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**Eternity and the Constitution:
The Promise and Limits of
Eternity Clauses**

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Abstract

This thesis sets out to investigate whether eternity clauses—unamendable provisions in constitutions—are democratic. It proceeds to answer this question in two parts. The thesis's first three chapters look at eternity clauses' foundations and at the substantive values they protect, in an effort to ascertain whether unamendability and democracy may be reconciled based on these provisions' origins and normative content. The thesis's latter two chapters are concerned with identifying process-based alternatives to, or ways out of, unamendability. They call into question the possibility of revolution to do away with eternity clauses and also provide an initial investigation into the relationship between the macro-trends of rigidity and popular participation present in constitution-making today. The argument ultimately put forth is that eternity clauses and democracy remain in a state of tension with each other irrespective of the manner in which they are adopted, of the values they protect, and of the fact that they may in theory be repealed via a new constituent moment. This is because they institute a hierarchy of norms within constitutions, which is then zealously guarded by constitutional courts with or without an explicit mandate to do so. More often than not, that hierarchy contains first-order value commitments of the polity which these courts can only review with reference to judicial ideology rather than any objective standard of review. This is the inevitable outcome of the logic of unamendable entrenchment, and not merely its exception.

Lay summary

This thesis analyses constitutional eternity clauses and their strained relationship to democracy. Eternity clauses are unamendable provisions in constitutional texts, or else judicial doctrines which similarly insulate from amendment certain principles or rights in the constitution. Examples include Germany's so-called *Ewigkeitsklausel* and India's basic structure doctrine, respectively. Although little studied by constitutional scholarship, eternity clauses are found in numerous basic laws and their appeal appears to be on the rise. At the same time, however, both scholars and practitioners have come to advocate for constitution-making to be democratic. They emphasise the benefits of popular involvement in the process of drafting and adopting a constitution, including an increase in democratic legitimacy of the new constitutional order.

This thesis posits that the two trends in constitution-making—one of rigidity via unamendability and another of increasingly participatory mechanisms for constitutional creation and change—are in tension with each other and potentially incompatible. As such, it explores the main arguments in favour of reconciling eternity clauses and democracy. First, the thesis investigates arguments about constitutional creation as an act of the constituent power and therefore as inherently democratic. Second, the thesis examines expressive theories which purport to explain unamendability as the decanted essence of a constitution. Third, the thesis scrutinises the content of eternity clauses in an effort to ascertain whether they can be substantively defended as democratic. Thus, it takes seriously unamendable commitments to certain state characteristics, militant democracy, and minority protection. Fourth, the thesis investigates the proposition that an eternity clause is never truly eternal but rather a roadblock which triggers high levels of deliberation when fundamental constitutional changes are sought. These distinct ways to frame the question of the democratic credentials of unamendable provisions are found to be only partially persuasive. More recent appeals to the transnational, for guidance in identifying the content of eternity clauses and in adjudicating unamendability, also do not alleviate the problem.

The last chapter brings back the question of the rise in unamendable provisions in constitutions around the world alongside an upsurge in recourse to popular involvement in constitution-making. The conclusion in that chapter, which mirrors the conclusion of the thesis as a whole, is that any inclusion of an eternity clause in a democratic constitution will create an irreconcilable tension at the time of constitutional enforcement. It leads to the empowerment of the judiciary, called upon (or taking it upon itself) to settle foundational questions of the constitutional order which should not be within the judicial remit. The thesis contends that this development unavoidably results in the judicialisation of constitutional politics and in the impoverishment of democracy in the long term.

Declaration

In accordance with Regulation 2.5 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I confirm that this thesis has been composed by me; that the work contained in this thesis is my own; and that the work contained in this thesis has not been submitted for any other degree or professional qualification. In Chapter 5, the thesis has incorporated material having previously been published as Silvia Suteu, "Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland", *Boston College International & Comparative Law Review*, Vol. XXXVIII, No. 2 (2015), pp. 251-76.

Silvia Suteu

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Introduction

Constitutions are drafted to endure. Both symbolic statements of core societal values and blueprints for organising government, they are meant to provide stability and a sense of identity. How to achieve such longevity, however, is less clear. From constitutionalism's earliest days, constitution-makers have struggled with how best to calibrate basic laws in order to ensure they are not too easily discarded but also not ossifying. Thomas Jefferson's call for the constitution to be renegotiated once every generation¹ and James Madison's fear that "a frequent reference of constitutional questions to the decision of the whole society" would engage dangerous passions² still capture the two poles of this debate. Whether to allow for constitutional flexibility or, conversely, to shut off certain matters from renegotiation are the choices between which drafters must decide in their pursuit of constitutional durability. They look to constitutional theory and comparative practice to help them ascertain which of these paths is more suited to their own polity.

Along the rigidity end of this spectrum of choices, eternity clauses have gained wide popularity. They are a type of constitutional provision or judicial doctrine which insulates from amendment certain principles or rights enshrined in a constitution. They represent a special mechanism of constitutional entrenchment, one which might be termed indefinite or limitless. The example of an eternity clause typically given is Germany, whose Article 79(3) or *Ewigkeitsklausel* declares the inviolability of human dignity and of human rights, as well as of the democratic, federal, and social nature of the German state, the electoral nature of the German democracy, and the rule of law. Such formalised eternity clauses are by no means rare, with other oft-studied examples including Brazil, Italy or Turkey. They are, however, only one incarnation of this type of provision. There are also judicial doctrines of implied

¹ Thomas Jefferson to James Madison, 6 September 1789, *The Thomas Jefferson Papers at the Library of Congress*, Series 1: General Correspondence, 1651-1827.

² James Madison, Federalist No. 49, 5 February 1788 in Alexander Hamilton *et al.*, Robert Scigliano, ed., *The Federalist: A Commentary on the Constitution of the United States*, Random House, 2000, p. 323.

substantive limits on amendment, such as India's basic structure doctrine or the Czech Constitutional Court's minimum core doctrine. Such judicial constructs are informed by analogous considerations to formal clauses and operate in a similar fashion to formal clauses. Other candidates for inclusion under the eternity clause label which will not be addressed in this study are de facto unamendable provisions. An example is the First Amendment of the United States constitution, which many have argued has been rendered virtually unamendable via social practice.³ Termed "constructive unamendability" by some,⁴ such examples of provisions which have become impossible to amend by virtue of constitutional practice would require a socio-legal type of analysis different from the one proposed here.

The rise of unamendable provisions has been constant in constitutions around the world, with one study estimating that 42 per cent (or 82 out of 192) of post-World War II constitutions adopted until 2011 incorporate some type of eternity clause, and 32 per cent (or 172 out of 537) of constitutions of all time doing so.⁵ Even more significantly, this trend does not appear to be abating. The two most recently adopted constitutions—Tunisia's 2014 and Nepal's 2015 constitutions—both incorporated formally unamendable clauses. The spread of judicial doctrines of unamendability has similarly continued, with the Pakistani Supreme Court adopting its own version of a basic structure doctrine in 2015.⁶ There is no better time to engage in a critical analysis of the problems and prospects raised by eternity clauses.

³ On unamendability in the US context, see Richard Albert, "The Unamendable Core of the United States Constitution" in Andras Koltay, ed., *Comparative Perspectives on the Fundamental Freedom of Expression*, forthcoming 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601646; Teresa Stanton Collett, "Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments", *Loyola University Chicago Law Journal*, Vol. 41, No. 2 (2010), pp. 327-49; Jason Mazzone, "Unamendments", *Iowa Law Review*, Vol. 90 (2005a), pp. 1747-1855; R. George Wright, "Could a Constitutional Amendment Be Unconstitutional?", *Loyola University Chicago Law Journal*, Vol. 22, No. 4 (1991), pp. 741-64; Douglas Linder, "What in the Constitution Cannot Be Amended?", *Arizona Law Review*, Vol. 23 (1981), pp. 717-33.

⁴ Richard Albert, "Constructive Unamendability in Canada and the United States", *Supreme Court Law Review*, Vol. 67 (2014a), p. 182.

⁵ Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea", *American Journal of Comparative Law*, Vol. 61 (2013), p. 667.

⁶ Constitutional Petition No. 12 of 2010 etc., Supreme Court of Pakistan, 5 August 2015.

The three problems of eternity clauses

The rise of eternity clauses is paradoxical in different ways. First, it is paradoxical when viewed in the broader context of advances in constitutional technology. Eternity clauses have risen alongside an upsurge in participatory modes of democratic engagement which place a high premium on citizen involvement in higher law-making.⁷ The latter are premised on beginning to trust that citizens will do a good job at this task, while eternity clauses show distrust of citizens and also of lawmakers, seeing them both as prone to undermining the constitutional order via amendment. We could see this as part of a paradoxical development on a larger scale: the rise of strong forms of constitutional review alongside that of participatory constitution-making (more on the latter in Chapter 5). I will not aim to provide a full solution to this paradox, but to argue that we should be aware of it and of how the two seemingly opposing trends reinforce or undermine each other. It may well be that the two will continue to coexist, embodying as they do the polarity of choices implicit in constitutionalism itself. Nevertheless, there are different implications flowing from a choice for rigidity versus one for flexibility, both at the level of drafting and of constitutional enforcement. Studying eternity clauses alongside the participatory turn in constitution-making should thus complement an analysis of such provisions on their own terms.

There is a second, related problem with the increased incidence of eternity clauses. More and more, studies of constitutional endurance point to a correlation between constitutional flexibility, understood as the ease of both formal and informal amendment, and a constitution's durability.⁸ If that is the case, eternity clauses as an inflexible mechanism planted at the heart of the constitutional project may disrupt its evolution and adaptation rather than ensure its endurance across generations. Perhaps this is merely part of the general problem of constitutions themselves having to maintain a fine balance between flexibility and rigidity. To the extent that eternity clauses significantly tilt that balance in favour of rigidity, however, they need to be addressed separately.

⁷ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford: Oxford University Press, 2012.

⁸ Zachary Elkins *et al.*, *The Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 8 and 89.

Thirdly, and crucially for my purposes, eternity clauses are democratically dubious. The tense relationship between constitutional precommitment and democracy is further strained if we take eternity clauses to be at the farthest end of a constitutional rigidity continuum. This is the view taken by the Venice Commission of the Council of Europe, which distinguished them from other rules on amendment as being “the most rigid and conserving mechanism for constitutional binding”.⁹ As this study will show, however, it is not just the fact that they are the most rigid among amendment rules which is problematic. Unlike other procedural amendment rules such as higher thresholds for legislative approval or obligatory referendums, unamendable provisions impose substantive limitations on change which create a certain hierarchy of norms within the constitution. That hierarchy rests on value commitments which are unavoidably vague but which are nonetheless enforced by constitutional review whose reach can be profoundly worrying to committed democrats. In the words of Allan Hutchinson and Joel Colón-Riós, democratic participation being limited in the name of elite-favouring values and certain constitutional change being channelled exclusively through the judiciary is deeply unsettling to a strong democrat.¹⁰ These three objections provide the impetus for my study and the backdrop against which to judge its originality and potential utility.

Eternity clauses and democracy: scoping the field

Eternity clauses may be examined from the vantage point of broad constitutionalism versus democracy debates, as particularly inflexible instantiations of constitutionalising normative values. They can also be analysed on their own terms, as tools of constitutional design posing distinctive problems. I will delineate understandings of unamendability within these two broad strands shortly. My approach will be different from either of these in that it positions itself mid-way between the often decontextualized studies of eternity clauses put forth by unamendability scholars and the macro-level debates within constitutionalism which tend to miss the unique challenges posed by these provisions. I will adopt a robust democratic position to question the capacity of constitutional orders to

⁹ European Commission for Democracy through Law (Venice Commission), *Report on Constitutional Amendment*, CDL-AD(2010)001-e, 11-12 December 2009, p. 41.

¹⁰ Allan C. Hutchinson and Joel Colon-Rios, “Democracy and Constitutional Change”, Osgoode Hall Law School Research Paper No. 48/2010, Vol. 6, No. 11 (2010), p. 4.

reconcile eternity clauses with satisfactory commitments to democracy. Furthermore, I will seek to explain unamendability within the larger context of constitution-making today, as a phenomenon embodying the increasing move toward constitutional rigidity at the same time as an opposing trend is afoot—toward greater popular participation in constitutional reform. These two elements—a comprehensive democratic critique of eternity clauses and situating their emergence within global trends in constitution-making today—will together form my original contribution to the literature on unamendable provisions.

This literature can thus be described at the same time as either vast or decidedly limited. Studies directly addressing eternity clauses, which I address below, remain few, though their appeal has clearly risen alongside that of their object of study. However, the problems raised by unamendability go to the core of legal philosophy and constitutional theory and as such can be read in the old key of the constitutionalism versus democracy debates. Thus, one could view such provisions as illustrating timeworn pursuits in legal philosophy, such as identifying the preconditions for constitutional permanence.¹¹ One could also see eternity clauses and their enforcement as the culmination of Ronald Dworkin's understandings of rights entrenchment and the judiciary's role as guardians of the constitution.¹² Once the right abstract moral principles have been found and incorporated into the constitution, and once their enforcement by judges has been provided for, a Dworkinian would be quite at ease with seeking to ensure the basic law's permanence.¹³

¹¹ Christoph Bezemek, "Constitutional Core(s): Amendments, Entrenchments, Eternities and Beyond: Prolegomena to a Theory of Normative Volatility", *The Journal Jurisprudence*, Vol. 11 (2011), pp. 517-48.

¹² See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, MA: Harvard University Press, 1996 and Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton, NJ: Princeton University Press, 2006. One such interpretation of eternity clauses is explored in Conrado Hübner Mendes, "Judicial Review of Constitutional Amendments in the Brazilian Supreme Court", *Florida Journal of International Law*, Vol. 17, No. 3 (2005), pp. 449-61.

¹³ For a critique of this view, see Hutchinson and Colón-Riós (2010).

The scholarship I find most illuminating in this broad sense addresses the paradox of precommitment in democracies.¹⁴ It asks how constitutionalism can defend its democratic credentials in the face of criticism that a will cannot bind itself, nor can one generation bind the next.¹⁵ Jon Elster has acknowledged the differences between a collective and an individual self-binding but nevertheless has argued that it makes sense to speak of constitutional precommitment.¹⁶ Stephen Holmes has argued that precommitment can be both “democracy-enabling” and “democracy-stabilizing” and that it empowers rather than blocks current generations: “Precommitment is justified because it does not enslave but rather enfranchises future generations.”¹⁷ Furthermore, because of the flexibility afforded by imaginative judicial interpretation, Holmes argues, loyalty to the past is reconciled with responsiveness to the present.¹⁸ Other liberal scholars have also defended the democracy-enabling function of constitutional limits, particularly of those protecting certain political rights.¹⁹ Precommitment theories are of limited relevance to my study, however, because they tend to remain at the general level when discussing constitutional entrenchment. In short, their explanatory power is aimed at constitutions as mechanisms of self-limitation and do not address degrees of entrenchment, nor eternity clauses as such. My project is precisely premised on the insight that “entrenchment poses different problems from those generated by ordinary constitutionalism.”²⁰ Additionally, eternity clauses do not protect only democracy-enabling values, so democracy-based criticism of precommitment theories remains valid at least in the case of those other values.

¹⁴ Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago: University of Chicago Press, 1995 and Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*, New York: Cambridge University Press, 2000.

¹⁵ Stephen Holmes, “Precommitment and the Paradox of Democracy” in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988, pp. 195-240.

¹⁶ Elster (2000), p. 96.

¹⁷ Holmes (1988), p. 216.

¹⁸ *Ibid.*, pp. 224-5.

¹⁹ Cass R. Sunstein, “Constitutions and Democracies: An Epilogue” in Elster and Slagstad (1988), pp. 327-8. See also Judith Squires, “Liberal Constitutionalism, Identity and Difference” in Richard Bellamy and Dario Castiglione, eds., *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford: Blackwell Publishers, 1996, p. 209.

²⁰ Melissa Schwartzberg, *Democracy and Legal Change*, New York: Cambridge University Press, 2009, p. 9.

If we accept that eternity clauses pose problems that go beyond those raised by constitutionalism as such, however, we need a better understanding of how they work as a distinct tool of constitutional entrenchment. These need to go beyond simply acknowledging the rise of the eternity clause worldwide as the migration of a constitutional idea which is then comparatively mapped.²¹ Useful as such studies are in a hitherto largely uncharted field, they mostly acknowledge that eternity clauses may pose problems for constitutional theory without seeking to resolve them. Descriptive mapping scholarship addressing mechanisms of constitutional change thus by its very nature avoids drawing the theoretical insights I pursue.²² Those investigating the experience with unamendability in a single country²³ or set of countries²⁴ are better at providing the requisite context for understanding eternity clauses and the way they function with or against their encompassing constitutional

²¹ Roznai (2013).

²² See comparative volumes such as Mads Andenas, ed., *The Creation and Amendment of Constitutional Norms*, London: British Institute of International and Comparative Law, 2000; Dawn Oliver and Carlo Fusaro, eds., *How Constitutions Change: A Comparative Study*, Oxford: Hart Publishing, 2011; and Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, New York: Routledge, 2012.

²³ See, *inter alia*, Manoel Gonçalves Ferreira Filho, "Significação e alcance das "cláusulas pétreas""", *Revista de Direito Administrativo*, Vol. 202 (1995), pp. 11-17 and Hübner Mendes (2005) on Brazil; Carlos Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine", *International Journal of Constitutional Law*, Vol. 11, No. 2 (2013), pp. 339-57 on Colombia; Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?", *Constellations*, Vol. 19, No 2 (2012), pp. 182-203 on Hungary; Richard Stith, "Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court", *American University International Law Review*, Vol. 11, No. 1 (1996), pp. 47-77 on Nepal; Paulo Ferreira da Cunha, "Les limites du pouvoir de révision constitutionnelle entre le pouvoir constituant et la constitution matérielle. Une illustration dans le contexte lusophone", Paper presented at International Association for Constitutional Law (IACL-AIDC) VIIIth World Congress, Athens, Greece, 2007, available at <http://works.bepress.com/pfc/6/> on Portugal; and Yaniv Roznai and Serkan Yolcu, "An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision", *International Journal of Constitutional Law*, Vol. 10, No. 1 (2012), pp. 175-217 on Turkey.

²⁴ See, *inter alia*, Lars Vinx and Gülsen Seven, "The Democratic Legitimacy of Strong Constitutional Entrenchment: The Cases of Turkey and India", Paper presented at the Political Studies Association Conference 2014, available at https://www.psa.ac.uk/sites/default/files/conference/papers/2014/Seven.Vinx_.Strong%20Constitutional%20Entrenchment.pdf; Michael Freitas Mohallem, "Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority", *The International Journal of Human Rights*, Vol. 15, No. 5 (2011), pp. 765-86; and Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Bursa: Ekin Press, 2008.

architecture. Nevertheless, their more limited scope of analysis has meant that any insights obtained are not tied into an overarching theory of unamendability.

Theoretical projects directly addressing eternity clauses remain scarce, although there has been a definite surge in interest in the topic in recent years. Neither comprehensively addresses the strained relationship between eternity clauses and democracy, as I do in this study. One such endeavour belongs to Richard Albert, who has looked at eternity clauses as a form of “indefinite constitutional entrenchment”,²⁵ at the doctrine of unconstitutional constitutional amendment,²⁶ and at the expressive function of rules of constitutional amendments.²⁷ His concerns focus on amendment provisions playing more than a mere corrective function and thus on entrenchment—seen as a matter of degree, on a continuum from simple majority rule to formalised eternity clauses—as representing an expressive site within constitutions. Amendment rules, he argues, are not always expressive, nor are they necessarily intended to be thus, but they “are *one* of the sites where constitutional designers may express a polity’s constitutional values, both internally to the persons who are nominally or actually bound by its terms, and externally to the larger world.”²⁸ When it comes to entrenchment clauses as such, Albert identifies three goals they pursue: “to preserve certain structural features of the state” (preservative), “to transform the state by helping to paint a portrait of the state not as it is, but as it could be” (transformational), and to “advance the cause of reconciliation” via protecting amnesty laws.²⁹

I will discuss his triptych in connection to the promise of eternity clauses below. What is more relevant here is how Albert’s study differs from mine. While he declares himself anxious to preserve “popular choice” within constitutionalism, and

²⁵ Richard Albert, “Constitutional Handcuffs”, *Arizona State Law Journal*, Vol. 42, No. 3 (2010), pp. 663-715.

²⁶ Richard Albert, “Nonconstitutional Amendments”, *The Canadian Journal of Law and Jurisprudence*, Vol. 22, No. 1 (2009), pp. 5-47.

²⁷ Richard Albert, “The Expressive Function of Constitutional Amendment Rules”, *McGill Law Journal*, Vol. 59, No. 2 (2013), pp. 225-81.

²⁸ *Ibid.*, p. 229.

²⁹ Albert (2010), pp. 666-67.

sees entrenchment clauses as “extinguish[ing] sovereignty”³⁰ and being based on a distrust model of constitutional change,³¹ his analysis lacks a coherent account of the continued role of citizens in constitution-making. He at no point acknowledges that empowering courts via constitutional review of entrenchment clauses is problematic for similar democratic considerations—on the contrary, he decries its absence as a potential gateway for mob rule.³² Albert’s solution to the problem of entrenchment, seen as an instantiation of the constitutionalism-democracy tension within constitutional design, is to argue against its indefinite version while advocating an intermediate type of entrenchment (what he calls “heightened constitutional entrenchment”).³³ His proposal is in tune with his starting point, which is a procedural view of democracy as the basis for his concerns.³⁴ Without here questioning the democratic credentials of entrenchment rules generally,³⁵ I find Albert’s examination only partially useful for at least two reasons. One is that it is imbued with the same distrust of citizen involvement in constitution-making which informs proponents of entrenchment clauses. Moreover, Albert only sees a difference of degree between the problems raised by eternity clauses as opposed to constitutions as such.³⁶ To sum up, despite many astute observations, I see Albert as failing to provide a sufficiently coherent, or ambitious, account of the democratic problems raised by eternity clauses. One of his insights, however, is an important premise for my own study as well: that entrenchment is real and has real consequences,³⁷ this in contrast to those who might dismiss it as pure symbolism.

Two scholars having put forth analyses of eternity clauses which engage with their thorniest theoretical problems are Po Jen Yap and Yaniv Roznai. The former has

³⁰ *Ibid.*, p. 676. Elsewhere, Albert more controversially calls the withholding of the constitutional amendment power from citizens as tantamount “to hijack[ing] their most basic of all democratic rights.” *Ibid.*, p. 698.

³¹ Richard Albert, “The Structure of Constitutional Amendment Rules”, *Wake Forrest Law Review*, Vol. 49 (2014b), p. 926.

³² Albert (2010), pp. 704-05.

³³ *Ibid.*, p. 672.

³⁴ *Ibid.*, pp. 673-74.

³⁵ For an interesting study on the normative problems raised by supermajority rules, see Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule*, New York: Cambridge University Press, 2013.

³⁶ Albert (2010), p. 713.

³⁷ *Ibid.*, p. 684.

systematised the normative arguments for and against unamendability along very similar lines to my aims here.³⁸ These include justifications rooted in constituent power theories, on the distinction between amendment and abrogation, and on the protection of democracy and fundamental rights, and counter-arguments grounded on the democratic limitations of eternity clauses and their entrenchment of vague commitments. However, Yap's approach is limited in two ways. He only deals with judicial doctrines of implicit limitations on amendment and does not address formal clauses. Moreover, his is very much an initial, scoping exercise rather than a complete study of the numerous issues raised by unamendability. He is not interested in solutions so much as in identifying and classifying the problems. Thus, while I will refer to Yap at various points during this dissertation, his arguments are not developed enough in order to serve as more than starting points for discussion.

The most comprehensive account of eternity clauses up until this point has been put forth by Yaniv Roznai, who has complemented his descriptive comparative work with an investigation of their theoretical challenges.³⁹ Roznai argues that eternity clauses can be defended on the basis of a theory of amendment power, understood as a limited, secondary constituent power different from the original constituent power exercised during the making of the constitution. On this model, the power to amend the constitution is a form of delegated power which can be reconciled with substantive limitations, as well as with the constitutional review of these limitations. I appreciate the rigour with which Roznai has attempted to provide a coherent theory of unamendability and share many of his insights throughout my own study. However, there are several key points on which we differ. First, I dispute his model of amendment power and the reliance on a distinction between primary and derived constituent power (more on this in Chapter 1). Second, I find the judicial enforcement of eternity clauses to be inevitable and more deeply problematic than he appears to, both in theory and in concrete cases (as I will show in Chapters 2 and 3). His search for a judicial standard of review of unamendability is ambitious but

³⁸ Po Jen Yap, "The Conundrum of Unconstitutional Constitutional Amendments", *Global Constitutionalism*, Vol. 4, No. 1 (2015), pp. 114-36.

³⁹ 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, February 2014a, available at http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf.

ultimately untenable. Third, whereas Roznai addresses some of the democracy-based arguments against eternity clauses, he does so more cursorily than is attempted here, and without engaging in depth with certain notions of democracy which he only briefly refers to (such as deliberative democracy, a point to which I return in Chapter 4). Finally, I place my analysis within the broader context of constitution-making trends today in an effort to open up the debate on unamendability and find its relevance to constitution-making today. It is with that objective that I propose scrutinising the rise of eternity clauses alongside that of participatory constitutional mechanisms, a concern which Roznai does not share.

Other works of constitutional theory which have engaged seriously with eternity clauses come in two clusters. The first is represented by the growing literature on constituent power and its import for differentiating between legitimate and illegitimate constitutional change. An example of scholars working in this vein is Joel Colón-Riós, who directly addresses the question of whether a constitution containing “those types of norms whose modification is out of the scope of the decision-making power of popular majorities” can be considered democratically legitimate.⁴⁰ The second includes theorists of constitutional identity such as Michel Rosenfeld and Gary Jacobsohn,⁴¹ who are concerned with the role constitutional value entrenchment plays in defining the contours of a constitutional order. While these two strands of literature deal with unamendability mostly cursorily, their insights into the requirements for constitutional change to be deemed legitimate will be addressed in great depth in Chapters 1 and 2, respectively. Colón-Riós’s attempt to reconcile robust democratic commitments with limits on constituent power, including eternity clauses, is especially relevant to my study.

Finally, I wish to briefly describe one more project from which this dissertation has drawn inspiration. Historical in nature, the project in question is Melissa Schwartzberg’s study of limits on majoritarian constitutional change.⁴² Her analysis,

⁴⁰ Joel Colón-Riós, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, New York: Routledge, 2012, p. 2.

⁴¹ Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, New York: Routledge, 2010 and Gary J. Jacobsohn, *Constitutional Identity*, Cambridge, MA: Harvard University Press, 2010.

⁴² Schwartzberg (2009).

with insights from ancient Athens, seventeenth century England, and the constitutional beginnings of the United States and Germany, leads her to conclude that constitutional entrenchment does not only insulate features deemed of higher or constitutive importance, it also protects privilege and power asymmetries.⁴³ She, too, is concerned with preserving the centrality of popular sovereignty to legal change, which she says “ought not to be alienated to judges nor subject to extraordinarily strenuous procedures.”⁴⁴ Her analysis is based on two insights which also inform my own. The first was already noted above and is that there are distinct problems posed by entrenchment which make it worthy of study separately from constitutions. The second is that entrenched rules empower courts, particularly when they are implicit rather than formalised.⁴⁵ Schwartzberg usefully deals with three major objections against democratic involvement in constitutional change. Labelling them as issues of “trustworthiness, competence, and justice”, she cautions against overestimating the inconstancy of democracies, against undue trust afforded courts as opposed to representative institutions, and against blind faith in procedural barriers in the face of potential injustice.⁴⁶ Finally, an important reason why I appreciate Schwartzberg’s account is that she acknowledges the potentially exclusionary content of eternity clauses. She gives the example of entrenching official language rights in places like Romania and Azerbaijan to illustrate this point.⁴⁷ This is an important observation, one which Albert and most constitutional expressivists miss and which I return to in Chapter 2. In short, eternity clauses demand our lifelong allegiance to values which might be themselves problematic from a democratic point of view.

However, Schwartzberg is primarily concerned with entrenchment in general and consequently views eternity clauses as the most extreme version of supermajority rules. I will argue that they also raise distinct issues, such as the correlated entrenchment of a constitutional hierarchy to be policed by constitutional courts and the near-impossibility of repealing them. Schwartzberg’s study is also mostly

⁴³ *Ibid.*, p. 2.

⁴⁴ *Ibid.*, p. 6.

⁴⁵ *Ibid.*, pp. 15-16.

⁴⁶ *Ibid.*, pp. 19-22.

⁴⁷ *Ibid.*, p. 24.

informed by political theory and does not engage with much case law having emerged around eternity clauses, nor with the rather complex jurisprudence having been constructed around them in places such as Germany. Nevertheless, hers is an example of taking democracy-based anxieties about entrenchment seriously and a welcome contribution to unamendability scholarship.

My original contribution to this landscape, therefore, amounts to identifying the distinctive problems which eternity clauses pose in a constitutional democracy, including the creation of a separate hierarchy of norms within the constitution and the resulting empowerment of constitutional courts to enforce it, with or without express authorisation to do so. I also place debates on unamendability in the wider context of constitution-making trends today, highlighting their role in the great battle between strong constitutionalism and popular participation. The impact of the transnational upon this battle, and therefore also upon the turn towards unamendability, has become inescapable, whether in the form of norms, enforcement bodies, or other transnational actors involved in processes of constitutional reform. Identifying elements of this transnational influence is thus another unique contribution this thesis makes to the study of eternity clauses.

The promise and limits of eternity clauses

My main research question asks whether eternity clauses are democratic. More specifically, I am concerned with exploring whether such provisions can be reconciled with democratic constitutionalist commitments and if so, whether there are particular notions of democracy which they are more compatible with than others. I am not interested in taking one theory of democracy as my starting point and then 'testing' whether eternity clauses fit with its main tenets. Such an approach would be close to setting up a straw man argument, as the different polities having adopted eternity clauses in their constitutions have done so in conjunction with sometimes very different democratic commitments. Thus, for example, Germany's anti-populist and militant democracy and its legalistic culture are perhaps more accommodating of constitutional unamendability. However, a constitutional order built on the promise of popular sovereignty such as India's may require greater twists of constitutional theory in order to coexist with the anti-majoritarian

consequences of the basic structure doctrine. Rather than subscribing to a specific democratic school, therefore, I take as my starting point the democratic self-understanding of constitutional drafters and evaluate whether and how easily eternity clauses are reconcilable with democracy in their respective contexts. This question goes to the heart of what makes us uncomfortable about eternity clauses to begin with: the fact that, taken at face value, they purport to close off the expression of popular sovereignty upon which most constitutional edifices are built. As such, this enquiry strikes at the very core of constitutional theory and its continuing struggle to reconcile constitutionalism's tensions.

In attempting to answer this important question, I entertain four hypotheses. These largely correspond to the first four chapters of the dissertation and are framed as potential justifications for eternity clauses. The first draws on author-based notions of constitutional legitimacy and would hold that the constituent people can bind themselves without limits, including via eternity clauses. Grounded in theories of constituent power and two-track lawmaking, this hypothesis allows for a democratic reading of eternity clauses as protecting the constituent's will. A second hypothesis focuses on eternity clauses' expressive function, whether purely symbolic or also imposing certain limitations on constitutional change. This reading would defend unamendable provisions on the basis of their link to fundamental values without which the identity of the constitution and of the polity itself would be in question. A third hypothesis draws on militant and counter-majoritarian notions of democracy. In this framework, eternity clauses become one more tool in the constitutional arsenal against the usurpation of democracy. They are necessary evils which preclude democracy's undoing by its own means. A final hypothesis relies on two other theories of democracy, deliberative and participatory. It would defend unamendability as only a procedural hurdle in the face of serious attempts at constitutional renegotiation, and one which has the added benefit of triggering widespread deliberation around the unamendable principles sought to be altered.

My argument, emerging in response to these four broad sets of defences of eternity clauses, is four-fold. I first propose that unamendable provisions should be taken seriously and not underestimated as merely symbolic or otherwise inconsequential

parchment barriers. The proof of this is in their widespread implementation, even in constitutional systems wherein the constitution was silent on whether substantive limits existed or could be enforced against otherwise valid amendments. Secondly, I contend that such clauses do more than merely express a set of values—they elevate these to a higher rank and as such create a potentially problematic hierarchy of norms within the constitution. Thus, rather than seeing them as one more type of procedural hurdle on amendment, we should pay attention to the distinct implications of setting aside certain constitutional values above others. Thirdly, I argue for the existence of an inextricable link between eternity clauses and strong constitutional review. I show that unamendability always appeals to constitutional courts, whether explicitly anchored in the constitutional text or not. My examination indicates that rather than being a mere possibility, this judicial empowerment is the logical consequence of unamendable provisions. Finally, my study indicates that push-backs against unamendability are very difficult, particularly when it has been reinforced by an assertive court. While eternity clauses may be no match for revolution—indeed, no constitution is—they may actually impede radical change in unforeseen and not always desirable ways.

By tracing the life of such provisions from their adoption through their operationalization by courts and up to their repeal, I am able to scrutinise both the promise and limits of unamendability in their constitutional contexts. With regard to their benefits, these have been said to consist of at least four: ensuring constitutional longevity; expressing the core values of the polity; maintaining the coherence of the constitutional text; and safeguarding democracy itself. In other words, certain principles and values are so crucial to the survival of the constitutional order and to preserving its unity that they should be placed outside any legislative reach. Moreover, defending the constitution is taken to be conducive to democracy's survival as well. The merits of eternity clauses have thus been described as expressive, preservationist, and, where they embody aspirations for the renovation of an emerging democracy, transformative.⁴⁸

⁴⁸ Roznai (2014a), pp. 33-46 and Albert (2010), pp. 666-67.

My study reveals that these purported benefits are only partially achieved and also come with high costs. There are serious limits to how eternity clauses work to achieve their intended purpose, which are revealed at various junctures in my analysis and which also emerge as running themes throughout the thesis. With regard to the promise of longevity, three potential problems arise. The first has to do with the content of the values protected by eternity clauses. Studies of eternity clauses have hitherto tended to focus on their protection of supposedly uncontroversial values such as democracy. Even where the values in question were political choices such as commitments to federalism or republicanism, these were taken at face value. Little to no concern has been voiced that the commitments themselves might be divisive and as such not worthy of enduring. Examples include the unamendable protection of official languages, of secularism, or the unitary nature of the state, all of which have served to mask and silence disagreement over fundamental values in different constitutions. A second limitation here has to do with the nature of our commitments to certain constitutional values. Holding certain principles as foundational to the constitutional order is not the same as entrenching them in the constitution via an eternity clause. Schwartzberg has argued as much about rights entrenchment, though her argument may be expanded to other values protected by unamendability:

To recognize the “core” of these norms as essentially immutable, as reflecting inherent truths about the duties of mankind, does not demand that we regard any particular positive formulation of these norms, set down at a given moment in time, as equally durable.⁴⁹

A third line of criticism of the promise of endurance made by eternity clauses is that it appears to be empirically untenable. A historical analysis of legal change in democracies indicates that immutability has a “rich legacy” or protecting insular interests and injustice and that “[i]ts contemporary use for rights provisions is historically anomalous.”⁵⁰ A different study has pointed to a counterintuitive link between flexibility in enacting constitutional change and constitutional longevity.⁵¹ At the very least, such studies should have us question our uncritical belief that

⁴⁹ Schwartzberg (2009), p. 18.

⁵⁰ *Ibid.*, p. 25.

⁵¹ Elkins *et al.* (2009).

rigidity is the best defence against injustice or democratic breakdown. To the extent that the latter do have a constitutional solution (not an obvious proposition), we should make sure we adopt the right one. Simply relying on drafting objectives, as so many do when invoking Germany's eternity clause, or on judicial intent in the case of India's basic structure doctrine, does not amount to proof of success.

The second and third merits of eternity clauses are also doubtful. With regard to their declarative function, it is unclear why such clauses are necessary besides constitutions' preambles if they are to remain merely symbolic. The reality of eternity clause adjudication paints a different picture. Furthermore, the aspirational function of eternity clauses as sites expressing constitutional values should also be questioned. There are at least two problems raised by readings of eternity clauses as part of a wider project of self-definition of the polity. One is that they assume that, in spite of any contestation and through dialogical engagement, a relatively stable constitutional identity always emerges. Such accounts of constitutional identity ignore the potential for exclusion by way of rigid commitments to higher values. Another is that, so far, these explanations have been unable to provide a sound account of how constitutional identity is to change over time. Without the means to respond to societal evolution and to challenges from minority voices, entrenched declarations of identity may remain static and unresponsive.

With regard to their role in maintaining the unity of the constitution, the logical ordering of constitutional values of which eternity clauses might be part is not immediately obvious. Elevating formally unamendable principles above others in the constitution may be short-sighted—there may well be principles outside the eternity clause which are equally important, such as provisions on the electoral system or on the separation of powers. To establish a kind of constitution-within-a-constitution raises questions about the sliding authority of different parts of the constitution and about how to mediate conflicts between them. Moreover, this quest for unity ignores the potentially large number of incongruities and inner contradictions of the constitutional text. Constitution-making tends to be messy, and the conditions of crisis under which it takes place are not conducive to a coherent final product. What has been termed the "inherent paradox in the constitution-

making process”⁵²—the mismatch between the need for calm, undisturbed conditions for and the turbulent reality of constitution-making—becomes especially problematic when eternity clauses are part of the constitutional mix. This is exacerbated in the case of post-conflict constitution-building, which “is much more conducive to partial or even conflicting innovations than it is to the adoption of coherent designs whose elements reinforce each other.”⁵³ Thus, if constitutions are “a tradeoff between negotiation and coherence”,⁵⁴ so too are eternity clauses.

A final observation with regard to the promises and limits of eternity clauses is that many arguments in their favour do not differ much from those in favour of the role of constitutions generally.⁵⁵ In other words, the same preservationist-militant, expressivist, and aspirational functions are attributed to both unamendable provisions and to the basic laws which incorporate them. The difference is taken to be one of degree, or else eternity clauses are viewed as one mechanism through which a constitution’s intended function is signalled. A subsidiary aim of this dissertation is to show that the literature on eternity clauses would stand to benefit from clearer delineations between arguments explicitly addressing them and those about constitutions more generally.

As mentioned, this critique of eternity clauses will emerge at various points throughout the thesis, as well as at the end, when the disparate pieces of the analysis come together. I have provided the contours of this critique here to help guide the reader and to signal the key matters of contention they should be aware of when evaluating the problems and prospects of unamendable provisions.

Methodology

My methodology in this study is primarily normative functionalist. It is functionalist because I am interested in tracing one constitutional institution, the eternity clause, as it operates in several key jurisdictions. It is normative because my

⁵² Jon Elster, “Deliberation and Constitution Making” in Jon Elster, ed., *Deliberative Democracy*, Cambridge: Cambridge University Press, 1998, pp. 117-18.

⁵³ Donald L. Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict States”, *William and Mary Law Review*, Vol. 49, No. 4 (2008), pp. 1226-27.

⁵⁴ *Ibid.*, p. 1235.

⁵⁵ See Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality*, Baltimore: John Hopkins University Press, 2009.

analysis aims “to identify what constitutional designs or doctrines are better suited to producing consequences that are normatively valuable,”⁵⁶ in this case, to evaluate the constitutional design value of the eternity clause in a robust democracy. Chapter 1 also presents a detailed historical account of the adoption of eternity clauses in a small number of jurisdictions. This is intended to complement the functionalist method employed elsewhere in the thesis and to provide the necessary contextualisation of this constitutional instrument.

A note is here necessary regarding case selection. My focus on a limited number of case studies is akin to what Vicky Jackson has called the “more detailed case study” variant of functionalism,⁵⁷ or to what Ran Hirschl has termed “prototypical” case selection: “a prototypical case serves as a representative exemplar of other cases exhibiting similar pertinent characteristics.”⁵⁸ I proceed thus because the theoretical insights I wish to draw from my case studies inevitably require a density of analysis not possible in large-N studies. In other words, I am not interested in cataloguing existing eternity clauses, but in mapping the normative challenges they pose in the ongoing debates on constitutionalism and democracy. While descriptive work of this kind has seen a recent surge in the field of constitutional change,⁵⁹ such “structured comparative case studies”⁶⁰ are not the model I follow. Finally with regard to case selection, I also, where possible, refer to countries which have not adopted eternity clauses. I do so acknowledging that in the study of institutions, the path not taken is often as illuminating as the one followed.⁶¹ Thus, looking at instances where an eternity clause was tabled after negotiations surrounding a new constitution or by the judiciary provides us with a practical example of debates surrounding this constitutional mechanism in practice.

⁵⁶ Vicky Jackson, “Comparative Constitutional Law: Methodologies” in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 62.

⁵⁷ *Ibid.*, p. 64.

⁵⁸ Ran Hirschl, “On the Blurred Methodological Matrix of Comparative Constitutional Law” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press, 2007, p. 53.

⁵⁹ See volumes such as Andenas (2000), Oliver and Fusaro (2011), and Contiades (2012).

⁶⁰ Jackson (2012), p. 65.

⁶¹ See also Hirschl (2007), p. 63.

The interdisciplinary study of the occurrence of change or continuity in the constitutional polity has also become more fashionable. An early example is the work of Donald Lutz, who studied amendment rates in American and comparative constitutional law and correlated them to the difficulty of the amendment process.⁶² In their more recent book, Elkins *et al.* set out to not only identify and measure the effects of crises on constitutions, but also to link such instability to important aspects of constitutional design. These authors put forth “a theory of constitutional formation, adjustment, and endurance.”⁶³ Most relevant to my own inquiry is their search for any features of constitutions which render them more or less resilient in the face of shifting conditions.⁶⁴ One of the three such features which they correlate to constitutional endurance is constitutional flexibility, understood as the ease of both formal and informal amendment.⁶⁵ I will make use of the authors’ perhaps counterintuitive finding that more flexibility leads to more endurance,⁶⁶ a finding in direct opposition to the impetus towards adopting eternity clauses.

An anticipated criticism of my approach comes from those emphasising contextualism and the expressive function of law in its national milieu. In Mark Tushnet’s words:

Contextualism...emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and that we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.⁶⁷

Contextualist studies are often ethnographic or historical and focus on the institutional and societal contexts of specific doctrines.⁶⁸ As noted already, I also resort to the historical analysis of eternity clauses in a limited set of jurisdictions. However, if the aim of expressivist approaches is “to contrast the self-

⁶² Donald S. Lutz, “Toward a Theory of Constitutional Amendment”, *The American Political Science Review*, Vol. 88, No. 2 (1994), p. 355.

⁶³ Elkins *et al.* (2009), p. 7.

⁶⁴ Elkins *et al.* (2009), p. 8.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 89.

⁶⁷ Mark Tushnet, “Some Reflections on Method in Comparative Constitutional Law” in Choudhry (2007), p. 76.

⁶⁸ *Ibid.*

understandings found in the constitutional documents of different nations,"⁶⁹ this would be more attuned to a constitutional identity-approach to eternity clauses than to my own. As I have already noted above, I have reservations concerning the value of constitutional identity theory to encapsulate the full theoretical significance of eternity clauses, particularly when analysed in the key of democracy as I do here.⁷⁰ I am thus closer to the "contextualized functionalism" identified by Jackson as the middle ground between the two approaches and with an openness "to noticing how legal rules or doctrines may be affected by the identitarian or expressivist aspects of the constitution."⁷¹

Outline

The first chapter of the thesis investigates arguments about constitutional creation as an act of the constituent power and therefore as inherently democratic. I engage with both theorists who dispute the utility of the concept of constituent power, and with those who take it seriously as a frame of reference for discussing constitutional responsiveness. Among the latter, I look at both relational understandings of constituent power as inherently linked to representation and to democratic constitutionalists' reclaiming of the concept's radical potentialities in the form of openness to manifestations of popular will. I then examine three constitution-making episodes—those of Germany, India, and Bosnia and Herzegovina—and reconstruct the narrative of peoplehood and identity which underpinned them. In doing so, I uncover the drafting aims behind unamendable value commitments in these constitutions, as well as where these sit within the larger institutional setting.

The second chapter examines expressive theories which purport to explain unamendability as the decanted essence of a constitution. I engage with the most sophisticated two theories of constitutional identities with a view to pinpointing their added value to understandings of unamendability. I also highlight objections to such theories and question their added explanatory value to a study of eternity clauses and perhaps of constitutions more generally. The chapter concludes with an analysis of the German *Lisbon* decision of 2009, a case in which constitutional

⁶⁹ Tushnet (2007), p. 80.

⁷⁰ See also works cited in fn. 24.

⁷¹ Jackson (2012), p. 72.

identity was invoked in a sovereignty-based struggle between the national and supranational.

Chapter 3 scrutinises the content of eternity clauses in an effort to ascertain whether they can be substantively defended as democratic. Thus, it takes seriously unamendable commitments to certain state characteristics such as the nature of the regime, territorial divisions, or the religious or secular foundations of the state; the embrace of militant democracy instruments such as party bans; and minority protections such as entrenched fundamental rights of non-discrimination or executive term limits. The link between eternity clauses and constitutional review becomes evident here. The nature of their content makes judicial intervention for their protection not only unavoidable, but also problematic. Insofar as it engages first-order questions such as the nature of democracy to which the polity subscribes or the coordinates of the protection of the rule of law, it is unclear that the enforcement of certain unamendable provisions can be driven by a coherent judicial standard rather than judges' own value assessments.

Fourth, the thesis investigates the proposition that an eternity clause can be removed by way of repeal in the case of formal provisions or judicial reversal in that of judicial doctrines. Chapter 4 builds on experiences with attempted constitutional revisions in Turkey and India. It shows that assumptions about the possibility of repeal are unfeasible in the face of the increasingly entrenched nature of eternity clauses themselves or of deep-seated societal divisions which render radical change impossible. The chapter also engages with arguments that unamendability is never truly eternal but rather a roadblock which triggers high levels of deliberation when fundamental constitutional changes are sought. I suggest that this reading ignores the realities of constitutional debates, which often do not set out the necessary conditions for constitutional politics to be inclusive and deliberative. Finally, the chapter discusses the difficulties in distinguishing between amendments and revolutions and suggests that the latter may be very costly and difficult to achieve even in peaceful time.

The last chapter brings back the question of the rise in unamendable provisions in constitutions around the world alongside an upsurge in recourse to popular

involvement in constitution-making. Examples explored in Chapter 5—those of South Africa, Kenya, Iceland, and Tunisia—prove that participatory constitution-making is not automatically opposed to the adoption of eternity clauses. The evidence is still thin and we can only speculate, beyond this descriptive observation, about the appeal of unamendability in contexts outside post-conflict reconstruction. To what extent drafters are aware of the full set of implications of adopting such a mechanism within the larger constitutional architecture is also not clear.

The conclusion of the study as a whole is that the inclusion of an eternity clause in a democratic constitution creates an irreconcilable tension at the time of constitutional enforcement. It leads to the empowerment of the judiciary, called upon (or taking it upon itself) to settle foundational questions of the constitutional order which should not be within the judicial remit. The thesis contends that this development unavoidably results in the judicialisation of constitutional politics and in the impoverishment of democracy in the long term.

Chapter 1

Eternity clauses as an expression of constituent power

This chapter turns to constituent power as a democratic theory of legitimation of constitutions and, by implication, of eternity clauses. In so doing, it seeks to open up the often mythologised process of constitution-making by engaging seriously with the questions of who, precisely, speaks at the founding moment, what is being spoken, and what happens to this and other voices after the constituent moment. I thus follow the lead of those who see in constituent power “a critical lens by which to evaluate existing political practices and choices and, particularly, various forms of constitutional making.”⁷² Understood as a reformulation of popular sovereignty and as such, as a restatement of democratic principles of self-government and self-determination, constituent power provides a normative criterion by which to assess the legitimacy of a constitution’s birth and of the constitutional order it instantiates.⁷³

My argument will unfold in several steps. I will first consider the nature of constituent power as a theory of democracy. I explore two broad strands of theories of constituent power. One, normativist (represented by authors such as David Dyzenhaus), finds no value in the concept, seeing the constitutional order as capable of generating its own normativity. Another, author-based, seeks to recover ‘the people’ behind a constitutional text and has itself two strands: one normative (represented by authors such as Martin Loughlin), which equates authorship to a theory of representation, and the other empirical (exemplified by scholars such as Joel Colón-Riós), for whom there is a historical aspect to authorship. I will argue, together with Loughlin and against Dyzenhaus, that constitutional legality is not self-generating and that constitutional origins do matter. Even while it is not the sole means of achieving constitutional legitimacy, we can and must inquire into the

⁷² Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power”, *Constellations*, Vol. 12, No. 2 (2005), p. 238.

⁷³ *Ibid.*

foundational act in order to evaluate who and what was decided. The case studies examined later in this chapter serve to reconstruct constitutional foundations in this vein. Secondly, together with democratic constitutionalists such as Colón-Ríos, I maintain that there exists an indissoluble link between constituent power and democracy, at least as the former has come to be understood in contemporary constitutional theory. In Antonio Negri's words, "to speak of constituent power is to speak of democracy."⁷⁴

I then look at constituent power from the perspective of its manifestations in the constitutional order and posit three conclusions. First, I contend that to consider constituent power irrelevant to the existing constitutional order, whether because it is seen as extra-legal or else closed off immediately after the founding moment, leads to a mystification of constitution-making. At the very least, it may help cloak and entrench undemocratic constitutional beginnings. Second, I argue that while constituent power resists complete institutionalisation and is inherently reliant on representation, we can still speak of more or less legitimate episodes of constitution-making depending on the nature of that representation. Chapter 5 will pick up on this point when discussing participatory constitution-making as an emerging norm in constitutional theory and practice. Third, the rise of internationalised constitution-making shows two things; on the one hand, that the link between constituent power and the people is problematic in cases where external actors constitute the polity; on the other hand, that to speak of constituent power as unlimited in the tradition of Emmanuel Joseph Sieyès and Carl Schmitt is increasingly inapt. The advent of international standards of constitution- and state-making, as well as evidence of constitutional courts interpreting their powers of substantive review as extending to future episodes of constitutional creation prove this latter point.

I proceed by first outlining several key theories of constituent power and the implications of their main tenets to arguments about eternity clauses. It will not be possible to engage with these at length; instead, my aim will be to focus on those theoretical insights which have had the most significant impact on understandings

⁷⁴ Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, Minneapolis, MN: University of Minnesota Press, 1999, p. 1.

of unamendability. I mainly rely on Loughlin's relational account of constituent power as political concept and refute Dyzenhaus's normativist repudiation of the concept's utility in constitutional theory. I then examine the work of democratic constitutionalists such as Joel Colón-Riós, who have both wrestled with constituent power as a rhetorical device of democratic legitimation and directly addressed its tense relationship with unamendability. I argue, however, that neither Loughlin nor Colón-Riós offer fully satisfactory answers to the problems raised by eternity clauses for constituent power theory. The first because, even while calling against the mystification of constitutional beginnings, ultimately focuses on representation and not on authorship. The second because he underestimates these problems at the same time as he tries to resolve them based on an unworkable distinction between fundamental and non-fundamental constitutional change. Finally, I explore recent calls for the enrichment of the theoretical apparatus of constituent power in light of the recognition of the transnational forces which necessarily impact constitution-making today. I engage with the work of scholars such as Christine Bell, Zoran Oklopčić, and Hans Agne, who in different ways have called for the expansion of the concept's boundaries so as to reflect the reality of internationalised constitution-making.

In the second part of this chapter, I examine three constitutional beginnings: those of Germany, India, and Bosnia and Herzegovina. My objective will be to reconstruct the foundational narratives of these three constitutional orders, including understandings of the people as bearers of constituent power, and to link these narratives to the form and content of their respective eternity clauses. Germany's eternity clause, arguably the paradigmatic example of a formalised provision on unamendability, can only be understood within the context of that country's highly legalistic, anti-populist, value-oriented constitutional foundations. India's constitution incorporates the extensive powers of judicial review which allowed its Supreme Court to announce the basic structure doctrine and to defend it on popular sovereignty grounds. Finally, Bosnia and Herzegovina's constitution is an extreme case of internationalised constitution-making. Its unamendable provision raises distinct legitimacy questions given this international source and content.

This chapter focuses on constitutional beginnings—the negotiation, drafting, and adoption of these three constitutions—as the starting point for any inquiry into the legitimacy of constitutions. Yet, while I wish to reclaim the importance of reconstructing what actually happened during these initial stages, I accept that constitutional legitimation may come about in spite of, rather than on account of, constitutional beginnings. If we can distinguish, to paraphrase Christine Bell, between constituent power as the empirical claim of a people invoking agency over a constituent act and as a heuristic account of constitutional normativity,⁷⁵ this chapter may be said to be concerned with both. It primarily looks at the adoption of eternity clauses as a historical occurrence in a particular context, but as one which has been subsequently incorporated into narratives of constitutional authority and legitimacy. Chapters 2 and 3, which analyse the substantive content of unamendable provisions and their implementation by constitutional courts, may be said to build on the second conception of constituent power, as rhetorical device justifying the constitution’s authoritative claims.

1.1 Constituent power theory as a democratic theory of eternity clauses

1.1.1 History of the concept of constituent power

There are several ways to tell the story of constituent power. One narrative would focus on the origins and evolution of the concept. It would trace its etymological roots (as “founding together, creating jointly, or co-establishing”⁷⁶) then illustrate the concept’s import to modern constitutional theory.⁷⁷ Inevitably in such accounts,

⁷⁵ Christine Bell, “Litigating Constituent Power: The International Law of Constitutional Transitions”, Paper presented at the International Society of Public Law (ICON-S) Annual Conference, 1-3 July 2015 (on file with author).

⁷⁶ Andreas Kalyvas, “Constituent Power”, *Political Concepts*, 2013, available at: <http://www.political-concepts.org/constituentpower/>.

⁷⁷ For reconstructions of the concept’s evolution in French, English, and American constitutional thinking, see, respectively, Lucien Jaume, “Constituent Power in France: The Revolution and Its Consequences” in Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 2008, pp. 67-85; Martin Loughlin, “Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice” in *ibid*, pp. 27-48; and Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, New York: W.W. Norton and Company, 1989.

constitutional theorists turn to the work of Emmanuel Joseph Sieyès, who drew a distinction between the unlimited constituent power and the limited constituted powers granted in the constitution. For Sieyès, the former belonged to the nation as a pre-political community which could, however, be represented by a constituent assembly as an extraordinary organ tasked with constitutional change (as opposed to the ordinary legislature, tasked with the business of everyday lawmaking).⁷⁸ This theory's considerable influence, most notable in French public law but also elsewhere, has resulted in a perception of the people as exterior (and even threatening) to legal institutions and, barring the most exceptional circumstances, as mediated by representation.⁷⁹

An alternative account would focus on theoretical disputes surrounding the theory of constituent power. Perhaps the most consequential for current constitutional thinking is that between Carl Schmitt and Hans Kelsen. Schmitt understood constituent power as a secularised theological concept and equated it to an unlimited political power to be contrasted with the amending power—the latter a legal competence subject to limitations.⁸⁰ Kelsen explicitly distinguished between the political and the legal, and conceived of law as a system of norms within which each norm was legitimised by a higher norm; at the peak of this hierarchy of norms was a founding norm he termed the *Grundnorm*.⁸¹ For Kelsen, the question of the authorisation of this apex norm could not be answered by the law itself: we can only presuppose that its validity rests on it being “whatever the framers of the first constitution have expressed as their will”.⁸²

A third option to tell the story of constituent power would build on such historical and theoretical developments to reconstruct opposing understandings of the

⁷⁸ Emmanuel Joseph Sieyès, *What Is the Third Estate* in Michael Sonenscher, ed., *Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791*, Indianapolis, IN: Hackett Publishing, 2003, pp. 92-162. See also Raymond Kubben, “L’Abbé de Sieyès: Champion of National Representation, Father of Constitutions” in Denis Galligan, ed., *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham*, Oxford: Oxford University Press, 2014, pp. 290-311.

⁷⁹ On the influence of Sieyès’s thought on French constitutional theory, see Jaume (2008).

⁸⁰ Carl Schmitt, *Constitutional Theory*, Durham, NC: Duke University Press, 1997.

⁸¹ Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Oxford: Clarendon, 1996, pp. 55-75.

⁸² *Ibid.*, p. 57.

concept, which in turn offer distinct answers to the question of the concept's place in constitutional theory today. We can here contrast an understanding of the concept as the highest power of command, traced back to the thought of Jean Bodin and Thomas Hobbes, with a less static and statist emphasis on the power of the people to constitute—a jurisgenerative understanding of the constituent 'power to' as opposed to 'power over',⁸³

Any of these avenues would provide insights into the link between constituent power theory and eternity clauses. The distinction between constituent and constituted power(s) underlies theories which differentiate between original and derivative constituent power and find amendment to be a secondary power of the latter type.⁸⁴ The Schmitt-Kelsen debate would further illuminate two problems raised by eternity clauses: of the justification of substantive limits on constitutional change and of the appropriate guardian of any such limits. With regard to the former, Schmitt emphasised the necessity of such substantive limitations to safeguard both the identity and the decisions of the constituent, whereas Kelsen accepted any limitation on amendment, even an absolute one, so long as it was formalised.⁸⁵ With regard to constitutional enforcement, the two differed again, with Schmitt emphasising the president as constitutional guardian and Kelsen a constitutional court largely in the form we know it today.⁸⁶ The third narrative would serve us well if we wanted to uncover the origins and perhaps forgotten possibilities of the concept and how it has fared in political theory. All three of these accounts accept the value of constituent power as a concept in constitutional theory. As will be seen shortly, this is not shared by all constitutional scholars, however. I proceed by outlining sceptical arguments against the utility of constituent power as a concept, after which I discuss its revival in contemporary constitutional debates.

⁸³ Kalyvas (2005), p. 233 and Martin Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press, 2003, p. 112.

⁸⁴ For an exploration of these theories as they apply to unamendable provisions, see Roznai (2014a), Chapter 4.

⁸⁵ For a discussion of these two positions, see Andrew Arato, "Multi-track Constitutionalism Beyond Carl Schmitt", *Constellations*, Vol. 18, No. 3 (2011), pp. 331-35.

⁸⁶ For an account of this debate between the two, see Lars Vinx, ed., *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 2015. See also Arato (2011), pp. 335-37.

Alongside these explorations, I will also explain their import to the theory of eternity clauses.

1.1.2 Constituent power sceptics and eternity clauses

Liberal constitutionalists such as David Dyzenhaus have criticised the utility of the concept of constituent power in understanding constitutional democracy. He has argued, first, that “the question of constituent power simply does not arise for a liberal account of the rule of law”,⁸⁷ and, second, that it is unhelpful in understanding the authority of law.⁸⁸ Dyzenhaus defends the first claim on account of the fact that normative legal theory denies the inevitability of the dualism at the core of the question of constituent power, a dualism between law and politics, between the normative and the prerogative. He terms theories such as Carl Schmitt’s “negatively prescriptive political theories” and calls them both non-normative and anti-liberal.⁸⁹ Legal authority is instead constituted by principles required to make sense of an on-going practice of legality, Dyzenhaus argues, and based on the acceptance of the regulative assumption of collaboration in the constitutional project by all institutions of the legal order.⁹⁰ He does not deny that dualism exists, but explains that it “can be responded to successfully unless one presupposes its inevitability.”⁹¹ In short, legitimacy for Dyzenhaus results from the continued practice of rule by law: authority emerges as exercised through the institutions of the legal order.⁹² In other words, it is law’s intrinsic qualities which give it authority.⁹³

Dyzenhaus defends his second claim by arguing that theories of constituent power fail on two accounts: first, they result in ambivalence about whether authority lies within or without the legal order and second, there is an affinity between such

⁸⁷ David Dyzenhaus, “The Politics of the Question of Constituent Power” in Loughlin and Walker (2008), pp. 129-30.

⁸⁸ David Dyzenhaus, “Constitutionalism in an Old Key”, *Global Constitutionalism*, Vol. 1, No. 2 (2012), p. 229.

⁸⁹ Dyzenhaus (2008), p. 132.

⁹⁰ *Ibid.*, p. 144.

⁹¹ *Ibid.*, p. 145.

⁹² *Ibid.*, p. 139.

⁹³ Dyzenhaus (2012), p. 233.

theories and legal positivist accounts of authority.⁹⁴ He calls this second exercise “deflationary”, as it deflates the claims of constitutionalism.⁹⁵ He proposes instead a one-system theory of law within which the regulative ideal is not a supposed hierarchy within positive law, but “the principles of legality that together make up a constitutional morality of legal order”, whether or not articulated in a written constitution.⁹⁶ In such a theory, the notion of constituent power becomes superfluous:

[I]n liberal democratic theories the founding moment becomes notional, and is displaced onto the validity-producing mechanisms of the legal order. That leads to the equation of authority with technical validity, an equation that Schmitt correctly pointed out makes constitutionalism altogether vacuous. In contrast, the idea of constituent power is superfluous to a one-system theory, since such a theory sees the authority of law, and of any legal instrument such as a bill of rights, as wholly internal.⁹⁷

To Dyzenhaus, then, constitutionalism is a project, and only one of the possible paths towards the overarching project of the rule of law.⁹⁸ Moreover, it is “an unfinished and unfinishable project” inasmuch as its object—regulating public power—is never fully achieved.⁹⁹ A written constitution is, contrary to widespread opinion, neither a special advance in this project, nor its achievement, Dyzenhaus claims.¹⁰⁰ He concludes that constituent power is “at best a distraction for legal theory” and at worst subversive of constitutionalism’s ideals.¹⁰¹

How, then, would an account along these lines explain eternity clauses within a constitution, whether formalised as a positive constitutional provision or taking the form of a judicial doctrine of implicit limits on amendment? It would appear that, so long as they conform to principles of the rule of law, they are unproblematic for a liberal account of constitutionalism such as Dyzenhaus’s. Moreover, they might be viewed as not just conforming to, but explicitly reinforcing the core commitments to

⁹⁴ *Ibid.*, p. 229.

⁹⁵ *Ibid.*, p. 234.

⁹⁶ *Ibid.*, p. 254.

⁹⁷ *Ibid.*, p. 253.

⁹⁸ *Ibid.*, p. 256.

⁹⁹ *Ibid.*, p. 257.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

legality, thus making them written embodiments of the criteria, internal to the legal order, necessary for law's authority. Eternity clauses thus become the embodiment of Dyzenhaus's implicit universalism.

There are several problems with such accounts. At their basis, Martin Loughlin has argued, rests the constitution as "an idealized representation of legal ordering", an autonomous abstraction.¹⁰² When inquiring into the "conditions that sustain constitutionality", Loughlin posits, "the question of how legal authority is generated within the political domain becomes critical."¹⁰³ I agree with Loughlin and against normativist theorists such as Dyzenhaus that the founding moment in a constitutional order is not pure myth, and that constituent power is not a mere presupposition. To again use Loughlin's words,

Constitutions are not purely normative constructions: they are bound up with the historical processes of state-building. Modern constitutions, drafted at particular moments in time, establish their authority only through a political process in which allegiance is forged.¹⁰⁴

This seems to me especially pertinent when discussing eternity clauses, which can only be properly understood, and justified, in the context of their adoption. Germany's eternity clause has most often been read as a direct response to the demise of the Weimar constitution. India's basic structure doctrine was also developed in the context of crisis, as recourse against the abuse of emergency powers by the country's then-Prime Minister, Indira Gandhi. Underpinning them is a desire to see constituent power closed off following the founding moment lest its manifestation results in the overthrow of the constitutional order as we know it. Thus, the "inherent paradox in the constitution-making process"¹⁰⁵—the crisis conditions in which it takes place, contrary to the calm reflection ideally required by constitution-making—becomes the very *raison d'être* of eternity clauses.

¹⁰² Martin Loughlin, "The Concept of Constituent Power", *European Journal of Political Theory*, Vol. 13, No. 2 (2014), p. 223.

¹⁰³ *Ibid.*, p. 224.

¹⁰⁴ *Ibid.*, p. 227.

¹⁰⁵ Elster (1998), pp. 117-18.

A further problem arises from the practical incompatibility between the reality of eternity clauses and commitments to the rule of law. To the extent that eternity clauses seek to protect recognisable elements of the rule of law, we can imagine Dyzenhaus accepting them. What happens, however, when this content is unclear and varies from case to case? As will be seen in Chapters 2 and 3, this is precisely what has been the fate of India's basic structure doctrine but also of other unconstitutional constitutional amendment doctrines.

1.1.3 Relational understandings of constituent power and eternity clauses

Martin Loughlin explicitly rejects such normativist scepticism of constituent power and maintains its centrality for constitutional thought. He sees it instead as expressing the tension between democracy and constitutionalism and as an inherently political concept.¹⁰⁶ Loughlin proposes a relational understanding of constituent power. The latter exposes "the tension between unity and hierarchy in constitutional foundation and the tension between the people-as-one and the people-as-governed in the course of constitutional development."¹⁰⁷ Loughlin accepts Carl Schmitt's contentions about constitutional ordering, including the inherent tension between sovereignty as the representation of the autonomy of the political and the sovereign as constituent power,¹⁰⁸ but diverges from Schmitt in his focus on representation. "'The people' must itself be regarded as a representation", Loughlin argues, and political power is generated via the differentiation of the people from the existential reality of a multitude.¹⁰⁹ In his view, and again contrary to Schmitt, relationism not only maintains the autonomy of the political, but sees political space as "incorporating an unresolved dialectic of determinacy and indeterminacy, of closure and openness."¹¹⁰ Constituent power is not just power

¹⁰⁶ Loughlin (2003), p. 112.

¹⁰⁷ Loughlin (2014), p. 218.

¹⁰⁸ *Ibid.*, p. 227.

¹⁰⁹ *Ibid.*, p. 228. See also Loughlin (2003), pp. 112-13.

¹¹⁰ Loughlin (2014), p. 228.

(force), but “a dialectic of right – of political right (*droit politique*) – that seeks constantly to irritate the institutionalized form of constituted authority.”¹¹¹

With respect to constituent power explaining constitutional ordering, Loughlin resorts to the paradoxical nature of the founding moment to explain that political power is maintained and augmented via institutionalisation.¹¹² Thus, a constitutional framework is needed as a mechanism to prevent political conflict and itself generates power:

Political power is generated through symbolic representation of foundation and constitution and is then applied through the action of government. Power thus resides neither in ‘the people’ nor in the constituted authorities; it exists in the relation established between constitutional imagination and governmental action.¹¹³

For Loughlin, therefore, constituent power “expresses the generative aspect of the political power relationship”¹¹⁴ and exists only as a projection of the expression of not just the many, but of all.¹¹⁵ It avoids both the materialist fallacy, which reduces constituent power to fact, and the normativist one, which absorbs it as a founding norm.¹¹⁶ Moreover, ‘the people’ at foundation-time must be conceptualised not just as a unity, but as part of a hierarchy (a governing relationship).¹¹⁷

One of Loughlin’s main arguments is especially relevant when investigating eternity clauses. He shows that his relational theory explains the continued function played by constituent power in the legal order, “as an expression of the open, provisional and dynamic aspects of constitutional ordering.”¹¹⁸ Constituent power is therefore to be understood as “the power that gives constitutions their open, provisional, and dynamic qualities, keeping them responsive to social change and reminding us that the norm rests ultimately on the exception.”¹¹⁹ This is also why he rejects the

¹¹¹ *Ibid.*, p. 229 and 232.

¹¹² *Ibid.*, p. 231.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p. 232.

¹¹⁶ *Ibid.*, pp. 231-32. See also Loughlin (2003), pp. 111-13.

¹¹⁷ Loughlin (2014), p. 233.

¹¹⁸ *Ibid.*, p. 232.

¹¹⁹ Loughlin (2003), p. 131.

distinction between original and derived constituent power as “misconceived”.¹²⁰ In such a reading of constituent power, then, its potential resides in the very tension it embodies and in the openness, and associated responsiveness, it triggers in the constitutional order. To the extent that eternity clauses seek to institutionalise closure, they operate on an opposite logic.

Where I would depart from Loughlin is in his reluctance to provide more contour to the question of who represents the people. In wanting to keep the answer to this question indeterminate, he seeks to avoid the danger of totalitarianism via claims of legitimacy of “the-people-as-one.”¹²¹ What began as a call to take constitutional authorship seriously appears, in the end, not to be about authorship at all. Loughlin terms direct democracy a “particularly ineffective” method of rule, given that “[a] properly constituted political order must be based on the notion of ‘indirect rule’ in which the representative remains independent of the people.”¹²² While we can accept that, “being relational, political power does not reside in any particular locus”,¹²³ I believe we can say more about its institutionalised forms, including accepting certain forms of direct and participatory democracy. We otherwise risk losing precisely the radical potential of the notion of constituent power which made it so appealing to committed democrats in the first place. Constitutional technology has advanced to the point of offering potentially workable institutions to approximate constituent will, and these should be integrated by constitutional theorists in their understandings of constituent power. I provide further detail on these institutions in Chapter 5.

1.1.4 ‘Weak constitutionalism’, constituent power, and eternity clauses

Joel Colón-Riós seeks to restore the radical potential of constituent power within a larger project to redeem constitutionalist commitments to democracy, which is why his theory is closest to my own project. He explains appeals to constituent power as always involving a challenge to the constitutional status quo, “a change in the locus

¹²⁰ Loughlin (2014), n. 46.

¹²¹ *Ibid.*, p. 234.

¹²² *Ibid.*, p. 63.

¹²³ Loughlin (2003), p. 112.

of the ultimate constitution-making power, a constitutional rupture that would bring the juridical order closer to the people."¹²⁴ Its destabilising force wanes with institutionalisation, but it is prone to reactivation under certain circumstances.¹²⁵ I share Colón-Riós' interest in constituent power as a concept which illuminates not only constitution-making as such, but also its transformation:

If it is to have a place in contemporary constitutional theory and practice, constituent power should be seen not only in light of its usefulness for explaining the nature of constitution-making, but in light of its transformative impulse, which procures to increase the political power of those that are subject to, but not yet authors, of a constitutional regime.¹²⁶

Colón-Riós directly addresses the question of whether a constitution containing "those types of norms whose modification is out of the scope of the decision-making power of popular majorities" can be considered democratically legitimate.¹²⁷ He argues that it can be, however, "a democratic conception of constitutionalism should rest on the idea that ordinary citizens must be allowed to propose, deliberate and decide upon important constitutional transformations through the most participatory methods possible", a conception which he calls "weak constitutionalism".¹²⁸ In giving his answer, Colón-Riós draws a distinction between two dimensions of democracy: "democracy at the level of daily governance" and "democracy at the level of the fundamental laws".¹²⁹ The latter can only be realised when mechanisms for the transformation of the constitution are available and "consistent with the principles of popular participation and democratic openness."¹³⁰ In short, Colón-Riós sees constituent power as "the expression of

¹²⁴ Joel Colón-Riós, "Five Conceptions of Constituent Power", *Law Quarterly Review*, Vol. 130 (2014), p. 335.

¹²⁵ *Ibid.*, pp. 335-36.

¹²⁶ *Ibid.*, p. 336.

¹²⁷ Colón-Riós (2012a), p. 2.

¹²⁸ *Ibid.*, p. 5.

¹²⁹ *Ibid.*, p. 6. He explicitly distinguishes his division from that of Bruce Ackerman by pointing out that the latter did not clarify the role of the citizenry in his theory, whereas "the second dimension of democracy requires the actual participation of citizens in the positing and (re)positing of the fundamental laws through mechanisms such as citizens assemblies, referendums, popular initiatives and different forms of local and direct democracy." *Ibid.*, pp. 39-40. See also p. 70.

¹³⁰ *Ibid.*, p. 6.

democracy at the level of the fundamental laws.”¹³¹ Thus, rather than viewing it as a threat, weak constitutionalism understands constituent power as “the possibility of correcting existing injustices through highly participatory episodes of constitutional change.”¹³²

With regard to eternity clauses, Colón-Riós does not negate their potentially problematic relationship to the principle of democratic openness. He argues, however, that they only make explicit what all constitutions have: “a fundamental core whose alteration is equivalent to the creation of a new constitution.”¹³³ Thus, in his words, the doctrine of unconstitutional constitutional amendment used by courts “allows us to differentiate between mere amendments and (re)constitution-making episodes”.¹³⁴ Chapters 2 and 3 will contradict this assumption and illustrate cases where, rather than reinforcing uncontroversial tenets of constitutionalism, eternity clauses have functioned to protect elite interests. The distinction between constitutional revision and amendment is notoriously difficult to conceptualise (see discussion in Chapter 4), and might not be able to bear the heavy burden which Colón-Riós entrusts it with. Just as his distinction between fundamental and ordinary law-making begs more refinement,¹³⁵ so too does his understanding of the boundaries of constitutional change, between amendment and revolution.¹³⁶ When dealing with an unamendable commitment to democracy, or to federalism, for instance (as both Germany and India have enshrined), we are dealing with concepts whose boundaries are fuzzy and reliant on interpretation.

Colón-Riós can thus maintain his defence of eternity clauses only by drawing a distinction between constituent and amending power, a division embraced by authors such as Roznai but which, as Loughlin noted above, is highly problematic. Such a division is attractive insofar as it resolves the conundrum of substantive

¹³¹ *Ibid.*, p. 8.

¹³² *Ibid.*, p. 7. See also p. 95 on the potential dangers posed by the exercise of constituent power to a regime’s aspirations for permanence.

¹³³ *Ibid.*, pp. 127-28.

¹³⁴ *Ibid.*, p. 132.

¹³⁵ A similar argument is put forth by Zoran Oklopcic in his review of Colón-Riós’ *Weak Constitutionalism*, *I-CONnect Blog*, 15 October 2012a, available at <http://www.iconnectblog.com/2012/10/joel-Colón-Riós-weak-constitutionalism-democratic-legitimacy-and-the-question-of-constituent-power-london-routledge-2012/>.

¹³⁶ Colón-Riós (2012a), p. 129.

limits on the power to review constitutions. However, it resolves it by denying it is a conundrum to begin with: instead, the power to amend the constitution is severed from the power which instituted the basic law and becomes a form of delegated competence to which any number of limitations may apply.¹³⁷ This view is inherently formalistic, relying as it does on a clear demarcation between popular sovereignty during the founding of the constitutional order and the inherently limited legislative power mandated by positive law. Rather than harness the democratic possibilities of constituent power, this approach relies on a view of constitution-making as a moment in time, clearly delineated and closed off, rather than as a “process of becoming”.¹³⁸

Colón-Riós also reads eternity clauses as “only binding on the constituted powers acting through the ordinary amendment process, not on the sovereign people.”¹³⁹ He admits that the German Constitutional Court recently used language that contradicted this view,¹⁴⁰ but deems this an exception. On the contrary, the *Grundgesetz* seems to have been adopted with precisely the intent to eliminate any claim to populism, with some readings of its Article 79(3) indicating a virtually limitless legalisation of constituent power.¹⁴¹ It is unclear whether there is much to rely on in the apparatus of eternity clauses that would ensure his favoured outcome—their interpretation as not constraining constituent power as exercised by the people—other than hoping that judges would exercise self-restraint. However, just because Colón-Riós is not committed to the “perpetual constitution”,¹⁴² it does not follow that a constitutional court with far-reaching review powers would not be. I return to this argument in Chapter 4.

Finally, Colón-Riós defends eternity clauses when the constitution allows for other, highly participatory procedures of constitutional change to be deployed when

¹³⁷ See Roznai (2014a), p. 58.

¹³⁸ Loughlin and Walker (2008), p. 4.

¹³⁹ Joel Colón-Riós, “A Reply to Professor Zoran Oklopčić”, ICONnect Blog, 15 October 2012b, available at <http://www.iconnectblog.com/2012/10/a-reply-to-professor-zoran-oklopčić/>.

¹⁴⁰ *Lisbon Case*, BverfG, 2 BvE 2/08, 30 June 2009, paras. 216-218. This case will be analysed in detail in Chapter 2.

¹⁴¹ Christoph Möllers, “‘We Are (Afraid of) the People’: Constituent Power in German Constitutionalism” in Loughlin and Walker (2008), pp. 87 and 97.

¹⁴² Colón-Riós (2012a), pp. 7 and 18.

change is desired at the level of fundamental laws. In a sense, his approach to the democracy question of eternity clauses is to look for answers in the wider constitutional design, by identifying alternative avenues for popular involvement in constitutional change. I sympathise with this approach, but reach a different conclusion. Given the inevitable link between eternity clauses and strong models of judicial review of constitutionality (see Chapters 2 and 3 below), I suggest that the democratic problems posed by such clauses run even deeper than Colón-Ríos suggests. A commitment to responsive constitutionalism cannot be achieved by way of 'add-on' participatory mechanisms which may themselves be regulated by untouchable substantive values. I develop this point further in Chapter 5.

1.1.5 Constituent power in a transnational context

Another novelty in recent scholarship on constituent power has been the attempt to reconcile it with the increasingly internationalised context in which constitution-making occurs. Post-constituent constitutionalism has been discussed in reference to the European Union and the challenges it presents to constitutional authority.¹⁴³ There have also been explorations of equivalents to 'the people' in international law in the context of the latter's constitutionalisation.¹⁴⁴ We may thus indeed be witnessing the first steps towards a "systematic theory of constituent power beyond the state."¹⁴⁵

Scholars have reacted to the prevalence of internationalised constitution-making of the type exemplified by Bosnia and Herzegovina discussed in section 1.4.3 below by calling for a substantive revision of our understanding of constituent power to accommodate the reality of external forces determining the contours of a polity. Thus, people like Christine Bell, Hans Agne, and Zoran Oklopčič have attempted to expand the toolbox available to constitutional theorists so as to better reflect

¹⁴³ Neil Walker, "Post-Constituent Constitutionalism? The Case of the European Union" in Loughlin and Walker (2008), pp. 247-68.

¹⁴⁴ Bardo Fassbender, "We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law" in Loughlin and Walker (2008), pp. 269-90. For a sceptical view of the presence of constituent power in the transnational context, see Alexander Somek, "The Constituent Power in a Transnational Context", *Transnational Legal Theory*, Vol. 3, No. 1 (2012), pp. 31-60.

¹⁴⁵ Markus Patberg, "Constituent Power beyond the State: An Emerging Debate in International Political Theory", *Millennium Journal of International Studies*, Vol. 42, No. 1 (2013), p. 224.

constitution-making in a web of transnational forces. While such efforts should be seen as part of a broader concern in the literature on constituent power to test the explanatory power of the concept in transnational contexts, they are different in an important respect. Unlike discussions of the constituent power within the European Union or the United Nations system, the perspective taken by scholars such as Bell, Agne, and Oklopčić remains primarily inward-looking—they are still concerned with constituent power as it legitimises domestic constitutional orders; they simply acknowledge the transnational web within which such legitimation can and sometimes must take place.

Bell finds a growing concern at the international level with regulating domestic exercises of constituent power. She identifies “instances where international law appears to attempt to regulate constituent power by trying to constrain when and how polities legitimately constitute themselves as such” including by way of international standard-setting, emerging supranational adjudication, and an international technology of governance of constitution-making seeking to regulate constitutional transitions.¹⁴⁶ Unlike conversations on the constitutionalisation of international law or the internationalisation of constitutional law, therefore, Bell is focusing on an emergent “international law of constituting polities”.¹⁴⁷ She looks at standards and practices produced and promoted by international and regional bodies such as the United Nations, the African Union, the Organization of American States, the European Union, and the Council of Europe expressly aimed at regulating and constraining constitution-making.¹⁴⁸ Moreover, she argues, international bodies have increasingly engaged in adjudicating such international standards, including in cases involving first order political questions in the domestic polity.¹⁴⁹ An example of this is provided by Bosnia and Herzegovina, whose case is detailed below.

From the point of view of constituent power and its relationship to eternity clauses, Bell’s observations are significant in two respects. On the one hand, she makes the

¹⁴⁶ Christine Bell, “What We Talk About When We Talk About International Constitutional Law”, *Transnational Legal Theory*, Vol. 5, No. 2 (2014), p. 242. See also Bell (2015).

¹⁴⁷ Bell (2014), p. 266.

¹⁴⁸ *Ibid.*, p. 270.

¹⁴⁹ *Ibid.*, p. 273.

empirical observation that international bodies are increasingly involved in assessing the legitimacy of constitutional change processes. This observation is confirmed by this thesis and detailed in its conclusion. On the other hand, she expresses worry at these bodies' involvement in requiring constitutional reform which "in essence challenge[s] and demand[s] a re-working of domestic constitution-framing efforts."¹⁵⁰ The result is the development of an unconstitutional amendment doctrine at the supranational level, which suffers from even more acute legitimacy problems than its domestic counterparts when we consider the precarious position of international judges as guardians of domestic constitutional orders.¹⁵¹ As Bell concludes, the latter can only stake a legitimacy claim in the name of universal values of constitutionalism such as democracy, the rule of law, separation of powers, human rights and respect for and protection of minorities.¹⁵² Constitutionalism is thus to be protected as a good in itself. The overlap with unamendable provisions which insulate similar principles is obvious. What Bell identifies, however, is the emergence of international guardians of these same principles that can and have clashed with their domestic counterparts. Bell gives the examples of Honduras in 2009, when the Organization of American States and the country's Supreme Court reached different conclusions on the ousting of the president (the case is discussed in greater depth in Chapter 3 below), and of Hungary in 2011, when the Venice Commission issued reports critical of the constitutional changes operated by the government in spite of the amendment procedure being otherwise complied with. These cases, together with Bosnia's, provide evidence of first order political questions of the sort protected by eternity clauses increasingly becoming the battleground between the supranational and the domestic levels. Whether constitutional change is a legitimate act of the constituent power is no longer a domestic question but may be scrutinised from beyond the state.

Agne has spoken of an entirely new mode of viewing democratic state founding: "The founding of a state is democratic—that is, constituted by the people subject to

¹⁵⁰ *Ibid.*

¹⁵¹ Bell (2015).

¹⁵² *Ibid.*

this foundational decision—when agreed to by as many persons as possible within and beyond the boundaries of the state to be founded.”¹⁵³ He goes on to explain that people constitute states in order to protect their autonomy, and this is contingent on people who will remain outside that state once formed.¹⁵⁴ This approach, Agne claims, overcomes the founding paradox of democratic theory (democratic founding deriving legitimacy from a people not yet formed): “the paradox of democratic beginnings will remain unsolved as long as we presume that a people is founded only by itself.”¹⁵⁵ He provides an alternative view of democratic legitimacy, stating that “the notion of a democratically legitimate people may be defined as a people recognized as such by, or justified in the views of, even those who will not play the role of citizens in the state about to be constituted.”¹⁵⁶ Crucially, Agne envisions a potentially positive role for these external constituents. They can reduce oppression by expanding the range of constitutional choice of the people and can enhance internal freedom, given that everyone affected by a decision should be able to participate.

Oklopcic is similarly bold in his call for constitutional theory “to ‘update’ its foundational imaginary”.¹⁵⁷ He calls for it to accept the plurality of constituent powers involved in the creation of a constitutional order as well as to enlarge its perception of the geopolitical theatre in which these powers operate so as to include external constituent powers.¹⁵⁸ Oklopcic relies on the examples of Bosnia and Kosovo to argue that there, the very identity of the people or peoples was determined by external powers engaged in an act of map-drawing.¹⁵⁹ Normative requirements of restraint on the part of international actors involved in constitution-making were ignored in the Balkans, Oklopcic argues:

¹⁵³ Hans Agne, “Democratic Founding: We the People and the Others”, *International Journal of Constitutional Law*, Vol. 10, No. 3 (2012), p. 836.

¹⁵⁴ *Ibid.*, p. 844.

¹⁵⁵ *Ibid.*, p. 843.

¹⁵⁶ *Ibid.*

¹⁵⁷ Zoran Oklopcic, “Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans”, *Constellations*, Vol. 19, No. 1 (2012b), p. 81.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 83.

External constitutive powers determined who is the people (in Kosovo, Bosnia and Herzegovina, Montenegro), what counts as the exercise of its will (Montenegro), and the range of constitutional options available to it after the constitutional order has been put in place (Bosnia and Herzegovina and Kosovo).¹⁶⁰

He thus finds necessary a distinction between a unitary notion of constituent power and popular sovereignty and, similarly to Agne, calls for the recognition of constituent forces both inside and outside the polity.¹⁶¹

1.2 Constituent power arguments in three cases of constitutional foundation

1.2.1 The adoption of the German Basic Law 1949

Often missing from accounts of the birth of the Basic Law is the turbulent nature of its first years. The Parliamentary Council set up to draft it completed its work quickly: convened on 1 September 1948, by 23 May 1949 it had promulgated the *Grundgesetz* and general elections were held in August of that same year.¹⁶² One of the primary sites of struggle over the new constitution was the membership and role of the newly-established Constitutional Court, a struggle which I will describe shortly. Moreover, the *Grundgesetz* was meant as a provisional document—apparent in its name as ‘basic law’ rather than ‘constitution’—for reasons to do with the country’s partition at the time of drafting. There were fears that the creation of a West German state would be an obstacle to reunification, so drafters shied away from using “the lofty term “constitution””.¹⁶³ This was also why a constituent assembly or convention was rejected by the leaders of the main West German political parties, as was popular ratification of the draft: they feared such moves would legitimise the country’s partition.¹⁶⁴ They chose instead a drafting body whose members were elected by state (*Länder*) parliaments. The latter also ratified

¹⁶⁰ *Ibid.*, p. 85.

¹⁶¹ *Ibid.*, p. 90.

¹⁶² Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge: Cambridge University Press, 2005, p. 62.

¹⁶³ Inga Markovits, “Constitution Making After National Catastrophes: Germany in 1949 and 1990”, *William and Mary Law Review*, Vol. 49, No. 4 (2008), p. 1309.

¹⁶⁴ *Ibid.*

the resulting document,¹⁶⁵ Some have seen this absence of popular sanction as the only blemish on the German constitution and as having inserted less legitimacy into the text than the constitutional theory of constituent power would presuppose.¹⁶⁶ Christoph Möllers places this choice in the context of a reaction against Weimar's constitutional populism—the existence of constitutional institutions under that text which allowed for democratic populism to express itself and bring about the National Socialist revolution.¹⁶⁷

This understanding of the theory of constituent power underpinning the German constitutional order is worth unpacking. It is not enough, I would argue, to subscribe to a reading of the *Ewigkeitsklausel* as a reaction to Germany's Nazi past. When read in the context of the whole Basic Law, particularly the provisions on the Constitutional Court, a more complex picture emerges. This becomes even more complicated in light of the evolution of the Basic Law at the hands of the Constitutional Court, and the latter's entrenchment of its own authority as guardian of the constitution. The result of these developments is a highly legalistic constitutional order within which Article 79(3) legitimates the hierarchy of norms. While I explore some of the unresolved aspects of this understanding in Chapters 2 and 3, rediscovering the foundations of this provision shows it to be a distinctly German creation. So embedded are its elements, underlying philosophy, and judicial interpretation, that adopting eternity clauses modelled on the *Ewigkeitsklausel* and expecting its success in other constitutional settings becomes highly problematic.

Article 79(3) was adopted in direct response to the Weimar experience. During that period, National Socialists channelled their "anti-republican energies into comparatively legitimate channels", seeing the advantages of capturing

¹⁶⁵ Markovits describes the rejection of a popular referendum to ratify the Basic Law as having almost led to the breakdown of Allied-German negotiations. *Ibid.*

¹⁶⁶ Ulrich K. Preuss, "Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization", *NY Law School Law Review* 51(2006/7), pp. 479-480.

¹⁶⁷ Möllers (2008), pp. 87 and 93.

legitimate authority.¹⁶⁸ Once in parliament, they could proceed to use this authority to alter the constitution. Since the Weimar constitution contained no substantive limits on amendment, whether explicit or implicit, the possibility of the “abolition of democracy and of the rule of law” by a parliamentary majority was left wide open.¹⁶⁹ This danger materialised in the form of an oft-resorted to practice of passing laws which amounted to non-explicit constitutional amendments. It has been noted that:

This so-called breaking-through of the constitution (*Verfassungsdurchbrechung*) was often—deliberately—practiced and allowed for the adoption of the infamous *Ermächtigungsgesetz* of March 1933 which transferred practically all legislative powers of Parliament to the government under the new chancellor Adolf Hitler.¹⁷⁰

Read in this light, then, the *Ewigkeitsklausel* was directly aimed at preventing “revolutions under the mask of legality” such as the National Socialists had engaged in.¹⁷¹ It was a particularly legalistic solution to what was perceived to have been a legalistic problem.¹⁷² More precisely, it was a distinctly legal positivist choice in a German tradition which equated legal norms with written provisions.¹⁷³ Moreover, the specificity of the *Grundgesetz*, including with regard to theoretical issues, has resulted in “the dominance of textualism”.¹⁷⁴ The Basic Law’s remedy for another constitutional subversion under the Weimar constitution—relying on Article 48 of the 1919 constitution to turn the Weimar presidency into a dictatorship—was to institute a parliamentary system of government and to render the role of the federal President almost purely

¹⁶⁸ Frederick Mundell Watkins, *The Failure of Constitutional Emergency Powers under the German Republic*, Cambridge, MA: Harvard University Press, 1939, p. 53.

¹⁶⁹ Werner Heun, *The Constitution of Germany: A Contextual Analysis*, Oxford: Hart Publishing, 2011, p. 19.

¹⁷⁰ *Ibid.*

¹⁷¹ Jens Woelk, “Germany” in Oliver and Fusaro (2011), p. 144. See also Markus Kotzur, “Constitutional Amendments and Constitutional Changes in Germany” in Contiades (2012), p. 129.

¹⁷² Möllers (2008), p. 87 also refers to a “highly legalistic constitutional culture” having developed in postwar Germany, and explains the formal notion of constitutional patriotism as having its roots in this history.

¹⁷³ Woelk (2011), pp. 145-46.

¹⁷⁴ Möllers (2008), p. 96.

symbolic. The German answer to fears of repeating past mistakes, therefore, was to put all faith in codification and, as will be discussed shortly, in a militant version of democracy to be enforced by a powerful constitutional court.

There is an apparent paradox related to the inclusion of an eternity clause in what was meant to be a provisional document. Donald Kommers finds this seemingly “jarringly incoherent”, but explains it by way of the framers’ conviction “that the best way to safeguard human dignity and preserve the “democratic and social federal state,” now and in the future, was to place certain principles of government beyond the capacity of the people to amend—in short, to freeze history.”¹⁷⁵ Werner Heun has also observed that during deliberations on the constitution, it became apparent that its provisional character referred mainly to its geographic reach, whereas “[t]he Basic Law in general and especially the decision to institute democracy as well as...the rule of law was...definite.”¹⁷⁶ Thus, it is plausible that, rather than setting up a temporary constitutional order, the German Basic Law aimed at providing a “fundamental guideline for all times. It could be abolished only by a revolution.”¹⁷⁷

This provisional character of the Basic Law also needs to be read in the context of the whole constitution—in particular in conjunction with the original Article 23 and Article 146. The former delineated the territorial applicability of the constitution to a list of Western *Länder*, the rest to come under its jurisdiction upon accession.¹⁷⁸ More significantly, Article 146 stated: “This Basic Law shall cease to be in force on the day on which a constitution that is adopted by a free

¹⁷⁵ Donald P. Kommers, “The Basic Law: A Fifty Year Assessment”, in *Fifty Years of German Basic Law: The New Departure for Germany*, Conference Report, American Institute for Contemporary German Studies, Johns Hopkins University (1999) (hereinafter “*Fifty Years of German Basic Law*”), p. 3. Elsewhere, he also notes that the “framers believed, quite clearly, that the best way to realize human dignity, now and in the future, is to freeze certain principles of governance into the constitutional structure itself.” Donald P. Kommers, “German Constitutionalism: A Prolegomenon”, *Emory Law Journal*, Vol. 40 (1991), p. 847.

¹⁷⁶ Heun (2011), p. 10.

¹⁷⁷ Ernst Benda, “The Protection of Human Dignity (Article 1 of the Basic Law)”, in *Fifty Years of German Basic Law*, p. 36.

¹⁷⁸ Article 23 was repealed in 1990, following the reunification of Germany.

decision of the German people comes into force.”¹⁷⁹ The intention behind this language was to address the partition by leaving the door open for a new constitution-making exercise upon reunification.¹⁸⁰ However, this would not be the legal basis for the 1990 reunification, which instead took the form of an accession of eastern *Länder* to West Germany on the basis of the former Article 23,¹⁸¹ Christoph Möllers explains that, while always contested, Article 146 had managed to contain any challenge to the democratic legitimacy of the Basic Law.¹⁸² The intersection between the former Article 23 and Article 146, together with the language of eternity used in Article 79(3), may undermine an expansive reading of the temporary nature of the Basic Law. At the very least, they provide evidence that “the Basic Law was ambivalent on its own provisionality.”¹⁸³

Another element of the postwar constitution which has been explained as a mechanism against a slide back into authoritarianism was the newly-established Constitutional Court (*Bundesverfassungsgericht*).¹⁸⁴ As Article 93 makes clear, its jurisdiction was to be far-reaching and comprised rights adjudication (including via the innovative mechanism of individual complaints), adjudication on disputes between federal organs or between federal and state organs, and party bans (on the latter, see discussion in Chapter 3.2). The Court’s review powers included both concrete and abstract review. This far-reaching competence was in stark contrast to the Weimar Republic’s State Supreme Court (*Staatsgerichtshof*). The Law on the Federal Constitutional Court of 12 March 1951 regulated the details of the Court’s

¹⁷⁹ Since reunification, the new version of Article 146 reads: “This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

¹⁸⁰ Möllers (2008), p. 96.

¹⁸¹ See discussion in Peter E. Quint, “The Constitutional Law of German Unification”, *Maryland Law Review*, Vol. 50, No. 3 (1991), pp. 475-631.

¹⁸² Möllers (2008), pp. 96-97.

¹⁸³ Vicki Jackson, “What’s in a Name? Reflections on Timing, Naming, and Constitution-making”, *William and Mary Law Review*, Vol. 49, No. 4 (2008), p. 1300.

¹⁸⁴ Among the proponents of this view of the German Constitutional Court are Donald Kommers and Kim Lane Scheppele. See Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., Durham, NC: Duke University Press, 2012, p. 1 and Kim Lane Scheppele, “Constitutional Interpretation after Regimes of Horror”, University of Pennsylvania Law School Public Law Working Paper No. 05 (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236219.

establishment, including the appointment process and working methods, and declared the Court “independent of all other constitutional organs” (Article 1). It thereby solidified the nature of the Court’s role as both constitutional organ and, at the same time, as guardian of the constitution separate and independent from other institutions.¹⁸⁵ The Court’s success has been celebrated as one of the highest achievements of the Basic Law and was the reason for the Court serving as model for similar institutions in Eastern Europe and beyond.¹⁸⁶ While it has not escaped criticism,¹⁸⁷ the prevailing view seems to be that the Court has acquitted itself honourably of its role of adjudicator. Its jurisdiction, more than formal amendments to the constitution, has been said to provide the best mirror of both constitutional change and fundamental cleavages and processes in Germany.¹⁸⁸

This story of success, however, has obscured the difficult beginnings of the Court. Agreement on the appointment process—arguably an important element of the Court’s success, as its design ensures the selection of moderate judges—required extensive negotiations and was only decided by ordinary legislation after some experimentation.¹⁸⁹ There is evidence to suggest that drafters saw the Court’s role as secondary and were aware of a popular distrust of the judiciary in light of the latter’s failings during the Nazi era.¹⁹⁰ Furthermore, the Court’s early years were characterised by disagreement between political actors as to its leadership and precise role, and even by confrontation.¹⁹¹ An example of the latter is the Adenauer administration’s hostility towards the Court once it became involved, in late 1952, in

¹⁸⁵ See also Gerhard Leibholz, “The Federal Constitutional Court in Germany and the “Southwest Case””, *The American Political Science Review*, Vol. 46, No. 3 (1952), pp. 723-24.

¹⁸⁶ See Donald P. Kommers, “An Introduction to the Federal Constitutional Court”, *German Law Journal*, Vol. 2 (2001).

¹⁸⁷ See essays in “Fifty Years of the Bundesverfassungsgericht”, *German Law Journal Special Issue*, Vol. 2 (2001) and in Susanne Baer *et al.*, eds., *German Law Journal Special Issue*, Vol. 11, No. 1 (2010), pp. 1-114.

¹⁸⁸ See Dieter Grimm, “The Basic Law at 60—Identity and Change”, *German Law Journal*, Vol. 11, No. 1 (2010), pp. 33-46 and Hubert Rottleuthner, “The Basic Law At 60 – Reading The Grundgesetz”, *German Law Journal*, Vol. 11, No. 1 (2010), pp. 47-66.

¹⁸⁹ Markovits (2008), p. 1345.

¹⁹⁰ Michaela Hailbronner, “Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism”, *International Journal of Constitutional Law*, Vol. 12, No. 3 (2014), p. 629.

¹⁹¹ Georg Vanberg, “Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers”, *Comparative Politics*, Vol. 32 (2000), pp. 333-53 and Vanberg (2005).

the review of two international treaties.¹⁹² Georg Vanberg has argued that only the transparency of these early controversies and public support for the Court allowed it to establish its authority.¹⁹³ The point of looking at the Court's beginning years is to temper easy assumptions of the institution's role as guardian of the constitution. Thus, rather than the "apolitical guardian towering above the turmoil of ordinary politics, fully able to control and constrain the actions of other institutions" which much of legal scholarship sees in the *Bundesverfassungsgericht* today, the Court's history shows a more embattled view.¹⁹⁴

A separate exercise in demystification around the Constitutional Court relates to its role as rights-protector in the aftermath of National Socialism. This hypothesis, termed "the Nazi thesis" by Michaela Hailbronner, does not explain the emergence of the strong, rights-protecting, anti-majoritarian institution which the Court has become.¹⁹⁵ This thesis only carries weight during the Court's early years in the 1950s and 1960s, Hailbronner has argued, although even then, the Court was not specifically entrusted with an anti-fascist (and anti-communist) mandate; nor did it invalidate any major federal projects before the 1960s.¹⁹⁶ She posits instead that the explanation for the rise of the *Bundesverfassungsgericht* lies in a combination of "(weak) transformative constitutionalism" and a hierarchical legal culture which allowed it to tap into legitimacy resources therein by formalising its early transformative decisions.¹⁹⁷ The result, according to Hailbronner, has been a value formalism which allowed lawyers an interpretative monopoly over the Constitution to the exclusion of other voices.¹⁹⁸ One such transformative decision was rendered in the *Southwest* case (discussed in detail in Chapter 3), in which the Court announced its doctrine of the unity and supremacy of the Basic Law.

¹⁹² One treaty concerned ending the occupation of West Germany and the other establishing a pan-European defence system which also included German forces. Once it became clear that the Court would not bend to the administration's will, the government openly declared its hostility towards the institution and explored the possibility of forcing the resignation of judges and packing the Court so as to achieve a desirable result. Vanberg (2005), pp. 67-77.

¹⁹³ *Ibid.*, pp. 61-94.

¹⁹⁴ *Ibid.*, pp. 93-94.

¹⁹⁵ Hailbronner (2014), p. 627.

¹⁹⁶ *Ibid.*, p. 635.

¹⁹⁷ *Ibid.*, p. 628.

¹⁹⁸ *Ibid.*, p. 648.

What emerges from this analysis is a very particular notion of democracy. It is a view of democratic self-government as actualised solely through legal form.¹⁹⁹ To the extent that it is not channelled in representative (parliamentary) democratic institutions, democracy in the Basic Law remains an informal irritant.²⁰⁰ This is a distinctly Kelsenian approach: constituent power is exiled from the constitutional order, and the constitutional court is empowered as guardian over substantive limits on constitutional change as formalised in a positive provision. Thus, the channelling of all democratic legitimacy to parliament, Möllers has argued, coupled with the strong version of judicial review developed by the Constitutional Court has resulted in the double formality of German postwar constitutionalism.²⁰¹ The *Ewigkeitsklausel* was yet another prong within that formal arsenal. It may thus be seen as an integral part of the German constitution's militant democracy commitment: the idea that the constitutional order may defend itself in the face of attempts to overturn it (see more on this in Chapter 3.2), while the power to enforce it remains solely vested in the Constitutional Court.²⁰² As I explain in Chapter 3, the theory of militant democracy is premised on the assumption that the law may indeed work as bulwark against authoritarian backsliding, an assumption which I problematise further in that chapter.

What role then for constituent power within this constitutional architecture of German democracy? The choice for legal formalism which both Möllers and Hailbronner emphasise has as a consequence the relegation of notions of constituent power to the extra-legal realm. Hailbronner thus explains that legal expertise in the context of a transformative constitutionalism has been developed in Germany as the alternative to popular sovereignty-based notions of

¹⁹⁹ Möllers (2008), p. 87.

²⁰⁰ *Ibid.*, p. 90.

²⁰¹ *Ibid.*, p. 94.

²⁰² Eckhart Klein, "The Concept of the Basic Law" in Christian Starck, ed., *Main Principles of the German Basic Law: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law*, Baden-Baden: Nomos Verlagsgesellschaft, 1983, p. 18.

legitimacy.²⁰³ Similarly, Möllers sees the so-called ‘paradox of constituent power’ as not arising in Germany.²⁰⁴ Constitutional populism having been abolished (both in its plebiscitary form and in the form of the direct election of the president),²⁰⁵ with the question of the legitimacy of the constitution never truly arising,²⁰⁶ and with the authority of constitutional review firmly established, “any conflict between constitutional power and constitutional form [has been rendered] invisible.”²⁰⁷ Current German constitutionalism has thus been shaped in the image of Kelsen’s theory of constituent power as outside of the law. To the extent that it exists at the beginning and end of the constitutional order, even constituent power might be controlled by other norms in the Basic Law, notably those in the eternity clause.²⁰⁸ As will be seen in the *Lisbon* decision of the German Constitutional Court discussed in Chapter 2, the Court itself entertains this notion of Article 79(3) placing substantive limits on constituent power while not endorsing it unequivocally.

In the German context, therefore, legal positivism in its distinctly formalist incarnation underpins the Basic Law and continues to dominate constitutional discourse. In this legalistic culture, democratic theories of constituent power have little appeal. A detailed legal text has been enacted within which constituent power plays no role. The interpretation of the constitution being the sole province of law and lawyers, the extra-legal realm to which constituent power has been relegated has no recognised bearing on constitutional change. Even if the constituent wished to assert itself, such as in the enactment of a wholly new constitution, there is a discrete chance that the long arm of the *Grundgesetz* (as enforced by the Constitutional Court) would seek to reach it.

In light of the transnational influence of the German constitutional model, the specificity of this constitutional tradition bears emphasis. An unreflective migration of the idea of eternity clauses in the image of the *Ewigkeitsklausel* risks missing the reasons why it has been a successful, relatively uncontroversial innovation in the

²⁰³ Hailbronner (2014), p. 628.

²⁰⁴ Möllers (2008), p. 87.

²⁰⁵ *Ibid.*, p. 94.

²⁰⁶ *Ibid.*, p. 95.

²⁰⁷ *Ibid.*, p. 96.

²⁰⁸ *Ibid.*, p. 98.

German context. The past played an important initial role in legitimising unamendability. However, as the discussion above has shown, an equal if not greater role was played by a mix of political and institutional dynamics, rooted in a highly legalistic culture. The reasons for Weimar's failure went beyond the battles over the amendment of the 1919 constitution—it was instead a “multi-causal and step-by-step process” within which law played only a partial role.²⁰⁹ To view Article 79(3), and the *Grundgesetz* more generally, as the only, or even primary, explanation for the consolidation of Germany's postwar democracy may mean to overestimate the power of legal institutions. As in the cases of India and Bosnia and Herzegovina analysed below, new democracies rarely combine the conditions Germany benefitted from in their struggle to consolidate their legal orders and to fight authoritarianism. For that reason, the story of eternity clauses in those contexts is more convoluted.

1.2.2 The creation of the Indian basic structure doctrine 1973

The Indian constitution was drafted by a Constituent Assembly set up by the British in 1946, before independence and partition. The Assembly was made up of members elected indirectly by the provincial assemblies and, once the delegations of areas incorporated into Pakistan withdrew, was dominated by the Indian National Congress. Drafting and deliberations took more than three years and the new constitution was adopted in late 1949 and came into force on 26 January 1950. It set up a parliamentary system of government and established India as a federation with some unitary elements. The Indian constitution had to fit but also unify a diverse society rife with religious, social, ethnic, linguistic, and regional tensions, a mission accomplished via what one scholar has termed “constructive ambiguity”: embracing such conflicts and importing them into the constitution via the deliberately ambiguous formulation of constitutional provisions.²¹⁰ This was a strategy to

²⁰⁹ Karl Dietrich Bracher, *Turning Points in Modern Times: Essays on German and European History*, Cambridge, MA: Harvard University Press, 1995, p. 4. Cindy Skach's alternative account of the roots of the constitutional crisis blames divided minority government—a sign of an unconsolidated democracy—as the reason for the Weimar system's move towards dictatorship. See Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton, NJ: Princeton University Press, 2005, p. 69.

²¹⁰ Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, Cambridge: Cambridge University Press, 2011, p. 149 and generally, pp. 109-51.

accommodate diversity and allow room for the uncertainties at the time of founding (such as the fate of Muslims in newly independent India) and led to the development of a distinctive type of legal pluralism.²¹¹ Drafters thus had to pursue the objectives of nation-building and the cultivation of a common identity and loyalty alongside minority protection at a time of lawlessness and violence.²¹² With these grim beginnings and with India not meeting any of the social and economic prerequisites which democracy theorists at the time associated with democratic survival, predictions about its transition to democracy were pessimistic.²¹³ However, the subsequent consolidation of Indian democracy proved these early estimates wrong and has called into question arguments that democracy is more likely in culturally homogenous societies.²¹⁴ The constitution and the Supreme Court have played a central role in this story of unexpected success.

Granville Austin provides a rich account of the debates in the Constituent Assembly surrounding the provisions in the constitution which established the Supreme Court and its review powers, as well as the amendment rules.²¹⁵ Different views were expressed in the Assembly as to the best architecture and role for the court, as well as the different models to emulate. While the British tradition was inescapable insofar as the country's inherited judicial system, drafters looked at the American Supreme Court as the model for their own apex court.²¹⁶ Unlike the US body, however, they chose to make the Indian Supreme Court's review powers explicit in the text so as to reinforce its role as guardian of the constitution (Article 124). Moreover, various statements on the desirability of a unified court system (as opposed to separate federal and state systems), as well as of a unified federal law

²¹¹ *Ibid.*, p. 149.

²¹² Yash Ghai, "Ethnicity and Competing Nations of Rights" in Colin Harvey and Alexander Schwartz, eds., *Rights in Divided Societies*, Oxford: Hart Publishing, 2012, p. 62.

²¹³ See Ashutosh Varshney, "Why Democracy Survives", *The Journal of Democracy*, Vol. 9, No. 3 (1998), pp. 36-50 and Sumit Ganguly, "Six Decades of Independence", *The Journal of Democracy*, Vol. 18, No. 2 (2007), pp. 30-40.

²¹⁴ See discussion in Sankaran Krishna, "Constitutionalism, Democracy and Political Culture in India" in Daniel P. Franklin and Michael J. Braun, *Political Culture and Constitutionalism: A Comparative Approach*, London: M.E. Sharpe, 1995, pp. 175-77.

²¹⁵ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford: Clarendon Press, 1966, pp. 164-85 and 255-64.

²¹⁶ See also P. K. Tripathi, "Perspectives on the American Influence on the Constitution of India", in Lawrence Ward Beer, ed., *Constitutionalism in Asia: Views of the American Influence*, Berkeley, CA: University of California Press, 1979, pp. 59-98.

interpreted uniformly by the courts point to the drafters' understanding of the legal and judicial system as elements of state-building.²¹⁷ These aspirations for a strong, independent judiciary resulted, among others, in the Supreme Court being given wide jurisdiction: original, appellate, and advisory (Articles 131-135).²¹⁸ Furthermore, judicial review was entrenched as a right to constitutional remedies and was made part of the Fundamental Rights section in the constitution (Article 32).²¹⁹

As far as the formal amendment formulas adopted in the constitution, we can count three distinct paths. One, regulated by article 368, requires a special majority and, in some cases, ratification from at least half of the states; a second involves provisions which expressly allow for their change by ordinary laws of Parliament; while a third is similar to the second method but specifies further requirements such as presidential recommendation, consultation, or request from the states.²²⁰ Austin traces these back to disagreements over the optimal balance to be struck between flexibility and rigidity in the new constitution.²²¹ Those in favour of a flexible constitution had advocated for a simple majority amendment formula, believing that the new constitution would be unavoidably flawed and as such should be easily amended, at least in its early years.²²² Those opting for a more rigid procedure were concerned with the survival of the federation and as such wanted state rights to be reflected in the method for changing the constitution. At a more fundamental level, the latter also perceived a real risk of the entire constitution unravelling if amendment was to be too facile. The solution chosen in the end—after surprisingly little debate in the Assembly—was the compromise outlined above. The Indian

²¹⁷ Austin (1966), pp. 167, 184. For a view that a European concept of 'state' was borrowed by Indian framers and inadequately grasped by Indian jurists, including by the Supreme Court in its basic structure jurisprudence, see R. Sudarshan, "'Stateness' and Democracy in India's Constitution" in Zoya Hasan *et al.*, eds., *India's Living Constitution: Ideas, Practices, Controversies*, New Delhi: Permanent Black, 2002, pp. 159-78.

²¹⁸ See, generally, Burt Neuborne, "Constitutional Court Profile: The Supreme Court of India", *International Journal of Constitutional Law*, Vol. 5, Issue 2 (2003), pp. 478-9 and Venkat Iyer, "The Supreme Court of India" in Brice Dickson, ed., *Judicial Activism in Common Law Supreme Courts*, Oxford: Oxford University Press, 2007, pp. 123-25.

²¹⁹ See discussion in Iyer (2007), p. 124.

²²⁰ See discussion in Mahendra Pal Singh, "India" in Oliver and Fusaro (2011), pp. 172-85.

²²¹ Austin (1966), pp. 255-64.

²²² See also discussion in P.B. Gajendragadkar, *The Constitution of India: Its Philosophy and Basic Postulates*, Oxford: Oxford University Press, 1969, pp. 84-88.

constitution has proven easy to amend, with 100 amendments having been adopted between 1950 and 2015.²²³

The context of the development of the basic structure doctrine is key to a proper understanding of its status in Indian constitutional law. The period following independence was marked by numerous amendments to the constitutional text. As a consequence, some scholars have evaluated the Court's subsequent activism as an immediate response to this time, when it was "[f]aced with an executive branch of government which was prepared to sacrifice hard-won freedoms and rights on the altar of populist and increasingly authoritarian policies, and a legislature which was captive to the ruling party of the day."²²⁴ Against this background, the Court decided the *Golaknath* case. In it, it had to rule on whether constitutional amendments enacted by the Parliament in accordance with Article 368 of the constitution were to be subjected to Article 13 rights review.²²⁵ In what was a deeply controversial decision, the Court found that amendments did constitute 'law' within the meaning of Article 13, that the Supreme Court could judicially review them, that this approach was also inherent in the nature of the fundamental rights as enshrined in the constitution, and that a doctrine of implied limitations on the sovereignty of Parliament was applicable.²²⁶

The basic structure doctrine was announced in the *Kesavananda* case six years later, which also overturned the *Golaknath* decision.²²⁷ Though seemingly refuting the

²²³ For a list of all amendments to the Indian constitution, see The Constitution (Amendment) Acts, India Code, Legislative Department, available at <http://indiacode.nic.in/coiweb/coifiles/amendment.htm>.

²²⁴ Iyer (2007), p. 131.

²²⁵ *Golaknath v. State of Punjab*, AIR 1967 SC 1643. Article 13(2) of the Indian Constitution provides that "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." Article 13(3) provided a non-exhaustive list of the types of legislative acts to be considered "law" – not explicitly including amendments.

²²⁶ See discussion in Sudhir Krishnaswamy, *Democracy and Constitutionalism in India*, New Delhi: Oxford University Press, 2009, pp. 11-23 on the Court's development of these four lines of argument. For an account of the wider political context of the decision, see Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience*, Oxford: Oxford University Press, 2003, pp. 173-233.

²²⁷ *Kesavananda v. State of Kerala* (1973) 4 SCC 225. See also discussion of the political context of the decision in Austin (2003), pp. 234-77.

notion of implied limitations on Parliament's power to amend the constitution, the *Kesavananda* Court nevertheless took the view, albeit by a narrow majority, that

though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features.²²⁸

The plurality of opinions and interpretive techniques deployed to identify the constitutional basis for the doctrine makes it difficult to paint a coherent picture of its genesis.²²⁹ Some have even argued this to be irrelevant, claiming the doctrine "was really advanced on a common sense basis".²³⁰ What nobody could deny, however, was that the decision's "effects were little less than seismic."²³¹ It was prophetically termed "the constitution of the future"²³² and has come to be seen "as the high-water mark of judicial activism in the entire history of independent India."²³³

The *Kesavananda* decision initially "appeared revolting to the basic tenets of democracy"²³⁴ and triggered a swift reaction from the government.²³⁵ What followed was the suppression of judges on the Supreme Court in an attempt to undermine the institution, including via a series of constitutional amendments which, unlike previous ones, now sought to secure executive power against the judiciary.²³⁶ After the emergency period (1975-77), the Supreme Court became more assertive, perhaps in a bid to undo the damage to its reputation during the emergency.²³⁷ The basic structure doctrine has since been relied upon in a variety of cases, with the result that a growing list of principles have been identified as part of the basic structure.

²²⁸ *Kesavananda*, para. 639.

²²⁹ For a detailed account of the disparate arguments put forth in support of the basic structure doctrine in the *Kesavananda* case, see Krishnaswamy (2009), pp. 1-42.

²³⁰ Krishnaswamy (2009), p. 39.

²³¹ Iyer (2007), p. 130.

²³² Upendra Baxi, "The Constitutional Quicksands of *Kesavananda Bharati* and the Twenty-Fifth Amendment", *Supreme Court Cases*, Vol. 1 (1974), p. 45.

²³³ Iyer (2007), p. 130.

²³⁴ S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi: Oxford University Press, 2002, p. 8.

²³⁵ Austin (2003), pp. 278-92 and O. Chinnappa Reddy, *The Court and the Constitution of India: Summit and Shallows*, New Delhi: Oxford University Press, 2010, pp. 65-72.

²³⁶ Chinnappa Reddy (2010), pp. 65-66.

²³⁷ Pratap Bhanu Mehta, "India's Unlikely Democracy: The Rise of Judicial Sovereignty", *The Journal of Democracy*, Vol. 18, No. 2 (2007), p. 79.

The original five announced in the *Kesavananda* decision included the supremacy of the constitution, the republican and democratic form of government, secularism, the separation of powers, federalism.²³⁸ They have more recently been said to consist of secularism,²³⁹ democracy,²⁴⁰ the rule of law,²⁴¹ federalism,²⁴² and the independence of the judiciary.²⁴³ Not all of these were cases wherein the Court intervened to reinforce democracy—some resulted in democracy’s dilution instead.²⁴⁴ Moreover, the doctrine has been tested in cases extending beyond the review of constitutional amendments—notably including national and regional emergency power, legislative and executive power—again, with mixed results.²⁴⁵

The rich history and increasing appreciation of the doctrine has not spared it from criticism. It has been called “a stability device that throws sand into the gears of the constitutional amendment process”²⁴⁶ and “a counter-majoritarian check on temporary legislative majority in order to prevent it from throwing away the basic principles of constitutionalism”²⁴⁷ by supporters. Detractors view it as “a form of originalism that embalms the normative commitments made by “we the people of India” in 1950”.²⁴⁸ The Supreme Court has been criticised for having failed to provide sound democratic²⁴⁹ and theoretical²⁵⁰ foundations for the doctrine. Its

²³⁸ *Kesavananda*, para. 315.

²³⁹ *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804; *S.R. Bommai v. Union of India*, AIR 1994 SC 1918; and *Pravin Bhai Toghadia v. State of Karnataka*, AIR 2004 SC 2081. I discuss the protection of Indian secularism in greater detail in Chapter 3.

²⁴⁰ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Kihoto Hollohan v. Zachilhu*, 1992 (Supp) 2 SCC 65;1 and *Union of India v. Association of Democratic Reforms*, AIR 2002 SC 2113.

²⁴¹ *Indira Gandhi v. Raj Narain and Rameshwar Prasad v. Union of India* (2006) 2 SCC 1.

²⁴² *S.R. Bommai v. Union of India and Rameshwar Prasad v. Union of India*.

²⁴³ *Sambamurthy v. State of AP, Minerva Mills*, AIR 1987 SC 663, *Kihoto Hollohan v. Zachilhu*, *Chandra Kumar v. Union of India*, AIR 1997 SC 1125 and *Sampath Kumar v. Union of India*, AIR 1987 SC 386. These five elements were also identified as the nearly unanimously accepted features of the doctrine. See Soli Sorabjee, “The Ideal Remedy: A Valediction” in Pran Chopra, ed., *The Supreme Court versus the Constitution*, New Delhi: Sage Publications, 2006, p. 204.

²⁴⁴ Mehta (2007), p. 79.

²⁴⁵ For an in depth discussion, see Krishnaswamy (2009), pp. 43-69.

²⁴⁶ Vivek Krishnamurthy, “Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles”, *Yale Journal of International Law*, Vol. 34 (2009), p. 237.

²⁴⁷ Sathe (2002), p. 11.

²⁴⁸ Krishnamurthy (2009), p. 237.

²⁴⁹ Pratap Bhanu Mehta, “The Inner Conflict of Constitutionalism: Judicial Review and the ‘Basic Structure’”, in Hasan *et al.* (2002), pp. 179-206.

²⁵⁰ Sathe (2002), p. 10.

fluctuating formulation has been criticised as imprecise and open to abuse even by well-intentioned judges.²⁵¹ Some have predicted its demise in amendment review: “while the horizon of the basic structure doctrine may expand to include legislative as well as executive actions, its use for considering the validity of a constitutional amendment may become rare.”²⁵² In terms of its implementation, the doctrine has been said to act “much like a suspensory veto to ensure that the people of India really want the constitutional changes enacted by their leaders,”²⁵³ in other words, to ensure that revision of certain core constitutional principles only takes place via a new constitutional moment. I explore this latter point in greater detail in Chapter 4, where I also discuss the doctrine’s place in recent constitutional reform initiatives in India.

A full analysis of the promise and shortcomings of the basic structure doctrine as developed over more than four decades of jurisprudence is beyond my scope here. I analyse several key cases in Chapter 3. I will instead focus on its theoretical foundations and the continued criticism that the doctrine is inherently undemocratic and therefore unjustifiable. I will seek to reconstruct the notion of constituent power upon which the Indian constitution may be said to rest and identify its implications for understandings of the basic structure doctrine. My conclusion is that while the doctrine has become widely accepted, an assessment of its legitimacy in the Indian context yields a complicated picture. The body of case law and doctrinal evidence around it provides evidence for several competing narratives, including one which reconciles the basic structure doctrine with Indian democratic commitments. However, the delicate balance which needs to be struck in order for such a doctrine to be democratically legitimate has proven difficult for the Supreme Court to find in certain cases (on this, see also discussion in Chapter 3). I conclude this section with a few words on the transnational influence of the doctrine.

²⁵¹ Ashok Desai, “Constitutional Amendments and the “Basic Structure” Doctrine” in Venkat Iyer, ed., *Democracy, Human Rights and the Rule of Law*, New Delhi: Butterworths India, 2000, p. 90.

²⁵² Sathe (2002), p. 98.

²⁵³ Krishnamurthy (2009), p. 238.

Perhaps due to the strong British and American influences on its foundations, Indian constitutional discourse seems to eschew notions of constituent power.²⁵⁴ It relies instead on the language of popular sovereignty. The constitution's preamble invokes it when it declares the Indian state a "sovereign socialist secular democratic republic"²⁵⁵ in the name of "we, the people of India" who "in our constituent assembly...do hereby adopt, enact and give to ourselves this constitution." Scholars have attempted to reconstruct 'the people' behind this declaration, either as an "imagined community",²⁵⁶ or as a multivocal, multivalent reflection of imaginations and expectations attributed to people within and behind the Constituent Assembly.²⁵⁷ I follow the latter in reconstructing the foundational narratives underpinning Indian democracy and link these to the theoretical roots of the basic structure doctrine.

Competing narratives have been put forth to make sense of India's constitutional foundations.²⁵⁸ One set of explanations places emphasis on continuity and British-style incrementalism in constitutional development. According to this view, India's independence was elite-driven and influenced by British notions of constitutionalism; as such, it was not meant to amount to a rejection of tradition and complete break with the past. A second reading of the Indian constitution is purely normative, seeing it as "an ahistorical grundnorm that generated its own validity".²⁵⁹ The entire constitutional order would thus draw its validity from this norm, which would also provide the normative justification for judicial review of legislation. A third set of interpretations focuses on the shortcomings of the Indian constitution when it comes to society's socio-economic transformation. Influenced

²⁵⁴ An exception is Upendra Baxi, "Some Reflections on the Nature of Constituent Power" in Rajeev Dhavan and Alice Jacob, eds., *Indian Constitution: Trends and Issues*, Bombay : N. M. Tripathi, 1978, pp. 122 *et seq.*

²⁵⁵ The terms 'socialist' and 'secular' were added during the 1975-77 emergency via The Constitution (Forty-second amendment) Act, 1976.

²⁵⁶ David Gilmartin, "Election Law and the "People" in Colonial and Postcolonial India" in Dipesh Chakrabarty *et al.*, eds., *From the Colonial to the Postcolonial: India and Pakistan in Transition*, New Delhi: Oxford University Press, 2007, pp. 55-82.

²⁵⁷ Kalyani Ramnath, "'We the People': Seamless Webs and Social Revolution in India's Constituent Assembly Debates", *South Asia Research*, Vol. 32, No. 1 (2012), pp. 57-70.

²⁵⁸ See an overview of these competing narratives in Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*, New Delhi: Oxford University Press, 2007, pp. 30-40.

²⁵⁹ *Ibid.*, p. 35.

by Marxist understandings of revolution, this scholarship sees India's constitution as "an attempt to preserve the status quo by political and professional elites through arguments and justifications reminiscent of those advanced by the operators of the colonial administrative system."²⁶⁰ Finally, there are also interpretations which emphasise the distinctiveness of India's historical experience and its indigenous revolutionary constitutional politics.²⁶¹ According to this last view, not only was there broad popular consent for a break with the past, mobilised via a distinctive model of leader-citizen engagement, but this type of interaction has reoccurred in cyclical patterns of popular mobilisation for change.

This brief foray shows just how contested the foundational narrative has been in India. Moreover, one can establish clear links between these narratives and interpretations of the basic structure doctrine—by the judiciary and scholarship alike. With regard to the former, commentators appear in agreement that the Supreme Court has gone from a "narrowly positivist" to a "broad purposive approach to the enunciation and enforcement of fundamental constitutional rights that verges on natural law."²⁶² Scholars' views are similarly divided. Those subscribing to notions of parliamentary sovereignty in the British tradition would likely view the notion of material limits on constitutional change as an aberration. To them, popular sovereignty is exclusively expressed by representatives in parliament and judicial interference with constitutional amendment is the sign of a judiciary overstepping its mandate. Scholars who focus on the transformative ambition of the Indian text will be prone to evaluating the basic structure doctrine according to its implementation in concrete cases, looking to establish whether it is an instrument which merely reinforces the status quo or a tool for socio-economic progress.²⁶³ Finally, much of the scholarship emphasising popular sovereignty as the

²⁶⁰ *Ibid.*, p. 37.

²⁶¹ *Ibid.*, pp. 32-35.

²⁶² Neuborne (2003), pp. 479-80. See also Sathe (2002), p. 6. Venkat Iyer has identified three distinct periods of activity of the Court: a first period (1950-73) of "fairly principled and doctrinally sustainable approach", during which the basic structure doctrine was also enunciated; a second period (1974-77) of subservience to the executive; and a third (1978-present) wherein the Court has been activist, albeit in a "somewhat undisciplined and theoretically questionable" manner. Iyer (2007), p. 121.

²⁶³ Baxi has described the Supreme Court's turn to judicial populism in developing its social action litigation (what has elsewhere been termed 'public interest litigation') as proof of it

basis for legitimacy of the Indian constitution at the same time accepts a distinction between acts of the people themselves versus their representatives. According to this view, the former requires entrenchment, including via the basic structure doctrine, so as to prevent subsequent temporary majorities from undoing the work of revolutionary popular mobilisation.²⁶⁴ In this reading, the basic structure doctrine protects the supremacy of the people against the ruling elite, rather than of the judiciary.²⁶⁵

My aim here has been to establish this correlation between particular foundationalist narratives and notions of democracy, popular sovereignty, and judicial review entertained both by the judiciary and by doctrine in India. Reconstructing this wider theoretical framework is necessary in order to understand outcomes in individual cases, as well as jurisprudential shifts in basic structure interpretations. Some will be more convincing than others, but any assessment of the legitimacy of the doctrine inevitably rests on an assessment of this broader set of theoretical commitments of Indian democracy. Based on this analysis, I will explore the feasibility of calls for the doctrine to be formalised, whether in the constitutional text itself or in an authoritative judicial enumeration of its elements, in Chapter 4.

A final observation revolves around the transnational influence of the basic structure doctrine. Similar doctrines have been adopted by the Bangladeshi Supreme Court²⁶⁶ and referenced by the South African Constitutional Court.²⁶⁷ It also shares important similarities with the Czech “substantive core” doctrine.²⁶⁸ Bangladesh in particular seems to have been emboldened by its powerful

finally becoming “the Supreme Court for Indians”. Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India”, *Third World Legal Studies*, Vol. 4 (1985), p. 107.

²⁶⁴ Sen (2007), p. 33??.

²⁶⁵ Sathe (2002), p. 85.

²⁶⁶ *Anwar Hossain Chowdhury v. Bangladesh*, 1989, 18 CLC (AD).

²⁶⁷ See discussion in Avinash Govindjee and Rosaan Kruger “The Basic Structure Doctrine Debate: South African Explorations” in Sanjay S. Jain and Sathya Narayan, eds., *Basic Structure Constitutionalism: Revisiting Kesavananda Bharti*, Eastern Book Company, 2011, pp. 209-27.

²⁶⁸ See discussion on the Czech Constitutional Court’s “substantive core” doctrine in Chapter 3. On the migration or rejection of the basic structure doctrine more broadly, see Roznai (2013), pp. 694-701.

neighbour.²⁶⁹ The mixed influence of the doctrine in South Africa is discussed further in Chapter 5.²⁷⁰ The doctrine's transnational influence has also been felt where it was not ultimately embraced. In Sri Lanka, for example, the Supreme Court expressly invoked Indian case law but ultimately rejected calls to review the constitutionality of amendments.²⁷¹ This rejection has been described as directly aimed at reinforcing the pre-eminence of Sinhala Buddhism and the unitary nature of the Sri Lankan state.²⁷² In Hungary, faced with a constitutional slide into authoritarianism by way of severe restrictions on judicial review, the Constitutional Court did not adopt an unconstitutional constitutional amendment doctrine.²⁷³ Drawing a direct analogy to the Indian Supreme Court's basic structure jurisprudence, Hungarian scholars condemned the Hungarian Court for having "given up on the ideal of constitutionalism" by refusing to engage in substantive review of amendments.²⁷⁴

Viewed in this comparative lens, basic structure doctrines show another ambiguous feature: the unpredictability of their application. Studies of countries which have developed unconstitutional constitutional amendment doctrines have concluded that courts have proven assertive about defending their power of judicial review and jurisdiction but less emphatic "when critical issues for the parliament and the executive are at stake."²⁷⁵ This decreased confidence was due to moderation and deference to other branches only in some cases and not in others. Such findings

²⁶⁹ Ridwanul Hoque, "Constitutionalism and the Judiciary in Bangladesh" in Sunil Khilnani *et al.*, eds., *Comparative Constitutionalism in South Asia*, Oxford: Oxford University Press, 2014, p. 315.

²⁷⁰ See also Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge: Cambridge University Press, 2000, p. 155.

²⁷¹ *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill 1999 LRC (Const) 1*.

²⁷² Gary J. Jacobsohn and Shylashri Shankar, "Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity" in Khilnani *et al* (2014), pp. 194-95. See also Jacobsohn (2010), pp. 61-68.

²⁷³ Hungarian Constitutional Court Decision No. 61/2011. (VII. 13.).

²⁷⁴ Halmai (2012), p. 199. See also Andrew Arato, "Regime Change, Revolution, and Legitimacy" in Gábor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 2012, pp. 52-55 and Kriszta Kovács, "Using the Amendment Rule to Change Constitutional Identity", Paper presented at "The Renovation of the Modern Constitution: Contemporary Constitutional Transformations in Europe" conference, University of Trento, 25 May 2015 (on file with author).

²⁷⁵ Freitas Mohallem (2011), pp. 781-82.

reinforce criticism of basic structure doctrines, and eternity clauses more generally, as volatile instruments in the hands of judges. As the case of India has shown, even in the birth country of the doctrine, laying a coherent foundation for it has proven difficult. Nor has the Supreme Court of India, for all its welcome activism, been fully able to avoid overreach and arbitrary interventions. Thus, while the basic structure doctrine may be defended on democratic constitutionalist grounds, “the court itself has obscured its own intimations of a principled defence by an indiscriminate use” of the doctrine in the years since *Kesavananda*.²⁷⁶

1.2.3 International constitution-making: Bosnia and Herzegovina 1995

The constitution of Bosnia and Herzegovina was drafted by international actors as part of the 1995 peace process and annexed to the Dayton Peace Agreement.²⁷⁷ Rather than being a first step in this peace process, however, the Dayton Agreement and by implication the constitution, was presented as “complete and final”.²⁷⁸ It instituted a rights protection system alongside a consociational (power-sharing) system of government drawn along ethnic lines, including a tripartite Presidency and a House of Peoples wherein only members of the three constituent peoples could seek representation.²⁷⁹ The constituent peoples were defined in the preamble, which declared the constitution in the name of “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina”. As part of this human rights arrangement, Article X.2 on ‘Human Rights and Fundamental Freedoms’ proclaims: “No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.” Article II.2 thereby referenced, titled ‘International Standards’, stipulates the supremacy and direct applicability of the European Convention of Human Rights (ECHR) and its Protocols. In what follows, I

²⁷⁶ Mehta (2002), p. 181.

²⁷⁷ General Framework Agreement for Peace in Bosnia and Herzegovina (‘the Dayton Peace Agreement’), 21 November 1995.

²⁷⁸ Christine Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press, 2003, p. 228.

²⁷⁹ For an overview of Bosnia’s consociational arrangements, see Christopher McCrudden and Brendan O’Leary, *Courts and Consociations: Human Rights Versus Power-Sharing*, Oxford: Oxford University Press, 2013a, pp. 21-34.

propose to unpack the implications of Article X.2 as an eternity clause of a very peculiar nature: one drafted entirely by actors external to the polity and exclusively referencing international standards.

I begin with the international foundations of the constitution as a whole. The document was written at a peace conference in Dayton, Ohio in November 1995 and ‘witnessed’ by international leaders. The conference was led by representatives of the US, EU, and Russia and attended by the warring parties’ presidents. The text was drafted in English, which remains the sole authoritative version of the basic law. This course of events resulted in the type of “heavily negotiated outcome” with potentially conflicting provisions which often results in post-conflict constitution-making.²⁸⁰ The European Court of Human Rights has since criticised this process, stating: “Since it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy.”²⁸¹ I propose to look deeper into the constitution’s origins in a peace process to see whether alternative narratives may redeem, at least partially, the legitimacy of the text and its appeal to the peoples of Bosnia and Herzegovina.

Bosnia and Herzegovina was not the first country to adopt a constitution heavily or entirely drafted by external actors. As we have seen above, the occupying forces intervened in several key moments in the drafting of Germany’s Basic Law. The constitutions of Germany and Japan have in fact been discussed as historical precedents for “heteronomous constitutions” such as Iraq’s and Bosnia’s—situations where regime changes are coerced from outside, including via a new constitutional order.²⁸² Michel Rosenfeld has distinguished between these precursors and more recent cases by including the former in his “war-based model” of constitution-making and the latter in a so-called “internationally grounded model”.²⁸³ Whereas in the war-based model a total defeat removes the possibility of internal strife, Rosenfeld argues, in the internationally-grounded model “no genuine constitution-

²⁸⁰ Horowitz (2008), p. 1230.

²⁸¹ *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, 22 December 2009, para. 6.

²⁸² Preuss (2006/7), p. 469.

²⁸³ Rosenfeld (2010), pp. 206-209.

making process could have occurred absent the international intervention.”²⁸⁴ Furthermore, “the international intervention leads to incorporation of certain external constitutional norms and standards...into the actual constitution to which it eventually leads.”²⁸⁵ Bosnia’s extensive human rights provisions are a good example of just such substantive commitments. Its constitution may thus be seen as the most extreme example of a wider phenomenon wherein constitutional drafting is not purely the province of internal actors. Unlike situations such as Germany’s or even Iraq’s, however, Bosnia’s constitution was drafted at an extreme distance from the polity it was meant to govern: geographically, linguistically and from the point of view of its ‘founding fathers’, the Bosnian constitution had close to no connection to the people in whose name it was adopted.²⁸⁶

The advent of internationalised constitution-making is undeniable. So prevalent has this become that attempts to lay out conditions to minimise the democratic failings of such processes are now frequent. They either focus on the process itself, including on conditions for the behaviour of international actors within that process, or on the substantive elements of the resulting constitution. Contrary to such efforts, however, scholars such as Ulrich Preuss see a constitution-making process lacking in popular input as inevitably blemished.²⁸⁷ He views constitution-making as an exercise in self-definition by a polity which has the institutional means to express its political will and as such, as “an act of political *self-determination*”.²⁸⁸ Preuss takes this further and correlates the subsequent authority of the constitution to the legitimacy of the process through which it was generated, with substance playing only a secondary role.²⁸⁹ This is the reason, he argues, why imported and even more so imposed constitutions are likely to fail.²⁹⁰ According to this view, irrespective of

²⁸⁴ *Ibid.*, p. 207.

²⁸⁵ *Ibid.*

²⁸⁶ The only link to the polity was the presence of its President and Prime Minister at the peace conference in Dayton. In terms of ethnic groups represented, Bosnian Croats played little role, while Bosnian Serbs and other groups were excluded. McCrudden and O’Leary (2013a), p. 24.

²⁸⁷ Preuss (2006/7), p. 479.

²⁸⁸ *Ibid.*, pp. 477-78.

²⁸⁹ *Ibid.*, p. 494.

²⁹⁰ *Ibid.*

the substance of the Bosnian constitution, the conditions of its drafting would render it irredeemable.

However, contrary to such categorical stances, scholars such as Philipp Dann and Zaid Al-Ali have been preoccupied with indicating practical steps the international community can take when engaging in constitution-making to ensure its influence remains legitimate. Among these is the requirement for external actors to be as unobtrusive as possible and not to impose substantive outcomes; the only exception would be demands for greater inclusiveness.²⁹¹ Other prerequisites would be for individual states to be prevented from intervening except as part of multilateral institutions and to ensure the procedural neutrality of expert legal advice given (by providing it publicly, transparently, and equally to all sides).²⁹² In Bosnia's case, all of these preconditions were missing. Not only were individual states involved—including leaders of neighbouring, warring countries—but there was never any doubt about many of the substantive elements of the constitution, first and foremost strong human rights guarantees.²⁹³

Conversely, one may subscribe to a view which is more concerned with the national ownership over the constitution as a means to redeem its democratic legitimacy. Thus, Rosenfeld argues that "substantial decision making power over the substantive particulars of the constitution-in-the-making must be left in the hands of relevant political actors within the nation-state affected."²⁹⁴ Contrary to Preuss, therefore, he would find a constitution like Bosnia's at least potentially redeemable if its text and subsequent implementation allowed for the development of a healthy and self-sufficient domestic legal system. As will become clear following the discussion below, this has not happened. Moreover, as the analysis of Bosnia's eternity clause will show, the aims behind the extensive human rights provisions

²⁹¹ Philipp Dann and Zaid Al-Ali, "The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor", *Max Planck Yearbook of UN Law*, Vol. 10 (2006), pp. 423-63.

²⁹² *Ibid.*, p. 461.

²⁹³ See Paul C. Szasz, "The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia", *The American Journal of International Law*, Vol. 90, No. 2 (1996), pp. 301-16.

²⁹⁴ Rosenfeld (2010), p. 207, citing Dann and Al-Ali (2006), p. 430.

incorporated in the constitution were precisely to maintain international involvement beyond the drafting moment.

What of exercises in reconceptualising constituent power—do they provide a better account of the case of Bosnia and Herzegovina? Agne's argument seems inadequate in this case. He writes on the assumption that the people engage in self-constitution, albeit understood in a wider international context. Bosnia's constitution, however, is an example where the external constituents embodied constituent power exclusively. The problem then is that at the time of constitutional drafting, the people of the polity in the making were excluded entirely from 'founding themselves'. More relevant is Oklopčić, who acknowledges the role of great powers in re-constituting the state in a foundational constitutional moment which inevitably involved the rupture of the international legal framework.²⁹⁵ They were the ones determining the identity of 'the people' to which the Bosnian basic law made reference.²⁹⁶ This involvement was then constitutionalised by these powers 'witnessing' the Dayton Agreement to which the constitution was annexed²⁹⁷ and has continued beyond the foundational moment.²⁹⁸ However, Oklopčić's is a call for a reorientation of the discipline of constitutional theory which needs to be taken up and developed further; it is not (and does not purport to be) a complete normative account of the legitimacy of internationalised constitutional documents at the moment of drafting and beyond. Bell is also critical of the involvement of external actors in deciding fundamental questions of the Bosnian polity's survival (see below).

In the absence of such a theory explicitly addressing the legitimation of constitutions which suffer from deep flaws of foundational legitimacy, therefore, the only alternative left is to investigate the text itself. As we have seen in the case of Germany above, the democratic shortcomings of a constitutional founding do not necessarily determine the subsequent legitimacy of the constitution and of its eternity clause. The question which arises then is whether Article X.2 in the Bosnian

²⁹⁵ Oklopčić (2012b), p. 82.

²⁹⁶ *Ibid.*, p. 83.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*, p. 84.

constitution may be justified on substantive grounds. This in part foreshadows the discussion on substantive values in Chapter 3. I engage in this analysis here, however, because the international content of Bosnia's eternity clause is intrinsically linked to the question of its international drafting and implementation. Moreover, even amidst provisions lifting human rights commitments to the rank of supra-constitutional norms, the formulation in Article X.2 is unique. Whereas most such clauses declare unamendable a minimum rights standard as enshrined in the domestic constitution (see below), the Bosnian provision protects rights via a transnational referent as defined by institutions beyond the state.

Several observations are in order. First, Article II.2 not only makes the European Convention on Human Rights directly applicable and the superior law of the land in Bosnia, but it was adopted before the country had even become a member of the Council of Europe—it only acceded in 2002, seven years after the adoption of the constitution.²⁹⁹ One commentator has referred to this choice as “smuggling” the Convention into the legal system.³⁰⁰ Even more astonishing, the provision appears to have incorporated treaties which had not entered into force for any other country, such as the 1994 Framework Convention for the Protection of Minorities and the 1992 European Charter for Regional and Minority Languages.³⁰¹ Moreover, the Bosnian constitution instituted a complex web of institutions tasked with human rights protection, among which: a Constitutional Court with mixed international and domestic membership; the Human Rights Commission staffed with a majority of international members; and the Office of the High Representative, tasked with overseeing the civilian implementation of the Dayton Agreement. Some of these institutions found themselves with overlapping jurisdictions.³⁰² Added onto this would be the Council of Europe apparatus once Bosnia became a member.

²⁹⁹ Donna Gomien, “Human Rights in Bosnia and Herzegovina: European Practice, Fraught Federalism and the Future” in Wolfgang Benedek, ed., *Human Rights in Bosnia and Herzegovina after Dayton: From Theory to Practice*, The Hague: Kluwer Law International, 1999, p. 109.

³⁰⁰ Zoran Pajic, “A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina”, *Human Rights Quarterly*, Vol. 20, No. 1 (1998), p. 131.

³⁰¹ See Gomien (1999), pp. 107-08.

³⁰² Examples are the Human Rights Commission and the Refugee Property Commission with competing jurisdictions over property restitution. Gomien (1999), p. 110.

Christine Bell has explained this structure as part of a state-building project driven by the international community. Thus, she describes human rights protections in the Bosnian constitution as meant to “take the sting out of the sovereignty issue” and institutions tasked with their implementation as “aim[ing] not merely to police the division between law and politics found in the polity, as in the classic liberal-democratic state, but also *creat[ing]* the polity by mediating communal divisions.”³⁰³ She explains these institutions in the context of the fraught federalism introduced in the country, the latter characterised by a formally weak central government. Bell states:

It is through human rights institutions that the international community tries to claw back the unitary state from the separate Entities to which it devolves power. The formal powers of the BiH government as compared with those of the Entities are extremely limited. In contrast, the BiH human rights institutions stand superior to the governments and institutions of the Entities. The human rights institutions are aimed at reversing the ethnic cleansing which resulted in the Entity division. With their international membership they also give the international community an ongoing role in implementation.³⁰⁴

This continuing role for international actors was downplayed before the general public.³⁰⁵ Bell acknowledges the difficulty of balancing the implementation of these provisions against the entrenchment of territorial devolution along ethnic lines.³⁰⁶ This might be an inevitable consequence of this constitution being “a compromise between opposing demands of separation and sharing”.³⁰⁷

These tensions in the constitution came to the fore in dramatic fashion in two 2006 cases contesting the very foundations of the polity. One, decided by the country’s Constitutional Court, concerned an appeal by the Party for Bosnia and Herzegovina and Mr Ilijaz Pilav, the latter having been denied inclusion on the candidacy list for the presidency and the House of Peoples as a Bosniak living in the territory of

³⁰³ Bell (2003), p. 200.

³⁰⁴ *Ibid.*, p. 196. See also Gomien (1999), p. 112, discussing how the federal structure allowed authorities to claim that responsibility for human rights violations was to be attributed to each federal unit rather than the state as a whole.

³⁰⁵ Pajic (1998), p. 127.

³⁰⁶ Bell (2003), p. 196.

³⁰⁷ *Ibid.*

Republika Srpska.³⁰⁸ The other, the now famous case of *Sejdić and Finci*, concerned a challenge brought before the European Court of Human Rights by two applicants, one a Bosnian Roma and one a Bosnian Jew, claiming that the constitutional provision restricting the office of the tripartite Presidency only to members of ethnically Bosniak, Croat, and Serb communities was discriminatory. While neither of these cases involve direct challenges to the constitution's Article X.2, they are nevertheless significant. They demonstrate the tension between the basic law's consociational regime and human rights principles which the constitution also enshrines, not least via the eternity clause. Moreover, these cases also illustrate the fraught relationship between at least two custodians of this constitution: the Constitutional Court and the European Court of Human Rights. The cases indicate that the unamendable provision does not help resolve the question of ultimate authority over rights protection in the Bosnian constitution and as such complicates rather than sheds light on constitutional hierarchy.

The national case involved a direct challenge to Article V of the constitution, which indicates that the tripartite Presidency of the country includes "one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska", together with Article 8.1 paragraph 2 of the Electoral Law of Bosnia and Herzegovina, which also stipulates that "one Serb shall be elected by voters registered to vote in the Republika Srpska." Mr Pilav's case had been dismissed on the grounds that it clearly contravened these provisions.³⁰⁹ In his appeal, he contended that the decision had been exclusively based on ethnic/national origin and had amounted to a violation of the Article 1 of Protocol No. 12 to the European Convention on European Rights on non-discrimination. He further invoked Article II.2 of the constitution as grounds to view the Protocol, as well as other international human rights instruments guaranteeing political rights of participation, as being at least equivalent to Article V.

³⁰⁸ Constitutional Court of Bosnia and Herzegovina, Case No. AP-2678/06, 29 September 2006.

³⁰⁹ Decision No. Iž-15/06, 10 August 2006.

The Constitutional Court reiterated the margin of appreciation left by the European Court of Human Rights in this area and acknowledged that the provisions in question in the case restricted Mr Pilav's rights. It nevertheless found these restrictions justifiable in the context of the country: "Taking into account the current situation in Bosnia and Herzegovina, the restriction ... is justified at this moment since there is a reasonable justification for such treatment."³¹⁰ Judge Feldman, concurring in case, indicated the presence of special circumstances justifying otherwise impermissible discriminatory treatment and stated that "the time has not yet arrived when the State will have completed its transition" away from them.³¹¹ Judge Grewe, dissenting, disagreed on this point. She admitted that Bosnia's democratic transition was ongoing, but thought that "the Dayton Agreement architecture is evolving and has to adapt to the different stages of evolution in BiH."³¹² She viewed the status quo as allowing an unfortunate combination of territorial and ethnic structures which de facto disenfranchised ethnic Bosniaks and Croats living in Republica Srpska and ethnic Serbs living elsewhere. This combination, she stated, was "inconsistent with the Dayton Agreement's goal of a multi-ethnic State and with the principle of equality of constituent peoples in both entities."³¹³ The only available means of remedy was to exclude the territorial criterion from presidential elections. Finally, she invoked Articles II.2, II.3, and X.2 to find that the international human rights provisions under scrutiny had at least the same rank as Article V of the constitution. As such, and contrary to the view of Judge Feldman, Judge Grewe had no qualms about finding compliance with human rights and the European Convention to have priority over any other law.

The case is significant in two respects. The first has to do with the conflicting interpretations of the state of Bosnia's transition and to the role of the constitution within it. As the dispute between Judges Feldman and Grewe illustrates, even while agreeing that there was still work to be done, there remained reasonable disagreement as to whether this should continue to permit deviation from human rights standards of non-discrimination. The same question was answered very

³¹⁰ Case No. AP-2678/06, para. 22.

³¹¹ Separate concurring opinion of Judge Feldman, Case No. AP-2678/06, para. 3.

³¹² Separate dissenting opinion of Judge Constance Grewe, Case No. AP-2678/06.

³¹³ *Ibid.*

differently in the following case. The second important observation here, however, is that the status of international human rights instruments as included in the constitution and the Dayton Agreement remained controversial. The Constitutional Court had in previous decisions taken the position that the European Convention on Human Rights could not have superior status vis-à-vis the constitution. Because it had entered into force by virtue of the constitution, the Court had held, the Convention's authority derived from the constitution.³¹⁴ Judge Grewe had dissented in those cases and again invoked Article X.2 as evidence of a hierarchy of norms which allowed the Court to engage in the judicial review of conformity with the European Convention.³¹⁵ This would be another point upon which the European Court would subscribe to a different conclusion.

The case of *Sejdić and Finci* represents a turning point in the constitutional development of Bosnia and Herzegovina. The applicants, Dervo Sejdić and Jakob Finci, invoked violations of Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the Convention on the grounds of their Roma and Jewish origins. The European Court found in their favour. With regard to admissibility, the Court indicated the government's responsibility was incurred: "leaving aside the question whether the respondent State could be held responsible for putting in place the contested constitutional provisions ... the Court considers that it could nevertheless be held responsible for maintaining them."³¹⁶ The judgment then proceeded to analyse the compatibility of the impugned constitutional provisions with the Convention. It left somewhat unresolved the question of whether they satisfied the legitimate aim requirement. The Court found that the conditions of drafting might justify the exclusionary definition of "constituent peoples" but argued that either way the provisions in question were not proportionate to this aim.³¹⁷

³¹⁴ Constitutional Court of Bosnia and Herzegovina, Case No. U-5/04 (2006), 31 March 2006. See also Constitutional Court of Bosnia and Herzegovina, Case No. U-13/05 (2006), 26 May 2006, in which the Court reiterated this view and refused to review a constitutional provision for conformity with the European Convention because the latter did not enjoy superior legal status.

³¹⁵ Separate Dissenting Opinion of Judge Constance Grewe, Case No. U-13/05 (2006).

³¹⁶ *Sejdić and Finci*, para. 30.

³¹⁷ *Ibid.*, para. 45.

The most controversial aspect was the Court's assessment of whether the time was ripe to engage in constitutional reform so as to alleviate the discriminatory nature of institutional arrangements in the Bosnian constitution. Contrary to the government's position that majoritarian rule remained dangerous in a country where mono-ethnic parties continued to dominate politics,³¹⁸ the Court emphasised the positive developments in the country since Dayton.³¹⁹ It relied on the analysis of the Venice Commission to hold that there existed alternative power-sharing mechanisms which would not totally exclude members of other ethnic communities and which would reach the same ends.³²⁰ The Venice Commission recommendations in question were quite detailed.³²¹ This coupled with the fact that the Bosnian constitution had been successfully amended on one prior occasion convinced the Court that constitutional change was possible in Bosnia.

While the majority remained silent on whether reaching such a conclusion was within its remit at all, the dissenting judges in the case were more vocal. Judges Mijovic and Hajjev, partly dissenting, wondered:

Are the special constitutional arrangements in Bosnia and Herzegovina still deemed necessary and can the current situation still be justified, despite the passing of time? Is it up to the European Court of Human Rights to determine when the time for change has arrived?³²²

Judge Bonello, dissenting, was even more intransigent in his opinion. He found the majority judgment to have completely divorced the country "from the realities of its own recent past" and to have disrupted the delicate Dayton Agreement.³²³ He found the European Court to have behaved "as the uninvited guest in peacekeeping

³¹⁸ *Ibid.*, para. 34.

³¹⁹ *Ibid.*, para. 47.

³²⁰ *Ibid.*, para. 48.

³²¹ With respect to Presidency reform, for instance, the Commission called for the concentration of all executive power in the Council of Ministers (a collegiate body already exercising some executive functions) and for the indirect election of a single President based on a wide majority and with rules for rotation of his ethnic affiliation. See *Sejdić and Finci*, para. 22

³²² Partly Concurring and Partly Dissenting Opinion of Judge Mijović, Joined by Judge Hajjev, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, 22 December 2009, pp. 49-50.

³²³ Dissenting Opinion of Judge Bonello, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, 22 December 2009, p. 52.

multilateral exercises and treaties that have already been signed, ratified and executed.”³²⁴ Moreover, Judge Bonello questioned whether the Court’s far-reaching powers also extended to

undoing an international treaty, all the more so if that treaty was engineered by States and international bodies, some of which are neither signatories to the Convention nor defendants before the Court in this case? More specifically, does the Court have jurisdiction, by way of granting relief, to subvert the sovereign action of the European Union and of the United States of America, who together fathered the Dayton Peace Accords, of which the Bosnia and Herzegovina Constitution—impugned before the Court—is a mere annex?³²⁵

He admitted that “the whole structure of the Convention is based on a primordial sovereignty of human rights” but found the values of equality and non-discrimination to be at least on equal footing with those of peace and reconciliation.³²⁶ Instead, “the Court has canonised the former and discounted the latter.”³²⁷ Finally, Judge Bonello questioned the involvement of a court so remote from the situation in assessing whether to engage in constitutional overhaul or not. Instead, he argued, this would have been a case where judicial self-restraint should have ruled.³²⁸

The European Court’s decision was surprising, even more so as it went against its own prior case law of restraint in reviewing consociational arrangements.³²⁹ McCrudden and O’Leary explain the European Court’s assertiveness as resulting from three factors: the growth of its anti-discrimination doctrine; the rise in criticism of consociational arrangements particularly by the Venice Commission; and the peculiarities of the Bosnian context, especially its commitments to the Council of

³²⁴ Dissenting Opinion of Judge Bonello, pp. 52-53.

³²⁵ *Ibid.*, p. 53.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*, p. 54.

³²⁹ See *Cases relating to certain aspects of the laws on the use of languages in education in Belgium* [1968] ECHR 1474/62, 1 EHRR 252 (1968) and *Mathieu-Mohin v. Belgium* [1987] ECHR 9267/81, 10 EHRR (1988) 1. See also discussion in Christopher McCrudden and Brendan O’Leary, “Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements”, *The European Journal of International Law*, Vol. 24, No. 2 (2013b), pp. 477-501.

Europe and to the European Union.³³⁰ They see the European Court as having seized the opportunity to trigger the transformation of Bosnia's consociational arrangements, seeing itself as "supporting the emerging consensus that things had to change."³³¹ Whether the Court judgment is read restrictively in this sense, or more broadly as signifying the death knell of Bosnia's power-sharing agreement, it remains problematic. I agree with McCrudden and O'Leary that whichever of these interpretations one ascribes to, "the key issues are when to make the changes, and how, and who has the legitimate authority to do so."³³² In other words, the European Court saw its own assessment of whether and when the Bosnian constitution was to be reformed as superior to that of the national government. It did so in disregard of the government's argument that the impact of such changes at the time would amount to the unraveling of the agreement upon which the constitution, and the state, were based.³³³ Moreover, the Court promoted as the alternative a civic model of constitutionalism,³³⁴ as recommended by the Venice Commission, which it presented as neutral by ignoring its practical consequences in Bosnia.³³⁵

Beyond such criticisms of individual decisions, however, the ineffectiveness of Bosnia's constitutional arrangements remains. Some have indeed argued that it has not been institutional arrangements as such which have stalled the country's democratic transition as much as its poor socio-economic situation.³³⁶ In the words of Sumantra Bose, "Bosnia is so fragile because of these factors, not because of some

³³⁰ *Ibid.*, p. 490.

³³¹ *Ibid.*

³³² *Ibid.*, p. 491.

³³³ *Ibid.*, p. 492.

³³⁴ Begić and Delić refer to the Court effectively calling upon Bosnian authorities to find a "'lucky" combination of civil and ethnic constitutional model." See Zlatan Begić and Zlatan Delić, "Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing fair Solutions", *International Journal of Constitutional Law*, Vol. 11, No. 2 (2013), p. 465.

³³⁵ To quote McCrudden and O'Leary again, one of those implications of the decision would be "to move Bosnia decisively in the direction of the preferred Bosniak position, because a central element of most Bosniaks' politics is to move towards majoritarian democracy." McCrudden and O'Leary (2013b), p. 494.

³³⁶ Florian Bieber, "The Balkans: The Promotion of Power-Sharing by Outsiders" in Joanne McEvoy and Brendan O'Leary, eds., *Power-Sharing in Deeply Divided Places*, Philadelphia, PA: University of Pennsylvania Press, 2013, p. 313.

original sin visited on it in Dayton, Ohio in November 1995.”³³⁷ Nevertheless, one cannot ignore the impact which the constitution has had in both ending the conflict and perpetuating instability in the country. If it is true that disagreement in Dayton was not so much over power-sharing as over whether the state should exist at all,³³⁸ one wonders whether enough has changed in this respect in the two decades since. Human rights provisions, including via an unamendable commitment to international human rights law, were meant as core pillars of the delicate political settlement meant to sustain the state. There are echoes of Germany’s constitutional beginnings when one reads arguments that Bosnia’s settlement has never been seen as anything other than temporary.³³⁹ However, unlike in Germany, the Bosnian polity remains embattled and “visions of a post-power-sharing system among the parties are diametrically opposed and often reduce the incentives to render the existing institutional setup effective.”³⁴⁰

My goal in this chapter has been two-fold. I first set out to explore constituent power theories and how they could accommodate notions of unamendability. I looked at both sceptical authors who found little use for the concept and to those more open to its democratic potential. Of the latter, I positioned myself between normative and empirical proponents of an authorship model of constituent power – between Loughlin’s relational understanding of constituent power and Colón-Ríos’s ‘weak constitutionalist’ one – while at the same time indicating the points on which I disagreed with their interpretations. My second aim was to reconstruct the notions of peoplehood present during the founding of three polities. These case studies have served to illustrate the constituent narratives underpinning the two most influential eternity clauses – Germany’s *Ewigkeitsklausel* and India’s basic structure doctrine – and one of the clearest cases of internationalised such provision – Bosnia’s Article X.2.

³³⁷ Sumantra Bose, “The Bosnian State a Decade after Dayton”, *International Peacekeeping*, Vol. 12, No. 3, (2005), p. 330.

³³⁸ Bieber (2013), p. 322.

³³⁹ *Ibid.*, p. 325.

³⁴⁰ *Ibid.*

The two conceptions of constituent power identified at the start of this chapter—as empirical reality versus heuristic necessity—can be traced in all three of these case studies. Loughlin and Walker had identified two distinct ways in which to conceptualise constituent power in constitutional discourse: as “rhetorical formulation”, inert, symbolic and only retrospectively constituted, and as “an active agent of change” with concrete democratic possibilities.³⁴¹ The three examples above demonstrate how both these notions of ‘the people’ coexist in modern constitutionalism and are balanced in different ways within the constitutional architecture. Germany’s Basic Law all but completely stifles any expression of popular constituent power, seeing it as dangerous ‘populism’. India’s framers constructed an elaborate narrative of popular sovereignty and empowered the Supreme Court as guardian of the constitution. The latter has relied on more and less persuasive arguments to reconcile its basic structure doctrine to these popular constitutional beginnings. Finally, Bosnia and Herzegovina shows just how difficult it is to invoke constituent power even as rhetorical device in a deeply divided polity uneasily brought and held together by the international community. Chapter 5 will complement this analysis by looking at instances of participatory constitution-making which have arguably enjoyed greater legitimacy. The question there will be how these more inclusive processes have dealt with unamendable constitutional commitments, if at all. In what follows, however, Chapter 2 examines the constitutional identity-based arguments around eternity clauses.

³⁴¹ Loughlin and Walker (2008), p. 2.

Chapter 2

Eternity clauses as an expression of constitutional identity

This chapter engages with the literature on constitutional identity, which has made significant advances in addressing eternity clauses. Theories of constitutional identity have built sophisticated arguments around unamendable provisions, which they view as expressing core values of the polity. Given the centrality of the values they enshrine, eternity clauses are to be understood—and accepted—as an important expressive site within the constitution. Constitutional identity is thus a rhetorical device through which to grasp unamendability, one which, as will become apparent, is intrinsically linked to the project of liberal constitutional democracy.

The chapter proceeds in four steps. First, I am interested in sketching the contours of the concepts used in identity-based explanations of unamendability. I thus seek to briefly outline expressive theories of law and their application to constitutional law. I then delineate the main understandings of the concept of constitutional identity and explore several main objections to it: that it relies on a static notion of identity; that it fails to provide an account for its own peaceful transformation; that it relies on an assumption of commitment to liberal constitutionalism as well as to a certain kind of pluralism; and that its explanatory force is unclear. Secondly, I map the main arguments surrounding unamendable provisions as expressive of constitutional identity and, relatedly, of a particular constitutional hierarchy. Thirdly, I put forth three clusters of objections to expressive understandings of eternity clauses: that they may fail to incorporate illiberal (whether authoritarian and/or theocratic) versions of constitutionalism; that they elide the contested nature of certain unamendable values; and that eternity clauses may be the result of unreflective migration of constitutional ideas more often than acknowledged. Fourth, I trace the constitutional identity arguments employed by the German Constitutional Court in its *Lisbon* decision in order to showcase the very real, and

problematic, import of constitutional identity theories on constitutional interpretation. This will also provide the bridge to Chapter 3, which is more directly concerned with how unamendable provisions have fared before courts.

My conclusion in this chapter is that constitutional identity is a concept which obscures more than it illuminates. The numerous theoretical and practical difficulties it raises should have us question its use for explaining, rather than merely describing, eternity clauses.

2.1 Constitutions as expressive law

In order to understand eternity clauses as expressive, we need to know what we mean when referring to law itself as expressive. As mentioned above, accounts of eternity clauses as expressive do not reflect the full sophistication of expressive theories of law, but mapping the core elements of the latter will nonetheless help situate these debates.

2.1.1 Expressive law

As Mary Ann Glendon reminds us, law-making is about storytelling.³⁴² Whether intentional or not, she tells us, law “tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going.”³⁴³ This prompt—to focus on law’s mechanisms for meaning production, for transforming social facts into legal data³⁴⁴—is at the heart of expressive theories of law. It may further be viewed in the larger key of the relationship between law and politics, with the latter long accepted as the site of expressive action.³⁴⁵ It can also be juxtaposed to instrumental understandings of law. These focus on the concrete goals law pursues and measure its effectiveness accordingly. By contrast, expressive theories view law in its incarnation as ceremonial or ritualistic state action. Within the ‘communicative’

³⁴² She does so by relying on Clifford Geertz’s *Local Knowledge: Further Essays in Interpretive Anthropology*, New York: Basic Books, 1983.

³⁴³ Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges*, Harvard University Press, 1987, p. 8.

³⁴⁴ *Ibid.*, p. 9.

³⁴⁵ See, *inter alia*, Murray Edelman, *The Symbolic Uses of Politics*, Urbana, IL: University of Illinois Press, 1964; Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence*, New York: Academic Press, 1971; and Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement*, Urbana, IL: University of Illinois Press, 1976.

approach to law,³⁴⁶ “the creation of statutes is an act which produces meaning” or a range of meanings.³⁴⁷ Law is thus seen as “expressive of shared norms”³⁴⁸—it embodies a set of aspirational norms which are communicated within a shared communicative framework between legislators and the interpretive community. Examples are laws on moral issues, which “can express who we are, what our identity is and which values we hold dear.”³⁴⁹ The law works when the community has internalised these norms. The difference between instrumental and symbolic laws, then, “is that the audience of symbolic laws forms a community that incorporates a morality.”³⁵⁰ There are also theories bridging the two, such as Cass Sunstein’s functional theory of expressive law.³⁵¹ He argues that support for law’s statements is not divorced from judgments concerning their consequences (“good expressivists are consequentialists too”, he says),³⁵² but those consequentialist inquiries may be “difficult and complex, and perhaps not subject to resolution at all.”³⁵³ These same problems with debating law’s consequences, Sunstein notes, make expressive approaches to law attractive.

The various strands of expressivism therefore place different emphases on the centrality of consequentialist evaluations behind law-making. Whether subscribing to a general belief in the communicative role of law or admitting consequentialist thinking, the expressivist is committed to viewing law as more than a collection of rules regulating behaviour. Thus, when we analyse the expressive function of a law, we are concerned both with its interpretive function—how it translates social reality

³⁴⁶ See, *inter alia*, Willem J. Witteveen, “Significant, Symbolic and Symphonic Laws”, in Hanneke van Schooten, ed., *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives*, Liverpool: Deborah Charles Publications, 1999, pp. 27-70; Willem J. Witteveen and Bart van Klink, “Why Is Soft Law Really Law? A Communicative Approach to Legislation,” *RegelMaat* (1999), pp. 126-140; and Nicolle Zeegers et al., *Social and Symbolic Effects of Legislation under the Rule of Law*, Lewiston, NY: The Edwin Mellen Press, 2005.

³⁴⁷ Witteveen (1999), p. 27.

³⁴⁸ *Ibid.*, p. 36.

³⁴⁹ Wibren van der Burg, “The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues,” *Law and Philosophy*, Vol. 20, No. 1 (2001), p. 36.

³⁵⁰ Witteveen (1999), p. 35.

³⁵¹ Cass R. Sunstein, “On the Expressive Function of Law”, *University of Pennsylvania Law Review*, Vol. 144, No. 5 (1996), pp. 2021-53. See also Richard H. Pildes and Cass Sunstein, “Reinventing the Regulatory State”, *University of Chicago Law Review*, Vol. 62, No. 1 (1995), pp. 1-129.

³⁵² Sunstein (1996), p. 2045.

³⁵³ *Ibid.*, p. 2047.

into legal language—and with its constitutive one—how our perception of reality is in turn affected by legal language and concepts.³⁵⁴

This approach is not without its critics, however. Sceptics of expressivism have contended that genuine expressivist accounts of law are “morally implausible,”³⁵⁵ given that “[t]he moral factors upon which expressivists standardly rely, such as culture, self-respect, desert, or deontological norms...are not in fact expressive.”³⁵⁶ These sceptics view as banal the contention that linguistic meaning can have moral impact and suggest as more important the quest for differentiating between the different kinds of impact different kinds of meaning may have.³⁵⁷ An example would be proving the deterrent effect of particular criminal laws, or explaining the effectiveness of laws unaccompanied by much enforcement power (for example, rules on littering).³⁵⁸ Another, in the context of this study, would be testing the impact of eternity clauses on constitutional discourse and society more broadly, be it educational, deterring (of certain constitutional changes) or otherwise. Such an analysis goes beyond my scope, particularly as it would require in depth analysis of the causal relationship between constitutional norms and social change. This is a worthwhile if brief reminder, however, that to refer to law as expressivist carries with it far more complexity than merely asserting an amorphous relationship to a particular set of moral values. As I will note shortly, a similar grievance may be raised about the concept of constitutional identity.

2.1.2 Expressive constitutions

Expressivist theories of law have found particular interest amidst constitutional scholars. Perhaps it is constitutional law’s trade in higher values and principles that makes it “pervasively oriented to expressivist, rather than to consequentialist, welfare-maximizing, or functional concerns.”³⁵⁹ Scholars have understood constitutions as expressive in several ways. Mark Tushnet has written on

³⁵⁴ Glendon (1987), p. 9.

³⁵⁵ Matthew D. Adler, “Expressive Theories of Law: A Skeptical Overview”, *University of Pennsylvania Law Review*, Vol. 148, No. 5 (2000), p. 1462.

³⁵⁶ *Ibid.*, p. 1494.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*, p. 1495.

³⁵⁹ Elizabeth S. Anderson and Richard H. Pildes, “Expressive Theories of Law: A General Restatement”, *University of Pennsylvania Law Review*, Vol. 148, No. 5 (2000), p. 1556.

constitutional law, with its doctrines and institutional arrangements, as a way “in which a nation goes about defining itself.”³⁶⁰ He views preambles as especially worthy of study by a constitutional expressivist (more on this in section 2.3.1 below). Echoing Tushnet, when writing about constitutions having an expressive function, Tom Ginsburg means they “reflect and sometimes even create a shared consciousness, and so overcome regional and ethnic divisions.”³⁶¹ Ginsburg relies on examples such as the South African constitution’s symbolic reconciliation role and the Mexican constitution of 1917 still having great symbolic value despite delayed enforcement to conclude that:

The symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different from other polities.³⁶²

The mechanism by which constitutions achieve this symbolic and their other functions, Ginsburg reminds us, is via entrenchment.³⁶³

Other scholars have emphasised the expressive nature of constitutional currency or its mechanics. By the former, I mean primarily rights protection and associated ‘expressive harms’, i.e. harms which “are not tied to material injuries to specific individuals in the same way that harms involved in conventional individual rights cases are tied to discrete injuries.”³⁶⁴ Scholarship on equality or dignity has been a particularly rich ground where such notions of harm are applied.³⁶⁵ By constitutional mechanics, conversely, I refer to the emphasis on the expressive nature of constitutional procedures, particularly judicial review. Scholars have observed that “[a]ll constitutional actors participate in creating constitutional

³⁶⁰ Tushnet (2007), p. 79.

³⁶¹ Tom Ginsburg, “Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law” in Susan Rose-Ackerman and Peter L. Lindseth, eds., *Comparative Administrative Law*, Cheltenham: Edward Elgar Publishing, 2010, p. 118.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Anderson and Pildes (2000), p. 1539.

³⁶⁵ See Ron Levy, “Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination”, *Alberta Law Review*, Vol. 40, No. 2 (2002), pp. 393-416 and Tarunabh Khaitan, “Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea”, *Oxford Journal of Legal Studies*, Vol. 32, No. 1 (2012), pp. 1-19.

decisions of principally expressive significance,³⁶⁶ but apex courts such as the Supreme Court are particularly well-suited for performing this expressive function due to operational rules such as unanimity, life tenure and more.³⁶⁷

It would go beyond the scope of this thesis to delve into more variants of expressivist theories of constitutional law.³⁶⁸ What this succinct foray into the literature has hopefully shown is what it is that constitutional scholars, particularly theorists and comparatists, mean when they describe constitutions as expressive. They refer to specific values enshrined in a given constitution, to particularities of constitutional culture, and, more practically, to how these are instantiated via practices such as constitutional adjudication. However, considering also the sophistication of expressive theories of law more generally, I would argue that there is a certain vagueness in these accounts of constitutional law as expressive. It is unclear whether we are still in the 'banal' framework Adler identified above. The call to move beyond such general assertions and study what is being expressed and to what effect has been yielded only rarely within constitutional law.³⁶⁹ In what follows, I attempt to move the discussion precisely in this direction by analysing what it means to say that constitutions in general, and eternity clauses in particular, are expressive of a polity's constitutional identity.

³⁶⁶ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, Oxford: Oxford University Press, 1994, p. 185.

³⁶⁷ *Ibid.*, pp. 186-87.

³⁶⁸ One example not covered here comes from theories of constitutional political economy. See Geoffrey Brennan and Alan Hamlin, "Expressive Constitutionalism", *Constitutional Political Economy*, Vol. 13 (2002), pp. 299-311; Geoffrey Brennan and Alan Hamlin, "Constitutions as Expressive Documents" in Donald A. Wittman and Barry R. Weingast, eds., *The Oxford Handbook of Political Economy*, Oxford: Oxford University Press, 2008, pp. 329-42; and Alan Hamlin, "Constitutions, Politics, and Identity" in Alain Marciano, ed., *Constitutional Mythologies: New Perspectives on Controlling the State*, Heidelberg: Springer, 2011, pp. 39-51

³⁶⁹ See, for example, Anderson and Pildes (2000), pp. 1531-64.

2.2 Constitutional law as expressive of constitutional identity

2.2.1 Defining constitutional identity

Accounts of constitutional identity have focused on actual features of the constitution (the system of government, territorial make-up etc.); on “the relation between the constitution and the culture in which it operates”; and on “the relation between the identity of the constitution and other relevant identities” (national, religious, ideological).³⁷⁰ Less often, however, do scholars invoking constitutional identity also offer an account of what they mean by the notion; they seem to presume we more or less know what we are talking about when invoking it. At the heart of the concept there is a notion of core values, higher principles, perhaps even essence of the constitution — “the language of eternity”.³⁷¹

Two scholars writing on constitutional identity are an exception to this rule: Michel Rosenfeld and Gary Jacobsohn.³⁷² With varying degrees of clarity, they have written about this concept with a view to actually defining it and understanding the mechanisms behind the emergence, and change, of constitutional identity. I propose to explore their contributions and their import for the theory of constitutional change and permanence. Given the near-ubiquitous nature of constitutional identity-centred arguments in studies of eternity clauses, I propose that (finally) knowing what we are talking about will have a much needed clarifying effect.

The most complex theoretical account of constitutional identity has been put forth by Michel Rosenfeld. He conceives of constitutional identity “as belonging to an imagined community that must carve out a distinct self-image”.³⁷³ Rosenfeld centres his account on three questions: “*To whom* should the constitution be addressed? *What* should the constitution provide? And *how* can the constitution be justified?”³⁷⁴ Rosenfeld’s most ambitious contribution, in my view, is his attempt to provide an account of the birth of constitutional identity. He thus spells out the dialectical

³⁷⁰ Michel Rosenfeld, “Constitutional Identity” in Rosenfeld and Sajó (2012), p. 757.

³⁷¹ See Denis Baranger, “The Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)”, *Israeli Law Review*, Vol. 44 (2011), pp. 389-428.

³⁷² See, primarily, Rosenfeld (2010) and Jacobsohn (2010).

³⁷³ Rosenfeld (2012), p. 759.

³⁷⁴ Rosenfeld (2010), p. 10.

process through which constitutional identity comes into being via two general propositions:

First, constitutions rest on a paradox inasmuch as they must at once be alienated from, and congruent with, the very identities that make them workable and coherent. And second, all constitutions depend on elaboration of a constitutional identity that is distinct from national identity and from all other relevant pre-constitutional and extra-constitutional identities. Moreover, these two propositions are related in that constitutional identity emerges from the confrontation of the very paradox on which its corresponding constitution rests.³⁷⁵

Rosenfeld acknowledges the ambiguity in answering the “who” question, as the notion of constitutional subject could refer to “the makers of the constitution, those subjected to it, or its subject-matter.”³⁷⁶ Even if we were to settle on one of these three, he goes on to explain, the identity of the constitutional subject would not be clarified. We would still need to answer whether the makers of the constitution were those who actually drafted it or those in whose name it was drafted; who those legitimately subjected to the constitution are; as well as what the subject matter of the constitution is—that which the text states or its evolving interpretations?³⁷⁷ The constitutional subject, Rosenfeld stresses, is pluralistic—both individualistically and communally so.³⁷⁸ It is bound together by a common project for the polity: “What allows the multiple selves that partake in the ongoing process of carving out sufficient bonds of unity to sustain the constitutional subject as a single self is the elaboration of a commonly shared constitutional identity.”³⁷⁹

Summing up, for Rosenfeld, the process of constitutional identity creation is dynamic and dialectical, in the sense that it requires confronting contradictions which, once overcome, give rise to new contradictions.³⁸⁰ It also remains forever unfinished, in that constitutional identity needs to be constantly adjusted.³⁸¹ Finally, it is a process which depends on the harmonization of the three different poles of identity of the constitutional subject: the subject as constitution-maker, as the

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*, pp. 18-19.

³⁷⁷ *Ibid.*, p. 19.

³⁷⁸ *Ibid.*, p. 22.

³⁷⁹ *Ibid.*, p. 26.

³⁸⁰ *Ibid.*, p. 26.

³⁸¹ *Ibid.*, p. 26.

collectivity bound by the constitution, and as interpreter, elaborator and custodian of the constitution.³⁸² In more concrete terms, Rosenfeld argues that a polity will emerge following a break with the past in need of a new constitutional identity. Via the process of negation, it will distance itself from prior traditions and from those prior identities which it sought to leave behind. However, it will need a positive identity and this will be achieved through a complex, dialectical and ever incomplete process of incorporation, which will engage other types of identities and prior traditions but carve out a separate space for itself.

What constitutional identity is not, and what Rosenfeld also distinguishes it from, is national identity, as well as "all other relevant pre-constitutional and extra-constitutional identities".³⁸³ Although a constitution will inevitably draw on national identity, to fold the two into one another would be to deny the constitution an identity of its own.³⁸⁴ Constitutional identity should also not be confused with constitutional patriotism, although Rosenfeld acknowledges the latter as a potential tool towards forging constitutional identity. Understood as loyalty to constitutionalism, constitutional patriotism can play a negative role in countering nationalistic patriotism;³⁸⁵ it may even play a positive role in constructing a positive constitutional identity at the transnational level, albeit the latter is a shakier proposition.³⁸⁶ Presumably, constitutional identity is also different from constitutional culture to which Rosenfeld makes occasional references.³⁸⁷ The differentiation between the two concepts is tricky, however, and some authors distinctly conflate them.³⁸⁸ A fuller account of this last distinction goes beyond the scope of my analysis here and, while acknowledging the similarities in the

³⁸² *Ibid.*, p. 26.

³⁸³ *Ibid.*, p. 10.

³⁸⁴ *Ibid.*, p. 29.

³⁸⁵ *Ibid.*, pp. 175 and 258.

³⁸⁶ *Ibid.*, pp. 258-69.

³⁸⁷ *Ibid.*, pp. 23, 132, 162, 181, and 230.

³⁸⁸ See, for instance, Jan-Werner Müller, *Constitutional Patriotism*, Princeton, NJ: Princeton University Press, 2007, p. 56.

literatures dealing with these two concepts, I will refer to constitutional identity as the frame of reference for understanding eternity clauses throughout.³⁸⁹

Jacobsohn does not have a similarly well-developed account of the generative processes behind constitutional identity. He does not seem preoccupied with constructing such a theory at all, preferring instead to describe constitutional identity and its components in various polities. He emphasises the dialogical nature of constitutional identity, its expressive nature and resistance to change:

I will argue that a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.³⁹⁰

The emphasis on experience and on a delicate balance between political commitments past and present are congruent with Rosenfeld's account. They lead Jacobsohn to describe "the fundamental dynamics of identity" as less a cultural or historical contingency and more "the expression of a developmental process endemic to the phenomenon of constitutionalism."³⁹¹ Jacobsohn's theory thus places great emphasis on dialogic engagement in several dimensions, including, interestingly, in the transnational.³⁹² It also links constitutional expressiveness with identity to the point of merging the two concepts. "An expressive component is present in all constitutional identities", he writes, and where, as in Ireland, "the

³⁸⁹ Definitions of constitutional culture share similarities with notions of constitutional identity. For example, Ferejohn *et al.* state: "constitutionalism rests on a complex and only partly visible collection of norms and practices of constitutional interpretation – what we are calling a constitutional culture". John Ferejohn *et al.*, eds., *Constitutional Culture and Democratic Rule*, Cambridge: Cambridge University Press, 2001, p. 14. See also Jason Mazzone, "The Creation of a Constitutional Culture", *Tulsa Law Review*, Vol. 40 (2005b), p. 672, emphasising the people's understanding and acceptance of their constitution and its limits.

³⁹⁰ Jacobsohn (2010), p. 7.

³⁹¹ Gary J. Jacobsohn, "The Formation of Constitutional Identities" in Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law*, Cheltenham: Edward Elgar Publishing, 2011, p. 130.

³⁹² *Ibid.*, p. 136.

principal marks of identity are largely a projection of the extant social or cultural condition rather than mainly or even partly a reproach to it, expressiveness might be viewed as a synonym for the concept of identity and not merely a component of it."³⁹³

Complicating Jacobsohn's account is what he terms "constitutional disharmony", which he links to the contestability of constitutional identity. Disharmony, he argues, refers to the dissonance (not incoherence) of constitutions, and "the course of constitutional identity is impelled by the discord of ordinary politics within limits established by commitments from the past."³⁹⁴ Contestability is thus crucial in understanding constitutional identity,³⁹⁵ as long as there exist "identifiable continuities of meaning within which dissonance and contradiction play out."³⁹⁶ For Jacobsohn, therefore, constitutional identity is not to be equated to an essence ("some core essence that at its root is unchangeable"³⁹⁷), but is the outcome of a continuous, and continuously fraught, process. To this Rosenfeld could be seen as agreeing. However, Rosenfeld has also emphasised the need for constitutional identity to cohere, "both at the level of the constitution as a whole and of particular constitutional provisions and most notably those most likely to provoke contestation."³⁹⁸ The conditions for this difficult equilibrium (or is it a back and forth?) between coherence and disharmony is something which the theorists of constitutional identity have not been able to pinpoint. An easy answer would be to say that it can only be evaluated in a particular context. A more honest answer would be that constitutional theory has not, and perhaps does not have the tools to, put forth a complete account of the inner mechanisms of constitutional identity.

Like Rosenfeld, Jacobsohn distinguishes between constitutional and national identity but acknowledges that the distinction is sometimes difficult to sustain. He gives the example of Turkey's Kemalist conflation of national and constitutional identities as one of the "situations where the express purpose of the constitution is

³⁹³ Jacobsohn (2010), p. 31.

³⁹⁴ Jacobsohn (2011), p. 135.

³⁹⁵ Jacobsohn (2010), p. 15.

³⁹⁶ *Ibid.*, p. 4.

³⁹⁷ *Ibid.*, p. 4.

³⁹⁸ Rosenfeld (2012), p. 759.

to separate the future from the past in ways that will have transformative effects on social behavior.”³⁹⁹ Moreover, Jacobsohn talks of a constitutional identity of the text versus of the people, which are not always aligned.⁴⁰⁰ He gives the uneven developments in US constitutional law as an example and argues that “[u]ltimately, stability in the identity of the constitutional order depended on convergence of the two.”⁴⁰¹

Accounts of constitutional identity were enriched as part of debates on whether the European integration project was compatible with the constitutional identity of Member States and, indeed, whether there existed something called a ‘European constitutional identity’. These debates, sparked by the eastward enlargement of the European Union and culminating during the ratification process of the Treaty of Lisbon, are too rich to cover here.⁴⁰² They will, however, re-emerge in the discussion in section 2.5 at the end of this chapter. For now it suffices to note that the meta-constitutional concept of identity has reached beyond the state and found currency, and contestation, at the supra-national level. However, the concept was not used uniformly in that context either, with commentators vacillating between notions of constitutional and national identity and often conflating the two. In other words, we find similar conceptual confusion when invoking constitutional identity at the European level.

2.2.2 Changing constitutional identity

So much for the creation of constitutional identity. What do we know about its transformation? An important objection to constitutional identity literature is precisely that it does not provide a sound account of how constitutional identity is to change lawfully.⁴⁰³ One aspect of this objection points to the static notions of identity thought to imbue expressivist theories of constitutional law more

³⁹⁹ Jacobsohn (2010), p. 10.

⁴⁰⁰ Jacobsohn (2011), p. 141.

⁴⁰¹ *Ibid.*, p. 141.

⁴⁰² See, *inter alia*, essays in “Symposium on the Proposed European Constitution”, *International Journal of Constitutional Law*, Vol. 3, No. 2-3 (2005) and in “Confronting Memories: Constitutionalization After Bitter Experiences”, *German Law Journal*, Vol. 6, No. 2 (2005).

⁴⁰³ See Rosalind Dixon, “Amending Constitutional Identity”, *Cardozo Law Review*, Vol. 33, No. 5 (2012), pp. 1847-58.

generally.⁴⁰⁴ Furthermore, comparative work investigating the practicalities of amending constitutional identity has yielded mixed results and has not clarified the tension between amendments and constitutional identity.⁴⁰⁵ Theoretical scholarship also seems to struggle with addressing changes in constitutional identity, seemingly stuck in the conundrum of distinguishing between constitutional amendment and constitution-making or remaking or else offering revolution as the only alternative. This is hardly surprising given the recurrence of debates on what constitutes a fundamental constitutional change in general. (One aspect of these debates was discussed in Chapter 1 in the context of exercises of constituent power; another will be explored in Chapter 4, on attempts to repeal eternity clauses.)

Rosenfeld, for instance, talks about constitutional amendment and its impact on constitutional identity and contrasts it with constitution-making. If “[a]mending the constitution involves changing it without threatening its overall unity or identity”, he notes, constitution-making “does require creating a new unity and identity which, in turn, depends on repudiation of preceding constitutional identities and of other pre-constitutional and extra-constitutional ones.”⁴⁰⁶ Rosenfeld acknowledges, however, that the distinction between the two is clear at the level of the formal constitution, but blurrier at the level of the material (living) constitution. To him, amendment is a site which aptly embodies the tension between sameness and selfhood as the two facets of constitutional identity: sameness is textual and may be complemented or contradicted by selfhood, which is interpretive and corresponds to evolving understandings of otherwise unchanged text.⁴⁰⁷ Admitting that some constitutions are more rigid than others, and some even explicitly restrict the scope of legitimate amendments, Rosenfeld asks: “can there be any cogent way to determine at what point do constitutional amendments threaten to destroy

⁴⁰⁴ Rosalind Dixon, “A Democratic Theory of Constitutional Comparison”, *American Journal of Comparative Law*, Vol. 56 (2008), p. 947 and Jackson (2012), p. 67. See also Tushnet (2007), p. 81.

⁴⁰⁵ Dixon (2012), p. 1858.

⁴⁰⁶ Rosenfeld (2010), p. 30.

⁴⁰⁷ Rosenfeld gives the example of the US constitution: its text has remained the same since 1787, with the exception of the 27 amendments; its interpretation, however, has evolved. To the extent that these interpretations can be organically understood as a process of adaptation and growth, they can be understood as constructing and preserving identity in the sense of selfhood. *Ibid.*, p. 27.

constitutional identity?"⁴⁰⁸ He gives the example of an amendment lowering the voting age in the US, which clearly does not; conversely, Hungary's use of amendments to completely overhaul its pre-1989 constitution clearly negated the latter's identity while preserving its formal shell.⁴⁰⁹ Post-Civil War amendments in the US are a more ambiguous example. In contrast to amendment, which can go either way (either bolster or erode constitutional identity), constitution-making would seem to necessarily "negate[] past constitutional identities to launch new ones".⁴¹⁰ This conclusion does not necessarily hold if we consider France's fifteen constitutions since 1789 (formally having distinct identities but materially, perhaps not) versus the US's single constitution (formally having one identity but materially, several).⁴¹¹ Thus, Rosenfeld concludes that it is best to rely on substantive rather than formal criteria for distinguishing between amending versus changing constitutional identity.⁴¹²

Jacobsohn more directly acknowledges the problem. Writing on India, he admits that "the jurisprudential record is slim in theorizing the changes in constitutional identity that extant circumstances may require."⁴¹³ If contestation is already bounded within the confines of an eternity clause expressive of constitutional identity, as he argues, then the only recourse left when attempting to change those boundaries is revolution. Jacobsohn accepts this possibility and says that when a constitution's heritage is deplorable, "its identity perhaps *should* be destroyed and reconstituted."⁴¹⁴ On Sri Lanka's rejection of a basic structure doctrine in pursuit of ethnic republicanism, for example, Jacobsohn writes: "that...the immutability of an identity in tension with the precepts of liberal constitutionalism should be held sacrosanct by a judicial tribunal is by no means self-evident."⁴¹⁵ He expresses similar concerns with regard to Turkey and its constitutionalisation of secularism.⁴¹⁶

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*, p. 31.

⁴¹⁰ *Ibid.*, p. 31.

⁴¹¹ *Ibid.*, pp. 31-32.

⁴¹² *Ibid.*, p. 207.

⁴¹³ Jacobsohn (2010), p. 18.

⁴¹⁴ Jacobsohn (2011), p. 132.

⁴¹⁵ Jacobsohn (2010), p. 69.

⁴¹⁶ *Ibid.*

I would argue that both of these accounts are unsatisfactory. Rosenfeld's move amounts to little more than displacing the problem. Without at least some further guidelines, invoking substantive criteria for determining a change in the material constitution and thus in constitutional identity leads us back to hoping we know it when we see it. Jacobsohn's call for major constitutional overhaul is limited to contexts where constitutional identity is illiberal and 'deplorable'. Moreover, this option is costly and amounts to a major disruption of the legal order. We are thus left with knowing that a constitutional identity may and should develop over time,⁴¹⁷ but unsure of how its contours may be shifted once in place.

2.2.3 Objections to the notion of constitutional identity

While I have already indicated my main bone of contention with theorists of constitutional identity—that they provide an inadequate answer to questions of how this identity is to change—there are other objections to this concept which are worth investigating. I will briefly discuss three here: the preliminary need to explain a commitment to constitutionalism itself; the unclear explanatory function performed by the concept of constitutional identity; and its propensity to be defined by potentially exclusionary values.

A first question is whether when we invoke constitutional identity we are not in fact discussing constitutionalism itself. One way to ask this question is to wonder whether an account such as Rosenfeld's should not, in the first instance, explain what constitutionalism itself has to offer to explain its pull, particularly given its invocation at the transnational level. In the words of Gianluigi Palombella, "it is uncertain where the pull toward constitutionalism, as a drive to reconciliation, comes from unless one presupposes a further normative identity ethos of inherent constitutionalist substance."⁴¹⁸ This is also a worthwhile reminder to those writing

⁴¹⁷ As Franz Mayer has said, "Identity, be it European or national, is nothing that can simply be written into a constitutional text and then it is there. It has to develop over time, which also means that it *can* in fact develop over time." Franz C. Mayer, "Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union", *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), p. 785.

⁴¹⁸ Gianluigi Palombella, "Structures and Process in the Constitutional Self: Coping with the Future?", *International Journal of Constitutional Law*, Vol. 8, No. 3 (2010), p. 660.

on eternity clauses without differentiating much between arguments in favour of unamendability and those in favour of the role of constitutions generally.⁴¹⁹

A second objection relates to the lack of clarity as to the explanatory value of constitutional identity as a concept. As Neil Walker has observed with regard to Rosenfeld's theory,

[Rosenfeld's] more general models of the constitutional subject tell us little about the dynamics of state and nation evolution and settlement that could not be redescribed in terms which omitted or downplayed the specifically constitutional variables, so begging the question of just how important and consequential those constitutional variables are as discrete causal forces rather than as one of many deeply sedimented and closely intertwined factors that make up the community's political way of life.⁴²⁰

In other words, if we can easily tell the story of constitutional evolution in various national settings without recourse to the concept of constitutional identity, why invoke it in the first place? Both Rosenfeld and Jacobsohn assume the existence of the notion of constitutional identity and set about defining its contours. They largely ignore the question of its explanatory necessity. Jacobsohn does engage with some critics of the concept and addresses Laurence Tribe's scepticism of constitutional identity.⁴²¹ However, Walker's concern here is not the same as Tribe's objection that there is a lack of unity in constitutional vision. It is a more clearly methodological one: we need a more concrete notion of the explanatory power of constitutional identity as distinct from other variables. Neither of the two main theories of constitutional identity provides this.

A final point here concerns the risk that exclusionary values become part of a polity's constitutional identity. Scholars such as Melissa Schwartzberg and Ayelet Shachar have expressed worry over this possibility.⁴²² The former has written on possible non-inclusive entrenchment of values, giving the example of entrenching

⁴¹⁹ See Breslin (2009).

⁴²⁰ Neil Walker, "Rosenfeld's Plural Constitutionalism", *International Journal of Constitutional Law*, Vol. 8, No. 3 (2010), pp. 680-81.

⁴²¹ See Jacobsohn (2010), pp. 3-4.

⁴²² Schwartzberg (2009) and Ayelet Shachar, "The Return of the Repressed: Constitutionalism, Religion, and Political Pluralism", *International Journal of Constitutional Law*, Vol. 8, No. 3 (2010), pp. 665-70.

official language rights in places like Romania and Azerbaijan to illustrate the point.⁴²³ (I further explore the discriminatory potential of unamendable language provisions in Chapter 3.) Shachar is less specific and more speculative in her fears but does wonder, reacting to Rosenfeld's theory, whether "the threat of extreme nationalism, religiosity, and identity politics of all kinds is far more influential than is acknowledged in [his] text."⁴²⁴ Taking this insight further in the realm of religious protection, Shachar posits that Rosenfeld's pluralist commitment only allows religion to thrive if

pacified and tempered so as never to challenge the lexical superiority of the society's *constitutional* identity. In the process, religions and other comprehensive ways of life are "disarmed" so as to remove their potentially disruptive power to challenge the semisacred, high modernist stance of constitutionalism as a "civil religion" that generates the *highest* law of the land.⁴²⁵

She thus ascribes to Rosenfeld a bounded pluralism, tolerant of difference only insofar as it poses no threat: "Pluralism is permitted only within a bounded set of margins that are not incompatible with basic constitutional or human rights standards."⁴²⁶ Shachar is not the only one to question the nature of Rosenfeld's pluralism,⁴²⁷ and her critique reaches beyond Rosenfeld's work. The contestation and divisiveness which characterise identity politics do not magically disappear when moving to the constitutional realm. Nor are they only to be found when constitutional identity veers into ethnic politics and illiberalism, as Jacobsohn suggested. Contestation can vary from reasonable disagreement about fundamental values to outright incompatibilities between different ways of life and constitutional forms and it is unclear whether constitutional identity theories solve or conceal the problem.

⁴²³ Schwartzberg (2009), p. 24.

⁴²⁴ Shachar (2010), p. 667.

⁴²⁵ *Ibid.*, pp. 667-68.

⁴²⁶ *Ibid.*, p. 669.

⁴²⁷ Neil Walker calls Rosenfeld a plural constitutionalist rather than constitutional pluralist. Walker (2010), p. 678.

2.3 Eternity clauses as sites of constitutional expression

2.3.1 One site among many: preambles as expressive of constitutional identity

As was noted above, it is hardly a revolutionary claim to describe constitutions as expressive of particular values. Within the constitutional edifice, moreover, some provisions are more likely to indicate core normative commitments than others. The 'usual suspects' are preambles, although other sites are also possible—for example, explicit declarations of principles such as are found in the South African and Spanish constitutions.⁴²⁸ Conventional views on preambles are thus extended by analogy to eternity clauses: just as the former are (largely non-justiciable) symbolic statements so too are the latter. In the words of Jon Elster, unamendable provisions are to be seen as "mainly symbolic".⁴²⁹ The problem with this line of argument is that it does not always hold true for preambles and it is perhaps even less true of eternity clauses.

Preambles have been described as "particularly useful for an expressivist".⁴³⁰ Mark Tushnet has called them a combination of pabulum with "some effort to capture a sense of national identity."⁴³¹ Beau Breslin has pronounced them "typically the portion of a traditional constitutional draft where the polity articulates its most important aims and objectives."⁴³² Sanford Levinson has similarly emphasised their expressive function which aims to encapsulate "the ostensible "essence" of the people or nation in whose name the constitution has been drafted, whether defined in terms of religion, language, ethnicity, shared history of oppression, or even

⁴²⁸ Albert (2013), p. 244.

⁴²⁹ Jon Elster, "Constitutionalism in Eastern Europe: An Introduction", *The University of Chicago Law Review*, Vol. 58, No. 2 (1991), p. 471.

⁴³⁰ Tushnet (2007), p. 79.

⁴³¹ Mark Tushnet, "Constitution-Making: An Introduction", *Texas Law Review*, Vol. 91 (2013a), p. 2001.

⁴³² Breslin (2009), p. 50.

commitment to some scheme of universal values.”⁴³³ In short, preambles are viewed as perhaps the most prominent site for expressing constitutional identity.⁴³⁴

Preambles go beyond this, however. As Levinson has aptly observed, they are not meant merely to provide “an additional patch of text for use in the standard arsenal of legal arguments”.⁴³⁵ According to Tushnet, they veer from “largely precatory” to occasionally having legal force.⁴³⁶ He associates the latter with the presence of constitutional review, with preambles at the core of structural constitutional interpretation in several jurisdictions.⁴³⁷ A recent study has in fact found that preambles have been increasingly used in constitutional interpretation, with an identifiable trend towards giving them greater binding force.⁴³⁸ Perhaps the most famous example is that of the French Constitutional Council elevating the preamble of the 1946 constitution to full constitutional status in 1971, contrary to clear drafting intent.⁴³⁹ The lesson here is that no statement in the constitutional text may be safely assumed to remain symbolic, irrespective of how far from justiciable its drafters intended it to be. In contexts which allow for expansive constitutional review, moreover, the likelihood that such statements are used as basis for interpretation increases.

More recently, comparative empirical studies have exposed just how unoriginal and unreflective preamble language often is.⁴⁴⁰ Ginsburg *et al.* have argued that despite the widespread understanding of preambles “as the local part” of the constitution, “they frequently seem to speak in an international idiom.”⁴⁴¹ By the latter they mean

⁴³³ Sanford Levinson, “Do Constitutions Have a Point? Reflections on “Parchment Barriers” and Preambles” in Ellen Frankel Paul *et al.*, eds., *What Should Constitutions Do?*, New York: Cambridge University Press, 2011, p. 177.

⁴³⁴ Jacobsohn (2011), p. 132. See also Vicki Jackson, *Constitutional Engagement in a Transnational Era*, Oxford: Oxford University Press, 2010, p. 18.

⁴³⁵ Levinson (2011), p. 166.

⁴³⁶ Tushnet (2013a), pp. 2001-2002.

⁴³⁷ *Ibid.*, pp. 2003-2004.

⁴³⁸ Liav Orgad, “The Preamble in Constitutional Interpretation”, *International Journal of Constitutional Law*, Vol. 8, No. 4 (2010), pp. 714-38.

⁴³⁹ Decision No. 71-44 DC, 16 July 1971. For a discussion, see Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford: Oxford University Press, 1992, pp. 66-78.

⁴⁴⁰ Tom Ginsburg *et al.*, “‘We the Peoples’: The Global Origins of Constitutional Preambles”, *George Washington International Law Review*, Vol. 46, No. 2 (2014), pp. 305-40.

⁴⁴¹ *Ibid.*, p. 337.

that preambles “often adopt terms or memes from other constitutions, they frequently invoke international treaties, and they sometimes contain language that amounts to foreign policy statements.”⁴⁴² Even innovations, when they do occur, do so in temporal and regional clusters: they come in global waves and are influenced by neighbours’ innovations.⁴⁴³ These findings lead the authors to suggest that

The broad pattern we observe is one of stasis, followed by periods of change. These periods are determined globally, and not simply by domestic developments. Preambles, then, are internationally embedded texts, whose production is related to their peers in time and place.⁴⁴⁴

While a similarly comprehensive empirical study of the migration of the language of unamendability has not been performed, the evidence which is available points to the likelihood of similar findings in the case of eternity clauses.⁴⁴⁵ I explore this more in section 2.4 below.

There is an additional question raised by proponents of preamble-like understandings of eternity clauses, however: if merely symbolic, why would there need to be an additional site of expressing the polity’s core values within its constitution? Why not relegate such symbolism to the preamble alone? Levinson observed about preambles that they “presumably...have a point, but it really cannot be the same kind of point that would be attributed to the main body of a written constitution.”⁴⁴⁶ One could reverse this and say eternity clauses really cannot serve the same aim as the preamble of the constitution. To assume otherwise amounts to assuming redundant drafting and ignoring the reality of unamendability’s justiciability.

2.3.2 Eternity clauses as expressive of constitutional identity

Richard Albert has written extensively on the expressive function performed by eternity clauses. He has addressed them as one sub-type of constitutional amendment rules, the latter of which he deems an important potential site of constitutional expressiveness. He states:

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, p. 311.

⁴⁴⁴ *Ibid.*, p. 337.

⁴⁴⁵ See Roznai (2013) and Roznai (2014a), Appendix, pp. 243-79.

⁴⁴⁶ Levinson (2011), p. 157.

Formal amendment rules are one of the sites where constitutional designers may express a polity's constitutional values, both internally to the persons who are nominally or actually bound by its terms, and externally to the larger world.⁴⁴⁷

In other words, alongside other functions they may perform—such as distinguishing constitutional from ordinary law and regulating the process of constitutional change—amendment rules, Albert posits, “should also be understood as one of several sites where constitutional designers may entrench and thereby express constitutional values.”⁴⁴⁸ He views this expression as more or less authentic, where authenticity is given by the distance between aspirations in the constitution and the implementation of these political commitments into reality.⁴⁴⁹ Thus, in Albert's understanding, amendment rules may be expressive of inauthentic values as well and are thus “susceptible to authoritarian commandeering.”⁴⁵⁰ Rules for constitutional change thus may become sites where authoritarian regimes express values they have no intention of pursuing in order to “secur[e] for themselves the goodwill that may come from their public, even if dishonest, association with democratic ideals.”⁴⁵¹ This is an argument reminiscent of Jacobsohn's on illiberal constitutional identity (see above).

Albert's argument is acceptable insofar as it makes only a modest claim: that the rules framers adopt concerning the change of their text express their more or less 'authentic' values. Writing on unamendability expressly, he sees it as an issue of degree on a continuum of constitutional rigidity. Thus, eternity clauses find their merit precisely in their expressive function:

That purposeful symbolism is the subtle, yet paradoxically the most powerful, virtue of entrenchment. For by identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colors in its self-portrait.⁴⁵²

⁴⁴⁷ Albert (2013) p. 229.

⁴⁴⁸ *Ibid.*, p. 230.

⁴⁴⁹ *Ibid.*, p. 257.

⁴⁵⁰ *Ibid.*, p. 260.

⁴⁵¹ *Ibid.*

⁴⁵² Albert (2010), pp. 699-700.

For Albert, therefore, unamendable provisions go beyond the expressive function performed by constitutionalism or constitutional law generally—because “there is nothing unarticulated about entrenchment”, he says, they leave no doubt as to the values binding citizens.⁴⁵³ Perhaps because it is difficult to deny that provisions which explicitly articulate constitutional values have some expressive role—indeed, one may even view it as tautological if expressivity is used as synonym for ‘value talk’—a great proportion of the literature on eternity clauses has focused on their link to constitutional identity.⁴⁵⁴

Returning to Rosenfeld and Jacobsohn as the main theorists of constitutional identity, their accounts make more or less direct reference to unamendability. As noted above, Rosenfeld deals with it only implicitly, when pointing to substantive limitations on constitutional change as markers of the preservation or destruction of constitutional identity.⁴⁵⁵

Jacobsohn’s account of constitutional identity more directly makes room for arguments about eternity clauses. For him, identity is a fluid concept but not one without boundaries, “and textual commitments such as are embodied in preambles often set the topography upon which the mapping of constitutional identity occurs.”⁴⁵⁶ Thus, a constitutive political commitment such as Turkey’s to secularism—insulated from amendment by the constitution’s Article 4—will in Jacobsohn’s view not preclude evolution: “its specific content would vary over time, tethered to the text, but only loosely, so as to accommodate the dialogical interactions between codified foundational aspirations and the evolving mores of the Turkish people.”⁴⁵⁷ It is slightly paradoxical that Jacobsohn relies on this example to advocate his dialogic argument given that the Turkish eternity clause does not allow even the proposal of an amendment to secularism and other basic characteristics of the state. (More on this in Chapter 3.) Similarly in the case of India, he argues, while the commitment to secularism may be fundamental to the

⁴⁵³ *Ibid.*, p. 700.

⁴⁵⁴ See also Roznai (2014a), p. 34 and Yaniv Roznai, “Unamendability and the Genetic Code of the Constitution”, *European Review of Public Law*, forthcoming 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569279.

⁴⁵⁵ Rosenfeld (2010), p. 207.

⁴⁵⁶ Jacobsohn (2010), p. 12.

⁴⁵⁷ *Ibid.*, p. 14.

country's constitutional identity, the meanings people ascribe to it will differ.⁴⁵⁸ The problem here, again, is that if the concept of constitutional identity is to do its intended work, there needs to be more we can say about when its boundaries are transgressed. Jacobsohn seems content to describe elements constitutive of the constitutional identity of one country or another and looks to eternity clauses as prime sites of its expression. Implicit in his reliance on constitutional court decisions is also the assumption that it is these bodies, perhaps above others, which are to be entrusted with policing the frontiers of and changes in constitutional identity. As the example discussed later in this chapter shows, constitutional identity is an especially malleable concept in the judiciary arsenal.

2.3.3 Eternity clauses as expressive of constitutional hierarchy

A variation on arguments about eternity clauses as expressive of core values is that unamendable provisions also serve an ordering function by establishing a hierarchy of constitutional values. Richard Albert's work is here again relevant. He has written about the variation in difficulty of amendment rules as motivated, at least sometimes, by a considered judgment about their importance.⁴⁵⁹ He has concluded that the entrenchment of a formal constitutional hierarchy can reflect a multitude of motivations, including political bargaining during drafting, self-interest, the expression of values, or "some combination of these three."⁴⁶⁰ In other words, it is not merely that drafters express constitutional values in eternity clauses as one type of amendment rule; they also seek to signal the precedence of those values over others in the constitution. The unavoidable consequence is the reliance on these apex values, to the exclusion of others, in resolving constitutional conflicts. A familiar example might be the protection of human dignity in Germany via Article 1 of the Basic Law, in turn rendered unamendable by Article 79(3), which permeates and orders the entire value structure of the constitution.⁴⁶¹ The lawyerly discomfort with disorder thus translates into a desire for a gradation even within higher law, with eternity clauses signalling the "authoritative predetermined hierarchy of

⁴⁵⁸ Jacobsohn (2011), p. 139.

⁴⁵⁹ Other reasons are political compromise and distrusting future generations as self-interested. Albert (2013), pp. 245-47.

⁴⁶⁰ *Ibid.*, p. 247.

⁴⁶¹ See Edward J. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law", *Utah Law Review* (1997), pp. 963-1056.

values, whether formally or informally entrenched”⁴⁶² which Albert deems necessary to mediate between competing and contested values.⁴⁶³

The problem with such arguments is that it is unclear whether establishing a hierarchy of norms internal to the constitution is either wise or practical. In previous work, Albert had himself deemed it imprudent to establish a hierarchy of constitutional norms via eternity clauses, on the basis that

[t]o regard the constitution as a mere compilation of individual provisions, each subject to a sliding scale of worth, is to devalue the constitutional text as a document whose constituent parts must be read together to give the larger whole its full meaning.⁴⁶⁴

Moreover, he claimed, “the reasons or principles according to which some constitutional provisions are elevated above others may be neither apparent nor even logically sound to those bound by its terms.”⁴⁶⁵ While I do not agree with Albert’s more extreme stance—he viewed such a constitutional hierarchy of norms as threatening “to deplete the text of its intrinsic value” as an institution of authority⁴⁶⁶—I do think more thought should be expended considering the logical ordering of constitutional values of which eternity clauses might be part. To establish a kind of constitution-within-a-constitution, as unamendable provisions are in this narrative, raises questions about the sliding authority of different parts of the constitution and about how to mediate conflicts between them. It also ignores the possible use of higher norms for private political agendas.⁴⁶⁷

Defenders of constitutional hierarchies view these conflicts internal to the constitutional text as articulations of “alternative visions or aspirations that may embody different strands within a common historical tradition”⁴⁶⁸ which generate healthy ‘disharmony’ in constitutional identity. I am more sceptical. I see such a

⁴⁶² Albert (2013), p. 240.

⁴⁶³ This view is not unavoidable. For a discussion of the rejection of a doctrine of supraconstitutional norms, see Baranger (2011), pp. 402-403.

⁴⁶⁴ Albert (2010), p. 683.

⁴⁶⁵ Albert (2010), p. 683.

⁴⁶⁶ Albert (2010), p. 684.

⁴⁶⁷ Baranger (2011), p. 403.

⁴⁶⁸ Jacobsohn (2010), p. 133

“quest for a compelling unity”⁴⁶⁹ as ignorant of the potentially large number of incongruities and inner contradictions in the constitutional text. A consistent application of the eternity clause as an ordering mechanism might require an extensive and unpredictable reshuffling of constitutional commitments. In short, it might create more problems than it solves. This, of course, assuming that the ordering norms themselves are coherent and easily identifiable – a precondition more easily met by Germany’s Article 79(3) than by India’s shifting basic structure doctrine, or indeed by Bosnia’s vast apparatus of international human rights commitments.

I therefore agree with Donald Horowitz’s observation that because of the conditions in which it takes place, the constitution-making process is unlikely to be conducive to coherent designs.⁴⁷⁰ Or with Walter Murphy, who acknowledged that “even a search for a consistent body of principles within a single constitutional document presents formidable problems.”⁴⁷¹ Constraints on time and resources, biases, accidents, pre-existing institutional capacity,⁴⁷² and above all the nature of negotiation and bargaining—Horowitz describes the latter as “often involving an exchange of incommensurables”⁴⁷³—are not immediately conducive to a considered judgment about constitutional hierarchy and coherence. There is no reason to assume that a constitution’s eternity clause benefitted from more virtuous drafting than the rest of the text and as such it is at least open to similar scrutiny, not veneration. Nor should we automatically assume the drafters’ intention for the unamendable provision to function as an ordering device, particularly in constitutions which do not explicitly grant courts review powers over it.

One might argue that constitutions are messy documents and it is the task of judicial interpretation to make sense of them. Murphy identified two missions of constitutional interpretation: “the first mission involves imposing a high but not rigid degree of order on what is typically unordered and often badly disordered”;

⁴⁶⁹ This is the title of the third chapter in Jacobsohn (2010), pp. 84-135.

⁴⁷⁰ Horowitz (2008), pp. 1226-27.

⁴⁷¹ Walter F. Murphy, “An Ordering of Constitutional Values”, *South California Law Review*, Vol. 53 (1980), p. 704.

⁴⁷² Horowitz (2008), pp. 1227-30.

⁴⁷³ *Ibid.*, p. 1230.

the second is to apply values and principles to particular problems with “political prudence”.⁴⁷⁴ As will become apparent in section 2.5 below, however, relying on notions of constitutional identity renders this double mission more difficult for courts and risks departing from the flexibility and prudential approach Murphy championed.

2.4 Limits of constitutional identity understandings of eternity clauses

Before proceeding to an in depth analysis of how constitutional identity may play out in concrete constitutional interpretation, I want to explore three additional problems with viewing eternity clauses as expressive of constitutional values. They refer to the dangers of entrenching undemocratic or contested values, as well as to the degree to which the language of unamendability may be less the result of constitutional soul-searching and more a result of the unreflective migration of constitutional language. As it will become clear, these problems mirror the objections to constitutional identity theories more broadly and may thus be seen as concrete examples of this critique.

With regard to the first problem, some of the unamendable provisions in authoritarian or theocratic settings appear to pursue the self-interest of a very narrow elite with access to drafting. For instance, Turkmenistan’s Article 116 (“The constitutional provisions on the form of governance as a presidential republic cannot be changed.”) may be judged a clear case of executive entrenchment. However, neighbouring Tajikistan’s Article 100 reads much like unamendable provisions in liberal constitutions: “The republican form of government, the territorial integrity, the democratic, law-governed, secular, and social nature of the State are unchangeable.” As Mark Tushnet has demonstrated, there is value in expanding our theoretical apparatus beyond liberal to “authoritarian constitutionalism”, which describes settings where there is at least some normative commitment to constitutionalism.⁴⁷⁵ Following his lead, the question of whether

⁴⁷⁴ Murphy (1980), p. 706.

⁴⁷⁵ Mark Tushnet, “Authoritarian Constitutionalism”, *Cornell Law Review*, Vol. 100, No. 2 (2013b), pp. 391-461.

eternity clauses in illiberal contexts are mere parchment commitments becomes more difficult to answer.

It is also difficult to categorise provisions which entrench commitments to particular religions. For example, Afghanistan's Article 149 reads, in part: "The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended." The difficulty here is not one of discrepancy between the letter of the constitution and its implementation, as in the case of many authoritarian regimes. Instead, it is one of delineating the boundaries of religious principles and their infringement. This is made even more complex in the Afghan constitution, which combines Islam and international law as sources of law (Articles 3 and 7, respectively), without guidance as to how they are to be reconciled if in conflict.⁴⁷⁶ My point here is not to claim a fundamental incompatibility between constitutionalism and religious sources of law, even while it has been acknowledged that including these will result in overlapping jurisdictions and possibly conflicting authority claims.⁴⁷⁷ Instead, it is to speculate that our constitutional imagination, influenced as it has been by Western liberal and mostly secular constitutionalist categories, may not be well-equipped to address the types of conflicts which may arise in such contexts, including via unamendable value pronouncements. Less ambitiously, I wish to raise awareness of the fact that these types of provisions are largely ignored by the literature on eternity clauses and constitutional identity and to argue against their erasure.⁴⁷⁸

The second problem I have outlined is by now a familiar one. One objection to expressive accounts of eternity clauses is to the optimistic way in which constitutional identity theory tends to view the process of self-identification. In other words, despite contestation and through dialogical engagement, a relatively

⁴⁷⁶ On this point, see Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan" in Rainer Grote and Tilmann J. Röder, eds., *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford: Oxford University Press, 2012, pp. 671-72.

⁴⁷⁷ For this argument being made in the Canadian context, see Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies", *McGill Law Journal*, Vol. 50 (2005), p. 72.

⁴⁷⁸ On the evolution of Islamic constitutionalism as a form of constitutional government, see Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, Albany, NY: State University of New York Press, 2001.

stable constitutional identity always emerges. I have found little concern for the inclusiveness of constitutional identity within this scholarship, or for the destabilising potential of exclusionary norms constituting it. Quite on the contrary, constitutional identity seems to operate on the logic of 'othering', of identification of an 'us' against a 'them' that to less optimistic ears sounds like a possible recipe for discrimination rather than 'disharmony'. Here again eternity clauses may be analogised to preambles, which also yearn for homogeneity:

The writing of preambles is more a testament to a yearning for homogeneity (whether of religion, ethnicity, or political ideology) than a reflection of reality. Sometimes this yearning may be relatively innocent and, on occasion, even inspiring—if we happen to agree with the preambular aspirations. But if one does not share the visions instantiated in a particular preamble, then it is surely permissible to view it as exemplifying simply one more power play in the struggle to establish the legitimacy of institutions of coercion that we call "law".⁴⁷⁹

Language rights have already been mentioned as a potential site of disagreement. Religious commitments and notions of the relationship between religion and the state are another. As Chapter 3 will show, listing these among 'eternal' commitments signals their acrimonious status in the polity rather than overwhelming agreement. Chapter 3 will also show that other, seemingly less contentious unamendable commitments such as to republicanism or federalism can similarly hide disagreement and the silencing of opposition. In short, then, the problem is that eternity clauses may seek to render impossible to amend principles and provisions to which significant sections of the polity do not ascribe and which do not express their values.

A final objection to constitutional identity-based understandings of eternity clauses stems from empirical analyses of their occurrence. Yaniv Roznai has done comprehensive comparative mapping of unamendable provisions around the world and across time and has placed their occurrence within the 'migration of constitutional ideas' paradigm.⁴⁸⁰ The conclusion of his study is that there is a "global trend...towards accepting the idea of limitations—explicit or implicit—on

⁴⁷⁹ Levinson (2011), p. 178.

⁴⁸⁰ Roznai (2013), pp. 657-719.

constitutional amendment power”, this migration resulting in the adoption of the eternity clause constitutional device either intact or with local influence.⁴⁸¹ Impressive and perhaps unexpected though the sheer number of eternity clauses present in constitutions of today or yesterday may be, one must not be too quick to believe their claims of expressiveness. I tried to illustrate in Chapter 1 that the story behind their adoption is hardly ever one of a polity coming together in an inclusive exercise of collective self-definition, which then gets immortalised in an unamendable provision in the constitution. Just like any other provisions, eternity clauses can also make their way into a constitutional text by way of accident, negotiation give-and-take, and as a result of biases towards neighbours and historical experience.⁴⁸² How else to explain the word for word eternity clause present in eleven of the constitutions of the Dominican Republic but as a case of constitutional copy/paste? Similarly, one need not look farther than Portugal’s lengthy Article 288 as the model for eternity clauses in the constitutions of former colonies Angola (Article 236), Cape Verde (Article 313), Mozambique (Article 292), Sao Tome and Principe (Article 154), and East Timor (Article 156).

Roznai himself acknowledges the problems with ascribing too much credence to identity-based claims, either due to their contested nature or to their migrant origin.⁴⁸³ This objection does not, of course, negate the possibility that even an exogenous eternity clause may grow roots in its adoptive constitutional setting and come to be accepted as expressing its constitutional identity. To determine whether this is the case, however, requires in depth contextual analysis. On the one hand, this is a problem inherent to understandings of the migration of constitutional ideas in general. On the other hand, given the nature of the values incorporated in eternity clauses and the consequences deriving from their adoption, their unreflective migration raises more important problems than that of other constitutional provisions. We need to keep this in mind given that eternity clauses adoption might be on the rise, either due to a ‘demonstration effect’ between

⁴⁸¹ *Ibid.*, p. 658.

⁴⁸² Horowitz (2008), pp. 1227-30.

⁴⁸³ Roznai (2014a), p. 44

countries or due to the growing internationalisation of constitution-making. The latter will be explored in Chapter 5.

2.5 Instantiations of constitutional identity arguments:

Germany's *Lisbon* decision

The examples thus far have mostly been of formal provisions to which we may attach one or another understanding of constitutional identity. But how, if at all, have courts operationalized this concept? Has it helped or hindered constitutional interpretation? The little we know from theoretical scholarship on this matter tells us that expressiveness has a bearing on constitutional interpretation, but “[t]he task of interpreting entrenched values need not commit us to a particular technique of interpretation, be it originalism, living constitutionalism, or another method.”⁴⁸⁴ In what follows, I propose to examine in detail a particularly important case so as to enrich our understanding of how constitutional identity arguments rooted in an eternity clause actually work in practice.

The jurisprudence of the *Bundesverfassungsgericht* surrounding the *Ewigkeitsklausel* is vast and varied. Perhaps surprisingly given the above discussions however, it was only more recently that the Court relied on notions of constitutional identity in its jurisprudence. Equally surprising to many, it has taken this step in the area of European Union integration, in the face of what it has perceived as the ever-encroaching reach of EU law upon the German legal system. I will thus focus here on the constitutional identity arguments adduced by the *Bundesverfassungsgericht* in its *Lisbon* decision of 2009, with occasional references to other cases in this area.⁴⁸⁵ I do so because this case law is a site of deep struggle for the Court wherein it resorts to constitutional identity as a meta-constitutional crutch, partially formalised by Article 79(3), which allows it to assert its political power.⁴⁸⁶ The *Lisbon* decision will serve to illustrate the contested application of the concept of constitutional identity as read into a formal eternity clause, as well as the difficulties of elevating it to the rank of operative interpretive device.

⁴⁸⁴ Albert (2013), p. 264.

⁴⁸⁵ *Lisbon Case*, BverfG, 2 BvE 2/08, 30 June 2009.

⁴⁸⁶ Jo Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871*, Oxford University Press, 2013, p. 154.

The *Lisbon* case originated in four complaints brought by members of the extreme right and the extreme left of the political spectrum. The complaints questioned the constitutionality of three acts: the Act Approving the Treaty of Lisbon, the Act Amending the Basic Law (Articles 23, 45, and 93), and the Act Extending and Strengthening the Rights of the German Federal Parliament (*Bundestag*) and the German Federal Council of States (*Bundesrat*) in European Union Matters. The claimants could not point to a specific injury so much as wanted a review of the Treaty of Lisbon itself. This amounted to an abstract review which the Court decided to engage in. The Court held the first two acts compatible with the Basic Law but found the third to insufficiently empower the German Parliament vis-à-vis European policy-making and EU treaty amending procedures. This resulted in the German Parliament rushing through a new law strengthening parliamentary oversight of European integration.⁴⁸⁷

The Court's analysis which is relevant here, however, came mostly in comments made *obiter dicta*, as part of the examination of whether the applicants' Article 38(1) rights had been violated by way of infringements of provisions in Articles 20(1), 20(2), 23(1), and 79(3).⁴⁸⁸ The judges referred to an "inalienable constitutional identity"⁴⁸⁹ which the Court alone was entrusted to protect against transgression, including by way of EU integration. The *Bundesverfassungsgericht* even went so far as to find a separate type of judicial review, termed "identity review", which it could employ alongside *ultra vires* review of EU law to determine the latter's compatibility with Germany's inalienable Article 79(3) values. The judgment thus stated:

⁴⁸⁷ For summaries of the decision in all its details, see Daniel Thym, "In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court", *Common Market Law Review*, Vol. 46, No. 6 (2009), pp. 1795-22; Christian Wohlfahrt, "The Lisbon Case: A Critical Summary", *German Law Journal*, Vol. 10, No. 08 (2009), pp. 1277-85; Kommers (2012), pp. 345-52.

⁴⁸⁸ Article 38 has been said to "subjectivize the constitutionally protected principle of democracy in Article 20 I", see Murkens (2013), p. 181. Article 23(1) declares Germany's participation in the European project, establishes the principle of subsidiarity, and links European integration to Article 79(2) and (3) ("The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.") See also Murkens (2013), pp. 168-71.

⁴⁸⁹ *Lisbon* decision, para. 219.

The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.⁴⁹⁰

The Court thus explained that it could in the future declare EU law inapplicable in Germany.⁴⁹¹ EU law's primacy had limits, and in Germany, those limits were to be found in the constitution's eternity clause. Despite the Court's discussion of the legislature possibly creating "an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review",⁴⁹² commentators have rightly noted that the judgment reads as though such identity control was already in the Court's power.⁴⁹³

There are several problematic aspects to the judgment. Due to space constraints, only three will be discussed here: the practical difficulties of judicial identity review; the problematic link the Court establishes between constitutional identity and constituent power; and the tense relationship between this judgment and the principle of 'open statehood' in German constitutional law. Much ink has been spilled in unpacking the decision's arguments and the literature abounds in analyses of its implications and contradictions.⁴⁹⁴ The three aspects I will outline

⁴⁹⁰ *Ibid.*, para. 240.

⁴⁹¹ *Ibid.* para. 241.

⁴⁹² *Ibid.*

⁴⁹³ See Mayer (2011), p. 783.

⁴⁹⁴ See Dieter Grimm, "Defending Sovereign Statehood Against Transforming the Union Into a State", *European Constitutional Law Review*, Vol. 5, No. 03 (2009), pp. 353-73; Alfred Grosser, "The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1263-66; Daniel Halberstam and Christoph Möllers, "The German Constitutional Court Says 'Ja Zu Deutschland!'", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1241-58; Mayer (2011); Philipp Küver, "German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1287-96; Stephan Leibfried and Karin van Elderen, "'And they shall Beat their Swords into Plowshares" – The Dutch Genesis of a European Icon and the German Fate of the Treaty of Lisbon", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1297-1308; Matthias Niedobitek, "The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1267-76; Frank Schorkopf, "The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon", *German Law Journal*, Vol. 10, No. 8 (2009), 1219-40; Christoph Schönberger, "Lisbon in Karlsruhe: Maastricht's Epigones At Sea", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1201-18; Christian Tomuschat, "The Ruling of the German Constitutional Court on the

suffice to illustrate why constitutional identity is such a thorny concept in constitutional jurisprudence.

With regard to the first problem, there are serious qualms over the consequences of the Constitutional Court engaging in identity control of constitutionality, particularly in the European context. Writing on this very issue, Franz Mayer is concerned with the destabilising effects of such identity review:

This will probably put an end to the balance created by the *'Solange II'* jurisprudence as well as to the stability of the relationship between German constitutional law and European law in the realm of fundamental rights; fundamental rights problems are simply going to be declared identity problems.⁴⁹⁵

Not only is there a risk of recasting *constitutional* issues as matters of constitutional identity, but there is the danger of EU Member States recasting other issues in the language of identity. "Allowing the concept to have a substantial function in legal terms," Mayer argues, "may turn out to be a Pandora's box"⁴⁹⁶ and, he gloomily concludes, in rendering the concept of identity meaningless: "If anything is national identity, nothing will be."⁴⁹⁷

While Mayer's fears may be exaggerated and his conflation of constitutional and national identity inaccurate, his core concern—that the Court is relying on a concept which creates more problems than it solves—remains. Indeed, it is boosted by the admission that not only is it difficult to operationalize, but constitutional identity (and other concepts the Court relies on in its judgment, such as sovereignty) does not appear to have a sound constitutional foundation in the Basic Law.⁴⁹⁸ In the words of one commentator, the Court "responds to questions that the case does not raise with answers the Constitution does not provide."⁴⁹⁹ In so doing, it arguably

Treaty of Lisbon", *German Law Journal*, Vol. 10, No. 8 (2009), pp. 1259-62; Wohlfahrt (2009); Mayer (2011); Kalypso Nicolaïdis, "Germany as Europe: How the Constitutional Court Unwittingly Embraced EU Democracy", *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), pp. 786-92; Murkens (2013), pp. 178-212; Lars Vinx, "The Incoherence of Strong Popular Sovereignty", *International Journal of Constitutional Law*, Vol. 11, No. 1 (2013), pp. 101-24.

⁴⁹⁵ Mayer (2011), p. 762.

⁴⁹⁶ *Ibid.*, p. 784.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Murkens (2013), p. 207.

⁴⁹⁹ Schönberger (2009), p. 1214.

undermines its own standing⁵⁰⁰ and exceeds its competence.⁵⁰¹ The Court's unacknowledged reliance on "constitutional ideology" (including with regard to the concepts of state, sovereignty, identity, and people (*Volk*))⁵⁰² renders its claims to a power to review constitutional identity infringements by EU law dubious.

The second problem I want to discuss is the connection the decision draws between constitutional identity and limits on constituent power. That Article 79(3) "prevents a constitution-amending legislature from disposing of the identity of the free constitutional order"⁵⁰³ is congruent with the aims behind the *Ewigkeitsklausel* as discussed in Chapter 1. The Court goes further, however, and leaves open the question of whether these substantive limitations also apply to the constituent power:

It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution.⁵⁰⁴

One reading of this statement may be that, given the universality of the principles in question, they also apply to the drafting of a new constitution, not just to legislative amendments. Such an interpretation may be in line with one strand of constitutional scholarship in Germany which has read Article 79(3) as an implied limitation on Article 146, the Basic Law's provision on the adoption of a new constitution.⁵⁰⁵ This strand is not without its critics, however, who are reluctant to expand the reach of the *Ewigkeitsklausel* beyond its text and original aims.⁵⁰⁶ Whether there are substantive limitations on constitution-making and how to identify them is a thorny, and as yet underexplored, question in constitutional theory. Another

⁵⁰⁰ Murkens (2013), p. 208.

⁵⁰¹ *Ibid.*, p. 181.

⁵⁰² *Ibid.*

⁵⁰³ *Lisbon* decision, para. 216. See also para. 218, where the Court states that "the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this."

⁵⁰⁴ *Ibid.*, para. 217.

⁵⁰⁵ See Murkens (2013), p. 174.

⁵⁰⁶ *Ibid.*, pp. 174-75.

reading of this statement, however, is potentially more worrisome. In a judgment wherein the Court asserts its power as protector of Germany's constitutional identity internally and externally, one could read a judicial warning that even wholly new exercises of constituent power could come under the Court's Article 79(3) scrutiny. In the European context, this would mean that even were the German people to express their desire for a new constitution, possibly even one which allowed integration within a federal European Union, this would still be reviewed by the Court. Thus, the Court left open the possibility of Article 79(3)—or at least some of its principles—reaching beyond its original understanding within the confines of legislative amendments and regulating constitutional revolution itself.⁵⁰⁷

The third and final aspect of the judgment I will discuss here relates to its impact on the 'open statehood' (*offene Staatlichkeit*) principle in German constitutional law. This fundamental commitment to the accommodation of international law, which permeates several constitutional provisions, "was meant to create a cosmopolitan constitutional order linking Germany's interests with the interests of the international community and integrating Germany into international law."⁵⁰⁸ The Court pays lip service to the principle but relies on notions of sovereignty to (re)claim the supremacy of the domestic legal order over the international:

The Basic Law strives to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution as a right of the people to take constitutive decisions concerning fundamental questions as its own identity. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with international treaty law – accepting, however, corresponding consequences in international relations – provided this is the only way in which a violation of fundamental principles of the constitution can be averted.⁵⁰⁹

Reactions to the introspective stance taken by the German Constitutional Court with regard to Article 79(3)—as a "provision that is concerned with the core internal

⁵⁰⁷ Colón-Riós (2012b).

⁵⁰⁸ Kommers (2012), p. 302. For more on Germany's 'open state' jurisprudence, see Kommers (2012), pp. 302-52.

⁵⁰⁹ *Lisbon* decision, para. 340.

structures rather than with external constitutional options⁵¹⁰—have been mixed. Critics have contested its isolationist bent in contradiction with the Basic Law's spirit and have accused the Court of misunderstanding "the core of open and transformed statehood which the Basic Law propounds."⁵¹¹ In other words, they have seen the Court's decision as going against the pro-integration letter of the German constitution as encapsulated by its preamble and Article 23(1). Others went further and chastised "the truly provincial, parochial and inward perspective underlying many aspects of the reasoning."⁵¹² One can also observe the irony of a provision adopted with a view to preventing Germany's slide back into authoritarianism being relied on to halt European integration. In the words of Franz Mayer:

The [Court's] reasoning is that what is precluded from alteration by constitutional amendment is also 'integration proof.' Yet wasn't Article 79 paragraph 3 GG, shielding the guarantee of human dignity and the fundamental principles of democracy, rule of law etc. from any amendment, primarily designed to protect the Germans from themselves, from a relapse into inhuman dictatorship, bondage and tyranny? Using this provision against Europe, where almost nothing else—at least from the point of view of our neighbors—has prevented more effectively the relapse of Germany into dictatorship, bondage, and tyranny than our participation in European integration, is—to say the least—remarkable."⁵¹³

Mayer is not the only one to have questioned the subjection of European integration to the same substantive scrutiny as fascism.⁵¹⁴ This perhaps more than anything signals the Court's newfound reticence towards the European project.

The Court in *Lisbon* departed from prior case law on open statehood, notably its *Maastricht* decision.⁵¹⁵ It even recast the 'open state' principle in different language, referring instead to the principle of 'openness to European law'

⁵¹⁰ Murkens (2013), p. 204.

⁵¹¹ Ingolf Pernice, "Artikel 23: Europäische Union", in Horst Dreier ed., *Grundgesetz: Kommentar (Band II)*, Tübingen: Mohr Siebeck, 1998, para. 35, cited in Murkens (2013), p. 206.

⁵¹² Joseph Weiler, "The 'Lisbon Urteil' and the Fast Food Culture", *European Journal of International Law*, Vol. 20, No. 3 (2009), p. 506.

⁵¹³ Mayer (2011), p. 763.

⁵¹⁴ See also Murkens (2013), p. 206.

⁵¹⁵ 89 BVerfGE 155, 12 October 1993.

(*Europarechtsfreundlichkeit*).⁵¹⁶ Recent case law had seen the Court seemingly relaxing its interpretation of Article 79(3) with regard to EU mechanisms, notably the Economic and Monetary Union, by stating it would not “from the outset” find changes to the mechanism incompatible with the eternity clause.⁵¹⁷ This move had been termed a “return to openness” and a welcome exercise in judicial restraint.⁵¹⁸ However, in its *OMT* decision of 2014, the Court reiterated the role of Article 79(3) as the “ultimate limit” on European integration, whose principles could not be balanced against any others (notably the national identity interests protected by Article 4(2) of the Treaty of the European Union).⁵¹⁹ It may thus be too soon to claim that we are witnessing “promising realignment”⁵²⁰ between the German and European constitutions.

The significance of the *Lisbon* decision cannot be overstated. Subsequent developments in other European states have included constitutional courts following the lead of the *Buderverfassungsgericht* and similarly declaring limits on European integration stemming from national constitutional law.⁵²¹ These developments have confirmed Mayer’s reflection that the judgment is “a symptom for unresolved issues of European integration that remain unresolved even with the new legal order that the Lisbon Treaty establishes.”⁵²² They also echo earlier calls to caution, such as that of Julio Baquero Cruz.⁵²³ He saw in the *Maastricht* 1993 decision the beginnings of a damaging competition between national courts and their supranational counterpart which was at bottom explained by sociological and

⁵¹⁶ *Lisbon* decision, paras.219-25. See also Murkens (2013), p. 179.

⁵¹⁷ Case No. 2 BvR 1390/12, 12 September 2012, para. 221, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs201209_12_2bvr139012en.html.

⁵¹⁸ Mattias Wendel, “Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012”, *German Law Journal*, Vol. 14, No. 1 (2013), pp. 21-52.

⁵¹⁹ Case no. 2 BvR 2728/13, 14 January 2014, para. 29, available at http://www.bverfg.de/e/rs20140114_2bvr272813en.html.

⁵²⁰ Wendel (2013), p. 52.

⁵²¹ For a comparative discussion of these developments, see Stefan Theil, “What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?”, *German Law Journal*, Vol. 15, No. 4 (2014), pp. 599-635.

⁵²² Mayer (2011), p. 785.

⁵²³ Julio Baquero Cruz, “The Legacy of the Maastricht-Urteil and the Pluralist Movement”, *European Law Journal*, Vol. 14, No. 4 (2008), pp. 389-422.

cultural resistance to integration.⁵²⁴ Some authors see in this “narrative diversity” a plus, “the spirit of European democracy” in action.⁵²⁵ Others note a shift in the attitude of the Court, from proactive towards integration to defensive in the form of a ““them and us”-perspective”.⁵²⁶ One’s take on this shift—whether one perceives it as worrisome or not—may depend on one’s attitude towards European integration more generally, as well as towards the desirable relationship between national and transnational law. In the context of this chapter, however, I view with unease the reliance on the concept of constitutional identity, anchored in the eternity clause, as the justificatory mechanism for the German Court’s judgment. The Court’s redrawing of the rules on the primacy of EU versus domestic law, on the openness versus caginess towards international law, and even potentially on the limitations placed on constituent power is shakier for its reliance on a concept as fuzzy as constitutional identity. As noted above, the consequences of the Court’s claim to a power of identity review are potentially grave.

This chapter has sought to clarify the concept of constitutional identity and its potential import for theories of unamendability. The investigation put forth has shown this concept to be problematic in several senses. First, it has found it to be vague and as such to carry dubious explanatory value as an autonomous notion. More significant, however, are the consequences of constitutional identity arguments in constitutional interpretation, both at the level of the national polity and in the supranational sphere. With regard to the former, my analysis has shown that unamendable provisions inevitably lead to the identification of a normative superstructure within the constitution, which is then jealously guarded by constitutional courts. When non-inclusive values are built-into this hierarchy, constitutional identity reveals its lack of neutrality and potentially exclusionary implications. This possibility is revealed as a reality in the case of unamendable commitments to secularism or official languages, discussed in Chapter 3 below.

⁵²⁴ *Ibid.*, p. 416.

⁵²⁵ Nicolaïdis (2011), p. 786.

⁵²⁶ Mayer (2011), p. 785.

The link between eternity clauses and an independent hierarchy of norms in the constitution is also at the centre of conflicts between constitutional courts and their supranational counterparts. In the European Union context, as was illustrated in the discussion of the *Lisbon* case and related jurisprudence, constitutional identity arguments have played a central role. They have provided the grounds for apex courts to disguise arguments about national sovereignty in the language of constitutional identity and pluralism. These courts could then push back against European integration and defend their jurisdiction by resorting to constitutional identity claims. This is a very different application of unamendability than has been envisioned by scholars of eternity clauses.

The *Lisbon* decision has revealed another worrisome development. The German Constitutional Court hinted in the case that it could find itself empowered to apply Article 79(3) considerations to new constitution-making exercises. Constitutional identity thus amplifies the prospect of eternity clauses constraining constituent power. What is especially worrying is the Court's reliance on the positive clause in the Basic Law, rather than any abstract preconditions of constitutionalism, when making this assertion. Thus, not only would Article 79(3) have defined the contours of German constitutional change since 1949, but it would also define those of a new constitution—all of it as determined by the Constitutional Court. The implication of such reasoning is that no revolution could occur without the court's stamp of approval on the basis of conformity with the previous constitution, a problem to which I return in Chapter 4. This potential repercussion of unamendability, coupled with the creation of a constitutional hierarchy of values, is what renders eternity clauses substantively different from other forms of constitutional entrenchment.

Chapter 3

Eternity clauses as substantively democratic

The previous chapter evaluated the persuasive force of arguments in favour of eternity clauses as embodiments of a polity's constitutional identity. It analysed the usefulness of the concept of constitutional identity not just from the point of view of its contested boundaries and implementation, but also from the perspective of substantive values and principles typically brought under the constitutional identity umbrella. One of my conclusions in Chapter 2 was thus that constitutional identity required further refinement if the concept was to do the work its proponents wished it to. Moreover, I indicated my unease with glossing over the debate concerning which substantive values eternity clauses enshrine.

The current chapter picks up precisely this thread. It discusses a different way to view eternity clauses as democratic, namely to justify them according to the actual values they protect. The latter can come in three guises. First, they can seek to place outside the vagaries of politics certain fundamental building blocks of the state, be it the nature of the regime (republican or monarchical), the integrity of the country's territory, the nature of its territorial architecture (federal or unitary), or the state's secular or religious foundations. Second, unamendable provisions can aim to protect democracy from forces attempting to subvert it, in the tradition of militant democracy theory. Examples would include an eternity clause declaring unamendable the democratic character of the state, the multiparty democratic system, rights of democratic participation, or the commitment to the rule of law. Third, eternity clauses may attempt to insulate substantive values perceived as essential to minority protection. Among these are fundamental rights and the principle of non-discrimination, but also blanket executive term limits.

The link between unamendable provisions and instituting a constitutional court with strong judicial review powers is shown to be here unavoidable. Unamendability could thus be seen as attempting to shield core tenets of

constitutionalism itself. I explore all three of these arguments below. Although dissimilar, they all share a concern with the substantive commitments enshrined in eternity clauses. Thus, contrary to the author-based or constituent power-rooted theories explored in Chapter 1, the aim of all three strands explored here is to justify eternity clauses on substantive grounds to do with their content. As will become apparent, these arguments are not equally persuasive. A fourth argument justifies eternity clauses on deliberative democratic grounds, hypothesising that attempts to change the polity's fundamentals will trigger constitutional deliberation when they gain sufficient traction. This proposition, because only marginally connected to the substantive content of eternity clauses, will be explored in Chapter 4.

3.1 Protecting fundamental characteristics of the state

In many ways, the justification for the protection of the state's foundational elements, including its regime type and territory, crosses over into the militant democracy logic discussed in section 3.2 below. The aim of eternity clauses which insulate such state fundamentals is to ensure the state's survival in a recognisable form. In the same way that militant democracy theory aims to address the risk of a democracy voting itself out of existence, so too do certain eternity clauses form part of the state's defence apparatus. This function of constitutions—preventing state disintegration or “forestall[ing] the destructive capacity of potential constitutional transformations”⁵²⁷—is laid bare in post-conflict situations. There, the stakes of constitution-making are openly on the table and constitutional subversion can be the death knell of an already weak state. But while this function may have become obscured in places with enduring state traditions, it has always been at the heart of constitutionalism. In its more positive formulation, this is constitution-making as state-building.⁵²⁸

3.1.1 Unamendable republicanism

The unamendable commitment to republicanism is among the most widespread eternity clauses, with one study counting more than 100 constitutions having such a

⁵²⁷ Breslin (2008), p. 45.

⁵²⁸ Loughlin (2003), p. 50. See also Joanne Wallis, *Constitution Making during State Building*, Cambridge: Cambridge University Press, 2014.

provision.⁵²⁹ Among the most well-known are France's Article 89 which states: "The republican form of government shall not be the object of any amendment." and Italy's Article 139: "The form of Republic shall not be a matter for constitutional amendment." The origin of such clauses seems to be the fear of a return of the monarchy in the immediate aftermath of the transition to republicanism.⁵³⁰ Thus, Article 8(3) of France's 1875 constitution, Article 90(4) of Brazil's 1894 constitution, and Article 82(2) in Portugal's 1911 constitution are the earliest examples of such unamendable commitments to republicanism. Even before these, nineteenth century Latin American constitutions declared their states 'forever' republican (see Article 164 of Colombia's 1830 constitution, Article 139 of the Dominican Republic's 1865 constitution, Article 139 of Ecuador's 1851 constitution, and article 228 of Venezuela's 1830 constitution) in what was a wider move in the region towards embracing republican government and empowering legislatures.⁵³¹

For all its influence, both as a colonial power and as a widely imitated constitutional model, France's experience with 'eternal' republicanism does not tell us much about how such a clause might work in practice. This is because the *Conseil Constitutionnel* has consistently refused to engage in the review of constitutional amendments.⁵³² It has done so with regard to Charles de Gaulle's 1962 revision of the constitution;⁵³³ in 1992 with regard to the Maastricht Treaty;⁵³⁴ and again in 2003 in a case involving decentralisation.⁵³⁵ Thus, although this is the sole substantive limitation placed on constitutional reform in the French constitution, the Council has refused to make it effective via its refusal to engage in judicial scrutiny of amendments.⁵³⁶ The absence

⁵²⁹ Roznai (2014a), p. 30.

⁵³⁰ Baranger (2011), p. 403. I discuss the danger of a transformation of the form of government into a dictatorship in section 3.2 below, as part of militant democracy arguments.

⁵³¹ See Roberto Gargarella, "Towards a Typology of Latin American Constitutionalism, 1810-60", *Latin American Research Review*, Vol. 39, No. 2 (2004), pp. 141-53.

⁵³² See discussion in Baranger (2011), pp. 391-98.

⁵³³ Decision No. 62-20DC, 6 November 1962.

⁵³⁴ Decision No. 92-308DC, 9 April 1992.

⁵³⁵ Decision No. 2003-469DC, 26 March 2003.

⁵³⁶ Baranger (2008), p. 404.

in the French context of any real threat of a return to monarchy may have encouraged perceptions of this clause as no longer necessary.⁵³⁷

While virtually eradicated in France, monarchism has not fully disappeared from other republics, including some, such as Romania, which also list republicanism among unamendable provisions in their constitutions (Article 152(1)).⁵³⁸ A Romanian experiment with popular participation in constitution-making in 2013, the Constitutional Forum, produced a report which listed the choice between monarchy and republic as a form of government among the possible topics of constitutional revision.⁵³⁹ Prominent political figures such as a former Prime-Minister and President of the Senate have also declared they would support a return to a monarchical system by way of constitutional reform.⁵⁴⁰ Former Prime-Minister Victor Ponta had also declared, albeit in a likely populist move, that he is prepared to organise a referendum on this issue if public opinion demanded it and that, if successful, it would bring about a new constitution.⁵⁴¹ A return to monarchy in Romania remains unlikely but such open support has made the topic acceptable in public discourse after years of being anathema. Were an amendment to be proposed towards this end, however, the Constitutional Court would presumably have no choice but to invalidate it as incompatible with the eternity clause. Most of the Romanian public actors discussing the issue do not appear to envision total constitutional replacement, however.

Thus, while republicanism may be a particularly uncontested unamendable constitutional commitment, one cannot assume it is without consequence simply

⁵³⁷ *Ibid.*

⁵³⁸ Similar debates have also happened in Bulgaria, which does not entrench its republican form of government via an eternity clause, however. See Rossen Vassilev, "Will Bulgaria Become Monarchy Again?", *Southeast European Politics*, Vol. IV, Nos. 2-3 (2003), pp. 157-74.

⁵³⁹ *Raportul Forumului Constituțional 2013*, Asociația Pro Democrația, Bucharest, 2013, p. 61, available at <http://www.apd.ro/wp-content/uploads/2015/03/Raport-Forumul-Constitutional-2015.pdf>.

⁵⁴⁰ "Tăriceanu: "Aș opta pentru monarhie sau republică parlamentară la revizuirea Constituției"", *Mediafax*, 22 October 2012, available at <http://www.gandul.info/politica/tariceanu-as-opta-pentru-monarhie-sau-republica-parlamentara-la-revizuirea-constitutiei-10248654>.

⁵⁴¹ "Ponta, despre monarhie: Viitorul șef al statului are obligația de a organiza un referendum privind forma de guvernământ", *Mediafax*, 20 October 2014, available at <http://www.gandul.info/politica/ponta-despre-monarhie-viitorul-sef-al-statului-are-obligatia-de-a-organiza-un-referendum-privind-forma-de-guvernament-13422241>.

because a return to monarchy seems impossible at a given time. Even in the case of France and despite the refusal of the *Conseil Constitutionnel* to review amendments, were such an amendment to be passed with a view to changing the republican nature of the state, the Council would likely not have a choice but become involved.

The counterparts to such provisions are clauses which declare the monarchy to be unamendable. Examples include Bahrain's Article 120(c), Cambodia's Article 153, Morocco's Article 175, or Thailand's Article 291(1). Roznai views these as examples of eternity clauses which seek to preserve existing power structures.⁵⁴² He sees their greater incidence in constitutions in certain parts of the world as further evidence of a deficient Arab constitutionalism and thereby distinguishes them from provisions on unamendable republicanism.⁵⁴³ I am wary of such generalisations. While we may find problems with the implementation of constitutional provisions in many of these countries, generalising from there with regard to the nature of constitutionalism in the entire Arab world is a step too far. Nor should it automatically lead us to dismiss all eternity clauses entrenching monarchies as *de facto* illiberal. Roznai himself later discusses Thai jurisprudence surrounding that country's eternity clause, which at the very least demonstrates an interest on the part of that country's judiciary to enforce constitutional limits.⁵⁴⁴

Too quick a judgment of forms of government alternative to republicanism as inadequate rests on an assumption of its superiority. As one judge in the Indian *Kesavananda* decision asked:

And, what is this sacredness about the basic structure of the Constitution? Take the republican form of Government, the supposed cornerstone of the whole structure. Has mankind, after its wandering through history, made a final and unalterable verdict that it is the best form of government? Does not history show that mankind has changed its opinion from generation to generation as to the best form of government? Have not great philosophers and thinkers throughout the ages expressed different views on the

⁵⁴² Roznai (2014a), p. 35.

⁵⁴³ He describes provisions on the unamendability of monarchical systems of government as "a manifestation of the more general character of the Arab world's constitutionalism in which written constitutions enhance rather than limit governmental power." *Ibid.*, p. 36.

⁵⁴⁴ *Ibid.*, p. 71. See also my discussion of Tushnet's notion of 'authoritarian constitutionalism' in Chapter 2.

subject? Did not Plato prefer the rule by the Guardians? And was the sapient Aristotle misled when he showed his proclivity for a mixed form of government? If there was no consensus yesterday, why expect one tomorrow?⁵⁴⁵

As we have seen, the assumption of republicanism's pre-eminence is rooted in nineteenth century fears of monarchical restoration. In the absence of real threats of monarchy's return as in France, or when faced with popular support for such a change as in Romania, the 'language of eternity' on this issue seems irrelevant and stifling, respectively.

A separate concern is how courts would assess transgressions of republicanism which do not amount to a return to monarchy. The task of judges in such a case would be decidedly more complicated.⁵⁴⁶ An example might include curtailing rights of political participation or altering the separation of powers to such an extent as to de facto extinguish popular sovereignty. Laurence Tribe discusses another—the open-ended delegation of governmental authority—as a potential violation of Article IV, section 4 of the US constitution ("the United States shall guarantee to every State ... a Republican Form of Government").⁵⁴⁷ Evaluating this potential violation would be trickier. Tribe's conclusion is that the only basis on which such an assessment could be made would be an unwritten principle of democratic accountability, not any precise vision of popular sovereignty or representative government held by the constitution's drafters or ratifiers.⁵⁴⁸ He admits that such a principle is "nowhere written into the text [of the US constitution] or implied by it" but argues that the consent of the governed is "nonetheless central to its being".⁵⁴⁹ Such reliance on interpretations of constitutional ethos and history may be open to abuse or simply yield very different results elsewhere, not all of them congruent with accepted notions of republicanism and its boundaries. The danger that a court mistakes its ideological commitments for those of the constitution it is tasked to interpret seems here especially high.

⁵⁴⁵ *Kesavananda Bharati*, para. 1761.

⁵⁴⁶ Roznai (2014a), p. 122.

⁵⁴⁷ Laurence Tribe, *The Invisible Constitution*, Oxford: Oxford University Press, 2008, p. 90.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

3.1.2 Unamendable federalism

Federalism as a principle of organisation of the state is formally placed beyond the reach of constitutional amendment in a significant number of basic laws. Some of the world's most influential constitutional models in fact protect federalism via unamendable or deeply entrenched provisions. One example is Germany, whose Article 20(1) ("The Federal Republic of Germany is a democratic and social federal state.") is among those protected by Article 79(3). Similarly, Brazil's Article 60(4)(I) bans the consideration of any amendment aimed at abolishing "the federalist form of the National Government." The earliest concern with the preservation of the equality of territorial units is found in Article V of the US Constitution, which reads in part: "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Lest one believe this an obsolete method of securing federalism, consider Iraq's 2005 constitution, which under Article 126(4) declares that amendments taking away powers of the region will require "the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum."

While federalism will be discussed here, the unitary nature of the state is also declared unamendable in several constitutions. Examples include Angola's Article 236(d), Guinea-Bissau's Article 102(a), Kazakhstan's Article 91(2), and Romania's Article 152(1). The entrenchment of both federalism and the unitary state aim to preserve the territorial status quo, but whereas the former is aimed at preserving equality among states and preventing centralisation, the latter is aimed at thwarting any centrifugal forces. I continue here with two examples of federalism unamendability: Germany and Brazil. They highlight, respectively, the potential for an entrenched federal principle to resolve constitutional conflict and bring order to territorial organization, as well as its propensity to throw a spanner in policy reform.

The first case where Germany's *Ewigkeitsklausel* was used was the *Southwest State Case* (1951).⁵⁵⁰ This was not only the first case involving the federal aspect of Article 79(3), but also Germany's *Marbury v. Madison*: the occasion for the Court to claim for

⁵⁵⁰ 1 BverfGE 14 (1951). For an assessment of the decision's importance at the time, see Leibholz (1952).

itself the power to review the constitutionality of amendments.⁵⁵¹ The case involved territorial reorganization by federal law and was brought by the state of Baden, which challenged redistricting on the basis that it affected the principles of democracy (by diluting votes of constituents) and of federalism (by taking away from the legislative powers of the *Land*). In its judgment, the Constitutional Court spoke of the “inner unity” of the constitution and of its reflecting “overarching principles and fundamental decisions to which individual provisions are subordinate.”⁵⁵² It viewed article 79(3) as a confirmation of this assumption. The Court then announced the “unconstitutional constitutional amendment” doctrine, whereby even a part of the Constitution may be found to be unconstitutional.⁵⁵³ In other words, a legislative provision is not free of constitutional scrutiny by mere virtue of its incorporation in the constitutional text. The Second Senate of the *Bundesverfassungsgericht* expressed approval of the notion that

[t]here are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution and other constitutional provisions that do not rank so high may be null and void because they contravene these principles...it follows that any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the Constitution.⁵⁵⁴

The Court found democracy and federalism to be such “elementary principles” and “basic decisions of the framers” and as such to prevent the federal government from disenfranchising, via postponed elections, the citizens of some states, or from taking away the legislative power of three states then in existence. Acknowledging that tensions may exist between democracy and federalism, the Court emphasised that in the case of the reorganisation of federal territory, “the people’s right to self-determination in a state must be restricted in the interest of the more comprehensive

⁵⁵¹ Kommers (2012), p. 85. See also Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis*, Oxford: Hart Publishing, 2014, p. 240.

⁵⁵² Cited in Kommers (2012), p. 82.

⁵⁵³ For more on this doctrine, see Gottfried Dietze, “Unconstitutional Constitutional Norms: Constitutional Development in Postwar Germany”, *Virginia Law Review*, Vol. 42, No. 1 (1956), pp. 1-22.

⁵⁵⁴ Cited in Kommers (2012), p. 82.

unit.”⁵⁵⁵ In the case at hand, therefore, the bodies politic of both the federation and of the area to be reorganised were to decide. The new state of Baden-Württemberg came into being the following year after a popular referendum.⁵⁵⁶

The Court’s decision was “readily accepted by all parties concerned” and “had a pacifying influence on the political life of all States involved in the controversy, and...cleared the political atmosphere considerably.”⁵⁵⁷ This resolution of the conflict endured and was confirmed by a 1970 referendum wherein the state’s inhabitants voted to maintain Baden-Württemberg’s borders.⁵⁵⁸ The federal principle’s unamendability in the Basic Law today refers to “the existence of a plurality of Länder, a minimum of substantial autonomy including especially their constitutional autonomy, and substantial participation rights in the legislative process.”⁵⁵⁹

Brazil’s federalism is also deeply rooted in a turbulent history, with the degrees of centralisation and decentralisation varying across different periods and regimes.⁵⁶⁰ Unlike elsewhere, however, “Brazilian federalism was never a response to deep social fissures along ethnic, linguistic and religious lines, and the country’s territorial integrity has never been seriously challenged by foreigners or threats of secession.”⁵⁶¹ It has instead been marked by deep regional inequality which has justified central government intervention including, as we shall see, via taxation policies.⁵⁶² When it comes to the country’s 1988 constitution, this was meant to mark the return to democracy and its eternity clause (*cláusula pétrea*) unequivocally committed the new regime to democratic principles and to the respect of the federal form of state. Like its German counterpart, the Brazilian Supreme Federal Court has also arrogated for itself the power to review the constitutionality of amendments in

⁵⁵⁵ Cited in *ibid.*, p. 85.

⁵⁵⁶ *Ibid.*, p. 86.

⁵⁵⁷ Leibholz (1952), p. 731.

⁵⁵⁸ Kommers (2012), p. 86.

⁵⁵⁹ Heun (2011), p. 47. See also *ibid.*, pp. 49-84, on the origins and workings of Germany’s federal system more generally.

⁵⁶⁰ See Celina Souza, “Brazil: From ‘Isolated’ Federalism to Hybridity” in John Loughlin *et al.*, eds., *Routledge Handbook of Regionalism & Federalism*, Abingdon: Routledge, 2013, pp. 457-70. See also Jeffrey Kahn, *Federalism, Democratization, and the Rule of Law in Russia*, Oxford: Oxford University Press, 2002, p. 52.

⁵⁶¹ Souza (2013), p. 459.

⁵⁶² *Ibid.*

the absence of an explicit textual basis for this.⁵⁶³ As Hübner Mendes points out, in practice, this review of amendment constitutionality “has become an arena for the discussion of neoliberalism,”⁵⁶⁴ including as part of tugs of war between the federal government and territorial units.

A relevant example is the involvement of the Court in the process of fiscal reform initiated in 1993 by way of a constitutional amendment. The governors of five states filed an injunction request against federal government plans for taxation reform on the grounds that they violated the constitution, including the principle of federalism incorporated in the eternity clause. The Supreme Federal Court quickly issued an injunction suspending the relevant paragraph of the amendment and the collection of tax from states and municipalities. It agreed with the states that, “by authorizing violation of the constitutional principle of “reciprocal taxation immunity” among federal, state, and municipal government, the amendment had undermined an essential element of Brazilian federalism, which the constitution establishes as an unamendable principle.”⁵⁶⁵ This was the first time the Court ruled on the constitutionality of an amendment to the constitution and it did so by suspending the imposition of a critical tax.⁵⁶⁶ The same reforms were implemented the following year, but only after a significant budgetary depletion.⁵⁶⁷

What to make of these two very different experiences? Germany’s federalism has been constitutive of the Basic Law in a very real sense: it was *Länder* parliaments that elected members of the Parliamentary Council which drafted it and the *Länder* again which enacted the draft.⁵⁶⁸ Constitutionalising the principle of federalism may thus be seen as recognition for this constitutive role. In Brazil, federalism has been seen as an important counterbalance to a strong executive; at the same time, however, as illustrated above, “federalism helps explain Brazil’s delay in

⁵⁶³ See discussion in Hübner Mendes (2005), p. 456.

⁵⁶⁴ *Ibid.*, p. 455.

⁵⁶⁵ Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil*, Cambridge: Cambridge University Press, 2012, p. 178.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*, p. 179.

⁵⁶⁸ Heun (2011), p. 51.

implementing economic reforms.”⁵⁶⁹ The capacity of state-based actors to constrain presidential reform initiatives may have kept the executive in check, but it also happened in the context of a constitution which remained vague as to the division of key responsibilities between the centre and units.⁵⁷⁰ The intervention of the Supreme Federal Court, therefore, left a serious, quantifiable dent in Brazil’s budget at a time when it could ill-afford to postpone reform.

3.1.3 Unamendable territorial integrity

Another type of eternity clause declares as unamendable territorial ‘unity’, ‘integrity’, or ‘indivisibility’. Such provisions are found in several postcolonial and postcommunist countries (see, for instance, Article 158 of Azerbaijan’s constitution, Article 91(2) of the constitution of Kazakhstan, Article 142 of Moldova’s and Article 152(1) of Romania’s constitutions, Article 100 of Tajikistan’s and Article 157 of Ukraine’s), although post-authoritarian constitutions contain them as well—for instance, Article 288 of Portugal’s constitution and Article 248 of El Salvador’s. While the justification for such provisions is complex,⁵⁷¹ they can be brought under the state protection umbrella: territory being integral to the life of the nation, its protection becomes coextensive with the state’s survival. Crucially, these provisions are not to be coalesced with those on the unitary (as opposed to federal) nature of the state—while the latter refer to administrative territorial organisation, territorial integrity seems to refer to a more fundamental ambition of ensuring the state’s endurance.⁵⁷²

Territorial unamendability has a mixed track record as protection in the face of external and internal forces, however. The principle of territorial integrity has been

⁵⁶⁹ David J. Samuels and Scott Mainwaring, “Strong Federalism, Constraints on Central Government, and Economic Reform in Brazil” in Edward L. Gibson, ed., *Federalism and Democracy in Latin America*, Baltimore: The Johns Hopkins University Press, 2004, p. 86.

⁵⁷⁰ *Ibid.*, p. 108.

⁵⁷¹ See discussion in Yaniv Roznai and Silvia Suteu, “The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle”, *German Law Journal*, Vol. 16, No. 3 (2015), pp. 542-80.

⁵⁷² The Venice Commission has also endorsed this view, declaring: “The state’s indivisibility is not to be confused with its unitary character, and therefore consorts with regionalism and federalism.” The European Commission for Democracy Through Law (Venice Commission), *Self-Determination and Secession in Constitutional Law*, 12 January 2000, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)002-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)002-e). See also Roznai and Suteu (2015), fn. 16, p. 546.

used to stifle Kurdish separatism in Turkey, which I discuss in the framework of Turkish militant democracy measures in section 3.2.1 below. However, as Roznai and I have shown with respect to Ukraine's unamendable commitment to territorial integrity, territorial unamendability was meaningless in the face of Crimea's breaking away. One can hardly imagine a blunter demonstration of the impotence of territorial integrity as a constitutional principle, and perhaps of law more generally, than in that case. Because territory is "subject to the internal threat of secessionist movements and the external threat of forceful annexation,"⁵⁷³ declaring its integrity unassailable has at most an aspirational function.⁵⁷⁴ This is perhaps the instance where Jon Elster's view of eternity clauses as purely symbolic carries most sway.⁵⁷⁵ I devoted a great part of Chapter 2 to disproving this view. With regard to declarations of unamendable territorial integrity, however, this belief in the enforceability of its constitutionalisation has yet to be tested. It may well be that, accompanied by provisions granting a court powers of constitutional review over it, the principle "moves beyond mere proclamation and into constitutional doctrine."⁵⁷⁶ Once there, however, the task does not become simpler. As Denis Baranger has stated, "there is nothing objective or merely procedural about such a standard as the "integrity of the territory"" and ruling on it would obviously involve going beyond legal forms.⁵⁷⁷

3.1.4 Unamendable secularism

Unamendable references to religion come in two guises. The first is the entrenchment of an official religion, such as of Islam in the constitutions of Algeria (Article 178), Bahrain (Article 120), Iran (Article 177), Morocco (Article 100), and Tunisia (Article 1). The second is the unamendable protection of secularism or the separation of church and state, such as in the constitutions of Angola (Article 236), Congo (Article 220), Portugal (Article 288), or Turkey (Article 4). Tempted though we might be to see here a correlation to majority Islamic countries, declarations of religious unamendability go back to the nineteenth century, when they were

⁵⁷³ Roznai and Suteu (2015), p. 580.

⁵⁷⁴ *Ibid.*, p. 570.

⁵⁷⁵ Elster (1991), p. 471.

⁵⁷⁶ Roznai and Suteu (2015), p. 557.

⁵⁷⁷ Baranger (2008), p. 404.

adopted by majority Catholic countries. Examples include Mexico's 1824 or Ecuador's 1854 constitutions.⁵⁷⁸

Richard Albert lists both official religion and secularism amidst the elements of preservative eternity clauses. He sees them as "an expression of the importance of religion or non-religion in that constitutional regime, either as a reflection only of the views of the constitutional drafters or of the views of citizens as well."⁵⁷⁹ His argument is reminiscent of those examined in Chapter 2: religion as expressive of constitutional identity, whether by achieving official status or by its banishment from public life in the form of a commitment to secularism. I propose to look at two societies where secularism is one of the core elements of constitutional eternity clauses: India and Turkey.

As we have seen in Chapter 1, the elements of India's basic structure doctrine have not been listed exhaustively and have varied from case to case. The Indian Supreme Court has not wavered, however, in its identification of secularism as one of the key elements of the doctrine. In the case of *Bommai v. Union of India*, it thus spoke of "the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution."⁵⁸⁰ The Court did so while upholding the president's authority to dismiss the elected BJP-led governments of three states in the aftermath of the destruction of the Babri Masjid mosque.⁵⁸¹ The judgment is said to have been as much about constitutional principle as about a public emergency.⁵⁸² The federal executive's argument had been that failure of the three state governors to ensure constitutional rule and order amounted to an inability to fulfil their mandate and as such rendered them vulnerable to replacement by presidential rule.⁵⁸³

⁵⁷⁸ See Roznai (2013a), p. 666.

⁵⁷⁹ Albert (2015), p. 5.

⁵⁸⁰ *S. R. Bommai v. Union of India*, para. 144.

⁵⁸¹ For a more detailed discussion of the circumstances of this case than are possible here, see Gary J. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, Princeton, NJ: Princeton University Press, 2003, pp. 125-38.

⁵⁸² *Ibid.*, p. 131.

⁵⁸³ *Ibid.*, p. 130.

The judges in *Bommai* did not seek to avoid ruling in what many saw as a clearly political question. They relied instead on the expressed sympathies and support of the three state governments for the perpetrators of the violence in order to find a clear violation of the constitution's secular foundations.⁵⁸⁴ The judges directly linked secularism to state survival:

The fact that a party may be entitled to go to people seeking a mandate for a drastic amendment of the Constitution or its replacement by another Constitution is wholly irrelevant in the context. We do not know how the Constitution can be amended so as to remove secularism from the basic structure of the Constitution. Nor do we know how the present Constitution can be replaced by another; it is enough for us to know that the Constitution does not provide for such a course that it does not provide for its own demise.⁵⁸⁵

This link did not remain at the level of an abstract survival of the state, however, but was integral to the state's socio-economic transformation:

The Constitution has chosen secularism as its vehicle to establish an egalitarian social order...Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socioeconomic needs essential for man's excellence and of his moral wellbeing, fulfilment of material and prosperity and political justice.⁵⁸⁶

As Jacobsohn has rightly noted, this view of secularism is "denoted only partially by its formal constitutional codification" and is better understood in its historical context of the development of the Indian state.⁵⁸⁷ Whatever else goes into the basic structure doctrine, therefore, secularism seems to be a principle enjoying universal acceptance. Though not without its critics, the judgment in *Bommai* is a good illustration of how this judicial doctrine could be relied upon to defend secularism in the face of ethnic violence.⁵⁸⁸

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *S. R. Bommai v. Union of India*, para. 310.

⁵⁸⁶ *Ibid.*, para. 186.

⁵⁸⁷ Jacobsohn (2010), p. 78.

⁵⁸⁸ Critics of the judgment saw it as "represent[ing] the triumph of leftist ideology and rank hypocrisy" given the Court's supposed about-turn with respect to state autonomy. See *ibid.*, p. 131.

Turkey's case is different insofar as its constitutional commitment to secularism has been formally enshrined in the basic law. Thus, it is found not only in the eternity clause in Article 4, but also in the preamble, in Article 2 which lists it as a characteristic of the republic, in Article 13 as a ground for rights limitations, in Article 14 on the abuse of rights and in numerous other places throughout the Turkish constitution. Beyond this textual difference, however, Turkey shares with India an understanding of secularism as intrinsically linked to the state's progress to a modernised society. Dicle Kogacioglu has reconstructed the Turkish Constitutional Court's jurisprudence in this area to uncover a narrative which inextricably binds together notions of unity, democracy, and progress, all seeped into "a hegemonic republican vision of nationalism and secularism."⁵⁸⁹

While this jurisprudence is vast,⁵⁹⁰ I will focus on only one case: the so-called *Headscarf* decision of 2008.⁵⁹¹ This decision annulled a legislative amendment meant to abolish the ban on headscarves in universities on grounds of equality and the right to education. The Court did this on the basis of the secular nature of the Turkish state, which it found to be an essential condition for democracy and "a guarantor of freedom of religion and of equality before the law".⁵⁹² The judges considered the eternity clause in Article 4 together with Article 175 regulating the amendment procedure and Article 148 on the functions and powers of Members of Parliament. In so doing, the justices ascribed themselves the power of substantive review of amendments despite the constitution only explicitly granting them procedural review competence.⁵⁹³ Exercising this newfound material competence, the Court further found a hierarchy of norms within the constitution, topped by the first three articles as entrenched by Article 4.⁵⁹⁴ Any amendments infringing upon these articles, therefore, were considered *ultra vires*.

The Court went on to define secularism thus:

⁵⁸⁹ Dicle Kogacioglu, "Progress, Unity, and Democracy: Dissolving Political Parties in Turkey", *Law & Society Review*, Vol. 38, No. 3 (2004), p. 459 and, generally, pp. 433-62.

⁵⁹⁰ See Gözler (2008).

⁵⁹¹ Decision of 5 June 2008, E. 2008/16; K. 2008/116, Resmi Gazete, 22 October 2008, No. 27032, pp. 109-52. See a fuller discussion of the case in Roznai and Yolcu (2012).

⁵⁹² Roznai and Yolcu (2012), p. 179.

⁵⁹³ *Ibid.*, p. 185.

⁵⁹⁴ *Ibid.*, p. 186.

The principle of secularism laid down in Article 2 of the Constitution provides that in a Republic, in which sovereignty belongs to the nation, no dogma other than the national will can guide the political system, and legal rules are adopted by considering the democratic national requirements as guided by intelligence and science, rather than religious orders. Freedom of Religion and Conscience is established for everyone, without any discrimination or prerequisites and not subject to any restrictions beyond those provided in the Constitution; misuse and exploitation of religion or religious feelings is prohibited; and the State behaves equally and impartially toward all religions and beliefs in its acts and transactions.⁵⁹⁵

It denounced legal arrangements based on religion rather than national will as incompatible with individual liberties and democracy.⁵⁹⁶ They are “defiant” and make “protecting social and political peace...impossible.”⁵⁹⁷

As will be further discussed in section 3.3.3 below, the Court also couched its decision in terms of minority-protection: safeguarding the right of the non-religious not to be subjected to the “instrument of compulsion” which the headscarf represented.⁵⁹⁸ Thus, beyond grand pronouncements on Turkey’s commitment to secularism since its founding, in practical terms the judgment amounted to a denouncement of a form of religious dress in universities on the grounds that it represented a threat to equality and public order. Coupled with other European jurisprudence on this issue, we can read this case as part of “the growth of a pan-European legal discourse of religious symbols not only as text, but as a mechanism, however broad and ambiguous, of social control.”⁵⁹⁹

3.1.5 The limits of unamendable characteristics of the state

Declaring basic state characteristics as unamendable decidedly serves a symbolic and aspirational function. Just like preambles before them, eternity clauses may here be seen as constitutionalising a “yearning for homogeneity”⁶⁰⁰—for a state which will only ever transform within certain ideological boundaries. The main objection to entrenching such state fundamentals is that it amounts to entrenching a black box

⁵⁹⁵ Cited in *ibid.*

⁵⁹⁶ *Ibid.*, p. 187.

⁵⁹⁷ *Ibid.*, p. 187.

⁵⁹⁸ See *ibid.*, p. 188.

⁵⁹⁹ Cindy Skach, “Şahin v. Turkey. App. no. 44774/98; “Teacher Headscarf.” Case no. 2BvR 1436/02”, *American Journal of International Law*, Vol. 100, No. 1 (2006), p. 190.

⁶⁰⁰ Levinson (2011), p. 178.

of abstract commitments. Constitutions do not come with a thesaurus explaining principles such as republicanism, federalism, territorial integrity, or secularism. To the extent that they are enforced at all, these principles will at best reflect a considered interpretation of their significance in their particular society and a reconstruction of the purposes behind their adoption. At worst, their interpretation will solely reflect judicial ideology. Most often, it will be a mix of both. The only way to understand the consequences of such unamendable commitments, therefore, is to delve deep into constitutional debates and jurisprudence and evaluate them on a case by case basis. The one overarching conclusion based on the analysis above might be, however, that, with only rare exceptions, constitutional courts will not shy away from declaring such eternity clauses justiciable.

3.2 Eternity clauses as militant democracy instrument

Eternity clauses and militant democracy are a natural fit. The latter tries to safeguard the democratic constitutional order by imposing limits which would otherwise be seen as illegitimate in a liberal democracy; eternity clauses follow a similar logic. Constitutional rigidity generally, and eternity clauses in particular, may be explained as favouring a substantive outcome (the survival of the democratic order) over mere procedural safeguards. Unamendable provisions, read in this key, are thus the embodiment of a lack of trust in the capacity of the political process to self-regulate so as to avoid sliding into authoritarianism. The spectre of Weimar, where just such a slide happened under the cloak of the law, looms large in these arguments.⁶⁰¹ Such eternity clauses are thus a response to what David Landau has termed “abusive constitutionalism” – the use of constitutional amendment by would-be autocrats to subvert democracy.⁶⁰²

There are certain types of eternity clauses which are more amenable to militant democracy justifications than others. Provisions which declare unamendable

⁶⁰¹ See Karl Loewenstein, “Militant Democracy and Fundamental Rights I”, *The American Political Science Review*, Vol. 31, No. 3 (1937), p. 424. See also Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond*, Abingdon: Routledge, 2015, pp. 11-25 and Mark Chou, *Democracy Against Itself: Sustaining an Unsustainable Idea*, Edinburgh: Edinburgh University Press, 2014, pp. 50-76.

⁶⁰² David Landau, “Abusive Constitutionalism”, *UC Davis Law Review*, Vol. 47 (2013a), pp. 189-260.

democracy, the multiparty system, or the rule of law are the most obvious examples. Germany's might be the most well-known example of such a clause, but there are others. Turkey's eternity clause, discussed in greater depth below, also references democracy and the rule of law among principles not to be touched by amendment. References to democratic pluralism are also not rare. For instance, Article 288 in the Portuguese constitution includes in a long list of unamendable provisions the "[p]lurality of expression and political organization, including political parties and the right to a democratic opposition." Angola's protection of "The state based on the rule of law and pluralist democracy" in Article 236 of its constitution is but one example where such commitments have migrated from one constitutional system to that of a former colony. References to 'multipartyism' tend to appear in African constitutions (see Article 165 of the constitution of Burkina Faso, Article 118 of the Malian constitution, and Article 177 of the constitution of Niger).

Militant democracy justifications do not solely explain formalised eternity clauses, however. As Po Jen Yap has argued, similar reasoning is resorted to when it comes to doctrines of implicit substantive limits on amendment. He has formulated the militant democracy-based argument in favour of eternity clauses thus:

[O]ne may argue that there must be implied substantive limits placed on constitutional changes or the constitution's amending body would otherwise be legally authorized to abridge all fundamental freedoms or remove all vestiges of democracy within the state. In other words, the implied 'essential features' doctrine is needed as a safeguard against abuse by the amending body and to prevent a country from establishing totalitarianism such that all cherished democratic principles may be rendered non-existent.⁶⁰³

The language used in several cases by constitutional courts declaring amendments unconstitutional despite not having an eternity clause in the constitution seems to support this view. The Colombian Constitutional Court, in a case involving an extension of presidential terms discussed in greater detail in the following section, stated:

The power of constitutional reform cannot be used in order to substitute the Social and Democratic State and the Republican form

⁶⁰³ Yap (2015), p. 121.

of government (article 1) with a totalitarian state, a dictatorship or a monarchy.⁶⁰⁴

As already discussed in Chapter 1, India's Supreme Court was similarly concerned with the erosion of the rule of law when it formulated its basic structure doctrine in the *Kesavananda* case.

The implication of such arguments is that a militant democracy undercurrent exists in all democratic constitutions, even in the absence of an explicit textual crutch. Put differently, the commitment to democracy and the rule of law by their very nature imply an embrace of legal means to safeguard them from subversion. In this reading, militant democracy becomes a tautology as all democracy is militant. Of course, the unstated element of such arguments is that the institution meant to give effect to this militancy is an apex court with the (sometimes self-ascribed) power to judicially review constitutional amendments.

This is precisely the aspect which critics focus on when disputing doctrines of implied substantive limitations on amendment. They point to the fact that a substantive commitment to the rule of law translated into constitutional adjudication often means the elision of reasonable disagreement about its implementation by way of a final judicial decision. Po Jen Yap, for instance, sees "the trouble with this elusive rule of law ideal [as being] not that people will disagree with its normative force in the abstract but that this higher-order law, if enforceable, must be given substance, be interpreted, and be applied."⁶⁰⁵ Others have similarly pointed out that, even with regard to a concept such as human dignity, once "sufficiently definite [for the concept] to be constitutionally useful", multiple conceptions of it may plausibly underpin policy choices.⁶⁰⁶ As also discussed in Chapter 2 with regard to the constitutive elements of constitutional identity, what counts as an essential element in any given constitutional system is not clear and is often open to reasonable disagreement.⁶⁰⁷

⁶⁰⁴ Sentencia 551/03, 9 July 2003, para. 33. Po Jen Yap also gives the example of the Bangladesh Supreme Court judgments invalidating the 5th and 7th Amendments to the constitution, which had imposed martial law on the country. See Yap (2015), p. 122.

⁶⁰⁵ Yap (2015), p. 122.

⁶⁰⁶ Wright (1991), p. 753.

⁶⁰⁷ See also Bernal (2013), p. 344.

A further line of criticism of eternity clauses, whether formal or implicit, as democratic safeguards raises the prospect of their abuse by the judiciary. Po Jen Yap's analysis is again instructive here. He finds "evidence that this implied basic structure doctrine has tended to expand through time as courts find more parts of the constitution to be basic, and it would seem that this doctrine is also used (or abused) by the judiciary for turf-protection purposes."⁶⁰⁸ He gives the example of the Colombian Constitutional Court finding unconstitutional attempts to recriminalise drug possession (following a judicial decision having decriminalised it) on the grounds that these would amount to a constitutional substitution, as they would violate human dignity and autonomy.⁶⁰⁹ The Indian Supreme Court's expansion of the elements of the doctrine over the years has also been given as example of a doctrine of implied limits being used "to open up new vistas of judicial activism."⁶¹⁰ If the incorporation of judicial independence may in itself be uncontroversial (and indeed is found in several formal eternity clauses, for instance in Article 288 of the constitution of Portugal and many of its former colonies, and in Article 152(1) of the Romanian constitution), not all applications of this principle have been equally undisputed. The Court has built a sizeable case law surrounding judicial appointments, for instance, asserting the primacy of the judiciary in controlling this arena.⁶¹¹ This has led to recurring and contentious interventions by the Court, which has most recently invalidated attempts to reform the process of judicial appointments to the Supreme Court and High Courts.⁶¹²

In a reversal of actors of abusive constitutionalism, therefore, the abuse would be perpetrated by judges overstepping their formal competence and arguably the boundaries of their judicial role. Harking back to criticisms of militant democracy more generally, these points echo the arguments that militant measures can and have been instrumentalised for political gain rather than their intended purpose. Such criticism also anticipates the discussion around eternity clauses as anti-majoritarian measures in the next section. The focus of that section will be on

⁶⁰⁸ Yap (2015), p. 123.

⁶⁰⁹ Sentencia C-574/11, 22 July 2011.

⁶¹⁰ Mehta (2002), p. 200.

⁶¹¹ See Singh (2011), p. 187.

⁶¹² See *Supreme Court Advocates-on-Record-Association and another versus Union of India*, Judgment of 16 October 2015.

unamendable provisions protecting fundamental rights. In what follows, however, I explore instances of judicial interpretation of eternity clauses protecting democracy and the rule of law as a testing ground for militant democratic arguments in favour of unamendability. I will therefore look at cases of party bans in Germany and Turkey, as well as a Czech case involving the attempted shortening of the parliamentary term. As mentioned in the beginning of this chapter, the boundaries between such cases and those of rights adjudication involving eternity clauses are porous. While the latter could have easily been discussed in this section, I believe there is value in exploring their distinctive counter-majoritarian aims separately.

3.2.1 Protecting democracy: party bans

Measures against political parties deemed a threat to the constitutional order can take a range of forms. As Samuel Issacharoff has noted, they can include “the proscription of political parties that fail to accept some fundamental tenet of the social order”, “an electoral code governing the content of political appeals”, and “a ban on electoral participation for some political parties, even if they are permitted to maintain a party organization.”⁶¹³ Such bans or restrictions are employed against parties deemed antidemocratic, but also against separatist or ethnic parties.⁶¹⁴ These measures are not necessarily predicated on proof of violence or advocacy of violence by the party in question, but “directed against the threat of a ‘legal’ anti-democratic takeover of the state apparatus”⁶¹⁵ in the tradition of militant democracy theory. However, the evidence from actual cases indicates that direct involvement in violent acts has played a role in a party’s ban,⁶¹⁶ while at the same time bans aimed at weakening political opposition have also occurred.⁶¹⁷ Thus, while the militant democracy paradigm cannot fully account for the phenomenon of party bans, constitutional theory has resorted to its logic when attempting to reconcile them

⁶¹³ Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge: Cambridge University Press, 2015, p. 78.

⁶¹⁴ Richard Pildes, “Political Parties and Constitutionalism” in Ginsburg and Dixon (2011), p. 260.

⁶¹⁵ Matthijs Bogaards *et al.*, “Ethnic Party Bans in Africa: An Introduction”, *Democratization*, Vol. 17, No. 4 (2010), p. 605.

⁶¹⁶ Angela K. Bourne, “Democratization and the Illegalization of Political Parties in Europe”, *Democratization*, Vol. 19, No. 6 (2012), p. 1080.

⁶¹⁷ Bogaards *et al.* (2010), p. 612.

with democratic commitments.⁶¹⁸ Party bans are in fact given as *the* example of militant democracy in action.⁶¹⁹

As noted above, eternity clauses and militant democracy have a clear affinity. However, a brief exploration of party bans or attempted bans justified on militant democracy grounds shows that they rely not so much on eternity clauses but on other constitutional provisions and the wider democratic ethos of the constitutional apparatus.

In Germany, for instance, Article 79(3) was adopted in conjunction with a vast array of measures based on the drafters' understandings of lessons from the Weimar experience.⁶²⁰ With regard to the regulation of political parties, the constitution's approach is robust and two-directional. On the one hand, the Basic Law is committed to multiparty democracy and, in Article 21(1), explicitly (and for the first time in positive law) recognises political parties as constitutional agents which help form the political opinion of the people.⁶²¹ This was a purposeful departure from the Weimar constitution, whose low levels of institutionalisation of parties was partially blamed for their abdication of parliamentary responsibility during the Nazi rise to power.⁶²² On the other hand, Article 21(2) declares unconstitutional parties which "by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." Moreover, the Constitutional Court has explained the role of parties as mediators between individuals and the state and not exclusive in their function as facilitators of political opinion, rendering the role of political parties in

⁶¹⁸ *Ibid.*, p. 605 and Bourne (2012), p. 1080.

⁶¹⁹ See, among others, Pildes (2011).

⁶²⁰ Although what, precisely, those lessons were was not uncontested. With regard to measures regulating political parties, for instance, there was disagreement as to whether the lack of thresholds for entry into parliament had been a cause of, or merely impotent in the face of, the rise of political polarisation. See H. W. Koch, *A Constitutional History of Germany*, London: Longman, 1984, p. 341.

⁶²¹ See Elmar M. Hucko, *The Democratic Tradition: Four German Constitutions*, Oxford: Berg Publishers, 1987, p. 72.

⁶²² Skach (2005), pp. 38, 52-57, 68. See also Cindy Skach, "Political Parties and the Constitution" in Rosenfeld and Sajó (2012), p. 878.

German democracy more ambiguous and subordinated to the parliamentary system of government.⁶²³

The case law of the German Constitutional Court includes eight instances of party bans or calls for such bans.⁶²⁴ Two of these occurred in the early years of the court and involved Konrad Adenauer's call to prohibit both the Socialist Reich Party (the party-heir to the Nazis) and the Communist Party on the ground of their anti-democratic ideologies.⁶²⁵ The court decided to ban both parties and established its doctrine in this area: its intervention would involve a detailed investigation of the party's internal structure and of its public actions and statements. It considered itself competent to declare a party unconstitutional, and thus to order its dissolution, "if, but only if, they seek to topple supreme fundamental values of the free democratic order that are embodied in the Basic Law."⁶²⁶ The Court's approach would arguably become more tolerant of antidemocratic parties as German democracy itself consolidated. An attempt to ban the extreme right-wing National Democratic Party of Germany failed in 2003.⁶²⁷ While it did so on procedural grounds, there are those who view this as an example of "[p]olitical extremism [being] contained not by militant democracy, but by the orderly political processes, an approach that avoids cloaking extremist political parties as 'martyrs of democracy.'"⁶²⁸ This raises the question of the appropriate timing of party bans, and

⁶²³ See Georg Ress, "The Constitution and the Requirements of Democracy in Germany" in Christian Starck, ed., *New Challenges to the German Basic Law: The German Contributions to the Third World Congress of the International Association of Constitutional Law*, Nomos Verlagsgesellschaft, 1991, p. 123.

⁶²⁴ See Kommers and Miller (2012), p. 300.

⁶²⁵ *Socialist Reich Party Case*, 2 BVerfGE 1 (1952) and *Communist Party Case* (1956) 5 BVerfGE 85 (1956).

⁶²⁶ *Socialist Reich Party Case* cited in Kommers (2012), p. 287.

⁶²⁷ *NPD Party Ban Dismissal Case*, 107 BVerfGE 339 (2003). The dismissal came following the court's concerns that much of the evidence in the case came from state agents having infiltrated the party and thus being potentially compromised. See discussion in Kommers (2012), pp. 294-5.

⁶²⁸ Dieter Oberndörfer, "Germany's Militant Democracy: An Attempt to Fight Incitement Against Democracy and Freedom of Speech Through Constitutional Provisions: History and Overall Record" in David Kretzmer and Francine Kershman Hazan, eds., *Freedom of Speech and Incitement Against Democracy*, The Hague: Kluwer Law International, 2000, p. 240. See also Michael Minkenberg, "Repression and Reaction: Militant Democracy and the Radical Right in Germany and France," *Patterns of Prejudice*, Vol. 40, No. 1 (2006), p. 29.

the careful balancing test courts should engage in when weighing the benefits of such bans against their costs for multiparty democracy.

More significant for my purposes here, however, are the implications of this case law for our understanding of Article 79(3). While the German Constitutional Court did not explicitly rely on the eternity clause given that no constitutional amendments were in play, its decisions did help clarify its interpretation of the commitment to democracy instituted by the Basic Law. Significantly, however, the Court's doctrine in this area cannot be understood without an adequate appreciation of Article 21 and of its distinctive background, purpose and scope. In other words, one must appreciate the complexity of the German constitutional architecture and the only partial role played by the *Ewigkeitsklausel* in the defence of democracy. This would constitute a useful reminder to countries wishing to emulate the success of Germany's constitutional order that an intricate web of constitutional provisions protect its democracy, and not merely—and possibly not primarily—its unamendability clause.

A more instructive case for my purposes here is that of Turkey, whose experience with bans on political parties has the Turkish constitution's unamendable commitments to territorial integrity and secularism at its heart. The number of such party bans in is high. In 2009, the Venice Commission found that Turkey's legal restrictions were stricter, included more material limitations on parties, and were applied based on a lower threshold and with fewer procedural obstacles than the rest of Europe.⁶²⁹ The Commission counted twenty-four bans between 1961 and 2009, eighteen of which under the 1982 constitution, and more cases pending.⁶³⁰ So common have dissolutions become, in fact, that the threat of disbanding has become normalised. Islamic or Kurdish parties, the main targets of these actions, have developed strategies such as setting up 'spare parties' in anticipation of judicial rulings against them.⁶³¹ The regulation of political parties, whether by outright bans or via a high parliamentary threshold, has thus been a staple of Turkey's

⁶²⁹ European Commission for Democracy Through Law (Venice Commission), *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, CDL-AD (2009) 006, 13 March 2009, para. 65.

⁶³⁰ *Ibid.*, para. 92.

⁶³¹ See Kogacioglu (2004), p. 440.

democratisation process.⁶³² Significantly, and contrary to the German case just described, the banned parties have not been politically marginal, but have had parliamentary representation and, in the case of the Refah Party discussed below, were part of a ruling government coalition.⁶³³

In discussing two instances of party bans, Dicle Kogacioglu reconstructs the discursive and normative steps taken by the Turkish Constitutional Court in its evaluation of threats to the country's democracy. In the case of the prohibition of HEP, the People's Labour Party (*Halkin Emek Partisi*),⁶³⁴ the Court found the Kurdish party to be separatist and to have threatened the unity of the nation-state—a core principle of the Turkish constitution. The preamble in fact speaks of “the eternal existence of the Turkish Motherland and Nation and the indivisible unity of the Sublime Turkish State”, while unamendable Article 3 declares the state, with its territory and nation, “an indivisible entity” and the national language Turkish. Other constitutional provisions also mention territorial integrity, such as Article 14 on the prohibition of abuse of fundamental rights. The Court invoked this constitutional basis and the history of post-Ataturk Turkey to find that

in the modern Turkish Republic the granting of minority status on the basis of differences of language or race was incompatible with the unity of the homeland and the nation. The state was unitary, the nation was a whole, and arguments to the contrary could only be seen as unwarranted foreign influences intensified by the rhetoric of human rights and freedoms.⁶³⁵

The court dealt with threats to a different but equally foundational constitutional principle in a famous case against the Refah Party.⁶³⁶ In that instance, the Constitutional Court was worried that the party was bent on replacing the democratic system with one based on Shari'a law, in contravention to Turkey's express laicism. The latter is protected by another unamendable provision, Article 2, by the preamble which mandates “that sacred religious feelings shall absolutely not

⁶³² See Sabri Sayarı, “Party System and Democratic Consolidation in Turkey: Problems and Prospects” in Carmen Rodríguez *et al.*, eds., *Turkey's Democratization Process*, Abingdon: Routledge, 2014, p. 101.

⁶³³ Kogacioglu (2004), p. 443.

⁶³⁴ Case No. 1992/1 (Political Party Dissolution), Decision No.: 1993/1, 14 July 1993.

⁶³⁵ Kogacioglu (2004), p. 447.

⁶³⁶ Case No. 1997/1 (Political Party Dissolution), Decision No.: 1998/1, 16 January 1998.

be involved in state affairs and politics as required by the principle of secularism", and by other articles including the aforementioned Article 14. The Court proceeded to define secularism as

a way of life that has destroyed the medieval scholastic dogmatism and has become the basis of the vision of democracy that develops with the enlightenment of science, nation, independence, national sovereignty, and the ideal of humanity.⁶³⁷

Based on this definition, the Court also accepted a dichotomy between religious states and secular ones, the latter being those where religion "is saved from politicization, saved from being a tool of administration and kept in its real respectable place which is the conscience of the people."⁶³⁸

The implications for rights interpretation of similar language used by the Turkish Constitutional Court in cases involving the wearing of the headscarf will be discussed shortly. What is relevant here is the Court's understanding of the democratic ideal it saw itself as tasked with protecting. As Kogacioglu has noted, the Court's notion of democracy was of "a formal category, an abstract entity in need of protection."⁶³⁹ There was no room left for democracy's inner tensions, only reliance on its presence or absence.⁶⁴⁰ In other words, no pluralist notions of democracy motivated the Court's decision.⁶⁴¹ Instead, it positioned its rhetoric squarely in the tradition of militant democracy and invoked the right to democratic self-defence.⁶⁴²

Of great interest in the Turkish cases of party bans are the transnational elements appealed to in these judicial decisions. In both cases discussed above, both the majority and the minority of judges writing opinions invoked commitments to

⁶³⁷ Cited in Kogacioglu (2004), p. 450.

⁶³⁸ *Ibid.*, p. 451.

⁶³⁹ *Ibid.*, p. 453.

⁶⁴⁰ *Ibid.*, p. 457.

⁶⁴¹ For a discussion of the tensions between the normative commitment to militant versus pluralist democracy as exemplified in the *Refah* case, including at the European Court of Human Rights, see Patrick Macklem, "Militant Democracy, Legal Pluralism, and the Paradox of Self-determination", *International Journal of Constitutional Law*, Vol. 4, No. 3 (2006), pp. 488-516.

⁶⁴² Kogacioglu (2004), p. 454.

human rights norms and international treaties in justifying their position.⁶⁴³ Kogacioglu aptly observed that the cases “were very much an amalgam of nationalist collectivist documents, such as Ataturk’s speeches or the problematic 1982 constitution, and international treaties,” including the European Convention on Human Rights.⁶⁴⁴ But whereas the defence were relying on individual rights to the freedom of thought, expression, and association, “the Court was emphasizing the element of the right of a democracy to defend itself.”⁶⁴⁵ In other words, the Constitutional Court was concerned with providing an international basis for the legitimacy of its rulings, and presented militant democracy, instantiated as the competence to ban political parties which it itself was exercising, as an international norm rooted in democracy and human rights. Interestingly, the European Court of Human Rights would agree with this application of militant democracy aims when reviewing the *Refah* case.⁶⁴⁶

3.2.2 Protecting the rule of law

A by now famous 2009 decision of the Czech Constitutional Court serves as a good illustration of rule of law arguments used to strike down amendments.⁶⁴⁷ The decision was handed down in a case involving a constitutional act wherein the lower house of parliament had been dissolved ahead of term, with early parliamentary elections already on the way. The proceedings had been initiated by a Member of Parliament who charged that his individual right to serve the full duration of his mandate had been violated. Although there was a procedure for early dissolution of parliament in the Czech constitution (incorporated in Article

⁶⁴³ *Ibid.*, pp. 442, 456.

⁶⁴⁴ *Ibid.*, p. 456.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ For a critique of the approach of the European Court of Human Rights in the *Refah Partisi* case and its reliance on militant democracy arguments, see Rory O’Connell, “Militant Democracy and Human Rights Principles”, *Constitutional Law Review*, Vol. 5, No. 1 (2009), pp. 84-90.

⁶⁴⁷ Decision Pl. ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, 10 September 2009. For analyses of the decision, see: Maxim Tomoszek, “The Czech Republic” in Oliver and Fusaro (2011), pp. 41-67; Kieran Williams, “When a Constitutional Amendment Violates the “Substantive Core”: The Czech Constitutional Court’s September 2009 Early Elections Decision”, *Review of Central and Eastern European Law*, Vol. 36 (2011), pp. 33-51; and Yaniv Roznai, “Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act”, *Vienna Journal on International Constitutional Law*, Vol. 8, No. 1 (2014b), pp. 29-57.

35), it had not been resorted to in this instance. Moreover, the petitioner contended, the 'substantive core' of the constitution, which he argued included principles of non-retroactivity, generality and predictability of laws, had been violated by the constitutional act. The Constitutional Court ignored the rights-based claim but embraced the arguments that the constitutional act represented an affront to the constitution's identity and the integrity of Czech democracy. The decision sought to justify the Court's competence to rule on the constitutionality of the law before it, as well as to justify the rule of law principles of generality and non-retroactivity as part of a 'material core' the boundaries of which the Court was entrusted to police.

With regard to the latter point, the Court went to great lengths to validate its doctrine both by reference to precedent and to history. It sought to "contextualiz[e] the...case as the faithful and logical extension of a line of cases running back to the first occasion on which the Court reviewed the constitutionality of a statute."⁶⁴⁸ In this case law, the Court had recognised "popular sovereignty, a right of resistance, and the basic principles of election law" as "fundamental inviolable values of a democratic society" and as such part of a 'substantive core' of the legal order.⁶⁴⁹ The Court also relied on the rhetorical force of appeals to history by referencing Czech, but also German and Austrian, experience with democratic subversion, including via the communist semblance of legal order.⁶⁵⁰ Kieran Williams has described this rhetoric as necessary for the Court to feel empowered to review the constitutional act (even while he questions the exaggeration of the so-called 'Weimar syndrome' by the Czech, and other, constitutional courts).⁶⁵¹

This was the background, the Court argued, which helped explain the adoption of Article 9(2) stating: "Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible." The practical meaning of this article had previously been disputed, particularly given the lack of an enforcement

⁶⁴⁸ Williams (2011), p. 42.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.* Williams defined the 'Weimar syndrome' with reference to "states in which authoritarian movements came to power in the past with the help not of foreign armies but of the ballot box." See also Kieran Williams, "Judicial Review of Electoral Thresholds in Germany, Russia and the Czech Republic", *Election Law Journal*, Vol. 4, No. 3 (2005), pp. 191-206.

mechanism attached.⁶⁵² Alternative readings saw it as a purely declaratory provision, or else as “an instruction to the Senate, which is supposed to be the ‘connecting agent’ with responsibility for revising legislation passed by the Chamber of Deputies.”⁶⁵³ The Constitutional Court took a different view, however, and arrogated for itself the power to review Article 9(2), laying the ground for its ‘material structure’ doctrine. It emphatically declared this provision as “non-changeable... not a mere slogan or proclamation, but a constitutional provision with normative consequences.”⁶⁵⁴ In so doing, it believed to be protecting not only core rule of law components such as non-retroactivity and the generality of laws, but also the democratic order, all of which it linked to the identity of the Czech constitutional system.⁶⁵⁵

Thus, not only did the Court specify concrete legal principles which make up the unamendable rule of law commitment in Article 9(2) (though it did not provide an exhaustive list), but it also took the more controversial step of declaring itself the guardian of this constitutional ‘core’. This move has been widely criticised in the literature. More sympathetic observers have termed it “one of the weakest points of the decision” but deemed it unavoidable in the face of a dangerous precedent and bound to remain exceptional.⁶⁵⁶ Others have accepted the Court’s move and admitted the problematic aspects of the constitutional act passed by the parliament but have maintained that the circumstances of the case had not warranted invalidation.⁶⁵⁷ Others still have called this an instance of “undercooked, “fast-food” judging”.⁶⁵⁸

There is an inescapable irony in the Court relying on rule of law considerations, including of predictability and legal certainty, while itself making an unprecedented (despite its protestations) move to increase its own review powers and strike down an otherwise constitutionally-passed act.⁶⁵⁹ Similar arguments would be at the core

⁶⁵² Tomoszek (2011), p. 57.

⁶⁵³ *Ibid.*

⁶⁵⁴ Decision Pl. ÚS 27/09, Part IV.

⁶⁵⁵ *Ibid.*, Part VI(a).

⁶⁵⁶ Tomoszek (2011), pp. 64-5.

⁶⁵⁷ See Roznai (2014b), p. 51.

⁶⁵⁸ Williams (2011), p. 50, using Joseph Weiler’s term from Weiler (2009).

⁶⁵⁹ See Roznai (2014b), p. 51.

of the Court's ensuing jurisprudence. In a subsequent ruling on the Treaty of Lisbon, the Court was called upon to delineate further the boundaries of its material core doctrine but refused to do so. It declined calls to provide a final list of elements of the doctrine and defended its position as one of "restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty."⁶⁶⁰ It is true, and inherent in any doctrine of substantive limits on constitutional change, that exhaustive lists may unduly constrain the adjudicator and may indeed be inappropriate when dealing with constitutional essentials. However, the 'original sin' of the doctrine's creation remains; so do questions over the appropriate dispensation of the judicial role when constitutional fundamentals are at stake.

Other arguments in favour of the Czech Constitutional Court's decision of 10 September 2009 seem to be opportunistic, defending it on grounds of the erosion of parliamentary practice in the Czech Republic.⁶⁶¹ These, however, overstate the danger in the concrete circumstances of this case. The existence of wide parliamentary consensus to shorten rather than extend the mandate raises questions about the proportionality of the Court's decision.⁶⁶² Although ad hoc, it is doubtful that the act in question would have resulted in the destruction of Czech democracy and rule of law. Moreover, the speedy adoption of an amendment to allow precisely the self-dissolution procedure struck down by the Court is further evidence that there had been broad consensus behind the act.⁶⁶³ In other words, the rhetoric of the Czech Constitutional Court, seeped as it was in a history of authoritarianism and reminiscent of militant democracy arguments, was at best only partially convincing. After all, a representative democratic institution willingly relinquishing its mandate so as to escape political crisis may only dubiously be equated with Nazi or

⁶⁶⁰ Decision Pl. ÚS 29/09: Treaty of Lisbon II, 3 November 2009, paras. 112-13.

⁶⁶¹ See Tomoszek (2011), p. 66.

⁶⁶² See Radim Dragomaca, "Constitutional Amendments and the Limits of Judicial Activism: The Case of the Czech Republic" in Willem Witteveen and Maartje de Visser, eds., *The Jurisprudence of Aharon Barak: Views from Europe*, Oisterwijk: Wolf Legal Publishers, 2011, pp. 177-96.

⁶⁶³ On the amendment to Article 35 providing for the self-dissolution procedure, see Williams (2011), pp. 46-48.

communist subversion of democracy by legal means. Doing so in an ad hoc manner may raise rule of law concerns, but hardly of a magnitude to be said to affect the constitutional order's very core. This case may therefore be evidence of Europe's "judicial culture more uniformly anxious for democracy's endurance."⁶⁶⁴ It may also be proof of judicial self-empowerment with a wider reach, as national defence against the encroachment of the supranational. This is after all a court which, like its German counterpart, asserted the fundamental core of the Czech constitution as delineating the limits of European integration.⁶⁶⁵

3.2.3 The limits of eternity clauses as militant democracy instrument

Several conclusions present themselves. The first is that eternity clauses as safeguards of democracy or the rule of law as such are to an extent dealing in imponderables, just like unamendable state fundamentals.⁶⁶⁶ Moreover, they do not exist on their own, but tend to be part of a wider militant democratic constitutional architecture. Full commitment to the eternity clause as militant democratic instrument argument, therefore, needs to examine their place within that broader architecture.

Secondly, while the above was not meant as a comprehensive mapping of case law involving eternity clauses in a militant democracy framework, the cases invoked do serve to showcase possible outcomes of judicial enforcement. On the one hand, there might be relatively uncontroversial cases such as banning fascist parties with known links to violent activity. On the other, however, there might be prohibitions of parties which are not politically marginal but represented in parliament and even in the government, on the grounds of antidemocratic activity contravening unamendable constitutional commitments. Courts' understandings of their own role in such instances will vary. Some will feel confident enough in the political system to allow competition to play itself out. Others, conversely, will take it upon

⁶⁶⁴ Williams (2005), p. 191.

⁶⁶⁵ Decisions Pl. ÚS 19/08: Treaty of Lisbon I, 26 November 2008 and Pl. ÚS 29/09: Treaty of Lisbon II, 3 November 2009. See discussion in Petr Bříza, "The Czech Constitutional Court on the Lisbon Treaty", *European Constitutional Law Review*, Vol. 5, No. 1 (2009), pp. 143-64; de Visser (2014); Theil (2014).

⁶⁶⁶ Yap (2015), p. 123.

themselves to police the political field based on their own, potentially “assertive and authoritarian”, values.⁶⁶⁷ While such interventions may prove more or less controversial, it appears inevitable that they will at least on occasion stifle reasonable disagreement over democratic practice and go beyond the last-resort protection of the constitutional order.

Finally, as the Czech case illustrates in this section, and as the Turkish one did in section 3.2.1, these judicial interventions in the name of militant democracy are themselves often on shaky constitutional ground. It is not just that courts enforce the values at the core of democracy (and constitutionalism), but that they often do it in the absence of an explicit constitutional basis, and even in spite of explicit language to the contrary. Are we comfortable with the rule of law being protected by way of a potentially self-empowered court? Or do we simply see it as part of what courts do and accept their role as final—and sole—arbiter of constitutional meaning? Is there more we can say about when they should intervene and when they should hold back? Different theoretical sensitivities will lead us to different conclusions, but these latter nevertheless need to be avowed and justified.

3.3 Eternity clauses as anti-majoritarian safeguard

There are two ways in which I will discuss eternity clauses as an anti-majoritarian safeguard. The first sees them as instantiations of democratic safeguard against abuse of the majoritarian failings of the electoral system. The example here is unamendable term limits. I believe the discussion of clauses which declare the number and/or duration of executive mandates unamendable needs to take into account the distinctive history of term limits as a tool of constitutional design in post-authoritarian contexts. In a sense, they are different from other eternity clauses, more distinctly practical in aim and blunter but therefore more easily recognised as transgressed. The second framework I look at is that of minority rights, within which eternity clauses serve as immutable commitments to the protection of minorities and safeguards against majoritarian abuse. As discussed in Chapter 2, not all values enshrined in eternity clauses are minority-protecting; some are

⁶⁶⁷ Ergun Özbudun describes the Turkish Constitutional Court’s understanding of secularism in these terms. See Ergun Özbudun, “Democracy, Tutelarism and the Search for a New Constitution” in Rodríguez *et al.* (2014), p. 306.

distinctly majoritarian, such as official religion or language provisions. Examples of both are given here.

Other types of unamendable provisions could have been brought under the umbrella of anti-majoritarianism. Federalism in particular could be seen as a pluralist democratic commitment to preserving territorial sub-units. In this light, then, eternity clauses which list federalism among the entrenched values would also be read as minority-protecting, only the minority would be a territorial unit rather than a population. Echoes of such an interpretation exist in German *Ewigkeitsklausel* jurisprudence discussed above. A further exploration of this issue here, however, would detract from the focus on minority rights (broadly understood) of this section.

3.3.1 Term limits

One of the clearest instances of eternity clauses adopted for anti-majoritarian purposes are unamendable executive term limits. Such clauses are relatively frequently found in Latin American and African countries trying to overcome a history of executive overstay and coups. Among these are: the Central African Republic (Article 108), El Salvador (Article 248), Guatemala (Article 281), Honduras (Article 374), Mauritania (Article 99), Guinea (Article 154), Madagascar (Article 163), Niger (Article 136), Qatar (Article 147), The Republic of Congo (Article 185), and Rwanda (Article 193). The most recent constitution having incorporated such an unamendable limit is Tunisia, whose Article 48 drafting is more or less the norm and states: “The number of Presidential terms may not be amended or increased.”

I agree with Richard Albert who notes that such clauses can be explained by these countries’ experience with coups and military rule and their desire to create functioning democracies.⁶⁶⁸ Yaniv Roznai includes them among a wider category of eternity clauses which uphold the state’s political structure by entrenching democracy, the sovereignty of the people, or the nature of elections.⁶⁶⁹ While I do not dispute that they are inherently linked to such general democratic commitments, I also believe there are aspects particular to the tool of executive term

⁶⁶⁸ Albert (2010), p. 688.

⁶⁶⁹ Roznai (2014a), p. 32.

limits which make them worthy of a separate investigation. Unlike a general commitment to democracy, and similar to but still separate from commitments to multiparty democracy specifically, term limit unamendability is a direct response to past democratic failure by way of executive usurpation. Seeing it as an extreme version of bans on executive term extension therefore better explains why they have been adopted and the likelihood of their effectiveness.

Restrictions on executive terms of office are quite common in constitutions around the world, especially in presidential and semi-presidential systems.⁶⁷⁰ The Twenty-second amendment to the United States constitution, Article 6 of the French constitution and Article 52 of the German Basic Law are examples of such clauses in three of the most influential fundamental laws. Limitations on the number and length of term limits has been found to be on the rise⁶⁷¹ and they have come to be called “one of the defining features of democracy”.⁶⁷² These types of rules present obvious advantages, particularly in the long run: they ensure rotation of office, limit incumbent advantage in elections, and encourage political competition. Conversely, they can be viewed as an illiberal constraint on citizens’ choice, discouraging experienced governance, underestimating the potential disruptive role of ex-leaders, and open to abuse.⁶⁷³

The literature on both unentrenched and entrenched term limits has also tackled the normative challenge they pose, as well as the question of their effectiveness. From a normative point of view, they have been said to create “an unhappy dilemma” when a popular leader reaches the end of tenure but wishes to remain in power.⁶⁷⁴ As Ginsburg *et al.* have put it, “[t]he resulting conflict is one between a majority (or plurality) that yearns for “four [or five or six] more years” and a minority that

⁶⁷⁰ Gideon Maltz, “The Case for Presidential Term Limits”, *Journal of Democracy*, Vol. 18, No. 1 (2007), pp. 128-42.

⁶⁷¹ Tom Ginsburg *et al.*, “On the Evasion of Executive Term Limits”, *William and Mary Law Review*, Vol. 52 (2011), p. 1840.

⁶⁷² Maltz (2007), p. 129.

⁶⁷³ Ginsburg *et al.* (2011), pp. 1818-27.

⁶⁷⁴ Tom Ginsburg *et al.*, “Do Executive Term Limits Cause Constitutional Crises?” in Tom Ginsburg ed., *Comparative Constitutional Design*, Cambridge: Cambridge University Press, 2012, p. 354. See also Ginsburg *et al.* (2011), p. 1830.

demands the implementation of constitutional rules.⁶⁷⁵ The counter-majoritarian rule, in other words, may end up being perceived as sacrificing short-term democratic choice for the system's long-term health.⁶⁷⁶ Moreover, the constitutional crisis this unpopular trade-off may spark is especially damaging given the personalisation of the conflict at its heart.⁶⁷⁷ Executive term limits have also been criticised as an exceedingly blunt instrument which does not take into account external conditions.⁶⁷⁸

From the point of view of their effectiveness, term limits are also contested. They are suspected of inducing constitutional crisis, but also possibly increasing the likelihood of presidents overstaying in the future and degrading democracy as a whole.⁶⁷⁹ However, empirical studies testing these assumptions have called term limits "surprisingly effective in constraining executives from extending their terms, at least in democracies."⁶⁸⁰ Not entirely surprisingly, the same authors have found that, in democracies, the gap between constitutional rules on term limits and practice is narrower.⁶⁸¹ Moreover, the very bluntness of these rules may be linked to their successful enforcement.⁶⁸² To the counterargument that they may always be overcome via constitutional amendment, these authors put forth a theory of executive term restrictions as default rules—only effective as long as they are not amended out of the constitution (and thus not eternal after all).⁶⁸³ These rules present an obstacle to executives extending their tenure, the argument goes, by raising its costs: "Term limits...raise the degree of political support required for an executive to maintain office from the ordinary electoral majority baseline to the higher constitutional amendment threshold, which we may think of as a

⁶⁷⁵ Ginsburg *et al.* (2011), p. 1830.

⁶⁷⁶ Maltz (2007), p. 139 has termed this trade-off "restricting the immediate power of the majority, but thereby preserving and facilitating genuine democracy."

⁶⁷⁷ Ginsburg *et al.* (2011), p. 1830.

⁶⁷⁸ *Ibid.*, p. 1829.

⁶⁷⁹ See Ginsburg *et al.* (2012), p. 370.

⁶⁸⁰ Ginsburg *et al.* (2011), p. 1814.

⁶⁸¹ *Ibid.*, p. 1854.

⁶⁸² *Ibid.*, p. 1868.

⁶⁸³ *Ibid.*, pp. 1828.

supermajority, although amendment provisions vary.”⁶⁸⁴ In other words, they may be viewed as supermajoritarian rules rather than absolute prohibitions.

The same empirical studies, however, indicate that, while not “associated with the death or disability of democracy”, term limits may in some circumstances trigger early constitutional replacement.⁶⁸⁵ This does not appear too bothersome to the authors, who see both term limits and their alternatives as imperfect instruments posing “problems of calibration”.⁶⁸⁶ As will be discussed below, however, the consequences of constitutional crises involving (if not outright triggered by) executive term limits are potentially dire. When entrenched by way of an absolute prohibition, not to mention cases where the eternity clause itself is entrenched (and its trespass criminalised, as in Honduras), the costs of attempts to extend executive tenure are even higher.⁶⁸⁷ The authoritarian context in which these eternity clauses almost invariably occur make these costs, up to and including constitutional replacement, not as easily written off as failures of calibration.

Two cases of constitutional crises surrounding attempts at overcoming executive term limits are relevant here. One of these, Honduras, is an especially pertinent example of a country having an eternity clause entrenching the ban on executive term extension, but also having entrenched the eternity clause itself. Recent judicial developments in Honduras have yet again brought this issue to the fore. The other, Colombia, while not having a similarly unamendable provision in its constitution, saw its constitutional court come up with a judicial doctrine of constitutional replacement which prohibited the extension of the number of presidential terms to more than two. These are not the only cases of judicial enforcement of term limits,⁶⁸⁸

⁶⁸⁴ *Ibid.*, pp. 1828-9. See also Maltz (2007), p. 141.

⁶⁸⁵ Ginsburg *et al.* (2011), p. 1814.

⁶⁸⁶ *Ibid.*, p. 1865.

⁶⁸⁷ Although there are those who view the entrenchment of term limits, and the entrenchment of that entrenchment, as a positive step. See Maltz (2007), p. 141.

⁶⁸⁸ Another example would be Niger, whose Constitutional Court invalidated a presidential attempt to hold a referendum on the extension of the maximum number of terms, finding that he could not do so in light of the country’s eternity clause (Article 136). See AVIS no. 02/CC du 25 mai 2009. The president eventually went ahead with the referendum in spite of the decision and obtained an extension of his mandate by three years, as well as an increase in his powers which transformed the republic into a presidential system. Following a year-long constitutional crisis, the military staged a coup to remove him from power. See

but they serve to illustrate different aspects of this democratically problematic instrument.

In 2009, the Honduran President Manuel Zelaya sought to override an entrenched term limit despite waning support. His bid to organise a non-binding public consultation regarding holding a referendum on whether to set up a body tasked with changing the constitution was opposed by the judiciary, parliament and the military. Despite his protestations to the contrary, many in the country saw this as Zelaya's attempt to override the one-term limit. This included the Constitutional Chamber of the Honduran Supreme Court, which held that the proposed referendum could not go ahead as it was in breach of the constitutional term limit. The constitutional crisis resulted in the president's forceful removal from office by the military and exile.⁶⁸⁹ A Supreme Court judge would justify this as nothing more than the military carrying out a lawful arrest warrant.⁶⁹⁰ The prevailing view appears to be that, while the methods employed were unfortunate, there was also a very real threat to democracy had plans to override the executive term ban gone ahead.⁶⁹¹ The role played by the eternity clause to this effect is more ambiguous.

Article 374 of Honduras's 1982 constitution states:

The foregoing article [the general amendment procedure], this article, the Articles of the Constitution relating to the form of government, national territory, the presidential term, the prohibition from reelection to the presidency of the republic, the citizen who has served as president under any title, and to persons who may not be

"Military Coup Ousts Niger President Mamadou Tandja", *BBC News*, 19 February 2010, available at <http://news.bbc.co.uk/1/hi/world/africa/8523196.stm>.

⁶⁸⁹ For an overview of events, see "Q&A: Political Crisis in Honduras", *BBC News*, 27 January 2010, available at <http://news.bbc.co.uk/1/hi/world/americas/8124154.stm>.

⁶⁹⁰ Joshua Goodman and Blake Schmidt, "Honduras Supreme Court Judge Defends President Ouster (Update1)", *Bloomberg*, 1 July 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axGENUiy9yKs>.

⁶⁹¹ See Douglass Cassel, "Honduras: Coup d'Etat in Constitutional Clothing?", *ASIL*, Vol. 13, No. 9, 15 October 2009; Mariana Llanos and Leiv Marsteintredet, "Epilogue: The Breakdown of Zelaya's Presidency: Honduras in Comparative Perspective", in Mariana Llanos and Leiv Marsteintredet, eds., *Presidential Breakdowns in Latin America. Causes and Outcomes of Executive Instability in Developing Democracies*, Basingstoke: Palgrave Macmillan (2010), pp. 229-38; J. Mark Ruhl, "Honduras Unravels", *Journal of Democracy*, Vol. 21, No. 2 (2010), pp. 93-107; and Frank M. Walsh, "The Honduran Constitution Is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal", *Georgia Journal of International and Comparative Law*, Vol. 38 (2010), pp. 339-73.

president of the republic for the subsequent period may not be amended.

The extent of restrictions on the presidential office is noteworthy. The ban on presidential reelection after one term is compounded by additional constitutional provisions which attach severe penalties to its breach or attempted breach. Thus, Article 239 stipulates that a person who violates the ban on reelection or even advocates for its amendment will be disqualified from public office for ten years. Moreover, Article 42 mandates the loss of one's citizenship for "inciting, promoting, or supporting the continuation or reelection" of the president. Honduras seems to have experimented with unamendable term limits from as early as its 1957 constitution; although the rule had previously been derogated from, at the time of Zelaya's efforts an absolute ban on reelection and its proposed amendment had remained in force since 1982.⁶⁹²

Some commentators saw the term limit provision and its double entrenchment as the immediate cause for the 2009 Honduran crisis.⁶⁹³ Others were careful to distinguish between the substantive prohibition on term limit extension and the "second-order proscriptions on debate or proposal of amendments."⁶⁹⁴ The latter opined that, while some core issues may best be protected by taking them off the table, term limits "do not seem so contentious as to prohibit all discussion of them."⁶⁹⁵ Others still, placing Honduras in a wider Latin American context, saw Zelaya's bid as an effort at "constitutional subterfuge": using the cover of legality to

⁶⁹² Leiv Marsteintredet, "The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions", I-CONNECT Blog, 2 May 2015, available at <http://www.iconnectblog.com/2015/05/marsteintredet-on-honduras/>.

⁶⁹³ Albert (2010), p. 692. He states: "It was none other than this constitutional clause that pit the leading popular democratic institution in Honduras—the presidency—versus the other national democratic institutions, namely the legislature, courts, and leading independent bodies."

⁶⁹⁴ Tom Ginsburg, "The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment", Comparative Constitutions Project, 12 August 2009, available at <http://www.comparativeconstitutions.org/2009/08/puzzle-of-unamendable-provisions-debate.html>.

⁶⁹⁵ *Ibid.*

break down constitutional barriers to their reelection.⁶⁹⁶ Few would have been able to predict the U-turn the Honduran court would make in a few short years.

In a decision on 22 April 2015, the Constitutional Chamber of the Honduran Supreme Court declared the ban on presidential reelection unconstitutional and effectively repealed Article 239.⁶⁹⁷ It found the article to be in conflict with the freedoms of speech and thought; to unduly limit political participation and debates; to be contrary to international human rights obligations; and to have been relevant at an earlier time, but no longer because Honduras had stabilised its democracy. Moreover, the court relied on the recommendations of the truth commission set up by Zelaya's successor to clarify the events of 2009 and to make recommendations meant to prevent such crises.⁶⁹⁸ The latter had found the actions of the military in ousting Zelaya to have been illegal and unjustifiable and called for comprehensive constitutional reform.

As David Landau has argued, the 2015 decision makes curious use of both the unconstitutional constitutional amendment doctrine and of arguments rooted in international human rights law.⁶⁹⁹ The Court used the unconstitutional constitutional amendment doctrine to strike down not an amendment to the constitution, but a provision of the original text; moreover, it had invoked international human rights, in particular freedom of expression, against their core purposes.⁷⁰⁰ Finally, Landau posits, the Court decision sealed the loss of an opportunity for wider constitutional reform in the aftermath of the 2009 coup by dealing with the term limit rule in isolation.⁷⁰¹ Other commentators also noted that

⁶⁹⁶ Forrest D. Colburn and Alberto Trejos, "Democracy Undermined: Constitutional Subterfuge in Latin America", *Dissent*, Vol. 57, No. 3 (2010), pp. 11-15.

⁶⁹⁷ Corte Suprema de Justicia, Sala de lo Constitucional, 22 April 2015, available at <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

⁶⁹⁸ Comisión de la Verdad y la Reconciliación (CVR), *Hallazgos y recomendaciones Para que los hechos no se repitan*, July 2011, available at <https://www.oas.org/es/sap/docs/DSDME/2011/CVR/Honduras%20-%20Informe%20CVR%20-%20RECOMENDACIONES.pdf>.

⁶⁹⁹ David Landau, "The Honduran Constitutional Chamber's Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?", *I-CONNECT Blog*, 6 May 2015, available at <http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary/>.

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid.*

this decision showed that unamendable provisions are “as amendable as any other constitutional article” if plausibly in contradiction with international standards or having lost their initial justification.⁷⁰²

Colombia’s constitution does not contain an eternity clause; in fact, the text is comparatively easy to amend: a simple majority is required at first reading and an absolute majority at the second (article 375). Article 197 does, however, limit the number of presidential terms in office. In 2005, the still-popular president Alvaro Uribe Velez steered the passing of a constitutional amendment allowing for his reelection (the constitution only allowed for a maximum of one term in office at that time). The Colombian Constitutional Court had been petitioned to find the amendment unconstitutional, both on procedural grounds and on substantive ones for violating the separation of powers, the principle of alternative exercise of political powers, and electoral equality.⁷⁰³ The Court rejected the arguments about the amendment’s unconstitutionality.⁷⁰⁴ It was to revisit the issue soon thereafter, when another amendment extending the executive term limit to three mandates was challenged before it.⁷⁰⁵

In both decisions, the Court relied upon its previously expounded ‘constitutional replacement’ or ‘substitution’ doctrine.⁷⁰⁶ The doctrine, first delineated in 2004, could initially be summarised thus: “a constitutional amendment is a constitutional replacement if it replaces an element defining the identity of the constitution.”⁷⁰⁷ (On the difficulties of distinguishing between such permissible amendment and impermissible replacement, see the corresponding discussion in Chapter 4 below.) The difficulties in operationalising the ‘identity element’ to render it judicially useful, by defining the concept or providing criteria for its application, have been

⁷⁰² Marsteintredet (2015).

⁷⁰³ See discussion in Bernal (2013), p. 345.

⁷⁰⁴ Sentencia C-1040/05, 19 October 2005.

⁷⁰⁵ Sentencia C-141/10, 26 February 2010.

⁷⁰⁶ For an analysis of the doctrine’s history and elements, see Bernal (2013). See also Joel Colón-Ríos, “Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia”, *Constellations*, Vol. 18, No. 3 (2011), pp. 372-76 and Colón-Ríos (2012), pp. 134-38.

⁷⁰⁷ Bernal (2013), p. 343. The judgment where the Court first defined this doctrine was Sentencia C-970/04, 7 October 2004.

noted by the literature.⁷⁰⁸ The Court gave further contour to the doctrine by replacing the concept of an 'identity element' with that of an 'essential element' and identifying seven steps in a 'constitutional replacement' test.⁷⁰⁹ Carlos Bernal has convincingly proven that several of these steps are problematic, either because they are ambiguous and create uncertainty, because they elide reasonable disagreement about constitutional fundamentals, or because they are simply circular.⁷¹⁰ Colombia's is thus yet another case where a court not originally empowered to do so developed a doctrine of substantive review of amendments.

In the second case, involving an extension from two to three executive terms, the Colombian Constitutional Court took great pains to explain that the circumstances of the case made such a change especially pernicious. The extended mandate would have allowed Uribe to appoint the leadership of virtually all institutions set up as a check on the presidency. Moreover, his incumbent advantage would only have grown over time. Thus, the court reasoned, the amendment in question would have amounted to a 'constitutional replacement' because Uribe's second re-election "would create such a strong presidency as to weaken democratic institutions."⁷¹¹ In other words, the court did not analyse the constitutionality challenge before it in a vacuum, but took into account the impact on the constitutional system of the proposed amendment and deemed it too dangerous an affront to democracy. As such, Landau has suggested, the Court succeeded in preventing "a serious erosion of democracy", even while this may not have in the end amounted to a full slide to authoritarianism.⁷¹² Colombia's hyper-presidential constitutional system, coupled with the ease of constitutional amendment, have also led Bernal to accept the constitutional replacement doctrine in the specific context of the country.⁷¹³ This doctrine, he has argued, is but one of more innovative tools of control over the

⁷⁰⁸ Bernal (2013), p. 343.

⁷⁰⁹ *Ibid.*, p. 344.

⁷¹⁰ *Ibid.*, pp. 344-45.

⁷¹¹ Landau (2013a), p. 203.

⁷¹² *Ibid.*

⁷¹³ Bernal (2013), p. 352.

government which the Court has had to devise in Colombia's distinct political landscape.⁷¹⁴

3.3.2 Minority rights protection

There are three broad categories of provisions which could be discussed under this umbrella. The first group includes commitments to the unamendability of certain discrete rights. An example is Germany's Article 79(3) which refers to Articles I and 20 of the Constitution as the entrenched rights. Second are broader commitments to the respect of human rights incorporated in eternity clauses such as Turkey's Article 4. There are provisions which might straddle the two, such as Russia's Article 135(1) which prevents the revision of the entire chapter on rights and liberties. The scope of clauses in this second category in particular is only elucidated via judicial interpretation. The third and seemingly most popular type read more like an unamendable minimum standard of rights protection. Romania's Article 152(2) is an example here: "Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof." Another is Tunisia's provision which is tellingly incorporated in the constitution's limitation clause (Article 42) and states that "There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution." Such language appears particularly frequently in post-conflict constitutions, which often also refer to international human rights standards (see Bosnia's Article X.2 and Kosovo's Article 144(3)). In what follows, I explore examples from the second and third categories. I do so in order to discuss the safeguarding of religious freedom and official language as two instances where minority protection clashes with unamendability.

The framework of minority rights provides a different lens through which to view the constitutional battles surrounding secularism. As was discussed in section 3.1.4 above, India's Supreme Court has invoked that constitution's secular foundations to protect a religious minority under threat. That court's intervention in this arena has

⁷¹⁴ *Ibid.*

led commentators to call its function ““super” anti-majoritarian”.⁷¹⁵ Other courts interpreting eternity clauses in this area have been less preoccupied with protecting the vulnerable. In Turkey, for instance, secularism has long been at the heart of public battles over the constitutional protection of religious identity. The *Headscarf* decision of 2008, also discussed in section 3.1.4, made references to the discrimination of the minority non-headscarf-wearing population:

[I]n Turkey, where the majority of the population is Muslim, the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practicing Muslims, nonpracticing Muslims, and nonbelievers on grounds of dress, with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as nonreligious.⁷¹⁶

In other words, the Court turned the tables on those arguing this was a case of religious freedom and rendered a judgment premised on the rights of the secular (but constitutionally entrenched) minority. It did so while at the same time couching its search for constitutional justice in international human rights standards, all while preserving the status quo.⁷¹⁷ Susanna Mancini has noted this same logic being adopted by the European Court of Human Rights in its case reviewing the Turkish decision and found it “striking that the Court used the margin of appreciation doctrine to protect *minorities* when the majority religion happens to be Islam.”⁷¹⁸ She places this observation in the Turkish context of militant anti-Islamic secularism, but also of the European Court’s previous findings that the veil was incompatible with certain fundamental principles.⁷¹⁹ Mancini wonders whether the European Court finds Islam more generally to be incompatible with democracy, and as such open to regulation: “Islam, unlike Christianity, even when it is the vast majority’s religion,

⁷¹⁵ Manoj S. Mate, “Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective”, *San Diego International Law Journal*, Vol. 12 (2010), p. 210.

⁷¹⁶ Roznai and Yolcu (2012), pp. 179-80.

⁷¹⁷ Kogacioglu (2004), p. 459.

⁷¹⁸ Susanna Mancini, “The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism”, in Susanna Mancini and Michel Rosenfeld, eds., *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press, 2014, p. 121.

⁷¹⁹ See *Dahlab v. Switzerland*, Application No. 42393/98, Decision of 15 February 2001.

can be restrictively regulated on the ground that it threatens the democratic basis of the state.”⁷²⁰

The Turkish decision is problematic for the protection of rights to religious freedom in a different way as well. The public/private sphere distinction upon which much of the doctrine on the separation of church and state relies was always problematic and has become increasingly so the more constitutionalisation encroaches upon hitherto unknown areas of life. András Sajó has argued this persuasively as a case of double pressure exercised not just

from increasingly aggressive religious interests but also, in part, due to the increasing constitutionalization of the legal and, consequently, of the social system. Contemporary constitutional law in most countries seeks to penetrate spheres hitherto respected as private and, hence, off-limits to public law.⁷²¹

The Turkish Constitutional Court took this as far as to portray its intervention in the *Refah Partisi* case and others as saving religion itself from ‘contamination’ by politics.⁷²² In Turkey, therefore, secularism may have relegated Islamic identity and practice to the private sphere, but it was to be followed there by the long arm of state regulation.⁷²³

Another testing ground for eternity clause rights protection are unamendable provisions which incorporate references to an official language. Such provisions exist in Algeria (Article 178), Bahrain (Article 120), Moldova (Article 142), Romania (Article 152(1)), Tunisia (Article 1), and Turkey (Article 4). This might seem like a mere declaration of fact, but as the cases of Turkey and Romania below demonstrate, can be anything but benign. Indeed, I would argue that just like territorial integrity discussed above, official language unamendability tends to appear in the constitutions of countries where it is a site of struggle. If unamendable integrity of the territory is more akin to a state’s declaration of independence, however, the entrenchment of an official language can and has been used to curtail minority rights in the name of faith to the constitution.

⁷²⁰ Mancini (2014), p. 121.

⁷²¹ András Sajó, “Preliminaries to a Concept of Constitutional Secularism”, in Mancini and Rosenfeld (2014), p. 62.

⁷²² Kogacioglu (2004), p. 451.

⁷²³ *Ibid.*, p. 437.

As we have seen, Turkey's eternity clause incorporated in Article 4 of its constitution has been at the heart of constitutional jurisprudence for decades. Less prominent, perhaps, has been the interpretation given by the Turkish Constitutional Court to the provision on official language and its impact upon minority language protection. In the *HEP* case, the Court interpreted calls for the use of the Kurdish language as "a display of separatism".⁷²⁴ It thus embraced the prosecution's argument that, while Kurds could speak their language freely, "attempts to institutionalize the use of Kurdish would amount to attempts to replace the Turkish language as the language of the nation, thereby also amounting to separatism."⁷²⁵ Attempts to use a minority language in education and media were ruled a violation of the eternity clause and direct affronts to the unity of the nation and to Atatürk's legacy:

[T]he Court ruled that in the modern Turkish Republic the granting of minority status on the basis of differences of language or race was incompatible with the unity of the homeland and the nation. The state was unitary, the nation was a whole, and arguments to the contrary could only be seen as unwarranted foreign influences intensified by the rhetoric of human rights and freedoms.⁷²⁶

Romania's case is also instructive. Despite early promises that individual and collective minority rights would be protected,⁷²⁷ the 1991 constitution told a rather different story. Drafted without the inclusion of minority groups, not even the sizeable Hungarian one,⁷²⁸ the text pays lip service to minority rights while at the same time subjecting them to the rights of the majority. Article 6(2) thus qualifies rights to minority identity protection by stating: "The protective measures taken by the state to preserve, develop, and express the identity of the members of the national minorities shall be in accordance with the principles of equality and

⁷²⁴ *Ibid.*, p. 447.

⁷²⁵ *Ibid.*, p. 445.

⁷²⁶ *Ibid.*, p. 447.

⁷²⁷ Michael Shafir, "The Political Party as National Holding Company: The Hungarian Democratic Federation of Romania" in Jonathan Stein, ed., *The Politics of National Minority Participation in Post-Communist Europe: State Building, Democracy and Ethnic Mobilization*, Armonk, NY: M.E. Sharpe, 2000, p. 102.

⁷²⁸ Carmen Kettley, "Ethnicity, Language and Transition Politics in Romania: The Hungarian Minority in Context" Farimah Daftary and Francois Grin, eds, *Nation-building, Ethnicity and Language Politics in Transition Countries*, Local Government and Public Service Reform Initiative, Budapest: Open Society Institute, 2003, p. 251.

nondiscrimination in relation to the other Romanian citizens.” Article 1(1) speaks of a “unitary and indivisible” state, Article 4(1) of “the unity of the Romanian people” as the foundation of the state, and Article 13 declares Romanian the official language. Moreover, Article 152(1) lists an array of values and principles which are not to be the object of amendment: “the national, independent, unitary, and indivisible character of the Romanian state, the Republic as the form of government, territorial integrity, the independence of the judicial system, political pluralism, and the official language.” These were never the elements of a pacified constitutional identity: unitary territory and official language in particular were fiercely contested from the onset by the Hungarian minority.⁷²⁹

The Constitutional Court inserted itself at the centre of Romania’s language wars on several occasions. In an early decision, the Court was called upon to rule on the constitutionality of education legislation insofar as it affected minority rights.⁷³⁰ Perhaps the sorest point in this saga has been the quest for a Hungarian-language state-funded university. More than a struggle for minority recognition, this has represented a quest for restitution of an institution forcefully taken away during the communist regime.⁷³¹ While the constitution guarantees the right of ethnic minorities to learn and be taught in their mother tongue (Article 32(3)), the Court unequivocally dismissed all objections of unconstitutionality in that case by virtue of Article 13 and the limitations in Article 6(2). In another case, the Court rejected calls for Hungarian to be used in public administration, again invoking Article 13 as the basis.⁷³² Education in particular has remained the site where language policy controversies have been fought out, with no sign of abating.⁷³³ More recently, in a

⁷²⁹ See also Miklós Bakk, “Comunitate politică, comunitate națională, comunități teritoriale” in Gabriel Andreescu *et al.*, *Comentarii la Constituția României*, Iasi: Editura Polirom, 2010, p. 110. Bakk argues that the constitutional definition as a nation-state has limited political debates and the legislative space to negotiate minority status in Romania. See *ibid.*, pp. 111-12.

⁷³⁰ Decision No. 72 of 18 July 1995, Monitorul Oficial No. 167, 31 July 1995.

⁷³¹ See Michael Shafir, “Mișcările xenofobe și dilemele „includerii” și „excluderii”: cazul minorității maghiare din România”, *Altera*, Vol. 6, No. 15 (2000), p. 172.

⁷³² Decision No. 40 of 11 April 1996, Monitorul Oficial, No. 76, 13 April 1996.

⁷³³ A Hungarian-language state university remains one of the core agenda issues for the country’s ethnic Hungarian political party to this day. See “Marko Bela: Nu s-a renunțat la universitatea de stat în limba maghiară”, *Mediafax*, 11 May 2013, available at

2014 ruling on the constitutionality of proposed revisions of the constitution (an exercise of abstract constitutional review), the Constitutional Court analysed a proposed amendment to Article 32 which would have included and defined the scope of a principle of “university autonomy”.⁷³⁴ The Court found this change unconstitutional on the grounds that it would result in a violation of Article 152(2) (“the elimination of the fundamental rights and freedoms of citizens or of the guarantees of these rights and freedoms”).⁷³⁵ As two minority opinions in this latter case argued, however, the majority judgment did not explain which rights and freedoms would come under attack, nor whether any of the principles contained in the eternity clause were violated and would thus justify a finding of *a priori* unconstitutionality.⁷³⁶

These cases illustrate that even seemingly nonthreatening unamendable provisions such as on official language can have very real consequences for those left out. Relying on apex courts to read ambiguous or discriminatory provisions in these texts in a manner that encourages toleration is not always a successful gamble. I agree therefore with Wojciech Sadurski who cautions against expecting a regime of toleration from constitutional courts in postcommunist settings.⁷³⁷ The reason is not that these courts have not made positive contributions, he says, but instead that they may have been elevated too quickly to a prominent role in the political system which they were perhaps not prepared for.⁷³⁸ Samuel Issacharoff has made a similar point about courts in all new democracies.⁷³⁹ The combination of complicated

<http://stirileprotv.ro/stiri/politic/marko-bela-nu-s-a-renuntat-la-universitatea-de-stat-in-limba-maghiara.html>.

⁷³⁴ Decision No. 80 of 16 February 2014, available at https://www.ccr.ro/files/products/Decizie_80_2014_opinii2.pdf.

⁷³⁵ Decision No. 80 of 16 February 2014, para. 128.

⁷³⁶ Separate Opinion, Judge Petre Lăzăroiu, p. 200 and Separate Opinion, Puskás Valentin-Zoltán, p. 2, Decision No. 80 of 16 February 2014.

⁷³⁷ Wojciech Sadurski, “Transitional Constitutionalism: Simplistic and Fancy Theories”, in Adam W. Czarnota *et al.*, eds., *Rethinking the Rule of Law After Communism*, Budapest: CEU Press, 2005, pp. 18-19. He gives the further example of the Ukrainian Constitutional Court, which “strengthened the constitutional place of the Ukrainian language in Ukraine, and established an affirmative duty on all public bodies to use only Ukrainian throughout the country (even though in the Eastern and Southern regions the Russian language is widely used both in private and public contexts).”

⁷³⁸ *Ibid.*, p. 19.

⁷³⁹ Samuel Issacharoff, “Constitutional Courts and Democratic Hedging”, *The Georgetown Journal*, Vol. 99 (2011), p. 971.

minority relations and potentially weak or inexperienced judicial institutions in these contexts was not ideal; the entrenchment of exclusionary values could only exacerbate the problem.

3.3.3 The limits of eternity clauses as anti-majoritarian instruments

Rights protection is at the heart of conceptions of judicial review and is taken to be a task judges are uniquely qualified for. One need not rehash lengthy legal versus political constitutionalism debates,⁷⁴⁰ however, to accept that there will be conditions which facilitate or hinder the exercise of their function. The cases discussed in this section have involved courts in democratising settings having to adjudicate on unamendable principles and values which directly affected constitutionally excluded minorities. These examples have shown that courts do not always acquit themselves of this task in a manner which maximises minority rights but may instead protect the status quo. Given the widespread occurrence of eternity clauses incorporating commitments to rights protection, this danger is worth keeping in mind.

There is also a related risk here. Sadurski aptly explains the danger resulting from elevating the role of judicial review in new democracies: legislative irresponsibility with regard to constitutional rights and a negative educational effect wherein neither the public nor its representatives engage in rights discourse. He cautions that rights review in such contexts

may help to generate the perception that the rights discourse is an obscure activity reserved for lawyers, and that deliberation about the political values that give rise to specific articulations of rights is something over which neither the population nor its elected representatives have any control.⁷⁴¹

Issacharoff has cautioned that legislatures in new democracies may be distinctly weaker than their counterparts in consolidated democracies and as such less able to resolve fundamental contestations of power.⁷⁴² Even if they were to engage in rights discourse, Sadurski argues, they may be proven mistaken by the constitutional

⁷⁴⁰ For an overview of the issues at stake in this debate, see, *inter alia*, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge: Cambridge University Press, 2007.

⁷⁴¹ Sadurski (2005), p. 19.

⁷⁴² Issacharoff (2011), p. 971.

court. He called this "a fiasco, rather than a triumph of the ideal of constitutionalism."⁷⁴³ His argument is reminiscent of Paul Blokker's concern that the legal-liberal notion of constitutionalism adopted in Eastern and Central Europe (and in many new democracies, we might add) resulted in

an overall depoliticized and essentialistic view of democratic politics that denies any role of the larger demos and civil society, in particular in terms of engaging in the definition of the foundational, ethical values that provide the constitutional context of the new democratic orders.⁷⁴⁴

I expand upon this in my analysis of arguments that eternity clauses facilitate deliberation on core constitutional values in the next chapter.

This chapter set out to clarify and deepen our understanding of the types of values enshrined in unamendable provisions. It has classified them into three broad categories: clauses protecting fundamental characteristics of the state, those aimed at guarding democracy in the militant democratic tradition, and those which serve distinctive counter-majoritarian objectives. This chapter thus completes the first part of this thesis, which has laid out the potential problems associated with unamendability: Chapter 1 by looking at constitutional foundations, Chapter 2 by untangling the concept of constitutional identity, and now Chapter 3 by engaging with the substantive commitments insulated by eternity clauses. This chapter in particular has shown that the combination of vague elements with potentially exclusionary ones renders such clauses perfect victims of judicial ideology. This is an inevitable consequence of unamendability rather than an accidental one: even were courts to try to exercise self-restraint, any case asking them to determine whether an unamendable commitment to republicanism or to democracy has been trespassed would unavoidably rely on the judges' own interpretations of these values and not on any objective definitions of these constitutional notions. In that sense, then, the search for a judicial standard of review of unamendable provisions

⁷⁴³ Sadurski (2005), p. 19.

⁷⁴⁴ Paul Blokker, *New Democracies in Crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Abingdon: Routledge, 2014, p. 5.

can only ever set in place procedural safeguards—no substantive ones are available in the cache of constitutional theory to guide interpretation.⁷⁴⁵

Such process-based solutions are sought in the second part of this thesis. Chapter 4 will thus investigate whether there exist resources within constitutional systems to amend or repeal eternity clauses, be they formalised in the constitution or judicially created. That chapter in particular complements my argument about the inevitability of judicial empowerment with regard to these provisions, which I show extends to attempts to renegotiate unamendability. Chapter 5 will then look at participatory constitution-making processes in an effort to ascertain whether more inclusive drafting is more or less likely to result in recourses to unamendability. Both these latter chapters illustrate the resilience of unamendable commitments, whether by means of judicial perpetuation or as an increasingly popular tool of post-conflict constitutional design.

⁷⁴⁵ This contrasts with Roznai's search for just such a substantive judicial standard. See Roznai (2014a), Chapter 7.

Chapter 4

Eternity clauses as surmountable precommitment

In previous chapters, I explored arguments about eternity clauses and democracy from the point of view of constitutional foundations and the substantive content of these constitutional provisions or doctrines. In this chapter, I will shift focus and look at what has happened, or what might happen, when an eternity clause is called into question. The latter may amount to calls for it to be repealed entirely or else for its content to be renegotiated, whether this amounts to different principles to be enshrined or to formalising a judicial doctrine into a positive constitutional provision.

There are several ways in which to assess such attempts. The first might be to hold that, where there is a formal eternity clause in the constitution, attempts to remove or change it are by definition illegal, as the very point of enshrining such a provision was to take the matters it addresses off the table at least until a new constitution-making moment (and possibly forever, if taken to enshrine principles which also bind the constituent power). This illegality is sometimes rendered explicit, such as when proposals to amend the eternity clause are outright prohibited, the most extreme example of which is criminalising any such attempts as was discussed in the case of Honduras in Chapter 3. Increasingly, however, even where such explicit illegality is not present, it is taken as a logical precondition of unamendable provisions.

In the case of judicial doctrines of unamendability such as the basic structure doctrine in India, the path towards repeal is presumably easier: the court having first expounded it may at any subsequent point denounce it and simply reverse itself. However, this is an unlikely course of events, for several reasons. On the one hand, where the doctrines are built around core elements of constitutionalism itself, such as the rule of law or judicial independence, a well-meaning court will neither denounce them nor be likely to refrain from enforcing them after already having

done so. On the other hand, where unconstitutional constitutional amendment doctrines extend beyond relatively uncontroversial commitments and encompass substantive values, such as secularism in both India and Turkey, they afford great power and flexibility to courts. Moreover, as was seen in the case of India, such a doctrine may come to be seen as a distinct method of judicial interpretation rather than a purely judicial artefact, gaining legitimacy with each uncontested application in a case. Judges are therefore not likely to part lightly with so powerful a weapon in their arsenal.

A separate view, applicable to both formal provisions and judicially-created doctrines, would hold that, despite their language, eternity clauses cannot realistically aspire to true eternity and are instead best read as obstacles to radical constitutional change. Thus, according to this line of reasoning, while they cannot forever forestall change, such clauses encourage deliberation around certain core values of the polity, ensure a higher threshold of agreement for their alteration, and serve to attach a stigma of illegality where reform is brought about in a non-deliberative, non-consensual manner. This is primarily applicable to eternity clauses in the form of formal constitutional provisions, around which it is perhaps easier to focus constitutional debates.

A final aspect I will discuss in this chapter is the difficulty of distinguishing between permitted amendments to the constitution and reform which amounts to illegitimate constitutional replacement or repeal. The problem I am concerned with here is not new in constitutional scholarship and has indeed been foreshadowed by the discussion of 'ordinary' versus 'fundamental' constitutional transformation in Chapter 1. It is nevertheless of special relevance in the case of eternity clauses, particularly when discussing their own amendment. As I noted above, often interpretations of eternity clauses posit that their modification would constitute an alteration of the basic law of such magnitude as to effectively amount to constitutional replacement. What I intend to outline at the end of this chapter, however, is that the neat distinctions upon which such arguments rest—between permissible and impermissible amendments of certain values, between legislating around the limits of a right and abolishing it etc.—are not very neat after all. As

such, I question the usefulness of relying on a discrete constitutional provision in order to identify transgressions of the constitutional order in its entirety.

4.1 Examples of eternity clauses in constitutional reform processes

Before proceeding to examine the substantive arguments surrounding the defensibility of eternity clause amendment, I wish to pause and explore whether this is a real problem. I propose to outline two concrete cases of constitutional reform wherein unamendable provisions were involved. In so doing, I seek to shed light on whether the problem I have placed at the centre of this chapter—discovering how eternity clauses help or hinder otherwise legitimate calls for constitutional change—actually occurs in processes of constitutional transformation and if it does, its centrality to these processes. I will outline the cases of Turkey and India and continue to draw upon insights from them throughout this chapter. I have chosen jurisdictions in which a formal unamendable provision and a judicial doctrine play a key role in the constitutional order and which have confronted serious attempts at constitutional revision. Where appropriate, I will also refer back to cases invoked in previous chapters, such as Honduras or Bosnia and Herzegovina.

4.1.1 Turkey's constitutional review process

Let us begin with Turkey. The country has been embroiled in a protracted process of constitutional revision since the summer of 2007, when the ruling Justice and Development Party (AKP) party of then-Prime Minister and current President Erdogan initiated it.⁷⁴⁶ These efforts came after the tripartite constitutional crisis of that same year, which saw bitter disputes over the election of a new President, the Constitutional Court's headscarf decision (discussed in Chapter 3), and a party ban case brought against the majority AKP itself.⁷⁴⁷ Previous attempts at elite

⁷⁴⁶ This was not the first time the Turkish constitution underwent change, however. Some have estimated that over seventy per cent of the text has been altered since adoption, particularly in efforts towards European Union accession. See Patrick Sharfe, "Erdogan's Presidential Dreams, Turkey's Constitutional Politics", *Origins*, Vol. 8, No. 5 (2015), p. 1. Such alterations have been piecemeal, however.

⁷⁴⁷ For overviews of the reform process, see Ersin Kalaycıoğlu, "Kulturkampf in Turkey: The Constitutional Referendum of 12 September 2010", *South European Society and Politics*, Vol.

convergence and cooperation surrounding reforms were reversed by these developments and led to 2010, when a package of amendments was passed by Parliament and endorsed by a popular referendum. While the referendum passed with a comfortable majority, the Turkish constitutional reform process is still not complete. A new constitution remains one of Mr Erdogan's key objectives, and he envisions it as changing, among others, the country's parliamentary system in order to enhance his executive power.⁷⁴⁸

The changes were aimed at removing protections for military coup leaders as enshrined in the 1982 constitution, at enhancing the protection of certain economic and social rights and individual freedoms, as well as at judicial reform. There were also amendments aimed at reforming the Constitutional Court, including by introducing individual complaints, stricter rules in party ban cases, new election rules for judges, and twelve-year term limits.⁷⁴⁹ Not everyone saw the reform as an attempt to eliminate "the authoritarian, statist, and tutelary features of the 1982 Constitution"⁷⁵⁰ and reign in "juristocracy".⁷⁵¹ Opposition parties suspected the reforms of masking AKP's Islamist intentions and being aimed at the politicisation of the judiciary and the court-packing of the Constitutional Court.⁷⁵²

Sources of deep divisions were also the first four, unamendable articles of the Turkish constitution, with opinion split as to whether they could be altered by reforms. Such divisions were not limited to political parties accusing the AKP of an Islamist agenda, however. A split seems to have existed within civil society groups as well, which were divided between those seeing these unamendable clauses as red

17, No. 1 (2012), pp. 1-22; Ergun Özbudun, "Turkey's Search for a New Constitution", *Insight Turkey*, Vol. 14, No. 1 (2012), pp. 39-50; Andrew Arato, "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition", *Constellations*, Vol. 17, No. 2 (2010), pp. 345-50; and Ergun Özbudun, "Turkey's Constitutional Reform and the 2010 Constitutional Referendum", *Mediterranean Politics* (2011), available at http://www.iemed.org/observatori-en/arees-danalisi/arxius-adjunts/anuari/med.2011/Ozbudun_en.pdf.

⁷⁴⁸ "Turkey's Erdogan Says New Constitution Priority after 2015 Election", *Reuters*, 1 October 2014, available at <http://www.reuters.com/article/2014/10/01/us-turkey-constitution-idUSKCN0HQ47H20141001>.

⁷⁴⁹ Kalaycıoğlu (2012), p. 5

⁷⁵⁰ Özbudun (2011), p. 193.

⁷⁵¹ Özbudun (2012), p. 49.

⁷⁵² Kalaycıoğlu (2012), p. 6.

lines and those for whom a new constitution by necessity had to involve the renegotiation of the constitution's very foundations.⁷⁵³ These entrenched differences between various sectors of society have led some to describe Turkey as a deeply divided society and the debates surrounding the 2010 referendum as "a long-running *kulturkampf* between the secularists and the Islamic revivalists".⁷⁵⁴ Rather than provide the contours of deliberation, unamendability appears to have become the site of intractable struggle over deep-seated differences.

The struggle over constitutional reform reverberated beyond Turkey's borders. The Venice Commission, through its president, welcomed the process of constitutional change, including of the eternity clause, which he termed "[t]he cornerstone of the tutelary system, established by the 1982 Constitution".⁷⁵⁵ While admitting that other European constitutions also included such clauses, he expressed concern at their broad and "unparalleled" enforcement in Turkey.⁷⁵⁶ The president of the Venice Commission expressed the institution's outright preference for the provisions to be amended out of the Turkish text:

This may mean, for example, that it might be wise not to open the issue of the three unamendable articles of the Constitution if, in the public perception, this would be linked to a desire to abandon the secular character of the State. If interpreted in a different manner, these articles seem to be compatible with a modern liberal democracy. Our preference would certainly be not to keep these articles as they are. But if keeping these articles is necessary to get a consensus on a new Constitution within society, this may be a price worth paying.⁷⁵⁷

The statement not only leaves little doubt as to the Commission's stance on the direction Turkish reform should take, but appears to disregard the actual reasons for opposition to amendment of Turkey's eternity clause. As Andrew Arato has

⁷⁵³ Ferhat Kentel *et al.*, "Making of a New Constitution in Turkey: Monitoring Report October 2011-January 2012", TESEV Democratization Programme, July 2012, p. 15, available at http://tesev.org.tr/Upload/Publication/f100d8f6-928b-4c32-8a1a-428305e0755e/12366ENGanayasaizleme1_10_07_12.pdf.

⁷⁵⁴ Kalaycıoğlu (2012), p. 2.

⁷⁵⁵ "Democratisation Process in Turkey in the Light of a New Constitution", Conference "Turkey in Europe", Keynote Speech by Mr Gianni Buquicchio, President of the Venice Commission of the Council of Europe, 2 November 2010, available at http://www.venice.coe.int/Newsletter/NEWSLETTER_2010_04/8_Speech_TUR_EN.html.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

noted, it is not any one amendment package which is seen as the problem; instead, such a package becomes worrisome if it is the first in a two-step plan to remove obstacles to governmental constitution-making.⁷⁵⁸ Buquicchio's statement, however, seemed more focused on how unamendable commitments had played out judicially than in the full complexity of constitutional politics surrounding them.

Turkey's case is at first glance paradoxical: here is a society which to a large extent (but for very different reasons) agrees that a new constitution is needed but which cannot come together, despite years of initiatives, to bring it about. The evidence for popular support for constitutional renewal lies in the continued electoral victories of the AKP, in the successful referendum in 2010, as well as in the fact that both in 2011 and in 2015 elections, all parties promised a new constitution. If everybody agrees that the 1982 constitution's authoritarian and tutelary features should be done away with, why has it proven so difficult to make this a reality? The answers are to be found in deep suspicions about the AKP's, and in particular Erdogan's, reformist push, as well as in the different interpretations given to unamendable provisions in constitutions. The latter, and secularism in particular, is to some coextensive with the identity of modern Turkey and to alter it would amount to constitutional revolution. To others, however, the secular commitment has become an unduly oppressive mechanism of (secular) elite control. The two positions appear irreconcilable. The slight waning of AKP's hold on power in the June 2015 elections seemed to have pried open the door for a more inclusive process of constitutional change,⁷⁵⁹ but this optimism was thwarted by the gains made by the AKP in the November 2015 early elections.⁷⁶⁰ At the time of writing, the constitutional change process appears newly energised by these gains, but the prospects for it being more broad-based seem slim.

⁷⁵⁸ Arato (2010), p. 348.

⁷⁵⁹ Yüksel Sezgin, "Could Erdogan Lose Turkey's Upcoming Election?", *Washington Post*, 19 May 2015, available at <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/05/19/could-erdogan-lose-turkeys-upcoming-election/>.

⁷⁶⁰ Jon Henley *et al.*, "Turkey Election: Erdoğan and AKP Return to Power with Outright Majority", *The Guardian*, 2 November 2015, available at <http://www.theguardian.com/world/2015/nov/01/turkish-election-akp-set-for-majority-with-90-of-vote-counted>.

4.1.2 Calls for renouncing India's basic structure doctrine

Turning now to India, the parameters of the discussion change. Calls for altering or doing away with the basic structure doctrine are inevitably different from a formal process of constitutional amendment. The Indian constitution has been amended on several occasions, tallying up one hundred amendments as of August 2015. As was discussed in Chapters 1 and 3, several of these amendments came up for review before the Supreme Court, which evaluated their conformity with the basic structure of the constitution. Also seen in those chapters, the doctrine has undergone numerous adjustments and additions over the years and a serious effort in reconstruction is needed for one to have a full picture of its elements today.

As Sudhir Krishnaswamy has argued, the basic structure doctrine has never attained unanimous acceptance and its sociological legitimacy can only be evaluated at a given point in time.⁷⁶¹ The doctrine received harsh criticism in its early years, gained in legitimacy during and after the 1975 emergency, and again came under fire at the turn of the century.⁷⁶² The latter round of contestation came when the National Commission to Review the Working of the Constitution was established by the BJP-led coalition government in 2000.⁷⁶³ According to its terms of reference:

The Commission shall examine, in the light of the experience of the past 50 years, as to how best the Constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of Parliamentary democracy and to recommend changes, if any, that are required in the provisions of the Constitution without interfering with its basic structure or features.⁷⁶⁴

The Commission was to fulfil the BJP's election promises and long-standing advocacy for radical change to the constitution, which it claimed needed "to reflect political indigenous institutions and values".⁷⁶⁵ Despite the Commission's terms of reference explicitly mentioning the basic structure doctrine as the red line at which constitutional change would stop, opposition parties criticised the Commission on

⁷⁶¹ Krishnaswamy (2008), pp. 226-27.

⁷⁶² *Ibid.*

⁷⁶³ Cabinet Resolution No. A-45012(2)/98-ADmn.III(LA), New Delhi, 22 February 2000.

⁷⁶⁴ *Ibid.*, para. 2.

⁷⁶⁵ Krishnaswamy (2008), p. xii.

various grounds.⁷⁶⁶ They deplored what they saw as an attempt to bring about comprehensive constitutional change by way of an executive decision which circumvented Parliament. They also disagreed with the government's intentions to replace the vote of no confidence with one of constructive confidence modelled on Germany's, which they saw as a ploy by the ruling coalition to ensure it remained in power. The government offered reassurances that the Commission's recommendations would be aimed at bringing constitutional institutions closer to their actual operation and at correcting regional and social imbalances. The opposition retorted that the bypassing of parliament on such important matters was unconstitutional. Moreover, they feared that, given the ideological commitments of the coalition parties, the rights of *dalits* and minorities would be eroded without the ability of Parliament to exercise oversight. In the end, the Commission's report received little attention when it was published in 2002.⁷⁶⁷

The doctrine has always had its most ardent detractors among academics and legal professionals. Contrary to calls for its repudiation at the time of its enunciation, more recent objections do not focus on the doctrine's lack of textual basis or on its unpredictable application by the Supreme Court, but instead on its appropriateness for India's democratic constitutional order. For example, Raju Ramachandran has argued that "the doctrine can now stand in the way of political and economic changes which may be felt necessary"⁷⁶⁸ and that its time has passed:

The basic structure doctrine has served a certain purpose: it has warned a fledgling democracy of the perils of brute majoritarianism. Those days are however gone. Coalitions can only bring about major changes through consensus. The doctrine must now be buried. The nation must be given an opportunity to put half a century's experience of politics and economics into the Constitution.⁷⁶⁹

⁷⁶⁶ See overview of these arguments in *Genesis of the Review Commission*, Commonwealth Human Rights Institute, pp. 17-19, available at http://www.humanrightsinitiative.org/publications/const/review_of_the_indian_constitution.pdf.

⁷⁶⁷ National Commission to Review the Working of the Constitution, *Final Report*, 2002, available at <http://lawmin.nic.in/ncrwc/ncrwcreport.htm>.

⁷⁶⁸ Raju Ramachandran, "The Supreme Court and the Basic Structure Doctrine" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible*, New Delhi: Oxford University Press, 2000, p. 108.

⁷⁶⁹ *Ibid.*, p. 130.

Other advocates of radical change also argue that the “basic dichotomy between the constitutional values and the superstructure of the political system” would need to be addressed by constitutional reform.⁷⁷⁰ Sceptics of such calls see behind them efforts to create the “political space for manoeuvre” to entirely reconstruct the doctrine⁷⁷¹ or as amounting to “elite flirtations with an authoritarian government”.⁷⁷² Ramachandran himself has since wondered whether his initial assessment was naïve in light of the unprecedented majority gained by the BJP in the 2014 elections and the possibility of its pursuit of a majoritarian Hindu state.⁷⁷³

What is striking about these debates is the degree to which they are reminiscent of arguments in favour of constitutional reform in places such as Bosnia and Herzegovina or Honduras (discussed in Chapters 1 and 3, respectively). There too advocates of change thought the time was ripe for previously entrenched commitments, once thought to be crucial for the survival of the polity, to be set aside in the name of progress. As was seen in previous chapters, such arguments may have been more persuasive in the case of Bosnia’s power-sharing system of government, which has been blamed for the political stalemate in the country. Less persuasive were arguments in Honduras claiming that its unamendable presidential term limit rule was no longer needed as Honduran democracy had consolidated.

Where India’s debates are different from these, however, is in the disputed nature of the type of change needed were the basic structure doctrine to be reformed. To the extent that the creation of the doctrine is considered an amendment to the constitution by way of judicial overreach, the Parliament may attempt to reverse it by way of its own constitutional amendment.⁷⁷⁴ This was precisely what Indira Gandhi’s Government had attempted to do following the *Kesavananda* decision: it

⁷⁷⁰ Subhash C. Kashyap *et al.*, *Need to Review the Working of the Constitution*, New Delhi: Shipra Publishers, 2004, p. 6, cited in Krishnaswamy (2008), p. xiv.

⁷⁷¹ Upendra Baxi, “Kar Seva of the Indian Constitution? Reflection on Proposals for Review of the Constitution”, *Economics and Political Weekly*, Vol. 35 (2000), p. 891, cited in Krishnaswamy (2008), p. xiv.

⁷⁷² Krishnaswamy (2008), p. xiv, referencing Manoranjan Mohanty, “Does India Need a New Constitution?” in Surya N. Mishra *et al.*, *Constitution and Constitutionalism in India*, New Delhi: APH Publishing Corporation, 1991, p. 1.

⁷⁷³ Raju Ramachandran, “The Quest And The Questions”, *Outlook India*, 25 August 2014, available at <http://www.outlookindia.com/article/the-quest-and-the-questions/291655>.

⁷⁷⁴ See discussion in Krishnaswamy (2008), pp. 183-89.

adopted the Forty-Second Amendment,⁷⁷⁵ in which it tried to reduce the powers of review of the Supreme Court and to eliminate limitations on the amendment powers of Parliament. The Supreme Court struck down these parts of the amendment as unconstitutional on the grounds, among others, that Parliament could not enlarge the scope of its own limited powers.⁷⁷⁶ That judgment has attained a certain level of approval, rendered as it was during a time of national emergency when constitutionalism was perceived to be under threat. Nevertheless, the question remains as to whether and how it would be possible to alter, if not do away with, the Supreme Court's powers of substantive review of amendments. Were there to be societal agreement behind significant changes to the elements of the doctrine or even its elimination, how could they ever carry the day? I return to these questions in section 4.3 below, which investigates options for reversing unconstitutional constitutional amendment doctrines.

4.2 Repealing eternity clauses as by definition illegal

The obvious answer to a desire to repeal a formal eternity clause might be to attempt to amend it out of the constitution. As will be seen, however, this is not straightforward, whether because of an explicit or an implicit prohibition on such change. The alternative in such instances, it has been argued, would be to resort to a new constitution-making moment. The novel constitution would then either incorporate a changed eternity clause or else renounce unamendability entirely. This option would amount to a Kelsenian iteration of eternities, in the sense that each new basic law would assume as eternal commitments declared as such and would ignore the possibility of constitutional revolution. This section focuses on the first option—of amending an eternity clause out of the constitution—and highlights the problematic aspects, both practical and theoretical, with this approach. Section 4.5 will discuss the challenging notion of constitutional revolution.

As a matter of practice, there has been at least one instance in which an unamendable provision has itself been amended. In 1989, Article 288 of the Portuguese constitution was altered to remove the reference to an unamendable

⁷⁷⁵ The Constitution (Forty-second amendment) Act, 1976, 28 August 1976.

⁷⁷⁶ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

principle of collective ownership of means of production and to repeal the constitutional clause that had originally declared the irreversibility of nationalisations between 1974 and 1976.⁷⁷⁷ This double change, done in order to bring the Portuguese economic system in line with European Community requirements and to permit the government to embark on a privatisation programme, was not challenged before the constitutional court.⁷⁷⁸ While this amendment has been taken as proof that Article 288 can be amended, Portuguese scholars have drawn distinctions among its components, arguing that some principles are too fundamental and close to the identity of the constitution for them to be altered.⁷⁷⁹ Thus, the 1989 amendment seems to represent an exception rather than the rule, brought about by the unique circumstances of the worldwide fall of communism which rendered many provisions of the Portuguese constitution irrelevant.⁷⁸⁰ Such entrenchment of the specific economic organisation of the state had already been criticised as inappropriate for constitutionalisation.⁷⁸¹ Article 288 is still said to require a revolution or some type of constitutional moment in order to be amended.⁷⁸²

The Portuguese example is an instance of this first possibility of eliminating or altering unamendable commitments in constitutions: by amending the eternity clause itself. Whether done in a single amendment as in Portugal, or else via a procedure of double amendment (amending the eternity clause first, followed by the desired change to a previously entrenched principle), this option has been advocated as an acceptable solution to the danger of “fossilising the constitution”.⁷⁸³ However, critics have argued that such escape by double amendment is “sleazy”⁷⁸⁴

⁷⁷⁷ Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective*, New Haven, CT: Yale University Press, 2009, p. 207, fn. 39.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ *Ibid.*

⁷⁸⁰ Jonatas E. M. Machado, “The Portuguese Constitution of 1976: Half-life and Decay” in Contiades (2012), p. 286.

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*, p. 283.

⁷⁸³ See proponents of this view discussed by Virgílio Afonso da Silva, “A Fossilised Constitution?”, *Ratio Juris*, Vol. 17, No. 4 (2004), pp. 454-73.

⁷⁸⁴ Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Baltimore: Johns Hopkins University Press, 2007, p. 504, fn 24.

and amounts to a “fraud upon the constitution”.⁷⁸⁵ Some value may still be found in the two-step process of amendment, in the form of the deliberations it triggers around fundamental constitutional change (more on this in section 4.4 below). More often, however, eternity clauses are taken to be implicitly entrenched even in the absence of language to this effect.

Before discussing arguments in favour of such implicit entrenchment, however, I wish to address the immediate obstacle to amending constitutional amendment provisions, including eternity clauses, represented by language explicitly prohibiting such a change or rendering it very difficult. An example of a deeply entrenched amendment procedure is contained in South Africa’s Article 74(1), which sets out a higher threshold for amending certain principles in the constitution as well as for amending the amendment formula itself (see more detailed discussion in Chapter 5). Examples of unamendable eternity clauses include Article 114 of the Armenian constitution, Article X.2 of the constitution of Bosnia and Herzegovina, Article 101 in the constitution of the Central African Republic, Article 175 in Niger’s, and Article 193 in that of Rwanda. The constitution of Nepal adopted in September 2015 also includes such a protection for its eternity clause in Article 274, the latter prohibiting amendments contrary to the “self-rule of Nepal, sovereignty, territorial integrity and sovereignty vested in people.”⁷⁸⁶ Article 374 in the Honduran constitution also contains a ban on amending the article itself. As was seen in Chapter 3, the case of Honduras is an extreme one, in that alongside an unamendable provision on presidential terms, the basic law also attaches sanctions of loss of citizenship and political rights to the initiation or support of executive term limit extension.

In the scenario discussed in this section—one in which formal unamendability is respected as an impediment to constitutional change—such entrenchment of the

⁷⁸⁵ Yaniv Roznai, “Amending ‘Unamendable’ Provisions”, *Constitution-Making and Constitutional Change Blog*, 20 October 2014b, available at <http://constitutional-change.com/amending-unamendable-provisions/>.

⁷⁸⁶ Constitution of Nepal 2015, Constituent Assembly Secretariat Singha Durbar, Unofficial translation by Nepal Law Society, International IDEA, and UNDP, available at <http://www.constitutionnet.org/v1/item/constitution-nepal-2015-preliminary-draft-unofficial-translation-international-idea>.

eternity clause appears unassailable, short of revolution. This problem is not limited to explicit bans on modifying the eternity clause, however. Often, even in the absence of language to this effect, courts have interpreted unamendable provisions as themselves protected. For instance, Germany's *Ewigkeitsklausel* has been interpreted as itself among the principles not open to change as a matter of logic.⁷⁸⁷ Thus, even though the "right of resistance" (*Widerstandsrecht*) was added to Article 20(4) of the German Basic Law in 1968, it is not considered as part of the eternity clause, "as otherwise [the clause's] modification through the elimination of some original principles would also be facilitated, which would put the effective protection provided by the provision at risk."⁷⁸⁸ The only alternative remains the revolutionary one mandated by Article 146 of the *Grundgesetz*, though its interaction with Article 79(3) is not straightforward (more on the possibilities of such a legal revolution in section 4.5 below). This reasoning is distinct from arguments about certain constitutional provisions having become de facto unamendable as a matter of constitutional practice, such as have been adduced in the case of the American First Amendment.⁷⁸⁹ It rests instead on an acceptance of eternity clauses as binding and as the source of real obligations, irrespective of whether they are themselves formally entrenched.⁷⁹⁰ As Hans Kelsen has argued, if we accept the validity of higher amendment threshold norms, we must also accept the validity of those prohibiting amendment altogether.⁷⁹¹ In other words, a serious reading of formal unamendable clauses accepts their effect upon constitutional change and takes seriously their claim to eternity.

What the analysis in this section has hopefully shown is that undoing formal unamendability is likely impossible without a new constituent moment. Whether formally entrenched or not, eternity clauses have been interpreted as being themselves immune to change. As section 4.5 below will discuss, this is an understanding which also results in a static and reactionary solution to radical change and does not take into account how constitution-making occurs today.

⁷⁸⁷ Woelk (2011), p. 153.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ See Albert (2015), p. 12. See more broadly Linder (1981).

⁷⁹⁰ Schwartzberg (2009), p. 9, fn 9.

⁷⁹¹ Hans Kelsen, *General Theory of Law and State*, Clark, NJ: The Lawbook Exchange, 2009, p. 259.

4.3 Reversing judicial doctrines of unamendability

The previous discussion referred to instances of eternity clauses formally incorporated into the constitutional text, but what of judicial doctrines of unamendability? Two options for reversing such doctrines present themselves: either the parliament explicitly legislates against them, or somehow restricts the court's powers of constitutional review, or the court itself backtracks. I address both scenarios in what follows, primarily referring to the Indian experience already prefigured in section 4.1 above.

The first alternative implies that parliament would have the power to push back against judicial pronouncements of a basic structure doctrine. As already noted, this is precisely what was attempted during the emergency period in India, via constitutional amendments that would have rendered Parliament's power of constitutional amendment limitless (see discussion in section 4.1 above). In more recent years, the Supreme Court has been said to have developed remedies allowing for some institutional dialogue with Parliament.⁷⁹² However, the evidence for the latter is flimsy and seems to revolve around one example: the case of *Indra Sawhney v Union of India*,⁷⁹³ in which the Supreme Court found certain reservations for backward classes to be in violation of equality as a basic feature of the constitution. Amendments to the impugned legislation were later upheld and not found in breach of the basic structure doctrine.⁷⁹⁴ This has been taken as evidence of inter-institutional dialogue and the Court shying away from having the last word in basic structure matters.⁷⁹⁵ It is scholarly commentators who have put forward such (re)interpretations of this Supreme Court case law, however. The Court has not itself hinted at any renunciation of its judicial supremacy in this area.

It is useful to ponder here the nature of the basic structure doctrine. Its detractors, finding no textual basis for the doctrine, have accused the Supreme Court of effectively amending the Indian constitution.⁷⁹⁶ This, authors like Krishnaswamy

⁷⁹² Kirshnaswamy (2008), p. 219.

⁷⁹³ *Indra Sawhney v Union of India*, AIR 1993 SC 477.

⁷⁹⁴ *M. Nagaraj v Union of India*, AIR 2007 SC 71.

⁷⁹⁵ Kirshnaswamy (2008), pp. 213-15.

⁷⁹⁶ *Ibid.*, p. xv.

have retorted, is to misunderstand the nature of the doctrine.⁷⁹⁷ He draws analogies with the doctrine of separation of powers and the doctrine of pith and substance (“which assists the court to determine the zones of legislative and executive competence between state and union governments”), both of which similarly lack a textual basis.⁷⁹⁸ Their force is not lessened, Krishnaswamy argues, for this absence of a textual hook in the constitution.⁷⁹⁹ As a consequence, “[a]ny constitutionally and politically nuanced project of radical constitutional change must integrate the pronouncements of the Supreme Court on the basic structure doctrine.”⁸⁰⁰ According to this view, then, constraints such as those identified as part of the basic structure not only cannot be amended out of the constitution, but presumably would also substantively limit future exercises of constituent power.

There are two problems with this view, however. The first is that, even accepting the basic structure doctrine as a separate doctrine of legal interpretation, it does not follow that it should take precedence over others. Absent language to the contrary, constitutional systems including India’s accept a variety of canons of interpretation without a hierarchy established among them; as such, neither canon may be regarded as the “true” one.⁸⁰¹ A second problem is that we are not dealing with abstract commitments to uncontested values of constitutionalism. Instead, the basic structure protected by the doctrine has come to be identified with a concrete list of principles, declared and ordered by the Indian Supreme Court in concrete cases. As Chapter 2 has sought to argue, eternity clauses do not merely express a set of values considered essential to the polity, but also effectively impose a hierarchy of norms within the constitution. Judicial pronouncements on the basic structure doctrine may similarly be said to have altered the hierarchy of commitments in the Indian constitution, not all of which are *sine qua non*s of constitutionalism. The separation of powers and even federalism and secularism may be uncontroversial in the abstract; their narrower understandings as given by the Supreme Court, however,

⁷⁹⁷ *Ibid.*

⁷⁹⁸ *Ibid.*, p. 169.

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Ibid.*, p. xv.

⁸⁰¹ See Andrea Dolcetti and Giovanni Battista Ratti, “Legal Disagreements and the Dual Nature of Law” in Wil Waluchow and Stefan Sciaraffa, eds., *Philosophical Foundations of the Nature of Law*, Oxford: Oxford University Press, 2013, p. 314.

are not. They are instead permeated by value judgments and as such can and have led to contestation (see discussion in Chapter 3). Thus, even if we agreed on a set of abstract higher values underpinning the constitutional order, a judicial doctrine for their enforcement cannot preclude reasonable disagreement over their interpretation in concrete cases.

A second alternative for doing away with judicial doctrines of unamendability would be for the issuing court itself to bring this about. It could do so either by reversing itself or by declaring, as some have called upon the Indian Supreme Court to do, that the doctrine is no longer needed to protect the constitutional order. There is no evidence of courts with basic structure doctrines having backtracked in this manner. On the contrary, as further argued in the Conclusion to this study, it appears as though the doctrine continues to spread to new jurisdictions. Even if these courts wished to exercise judicial restraint, it is unlikely that this would come in the form of a repudiation of the basic structure doctrine. It would be odd to find a court having linked such a doctrine to the core elements of constitutionalism either denounce these or deny itself the role of their guardian. At most, judges may exercise restraint by keeping the number of basic structure decisions—and certainly of those invalidating legislation on these grounds—low, as the Indian Supreme Court has seemingly done.⁸⁰² However, arguing for courts to take a further step back and revert to a political question doctrine with regard to issues previously decided on basic structure grounds seems futile. Not only would it require them to give up an instrument affording them great flexibility, but it would place these courts in the unlikely situation of curtailing their own powers of review. As has been argued more generally in the context of the rise of strong forms of constitutional review, it is improbable that the direction be other than towards increased judicial power.⁸⁰³

A final option briefly considered is the possibility of formalising judicial doctrines as discrete constitutional provisions. In other words, of amending the constitution itself so as to adopt an eternity clause mirroring the basic structure doctrine developed by the judiciary. This would present a variety of novel problems,

⁸⁰² Kirshnaswamy (2008), pp. 212-13.

⁸⁰³ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, NJ: Princeton University Press, 2009, p. 254.

however, not least among them potential incongruities between constitutional text, judicial pronouncements pre- and post-adoption, and framer intent. It would also not solve the difficulties of repeal: even if the constitutional clause were open for amendment and successfully changed, courts could nonetheless continue to consider the basic structure doctrine binding in its judicial formulation. Such a scenario finds some similarities to debates on unamendable mechanisms in political constitutions, such as in the UK surrounding the repeal of the Human Rights Act and where courts have resurrected common law rights protections as alternative grounds for judicial review.⁸⁰⁴

4.4 Eternity clauses as a tool encouraging deliberation

A separate line of argument justifying eternity clauses in democratic constitutions does so by describing them as deliberation-inducing. More specifically, proponents of this view argue that rather than ensuring eternal unamendability, eternity clauses impose an added procedural hurdle to radical constitutional change which plays the role of a trigger for a society-wide debate on the proposed reform. Authors ascribing to this view include Tom Ginsburg, Jason Mazzone, and Yaniv Roznai.

Ginsburg, writing on Honduras's 2009 constitutional crisis triggered by the ban on a presidential third term and the criminal penalties attached to calls for reform of this provision (see discussion in Chapter 3), questions the wisdom of entrenching such "second-order proscriptions on debate or proposal of amendments".⁸⁰⁵ He finds these to be

of more serious concern, as they freeze the deliberative process that the constitution may be designed to encourage. Indeed, the prohibition on debate may conflict with other parts of the constitution that are of equivalent normative authority, in particular a right to free speech.⁸⁰⁶

Beyond these outright prohibitions on debating reform, however, Ginsburg sees the potential value on having certain issues taken off the table, particularly of those he

⁸⁰⁴ Gert Jan Geertjes and Jerfi Uzman, "Conventions of Unamendability: Unamendable Constitutional Law in Politically Enforced Constitutions", Paper presented at workshop on "Unamendable Constitutional Provisions", Koç University, Istanbul, 17 June 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619643.

⁸⁰⁵ Ginsburg (2009).

⁸⁰⁶ *Ibid.*

considers uncontroversial such as certain state characteristics. He nonetheless calls for caution:

On the other hand, a substantive prohibition on amendment may perhaps be best effectuated by nipping proposals in the bud. And some issues such as the religious or republican character of the state may indeed be best handled by removing them completely from ordinary or constitutional politics. But others, in particular the issue of term limits, do not seem so contentious as to prohibit all discussion of them. Term limits, after all, restrict democratic choice. Perhaps the only conclusion then, is that constitution-makers should tread cautiously when purporting to make some provisions unamendable: different issues seem differentially suited to this approach, and second-order prohibitions on debate risk the unintended consequence of premature constitutional death.⁸⁰⁷

Ginsburg is thus prudently not endorsing unamendability in all situations. He also acknowledges its potential chilling effect on debate, but sees this as beneficial with regard to some principles, notably fundamental state features.

Ginsburg's approach finds echoes in those of Mazzone and Roznai. In discussing the problem posed by un-entrenched eternity clauses—the possibility of the unamendable provision being itself amended out of the constitution—Mazzone finds such a two-step process to preserve some value for entrenchment. He writes:

Entrenchment is therefore a meaningful restriction, because the first step invites deliberation on why the constitutional rule was entrenched in the first place. Repeal of an entrenched clause also might prove more difficult than other kinds of amendments just because it involves two stages: Some number of people might be opposed to taking the first step, out of special respect for entrenched provisions, even if they would quite happily take the second step if the objectionable provision were not entrenched.⁸⁰⁸

Roznai similarly defends eternity clauses on deliberative grounds and states:

The declaration of unamendability remains important even if conceived as eventually amendable because its removal would still necessitate political and public deliberations regarding the protected constitutional subject. Such deliberations grant the unamendable provision [an] important role. Moreover, the unamendability adds a procedural hurdle – and thus, a better

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Mazzone (2005a), p. 1818.

protection – since the double amendment process is still procedurally more difficult than a single amendment process. Lastly, the unamendability of a provision might have a ‘chilling effect’, leading to hesitation before repealing the so-called unamendable subject.⁸⁰⁹

These three arguments are worthy of being addressed separately. First, Mazzone and Roznai do not expand any further on how, precisely, such deliberations are to take place ideally or how they have occurred in practice. They seem to base this point on similar arguments about the deliberative character of constitutional amendment rules more generally.⁸¹⁰ The latter view supermajority rules or two-stage amendment processes as “additional filters designed to approximate the will of the people as a whole and reduce the effect of factions.”⁸¹¹ In this vein, Richard Albert has discussed mechanisms such as temporal limits on amendment or requirements of institutional dialogue during constitutional change as “deliberation requirements”.⁸¹²

All of these accounts seem to refer to deliberation in the broad sense of public discussion rather than the narrower sense of deliberative democratic theory as applied to the constitutional field.⁸¹³ Indeed, as Simone Chambers has argued, “nearly everybody these days endorses deliberation in some form or other”⁸¹⁴ and these authors’ use of the term is no exception. While there is value in this generic type of public debate, I believe there is something lost in diluting the concept of deliberation to mean just any form of discussion in the public arena. Understood in this broad sense, the normatively attractive features of the concept are lost—the conditions of equality, inclusiveness, openness, and reflexivity (to name but a few) which are key to real deliberation fall out of sight. Constitutional theorists have recently begun to fine-tune these principles as they apply to various processes of constitutional change, arguing that it is possible to build on deliberative insights in

⁸⁰⁹ Roznai (2014a), pp. 115-16.

⁸¹⁰ See Albert (2014b), pp. 913-75. See also Mazzone (2005a), p. 1818.

⁸¹¹ Raymond Ku, “Consensus of the Governed: The Legitimacy of Constitutional Change”, *Fordham Law Review*, Vol. 64, No. 2 (1995), p. 571.

⁸¹² Albert (2014b), p. 952.

⁸¹³ For an example of the latter, see Ron Levy, “The Law of Deliberative Democracy: Seeding the Field”, *Election Law Journal*, Vol. 12, No. 4 (2013), pp. 355-71.

⁸¹⁴ Simone Chambers, “Deliberative Democratic Theory”, *Annual Review of Political Science*, Vol. 6 (2003), p. 308.

order to achieve a more robust constitutional democracy.⁸¹⁵ Compared to these advances, deliberative arguments in favour of eternity clauses appear underdeveloped. As such, they miss the importance of the conditions necessary for deliberation and merely assume that it will occur when unamendable provisions are called into question.

To the second step of the argument put forth by Mazzone and Roznai, that the extra procedural hurdle adds a better protection of the unamendable principles in question, one can retort that this added protection is only effective so long as there is parliamentary balance of power. Hungary's 2011 adoption of a new Basic Law has proven that even seemingly consolidated constitutional democracies may slide back into authoritarianism when an illiberal supermajority exists in parliament.⁸¹⁶ This is not so much a counter-argument as a qualification of the two authors' point, however. My aim is to reiterate that there is no guarantee that a procedural hurdle in the form of an unamendable provision, or of a multi-tiered amendment process for that matter, would be able to forestall constitutional change.

Finally and similarly to Ginsburg, Roznai concludes his defence of amendable unamendable provisions on the grounds of their inhibitive function. This is somewhat ironic in the context of an overall argument about the deliberation-inducing qualities of eternity clauses. The "hesitation" Roznai speaks of may be seen as the silencing of dissent. The technique of taking certain agreements off the table in a nascent constitution has long been employed as a mechanism of constitutional design in post-conflict situations.⁸¹⁷ In such contexts, the hard-fought political agreement is especially fragile and as such insulated from amendment, at least temporarily via a sunset clause, for the sake of preserving peace and preventing a

⁸¹⁵ For an argument in favour of constitutional referendums as potentially deliberative exercises, see Tierney (2012). See also Ron Levy, "Deliberative Constitutional Change in a Polarised Federation" in Paul Kildea *et al.*, eds., *Tomorrow's Federation: Reforming Australian Government*, Leichhardt: The Federation Press, 2012, pp. 350-70, arguing that deliberative values can be incorporated into constitutional change processes with a view to narrowing the latter's 'democratic gap'. See also Ron Levy and Graeme Orr, eds., "Symposium: The Law of Deliberative Democracy", *Election Law Journal*, Vol. 12, No. 4 (2013), pp. 355-539.

⁸¹⁶ See discussion in Miklós Bánkuti *et al.*, "Hungary's Illiberal Turn: Disabling the Constitution", *Journal of Democracy*, Vol. 23, No. 3 (2012), pp. 138-46 and Halmai (2012).

⁸¹⁷ Louis Aucoin, "Introduction" in Laurel E. Miller and Louis Aucoin, eds., *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, DC: United States Institute for Peace, 2010, p. xviii.

return to conflict. An example typical of such post-conflict situations is the constitutionalisation of amnesties, which occasionally also takes the form of unamendable provisions such as in the 1999 constitution of Niger or the 2013 Fijian basic law.⁸¹⁸ Beyond the immediate aftermath of conflict, however, the chilling effect on public discussion of constitutional fundamentals begins to lose its appeal. The message sent to citizens is one of distrust in their capacity to debate the fundamentals of their own constitutional order, and more broadly of lack of confidence in the prospects of democracy. As Chapter 5 will argue, there is growing evidence that citizens can and do engage effectively in processes of constitutional change when given the opportunity and adequate resources. A model of democracy built around permanently distrusting their ability to do so is arguably not the most robust.

There is another dimension to the effect of eternity clauses on public deliberation. It may plausibly be argued—indeed, this study itself has tried to do so—that the consequences of unamendability may be to preclude certain constitutional renegotiation entirely, or more likely to shift the locus of such debates to the judiciary. This results in higher courts playing the role of final arbiter in first-order matters of the constitutional order, a task for which, as Samuel Issacharoff reminds us, they may be distinctly ill-suited, particularly in newer democracies.⁸¹⁹

Writing on the danger which judicialisation represents for deliberation, Ron Levy gives the example of the Australian High Court “second-guess[ing] parliamentary choices about democratic design trade-offs” in a case involving publicly-funded broadcast airtime for political parties.⁸²⁰ He sees the Court in that case as engaging

⁸¹⁸ On the first instance of constitutionalisation of amnesties, in South Africa, see Daniel R. Mekonnen and Simon M. Weldehaimanot, “Transitional Constitutionalism: Comparing the Eritrean and South African Experience”, Paper presented at ANCL-RADC Annual Conference on “The Internationalisation of Constitutional Law”, Rabat, Morocco, 2-5 February 2011, available at http://www.ancl-radc.org.za/sites/default/files/images/transitional_constitutionalism._comparing_the_eritrea_n_and_south_african_experience._full_paper.doc, p. 10. On unamendable amnesty provisions, see Albert (2015), p. 6; Tom Ginsburg and Yuhniwo Ngege, “The Judiciary and Constitution Building in 2013” in Sumit Bisarya ed., *Constitution Building: A Global Review (2013)*, International IDEA, 2014, p. 32; and Albert (2010), pp. 693-98.

⁸¹⁹ Issacharoff (2011), p. 971.

⁸²⁰ Levy (2014), p. 14.

in rights reasoning and as such imposing a coercive outcome upon the dispute.⁸²¹ Although that case involved the interpretation of electoral law, cases involving eternity clauses may prove an even more contentious site for court involvement. Indeed, the examples drawn from German, Indian, Turkish, and Bosnian jurisprudence in previous chapters are all instances in which reasonable disagreement about essentially political questions was resolved by apex courts. What Levy identified as the threat of codification of rules of good practice in the arena of political law—“a self-perpetuating process of juridification and judicialisation” which only “shift[s] the site of political contestation to the courts”⁸²²—is thus even more likely to occur in the case of substantive limits on constitutional change which by their very nature require courts to engage in value adjudication. The process of rationalising values said to be at the core of deliberative democracy⁸²³ is thus funnelled to constitutional courts to the exclusion of competing deliberative arenas such as parliament or the wider public sphere.

The link between eternity clauses and juridification is by now inescapable. Juridification in the field of constitutional change is thus aided by unamendability and goes beyond the expansion of legal norms and the increased pursuit of conflict-solving with reference to law.⁸²⁴ It should also be understood as augmented judicial power or, as Alec Stone Sweet views it, “as shorthand for...the construction of judicial power”.⁸²⁵ The notion that courts, and constitutional courts in particular, may themselves act as deliberative forums has recently been advanced by scholars,⁸²⁶ but it does not alleviate the concerns expressed here. Rather, these concerns should be viewed in the larger context of critiques of the rise of ‘strong’ versions of constitutional review and of an impoverishment of constitutional experiences correlated to the advent of legal constitutionalism. This has been

⁸²¹ *Ibid.*

⁸²² *Ibid.*, p. 16.

⁸²³ *Ibid.*, p. 5.

⁸²⁴ Lars Blichner and Anders Molander, “What Is Juridification”, Centre for European Studies, University of Oslo Working Paper No. 14, March 2005, p. 5.

⁸²⁵ Alec Stone Sweet, “Judicialization and the Construction of Governance”, in Martin Shapiro and Alec Stone Sweet, eds., *On Law, Politics and Judicialization*, Oxford: Oxford University Press, 2002, p. 71.

⁸²⁶ Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford: Oxford University Press, 2013.

observed for decades in the case of American constitutional discourse,⁸²⁷ and is now also noted in other countries having followed the legal constitutionalist model.⁸²⁸

4.5 The difficult distinction between amendment and repeal

In this final section, I propose to unpack some of the assumptions underlying arguments on constitutional renewal. One such assumption is that we may neatly, or at least convincingly, be able to distinguish between constitutional amendment and other instances of constitutional change, including via judicial interpretation. An ability to distinguish between 'ordinary' and 'fundamental' change, and between substantively permissible and impermissible variants of the latter, underpins all unconstitutional constitutional amendment doctrines. A second set of assumptions believes in a revolutionary solution to impulses for radical change. Those who argue for revolution as the only alternative to an eternity clause appear to trust that this is both a feasible and a desirable, or at least not an inordinately costly, way out of unamendability. I propose to test these assumptions and to place them in the context of processes of constitutional change as they occur today.

4.5.1 Defining amendment

We encounter a first hurdle when attempting to conceptualise constitutional amendment as distinct from other mechanisms through which constitutional meaning is changed.⁸²⁹ Sanford Levinson has defined amendments as "a legal invention not derivable from the existing body of accepted legal materials."⁸³⁰ He has identified five levels at which constitutional change may come about:

⁸²⁷ See, *inter alia*, Gerhard Casper, "Guardians of the Constitution", *Southern California Law Review*, Vol. 53, (1980), p. 783, stating:

The American legal culture's fixation on the courts, which accords the Supreme Court its monopoly on constitutional interpretation, results in a rather sharp division between constitutional law and politics which, unlike the Federal Republic, makes the bounds of constitutional law coextensive with the limits of justiciability.

This American approach exacts a cost: the impoverishment of general constitutional thinking and scholarship[...]

⁸²⁸ See Paul Blokker's comments on Eastern Europe in Blokker (2014), p. 5.

⁸²⁹ On this point, see Sanford Levinson, "How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (c) 27; (D) > 27: Accounting for Constitutional Change", in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton, NJ: Princeton University Press, 1995, pp. 20-21; Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity" in Levinson (1995), p. 177; and Rosenfeld (2010), pp. 30-31.

⁸³⁰ Levinson (1995), p. 16.

interpretation of what was already immanent within the existing body of legal materials; interpretation of the powers allowed governmental actors by the Constitution; amendment; revision; and, finally, revolution.⁸³¹ Laurence Tribe has spoken of the "quasi-revolutionary process of constitutional amendment"⁸³² and has explained the resort to it as resulting from a breakdown in the evolutionary possibilities of ordinary lawmaking:

The resort to amendment – to constitutional *politics* as opposed to constitutional *law* – should be taken as a sign that the legal system has come to a point of discontinuity, a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for.⁸³³

American constitutional discourse has also highlighted the differences in tone when speaking of amendments. The positive language associated with amendments may be exemplified by Walter Murphy's understanding of them as a correction of the system, "operat[ing] within the theoretical parameters of the existing Constitution."⁸³⁴ Furthermore, the desirability of some degree of constitutional flexibility is broadly accepted. A variety of reasons exist for wanting to be able to fine-tune the political system, and in turn the constitution.⁸³⁵ However, amendment triggers are not only varied, they relate differently to the original text: they may be correlated to a lacuna in the constitutional text, to a discontinuity akin to a small revolution, or indeed, to an invention that, if adopted via unorthodox means, may

⁸³¹ *Ibid.*, pp. 20-21.

⁸³² Laurence H. Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role", *Harvard Law Review*, Vol. 97, No. 2 (1983), p. 436, fn. 13.

⁸³³ *Ibid.*, p. 436.

⁸³⁴ Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy" in Douglas Greenberg *et al.*, eds., *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford: Oxford University Press, 1993, p. 14.

⁸³⁵ A good round-up of these possible reasons comes from Donald Lutz in his study of empirical patterns of amendment across constitutions:

Every political system needs to be modified over time as a result of some combination of (1) changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); (2) changes in the value system distributed across the population; (3) unwanted or unexpected institutional effects; and (4) the cumulative effect of the decisions made by the legislature, executive and judiciary.

Lutz (1994), p. 357.

be illegitimate.⁸³⁶ Levinson, describing how amendment is often pitted against interpretation as a means of innovation, also brings to the fore a particularly negative connotation of the use of the term:

In many contexts...to describe something as an amendment is at the same time to proclaim its status as a legal invention and its putative illegitimacy as an interpretation of the preexisting legal materials.⁸³⁷

Designating something as interpretation would seem to carry with it “a certain legal dignity”, provided it had been exercised in good faith.⁸³⁸ Scholars such as Bruce Ackerman have not only come to defend such amendment mechanisms lacking in textual basis, but even to praise them as a means of “using old institutions in new ways” and of thereby gaining in popular legitimacy.⁸³⁹

We thus speak of different things, and with vastly different tones, when discussing amendments. One of the thorniest distinctions in this discourse as it applies to eternity clause remains the one between permissible and impermissible interpretation of unamendable principles and whether it amounts to a de facto amendment. Given the open-ended nature of unamendable provisions, these boundaries are hazy, and possibly even blurrier in cases of evolving judicial doctrines of unamendability. As discussed in Chapter 1 with regard to theories of two-track constitution-making such as Joel Colón-Riós’s, discriminating between an ordinary versus a fundamental change may not always be possible. A further question, of whether courts themselves may be bound by eternity clauses has so far received only academic interest⁸⁴⁰ and does not seem to have been addressed explicitly in case law. The closest we have come has been in the realm of domestic and supranational court clashes such as in Bosnia’s *Sejdić and Finci* and Germany’s *Lisbon* cases (see Chapters 1 and 2, respectively). Implied in both cases was the

⁸³⁶ See also Rosalind Dixon, “Constitutional Amendment Rules: A Comparative Perspective”, Chicago Public Law and Legal Theory Working Paper No. 347, The Law School of the University of Chicago, May 2011, pp. 96-104.

⁸³⁷ Levinson (1995), p. 17.

⁸³⁸ *Ibid.*

⁸³⁹ Bruce Ackerman, “Higher Lawmaking”, in Levinson (1995), p. 69. A more in-depth look at Ackerman’s theory of the evolution of American constitutional law via non-Article V amendments is found in Bruce Ackerman, *We the People, Vol. 1, Foundations*, Cambridge, MA: The Belknap Press of the Harvard University Press, 1991 and *We the People, Vol. 2, Transformations*, Cambridge, MA: The Belknap Press of the Harvard University Press, 1998.

⁸⁴⁰ de Visser (2014), p. 371, fn 204.

question of who has ultimate authority to decide on first-order issues for the polity, including as they are protected via eternity clauses. The two cases may be early indicators of where unamendability jurisprudence is heading.

4.5.2 Amendment and judicial interpretation

Even outside the area of constitutional review of unamendability, however, identifying the proper judicial role in amendment processes is not easy. Opinions vary concerning the proper role of courts in steering, or even taking over, constitutional change. Some authors are staunch defenders of such a proactive role,⁸⁴¹ while others urge more caution.⁸⁴² Even terminology differs, ranging from calling certain judicial interventions “virtual amendments” to the constitutional text⁸⁴³ to naming them outright “usurpation”.⁸⁴⁴ There is no denying, however, that courts have played a significant role in constitutional change even in the absence of eternity clauses. As will be seen in Chapter 5, the Constitutional Court of South Africa was called upon to certify the entirety of the country’s 1996 constitution. Perhaps the epitome of ‘activist’ courts, the Israeli Supreme Court is another example here. Its expansion of its own powers of review and declaration of a “constitutional revolution” resulted in Israel’s shift

from a state with no written constitution or judicial review to a state that, at least from the Court’s perspective, transitioned almost overnight to a full-blown constitutional regime complete with judicial review, with very little public engagement, deliberation, or intention.⁸⁴⁵

⁸⁴¹ Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process”, *Harvard Law Review*, Vol. 97, No. 2 (1983), pp. 386-432.

⁸⁴² Tribe (1983). See also Elai Katz, “On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment”, *Columbia Journal of Law and Social Problems*, Vol. 29 (1996), p. 290.

⁸⁴³ Peter Suber, *The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change*, Oxford: Peter Lang Publishing, 1990, p. 199. See full discussion at pp. 197-206 and also p. 415.

⁸⁴⁴ Abraham Lincoln cited in Levinson (1995), p. 69.

⁸⁴⁵ Adam Shinar, “Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel” in Denis J. Galligan and Mila Versteeg, eds., *Social and Political Foundations of Constitutions*, Cambridge: Cambridge University Press, 2013, p. 217.

A more recent example may be found in Canada, which has been said to have one of the most difficult constitutions to formally amend.⁸⁴⁶ Despite or likely because of this rigidity, the Canadian constitution has undergone a remaking at the hands of its Supreme Court judges which in the course of one year has included the constitutionalisation of provisions in the Supreme Court Act and the introduction of a right to strike and of a right to assisted suicide.⁸⁴⁷ How one views these judicial innovations depends on one's notions of the proper judicial role in a democracy and perhaps on how desirable one finds these changes. It can hardly be denied, however, that such interventions have radically altered their respective constitutional landscapes, to no less a degree than a formal amendment would have done.

4.5.3 Informal amendment

A corresponding discussion, beyond one over the benefits and vices of judicial review generally, touches upon the desirability of adhering to a more formalist amendment procedure. After all, one answer to the occurrence of constitutional amendment by judicial review could be to add to or clarify the constitutional text. The virtues of formalism would be that it gives fair notice to constitutional actors and signals to them "the point at which a particular exercise in constitutional lawmaking comes to an end."⁸⁴⁸ It thus breeds legal certainty.⁸⁴⁹ As was seen in Chapter 1, this positivist preference was a central concern for drafters of the German Basic Law's amendment procedure.⁸⁵⁰

Detractors of such formalism, however, point to the risk of "*presuming* the existence of a mobilized and considered popular judgment by pointing to some readily

⁸⁴⁶ Richard Albert, "The Difficulty of Constitutional Amendment in Canada", *Alberta Law Review*, Vol. 39 (forthcoming 2015b), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609939.

⁸⁴⁷ Grégoire Webber, "The Remaking of the Constitution of Canada", *UK Constitutional Law Blog*, 1 July 2015, available at <http://ukconstitutionallaw.org/2015/07/01/gregoire-webber-the-remaking-of-the-constitution-of-canada/>.

⁸⁴⁸ Ackerman (1995), p. 84.

⁸⁴⁹ Dellinger (1983), p. 389.

⁸⁵⁰ See also discussion in Woelk (2011), pp. 145-47.

observable institutional criteria.”⁸⁵¹ In other words, assuming higher legitimacy for formal amendments may be erroneous in cases where the process of constitutional change can be manipulated. Elai Katz gives the hypothetical example of a vast majority of the French population seeking to change the republican nature of their state, entrenched as immutable in the 1958 French constitution, finding that such an act, though illegal, “may be legitimate in terms of popular consent or popular sovereignty.”⁸⁵² I revisit debates on the legitimacy of processes of constitutional change in the next chapter. However, even as a matter of political opportunity, it is not clear that a deliberate circumvention of formal amendment rules (what Richard Albert has called “amendment by stealth”⁸⁵³) can easily be prevented. Moreover, other types of informal amendment may affect eternity clauses, such as constitutional desuetude—the falling into disuse of certain constitutional provisions⁸⁵⁴—or amendment by custom. The latter may take the form of an unwritten constitutional convention (in the common law sense of the term, rather than that employed in Chapter 5) contradicting one of the unamendable principles. Given that such conventions are not binding and depend on judicial interpretation, it is unlikely that they would be interpreted to contravene a textual provision; they are also open to be overridden by a formal amendment.

4.5.4 Amendment and revolution

The last strand of arguments I wish to address here advocates revolution as a possible way around eternity clauses. Proponents of this view argue that there is nothing which ultimately prevents a new constitution-making moment from occurring during which unamendability is to be renounced or its contours modified.⁸⁵⁵ Such views echo theories of a right to amendment as corollary to the concept of popular sovereignty such as Akhil Reed Amar’s, who views this right as

⁸⁵¹ Ackerman (1995), p. 85. He goes on to call this the “theory of institutional resistance”: “Institutional resistance...will frustrate the cynical manipulation of the idea of a higher law by coalitions of narrow pressure groups.” *Ibid.*

⁸⁵² Katz (1996), p. 265.

⁸⁵³ Richard Albert, “Constitutional Amendment by Stealth”, *McGill Law Journal* (forthcoming 2015c), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589255.

⁸⁵⁴ For an argument that Article V in the US Constitution has fallen into desuetude, see Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V”, *Boston University Law Review*, Vol. 94 (2014c), pp. 1029-81.

⁸⁵⁵ See, *inter alia*, Roznai (2014), p. 134; Woelk (2011), p. 154; and Kotzur (2011), p. 131.

“preexisting” and founded on “first principles” of the American constitution.⁸⁵⁶ While Amar sees this right as one capable of being employed *within* the current constitutional order, the view discussed here refers to a distinct legal rupture as the means of changing eternity clauses.

Such ruptures may take the form of revolution in the classical sense of the French and American revolutions of the eighteenth century, completely breaking the legal order. However, even these may not conform neatly to notions of revolutions as violent events. As Frederick Schauer has argued, debates on the initial illegality of the US Constitution are “premised on the mistaken supposition that the only options are violent and armed revolution, on the one hand, and legal continuity, on the other.”⁸⁵⁷ He has explained instead that, “if we accept the fact that there can be peaceful, orderly, and deliberative revolutions”, then we could also view the American framers as not acting lawlessly in the violent sense of that term.⁸⁵⁸ In postwar constitution-making in the twentieth-century, talk of constitutional ruptures has been further domesticated. Article 146 in the German Basic Law has already been mentioned as one instance where drafters envisioned a constitutional transition, justified by the initial provisional character of the text. Furthermore, the post-1989 constitution-making episodes in Eastern Europe were considered cases of partial transformation of the legal order, or instances of “rebuilding the ship at sea”.⁸⁵⁹ More recently as well, polities in transition have employed mechanisms to reach constitutional settlements without interruptions in legality (more on this in Chapter 5).

If revolution has become domesticated, has my study’s core concern been solved? Are eternity clauses democratically acceptable in conjunction with this

⁸⁵⁶ Akhil Reed Amar, “Popular Sovereignty and Constitutional Amendment”, in Levinson (1995), p. 97. Richard Albert has accused eternity clauses of “deny[ing] citizens the democratic right to amend their own constitution.” Albert (2010), p. 667.

⁸⁵⁷ Schauer (1995), p. 154, fn. 20. On the illegality of the American founding, see Bruce Ackerman, “Storrs Lecture: Discovering the Constitution”, *The Yale Law Journal*, Vol. 93 (1984), p. 1058 and Richard S. Kay, “The Illegality of the Constitution”, *Constitutional Commentary*, Vol. 4 (1987), pp. 57-80.

⁸⁵⁸ Schauer (1995), p. 154, fn. 20.

⁸⁵⁹ Jon Elster et al., *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*, Cambridge: Cambridge University Press, 1998. See also Ulrich K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress*, Atlantic Highlands, NJ: Humanities Press International, 1995.

domestication of radical change? I would argue that democratic problems linger despite the most optimistic scenarios in which an eternity clause is to be replaced in a new act of constitution-writing. First, not all constitutions are open to their own replacement. Perhaps an extreme example of this is the constitution of Mexico, which in Article 136 expressly declares the continuation in force of the constitution in spite of rebellion. Ginsburg *et al.* have traced similar provisions in a number of constitutions and explain the presence of such constitutional “rights to resist” according to context: either as retroactive legitimising tools for coupmakers or as insurance against democratic backsliding.⁸⁶⁰ One can easily imagine such clauses being invoked in order to delegitimise calls for the change of an unamendable provision.

A second potential obstacle to unamendability repeal via a novel episode of constitution-making is the advent of judicial pronouncements that constituent power is itself substantively limited. As was discussed in Chapter 2, Germany’s Constitutional Court has hinted that the limitations of Article 79(3) would also apply to a new exercise of constituent power.⁸⁶¹ Moreover, the internationalised environment in which constitutional drafting takes place today places very real constraints on the constituent power. Such interpretations only leave room for constitutional change within ever-narrower boundaries, possibly including those of present-day eternity clauses. Thus, one increasingly finds little reassurance in calls to seek revolution if dissatisfied with a given unamendable provision.

Similar frustration may come from a third problem with advocating constitutional replacement: the potentially high costs of this solution. Particularly in post-conflict and deeply divided societies, the political settlement embodied in the constitution may be fragile and the prospect of its unravelling, including by way of too much constitutional flexibility, is feared by drafters. Indeed, that is one of the main justifications for adopting eternity clauses in such settings. Nevertheless, these societies also evolve and their constitutional arrangements need to be able to evolve with them. The same is true for changing conditions in other societies as well,

⁸⁶⁰ Tom Ginsburg *et al.*, “When to Overthrow Your Government: The Right to Resist in the World’s Constitutions”, *UCLA Law Review*, Vol. 60 (2013), pp. 1184-1260.

⁸⁶¹ See also Woelk (2011), p. 154.

potentially resulting in clashes over unamendable principles. The case of Turkey discussed at the start of this chapter amply illustrated this. One cannot estimate in the abstract whether the costs of opening up a particular constitution for renegotiation would be preferable to carrying on with a dysfunctional or unpopular unamendable commitment. There is some evidence that in cases where deferral—understood as the deliberate choice of drafters to postpone deciding on certain contentious elements of constitutional design—was not embraced in the constitutional design, the likelihood of “significant pressures for whole-scale constitutional replacement, as opposed to amendment” increases.⁸⁶² Applying this to eternity clauses which were adopted in a non-inclusive, contested manner, one can expect them to be the source of continued instability in the polity and potentially to trigger early constitutional replacement.

This chapter has shown that the repeal of eternity clauses poses challenging theoretical problems as well as difficulties of implementation. While the trend still appears to be toward the expansion rather than the repeal of unconstitutional constitutional amendment doctrines, the concrete cases of attempted reform of unamendable provisions discussed here have shown that such attempts may become battlegrounds once they do occur. Any push-back against unamendability seems to only be possible via revolution. However, this chapter has also shown how complicated and costly such revolution may be, particularly in societies where the constitution reflects delicate post-conflict balances. Chapter 5 picks up on this last point and discusses the adoption of eternity clauses in several participatory constitution-making processes. These last two chapters of the thesis thus reinforce each other by presenting the promises and limits of process-based solutions to the democratic shortcomings of eternity clauses.

⁸⁶² Rosalind Dixon and Tom Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design”, *Journal of International Constitutional Law*, Vol. 9, No. 3-4 (2011), p. 645. On incrementalism as a useful mechanism of constitutional design in divided societies, see Lerner (2011). See also Tushnet (2013a), pp. 2007-12.

Chapter 5

Eternity clauses and participatory constitution-making

My aim in this chapter is to place the discussion of eternity clauses in the wider context of advancements in constitution-making and ask whether they are compatible. I focus on the trend towards encouraging popular participation during constituent moments as evidence of the enriched notion of democracy—and constitutionalism—which constitution-makers increasingly strive for. The participatory pull is both normatively and empirically attractive. Scholars of participatory democracy extol its capacity to create a better informed, empowered citizenry ready to more closely engage in the business of governance. Democratic constitutionalists build on these insights and combine them with their belief in popular sovereignty as a reality and not mere rhetoric. They believe that harnessing participation's potential will enhance constitutionalism and therefore search for concrete institutions and decision-making strategies that would bring popular participation to constitutional politics. By taking their efforts seriously, I set out to explore whether unamendability is compatible with this shift towards participation or whether it is a potentially costly anachronism.

The chapter proceeds as follows. I first discuss the rise of participation in constitution-making and present the advantages as well as the drawbacks or uncertain consequences of promoting such public input. I briefly list two mechanisms as examples of this trend: constitutional referendums and citizen assembly-style constitutional conventions. Both are instruments which have been used with increased frequency to encourage and manage popular involvement in fundamental constitutional change. The reason such institutional innovations are important to constitutional theory is that, in different ways, they seek to give weight to the commitment of letting the people speak on matters of constitutional change. In other words, they are potential answers to the question of how, precisely, to approximate the popular voice in constitution-making. These mechanisms will be

imperfect as is unavoidably true of any purported institutionalisation of constituent power. Nevertheless, at their best, they can result in a better representation of popular will than purely elite-driven processes. As such, I argue that they deserve our attention particularly when seeking the type of enduring constitutional legitimacy which eternity clauses also pursue.

The chapter then explores the relationship between constitutional rigidity in the form of eternity clauses and participation. I map out both instances of popular constitution-making having resulted in constitutional texts without an unamendable provision and those wherein such a provision was included. Case studies discussed include South Africa, Kenya, Iceland, and Tunisia. The aim of this empirical investigation, limited as it is (not least because the sample of participatory drafting is still small), is to test out certain assumptions about involving the people in authoring their basic laws. One such assumption is that participation initiatives are doomed by popular apathy and do not yield high levels of engagement. Another, also posited by some direct democracy scholars, is that participation in one constituent moment results in a more participatory, flexible constitution. In other words, that one instance of popular inclusiveness triggers the institutionalisation of participation in the future. A further worthwhile investigation, given findings in other chapters in this thesis, is whether constitutional courts are more or less willing to embrace unamendability doctrines when guarding basic laws drafted with substantive popular input.

As will be seen, the first two assumptions are not borne out by practice, with only partial evidence of the second carrying some truth. The four cases discussed below all show that wider society has perhaps unforeseen resources for engagement in constitutional politics and that it can have a real impact on constitutional deliberations. The evidence on the second assumption is less clear. There are examples of participatory processes resulting in texts both with and without eternity clauses. We should not therefore assume that popular authorship automatically correlates with a flexible constitution, although as in all instances of constitution-making, the full implications of adopting unamendable provisions may not always be obvious to drafters. With regard to the stance constitutional courts take, here

again the conclusion is mixed. While Kenya's Constitutional Court has subscribed to the protection of the constitution's identity and restricted its fundamental alteration to a new exercise in constituent power only, South Africa's Court appears more ambivalent. The same court which certified the country's 1996 constitution based on pre-agreed substantive fundamental principles later found textual barriers to the embrace of a doctrine of unconstitutional constitutional amendment.

This chapter thus aims to find an answer to the question of popular participation's relationship to eternity clauses: is it a justification for, and alternative to, or otherwise closely linked to unamendable provisions? More broadly, are eternity clauses the high point of the battle between rigidity and openness in constitutional design today or are they merely a distraction?

5.1 The rise of participation in constitution-making

While calls to take popular participation seriously in constitutional decision-making are more numerous today, they have not occurred in a theoretical vacuum. Their debt to democratic theory is further explored shortly. However, there are also echoes here of older scholarship on responsive constitutionalism. A.V. Dicey explained that responsive constitutionalism, such as he found in England, and irresponsive constitutionalism, which he exemplified by the United States, should not be assumed to neatly correspond to democratic versus non-democratic, nor to flexible versus rigid constitutionalism.⁸⁶³ What mattered according to Dicey was the speed and ease with which "expression can be...given to the wishes, feelings, or opinions of the citizens of a given country."⁸⁶⁴ A different understanding of responsive constitutionalism emphasises empathy to those who are subordinated and the explicit incorporation of lessons from the past into the constitution (on the model of South Africa).⁸⁶⁵ Underlying both these positions is a positive expectation that the constitutional practice and text would correlate with public opinion (Dicey) and the wider community (Cooper Davis). Promoters of participatory democracy in

⁸⁶³ Albert V. Dicey, *Comparative Constitutionalism*, John W.F Allison, ed., Oxford: Oxford University Press, 2013, pp. 243-48.

⁸⁶⁴ *Ibid.*, p. 243.

⁸⁶⁵ Peggy Cooper Davis, "Responsive Constitutionalism and the Idea of Dignity", *Journal of Constitutional Law*, Vol. 11, No. 5 (2009), pp. 1373-80.

constitution-making have presented it as the tool with which to ensure this tight bond.

5.1.1 The promises of participatory constitution-making

I identify four arguments for why we should care about processes of constitution-making, as follows.⁸⁶⁶

The first rests on a correlation between the legitimacy of the process and that of the resulting constitutional order. While constitutional legitimacy depends on a series of factors, the process of its creation is often central. Cheryl Saunders has identified four common features of twenty-first century constitution-making, of which two are distinctly relevant here. The first has to do with popular participation in constitution-making: “there is now, effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned.”⁸⁶⁷ She argues that we may broadly identify a trend “towards openness, inclusivity and the active involvement of the people of a state at all stages of the process through participation, rather than mere consultation.”⁸⁶⁸ Others have echoed this view,⁸⁶⁹ even going so far as to identify a right to participate in democratic governance in international law which extends to constitution-making.⁸⁷⁰ An inclusive and open process of constitutional change gives weight to ideas of self-government and public engagement in politics.

The other common feature Saunders identifies is an emphasis on process:

Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instil a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as

⁸⁶⁶ For a more in depth analysis of this turn to participation in recent constitution-making, see Silvia Suteu, “Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland”, *Boston College International & Comparative Law Review*, Vol. XXXVIII, No. 2 (2015b), pp. 251-76.

⁸⁶⁷ Cheryl Saunders, “Constitution Making in the 21st Century”, *International Review of Law*, Issue 4 (2012), pp. 2-3.

⁸⁶⁸ *Ibid.*, p. 9.

⁸⁶⁹ Claude Klein and András Sajó, “Constitution-Making: Process and Substance” in Rosenfeld and Sajó (2012), pp. 435-36.

⁸⁷⁰ Vivien Hart, “Democratic Constitution Making”, United States Institute of Peace Special Report 107, July 2003, p. 1, available at <http://www.usip.org/sites/default/files/resources/sr107.pdf>.

form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.⁸⁷¹

In other words, there is an educational element involved in having a 'good' constitution-making process, as it can serve as model for subsequent political interactions. There is also a link to public ownership and increased vigilance: an informed public will know when the constitution has been transgressed and demand accountability.⁸⁷²

A second argument in favour of caring about constitution-making rests on a possible link between participatory constitution-making and having more mechanisms of popular involvement included in the new or revised constitution.⁸⁷³ There is evidence suggesting that more inclusive constitutional moments lead to more democratic politics, to more constraints on government authority and to stronger, and thus more durable, constitutions.⁸⁷⁴ These findings would seem to confirm that "the content of constitutions depends on who sits at the table to hammer out their provisions": the more inclusive the drafting and negotiation of the content of constitutions, the greater the benefits for democracy and constitutional stability.⁸⁷⁵ The case studies examined later in this chapter partially endorse this conclusion, but the relationship between a participatory process and the adoption of more direct democratic mechanisms is not straightforward.

A third point has been briefly touched upon above and has to do with the correlation between inclusion during constitution-making and constitutional longevity. In their empirical study of constitutions, Elkins *et al.* have identified inclusion—the breadth of participation in both formulating and subsequently

⁸⁷¹ Saunders (2012), p. 5.

⁸⁷² See also Jennifer Widner, "Constitution-Writing in Post-conflict Settings: An Overview", *William and Mary Law Review*, Vol. 49, No. 4 (2008), p. 1519.

⁸⁷³ For an early study on the link between public participation in constitutional promulgation and the contents of the constitutional text, see Zachary Elkins *et al.*, "The Citizen as Founder: Public Participation in Constitutional Approval", *Temple Law Review*, Vol. 81, No. 2 (2008), pp. 361-82.

⁸⁷⁴ John M. Carey, "Does It Matter How a Constitution Is Created?" in Zoltan Barany and Robert G. Moser, eds., *Is Democracy Exportable?*, Cambridge: Cambridge University Press, 2009, pp. 159-60.

⁸⁷⁵ *Ibid.*, p. 177.

enforcing constitutional agreements—as one of the key factors ensuring constitutional survival.⁸⁷⁶ The common knowledge created when the constitution is publicly formulated and debated, they argue, leads to attachment to the constitutional project, which results in self-enforcement and in turn in its longevity.⁸⁷⁷ It is hardly surprising, then, that the same authors praised the Icelandic process when reviewing the 2011 draft constitution.⁸⁷⁸

A final perspective on the benefits of participatory constitutional change links it to the crisis of democracy and the latter's turn to deliberation. In an age where citizens feel detached from regular politics, deliberative forms of engagement may yet resurrect their interest. As some scholars have noted, "[a]lthough electoral participation is generally declining, participation is expanding into new forms of action", with citizens seeking a more active role and "prepared to challenge (and thereby engage with) existing systems and norms."⁸⁷⁹ A "new model of democracy" is said to be evolving, one which requires more from its citizens.⁸⁸⁰ Perhaps it is not unrelated that these mechanisms have been called for in the aftermath of economic crises (as the constitutional conventions set up in Iceland and Ireland) or of 'once in a generation' decisions (as the 2014 independence referendum was in Scotland). The advantages promised by deliberative democracy—creativity, openness and consensus-based (rather than adversarial) politics among them—are that much more attractive when confronted with constitutional failure and stale institutions. Moreover, there is no reason to consider this a trade-off: representative institutions can coexist with such innovations, and may in fact be developed and improved alongside them.⁸⁸¹

⁸⁷⁶ Elkins *et al.* (2009), p. 78.

⁸⁷⁷ *Ibid.*, pp. 78-79.

⁸⁷⁸ Zachary Elkins *et al.*, "A Review of Iceland's Draft Constitution", The Comparative Constitutions Project, 14 October 2012, available at <http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf>.

⁸⁷⁹ David M. Farrell *et al.*, "Deliberative Democracy in Action Irish-Style: The 2011 *We the Citizens* Pilot Citizens' Assembly", *Irish Political Studies*, Vol. 28, No. 1 (2013), p. 100, citing Russell J. Dalton, *The Good Citizen: How a Younger Generation Is Reshaping American Politics*, 2nd ed., Thousand Oaks, CA: Congressional Quarterly Press, 2009, p. 1.

⁸⁸⁰ *Ibid.*

⁸⁸¹ Peter Vermeersch, "Innovating Democracy in Times of Crisis: Solution or Utopia?", *Open Citizenship*, Vol. 4, No. 1 (2013), p. 66. See also David M. Farrell, "The Irish Constitutional Convention: A Bold Step or a Damp Squib?" in John O'Dowd & Giuseppe Ferrari, eds., 75

5.1.2 The limits of participatory constitution-making

The narrative centred on the benefits of increased participation in constitution-making requires at least two significant caveats. The first deals with the dangers of ‘overselling’ the benefits of participation and its effects on legitimacy. Such concerns are expressed in two forms. They focus either on counter-examples to prove participation is not necessary—cases where non-participatory processes still led to constitutions accepted as legitimate (such as Germany or Japan)—or on cases where participation backfired (examples include Chad’s 1996 constitutional conference increasing Francophone-Arab tensions and Nicaragua’s 1987 process with doubts over the fairness of canvassing local opinion).⁸⁸² These examples serve to remind advocates of participation, including international NGOs involved in advising governments and providing expertise such as the US Institute for Peace (USIP), Interpeace, and International IDEA,⁸⁸³ that local conditions should determine the degree to which popular involvement is appropriate in any given context. Participation is not a panacea for constitutional legitimacy, as Kenya’s example below also illustrates. Nevertheless, the evidence on necessary local preconditions

Years of the Constitution of Ireland: An Irish-Italian Dialogue, Dublin: Clarus Press, 2014, pp. 191-202, arguing that innovative mechanisms such as the Irish constitutional convention are a complement to other representative institutions.

⁸⁸² Alicia L. Bannon, “Designing a Constitution-Drafting Process: Lessons from Kenya”, *Yale Law Journal*, Vol. 116, No. 8 (2007), pp. 1843-44. See also Richard Stacey, “Constituent Power and Carl Schmitt’s Theory of Constitution in Kenya’s Constitution-making Process”, *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), p. 1138, arguing that participation is not a sine qua non for constitutional efficacy.

⁸⁸³ For an example of USIP calling for participation in constitution-making, see Jason Gluck and Michele Brandt, *Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring*, United States Institute of Peace, 2015, p. 18, available at <http://www.usip.org/publications/participatory-and-inclusive-constitution-making>. For an example of Interpeace doing so, see Michele Brandt *et al.*, *Constitution-making and Reform: Options for the Process*, Interpeace, November 2011, available at <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>. For an example of the same from International IDEA, see Markus Böckenförde *et al.*, *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance (International IDEA), 2011, pp. 16-18, available at <http://www.idea.int/publications/pgcb/>.

for participation to be effective is growing.⁸⁸⁴ The myriad forms participation can take also means its impact on the final constitution can be scaled up or down.

A second, related, caveat is that it is possible that in societies emerging from conflict, or where there is a strong possibility that the constitution-making process would be subverted if fully participatory, considerations such as those presented above may have more limited relevance. In other words, opening up constitution-making in post-conflict or fragile democracies might have deleterious effects. One study has in fact indicated that the representativeness of constitutional assemblies in post-conflict situations might not be very important.⁸⁸⁵ David Landau has also recently cautioned against idealising constitution-making moments. He has noted that there is in some contexts a real danger of unilateral exercises of power diverting the constitutional process.⁸⁸⁶ These are valid concerns in need of further exploration. They alert us to the fact that the essentially positive, respectful, and consensus-seeking nature of experiences such as Iceland's may have masked crucial preconditions for their success. Nevertheless, the inclusion of participatory elements in several post-conflict contexts such as in South Africa, Kenya, and Tunisia tempers this pessimism. These experiences show that we should not too hastily discard avenues for popular involvement in constitutional drafting and that this openness may actually aid conflict resolution.

5.1.3 Examples of participation in constitutional change: referendums and constitutional conventions

There has been much recent interest in mechanisms for achieving constitutional change. In depth comparative legal work has helped paint a complex picture of the varied tools, both formal and informal, which countries around the world use to

⁸⁸⁴ See Suteu (2015a), p. 276 and Bannon (2007), p. 1844.

⁸⁸⁵ Widner (2008), p. 1533. See also Fernando Mendez and Jonathan Wheatley, eds., *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-making*, Farnham: Ashgate Publishers, 2013, p. 13.

⁸⁸⁶ David Landau, "Constitution-Making Gone Wrong", *Alabama Law Review*, Vol. 64, No. 5 (2013b), pp. 923-80.

achieve constitutional reform.⁸⁸⁷ This interest has been matched in the field of political theory, wherein scholars have tried to incorporate democratic innovations into theories of institutional design.⁸⁸⁸ While authors have put forth typologies of participatory constitution-making instruments,⁸⁸⁹ distinguishing between forms as disparate as constituent assemblies, round tables, constitutional conventions, or peace negotiations, only constitutional referendums and conventions modelled on citizen assemblies will be analysed here. These are by no means the sole innovative mechanisms of participatory decision-making, which also include citizen juries, deliberative polls and participatory budgeting. Indeed, one study listed over 100 different types of participation mechanisms.⁸⁹⁰ I see such mechanisms as especially promising advancements in constitutional theory and comparative constitutional design when it comes to giving voice to 'the people' in whose name the constitution will be written. Scholarship on mechanisms for the expression of constituent power have too long remained uninterested in institutions other than constituent assemblies or roundtables.⁸⁹¹ While these still hold promise for certain situations—indeed, the Tunisian process discussed below involved the creation of a constituent assembly—there are advantages to enlarging our constitutional imagination.

The first example of the participatory trend is the rise in recourse to constitutional referendums, understood as referendums which bring to the voting public questions of constitutional significance.⁸⁹² Scotland and Catalonia are only the most

⁸⁸⁷ Three such recent studies include Adenas (2000), Oliver and Fusaro (2011), and Contiades (2013).

⁸⁸⁸ See, among others, Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge: Cambridge University Press, 2009.

⁸⁸⁹ See Andrew Arato, "Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making", *Global Constitutionalism*, Vol. 1, No. 1 (2012), pp. 173-200 and Andrew Arato, "Forms of Constitution Making and Theories of Democracy", *Cardozo Law Review*, Vol. 17, No. 2 (1995), pp. 191-231. See also Jennifer Widner, "Reform Models", Constitution Writing and Conflict Resolution Project, Princeton University, 2005, available at <http://www.princeton.edu/~pcwcr/drafting/models.html> and Rosenfeld (2010), pp. 185-209 for typologies of constitution-making more broadly.

⁸⁹⁰ Gene Rowe and Lynn J. Frewer, "A Typology of Public Engagement Mechanisms", *Science, Technology, & Human Values*, Vol. 30, No. 2 (2005), p. 257.

⁸⁹¹ See Arato (2012); Jon Elster, "Ways of Constitution-making" in Axel Hadenius, ed., *Democracy's Victory and Crisis*, Cambridge: Cambridge University Press, 1997, pp. 123-42; Arato (1995); and Jon Elster, "Forces and Mechanisms in the Constitution-Making Process", *Duke Law Journal*, Vol. 45 (1995), pp. 364-96.

⁸⁹² Tierney (2012).

recent and visible instances of what has been called Europe entering the 'age of referendums'.⁸⁹³ Such cases, with Quebec's 1995 referendums as another example, bring to the voting public the issue of sovereignty of a sub-national unit and its relationship to the plurinational state. As Stephen Tierney has argued, they challenge contemporary assumptions about the waning of nationalism (whether at the state or sub-state levels) and about the unitary character of constituent power, understood as the embodiment of a unified demos.⁸⁹⁴

In the cases discussed below, however, referendums appear at the end of constitutional drafting as mechanisms for garnering a popular stamp of approval on the final text. Such instances can be more or less inclusive and thus achieve a higher or more limited degree of legitimation of the new constitution. Tierney is again our guide when searching for principles of good practice to help ensure such referendums return a close approximation of popular will rather than becoming exercises in populism.⁸⁹⁵ Among the goals he identifies as key to a democratic, deliberative and inclusive referendum are: maximising popular participation (including via voter registration and regulating the franchise); ensuring an environment where meaningful public reasoning can take place (including outreach to ensure the people understand the options before them); inclusion and parity of esteem (bridging societal divides so as to ensure widespread assent to the referendum's result, but also setting out balanced funding and spending rules to ensure a level playing field); and transparent rules for measuring consent (agreeing on the majority requirements for referendum success).⁸⁹⁶ These are the preconditions

⁸⁹³ Stephen Tierney, "Europe is Entering the "Age of the Referendum", But There is Nothing to Fear for European Democracy If Referendums Are Properly Regulated", *Democratic Audit*, 22 October 2014, available at <http://www.democraticaudit.com/?p=8777>.

⁸⁹⁴ Stephen Tierney, "'We the Peoples': Constituent Power and Constitutionalism in Plurinational States", in Loughlin and Walker (2008), pp. 229-30.

⁸⁹⁵ Tierney (2012).

⁸⁹⁶ These are drawn from Tierney (2012). See also Stephen Tierney and Silvia Suteu, *Towards a Democratic and Deliberative Referendum?: Analysing the Scottish Independence Referendum Bill and the Scottish Independence Referendum (Franchise) Bill*, Workshop Report, 23 August 2013, available at http://www.scottishindependenceaudit.ed.ac.uk/_data/assets/pdf_file/0020/125912/Report_-_Analysing_the_Scottish_Independence_Referendum_Bill_and_the_Scottish_Independence_Referendum_Franchise_Bill.pdf.

to public deliberation, which scholars describing unamendability as deliberative (discussed in Chapter 4) have failed to articulate.

Of the case studies below, only Kenya and Iceland held referendums to validate the outcomes of their participatory processes of constitutional reform. In Kenya, a number of factors likely precluded the processes in question from rising to the high threshold for democratic legitimacy identified by Tierney and argued by him to have characterised the 2014 Scottish referendum,⁸⁹⁷ not least among them the post-conflict nature of the context. However imperfect, the recourse to national referendums played an important symbolic role in these processes of constitutional renewal. Moreover, as will be seen, the referendum was used in conjunction with other participatory mechanisms.

Another innovation in institutional design of constitution-making bodies is the citizen assembly-style constitutional convention of the type used in Iceland and discussed below. Such conventions have been deemed to stand out as “the most extensive modern form of collective decision-making by common folk” and as representing “the only method of citizen policymaking that combines all the following characteristics: a relatively large group of ordinary people, lengthy periods of learning and deliberation, and a collective decision with important political consequences for an entire political system.”⁸⁹⁸ Moreover, citizen assemblies have been said to amount to “a litmus test for the consequences of deliberation”.⁸⁹⁹ Constitutional conventions of this type—termed by some “people’s conventions”⁹⁰⁰—are united by several traits, including the centrality of randomly selected citizens tasked with deciding important constitutional reforms in a deliberative setting. When it comes to experiments with deliberative mini-publics, understood as “forums, usually organised by policy-makers, where citizens representing different viewpoints are gathered together to deliberate on a particular

⁸⁹⁷ Stephen Tierney, “And the Winner is... the Referendum’: Scottish Independence and the Deliberative Participation of Citizens”, *I-CONnect Blog*, 26 September 2014, available at <http://www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/>.

⁸⁹⁸ Patrick Fournier *et al.*, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform*, Oxford: Oxford University Press, 2011, p. 10.

⁸⁹⁹ *Ibid.*, p. 13.

⁹⁰⁰ Farrell (2013).

issue in small-N groups”,⁹⁰¹ British Columbia, The Netherlands and Ontario are Iceland’s precursors. British Columbia in particular was a ground-breaking experiment with a citizen assembly, sparking a “demonstration effect” in other contexts.⁹⁰² These earlier examples were all aimed at effecting electoral reform and not far-reaching constitutional change. Nevertheless, they also shared a commitment to participatory and deliberative democracy aimed at “inject[ing] some popular legitimacy into policymaking.”⁹⁰³

Such considerations were at the heart of resorting to a people-driven constitutional convention in the Icelandic and later Irish contexts.⁹⁰⁴ Scholars have seen the Icelandic experiment in particular as playing on “the idea of self-governance and a perception of constitutionalism which understands civic participation as a necessity in order for a constitution to become a vibrant reflection of a political community’s political imagery and self-understanding.”⁹⁰⁵ Similar arguments have underpinned arguments for a constitutional convention as one possible mechanism for effectuating needed changes to the UK constitution.⁹⁰⁶ Advocates there also believe such a convention to be the only way to achieve both comprehensive constitutional change and democratic legitimacy. The normative assumption behind such arguments has been that direct citizen engagement in constitutional revision processes can supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument goes, actualises the hitherto mythical ‘people’ and turns self-government into an empirical reality.

⁹⁰¹ Kimmo Grönlund *et al.*, *Deliberative Mini-Publics: Involving Citizens in the Democratic Process*, Colchester: ECPR Press, 2014, p. 1.

⁹⁰² Fournier *et al.* (2011), p. 28. For more on the experience of British Columbia, see Mark E. Warren and Hilary Pearse, eds., *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly*, Cambridge: Cambridge University Press, 2008.

⁹⁰³ Fournier *et al.* (2011), p. 18.

⁹⁰⁴ For more on the Irish constitutional convention set up in 2012 and tasked with making recommendations for constitutional reform, see Farrell (2014).

⁹⁰⁵ Baldvin Thor Bergsson and Paul Blokker, “The Constitutional Experiment in Iceland” in Kalman Pocza, ed., *Verfassungsgebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?*, Baden-Baden: Nomos Verlag, 2014, pp. 159-60.

⁹⁰⁶ For a more in depth discussion of calls for the establishment of a constitutional convention in the UK in the aftermath of the Scottish independence referendum, see Silvia Suteu, “Developing Democracy through Citizen Engagement: The Advent of Popular Participation in UK Constitution-Making”, *Cambridge Journal of International and Comparative Law*, Vol. 4, No. 2 (forthcoming 2015b).

The case of Iceland is discussed below as the only instance where such a convention has been set up and entrusted with the task of drafting a completely new constitution. That said, an important caveat is in order. There is a difference in the way citizen assembly-style constitutional conventions have been conceptualised, in contrast with their cousins, constituent assemblies in the tradition of eighteenth century France and the United States. The latter have long been seen as being formed in the aftermath of constitutional upheaval and as fully embodying popular sovereignty; as such, they have been seen as omnipotent in discarding prior constitutions, making their own procedural rules, and deciding on the content of the basic law they would produce.⁹⁰⁷ That is also the model on which modern constitutional theorists have constructed their notions of constituent power (see discussion in Chapter 1 of constituent power as unfettered as understood by Sieyès and Schmitt). If our starting point is an understanding of constituent power as resisting any institutionalisation within the constitution, a constitutional convention in the form I am discussing here carries no greater legitimacy than would a national opinion poll. However, as has been argued by democratic constitutionalists such as Joel Colón-Ríos and throughout this thesis, a robust commitment to giving voice to the constituent power can coexist with designing institutions for its expression as part of the current constitutional order. An example would be the constitutionalisation of the constituent assembly as a mechanism of constitutional change in the Colombian constitution (see Title XIII on constitutional reform in the constitution of Colombia). Thus, conventions as I discuss them here can come close to approximating constituent will; they certainly are no less entitled to claiming they do so than would be a constituent assembly of more traditional ilk. The truth of this claim, however, depends on careful design of such conventions and can only be confirmed retroactively.

⁹⁰⁷ See Andreas Auer, "L'institution de la constituante: traits caractéristiques, naissance et développement", Centre for Research on Direct Democracy (C2D) Working Paper Series 37/2011, 2011, available at http://www.c2d.ch/files/C2D_WP37.pdf.

5.2 Case studies of participation in constitution-making

The purpose of this section is to investigate concrete cases of participatory constitution-making in an effort to ascertain the answers to three sets of questions. The first asks in what way these processes were participatory, what forms this participation took, and if known, to what extent it influenced the content of the final product. A second set of questions is whether an eternity clause was explicitly incorporated in the resulting drafts. If it was, I analyse its content and fit within the larger constitutional architecture, including provisions on constitutional review. Even where such a clause was not formally adopted as part of the constitution, I ask whether a judicial doctrine of substantive limitations on amendments was subsequently developed and if so in what context. I also briefly note what if any provisions on direct democracy were incorporated into these basic laws in an effort to ascertain whether the hypothesis of openness of process triggering a more open result (in this case, the constitutional text) actually holds. Finally, I make a note of cases where the driving force behind the adoption of an eternity clause was international and speculate whether this amounts to evidence of transnational norm convergence in this field. Section 5.3 will then build on these insights in order to assess the relationship between the rise of constitutional rigidity and the trend towards participatory constitutional change.

5.2.1 South Africa's 1996 constitution

South Africa's constitution, and constitution-making process, has become a model for post-conflict societies drafting transformative and inclusive basic laws. Political negotiations during the country's transition took place against a backdrop of political violence and resulted in a two-stage process: an interim constitution was agreed upon in 1993, followed by the adoption of the permanent constitution in 1996.⁹⁰⁸ The former set up a government of national unity and made provisions for a constituent assembly tasked with adopting a new constitution. It also incorporated a set of constitutional principles emerging from multi-party talks which were to guide

⁹⁰⁸ For fuller accounts of the various steps in the process, see Lauren Segal and Sharon Cort, *One Law, One Nation: The Making of the South African Constitution*, Johannesburg: Jacana Media, 2011 and Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, Oxford: Oxford University Press, 1999.

the constitution-making process, among them commitments to a democratic system of government, equality between the genders and races, human rights and non-discrimination.⁹⁰⁹ The new constitution was to be certified by the Constitutional Court, which initially rejected the draft before confirming a modified version's compliance with these principles.⁹¹⁰ The success of this process, particularly in a post-conflict context and in a society struggling to overcome a long period of racist oppression, has been heralded as not short of a miracle.⁹¹¹ It has also led some scholars to view two-pronged constitution-making as the ideal model of bringing about a new constitutional order.⁹¹² The constitution's endurance in spite of continued deep divisions in society and inequality is proof of this success.

The South African process was notable for a different reason as well: it strove for public participation, both in terms of outreach to the population to have it be informed of ongoing developments and in terms of substantive input on drafting. Heinz Klug places this emphasis on inclusiveness in the larger context of a "new international moment", one "marked...by the increasing politicization of constitutional change accompanied by demands for greater participation," including by the re-emergence of elected constituent assemblies.⁹¹³ Thus, he sees the constitution-making effort in South Africa as a mix of polar opposites: elite-pacting constrained by limits of local and international imperatives and multi-party negotiations and public debate.⁹¹⁴ The latter took the form of vast publicity exercises,

⁹⁰⁹ (Interim) Constitution of the Republic of South Africa, Act 200 of 1993, Schedule 4.

⁹¹⁰ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), 6 September 1996 (hereinafter 'First Certification Judgment') and *Certification of the Amended Text of the Constitution of The Republic Of South Africa*, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97, 4 December 1996.

⁹¹¹ Hugh Corder, "The Republic of South Africa" in Oliver and Fusaro (2011), p. 261 and Steven Friedman and Doreen Atkinson, *The Small Miracle: South Africa's Negotiated Settlement*, Johannesburg: Ravan Press, 1995.

⁹¹² Arato (2011).

⁹¹³ Heinz Klug, "Participating in the Design: Constitution-Making in South Africa", *Review of Constitutional Studies*, Vol. III, No. 1 (1996), p. 31.

⁹¹⁴ *Ibid.*, pp. 19-20. Abrak Saati mentions the sequencing in the South African process—the fact that public participation was preceded by elite negotiations—as an oft-forgotten but significant reason for the success of participation in that context. See Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, Doctoral thesis, Umeå University, Faculty of Social Sciences, Department of Political Science,

public meetings around the country, workshops run by the constituent assembly, a dedicated weekly television programme focusing on constitutional issues, a regular assembly publication, and a dedicated telephone service and website.⁹¹⁵ These efforts were that much more impressive given the high level of illiteracy in the country, which constitution-makers made real efforts to address.⁹¹⁶ Even before the first draft was made public, the assembly had received over two million submissions from the public.⁹¹⁷ Thus, if the period before the establishment of the constituent assembly was marked by mass actions, demonstrations, and petitions which gave way to various claims and frustrations,⁹¹⁸ the creation of the constituent assembly changed the nature of participation to “a more individualistic, yet equally active, form of participation in the attendance of discussion-meetings and the making of formal submissions.”⁹¹⁹ The final draft was adopted in December 1996 and came into force in February 1997.

Perhaps surprisingly given this emphasis on popular inclusion during the drafting period, the text of the constitution does not make much room for public involvement in constitutional change. Legislative initiative is vested in the National Assembly, the National Council of Provinces, cabinet members, and the President, depending also on the nature of the law in question (Articles 55(1), 68, 73, and 85(2), respectively). The President is also empowered to call a national referendum “in terms of an Act of Parliament” (Article 84(2)(g)), but no further language was included in the constitution to specify the conditions for this to take place. The amendment procedure, however, is comprehensively described. It includes different majority requirements depending on the object of change in the constitution and the interests affected by the amendment, as well as detailed procedural steps (Article 74). Amendment power is vested in the National Assembly, with the participation of the National Council of Provinces when provincial interests are at stake (Article

2015, available at <http://umu.diva-portal.org/smash/record.jsf?pid=diva2%3A809188&dswid=7751>.

⁹¹⁵ Klug (1996), p. 56.

⁹¹⁶ Thomas M. Franck and Arun K. Thiruvengadam, “Norms of International Law Relating to the Constitution-Making Process” in Miller and Aucoin (2010), p. 9.

⁹¹⁷ Klug (1996), p. 56.

⁹¹⁸ *Ibid.*, pp. 42-43.

⁹¹⁹ *Ibid.*, p. 57.

44(1)). A two-thirds majority in the National Assembly is required for the adoption of constitutional amendments, with the obligatory or optional vote of the provinces depending on the subject matter of the amendment (Article 74(2) and (3)). A higher threshold of seventy-five per cent is set out in Article 74(1). This covers changes to Article 1 of the constitution, which lists the values underpinning the state, the supremacy of the constitution, citizenship, the national anthem and flag, and the official languages; it similarly entrenches Article 74 itself. As one author has noted, however, there is “significant difference” between these principles and the values which have come to underpin the 1996 document.⁹²⁰

One of the most important innovations of the 1996 constitution was the establishment of a constitutional court with wide-ranging powers of review. The South African Constitutional Court gets to decide on constitutional matters and, since an amendment in 2012, on “any other matter of general public importance” (Article 167(3)). Its jurisdiction extends to, among others, disputes between organs of state, reviewing bills of the national parliament or provinces, and, explicitly, to deciding on the constitutionality of any amendment to the constitution (Article 167(4)). The court also certifies orders of invalidity of laws by other higher courts (Article 167(5)). Through a series of adjudicative strategies, the court has established its reputation as a guarantor of rights and democracy both in South Africa and internationally, and has gained institutional stability.⁹²¹ It has achieved this despite great early pressures. For instance, it abolished the death penalty on human rights grounds in one of its earliest judgments despite public support for capital punishment.⁹²² With regard to its duty to certify the permanent constitution, many had expected this to be an exercise in rubber stamping the result of years of protracted negotiations. The Court instead accepted challenges from minority political parties and other interest groups and found the initial draft to not be in

⁹²⁰ Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Oxford: Hart Publishing, 2010, p. 110.

⁹²¹ See Theunis Roux, “Principle and pragmatism on the Constitutional Court of South Africa”, *International Journal of Constitutional Law*, Vol. 7, No. 1 (2009), pp. 106-38 and Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005*, Cambridge: Cambridge University Press, 2013.

⁹²² *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, 6 June 1995.

compliance with the pre-agreed constitutional principles.⁹²³ Despite the unpopularity of these two decisions, they were unquestionably followed.⁹²⁴

The South African situation is an interesting example of innovative popular involvement in constitution-making mixed with textual entrenchment guarded by a powerful constitutional court. The 1996 constitution insulates core values by way of a high threshold for constitutional amendment but stops short of incorporating an eternity clause. This despite previous experience with such a mechanism, such as Section 74 of the interim 1993 constitution. The latter sought to protect the constitutional principles, as well as the requirement for the permanent text to comply with these principles and for Constitutional Court certification, for the duration of the ensuing negotiations. One can go even further back in South Africa's history to find another fraught example of constitutional entrenchment, in the South Africa Act 1909.⁹²⁵

Most relevant to my study, however, is the fact that the South African Constitutional Court has on several occasions come close to embracing a doctrine of substantive limits on amendment similar to the Indian basic structure one. In a case involving questions of limits to Parliament's power to delegate its authority, Sachs J found limitations on this power to be inherent in the very nature of Parliament's role in a democracy: "There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose."⁹²⁶ Another case concerned an amendment to the 1993 constitution having the effect of delaying the elections in the province of KwaZulu-Natal by three days, in which the Court responded to the argument "that

⁹²³ Roux (2013), p. 35.

⁹²⁴ Ibid.

⁹²⁵ The Act had sought to entrench voting rights in the Cape Province, including those of Coloureds, and led to a constitutional crisis in the 1950s when the Senate was packed in order to overcome the obstacles to amendment. See also Erwin N. Griswold, "The 'Coloured Vote Case' in South Africa", *Harvard Law Review*, Vol. 65, No. 8 (1952), pp. 1361-74.

⁹²⁶ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877, 22 September 1995, para. 204.

amendments to the Constitution had to be made within the “spirit” of the Constitution.”⁹²⁷ Mahomed DP writing for the majority opined:

The reliance upon the “spirit” of the Constitution is, in my view, misconceived. There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an “amendment” at all.⁹²⁸

While the court did not do so in that case, such language and positive references to Indian case law appeared to leave open the possibility of adopting a version of the basic structure doctrine.⁹²⁹ In the *United Democratic Movement (UDM)* case of 2002, however, this possibility seems to have been rendered more remote.⁹³⁰ The case involved two amendments and two statutes which together were meant to overcome the ban on political ‘floor-crossing’ in legislatures at the national, provincial, and local levels. The prohibition had been adopted and constitutionalised as corollary to South Africa’s closed-list proportional representation system.⁹³¹ The ban had been contested as part of the certification procedure on the 1996 constitution, with the Constitutional Court rejecting its incompatibility with the basic law’s commitment to multi-party democracy.⁹³² The response of the Court in *UDM* was to hold that it was

not necessary to address problems of amendments that would undermine democracy itself, and in effect abrogate or destroy the Constitution. The electoral system adopted in our Constitution is one of many that are consistent with democracy, some containing anti-

⁹²⁷ *Premier of Kwazulu-Natal and Others v President of the Republic of South Africa and Others* (CCT36/95) [1995] ZACC 10; 1995 (12) BCLR 1561; 1996 (1) SA 769, 29 November 1995, para. 45.

⁹²⁸ *Ibid.*, para. 47.

⁹²⁹ See Andrew Henderson, “Cry, the Beloved Constitution: Constitutional Amendment, the Vanished Imperative of the Constitutional Principles and the Controlling Values of Section 1”, *South African Law Journal*, Vol. 114 (1997), p. 553, fn. 89.

⁹³⁰ *United Democratic Movement v President of the Republic of South Africa and Others* (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179, 4 October 2002 (hereinafter ‘United Democratic Movement’).

⁹³¹ For a more in depth analysis of the case, see Roux (2013), pp. 351-62.

⁹³² First Certification Judgment, paras. 180-88.

defection clauses, others not; some proportional, others not. It cannot be said that proportional representation, and the anti-defection provisions which support it, are so fundamental to our constitutional order as to preclude any amendment of their provisions.⁹³³

A different argument brought by the applicant was that proportional representation was to be inferred in the constitutional principles of Article 1 of the 1996 constitution and as such that its amendment should have been passed with the highest threshold as set out by Article 74(1). To this, judges retorted that the absence of any explicit mention of proportional representation in Article 1 meant it could not be inferred as a fundamental value in the same vein and reiterated that a commitment to democracy was compatible with a multitude of electoral systems.⁹³⁴ It has been argued that this was an “unusually deferential and unconvincing” judgment of the court, which misrepresented the applicant’s case and was overly influenced by institutional reasons such as the reluctance of the court “to pierce the veil of South Africa’s dominant-party democracy.”⁹³⁵

In light of this fraught case law, evaluations of the South African Constitutional Court’s relationship to the basic structure doctrine have differed. Some have described “the precise status of the basic structure doctrine in South Africa” as “ambiguous”,⁹³⁶ Others have seen the jurisprudence in this area as one of avoidance, moderation, and concern for other branches of government.⁹³⁷ I find most persuasive those interpretations, like Sujit Choudhry’s, which more clearly view the Court’s stance as one of rejection.⁹³⁸ He explains the Court’s refusal to embrace a basic structure doctrine on both formal and contextual grounds: the former have to do with the explicit entrenchment of values in the 1996 constitution, which is interpreted as excluding others; the latter refer to unease about the doctrine’s origins in land redistribution and property rights cases.⁹³⁹ As noted, the reasons for this stance may be found in the Court’s own strategic positioning as a player within

⁹³³ United Democratic Movement, para. 17.

⁹³⁴ *Ibid.*, para. 29.

⁹³⁵ Roux (2013), p. 362.

⁹³⁶ Roznai (2013), p. 708.

⁹³⁷ Freitas Mohallem (2010), pp. 779, 781.

⁹³⁸ Sujit Choudhry, ““He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy”, *Constitutional Court Review*, Vol. 2 (2009), p. 45.

⁹³⁹ *Ibid.*, pp. 47-48.

South Africa's democracy.⁹⁴⁰ Nevertheless, a multi-tiered amendment procedure and a Constitutional Court unwilling to formally embrace a basic structure doctrine together mean that South Africa may not (yet) be included on the map of constitutional orders embracing substantive limits on amendment.

5.2.2 Kenya's 2010 constitution

Kenya's current constitution was adopted in 2010 and represents the culmination of a protracted, hard-fought process. It began in 2002, when an act of parliament set out the legal framework for the process of constitutional review and created the Constitution of Kenya Review Commission (CKRC); the Commission was tasked with preparing a draft later to be submitted to the larger National Constitutional Conference ('the Bomas').⁹⁴¹ The latter comprised over 600 members, including all members of Parliament and representatives from political parties, from each district, religious groups, women's groups, youth groups, the disabled, trade unions, and NGOs.⁹⁴² The Bomas draft, which included significant checks on executive power, was rejected by the government, which instead put its own modified draft ('the Wako draft') to a referendum in 2005. The people rejected the new draft. The December 2007 elections followed, infamously resulting in political violence across the country. Violence subsided once a Government of National Unity was formed brokered by Kofi Anan under the auspices of the African Union. A Commission of Experts was also set up in accordance with the Constitution of Kenya Review Act (2008). Its task was "to identify and resolve outstanding constitutional issues",⁹⁴³ with the review process having to "provide[] the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution".⁹⁴⁴

The post-2008 process was characterised by a diversity of outreach efforts. These comprised general debates, dissemination campaigns including via the media and

⁹⁴⁰ Roux (2013), p. 362.

⁹⁴¹ For overviews of this process, see Saati (2015), pp. 150-60; Kibet A. Ngetich, "Toward a People-Driven Constitution: Opportunities, Constraints, and Challenges of the Kenyan Example", in Said Adejumobi, ed., *Democratic Renewal in Africa: Trends and Discourses*, New York: Palgrave MacMillan, 2015, pp. 135-38; and Stacey (2011), pp. 594-98.

⁹⁴² Ngetich (2015), p. 136 and Bannon (2007), p. 1860.

⁹⁴³ Ngetich (2015), p. 137.

⁹⁴⁴ The Constitution of Kenya Review Act (2008), Article 4(6)(d)(i).

the training of civic educators, and consultations with various stakeholders, with special efforts made to overcome poverty and illiteracy.⁹⁴⁵ The Commission collected over 26,400 memoranda and presentations from members of the public in eight months, including from political parties, religious organisations, statutory bodies, and civil society.⁹⁴⁶ Efforts were also made to show to the public that its input had been acknowledged and possibly also incorporated into the working draft.⁹⁴⁷ The process was not without faults, however, among which were political capture of certain forms of participation and the influence of sectoral interests on delegates.⁹⁴⁸ Despite these shortcomings, there seems to be agreement among commentators that, “[o]n balance, Kenya’s highly participatory process was likely “worth” the cost.”⁹⁴⁹ In August 2010, the new draft was approved in a national referendum.⁹⁵⁰

Criticism does remain, however, of the underlying understanding of the process of constitutional reform as one of amendment rather than an exercise of constituent power.⁹⁵¹ The issue goes back to the pre-2005 referendum, when a cleric, Timothy Njoya, challenged the Bomas draft before the High Court of Kenya arguing that the constitutional reform process was unconstitutional because it amounted to constitutional replacement and not mere amendment, as the then-constitution would have permitted.⁹⁵² Interestingly, his argument drew explicit analogies to India’s basic structure doctrine. The judges agreed that the draft could only become the new constitution if given the imprimatur of an exercise of constituent power, i.e. a referendum. The alternative would have seen the Parliament exercising unlimited powers and thus amounted to a subversion of the supremacy of the constitution. The Review Act was subsequently amended,⁹⁵³ and the referendum was held.

⁹⁴⁵ Ngetich (2015), pp. 137-38.

⁹⁴⁶ *Ibid.*, p. 138.

⁹⁴⁷ *Ibid.*, p. 144.

⁹⁴⁸ See Ngetich (2015), p. 143 and Bannon (2007), p. 1841-58.

⁹⁴⁹ Bannon (2007), p. 1844.

⁹⁵⁰ Ngetich (2015), p. 139.

⁹⁵¹ Ngetich (2015), p. 145.

⁹⁵² *Njoya and six others v. Attorney General and another* [2004] 1 KLR, 3 March 2004. See also discussion in Stacey (2011), p. 597 *et seq.*

⁹⁵³ Constitution of Kenya Review Act 13 of 1997 (as amended), section 26. See also discussion in Stacey (2011), p. 597.

It is fascinating to note how the same decision has been interpreted by scholars both as a repudiation of Kelsenian positivism and as its clearest instantiation. Richard Stacey, as a proponent of the former, finds the High Court's opinion congruent with Schmittian notions of constituent power even while accepting that the post-2008 process involved severe limits on its exercise.⁹⁵⁴ Conversely, James Thuo Gathii sees in the *Njoya* case the Court subscribing to a purely Kelsenian worldview: it wanted to base the rule of recognition for a new constitutional order on the pre-existing norm of popular sovereignty as recognised by the constitution then in force.⁹⁵⁵ In other words, as a positive norm rather than an inherent power of self-government. This was troubling given the colonial roots of Kenya's basic law and, Gathii argues, possibly fetishized popular authorship.⁹⁵⁶ The divergence between the two views seems to rest on how one ultimately legitimises participation in the Kenyan constitution-making process. If one follows the High Court's reasoning, then Gathii's apprehension at formally basing popular involvement in the previous constitution is justified. However, if one accepts the existence of a norm of popular participation inherent in the notion of constituent power irrespective of the language of Kenya's former constitution, this should alleviate such anxieties. I return to this issue in section 5.3 below.

In terms of the resulting text, it introduced profound changes to Kenya's system of government, including the creation of national and county governments; checks and balances between the branches of government; principles of good governance; and a bill of rights and provisions for socio-economic rights protection.⁹⁵⁷ The 2010 constitution vests amendment power in the Parliament (Article 94(3)), but also stipulates the option of popular initiative (Article 257). A popular initiative requires at least one million signatures for "a general suggestion or a formulated draft Bill", which is first submitted for verification by the electoral commission and, if approved, to each county assembly for consideration within three months; if a majority of county assemblies approve the bill, it is submitted to Parliament and

⁹⁵⁴ Stacey (2011), p. 606.

⁹⁵⁵ James Thuo Gathii, "Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya", *William & Mary Law Review*, Vol. 49, No. 4 (2008), p. 1130.

⁹⁵⁶ *Ibid.*, p. 1131.

⁹⁵⁷ Ngetich (2015), p. 139.

then follows the regular amendment procedure. The latter, detailed in Article 255, differentiates between amendments to certain substantive elements of the constitution and other amendments. Thus, according to Article 255(1), a mandatory referendum is required in the case of a bill amending: the supremacy of this Constitution; the territory of Kenya; the sovereignty of the people; the national values and principles of governance mentioned in Article 10 (2) (a) to (d); the Bill of Rights; the term of office of the President; the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies; and the functions of Parliament. Article 10(2) includes democracy and participation of the people alongside such principles as national unity, human rights, inclusiveness, and non-discrimination. These values are meant to govern the application and interpretation of the constitution, but also to the adoption and interpretation of laws and public policy decisions (Article 10(1)).

The lack of further provisions on popular involvement in constitutional matters has been noted by some observers, who saw it as “paradoxical that while Kenya went through a unique and historical process that was participatory and all-inclusive by design, it resulted in a largely constitutional outcome without a participatory outlook.”⁹⁵⁸ What has become increasingly uncontested, however, is the significance played by this highly participatory process in the Kenyan context. It contrasted with the fact that Kenyans had never had a post-independence opportunity to exercise constituent power (previous constitutions had been negotiated by elites and amended without referendums).⁹⁵⁹ Popular participation in Kenyan constitutional reform has been described as an outgrowth of a larger democratisation (and decolonisation) movement and as such equated with a normative and logical imperative.⁹⁶⁰ Thus, despite failings, participation seems to have been a necessary legitimising force for Kenyan constitutionalism.

⁹⁵⁸ *Ibid.*, p. 145.

⁹⁵⁹ Stacey (2011), p. 595. For more on the role of constitutions as sites of authority in Kenya's political culture, see Mateo Taussig-Rubbo, “From the ‘Stranger King’ to the ‘Stranger Constitution’: Domesticating Sovereignty in Kenya”, *Constellations*, Vol. 19, No. 2 (2012), pp. 248-66.

⁹⁶⁰ Bannon (2007), p. 1844.

5.2.3 Iceland's 2011 draft constitution

Iceland's attempt at constitutional reform came in the aftermath of the country's financial crash in 2008 and the so-called 'pots and pans' revolution which followed. Calls for constitutional change had existed for a long time, although they had not managed to garner enough support to gain traction.⁹⁶¹ Following the crash, however, a constitutional assembly was set up and tasked with recommending changes to the constitution.⁹⁶² The 25-member elected assembly ("Constitutional Council") would deliberate based on a report produced by a 950-strong national forum of randomly selected citizens. The Council sought both to inform citizens of its progress, as well as to have them participate and make suggestions along the way. It set up various social media platforms for this purpose, posted meeting schedules and minutes online, and updated its website with news and a weekly newsletter. Advertisements encouraging the public to become involved in the process were also published in the media. By the end of the Council's work, the public had made some 360 proposals and more than 3,600 comments on the various available platforms.⁹⁶³ The process was not without its flaws, with some delays in publicising materials, a lack of resources and institutionalisation of feedback-giving, and with the 'crowd' not truly writing the draft constitution, despite the result being subsequently lauded as the "world's first crowdsourced constitution".⁹⁶⁴

The Council unanimously adopted the bill it was to present to Parliament in July 2011.⁹⁶⁵ The main themes observed during its work had been distribution of power, transparency, and responsibility, which were reflected in its draft. With regard to the amendment procedure, the draft Article 113 stipulated that a bill passed by the Parliament required approval in a national referendum, unless it had been passed

⁹⁶¹ For more on the build-up to the 'constitutional moment' following the 2008 financial crisis, see Anne Meuwese, "Popular Constitution-Making: The Case of Iceland" in Denis J. Galligan and Mila Versteeg, eds., *Social and Political Foundations of Constitutions*, Cambridge: Cambridge University Press, 2013, pp. 472-76.

⁹⁶² Act on a Constitutional Assembly no. 90/2010.

⁹⁶³ H el ene Landemore, "Inclusive Constitution-Making: The Icelandic Experiment", *The Journal of Political Philosophy*, Vol. 23, No. 2 (2014), p. 182.

⁹⁶⁴ For a more in depth critique of the Icelandic process, see Suteu (2015a).

⁹⁶⁵ See "A Proposal for a New Constitution for the Republic of Iceland, Drafted by Stj rnlagar  , a Constitutional Council, appointed by an Althingi resolution on March 24th 2011" (English translation), available at http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf.

with more than a five-sixth majority, in which case it became law automatically. Interesting for the aims of the present discussion was also the inclusion of several items related to democratic participation in decision-making. Thus, provisions were made for public input such as on bills returned to Parliament by the President (Article 60) and on approving the removal of the President from office (Article 84). The more radical provisions were Article 65, which stipulated that "Ten per cent of voters may demand a national referendum on laws passed by Althingi [the Parliament].", and Article 66, which stated that "Two per cent of voters may present an issue to Althingi. Ten per cent of voters may present a bill to Althingi.", the latter of which was then to be submitted to a referendum. The draft also mentioned the Supreme Court (Article 101), a court of final appeal which had previously been instituted by ordinary legislation only, but did not stipulate any powers of constitutional review. No formal eternity clause was included.

The picture emerging from this brief analysis is of a draft with innovative elements for direct democracy and thus in many ways quite flexible. Commentaries on the draft constitution have noted that "[o]ne of the most salient features of the Icelandic Constitutional Bill is its open approach to the direct participation of citizens, through referendums, in government business and legislation."⁹⁶⁶ The Venice Commission was more ambivalent in its appraisal of the draft's direct democracy elements, noting their lack of clarity and of necessary technical detail.⁹⁶⁷ Others regretted that such a radical process of constitution-making did not result in "a radically participatory form of democracy in constitutional terms".⁹⁶⁸ There have been those who were very enthusiastic, however, finding "that Iceland's [draft] constitution comes in as one of the most inclusive in history and well-above the mean of contemporary constitutions."⁹⁶⁹

In many ways, the Icelandic experience confirmed the presuppositions of participatory democrats. The constitutional convention and public consultation both

⁹⁶⁶ European Commission for Democracy Through Law (Venice Commission), *Opinion on the Draft New Constitution of Iceland*, CDL-AD(2013)010-e, 11 March 2013, para. 116.

⁹⁶⁷ *Ibid.*, paras. 116-30.

⁹⁶⁸ Bergsson and Blokker (2014), p. 162.

⁹⁶⁹ Elkins *et al.* (2012), p. 3.

appeared to have worked well and, while inclusiveness was not perfect, the end result was widely lauded as a triumph of citizen engagement in constitution-making. The process of constitutional renewal has seemingly fizzled out, however. The work of the Council was to “form the basis of a new draft Constitution” following approval in a national (advisory) referendum in October 2012.⁹⁷⁰ Political parties were unable to fully consider the draft before the general elections in April 2013 and a new bill introduced a novel procedure to amend the constitution by 2017, combining legislative initiative and a threshold referendum.⁹⁷¹ During the 2013 general elections, the constitution was not high on voters’ priority lists and, although all parties agreed that constitutional change was necessary, it seems support for a completely new constitution had waned.⁹⁷² Despite this, we may still look at the Icelandic participatory process for lessons on how and when popular involvement in constitution-making may succeed, as well as draw cautionary tales about the fate of such a process.

5.2.4 Tunisia’s 2014 constitution

Tunisia’s 2014 constitution is one of two recently adopted basic laws incorporating a formal eternity clause (the other is Nepal’s constitution, ratified in September 2015). It was drafted during an intensive and prolonged process, following the ousting of President Ben Ali and the so-called ‘Jasmine Revolution’ in 2011. Heavy expectations loomed over the constitutional assembly elected in October 2011, which simultaneously had to draft a new fundamental law and act as transitional legislative body.⁹⁷³ Opinions differed widely on how long the assembly had to deliberate,⁹⁷⁴ though in the end it completed its work in two years. The final

⁹⁷⁰ Other questions asked about national ownership over natural resources, the establishment of a national church, the election of individuals to Parliament, and the weight of votes cast in different parts of the country. See “Questions on the Ballot: Discussion and Clarification”, Thjodaratkvaedi.is (website for the general referendum in Iceland), 20 October 2012, available at http://www.thjodaratkvaedi.is/2012/en/question_on_the_ballot.html.

⁹⁷¹ Bergsson and Blokker (2014), pp. 166-67.

⁹⁷² *Ibid.*, pp. 169-71.

⁹⁷³ See Loi Constituante no. 2011-6 du 16 décembre 2011, portant organisation provisoire des pouvoirs publics and Décret-loi no. 2011-14 du 23 mars 2011, portant organisation provisoire des pouvoirs publics.

⁹⁷⁴ Eymen Gamha, “Tunisia’s Constituent Assembly: How Long Will It Last?”, *Tunisia Live*, 10 October 2011, available at <http://www.tunisia-live.net/2011/10/10/constituent-assembly-what-about-its-duration/>.

constitution was adopted in January 2014 by a two-thirds majority of the assembly but was not submitted to popular referendum. It would bring to an end what some have seen as a period of “extraordinary politics” whereby the Tunisian people actively reconstituted society.⁹⁷⁵

Among other elements, the drafting process was notable due to the efforts to involve the public. Focus groups conducted before the assembly began deliberating warned that it needed to “listen to the people” and “should not forget what happened to [ousted President] Ben Ali; the Tunisian people revolted once and can do so again.”⁹⁷⁶ Moreover, a February 2013 poll “showed that 80 percent of Tunisians wanted to be able to vote on the constitution at referendum, a contingency that was available only if the Constituent Assembly failed to approve the draft by a two-thirds majority vote.”⁹⁷⁷ The initial drafting stages appear to have been less inclusive, but transparency and public involvement were pursued following the publication of the first draft in August 2012.⁹⁷⁸ Once a second draft was published, these efforts intensified. A two-month outreach campaign was launched that included public meetings in the assembly members’ constituencies, hearings with interest groups, and television broadcasts of most assembly proceedings, and the United Nations supported a dialogue between assembly members and citizens and civil society organizations in all of Tunisia’s governorates.⁹⁷⁹ Estimates are of 6,000 citizens, 300 civil society organizations, and 320 university representatives having provided input directly to assembly members.⁹⁸⁰ This input seems to have had a direct bearing on certain changes to the text, including on issues such as guarantees of the separation of powers and of the right to vote, state involvement in religious practice, and constitutional language on women.⁹⁸¹ Moreover, civil society representatives were involved in brokering compromise between political parties and thereby overcoming a majoritarian

⁹⁷⁵ Sami Zemni, “The Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making”, *Mediterranean Politics*, Vol. 20, No. 1 (2015), p. 2.

⁹⁷⁶ Gluck and Brandt (2015), p. 7.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *Ibid.*, p. 8.

⁹⁷⁹ *Ibid.*, p. 10.

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Ibid.*, fn. 44-45.

political dynamic in the assembly.⁹⁸² However, poor planning, inadequate resources, and to an extent a lack of understanding of the role public participation could play also led to failings in the process, particularly in its early months.⁹⁸³

The new constitution's substantive provisions on amendment allocate amendment initiative to the President or to one-third of the Members of Parliament (Article 143) and stipulate that proposed amendments must obtain a two-thirds majority in parliament and may be submitted to a referendum by the President (Article 144). Provisions on unamendability are scattered throughout the text: in Article 1 which declares the characteristics of the Tunisian state ("Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican.")⁹⁸⁴; in Article 2 on the civil nature of the state ("Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law."); in Article 49, the constitution's general limitation clause on rights ("There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution."); and finally in Article 75, banning amendments that would increase the number or the length of presidential terms. In previous drafts, these had been collated in a single eternity clause, and the language used was of precluding amendments that "may be prejudicial to" these guarantees.⁹⁸⁵ Interestingly, one draft had included a sunset clause alongside an unamendability provision, banning amendments for a period of five years after the constitution

⁹⁸² *Ibid.*, p. 10.

⁹⁸³ *The Constitution-Making Process in Tunisia: Final Report 2011-2014*, The Carter Center, 15 April 2015, pp. 68-71, available at http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html.

⁹⁸⁴ This article mirrors Article 1 of Tunisia's previous constitution of 1959. The latter, however, only precluded amendments of the republican form of state (Article 72), in the tradition of French constitutional law.

⁹⁸⁵ Article 9.3 of Draft of the Constitution of the Republic of Tunisia, 14 August 2012, available at http://www.constitutionnet.org/files/2012.08.14_-_draft_constitution_english.pdf; Article 148 of the Draft Constitution of the Republic of Tunisia, 14 December 2012, available at http://www.constitutionnet.org/files/tunisian_constitution14_dec_2012-english-undp.pdf; and Article 136 of the Draft Constitution of the Tunisian Republic, 22 April 2013, available at http://www.constitutionnet.org/files/2013_04_23_-_third_draft_english_idea_3.pdf (unofficial translations).

would enter into force.⁹⁸⁶ Entrenching the hard-fought gains of the drafting process was clearly on the minds of its architects.

Another important concern for drafters was instituting a well-functioning, independent judiciary. A Constitutional Court with extensive competencies is to be set up (Title V. Part II of the constitution). Its mandate is to include *ex ante* and *ex post* constitutional review (Article 120), reviewing presidential impeachment (Article 88) and declarations of states of emergency (Article 80), and playing the role of arbiter in disputes over executive powers (Article 101). The new Court, which was to replace the previous, weaker Constitutional Council, was strongly advocated for by international actors as “a step towards establishing effective democratic institutions”⁹⁸⁷ and as constituting now “a standard component of a democracy.”⁹⁸⁸ Previous drafts had narrower provisions on access to the Court, for instance, only permitting the President to call for *ex ante* review.⁹⁸⁹ The Venice Commission, in an opinion on the draft constitution, welcomed the creation of the new Court and its extensive competences but encouraged wider access to initiating constitutional review procedures.⁹⁹⁰

With regard to provisions on direct democracy, the Tunisian text is rather less embracing. The President has the power to submit to a referendum “the draft laws related to the ratification of treaties, to freedoms and human rights, or personal status” passed by the Parliament (Article 82). As already noted above, calling a referendum on constitutional amendments, also among the powers of the President, is optional. Legislative initiative belongs exclusively to Members of Parliament, the President, and the Head of Government (Article 62). Thus, and despite Article 3’s

⁹⁸⁶ Article 147 of the Draft Constitution of the Republic of Tunisia, 14 December 2012.

⁹⁸⁷ *Enhancing the Rule of Law and Guaranteeing Human Rights in the Constitution: A Report on the Constitutional Reform Process in Tunisia*, International Commission of Jurists, 2013, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf>.

⁹⁸⁸ *Constitutional Review in New Democracies*, The Center for Constitutional Transitions and Democracy Reporting International, Briefing Paper no. 40, September 2013, p. 1, available at http://constitutionaltransitions.org/wp-content/uploads/2013/10/CT-DRI-BP-EN_Constitutional_Review_in_New_Democracies_2013.pdf.

⁹⁸⁹ Article 114(1) of the Draft Constitution of the Tunisian Republic, 22 April 2013.

⁹⁹⁰ European Commission for Democracy Through Law (Venice Commission), *Opinion on the Final Draft Constitution of the Republic of Tunisia*, CDL-AD(2013)032, 17 October 2013, paras. 165-82.

declaration that “The people are sovereign and the source of authority, which is exercised through the peoples’ representatives and by referendum.”, the Tunisian constitution cannot be said to have formalised any of the participatory elements of its drafting process. More will depend on ensuing constitutional practice, of course. For now and on the face of it, the text itself seems more preoccupied with preventing any erosion of the difficult compromise achieved than with instituting mechanisms of flexibility and openness. The reliance on entrenchment, including via unamendable provisions, goes hand in hand with the creation of a strong Constitutional Court. The latter has been entrusted with a key role in consolidating Tunisian democracy but almost two years since the entry into force of the new basic law, the Parliament still had not passed the necessary law on the functioning of the Court.⁹⁹¹

5.3 Rigidity and participation: competing paths towards constitutional legitimacy

These brief forays into the practice of participatory constitution-making allow for more informed speculation about its potential relationship to mechanisms of rigidity in constitutions such as eternity clauses. One conclusion to be drawn based on these case studies is that participation and unamendability can and do coexist. Tunisia’s constitution is proof of this. The various drafts made public in that process show an early concern with rendering certain principles unamendable. The fact that the previous constitution also had an eternity clause in the French tradition of protecting the republican nature of the state, a provision again found in the 2014 text, may have meant that unamendability was always going to be present in drafters’ constitutional imaginations. It appears undeniable, however, that the tense context in which Tunisian constitutional negotiations took place, with the very real possibility of the country backsliding into violence, also explains this focus on taking certain principles off the table. The content of these principles is similar to

⁹⁹¹ Yassine Bellamine, “Tunisie - Projet et proposition de loi sur la Cour Constitutionnelle: Ce qu’il faut savoir”, *Huffington Post Tunisie*, 1 September 2015, available at http://www.huffpostmaghreb.com/2015/09/01/projet-proposition-loi-cour-constitutionnelle_n_8071672.html.

other eternity clauses discussed in this study, including state characteristics, executive term limits, and a minimum standard of human rights protection.

At the other pole is Iceland's 2011 draft, which not only did not contain an eternity clause but also seems to have confirmed predictions about highly participatory processes resulting in inclusive constitutions with more numerous provisions on direct democracy. South Africa's case is different, in that while the constitution did not formally incorporate an eternity clause, the South African Constitutional Court came close to embracing a basic structure doctrine. Court judges on several occasions indicated that they saw value in arguments that certain constitutional changes should not be permitted even if procedurally irreproachable, even while in the end they did not go as far as to expound an unconstitutional constitutional doctrine outright.

Kenya's case is in many ways the most challenging for my investigation. On the one hand, its participatory process, for all its flaws, produced a draft which received the popular stamp of approval in a national referendum and which has since remained in place without significant contestation. On the other hand, the High Court intervened in the process in 2004 with a decision which purported to define the legitimacy boundaries of the constitution-making process. Was this judicial intervention justified from a democratic point of view because it triggered legislative change to formalise popular involvement in the process? Or, in line with Gathii's arguments above, should we nonetheless be sceptical of this judicial need to control and root the process in a prior norm? Kenya's case forces us to consider the normative basis for calls for participation in constitutional drafting. It is not the same to find this basis in an emerging international norm of democratic governance or intrinsic in the constitutional order. In the latter case, it is again different whether we link participation to an inherent openness of any constitution to manifestations of constituent power or to a positive commitment to popular sovereignty. The former is similar to Akhil Reed Amar's argument that Article V of the US Constitution does not exhaust the popular sovereign's right to amendment;⁹⁹² the latter seems to have been the Kenyan High Court's interpretation and is more

⁹⁹² Amar (1995).

formalist, giving some credence to Gathii's analysis. The court's intervention can be cautiously welcomed insofar as it encouraged increased participation in the process, even while the grounds on which it did this were dubious.

There are other conclusions emerging from these case studies, beyond those about the links between unamendability and participation. One has to do with the nature and mechanisms of participation and how widely these have differed from case to case.⁹⁹³ The type and level of participation in these processes reflected, first, the state of constitution-making practice and knowledge at the time. Thus, South Africa's inclusiveness efforts were ground-breaking and farsighted even while they may seem limited when looking at a case such as Iceland's. Second, local contexts and capacities severely impacted participatory possibilities: the complex diversity, economic, and literacy challenges present in South Africa, Kenya, and to an extent Tunisia were not there in the highly industrialised, homogenous Iceland. Nevertheless, there are sufficient similarities between these cases—at the level of the aims of resorting to participation if not at that of implementation—to reassure us that these are instances of the same phenomenon.

What of the initial assumptions about the benefits and limitations of participatory constitution-making? First, it would appear that fears about citizen apathy and/or inability to take part in such processes may be overblown. These four cases further show that such anxieties applied distinctly to post-conflict or divided societies may be similarly exaggerated. South Africa, Kenya, and Tunisia were all contexts in which deep divisions in society and the threat of violence could have derailed the entire constitution-making endeavour, not just its participatory elements. They nevertheless produced results, raising the prospect that a well-designed and implemented process may overcome even such challenging conditions. Second, the four constitutional texts examined only partially support the hypothesis of a correlation between participatory drafting and a participation-friendly constitution. Third, the question of whether participation breeds higher levels of legitimacy and thus greater constitutional longevity cannot be definitively answered on the basis of this succinct investigation. The adoption and consolidation of South Africa's

⁹⁹³ Saati also calls for more analytical sharpness in distinguishing degrees of participation in constitution-making. See Saati (2015), p. 263.

constitution have been heralded as nothing short of miraculous and are likely to have triggered the turn to participation in post-conflict constitution-building.⁹⁹⁴ Kenya's constitution likewise seems to have managed to unify the country at the same time as it transformed its system of government. Tunisia's fundamental law is thus far the only instance of a successful transition amidst the Arab Spring countries, and promoted as a model for the rest as a consequence.⁹⁹⁵ Only time will tell whether and how these basic laws will survive.

The bigger question of the place of eternity clauses within the battle between constitutional rigidity and openness remains only partially answered. The cases discussed in this chapter are not sufficient to decisively declare popular participation and unamendability as incompatible. On the contrary, they seem bound to continue to coexist, in particular as part of post-conflict constitutions—the majority of new constitutions written today. There is value, however, in having identified the macro-phenomena of unamendability and popular participation as occasionally occurring simultaneously and possibly being in contradiction with each other. The analysis here may thus be seen as an initial investigation into this potential clash in constitution-making, to which future research will hopefully add further insights.

Also obvious from the discussion in this chapter is the presence of transnational forces at play in these constitution-making processes. In the case of the four countries discussed, these have taken different forms. In South Africa, as Klug and others have argued, there was from the very beginning international pressure for the political settlement to be achieved in an inclusive manner.⁹⁹⁶ While the impact and precise contours of such changes in international political culture may be vague, other examples of international intervention in the cases discussed are unambiguous. Thus, the involvement of the Venice Commission in the Icelandic and Tunisian processes took the form of reports on drafts in which the Commission evaluated substantive provisions against what it considered transnational norms of

⁹⁹⁴ *Ibid.*, pp. 273-74.

⁹⁹⁵ Scott Stearns, "Kerry: Tunisia's New Constitution is Model for Arab World", *Voice of America*, 18 February 2014, available at <http://www.voanews.com/content/kerry-visits-tunisia-amid-democratic-transition/1853607.html>.

⁹⁹⁶ Klug (1996), pp. 22-29 and Franck and Thiruvengadam (2010), pp. 7-10.

constitution-making good practice. Its report on Tunisia is that much more surprising when remembering that the country is not a member of the Council of Europe.

Such interventions—which also include the presence as advisors of foreign experts, international NGOs, and representatives of transnational professional bodies—hark back to the discussion in Chapter 1, in particular to Bell’s call for internationalising notions of constituent power to take into account the myriad forces at play in constitution-making considered legitimate today. International standards in this area are still in flux, although there is at least one set of norms with which participation is potentially in tension: the area of minority protection. Fears of majoritarian takeover of a participatory process (which are no less present in elite-driven processes⁹⁹⁷) appear not to have been borne out in the four cases discussed in this chapter. These all produced basic laws with bills of rights and protections against discrimination, in all four cases with clear awareness of the country’s international human rights obligations in this respect. Beyond rights protections, however, the internationalisation of constitution-making as discussed in this chapter raises the question of whether even the most highly participatory drafting processes today can escape some form of transnational certification. I return to this issue in the Conclusion below.

⁹⁹⁷ Ulrich Preuss, “The Implications of “Eternity Clauses”: The German Experience”, *Israel Law Review*, Vol. 44 (2011), p. 447.

Conclusion

The question this study set out to investigate was whether eternity clauses were democratic. In other words, given that their main objective appears to be to close off future expressions of popular sovereignty, it asked whether they could be reconciled with democratic constitutionalist commitments. Moreover, viewing the rise of eternity clauses in the context of a growing trend towards more participatory forms of constitution-making and constitutional change, the study also asked whether they could be squared with this development or whether we were, in fact, witnessing two opposing trends. I proposed to approach these questions by way of taking democracy-based interpretations of unamendability seriously and engaging with them systematically. Thus, each substantive chapter examined a different aspect of the democratic story of eternity clauses.

Chapter 1 looked primarily to theories of constituent power as a rhetorical referent for ‘the people’ and to how such theories could accommodate the notion of constitutional values entrenched beyond the possibility of amendment. In looking at three episodes of constitution-making—Germany’s adoption of the Basic Law, India’s post-independence constitution and subsequent development of the basic structure doctrine, and Bosnia and Herzegovina’s power-sharing agreements adopted as part of a constitution as peacebuilding tool—I sought to identify the nature of the narratives surrounding peoplehood incorporated in these texts and how they related to the adoption of unamendable provisions. My conclusion in that chapter was that even staunch democratic constitutionalists who find value in eternity clauses have a difficult time reconciling their commitments to robust democracy and constitutional openness with this rigidity. I argued that in order for constituent power to be a useful concept for constitutional theory today, it must move beyond its revolutionary understanding and accommodate a certain degree of constitutional flexibility and renegotiation; that we must speak less about constituent moments and more about constitution-making as process.

Chapter 2 engaged with the main theories of constitutional identity, which view eternity clauses as expressive of core values of the polity whose indispensable nature justifies their absolute entrenchment. I criticised the concept of constitutional identity itself as lacking in analytical sharpness, relying on static and potentially exclusionary notions of identity, and as reliant on distinctly liberal assumptions about constitutionalism. Moreover, I showed that in order to attain explanatory force, the concept needs further refinement, including accounting for its own transformation. With regard to unamendable provisions, I argued that understanding them as expressing essential values results in the entrenchment of a certain constitutional hierarchy of norms within the constitution, which constitutional courts end up enforcing. The example I relied on in the chapter was the German Constitutional Court decision in the *Lisbon* case, which highlights the potential consequences of applying constitutional identity-based reasoning to interpretations of eternity clauses. The result in that case was a negative—some have argued nationalistic—turn away from the transnational in defence of state sovereignty.

Chapter 3 picked up on arguments about the content of eternity clauses and classified them according to the substantive values they protect. The chapter distinguished between unamendable provisions on state characteristics such as the nature of the regime, the integrity of the country's territory, territorial divisions, and secular or religious foundations; provisions on protection of the rule of law or democratic commitments in the tradition of militant democracy; and certain provisions on minority protections. The link to judicial enforcement intimated in Chapter 2 became inescapable in Chapter 3. In the case of each of these categories, apex courts have been the ones to shape the boundaries of the otherwise general commitments incorporated in eternity clauses. Be it unamendable secularism, official language, or executive term limits, such courts have acted as guardians of their boundaries, often in a manner not explicitly mandated (or even seemingly prohibited) by the constitution. The result has been a growing jurisprudence around the acceptable contours of legislation on these matters, but one in which the judicial standard of review has not been consistent.

Chapters 4 and 5 explored two process-based solutions to the problems identified in the first three chapters. Chapter 4 sought to ascertain to what extent the oft-repeated mantra of unamendability defenders—that it does not preclude the alteration or removal of eternity clauses via a new constitution-making moment—actually works in practice. In other words, it attempted to evaluate how realistic it is to describe such clauses as a surmountable precommitment. The chapter explored the possibility of amending formal eternity clauses, as well as of judicial basic structure doctrines being reversed. It found the prospects for both to be disappointing, whether because of implicit entrenchment of the eternity clause itself or due to the unlikely renunciation of this judicial tool. The chapter also considered and questioned arguments that unamendability is a trigger for deliberation and concluded with a discussion of the difficult distinctions between constitutional amendment, repeal, and revolution. The overall conclusion I drew in Chapter 4 was that the invitation to (peaceful) revolution which eternity clauses might be deemed to incorporate is an uneasy solution to changing societal values.

Chapter 5 explored another process-related attempt to boost the democratic credentials of unamendable provisions, this time during the constitution-making process itself. It thus placed the discussion in the wider context of a rise of participatory constitutional change increasingly promoted as both normatively and practically attractive. I analysed four case studies—South Africa, Kenya, Iceland, and Tunisia—in which constitution-making was distinctly aimed at inclusion and popular input. Based on these experiences, I argued that mechanisms of constitutional rigidity such as eternity clauses are not necessarily incompatible with participatory processes, and that the latter may indeed result in basic laws with unamendable commitments. Nevertheless, the recourse to unamendable provisions as conflict resolution mechanism has not definitively been proven to be effective and may yield its own set of problems once a democracy begins to consolidate. More work is needed on this as well as on establishing the link between participatory processes and unamendability outside post-conflict situations.

Findings

Based on this foray into democracy-based understandings of eternity clauses, I identify three key findings.

Eternity clauses inevitably empower courts

The story of eternity clauses and democracy which I have set out to tell has turned out to inevitably also be the story of the constitutional review of unamendability. Contrary to early understandings of such provisions, and irrespective of any drafter intent to the contrary, they have not remained merely symbolic expressions of constitutional values. In numerous instances, constitutional courts have determined, first, that eternity clauses are justiciable, and second, that it falls upon their institution to police their boundaries. This has happened even where the constitution was silent on any power of judicial review of amendments or where this was explicitly limited to procedural grounds only. The judicial answer to this lack of textual mandate has been to declare the enforcement of eternity clauses a logical and normative imperative. As Chapter 2 has illustrated, the hierarchy of norms which unamendable provisions institute unavoidably allows courts to engage in such reasoning and renders legislatures powerless to reverse this course. As Chapter 3 has shown with regard to a wide range of protected values, their vague nature has meant that the enforcement of eternity clauses has been an unpredictable endeavour. Judicial value judgments have intervened to fill a void and eschew the need for a coherent judicial standard to be applied in eternity clauses cases. Such a standard is, despite recent scholarly efforts to the contrary,⁹⁹⁸ largely impossible to define objectively. On the one hand, one must hope for a certain degree of judicial restraint in cases involving the negotiation of fundamental values if other constitutional actors, notably the legislature, are accepted as legitimate defenders of the constitutional order. On the other hand, however, I share the scepticism of those who consider courts a particularly inappropriate forum for the resolution of such first-order questions of the polity.⁹⁹⁹

⁹⁹⁸ Roznai (2014), Chapter 5.

⁹⁹⁹ Issacharoff (2011), p. 971.

A third argument put forth by some courts, such as the German *Bundesverfassungsgericht*, has been that their reach may extend beyond the current constitution to new constitution-making moments. They would thus be called upon to guard the values enshrined in present day eternity clauses against any intrusion, seemingly in perpetuity. This implies that any future exercises of constituent power are not only substantively circumscribed, but that these limits are policed, again by constitutional courts. While the former may be acceptable to democrats if certain norms of constitutionalism are taken to be necessary in any constitution for it to be viewed as legitimate, the implications of the German court's argument go much further. It seems to tie these norms to their positive expression in the positive eternity clause, and to entrust their enforcement to a present-day constituted judicial power. Even beyond the theoretical problems such an interpretation poses to robust notions of constituent power—resulting in the juridification of the ultimate exercise in democratic self-government—its practical consequences may be nefarious. In polities with less legalistic constitutional cultures and more embattled high courts, empowering the latter to act as guardians over future constitution-making may be akin to instituting judicial tyranny.

More work is needed to establish the link between eternity clauses and participation

A second finding of my analysis relates to the relationship between the two global trends afoot in constitution-making today: one towards rigidity via unamendability and another towards participation. My initial hypothesis was that these tendencies would prove to be incompatible insofar as they were aware of each other. The evidence on this, while still incomplete due to small sample size, seems to indicate that eternity clauses can coexist with participatory episodes of constitutional creation. While the latter may indeed result in increased constitutional openness and in more mechanisms of direct democracy being adopted (such as in Iceland), more case studies are needed in order to determine whether these can easily coexist with unamendable provisions.

What recent examples of participatory constitution-making have more conclusively demonstrated, however, is that the appeal of mechanisms of rigidity has not waned.

The cases of Tunisia, which incorporated an eternity clause in its 2014 constitution, that of Nepal, which similarly adopted such a clause in its 2015 constitution, as well as that of Pakistan, whose Supreme Court adopted a basic structure doctrine in 2015, are examples which prove that, in practice, unamendability is still very much part of the arsenal of constitutional designers and of constitutional courts. Whether that is due to an unreflective migration of this constitutional idea, to its perceived success in other countries and a related demonstration effect, to the influence of international advisory institutions, or to a combination of these factors is more difficult to determine and exceeds the scope of my analysis here.

Eternity clauses are increasingly impacted by transnational forces

Just as the story of eternity clauses today is also one of courts mandated or empowering themselves to review them, the tale of unamendable provisions is inextricably tied to transnational forces. Emerging from all chapters is a sense of the ubiquitous presence of the transnational in all understandings on unamendability, from their adoption to their enforcement and finally to their potential repeal. With regard to constitution-making, the example of Bosnia and Herzegovina discussed in Chapter 1 has illustrated a perhaps extreme example of the internationalisation of constituent power to the point that the international community decided not just the architecture of the state, but also the (transnational) values placed beyond the reach of its citizens. Chapters 4 and 5 illustrated the presence of the transnational in current constitution-making efforts as well, whether in the shape of transnational norms or of the involvement of international actors including international organisations, NGOs, and advisory institutions such as the Venice Commission.

The enforcement of eternity clauses is similarly permeated by the transnational. This has taken several forms in the cases discussed in this study: of a supranational human rights court intervening in cases springing from the contestation of unamendable norms, such as of secularism in Turkey; of national courts themselves appealing to international human rights norms in order to justify changes to unamendable commitments, such as to executive term limits in Honduras; and of international bodies evaluating the enforcement of unamendable provisions against a country's international rule of law commitments, such as the Venice Commission

with regard to Turkey. Constitutional scholarship has started to take notice of these developments and to put forth defences of international interventions in this field¹⁰⁰⁰ or to determine the appropriate limits, rooted in transnational values, of doctrines of unconstitutional constitutional amendment.¹⁰⁰¹ In all these cases, eternity clauses have been interpreted as being in line with the country's international commitments, and the appeal to the transnational was essentially positive. Conversely, in the *Lisbon* case discussed in Chapter 2, unamendability was relied upon in a case of rejection of the transnational. The *Ewigkeitsklausel* was enforced as a last defence of national sovereignty against the latter's chipping away by transnational forces.

With regard to processes of constitutional change, the evidence suggests that transnational forces may pull in competing directions. On the one hand, as was discussed in the case of South Africa's choice of a participatory constitution-making process, this reorientation may have been due to an emerging international culture promoting democratic governance.¹⁰⁰² This promotion of participation has only grown in the years since and may well be viewed as an emerging international norm. On the other hand, rigidity mechanisms such as unamendability appear to also be promoted, or at least not discouraged, in internationalised constitution-making, particularly in post-conflict settings. One potential explanation for this ostensible contradiction is that drafters and international advisors are unaware of the possible tension between these two options. A more generous take would be that they do not view them as incompatible, or else view this incompatibility as non-threatening or less threatening than the prospect of reaching no constitutional settlement at all. If this is indeed the case, then all the potential difficulties with enforcing eternity clauses remain—they have simply not been determinative of the outcome of these constitutional negotiations but postponed to a future post-democratic consolidation.

¹⁰⁰⁰ Lech Garlicki and Zofia A. Garlicka, "External Review of Constitutional Amendments? International Law as a Norm of Reference", *Israel Law Review*, Vol. 44 (2011), pp. 343-68.

¹⁰⁰¹ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", *International Journal of Constitutional Law*, Vol. 13, No. 3 (2015), pp. 606-38.

¹⁰⁰² Klug (1996), p. 58.

Avenues for further research

Several avenues for further research present themselves, of which I will highlight five. The first relates to further specifying our understanding of the different types of eternity clauses and how their substantive content influences enforcement. An example would be to investigate whether the specificity of the principles insulated in a provision has an impact on its interpretation and potential repeal. The case of Portugal's eternity clause being amended to remove mentions of communist economic principles may provide the practical starting point for such an investigation. Contrary to existing classifications of eternity clauses, the aim of such research would be to establish correlations between the types of unamendable norms and their implementation in concrete cases and impact on processes of reform.

A second avenue concerns the link between unamendability and the transnational. A fruitful line of investigation would be to scrutinise the institutional method of transmission of this constitutional idea. Thus, moving beyond merely noting its existence as some have done, research is needed on the concrete channels through which this constitutional mechanism has attained its popularity today. One can hypothesise that international actors have played a significant role, especially in more recent constitution-making instances; that neighbouring countries or countries with similar legal systems have influenced each other; or that all of these factors combined have produced a demonstration effect. However, any causality requires more in depth analysis of the actors and forces at play in a given polity.

A third potential research project would focus exclusively on the post-conflict context, with its special dynamics and goals, and would endeavour to determine the role played by unamendable provisions there. The literature relevant to such a project, which I have already begun exploring,¹⁰⁰³ necessarily includes scholarship in the fields of peacebuilding, conflict resolution, and the political economy of constitutions, all of which in different ways have attempted to disentangle mechanisms for the success of post-conflict political settlements, constitutions

¹⁰⁰³ See Silvia Suteu, "The Promise and Limits of Eternity Clauses in Post-conflict Contexts" (under review).

included. Sporadically touched upon in this study, the considerations which go into designing a constitution in such a context are different from those assumed by much of our constitutional theoretical arsenal. For example, threats to human security and the necessity of offering constitutional guarantees to previous ruling elites and military opponents have a direct impact on what is deemed non-negotiable in the ensuing constitution. An in depth study of eternity clauses in the post-conflict key thus offers the chance to uncover aspects previously ignored by debates focused on the 'prototypical' cases of Germany or India.

The last two strands of further research are both concerned with identifying the causes for the adoption of eternity clauses but approach this question from two different methodological vantage points. One strand is distinctly comparative, and would proceed by comparing cases of adoption of unamendable provisions with others where such provisions were not adopted, or even rejected. This investigation would require comparing countries which share most elements of their constitutional cultures (independent variables) except for the resort to unamendability, which would thus become the dependent variable. Proceeding in this way would allow one to speculate with greater certainty about the reasons for a choice to incorporate an eternity clause. A possible starting point for such a study, already hinted at in Chapter 2, would be to compare India's development of a basic structure doctrine with Sri Lanka's explicit rejection of such a doctrine. Another might be a comparison between Portugal and Spain, which adopted post-authoritarian constitutions in the 1970s and embarked on rapid European Union integration processes thereafter but did not both embrace constitutional unamendability. This way of 'controlling' for unamendability in the comparison would yield more robust results in terms of determining causality.

The final further research idea I would like to highlight involves a longitudinal study of unamendability in a discrete country. For example, one could trace back the French eternity clause protecting the republican form of government from its inclusion in the 1958 constitution through to its incarnation in the 1946 constitution and down to its origin as an 1884 amendment to the 1875 constitution. Engaging in such a historical reconstruction would allow us to better understand the origins of

the thinking on 'eternity' and to relate it to how unamendability is understood today. Such a study would also likely indicate the cases where an eternity clause has been inherited by subsequent constitutions without necessarily undergoing renewed debate and would thus illuminate the process of unreflective migration of unamendability across time. Moreover, a study such as the one suggested on the French provision would likely also shed light on colonial processes of transmission of eternity clauses, from the metropolis to the colony. We may discover that such a clause, handed down by the former coloniser, has fared differently in a post-independence polity, and that the values it entrenched at the time of adoption changed significantly with the evolution of the constitutional order.

The main argument of this thesis has been that eternity clauses and democracy remain in a state of tension with each other irrespective of the manner in which they are adopted, of the values they protect, and of the fact that they may be repealed via a new constitution-making moment. I have sought to show, first, that they institute a hierarchy of norms within the constitutions and second, that this hierarchy is then zealously guarded by constitutional courts with or without an explicit mandate to do so. Significantly, these two developments have been shown to be the inevitable consequences of the logic of unamendable entrenchment. The practical implication of these findings is that constitution-makers should be very careful with their design choices and should remain aware of the need to harmonise provisions on unamendability with those on constitutional amendment, judicial review, and legislative initiative. The consequence of my findings for constitutional theorists is to call upon them to further refine their conceptual categories, such as their understandings of constituent power and of constitutional identity, so as to better capture the complexity of eternity clauses and of their enforcement. If the current trend continues, we stand to see higher numbers of both formal eternity clauses and unconstitutional constitutional amendment judicial doctrines. Arming ourselves with the analytical tools to understand and respond to this phenomenon is therefore an overdue necessity.

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