore, if so, would the Court of Justice of the European Union (CJEU) have the competence to enforce such limits? These questions are the central focus of this article. We argue that accepting the idea of substantive requirements of Treaty revision may be one of the next important steps in the ongoing process of EU constitutionalisation. In the first part of the article, we explore what kind of arguments are being used to justify a doctrine of unconstitutional constitutional amendments in national systems. Next, we ascertain to what extent such arguments can be used to justify a doctrine of unconstitutional constitutional amendment in EU law. In conclusion, we argue that it is quite conceivable that certain EU Treaty amendments would indeed be deemed to be a violation of the Treaties. Moreover, we contend that it is not unimaginable that the CJEU will assume the power to substantively review amendments to the EU Treaties, in cases where the Member States would choose to put forth suspect revisions to these documents.

Keywords

Unconstitutional Constitutional Amendments, European Union, Treaty revision

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1 Introduction

The Treaty on European Union¹ (TEU) seems to provide that the Member States have the power to amend the European Union (EU) Treaties as they wish, provided that they follow the ‘ordinary revision procedure’ set out in Article 48. Does this mean that the Member States could legally introduce a principle of fascism into EU law? Would it be possible for the Member States to exclude, say, the Roma from the Charter of Fundamental Rights? Moreover, could the Member States legitimately use the Article 48 procedure to abolish the European Parliament? These are but a few awkward, yet not entirely unrealistic, possibilities.

In many national constitutional systems, such illiberal amendments would presumably be considered unconstitutional. Written constitutions often include, besides procedural requirements, substantive requirements of amendability that forbid certain kinds of changes.² States that do not have explicit constraints on formal constitutional change may have some kind of implicit doctrine that deems certain constitutional norms and values untouchable. It is, furthermore, conceivable that constitutional changes that are legally permissible are nevertheless considered substantially illegitimate for the reason that it is impossible as a political matter to fulfil the qualified requirements to pass a formal amendment—a phenomenon that Albert has labelled ‘constructive unamendability’.³

The idea of an ‘unconstitutional constitutional amendment’ may seem paradoxical.⁴ Yet, according to Roznai, ‘the global trend is moving towards accepting

- 1 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).
- 2 According to the Constitute database, 78 of the national constitutions in the world include unamendable provisions. See The Comparative Constitutions Project, ‘Constitute’ <<https://www.constituteproject.org/search?lang=en&key=unamend>> accessed 24 August 2015; For a discussion and categorisation of the many forms of formal unamendability in constitutional states, see Richard Albert, ‘Constitutional Handcuffs’ (2010) 42 *Arizona St LJ* 663, 678ff.
- 3 Richard Albert, ‘Constructive Unamendability in Canada and the United States’ (2014) 67 *SCLR* 181, 182.
- 4 Jacobsohn calls it a ‘conundrum’. He argues that asking whether a constitution—or a constitutional amendment, for that matter—can be unconstitutional is sort of like asking whether ‘the Bible can be unbiblical’. See Gary Jeffrey Jacobsohn, *Constitutional Identity* (HUP 2010) 34; Harris notes that ‘[a]t first blush, the question of whether an amendment to the Constitution could be unconstitutional seems to be either a riddle, a paradox, or an incoherency’. See William F Harris, *The Interpretable Constitution* (John Hopkins UP 1993) 169; The possibility of an unconstitutional constitutional amendment strikes Preuss as ‘inconceivable within the logic of a legal hierarchy’. See Ulrich K Preuss, ‘The Implications

the idea of limitations—explicit or implicit—on constitutional amendment power.⁵ Significant numbers of contemporary states, moreover, have implemented the practice of judicial review of constitutional amendments.⁶ However, what about the ‘supranational’ EU? Would there be room to argue that substantive limitations of amendability—explicit or implicit—also exist as regards the European Treaties? Furthermore, if so, would the CJEU have the competence to enforce such limits? These questions are the central focus of this article.

The search for substantive constraints on the Member States’ EU Treaty revision power is not self-evident. On the face of it, the EU formally does not have a constitution, but is governed by a set of Treaties—the TEU, the Treaty on the Functioning of the European Union⁷ (TFEU) and the Charter of Fundamental Rights of the European Union⁸ (Charter)—and under international law, treaties may be amended by agreement between the parties.⁹ This would mean that the Member States are not bound by any other procedural or substantive requirements of treaty amendability.¹⁰ In other words, the revision procedure set forth in Article 48 would be optional. The Member States would ultimately remain ‘masters of the treaties.’¹¹

of ‘Eternity Clauses’: The German Experience’ (2011) 44 Israel LR 429, 431. The mystery disappears if one realises that there is a difference in legal status between a constitution and a constitutional amendment (in the context of unconstitutional constitutional amendments): the constitution is in force, whereas a constitutional amendment is not; as a proposed change to the constitution, it is not yet part of the constitution. Clearly, a proposed change can contradict one or more parts (or even the identity or spirit) of the existing constitution.

- 5 Yaniv Roznai, ‘Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea’ (2013) 61 AJCL 657, 660.
- 6 See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008) 52 ff.
- 7 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).
- 8 Charter of Fundamental Rights of the European Union [2010] OJ C83/02 (Charter).
- 9 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 39 (VCLT).
- 10 Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edn, Sweet and Maxwell 2011) 82–83.
- 11 *The Maastricht Case* (1993) 89 BVerfGE 155, para 111; *The Lisbon Case* (2009) 123 BVerfGE 267, para 231.

It is often considered, however, that EU primary law—the Treaties and general principles of EU law—has been undergoing ‘constitutionalisation.’¹² This phenomenon is described by Möllers as:

the unorganised intensification of a legal regime, whose increasing quantity of norms finally enables the emergence of normative structures—of legal principles—that can be generalised and that are also, at least factually, difficult to amend due to their generality. In this way, a spontaneous internal hierarchy of norms arises that increases and accelerates through the multiplication of adjudicative authorities.¹³

Indeed, since the 1960s, EU primary law has in fact enjoyed legal supremacy above all other kinds of Union law, and, at least as a matter of doctrine, it has also taken precedence over the laws of the Member States.¹⁴ Like national constitutional law, EU primary law attributes power to public authorities, regulates relationships between public authorities, and regulates relationships between public authorities and individuals. The contemporary Treaties provide for fundamental rights and key values of modern constitutionalism, such as democracy and the rule of law.¹⁵ The CJEU, moreover, has increasingly employed what von Bogdandy has termed ‘constitutional semantics.’¹⁶ As early as 1986, it referred to the Treaties as the ‘constitutional charter’ of the EU,¹⁷ and more recently, it introduced the terms

12 Since 2009, the TEU gives expression to the fact that the constitutionalisation of the EU is not per definition a progressive development (notwithstanding art 1 TEU, which speaks of ‘an ever closer union’). Art 48 TEU, which provides the ordinary Treaty revision procedure, states that proposals for amending the Treaties may serve not only to increase, but also to *reduce* the competences conferred on the Union. Art 50 TEU, moreover, provides that any Member State may decide to withdraw from the Union.

13 Cristoph Möllers, ‘Pouvoir Constituant—Constitution—Constitutionalisation’, in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart and CH Beck 2010) 169, 195.

14 Lenaerts and Van Nuffel (n 10) 81.

15 See, in particular, TEU (n 1) art 2; Since 2000, the EU has had in place the Charter, which became legally binding in 2009; However, since 1970, the CJEU has declared that it would protect human rights as an integral part of EU law. See *Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1126 (Internationale Handelsgesellschaft).

16 Armin von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’ (2010) 16 ELJ 95–96.

17 Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, para 23.

‘constitutional principle’ and ‘constitutional guarantee’.¹⁸ In EU legal scholarship, it is now almost conventional to regard EU primary law as constitutional law.¹⁹ Accepting the idea of substantive requirements of Treaty revision may be one of the next important steps in the ongoing process of EU constitutionalisation.

We are fully aware of the fact that we are not the first to consider the existence of substantive constraints on EU Treaty amendability.²⁰ It should be noted that the CJEU never declared a Treaty amendment in violation of the Treaties. However, when in the early 1990s, the CJEU opined that it has the task to safeguard respect for ‘the autonomy of the Community [now EU] legal order’;²¹ commentators suggested that fundamental EU tenets, such as respect for human rights, democracy, and the rule of law, may be untouchable.²² The discussion, however, fell silent. In the past two decades, the idea of substantive requirements for EU Treaty revision has hardly been considered.²³

Meanwhile, the process of constitutionalisation has continued rapidly. Therefore, it is now time to rethink this topic. All the more reason to do so is the fact that the issue of unconstitutional constitutional amendments is extremely topical in the field of national constitutional law.²⁴ It is true that comparing national

18 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (*Kadi I*), paras 5 and 285.

19 See, eg, Möllers (n 13); Lenaerts and Van Nuffel (n 10); Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012) 1 ff; A journal called ‘European Constitutional Law Review’ has been in publication since 2005.

20 See, eg, Bruno de Witte, ‘Rules of Change in International Law: How Special is the European Community?’ (1994) 25 NYIL 299.

21 Opinion 1/91, *European Free Trade Association* [1991] ECR I-6079, para 35.

22 cf José Luis da Cruz Vilaça and Nuno Piçarra, ‘Y a-t-il des limites matérielles à la révision des traités instituant les Communautés Européennes?’ (1993) 29 Cahiers de Droit Européen 37; Roland Bieber, ‘Les limites matérielles et formelles à la révision des traités établissant la Communauté Européenne’ (1993) 367 Revue du Marché Commun et de l’Union Européenne 343; Deirdre Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 CMLR 17; Joseph H H Weiler and Ulrich Haltern, ‘The Autonomy of the Community Legal Order: Through the Looking Glass’ (1996) 37 Harv Intl LJ 411.

23 For an exception, see Markus Sichert, *Grenzen der Revision des Primärrechts in der Europäischen Union* (Duncker und Humblot 2005); See also, Wim J M Voermans, ‘Constitutional Reserves and Covert Constitutions’ (2009) 3 Indian J Const L 84, 99. Voermans focusses on the principle of conferral and calls it the ‘meta-constitutional reserve’ of the European constitutional order.

24 cf Gary Jeffrey Jacobsohn, ‘An Unconstitutional Constitutional Constitution? A Comparative Perspective’ (2006) 4 ICON 460; Preuss (n 4); Rosalind Dixon, ‘Transnational Constitutionalism and Unconstitutional Constitutional Amendments’ (2011) Chicago Public Law and Legal Theory

law with EU law poses methodological challenges; as Dehousse has cautioned, the EU operates at a different level.²⁵ Still, we believe that a cross-level comparative analysis can make an important contribution to the current understanding of the EU legal order.²⁶

Below, we will first explore the kinds of arguments that are being used to justify a doctrine of unconstitutional constitutional amendments in national systems. We will show that substantive amendment limitations may be based upon the constitutional text or upon an implicit understanding of which norms or values may not be touched. Secondly, we will ascertain the extent to which such arguments can be used to justify a doctrine of unconstitutional constitutional amendment in EU law. In conclusion, we will argue that it is quite conceivable that certain EU Treaty amendments would indeed be deemed to be a violation of the Treaties.

Searching for substantive requirements of amendability may reveal deeper constitutional structures that underlie the text of the EU Treaties. It may furthermore reveal whether and how constitutional aspirations expressed by the TEU preamble, among other sources, have been translated into enforceable provisions. Considering the idea of substantive constraints on the Member States' power of Treaty revision may be especially important, moreover, at a time when constitutional democratic norms and values are under considerable pressure in certain European countries.²⁷

Working Paper 349 <<http://www.law.uchicago.edu/files/file/349-rd-transnational.pdf>> accessed 1 February 2015; Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 Const 182; Roznai (n 5); Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 ICON 339; Po Jen Yap, 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) 4 GlobCon 114; Richard Albert, 'The Theory and Practice of Unconstitutional Constitutional Amendment in Canada' (2016) Queen's LJ (forthcoming).

25 Renaud Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) 42 AJCL 761, 769.

26 *ibid* 781.

27 cf Gábor Halmai, 'An Illiberal Constitutional System in the Middle of Europe' (2014) European YB HR 497, 497ff; Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart 2015); Tomasz Konciewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense' (*Blog of the International Journal of Constitutional Law*, 6 December 2015) <<http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/>> accessed 30 January 2016.

2 Substantive requirements of amendability in national constitutional systems

In this section, we will examine doctrines of unconstitutional constitutional amendments in leading national constitutional jurisdictions. We will argue that substantive requirements of amendability may be justified with direct reference to specific constitutional provisions in the constitutional text itself—explicit limitations—and with reference to the constitutional context—implicit limitations. We will also consider the possibility of judicial enforcement of these limitations.

2.1 Explicit limits: arguments based on the constitutional text

78 constitutions in the world provide what the Germans call ‘eternity clauses’ (*Ewigkeitsklauseln*): explicit substantive prohibitions that preclude certain amendments by making them illegal.²⁸ Eternity clauses may prohibit the textual alteration of certain constitutional provisions, but they may also designate certain ‘core’ norms and values as untouchable. Article 79(3) of the German constitution, the Basic Law for the Federal Republic of Germany (German Basic Law), provides an example of both:

Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [basic institutional principles] shall be inadmissible.

According to German legal doctrine, constitutional amendments that would appear to contravene Article 79(3) could be tested, and in cases where an amendment is seen to violate the eternity clause, they could be ruled impermissible.²⁹

Other examples of explicit substantive limits of amendability may be found in the US, France and Italy. Article V of the United States Constitution 1787 provides that a qualified majority of Congress and the states may amend the document provided that ‘no State, without its Consent, shall be deprived of its equal Suffrage

28 The definition is derived from Jacobsohn (n 4) 35.

29 See Hartmut Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen* (5th edn, CH Beck 2007) 745.

in the Senate' Both the French and Italian constitutions provide that the republican form of government shall not be a matter for constitutional amendment.³⁰

Some constitutions, moreover, also designate what kinds of textual changes may not be brought about by way of formal constitutional amendment. Article 112(1) of the Constitution of the Kingdom of Norway 1814 (Norwegian Constitution), for instance, provides that formal amendments may never 'contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution.'³¹ To be meaningful, of course, this provision needs some articulated doctrine that indicates what amounts to altering the 'spirit' of the Norwegian Constitution.

2.2 Implicit limits: arguments based on the constitutional context

Under constitutional texts that do not contain an eternity clause, arguments for the recognition of substantive requirements of amendability may yet be available. Substantive constraints on constitutional revision may also be justified on the basis of a doctrine or concept of amendment opposing changes that are so fundamental that they would amount to a complete replacement of the constitution. An alternative justification may be provided by a doctrine of 'supra-constitutional' norms that occupy such high moral ground that they can never be revised.

As regards substantive limits that are derived from the concept of amendment itself, India is a case in point. Indian constitutional amendment theory starts from the premise that any part of the constitution may be amended by following the procedure laid down in Article 368.³² However, in the famous 1971 *Keshavananda*³³ case, the Supreme Court has held that the Constitution of India provides certain 'basic features' that cannot be altered by way of formal amendment.³⁴ The Court asserts the right to annul any amendment that seeks to alter the basic structure or the basic framework of the Constitution on the ground of 'ultra vires'. In other words, it has held that the word 'amend' in Article 368 encompasses only the possibility of

30 Art 89(5) of the Constitution of the Fifth Republic 1958 (Constitution of France); Art 139 of the Constitution of the Italian Republic 1947.

31 See also Eivind Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 *Israel LR* 369.

32 See Durga Das Basu, *Introduction to the Constitution of India* (20th edn, Lexis Nexis 2012) 167.

33 *Kesavananda v State of Kerala* [1973] AIR 1461 (SC).

34 *ibid* para 787.

bringing about changes that fit into the existing structure of the Constitution. The amendment procedure prohibits changes that would be tantamount to drafting a new constitution. Since the Indian Supreme Court first introduced this so-called 'basic structure doctrine', the judiciary has recognised at least 25 basic features.³⁵

Also in other jurisdictions, it is considered that a constitutional amendment procedure may not be used fundamentally to alter the existing constitutional framework. In *Raven v Deukmejian* (1990),³⁶ the California Supreme Court invalidated a constitutional amendment because 'it substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections.'³⁷ In other words, the court held that the scope of changes that can be brought about by way of formal amendment is limited. While the US Supreme Court has never really scrutinised the constitutionality of a constitutional amendment, some American constitutionalists have argued that the procedure laid down in Article V is designed as a means to 'respond to imperfection', not as a means to bring about fundamental change.³⁸

Murphy asserts that similar arguments could be used in any system that considers itself a constitutional democracy.³⁹ Indeed, the verb 'to amend' stems from the Latin word *emendere*, which means 'to correct' or 'to modify'. Any amendment that would *de facto* abolish the existing constitutional order or fundamentally change its nature would, therefore, not be an amendment at all, but a replacement—and that is, by definition, not the power an amendment procedure grants, or so Murphy's argument goes.

In the same vein, Roznai argues that a fundamental distinction between, what he calls, a people's 'primary constituent power'—the constitution-making power—and a people's 'secondary constituent power'—the constitution-amending power—

35 Basic features include the 'essence' of fundamental rights, the principle of separation of powers, federalism, the powers of the Supreme Court, and social justice. For a detailed list, see Basu (n 32) 168.

36 *Raven v Deukmejian* (1990) 52 Cal 3d 336 [276 Cal Rptr 326, 801 P 2d 1077].

37 *ibid* 354.

38 Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (OUP 2012) 331.

39 Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (John Hopkins UP 2007) 506.

can be made in every country whose people live under a written constitution.⁴⁰ According to Roznai's theory of 'foundational structuralism', the primary constituent power cannot be bound by prior constitutional rules; it is unlimited by nature. However, the instituted secondary constituent power is, instead, a delegated power 'acting as a trustee of the primary constituent power.'⁴¹ The secondary constituent power, Roznai argues, can therefore not destroy or replace the constitution that the primary constituted power has created; it must build upon the foundational principles that grant the constitution its identity.⁴²

Arguments for substantive requirements of constitutional amendability may also be based upon some kind of understanding of supra-constitutional norms or natural law-like norms that supposedly limit the constitutional legislator. As Murphy puts it:

Citizens' rights and dignity are not fundamental merely because the basic charter and the larger constitutional order recognize them as such; rather, the basic charter and the constitutional order protect those values because they are fundamental.⁴³

Here, the idea is that certain norms and values are of such a fundamental nature that they constitute morally compelling demands. For that reason, the constitutional legislator cannot deviate from them.

The idea of supra-constitutionality has been embodied paradigmatically in the German constitutional order. Respect for human dignity and human rights constitutes the core of the German Basic Law. Since the early days of its existence, the German Federal Constitutional Court has reinforced this view. In its famous 1951 *Southwest* case,⁴⁴ for example, it held that:

(...) a constitutional provision itself may be null and void is not conceptually impossible (...) There are constitutional principles that are so fundamental (...) that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.⁴⁵

40 Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science 2014), 81–170 (Ch. 4–6).

41 *ibid* 237.

42 *ibid*.

43 Murphy (n 39) 508.

44 *The Southwest Case* (1951) 1 BVerfGE 14.

45 Translated and reprinted in part in Walter F. Murphy and Joseph Tanenhaus (eds), *Comparative Constitutional Law* (St Martin's Press 1977) 208.

2.3 Judicial review of constitutional amendments

The recognition of substantive requirements of amendability in a particular constitutional order does not necessarily imply that this order also subjects constitutional amendments to substantive judicial review.⁴⁶ ‘Understanding that constitutional change may produce an unconstitutional result does not in itself prescribe a particular remedy’, as Jacobsohn explains.⁴⁷ Indeed, only a very small number of constitutional documents in the world expressly grant the judiciary the power to review constitutional amendments substantively.⁴⁸ Far more commonly, is a doctrine or actual practice according to which the judiciary has the right to declare a constitutional amendment ‘unconstitutional’ on substantive grounds.⁴⁹ The two most prominent examples of the latter judicial power are found in Germany and India.

The German Basic Law does not grant the Constitutional Court an express right to review the constitutionality of constitutional amendments. However, according to German constitutional doctrine, the Constitutional Court has the right to declare a constitutional amendment unconstitutional and null and void when that amendment would not meet the substantive requirements set out in Article 79(3) of the German Basic Law.⁵⁰ In several judgments, the German Federal Constitutional Court has actually reviewed the constitutionality of constitutional amendments.⁵¹

The Indian case is fascinating, and it arguably indicates that anything is possible in constitutional law. After the Indian Supreme Court introduced the practice of judicial review of constitutional amendments and the basic structure

46 Although Roznai believes that, ultimately, the two ideas are inseparable. See Roznai (n 5) 661.

47 Jacobsohn (n 4) 82.

48 Art 93(3) of the Constitution of Chile (1980) provides that it is one of the powers of the Constitutional Court to resolve ‘the questions concerning constitutionality which arise during the processing of the Bills of law or of constitutional reform and of the treaties submitted to the approval of the Congress’; Art 146(a) of the Constitution of Romania provides that the Constitutional Court has inter alia the power to review initiatives to revise the constitution. That is to say, it has a precautionary power to review constitutional amendments; See ‘The Comparative Constitutions Project, ‘Constitute’ <https://www.constituteproject.org/constitution/Chile_2014?lang=en> and <https://www.constituteproject.org/constitution/Romania_2003?lang=en> accessed 14 June 2016.

49 cf Gözler (n 6); Halmai (n 27).

50 See Maurer (n 29) 745.

51 See *The Article 117 Case* (1953) 3 BVerfGE 225; See also *The Eavesdropping Case* (1970) 30 BVerfGE 1.

doctrine in the 1971 *Keshavananda* case,⁵² the government sought to reverse the ramifications of this sweeping ruling.⁵³ In 1976, therefore, the Indian Parliament added two clauses to the constitutional amendment procedure (set out by Article 368) that purported to prohibit the judiciary from reviewing the constitutionality of formal constitutional amendments.⁵⁴ The first clause added (now paragraph 4 of Article 368) provides, '[n]o amendment of this 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.'⁵⁵ The second clause added (now paragraph 5 of Article 368) provides, '[f]or the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.'⁵⁶ Four years later, the Supreme Court would nullify this attempt to preclude the judicial review of constitutional amendments. In the case *Minerva Mills Ltd v Union of India*,⁵⁷ it ruled that the new paragraphs 4 and 5 of Article 368 were unlawful. The Court upheld its *Keshavananda* judgment, stating that judicial review is a basic feature of the Indian Constitution and cannot be abolished by way of constitutional amendment. To this day, the Court has continued to assert its right to review the constitutionality of constitutional amendments.⁵⁸

3 Substantive constraints on EU Treaty revision

The brief review above has shown that the idea of substantive constraints on the power to amend a national constitution can be justified with reference to explicit limitations within the constitutional text itself—commonly in the form of an eternity clause—or with reference to implicit limitations. Implicit limitations may be based upon a normative understanding of what amounts to 'amendment' as opposed to 'fundamental change', or upon a belief in natural law-like or 'supra-constitutional' norms. In some countries, the constitutionality of constitutional

52 See above (n 33).

53 Basu (n 32) 167.

54 The [Indian] Constitution (Forty-second Amendment) Act 1976, art 55.

55 *ibid.*

56 *ibid.*

57 *Minerva Mills Ltd v Union of India* [1980] AIR 1789 (SC).

58 Basu (n 32) 45.

amendments can be—and in fact is—reviewed by the judiciary. The power of a court to review constitutional amendments is usually not expressly provided by the constitutional text, but justified by an implicit doctrine. The case of India shows that a court can even assert the power to review the validity of constitutional amendments in defiance of an explicit constitutional prohibition against doing so.

We are now ready to explore whether any of these ideas make sense with regard to the legal system of the EU. Below, we will explore whether, and to what extent, EU law may be open to the idea of unconstitutional constitutional amendments. We will first try to establish whether the Treaty revision procedure is optional or mandatory, as the existence of a mandatory procedure is a prerequisite for accepting substantive limitations. Next, we will investigate possible limits to Treaty amendments—explicit or implicit—and the mandate of the CJEU to review Treaty amendments. Our conclusion will be that it is quite conceivable that, in the near future, substantive revision limitations will be also accepted in EU law.

3.1 Prerequisite: the mandatory status of the revision procedure

As we noted at the outset of this article, the search for substantive limits to EU Treaty amendment is not self-evident. The EU is established by means of international treaties between the Member States. According to Article 39 of the Vienna Convention on the Law of Treaties, a treaty may be amended by ‘agreement’ between the parties; furthermore, such an agreement can take many different forms. The agreement to amend a treaty does not have to constitute a treaty itself. For example, oral agreements are also perfectly possible.⁵⁹ A subsequent practice in the application of a treaty can also have the effect of modifying it, if all parties implicitly consent to it.⁶⁰ This procedural freedom is coupled with substantive freedom. In principle, there are no substantive limits to international treaty amendments. The only thing that is needed is agreement between the parties.⁶¹

Under international law, the parties to a treaty can provide for an amendment procedure. This, of course, confers a considerable benefit—that an orderly means by

59 The legal force of such an agreement is preserved by art 3 of the Vienna Convention on the Law of Treaties.

60 *ibid* art 31(3)(a).

61 It is true that international law recognises peremptory norms (*ius cogens*), but there is no agreement regarding precisely which norms are peremptory and how they reach that status. The Vienna Convention on the Law of Treaties, which declares any treaty that conflicts with a

which amendments can be brought about is agreed upon from the start. However, there may also be reasons not to include an amendment clause in a treaty. For example, such a clause might be politically undesirable in a treaty that establishes a border. Perhaps counterintuitively, if the parties decide to include an amendment clause, under international law, this clause is not binding on the parties. As Aust explains, ‘should the means not be suitable, the parties can simply ignore it and amend the treaty in any way they can agree on.’⁶²

Article 48 TEU provides for a revision procedure of the EU Treaties.⁶³ Clearly, the significance of this article depends on whether the procedure it sets out is exclusive or not. In the latter case, the Member States could easily evade any possible substantive constraints on Treaty amendment by relying on their general (and substantively unlimited) international treaty-making power to amend the Treaties. Arguments to the effect that the Member States can amend the Treaties on the basis of general consent outside the revision procedure of Article 48 TEU have stressed, in one way or another, the Member States’ sovereignty; in other words, their status as subjects of international law. The Member States are the ‘Masters of the Treaties,’ as the German Federal Constitutional Court calls it.⁶⁴ In terms of constitutional theory, this means that the Member States possess constituent power with regard to the EU, and create the Union’s primary law. The EU institutions, representing constituted power, are based on, and limited by, primary law. Crucially, the Member States themselves remain outside constituted power. This implies that the Member States can freely choose whether or not to use the procedure in Article 48 TEU if they want to change the Treaties.

This line of reasoning, however, ignores the possibility of self-bindingness. The purpose of Article 48 TEU is precisely to exclude the possibility of informal Treaty changes by agreement among the Member States. If one were to accept amendments outside the formal procedure, this would upset the institutional balance between the EU institutions. That is, it would imply that the European Council could transform itself into a diplomatic conference—and on the basis of general consent, without being subject to any formal requirements, could simply

peremptory norm to be void, does not specify any peremptory norms, nor are they specified by any authoritative body. For a discussion, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008).

62 Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 233.

63 Outside the scope of this article is a discussion of the ‘passerelle clause’ and the amendment procedure for changing the status of the special territories of the Member States.

64 See above (n 11).

modify all primary law.⁶⁵ Indeed, in *Defrenne*,⁶⁶ the CJEU ruled this option out: ‘In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 [now Article 48 of the TEU].’⁶⁷ This ruling implies that, within the EU legal order, with regard to the form of amendment, the Member States are no longer the masters of the Treaties. They are bound by the revision procedure of Article 48 TEU.⁶⁸

The question, then, is whether the Article 48 procedures allow for every possible change, or whether they forbid certain kinds of revisions.

3.2 Explicit limits: arguments based on the text of the Treaties

The revision procedure in Article 48 TEU, in fact, lays down two procedures: an ‘ordinary revision procedure’ and a ‘simplified revision procedure.’⁶⁹ Both procedures differ not only in formal requirements, but also with regard to what can be changed and how it can be changed. The simplified procedure can be used to amend all or parts of the provisions of Part Three of the TFEU, which relates to Union policies and internal actions. This comprises, inter alia, the internal market and the four freedoms, the area of freedom, security and justice, economic and monetary policy, and social policy. Negatively formulated, it excludes the general principles of the EU, non-discrimination and citizenship, external action, and institutional and financial issues. The simplified revisions procedure, moreover, may not be used to increase the competences of the Union. By contrast, the ordinary revision procedure may

65 cf De Witte (n 20) 314–15.

66 Case 43–75 *Gabriella Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 456.

67 *ibid* para 58.

68 The Member States have signed a number of treaties closely related to EU law outside of the EU legal framework. Such treaties could, in principle, affect EU primary law. See the discussion of the *European Free Trade Association* case and the *European and Community Patents Court* case below. A recent example is the Treaty Establishing the European Stability Mechanism (ESM). A separate treaty, amending art 136 TFEU, gave the ESM a legal basis in EU law. It was argued that the ESM was incompatible with the ‘no bailout’ clause of Art 125(1) TFEU, but the CJEU was not convinced. See the discussion of the *Pringle* case below.

69 Some national constitutions include more than one amendment procedure. Sometimes, the amendment procedures can only be used to amend specified provisions of the constitution. Albert describes this feature as ‘restricted single track’. See Richard Albert, ‘The Structure of Constitutional Amendment Rules’ (2014) 49 *Wake Forest LR* 913, 942–43.

be used to amend all primary law, and it may also be used to increase (or to reduce) the competences of the Union.

Therefore, Article 48 TEU clearly sets out formal requirements for any Treaty revision. However, does it also put forward substantive limits of Treaty amendability? At first glance, this is not the case: Article 48 seems to provide procedural constraints only. However, the questions as to whether a particular amendment can or cannot be brought about by using the simplified revision procedure may, as a practical matter, turn out to be a substantive one. The recent *Pringle* case illustrates this point.

In *Pringle*,⁷⁰ the CJEU was asked to assess the validity of a Treaty revision engineered using the simplified revision procedure. The amendment inserted a provision for a stability mechanism into Article 136 TFEU. Ten intervening states, in addition to the European Council and the Commission, argued that the CJEU 'has no power under Article 267 TFEU to assess the validity of provisions of the Treaties'. One reason they cited was that 'the consequence of reviewing the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions would (...) be to preclude amendments to the Treaties'.⁷¹

The Court, however, was of a different opinion. First, it made the observation that the amendment was 'an act of the institutions' under Article 267 TFEU, as it concerned a decision of the European Council. This means, the Court held, that the CJEU has jurisdiction. The Court then went on to verify whether the procedural rules of the simplified procedure were followed, and determined that this also encompasses an assessment that the amendment does not increase the competences of the Union and concerns only Part Three of the TFEU. The latter determination contains the finding that the amendment 'does not entail any amendment of provisions of another part of the Treaties on which the European Union is founded'.⁷²

According to Advocate General Kokott, such an assessment amounts to a substantive review of the amendment.⁷³ The content of the amendment cannot be assessed by reference to the provisions of Part Three, precisely because the amendment aims to change parts of Part Three. Amendments under the simplified

70 Case C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756, para 30.

71 *ibid* Opinion of AG Kokott, para 19.

72 *ibid* para 32.

73 *ibid* para 23.

procedure, therefore, have to be examined in the light of the provisions of primary law established elsewhere. 'A formal amendment of Part Three of the TFEU must not have as a consequence a substantive amendment of primary law which may not be amended by means of the simplified revision procedure.'⁷⁴ This would imply that the European Council is barred from amending the text of Part Three of the TFEU in a way that is incompatible with provisions of primary law outside Part Three. Otherwise, the European Council could amend all provisions of the Treaties by using the simplified procedure.

The Court eschews the distinction between formal and substantive review, stating that it simply examines the validity of the amendment in light of the conditions laid down in Article 48(6) TEU. It holds that the amendment does not overextend Part Three and does not create any new competences for the EU. Therefore, in *Pringle* the CJEU made it clear that there are substantive limits to amendments under the simplified revision procedure: they may not entail changes of primary law outside Part Three of the TFEU.

However, what about the more interesting and fundamental question: do substantive constraints exist with regard to the ordinary revision procedure? Article 48 TEU remains textually silent on the issue. It does not provide a kind of eternity clause, as for instance the German, the American, and the French constitutional documents do.⁷⁵ It also does not explicitly provide that 'the spirit' of the Treaties may not be revised, as, for example, the Norwegian Constitution does.⁷⁶ Therefore, it seems, at least from a strictly formal (or legalistic) point of view, that the procedure may be used to amend all primary law as well as to increase or to reduce the competences of the Union. If there are any substantive constraints on Treaty amendability, they do not follow immediately from the text of the Treaties.⁷⁷ We should therefore consider the possibility of implicit limits.

74 *ibid* para 28.

75 See the discussion of explicit limits in national constitutions above.

76 *ibid*.

77 Still, the word 'revision' employed by art 48 TEU could be interpreted to imply that the ordinary revision procedure of art 48 may only be used to bring about corrections, improvements, or updates, not fundamental change. See the definition in OED, 'Revision' (*Oxford English Dictionary*) <<http://www.oed.com/view/Entry/164894?rskey=wq1paf&result=1#eid>> accessed 24 August 2015; See also the discussion of implicit limits in national constitutions above.

3.3 Implicit limits: arguments based on the context of the Treaties

3.3.1 Hints in the case law of the CJEU

The CJEU, in a number of opinions, has clearly hinted at the existence of substantive limits under the ordinary revision procedure. In 1991, the Court had to give its opinion on the validity of a treaty establishing a European Economic Area.⁷⁸ The treaty provided an alternative judicial system. The Court held: ‘However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 EEC Treaty and, more generally, with the very foundations of the Community.’⁷⁹ The Commission had suggested that in case of a conflict, the EEC Treaty could be amended. In the Court’s view this would not solve the problem: ‘For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.’⁸⁰ The Court here distinguishes between ‘ordinary’ EU primary law and ‘the very foundations of the Community’, by which it includes the judicial system. These very foundations possess a higher rank than other primary law. The court at least suggests that they constitute an absolute substantive limit on Treaty revision, meaning that they could never be amended.

The CJEU employed a similar line of reasoning in its opinion on the compatibility with EU law of a draft agreement that aims to set up a European patent court.⁸¹ That court would be outside the institutional and judicial framework of the EU, and would have exclusive jurisdiction to hear actions brought by individuals in the field of patent law and to interpret and apply EU law in that field. This, the CJEU concluded, ‘would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts.’⁸² Consequently, the contemplated system ‘would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and

78 See above (n 21) para 35.

79 *ibid* para 71.

80 *ibid* para 72.

81 Opinion 1/09 *European and Community Patents Court* [2011] ECR I-1137.

82 *ibid* para 89.

on the Member States and which are indispensable to the preservation of the very nature of European Union law.⁸³

In its opinion on the draft agreement concerning the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the CJEU once again stressed its exclusive jurisdiction in the field of EU law.⁸⁴ The Court found that, although the TEU provides for the accession of the EU to the ECHR,⁸⁵ the agreement that is supposed to facilitate this accession is not compatible with the TEU because it disrupts EU competences and the monopoly of the CJEU in the interpretation of EU law.⁸⁶

The three aforementioned opinions of the Court concern mainly institutional features of the Union, in particular the Union's judicial system. This system is part of the essence of the EU, the Court stated, and hence it cannot be altered—probably not even with an explicit Treaty amendment. However, in the case law of the Court, there is also the hint at a substantive Treaty amendment limit that is not so much institutional in nature, but rather concerns the moral-political identity of the Union. In the *Kadi I* judgment, the Court draws a distinction between two kinds of limitations on the operation of the common market. On the one hand, there are limitations placed on the common market in exceptional circumstances, which are permitted under Articles 297 and 307 TFEU in order to carry out international obligations for the purpose of maintaining global peace and security. On the other hand, there are limitations that would imply a 'derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU [now Article 2 of the TEU] as the foundation of the Union.'⁸⁷ Limitations of the latter kind, the Court suggested, are prohibited.⁸⁸ Therefore, the Court has ruled that there is a normative hierarchy between the foundation of the Union and the other principles and rules of primary law, including the four freedoms. Whereas the latter can be subjected to limitations, the former cannot. Translated to the amendment procedure, this would impose

83 *ibid.*

84 Opinion 2/13 *Accession to the ECHR* [2014] ECLI:EU:C:2014:2454.

85 TEU (n 1) art 6(2); See also Protocol 8 to the Treaties, art 1 of which stipulates that the agreement relating to the accession 'shall make provision for preserving the specific characteristics of the Union and Union law'.

86 Opinion 2/13 (n 84).

87 *Kadi I* (n 18) para 303.

88 *ibid* para 304.

a categorical prohibition: the foundations of the Union can never be amended, at least not in a limiting sense; they can only be corrected and perfected.

Hence, the CJEU seems to deem the EU judicial system and the foundational values of the EU so fundamental that they can never be abolished. The considerations of the Court, meanwhile, remain very concise. Moreover, the very limited number of cases available for analysis cannot provide a definitive answer. For this reason, it is appropriate to undertake a more daring exploration of possible substantive limits to Treaty revision. To this end, we must explore the deeper structure that arguably underlies the text of the Treaties.

3.3.2 The deeper structure of EU law

In its *Kadi I* judgment, the CJEU suggested that Article 2 TEU provides an unchangeable core of EU law. The first sentence of Article 2 states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’ These values are also mentioned in the Preamble to the TEU, and in the Preamble to the Charter.⁸⁹ The fact that these values are placed at the beginning of the TEU indicates that they are of the utmost importance to the EU. If there are any substantive limitations to Treaty amendability, Article 2 TEU seems to point at the most obvious ones (besides the Union’s judicial system). The question, then, is whether Treaty amendments must be tested against Article 2, or—delving even closer to the heart of the matter—whether it is possible directly to amend the values of this article by removing one of the values (such as democracy) or by inverting one of them (such as by turning equality into inequality).

Contrasted against Article 2 TEU as the unchangeable core of EU law, European integration, it could be argued, is an open-ended process. Article 1 TEU describes this process as a process of ‘creating an ever closer union’, but it does not oblige the Member States to develop the Union in a specific direction. Furthermore,

89 According to the second sentence of TEU (n 1) art 2: ‘These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. The ‘values’ mentioned in this sentence are characteristics of European society (or the societies of the Member States); they are not EU values. An important argument for this interpretation is that the values of freedom and human rights require a distinction between state and society. In light of these values, the state—or, in this case, the EU—may not impose its values on society.

the ordinary Treaty revision procedure explicitly allows for a reduction of competences on the side of the EU.⁹⁰ The lack of political consensus about the founding values of the Union—for example, concerning the value of solidarity—provides another argument for the claim that Article 2 TEU can never be the final definition of the core of the Union.⁹¹

There are, however, also strong arguments in favour of taking the values of Article 2 TEU as the ultimate criteria of legality for any Treaty amendment. These values constitute the ‘foundation’ of the Union, so changing them would impact the whole edifice of EU law. Importantly, the founding values are positioned before the objectives of the Union, which are listed in Article 3 TEU. This indicates that these values are not instrumental; instead, they constrain the Union’s objectives, and all EU action should comply with them. Further testament to this is the fact that political parties in the European Parliament are obliged to respect the Union’s founding values. Only political parties that ‘observe’ the values of Article 2 TEU are entitled to register at the European Parliament and receive funding.⁹² Clearly, the rationale of this is to bar and eliminate any political forces that would attempt to undermine these values.

We can take Article 2 TEU as the normative core of EU law, against which all Treaty revisions must be tested—the status of the values of Article 2 TEU is another question altogether. While EU law does not define the concept of values, von Bogdandy has defined values as ‘normative convictions of a highly abstract order that are part of the social identity of the individual.’⁹³ Callies, following Di Fabio, defined values as ‘basic attitudes of society or individuals characterized by a particular strength and conviction of truth.’⁹⁴ In both definitions, values are understood as subjective preferences of individuals. This would imply that the EU is founded on the ethical convictions of the majority of its citizens.

90 In contrast, the fifth indent of art B of the Maastricht Treaty determined: ‘The Union shall set itself the following objectives: – to maintain in full the “acquis communautaire”’.

91 CONV 574/1/03 REV1, Reactions to draft arts 1 to 16 of the Constitutional Treaty—Analysis, Brussels, 26 February 2003.

92 See Regulation (EC) 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at the European level and the rules regarding their funding [2003] OJ L 297/1, arts 2 and 3.

93 Armin von Bogdandy, ‘The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe’ (2005) 3 *ICON* 295, 308.

94 Christian H Callies, ‘Europe as Transnational Law: The Transnationalization of Values by European Law’ (2009) 10 *German LJ* 1367, 1367.

This subjective interpretation of values relativises the validity of the foundational values. In principle, they may be immutable, but if the citizens of the EU come to hold different moral and political convictions, the values of Article 2 TEU have to change as well. They constitute a substantive limit to Treaty revisions, but they can be revised. If society changes, the values of the EU will change as well.

One of the problems with this interpretation is that the values of the EU lose their corrective function. According to the doctrine of constitutional democracy, human dignity and equality are not merely preferences: they are considered the ultimate norms of law. Legislatures and constitution drafters do not create them, but are morally obligated to recognise them legally. A positivistic interpretation that makes the validity of human rights dependent upon day-to-day societal attitudes misses the very point of human rights.

This consequence can be avoided by interpreting the values of Article 2 TEU, not as subjective preferences, but as objective ‘supra-constitutional’ moral-political truths. Human dignity and human rights do not originate in a contingent choice. The Member States have not created or invented them. As treaty-making parties, they have merely fulfilled their moral obligation to recognise these values legally. The foundational values of the EU define the bedrock of the European project; amending them in a detrimental way would amount to betraying everything for which the EU stands.

This objective interpretation, which is indebted to a form of moral realism, is problematic in itself. Law and societal reality may not correspond completely. Indeed, law lives through a certain degree of discrepancy with societal reality (otherwise, law would be redundant). However, this discrepancy can only be relative; if it is too wide, law loses its actual validity, and becomes meaningless. Here we encounter a kind of European Böckenförde dilemma: the free, secularised EU lives by values that it cannot guarantee itself.⁹⁵ If the Member States really do want

95 The full formulation in the original German: „Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und—auf säkularisierter Ebene—in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat“. Ernst-Wolfgang Bockenförde, *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Suhrkamp 1976) 60.

to chart a different moral-political course, the values of Article 2 TEU will degrade into a reality on paper. The EU, as a legal construct, simply misses the capacity to enforce its values (leaving aside the preliminary question whether enforcing them is a justified responsibility of the EU at all). Of course, this is not likely to happen in the near future, but neither can the possibility be excluded.

A third option would be to combine both interpretations: on the one hand, the values of Article 2 TEU constitute an unchangeable core of EU law; on the other hand, because of their very abstract nature, they allow for changing interpretations. The foundation of the EU would become a ‘living foundation.’⁹⁶ This option may seem attractive, but in fact it would mean that the foundational values would lose much of their bite. At the very least, they would lose their capacity effectively to guide the development of the EU legal order. The foundational values would then no longer be able to prevent radical changes. Furthermore, this option would grant the CJEU considerable leeway to interpret them in a very indefinite way.

The objective interpretation of the EU’s founding values—according to which human dignity and human rights are moral-political truths—seems to be the most consistent with the self-understanding of the EU. The Treaties, including the Charter, are infused with the idea that the Union stands for values that can never be abandoned. Taking this idea seriously, we suggest, would require accepting the founding values of the Union as substantive limits to Treaty revision.

3.4 Review by the CJEU

An affirmative answer to the question whether there are substantive limits to Treaty amendments does not imply, strictly speaking, that the CJEU has the responsibility (and should have the competence) to review amendments in this respect. On the one hand, it can be pointed out that the CJEU, under Article 48 TEU, does not even have a role in the consultation process (as do the European Parliament and the European Commission). On the other hand, it can be pointed out that the CJEU, on the basis of Article 19(1) TEU, has a very broad charter—namely ‘to ensure that in the interpretation and application of the Treaties the law is observed.’ The

96 Comparable to the idea that the ECHR is a ‘living instrument’ that ‘must be interpreted in the light of present-day conditions,’ an idea that was acknowledged by the European Court of Human Rights (ECtHR) for the first time in 1978. See *Tyrer v United Kingdom* (1978) ECHR Series A no 26, para 31.

Treaties do not contain any restrictions on the jurisdiction of the CJEU concerning the review of Treaty amendments. This finding is particularly significant given the fact that Article 269 TFEU explicitly lays down such a restriction in other circumstances.⁹⁷ It can be argued, *a contrario*, that the Court has the competence to review both the formal and substantive aspects of Treaty amendments.⁹⁸ This argument is reinforced by the fact that the CJEU has always been a very active court.

This does not alter the reality that the number of institutions that can meaningfully initiate a legal procedure against an amendment would be very limited. As all the Member States will have agreed to the amendment under this scenario, only the European Commission would be in a position to start an infringement procedure (against all of the Member States). Another option would be national courts that refer to the Court for a preliminary ruling about the validity of the Treaty amendment.⁹⁹

On first examination, two issues may seem to make it unlikely that the CJEU would substantially review Treaty amendments. First of all, it can be sceptically asked where the Court might derive its legitimacy to do so. As the CJEU is not a democratically legitimised institution, why should it have the power to invalidate amendments that are unanimously accepted by the Member States? One answer might be due to the fact that the revision procedures are not democratic either. In practice, the procedures to amend the Treaties lack transparency. Furthermore, it could be argued that the CJEU has its own, non-democratic legitimacy. The CJEU, after all, may serve as the guardian of human dignity and human rights against popular democracy and the delusions of the day. Defending the core of European values, the Court could even enhance its legitimacy vis-à-vis national courts.

Secondly, one could point to the very abstract nature of the Union's founding values. How could the Court possibly use them to invalidate amendments? Clearly,

97 According to art 269 TFEU, the Court can review acts adopted pursuant to art 7 TEU (the political sanctioning mechanism for the case of the existence of a serious and persistent breach by a Member State of EU values) solely at the request of the Member State concerned and solely in respect of procedural stipulations. This limitation of the jurisdiction of the Court was motivated by the extreme political sensitivity of such acts.

98 *Pringle* (n 70) Opinion of AG Kokott.

99 A third option would be that a national (constitutional) court declares an EU Treaty amendment incompatible with its national constitution. This scenario—first envisaged in the first *Solange* judgment of the German Federal Constitutional Court (*Solange I* (1974) 37 BVerfGE 271)—will not be explored here, as this article focuses on substantive limits to EU Treaty amendments ensuing from EU law, not from national (constitutional) law.

the values need specification in order to make a difference. Giving this power to the CJEU, it must be acknowledged, would give the Court enormous leeway. The only constraint on the judges is the moral expectation that they will administer justice in the spirit of European values. However, at the same time, it must be pointed out that the Court has already shown itself to be very well-suited for this job. For one value, respect for human rights, it was the Court (not the Member States or other EU institutions) that has fleshed out its concrete meaning in an impressive collection of case law.

4 Conclusion

We started our article by asking a couple of provocative questions. Could the Member States use the Article 48 revision procedure of the TEU to introduce a principle of fascism in European law? Could they use the same procedure to exclude certain minorities from the Charter of Fundamental Rights? Could the Member States legitimately use the Article 48 procedure to abolish the European Parliament? Our exploration suggests a tentative no.

Although the EU Treaties do not contain explicit substantive limits of Treaty amendability—and the CJEU has never expressly ruled to this effect—there is, nevertheless, room to argue that the idea of a doctrine of unconstitutional constitutional amendments is indeed relevant with regard to the legal system of the EU. In its case law, the CJEU has repeatedly emphasised that the judicial system of the Union is part of the Union's essence. Changes to the Treaties that would impair this essence seem to be unacceptable to the Court, indicating that there is a substantive constraint to Treaty amendability concerning the institutional features of the Union. More saliently, we have also encountered possible constraints that relate to the moral-political identity of the Union. As we have argued, there are good reasons to assume that the founding values of the Union, as enshrined in Article 2 TEU, constitute substantive limits of EU Treaty amendability. We have also argued that it is not unimaginable that the CJEU will assume the power to substantively review amendments to the EU Treaties, in cases where the Member States would choose to put forth suspect revisions to these documents.

Would this conclusion make any practical difference in cases where the Member States leverage Article 48 fundamentally to change the constitutional democratic identity of the EU? In other words, could a doctrine of unconstitutional constitutional amendments—including a judicial power substantively to review Treaty revisions—save a Europe in which the 'spirit of moderation,' to use the

famous words of Hand, is gone?¹⁰⁰ As Jacobsohn suggests, '[e]ndowing courts with a judicial review responsibility over constitutional amendments might, when prudently considered, be thought of in relation to the relative ease or difficulty of altering the document'.¹⁰¹ In India, for example, where the larger part of the constitutional document can be amended by just a simple majority in Parliament, the judiciary may adopt a relatively strong stance when faced with illiberal opposition. Amending the EU Treaties, by contrast, is extremely challenging, as it requires unanimous support of the Member States. It would be a formidable undertaking for the CJEU to go against that potent tide. Indeed, ultimately, the people of Europe therefore presumably comprise the body that should be counted on to prevent illiberal amendments from ever being adopted.¹⁰² For, in the end, law itself cannot prevent a revolution.

100 Learned Hand, *The Spirit of Liberty* (Alfred A Knopf 1953) 164 quoted in Jacobsohn (n 4) 82.

101 Jacobsohn (n 4) 82.

102 cf German Basic Law art 20(4): 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.'