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Chair of Comparative Public Law

The Eternity Clauses in Modern Constitutions: a Danger to Democracy or a necessary Safeguard? Past, Present, and Future of Constitutional Amendment

Prof.ssa Elena Griglio

SUPERVISOR

Prof.ssa Cristina Fasone

CO-SUPERVISOR

Alessia Putignano
Matr. 649522

CANDIDATE

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Introduction

"All human beings are born free" does Article 1 of the 1948 Universal Declaration of Human Rights (UDHR) cite. They are unconditionally entitled to rights and liberties, whose violation has found extensive condemnation in International Charters, agreements, customs, and shared practices.

However, to what extent are rights and liberties secured in the domestic sphere each country is characterized by? Does a superior legal framework exist, whose supreme values are unequivocally immune to legislative, political, partisan, and jurisprudential invalidation? Which role does the public debate play in this context? How do popular claims contribute to the establishment of these high principles? And how, once established, do these core values interact with societal change, democratic concerns, and supranational legislation?

Domestically, the role of protecting supreme values is embodied by the Constitution. Each constitutional text expresses the specific characteristics of a country, organizes the structures of power, delegates the regulation of specific matters to the public institutions it generates, enumerates both implicitly and explicitly the supreme principles the State identifies itself in, establishes what is subject to change, which patterns of innovation shall the latter adhere to, and what is completely immune to alteration.

Metaphorically, the Constitution is here presented as a shell within which the State operates and time moves needs and beliefs. As with every shell, it is subject to pressures originating from the inside. These pressures are the constitutional issues a country constantly faces, and the Constitution is supposed to answer. Their disruptiveness may eventually result in the shell's impairment.

What determines how the shell tackles these pressures is the material it is composed of and the instruments employed during its *genesis*. These represent the theories modeling the role a Constitution plays in a country, which may be purely descriptive as in ancient times, or a combination of both descriptive and prescriptive functions, as the evolution of constitutional theory has promoted, along with the other influences diverse events have produced on the evolution of the Constitution's definition.

The historical and jurisprudential circumstances have further contributed to the awarding of a specific collocation to the Constitution, namely a supreme position standing above all the other laws governing the country. This higher standing assigns to the constitutional shell the task of verifying whether what it contains coheres to its nature and

values, to the provisions it enshrines. It is done through courts specifically delegated to the adjudication of laws' constitutionality.

As concerns the instruments employed during the shell's creation, the role of the people in the constitution-making process proves explanatory, along with the context in which the creation has occurred. People's participation in the process of making the constitutional text coherent to popular values, and the historical circumstances lying in the background of the creation produce specific outcomes that consequently trigger the survival of the Constitution and its popularity.

For instance, even the UDHR has been frequently identified by scholars as enjoying the status of a World Constitution, although the assumption proves extremely controversial. Whenever the lack of democratic legitimacy of the UN General Assembly which drafted the document, in terms of being a non-elected body, is considered, the association with the UDHR and the Constitution vacillates.

Turning back to the internal pressures, the Constitution invariably faces matters of balance between diverse constitutional issues often related to change, dialogue, and interaction. In this regard, every Constitution must strike a balance between the need for stability and that of change, which is represented by the rigidity-flexibility spectrum. The preeminence of the values inserted in the Constitution forcibly triggers the question of whether robust entrenchment should prevail over more flexible procedures or not.

Societal change is unavoidable as well as the evolution of popular beliefs and principles. As a consequence, the shell is not intended to remain the same throughout time. It is rather meant to embrace change. The degree of this adaptability varies across cultures, countries, and historical moments.

Given the irremediability of change, Constitutions commonly regulate the process of alteration providing for precise procedural and substantial limits according to which constitutional innovation is legally possible. Procedurally, thresholds, delays, and quorums are some of these limits. Substantially, constraints may be identified explicitly through the employment of eternity clauses insulating specific supreme constitutional provisions from change or implicitly through eminent rulings of special courts and diverse jurisprudential approaches.

Unamendability, namely the shell's resistance to innovation, should not be confused with a democratic deficit. Indeed, frequently in history, the protection of certain principles from the risk of being demolished by political winds has proved essential. However, are some values completely immune to change? Is the generation of those building the shell,

namely drafting the Constitution, entitled to confine the space of maneuver of future generations? And how this issue is addressed both in theory and facticity? How to reconcile high standards of values protection and the challenges posed by new rights and sensibilities is a matter of constant debate, addressed by world constitutional orders differently.

Globally, another context in which unamendability differs in approaching constitutional concerns is the dialogue with other sorts of norms. Pressure, indeed, may also come from the outside of the shell. The adherence to specific international regional agreements exerts influences on the interaction between certain constitutional protections of values and the requirement of a direct effect supranational laws shall have on the constitutional orders. What should prevail and where it finds proper legitimation? The dialogue between European Union Law and Member States' unamendable constitutional provisions has been paramount to the test of this troublesome interaction.

Therefore, a Constitution does not possess a standing per se. As a shell, it is subject to what it embraces internally which inevitably changes over time, and to what surrounds it. It requires balance to tackle multiple pressures and often controversial concerns ultimately produce controversial responses.

This dissertation precisely aims to speak about the life of the shell, namely the existence of the Constitution from birth to death. Specifically, what occurs in between will receive special consideration, being the core of the investigation. Indeed, the evolution of the Constitution's existence, namely the adaptation to change through constitutional amendment and, *per contra*, the intent of preserving its original features through time will be explored. The work attempts to reconcile theoretical knowledge and practical experience, exploring concepts, events, and variables via a thorough analytical and qualitative approach. In the inquiry, a comparison of global Constitutions and cultures will be extensively employed leading the questions encountered to diversified answers.

Time, change, dynamism, tensions, and conflict are here associated with the Constitution. Although this interrelation proves profoundly underestimated, it produces relevant effects on democracy and people's lives, uncovering risks, safeguards, and disguised fragilities.

1. The Life and Death of Constitutions

In the ever-evolving landscape of governance, Constitutions stand as foundational pillars, embodying the principles and values upon which societies are built. These values have developed through time, theories, and factual experiences, modeling the modern notion Constitutions have acquired. These revered documents not only articulate the fundamental rights and responsibilities of citizens but also provide a framework for the exercise of governmental powers, which stands at the apex of the hierarchy of norms existing in a polity.

However, the dynamism inherent in societal progress often necessitates adjustments of constitutional provisions and values to newly evolved frameworks. The role of the people in defining what these constitutional norms contain and how they adapt to change proves instrumental in this chapter.

Constitutional change, indeed, may occur in several ways that are commonly settled at the time of the constitution-making process and regulated by the practice of constitutional amendment. The latter holds diverse meanings and serves multiple purposes. In facticity, amendment is constrained by procedural and substantial limits that are essential to preserve stability within change and that will be analyzed later in the text.

This chapter, instead, attempts to identify what the Constitution is and how it is conceived both in theory and practice, which are the basic features and values it possesses and the constitutional issues it should address, how these characteristics have been generated, and the reasons why it is crucial to secure their adaptability to change, while not endangering the risks of extreme flexibility. The following section thus delves into the intricate tapestry of constitutional amendments. As one embarks on this intellectual journey, the threads that bind the essence of Constitutions with the mechanisms employed to shape and reshape them will be unrevealed.

Therefore, first, the section will explore how the definition of the Constitution has departed from its original etymology. Then, it will be demonstrated how the concept has been modeled by theories and historical events and to what extent they relate to change. Consequently, the section will identify the position the Constitution legally and symbolically holds in a polity and the implications of this feature. After what a Constitution is and where it is located, how the Supreme Law is produced will be explained, along with the role of the people in the process.

Secondly, the challenge the text faces when change is concerned, namely the balance between rigidity and flexibility will be considered, along with how the issue has been eminently tackled in the U.S. experience.

Thirdly, the focus will be centered on constitutional change. Therefore, constitutional amendment will find a devoted section and its political, social, and jurisprudential functions and meanings will be extensively investigated.

Ultimately, the chapter will aim at creating a shell, drawing from the culture of constitutionalism according to which the reform procedures will guarantee that the Constitution remains a stable context within which the legislator navigates, and the people express their belief and sense of belonging that are supposed to always remain up to date.

1.1. What is a Constitution?

1.1.1. From etymology to concept definition

Before navigating the historical evolution of the culture of constitutionalism and how its modern notion has emerged, it is worth starting from the very meaning of the term Constitution. Originally, the word "Constitution" was an indicator of the state of things, applied to the state of the human body, and subsequently employed to describe the polity in terms of its geographical, demographical, jurisprudential, and climate characteristics[1].

Occasionally, the term acquired legal connotations, but its use was limited to laws regulating the conduct of the individual and not that of the government. Instances of this latter application were criminal codes like the 1532 *Constitutio Criminalis Carolina* and the 1768 *Constitutio Criminalis Theresiana,* whereas those laws through which public power was exercised were called *leges fundamentales*, namely fundamental laws[2]. They did not provide a comprehensive set of regulations for governing, nor did they possess any constitutive force.

Only when the modern notion of the Constitution emerged, a reactionary backlash of historians and supporters of the *status quo* led to considering old fundamental laws as a Constitution[3]. Indeed, according to this approach, in antiquity, the Constitution was a stable and unchangeable law, as exemplified by the Hammurabi Code which cursed whosoever would have attempted to change its content.

In Greek history, the Constitution was called *politeia* and was deemed to be eternal, being the supreme law able to constrain political conflict.

Only in the eighteenth century, after the emergence of the modern nation-States that occurred in Europe between the fifteenth and seventeenth centuries, the concept of the Constitution started to be applied to the state of a country and the related legal structure. At this moment, territorial boundaries became the *conditio sine qua non* a Constitution cannot exist.

Therefore, in ancient legal history, the role of Constitutions was to describe the institutions and powers of the government, hence the appellate of descriptive

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[1] Michel Rosenfeld & Andras Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013).

[2] Ibid.

[3] Ibid.

constitutionalism[4]. In this case, the Constitution stood as a product of the State and an indicator of the several forms a government could acquire.

However, the events of the eighteenth century, namely the American and French Revolutions, enriched the role of the Constitution which acquired, along with its descriptive connotation, a prescriptive function. This new nature was enshrined in eminent papers of American and French constitutional history.

Firstly, the Covenant of the Pilgrim Fathers was signed on the Mayflower in 1620 establishing the rules disciplining the new Pilgrim community, expressing by its signature the will of combining "ourselves [the Pilgrims] together into a civil body politic, four our better ordering and preservation"[5]. Conversely to ancient instances, the body politic here did not exist before the Covenant, but it was generated by the document itself.

Secondly, the 1776 Declaration of Independence of the United States of America assumed that it is self-evident the truth according to which "[…] all men are created equal […] with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness", expanding by stating that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed".[6]

Seemingly, in *The Federalist*[7], the collection of papers written in 1787 by Alexander Hamilton, James Madison, and John Jay, to encourage the ratification of the United States Constitution, and still nowadays considered the most reliable interpretation of the constitutional text, the Republic derives its source of power from the people and indirectly administers it by office holders elected by the people themselves.

It is thus in the context of the American Revolution that the six modern democratic forms of government have originated[8]. They are parliamentarism, associated with ancient aristocracy, since the People, the majority, hold sovereignty through their representatives, the minority, which eventually make decisions on behalf of the former. Its corrupted form

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[4] Rosenfeld & Sajó (n 1).

[5] Silvia Bagni, *Materiali Essenziali per Un Corso Di Diritto Costituzionale Comparato* (Filodiritto Editore 2016) 19.

[6] Ibid 20.

[7] Roger Masterman & Robert Schütze, *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 46, citing A. Hamilton, J. Madison and J. Jay, *The Federalist* (Cambridge University Press 2003).

[8] Ibid.

is the Party State, where a restricted assembly of politicians makes decisions without public consultation. Furthermore, presidentialism is enumerated, consisting in representative indirect democracy that is applied to the head of state, representing the people that have elected him. The negative expression of presidentialism is considered to be a dictatorship. Then, also direct democracy and its degeneration, populism, belong to the six categories.

Thirdly, the 1791 Ten amendments to the 1787 U.S. Constitution also known as the Bill of Rights represented a changing course of the concept.

Moreover, drawing from the French experience, Article 2 of the 1789 French Declaration of the Rights of Man and of the Citizen citing that "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression"[9] enriched the list of natural rights and make their preservation the purpose of each political association.

Therefore, the American and French Revolutions stood as benchmarks of the "greatest semantic revolution to the classic constitutional vocabulary"[10]. Their byproduct is today's understanding of constitutionalism and the constant debate about what constitutional theory is.

1.1.2. Theories and time: a relation at a glances

Constitutionalism, as the science of the Constitution[11] or the envelope of the ideas detailing what a Constitution is or should be[12], has grown along with the nature of the word itself. As a result of this evolution, diverse theories of constitutionalism exist and have eventually produced multiple configurations of the relation between theory, time, and change.

Generally, the revolutionary periods analyzed above may be conceived as a *caesura* between ancient and modern constitutionalism[13]. However, since it proves

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[9] Bagni (n 5) 23. English translation: "*The aim of every political association is the conservation of the natural and imprescriptible rights of Man. These rights are liberty, property, security and resistance to oppression*".

[10] Masterman & Schütze (n 7) 45.

[11] Luc J. Wintgens, *The theory and practice of legislation* (Routledge 2005).

[12] Masterman & Schütze (n 7).

[13] Rosenfeld & Sajó (n 1).

difficult to draft a clear-cut classification of the theories, an overview of them will be provided by mentioning eminent theoreticians and essential principles through which the Constitution is conceptualized.

John Locke's constitutional protection of natural rights[14] from the interference of the State is considered the pioneering idea of modern[15], formal[16], or liberal[17] constitutionalism, along with the concept of separation of powers[18] enshrined in Montesquieu's rational theory.

The rationalization of government was further sharpened by Paine's republican constitutionalism endorsing a constant division of powers and clarity in the Constitution about how laws are made and executed, namely through popular elections of political officers[19]. Article 16 of the aforementioned 1789 Declaration of the Rights of Man and of the Citizen is paramount to summarize these principles: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all"[20].

Then, constitutionalism embraced the social contract theory of Rousseau. The theory thus evolved towards the inclusion of positive rights such as social, political, and civil rights into the Constitution[21] and stressed the importance of the general will[22] of the people which became the absolute source of political authority and created the modern constitutional guarantee of popular sovereignty. Therefore, the *rule of law*, namely the

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[14] John Locke, *Second Treatise of Government* (Edited by C. B. Macpherson, Hackett Publishing 1980).

[15] Rosenfeld & Sajó (n 1).

[16] Masterman & Schütze (n 7).

[17] Thomas E. Baker, *Constitutional Theory in a Nutshell* (vol. 13 William & Mary Bill of Rights Journal 2004).

[18] Charles Montesquieu*, The Spirit of Laws* (J. Collingwood, 1823).

[19] Thomas Paine, *Dissertation on First Principles of Government* (The proprietors 1795).

[20] *Declaration of the Rights of Man and of the Citizen* approved by the National Assembly of France, August 26 (1789).

[21] Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics 1968).

[22] Ruzha Smilova, *The General Will Constitution: Rousseau as a Constitutionalist*, in Denis Galligan (ed.), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford 2014).

assured protection of rights by the Constitution, stood as a product of liberal constitutionalism.

Differently from the latter, conservative constitutionalism[23] holds a stricter approach towards rights and the Constitution itself, preferring a textual interpretation of constitutional law, considering the original intent and understanding of the drafters, implementing a developmental approach that relies on history and tradition like that of the developmentalists Ackerman[24] and Amar[25], or seeing the Constitution as the organizing structure of a polity.

The distinction between liberal and conservative constitutionalism proves instrumental to this dissertation. Indeed, conservative originalists and textualists seem to face difficulties when choosing between "continuities and disjunctions"[26], between irreversibility and change. "Conservatives reject the liberal motto that the Constitution has to be kept in tune with the times, and that the courts should lead the way. Conservatives might turn that cliché around to insist that judges are supposed to keep the times in tune with the Constitution"[27].

Ultimately, postmodernism, embodied by U.S. Supreme Court Justice Scalia[28], disrupts the balance of more or less commitment to text and traditions by stating that the Constitution holds the meaning judges attribute to it, thus arguing that the document does not contain a meaning *per se*[29].

Always relating the reasoning of this dissertation to the relation between the constitutional text and change, it is worth revealing the speculative debate between descriptive and prescriptive constitutionalism, by mentioning the view of Strauss[30] stating that constitutional theory is both descriptive and prescriptive, as the Constitution "justifies its prescriptions about controversial issues by drawing on the bases of agreement that

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[23] Baker (n 17).

[24] Bruce A. Ackerman, *We the People: foundations* (Harvard University Press 1991).

[25] Akhil Reed Amar, *The Bill of Rights: creation and reconstruction* (Yale University Pres 1998).

[26] Baker (n 17).

[27] Ibid.

[28] Jack M. Balkin, *What Is a Postmodern Constitutionalism?* (vol. 7 *Michigan Law Review* 1992).

[29] Baker (n 17).

[30] David A. Strauss, *What is Constitutional Theory?* (California Law Review 1999).

exist within the legal culture"[31]. Here, constitutional provisions are prescriptive rules that transpose a people's consensus describing how a polity should address issues into rules governing areas.

Another approach defines the Constitution as a way to organize an unequal society into a polity guaranteeing the full exercise of rights[32]. According to this approach, "constitutional rules deal not only with the regulation of the present situation, but they also aim to support given patterns of social, political and economic evolution"[33]. Consequently, constitutional theory becomes a science of the "being-becoming"[34] as it deals with the irreversibility of the social processes and the adaptation to change.

Mentioning the social and political patterns of the Constitution further leads to the speculative distinction between legal and political constitutionalism. The former has been perfectly explained by the work of Hans Kelsen who became the "archetypal normativist"[35] and considered the Constitution as "the set of norms that authorizes law-making, law-interpreting and law-applying powers" [36]. It stands for a formalist definition in considering the State as a personification of a legal structure[37], the product of the Supreme Law, as mentioned above. This legalist approach thus clearly distinguishes the Constitution from social and political connotations and translates political principles into positive legal norms[38].

Conversely, political constitutional theory, whose eminent theorist is Carl Schmitt, explains the Constitution as a political document, "the factual expression of a political will"[39]. Schmitt's constitutional theory[40] will be further instrumental when the theory of constitutional change is provided later in this work.

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[31] Strauss (n 30) 582.

[32] Wintgens (n 11).

[33] Ibid.

[34] Ibid.

[35] Panu Minkkinen, *Political constitutionalism versus political constitutional theory: law, power, and politics* (Oxford University Press & New York University School of Law 2013) 591.

[36] Marco Goldoni & Michael A. Wilkinson, *The Material Constitution*, (The Modern Law Review 2018) 569.

[37] Ibid.

[38] Minkkinen (n 35).

[39] Ibid 592.

[40] Carl Schmitt, *Constitutional Theory* (Duke University Press 2008).

This conceptualization of the Constitution may be related to the material interpretation of the document. According to the latter, the Constitution carries a material legitimacy, a facticity, that is not legal in nature but is social. Constitutions are "socially postulated"[41] by the people that consequently elevate them to the highest law of their polity.

This social dynamic further produces interdependence between the Constitution as a legal structure and politics, as theorized by Hermann Heller[42]. According to the jurist, constitutional orders aim at self-preservation by not only requiring formal legality but also attempting to find material legitimacy or an ethical justification. The moral purpose hence results in social acceptance and implies the attainment of socio-economic equality. As a consequence, constitutional orders in Heller's view are intrinsically democratic. For the people to consciously constitute in a united constitutional order, Heller argues that *social homogeneity* is needed, in terms of socio-economic equality, or the prospect of such. It is in the disruption of the democratic path towards social homogeneity that dictatorship emerges and the constitutional order collapses, as occurred with the Weimar Constitution and the ascent of Hitler in 1933[43].

Along with Heller and contemporary to him, the jurist Constantino Mortati, enriched the link between the legal and social structures via a realist interpretation of the constitutional order. Mortati, indeed, defines the material Constitution as the political and economic context, and the deeper values that exist beyond the written text, the latter considered by the Italian jurist as the formal Constitution. Those deeper values shape the interpretation and application of the constitutional text.

Hence, according to this approach, endorsed by Goldoni and Wilkinson[44], the formal Constitution becomes a "dead letter", a feature of the material one, "a list of wishful auspices or even a sham"[45]. For instance, a sham Constitution may be the definition for the 1937 Soviet Constitution which although codifying those provisions belonging to the culture of constitutionalism, did nothing to actualize them in facticity[46].

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[41] Masterman & Schütze (n 7) 51.

[42] Goldoni & Wilkinson (n 36).

[43] Ibid.

[44] Ibid.

[45] Ibid 593.

[46] Rosenfeld & Sajó (n 1).

The distance between formal and material Constitution may influence the speculation around the efficacy of constitutional change. Indeed, the approach of distinguishing the two leads to the disruption of the logic according to which every formal constitutional amendment corresponds to a change in the material constitutional order.

Furthermore, it follows that material change may occur without a formal constitutional reform. An instance of this disruption can be detected in the 20th century's fascist regime which generated a new material constitutional order in a country, Italy, which was still formally bound by the 1848 *Statuto Albertino*[47].

The non-linear relation between formal and material constitutions proves explanatory of the debate focusing on the legitimacy of a constitutional amendment. Arguably, constitutional change is not only supposed to express the limits inserted in the formal (written) constitutional text, but modification is also bound by the identity of the wider constitutional order which is commonly considered unamendable. The core values of a material order have been enshrined in the preambles of modern constitutions that are deemed eternal since they represent the pillars of a polity's constitutional identity. Notwithstanding, considering the identity of a polity as completely immune to change is a controversial assumption hard to demonstrate.

1.1.3. The Constitution as Supreme Law and the judicial review of legislation

Along with thinkers, jurists, and philosophers, eminent judgments across the world have nurtured the ever-evolving notion of the Constitution. The American Supreme Court decision in *Marbury v. Madison* of 1803 expressed by Chief Justice John Marshall stood as the seminal case of American constitutionalism, establishing the supremacy of Constitutional Law over ordinary legislation and the role of the Supreme Court, jointly with the other courts, in granting the constitutional supremacy.

The theory was inspired by Hans Kelsen's *Pure Theory of Law*[48]. Kelsen elaborated a clear hierarchy of the State's sources of law which posed the Constitution as the highest source, and then continued with statutory law issued by the legislative followed by other sources of law, such as acts issued by the executive like regulations and implementation acts, located at the bottom.

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[47] Goldoni & Wilkinson (n 36).

[48] Hans Kelsen, *The Pure Theory of Law* (1934).

The jurisprudential case relates to the controversy between U.S. President John Adams and his successor Thomas Jefferson, arisen in 1801 during the final days of Adams's administration. Before leaving office and letting the new administration attribute offices to the new party loyalists, President Adams nominated fifty-two candidates, later called "midnight judges"[49] as officers of the federal judiciary, eventually obtaining the Senate's endorsement. However, several appointments remained undelivered, and when President Thomas Jefferson took office, he decided to disregard Adam's nominees. The disillusioned judges, among which William Marbury stood, filed the Supreme Court with the petition for a writ of mandamus[50], demanding James Madison, as the new Secretary of State, to reverse Jefferson's decision and recognize them as federal judges.

In 1803, the controversy *Marbury v. Madison* began[51]. The related outcome was the utmost verdict delivered by John Marshall, whose part about constitutional legitimacy is here instrumental. Indeed, the Chief Justice concurred that the Supreme Court of the United States did not possess the right to issue a writ of mandamus. Marshall declared section 13 of the 1789 Judiciary Act enlarging the authority of the Supreme Court as invalid. Section 13, as being located at the level of ordinary law in the hierarchy of sources, violated Article VI of the Constitution containing the constitutional provisions governing the Supreme Court's primary jurisdiction[52], which was located above. Consequently, Marbury's legal claim and that of Adam's appointees were ultimately nullified.

According to Marshall, the authority of the Constitution resided in the American people who established it. The same will of the people "had organized the government, allocating political powers among different departments"[53] and imposed limits to the organized government. Thus, Marshall's constitutionalism places a strong emphasis on popular sovereignty. The Chief Justice believed the latter to be the ultimate wellspring of

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[49] Clyde Ray, *John Marshall, Marbury v. Madison, and the Construction of Constitutional Legitimacy* (Law, Culture and the Humanities 2016) 210.

[50] A remedy known as a writ of mandamus may be used to force a lower court to carry out a ministerial act for which the court is clearly required by law. In order to file a petition for a writ of mandamus, you must demonstrate that there is no other remedy available.

[51] Ray (n 49).

[52] Ibid.

[53] Ibid 216.

the constitutionally guaranteed rights. The people's power, as constituent power, was supreme, he declared unequivocally, and the values they formed were designed to be permanent.

As a result, consent and rights were two complementing pillars that supported the validity of the Constitution. Via his verdict, Marshall has elevated the standing Constitution making it the personification of a fundamental moral legitimacy enshrined in citizens "hearts and minds"[54], and has strengthened the practice of constitutional review of legislation, already highlighted by Alexander Hamilton in the *Federalist 78*[55]. Indeed, since the Constitution remains above ordinary legislation, "at the apex of the legal hierarchy"[56] as being "the highest laws within a society"[57].

To ensure the Constitution's high standing, a review of constitutionality is needed to verify whether national laws cohere with constitutional provisions. The practice may be defined as "the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution"[58]. Today, it is present in 83% of the Constitutions worldwide.

There are three main models for evaluating constitutionality, and they all largely rely on the political and legal backgrounds of the individual nations. The site of the review (the legislature or the courts) determines the three models. These categories can help frame the conversation around the primary choices for establishing constitutional review, even while they are mostly based on legal theory and regulations and may not have a significant impact on the various results and practical efficacy of constitutional review.

The first instance is represented by the centralized and abstract model of the Kelsenian-Austrian 1920 First Republic Constitution which is exclusively exercised by a constitutional court providing answers to abstract constitutional questions. The second model is identified in the decentralized judicial review that is exercised in a concrete dispute at each level of the judiciary. Thirdly, the parliamentary sovereignty model exists. It does not provide for judicial review of legislation in the sense of courts having the

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[54] Ray (n 49).

[55] Tom Ginsburg & Mila Versteeg, *Why do countries adopt constitutional review?* (vol. 30 The Journal of Law, Economics, and Organization 2014).

[56] Masterman & Schütze (n 7) 48.

[57] Ibid 41.

[58] Ginsburg & Versteeg (n 55) 589.

power to declare laws unconstitutional or invalid. Instead, the Parliament has the ultimate authority to make, amend, or repeal laws without interference from the judiciary[59].

1.1.4. The Constitution-making process and the continuity-discontinuity dilemma

Listing theories and speculative approaches about the interpretation of the Constitution may appear an abstruse exercise of philosophical tenure. However, it is inconceivable to deal with facticity without understanding the ideas from which the hierarchy of legal norms, the typology of rights deemed to be protected by constitutional provisions, the degree of this protection, and the way a Constitution adapts itself to societal evolution are generated. Therefore, after having detailed how the Constitution is conceived in theory and where it is located in the hierarchy of legal norms, it is worth explaining how a Constitution is produced, thus briefly presenting the constitution-making process and the related degree of public participation.

Since constitutional change is subjected to rules and limits that are inserted in the Constitution at the moment of its making, it is interesting to test if people join the process by making the Constitution the instrument people govern themselves the way they favor[60], and which is the outcome of public engagement.

Sieyès assumes that “In each of its parts a constitution is not the work of a constituted power but a constituent power”[61] that is the nation will. The "nation will" refers to the idea that political authority should be based on the general will of the entire nation rather than the interests of a privileged few. Sieyès believed in the sovereignty of the people and the idea that political decisions should reflect the collective will of the nation. This concept influenced later revolutionary developments, including the drafting of the French Constitution of 1791. In summary, Sieyès advocated for a political system where the will of the nation, especially the common people, played a central role in shaping the government and its policies. For this reason, he defines the Constitution as being subjected to the nation will that generates it.

According to Rawls[62] and relying on the principles of constitutionalism that have been acknowledged above, the constituent power held by the people creates a new

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[59] OECD, *Constitutions in OECD Countries: A Comparative Study* (OECD Publishing 2022).

[60] John Rawls, *Political Liberalism* (Columbia University Press 1993).

[61] Emmanuel Joseph Sieyès, *Political Writings* (Hackett Publishing Company, Inc. 2003) 136.

[62] Rawls (n 60).

framework regulating the ordinary power of officers of the government through making a new Constitution, thus initiating a constitution-making process.

Focusing the analysis on written Constitutions which are less subject to casual and cryptic mechanisms[63] than the unwritten ones, it may be useful to clarify that the constitution-making process occurs in waves. The reason underlying this assumption is that Constitutions usually reflect a period of crisis[64] or of unique circumstances that may have social or economic nature (1787 American Constitution and 1791 French Constitution); they may be produced by a Revolution (1848 French and German Constitutions); be the outcome of a collapsing regime and even the fear of its disruption (mid-1970s Southern European and 1990s Eastern European constitutions, 1958 French Constitution and 1791 Polish Constitution); triggered by a war defeat and the post-conflict reconstruction (Germany and Italian experiences after the First and Second World Wars and France in 1946); generated by the birth of a new polity (post-war Poland and Czechoslovakia); born in the aftermath of colonial rule (third world countries after Second War conflict).

After exceptional conditions trigger the constitution-making path, other factors influence the process and shape its outcomes like reason, interest, and passion, as argued by Elster[65]. Following the configuration of particular conditions and factors, the theory of popular sovereignty plays an important role. The theory precisely requires a popular selected convention enabled to write the Constitution, and a referendum expressing popular consent to ratify the text[66]. Already in the 1780s, the constitution-making process of Massachusetts and New Hampshire Constitutions pioneered the partial application of the doctrine.

According to Lutz, popular sovereignty stands also as one of the premises generating the amendment process whose analysis will be investigated later in this text.

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[63] Jon Elster, *Forces and Mechanisms in the Constitution-Making Process* (vol. 45 Duke Law Journal 1995).

[64] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press 2009).

[65] Elster (n 63).

[66] Donald S. Lutz, *Toward a Theory of Constitutional Amendment* (vol. 88 The American Political Science Review 1994).

Among the consequential moments of constitutional design, Widner[67] lists those of drafting, consultation, deliberation, adoption, and finally ratification, whereas a prior phase has been identified by Banting and Simeon[68] and corresponds to the mobilization of interests, namely the idea-generating stage[69]. However, the phases may be summarized as in Figure 1.1[70].

Figure 1.1 – Stages of the constitution-building process

Source: Erin C. Houlihan and Sumit Bisarya, Practical Considerations for Public Participation in Constitution-Building (Policy Paper no 24 International IDEA 2021)

What matters in the context of this dissertation is the space devoted to public participation, namely the democratic tenure of the process that proves distinctive in the constitution-making path[71]. Being the Constitution the Supreme Law has demonstrated above, "it requires the greatest level of legitimation in democratic theory"[72]. As a result, public ratification of the constitutional text has been a growing practice since the end of the Second World War, as shown in Figure 1.2.

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[67] Jennifer Widner, *Proceedings, Workshop on Constitution Building Processes* (Princeton University 2007).

[68] Keith G. Banting & Richard Simeon, *Redesigning the State: The Politics of Constitutional Change* (University of Toronto Press 1985).

[69] Justin Blount, Zachary Elkins, and Tom Ginsburg, *Does the Process of Constitution-Making Matter?* (vol. 5 Annual Review of Law and Social Sciences 2009).

[70] Erin C. Houlihan & Sumit Bisarya, *Practical Considerations for Public Participation in Constitution-Building* (Policy Paper no 24 International IDEA 2021).

[71] Blount, Elkins, and Ginsburg (n 69).

[72] Ibid 36.

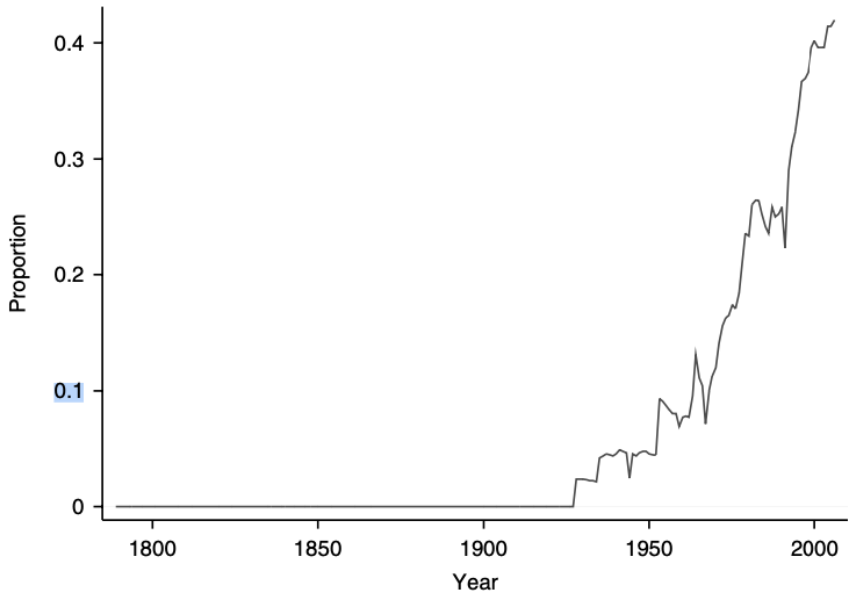

Figure 1.2. – Proportion of standing constitutions providing for public ratification

Source: Justin Blount, Zachary Elkins, and Tom Ginsburg, Does the Process of Constitution-Making Matter? (2012).

Public participation may take place in different ways. The most common ones are: ratification referenda that enhance popular legitimacy in authoritarian or transitioning regimes (1980 Chile, 2014 Egypt, 2020 Guinea, 2005 and 2010 Kenya, and 2008 Ecuador); elections of a constitution-making assembly or representatives promising constitutional reform in their electoral campaigns (Bolivia in 2005, Chile in 2013, Sri Lanka in 2015 and Mongolia in 2017); consultations that concretize in consultative referenda (1976 Spain, 1990 Colombia, 1992 South Africa and Canada, 2012 Iceland, 2015 Luxemburg); submissions of popular comments (2021 Egypt, 2011-2014 Tunisia, 2011-2013 Iceland, 2016-2017 Mexico City); surveys or questionnaires (2002 Kenya, 2017-2018 Gambia, 2008-2012 Nepal); in-person meetings (1995 Uganda, 1997 Eritrea)[73].

Acknowledging the diffusion of people's involvement in constitution-making paths proves crucial because, according to Elkins et al.[74], a positive correlation exists between public participation and the lifespan of a Constitution.

[73] Houlihan & Bisarya (n 70).

[74] Elkins, Ginsburg, and Melton (n 64).

Moreover, as pointed out by the Comparative Constitutions Project[75], there is a further correlation between public participation methods during the Constitution's adoption and the inclusion of specific democratic institutions and rights in the final text[76].

The constitution-making process thus also consists of public choices. One of the aspects that should be decided during the path is the degree of continuity with the framework the new Constitution is supposed to replace, namely whether there will exist any "systematic relationship"[77] between past and present.

Consequently, during the constitution-making process, tension arises around the question of whether to defer to the old Constitution or to completely disrupt the previous constitutional order. The dilemma proves important because when a new Constitution is to be drafted and the constitution-making process begins, it comes right after a period of crisis, as above mentioned, during which a social and political framework has experienced extraordinary events that are not legal in nature. The choice of endorsing a new constitutional order thus becomes "a political decision"[78] and without it, the new legal and constitutional framework cannot be produced.

According to Kelsen[79], when the Constitution remains intact or it changes following its own provisions, the related legal order remains the same as in the past situation. In this case, continuity prevails. Conversely, when constitutional change occurs illegally, discontinuity takes place as a revolution originates from the illegal practice, and the past legal order is eventually replaced by a new system.

What is subject to change is the original identity of the previous system, what Kelsen[80] calls "the basic norm" detectable in the historical first Constitution, or "the rule

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[75] The Comparative Constitutions Project was lunched in 2005 by Zachary Elkins, Tom Ginsburg, and James Melton. It is a non-profit organization that aims at filling the informational gap in constitutional design issues by providing comparative legal experts systemic data to exert their tasks ad advisors.

[76] Blount, Zachary Elkins, and Ginsburg (n 69).

[77] John Finnis, *Revolutions and Continuity of Law* (vol 4 Oxford Academic 2011) 420.

[78] Zsolt Körtvélyesi, *Continuity, Discontinuity and Constitution-Making: A Comparative Account* (Hungarian Academy of Sciences - Institute for Legal Studies 2016) 6.

[79] Kelsen (n 48).

[80] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1934/2002).

of recognition"[81] in Hart's view that is the presumption of validity of a rule or a system generated by its constant application as a legal norm. Whether legally or illegally this change occurs, it explains the continuity or discontinuity patterns of the future system[82].

However, much debate has emerged around the several shades this theory entails. Indeed, the different ways a revolution may materialize may not be considered as all leading to the same outcome, thus to the discontinuity of law and the establishment of a new system. It is worth distinguishing those acts that even if subverting the rules of succession to office like *coup d'état*, do not violate the rules of succession of rules, that are those provisions disciplining amendment, suspension, or replacement of rules[83]. This latter set of rules seems to constitute the identity of a Constitution.

The disruption of colonial rule over a territory may be a useful example of how difficult is to assess an event as a revolution or not. For instance, when Pakistan acquired an independent status from Britain in 1947, the Indian Independence Act transferred the rule-making authority over that territory to the Constituent Assembly of Pakistan.[84] However, this Act was not a revolutionary Act providing for completely new provisions. Indeed, it complied, in continuity, with the rules of succession of rules of British constitutional culture. Undoubtedly, a new State was born but it still carried the legal identity and the validity of the Constitution of the former ruler.

Since Pakistan seems to derive its source of validity and legitimation from British constitutional law, does this mean that the two polities are irrevocably connected? Hart would reply to this assumption by stating that when a territory gains independence from colonial rule, its rule of recognition, *de facto,* is not influenced in any aspect by the way it was created, namely an Act of Independence granted by the colony and, logically, by the ex-homeland Constitution[85]. Kelsen's theory of discontinuity appears here discarded and analytical troubles emerge about the very definition of continuity and discontinuity.

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[81] Herbert L. A. Hart*, The Concept of Law* (Oxford: Clarendon Press, 1994), 109.

[82] Finnis (n 77).

[83] Ibid.

[84] Finnis (n 77).

[85] Hart (n 81).

Another interesting view in the debate is that of Alf Ross[86], who considers the final rule in the chain of rules, the one that permits the amendment of the Constitution as being immune to legal change, thus continuing to exist in successive constitutional systems.

However, agreeing with continuity patterns in constitutional succession seems to be conceivable only by interpreting the legal system and its provisions as not just a set of rules. In this regard, Finnis argues that "the continuity and identity of a legal system is a function of the continuity and identity of the society in whose ordered existence in time the legal system participates"[87] and expands by stating that "Legal, like pre-legal, social rules have no common identity or basis of existence in time save that of the group of human beings which accepts them"[88]. Thus, continuity appears here to be subject to social acceptance, and not directly derived from the past or the "first" Constitution.

In contrast to this view, McIntosh[89] argues that the debate about continuity and discontinuity cannot be restricted to a matter of individual norms of a system, seemingly to Ross's assumption about unchangeable amendment provisions. Instead, it defers to a problem of the temporal existence of a system as a whole and refers to concerns about sovereignty and the Constitution of a State, giving legitimacy to a legal order. When the Constitution is challenged and the sovereignty replaced by revolutionary events, a new order is established.

Once again the speculative debates about theories' validity may seem to hold a meaning *per se*. However, the theory of discontinuity is instrumental in assessing the degree of rupture with the past of constitutional amendments. The discontinuity theory could be applied when the amendments introduce radical changes to the previous version of the Constitution. Then the theory can be linked to the evolution of legal thought in the context of the amendments especially when they affect rights, justice, or the structure of the State. Finally, the discontinuity theory could be applied to emphasize how constitutional changes represent a "discontinuous" or distant response from previous conditions. The choices made during the process influence the endurance of the

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[86] Alf Ross, Jakob v. H. Holtermann & Uta Bindreiter, *On Law and Justice* (Oxford, 2019).

[87] Finnis (n 77) 428.

[88] Ibid 429.

[89] Simeon C. R. McIntosh, *Continuity and Discontinuity of Law: a Reply to John Finnis* (vol. 21 Connecticut Law Review 1998).

constitution, but also the balance between rigidity and flexibility, between the need for stability and the demands of change.

1.2. Balancing rigidity and flexibility

1.2.1. What do they mean?

Every Constitution must strike a balance between the demands of change and the need for stability. Rigid and flexible Constitutions approach this balance differently. James Bryce established this categorization in his *Studies in History and Jurisprudence*[90]. According to Bryce, "some constitutions […] are on the level of the other laws of the country" and "are promulgated or repealed in the same way as ordinary laws"[91]. These are flexible Constitutions that can be changed by regular legislative processes. They are therefore susceptible to powerful majorities.

Flexible Constitutions are not the product of recent times. They date back to "the very beginning of organized political societies, being the first form which the organization of such societies took"[92]. Indeed, they represented the rule of constitutionalism, at least until the nineteenth century. Bryce identifies the origin of constitutional flexibility in the presence of a supreme legislative authority organized in a regular community of citizens (the Primary Assembly) which was the only existent and legitimate body entitled to pass laws. Being the unique holders of this function, these leading men could "at any moment change the laws they deem fundamental"[93].

Therefore, constitutional texts of this kind were subject to ordinary processes of change. Nowadays, reminiscences of complete constitutional flexibility exist in a few instances like New Zealand, whose Constitution does not require special amending procedures to be modified, supplemented or repealed[94]. A wider perspective on the subject will be provided later in the dissertation when other examples of flexible and rigid Constitutions will be provided.

On the other hand, rigid Constitutions denote a relatively advanced stage in political development, when significant experience in government and political affairs has been accumulated, and when the concept of separating fundamental laws from other

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[90] James Bryce, *Studies in History and Jurisprudence* (vol. 1 Oxford University Press 1901).

[91] Ibid 128-129.

[92] Ibid 167-168.

[93] Bryce (n 90) 138.

[94] Elster (n 63).

laws has grown familiar[95]. These are those Constitutions which "stand above the other laws of the country which they regulate" and "if it is susceptible of change, it can be changed only by that [higher] authority or by that special person or body"[96]. Constitutions of this kind are thus rigid, possessing special procedures for amendment and admitting constitutional change only by strict procedures.

Precisely, they began to appear in the global constitutional framework after the nineteenth century, although primary instances were traced back to the seventeenth century. The latter were rudimentary Constitutions among which the royal charters of the British colonies settled in North America account, along with the 1653 Instrument of Government promulgated by Oliver Cromwell meant to stand beyond the English Parliament[97]. Drawing from these experiences, the first elements of democratic constitutionalism materialize and popular sovereignty gains momentum.

However, true rigid Constitutions officially emerge when the Constituent Assembly becomes a representative body and an established system of representation appears, leading to the clearcut distinction between the authority of the people and that of the elected representatives[98]. Thus, afterward, the Constitution becomes the byproduct of the will of the people.

According to Kelsen[99], along with the evolution of democratic constitutionalism, "the practice of judicial review of the constitutionality of all acts"[100] originates and the role of the constitutional courts develops "to provide a full institutional explication of the idea of legal objectivity and to realize the utopia of legality"[101]. Hence, this intrinsic interdependence paves the way for aggravated procedures of constitutionality review of laws, commonly employed by Constitutional or Supreme Courts. This interrelation represents the very core of contemporary constitutionalism, aimed at protecting the higher standing of the Constitution.

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[95] Bryce (n 90).

[96] Elster (n 63) 129.

[97] Bryce (n 90).

[98] Ibid.

[99] Kelsen (n 48).

[100] Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford Academic 2009) 145.

[101] Ibid.

Nonetheless, the evolution from flexible to rigid Constitutions has not prevented controversy in historical constitutional experiences. Indeed, before World War II, most Constitutions were still ambiguous in this regard. As a result, during the 1920s and 1930s, many European Constitutions were essentially overturned by the introduction of statutory law, which eliminated any protection for basic rights or the separation of powers, even while they were still legally in place. Fascist Italy is a prime example, as the regime abolished the liberal *Statuto Albertino* despite it being still legally binding.

What determines whether a Constitution is rigid or flexible is the level of entrenchment of the amendment rules. Primarily, it is worth highlighting again that the most reliable and suitable feature that distinguishes the modern Constitution from ordinary law is the former's higher degree of stability. Nonetheless, there are some exceptions to this rule, like the resistance of the French Civil Code to the succession of several Constitutions in France[102].

Ultimately, even in rigid or more stable texts, which eventually enjoyed significantly greater support over the past two centuries than flexible-type Constitutions, constitutional innovation cannot be prevented. The extent to which the alteration of a Constitution occurs and flexibility prevails over rigidity is a matter of constant debate, as will be shown in the next sections.

1.2.2. Jefferson v. Madison

Therefore, finding a balance is not easy and straightforward. In this regard, the conflicting views between James Madison and Thomas Jefferson, two of the American Founding Fathers, are instrumental.

On 6th September 1789, Jefferson, while serving as American minister to France, wrote a letter to Madison stating the paramount assumption which led to the foundations of living constitutionalism, such as "the earth belongs to the living and not to the dead"[103]. The aim was evident: people should be enabled to withdraw their consent to laws belonging to the past generation. Jefferson expanded by calculating the length of a generation in 18 years and 8 months, drawing from Buffon's mortality tables and assuming that a Constitution "naturally expires at the end of 19 years. If it be enforced

[102] Rosenfeld & Sajó (n 1).

[103] Timothy Brennan, *Thomas Jefferson and the Living Constitution* (The Journal of Politics 2017) 937.

longer, it is an act of force not of right"[104]. Jefferson believed that since "the dead have neither powers nor rights"[105] it was wrong to use the Constitution to bind future generations.

Jefferson's assumption may sound somewhat extremist. However, it is the purpose of this dissertation to present it as a reasonable progressive idea, rather than disruptive or fanatical. Jefferson thus believed that all laws, including the Constitution, should automatically expire. The President was extremely skeptical about the tacit consent that successors give to former Constitutions and his view was strongly in contrast with John Locke's. The latter, indeed, believed that people's consent may or may not be conveyed through explicit constitutional deliberation and tacit agreement should be common practice since "no political community could obtain evidence of consent on a continuous basis"[106].

Jefferson's ideas about constitutional expiration are reflected in various U.S. State Constitutions and in that of Micronesia, where Congress is required by Art 14 Section 1 to ask voters every ten years whether to summon a convention to modify or alter the Constitution[107].

However, on 4th February 1790, Madison replied to Jefferson's letter highlighting the value of constitutional stability by saying that alterations to the Constitution should only be made on "great and extraordinary occasions"[108] and that the document was "sacred". Aristotle's belief that unpredictability in the laws would erode the concept of law itself and Edmund Burke's "habits of obedience" are only two of the many views on the value of stability that Madison could draw upon for support. Moreover, in Federalist

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[104] *Thomas Jefferson to James Madison, September 6, 1789*, *with Copies and Fragment, from the Works of Thomas Jefferson in Twelve Volumes*. (Federal Edition, Paul Leicester Ford).

[105] Ibid.

[106] Brennan (n 103) 937.

[107] Houlihan & Bisarya (n 70).

[108] Alexander Hamilton & James Madison, *Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention From the New York Packet* (Federalist Paper 49, 1788).

43, Madison assumed that even constitutional amendment rules may render the Constitution extraordinarily mutable[109].

As a result of his victory, the U.S. Constitution is one of the most difficult to amend. It has existed for more than 220 years, and just 27 changes have been made since its inception in 1789. But although the material constitution has changed significantly due to judicial interpretation, the formal Constitution has virtually remained the same.

1.2.3. Is choosing possible?

It is argued that fundamental arrangements of the institutions of a country usually prove stable and enduring because they have been adopted during "constitutional moments"[110]. The concept of moments of "higher lawmaking"[111] developed by Bruce Ackerman, refers to times of extraordinarily high public participation, that alter fundamental ideas either with or without textual modifications. These moments are characterized by the following conditions: they extraordinarily attract public interest, they directly involve a mobilized opposition, and they encompass the endorsement of legal initiatives based on merits by the majority of the people's support[112]. All these particular features make constitutional moments limited in history.

This theory precisely explains why "constitutional arrangements have greater normative force than ordinary law"[113]. In the case of U.S. history and according to Ackerman, three constitutional moments have occurred: the 1787 Founding, when the federalists succeeded in getting the people to approve the Constitution despite the Articles of Confederation's procedures; the Reconstruction Era, when the 13th and 14th Amendments were ratified without the genuine consent of three-fourths of the States; the New Deal, when Roosevelt bullied the Supreme Court into expanding the reach of federal intervention; and the Civil Rights movements in the 50s and 60s.

Not every constitution has lasted this long. For instance, since 1791 France has had fifteen different constitutions. Remarkably, a Constitution only lasts an average of 17

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[109] Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective* (University of Chicago Public Law & Legal Theory 2011).

[110] Ackerman (n 24).

[111] Ibid.

[112] Ray (n 49).

[113] Rosenfeld & Sajó (n 1) 213.

years also due to pre-legal factors like coups, revolutions, military defeats (Japan, 1946; Iraq, 2003), leadership changes (for example, in Latin America, from liberal to socialist governments leading to the adoption of new Constitutions), secessions and state mergers, and the transition from a unitary to a federal form of state. The inclusiveness of the adoption process, the adaptability of the amending process, and the document's specificity are some elements that support the durability of the Constitution.

Along with Jefferson and Madison's claim, scholars have debated the effects of the Constitution's rigidity[114]. It is argued that the latter promotes democratic self-government preventing a polity from being consumed by frequent discussions about how to change its institutions which eventually hinders the effective collective action in a democracy. Moreover, stability facilitates the preservation of minority rights and inclusion for future generations.

Another concern revolves around the potential for a temporary political majority to use flexible amendment processes to secure long-term power, thereby undermining the essence of constitutionalism. Constitutional stability is seen as a safeguard against momentary majorities attempting to entrench themselves in power[115].

Although extensive flexibility poses severe threats to democracy, it is incontrovertible that the rapid pace of social change and technological development each polity constantly undergoes "put great pressure on constitutional stability"[116] since rules work "as long as they are useful"[117]. If the demand for change increases, the obsolescence of laws crystalizes, and more flexible procedures for amendment are required.

To balance the challenges posed both to flexibility and rigidity, specific procedural and substantial limits have been applied to the practice of constitutional amendment. The following sections and chapters precisely aim to define the concept and explore its characteristics.

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[114] Dixon (109).

[115] Ibid.

[116] Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty* (Coase-Sandor Institute for Law & Economics 2014) 3.

[117] Ibid.

1.3. Constitutional change

1.3.1. An overview

The speculative debates around doctrines and the ways theoretical principles have implications in factual circumstances have fostered specific legal and social patterns guiding diverse constitutional practices, including that of constitutional reform, namely the way Constitutions respond to change.

To determine its role, it is worth starting from the definition of amendment power. The latter was originally attributed to the constituent power acting as an extra-legal body (above ordinary law) in reforming constitutional provisions[118]. However, throughout time the constituent power has empowered the constituted power, namely the executive and the legislative, to amend the Constitution via the adoption of constitutional statutes that are legally considered as highly ranked as the constitutional text. This power delegation has been limited in its function substantially (explicitly or implicitly) and procedurally.

Substantially, by the expression of formal *eternity clauses*, explicit parts of the Supreme Law enshrining the core values of a polity that cannot be amended by the constituted power but require the constituent endorsement to be reformed or are simply eternal. Additionally, by the costume of implicitly considering the identity of a State's Constitution as non-amendable.

Procedurally, by providing for onerous reform procedures that make constitutional change more difficult than amending ordinary law, commonly existing in rigid constitutional texts. In this way, the Constitution can give higher protection to rights, by devoting its function to the fulfillment of constitutionalism values[119] that have been presented above.

After the historical first Constitution (as Kelsen calls it[120]) is drafted, the constituent power is eliminated. In certain respects, though, it is still hidden in the master-text Constitution, "the highest posited law within the legal system"[121], specifically in the constitutional amendment process, disciplining its own change.

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[118] Masterman & Schütze (n 7) 52.

[119] Xenophon Contiades & Alkmene Fotiadou, *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020).

[120] Kelsen (n 48).

[121] Contiades & Fotiadou (n 119) 46.

In terms of nomenclature, a constitutional reform occurs when a section of the text is rewritten, or new material is introduced: this practice is defined as amendment. The expression “to amend” derives from the Latin word *emendare* which means “to free from fault”[122] or to find a remedy.

As a consequence, the amendment is commonly understood as that procedure enabling the people and the lawmakers to update the Constitution in a situation of obsolescence or unsuitability of the Supreme Law, without incurring the adoption of a new Constitution. In this regard, Article 28 of the 1793 French Constitution stated that “Un peuple a toujours le droit de revoir, de reformer et de hanger sa Constitution. Une génération ne peut assujettir à ses lois les générations futures”[123]. Hence, through the amendment the Constitution may get rid of an error, or adapt itself to the ever-changing social, economic, and jurisprudential framework the text refers to.

An amendment may concretize in deletions, namely removals of specific clauses or articles from the Constitution, additions of sections, or substitutions of existing parts with other entirely new ones.

As a result, “an amendment is not merely a change”[124]. Indeed, it may be an adjustment of constitutional values to political and social changes like Article 9 of the Italian Constitution adding environmental protection to the constitutional values of the Italian polity, or the incorporation of a wider understating of constitutional principles in light of the current time like Article 51 of the Italian Constitution about gender equality, or to further adjust the institutional design of a government.

Therefore, changing the Constitution is everything but a pure legal practice. It is rather both “a legal and political phenomenon that fuses the normative and factual together”[125]. It thus ensures peaceful and negotiated change within a constitutional order and is commonly subjected to “clearly prescribed rules of change”[126] which will be analyzed in the next chapter.

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[122] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 39.

[123] Bagni (n 5) 25. English translation: "*A people always has the right to review, reform and change its Constitution. One generation cannot subject future generations to its laws*".

[124] Ralws (n 60) 238.

[125] Contiades & Fotiadou (n 119) 26.

[126] Albert (n 122) 39.

1.3.2. Constitutional amendment

Before detailing what constitutional amendment is and the functions it holds, it is worth starting with what amendment is not. Constitutional change, indeed, may occur also through constitutional revision, which is an exhaustive rewriting of the entire document.

Conversely to amendment, the revision entails fundamental changes to the Constitution and amounts to "potentially far-reaching changes to fundamental political rules"[127]. As it affects the core values of a polity, it requires more demanding procedures to be put in place. It is more costly because it requires more time, it makes old issues newly present and debatable, and may be illegal, as in the context of a coup d'état[128].

Revising a Constitution therefore triggers the discontinuity of the legal order, being a transformative and disrupting change within a framework that ceases to be the same. Schmitt clarifies the concept of amendment and that of revision by making their distinction a matter of authority. Indeed, the latter originates from the authority to "establish a new Constitution" and to "change the particular basis of [the] jurisdiction"[129], whereas "an amendment alters the constitution harmoniously with its spirit and structure"[130].

Albeit constitutional revision is rarely disciplined in the text, the Spanish Constitution represents a relevant exception. In Spain, constitutional change is regulated by Part X of the Constitution. Article 167 establishes the requirements for ordinary amendment (three-fifths majority) as will be detailed in Chapter 2, whereas Article 168 is specifically devoted to partial or total revision. The latter refers to alteration affecting "[…] the Introductory Part, Chapter II, Division 1 of Part I, or Part II […]"[131] and its approval requires: a qualified two-thirds majority in both the Houses; the dissolution of the *Cortes Generales;* a two-thirds majority in the new elected Houses; the ratification by referendum. The analysis of Articles 167 and 168 becomes explanatory of the greater tenure constitutional revision holds in terms of change if compared to ordinary

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[127] Blount, Elkins, and Ginsburg (n 69) 31.

[128] Elkins, Ginsburg, and Melton (n 64).

[129] Schmitt (n 40) 150.

[130] Richard Albert, *Amending constitutional amendment rules* (Oxford University Press and New York University School of Law 2015) 667.

[131] Constitution of Spain 1978, Art 168.

amendment. The latter, indeed, embodies a lower degree of entrenchment since it does not commonly affect the fundamental values of a country, being in continuity with the constitutional order it occurs within.

Although the study of constitutional amendment has found wide scope in literature, its investigation may start from the premises of the practice. Along with popular sovereignty, Lutz[132] identifies other three aspects lying in the background of amending procedures and specifically referring to the American experience. They are "an imperfect but educable human nature, the efficacy of a deliberative process, and the distinction between normal legislation and constitutional matters"[133].

The first factor indicates the fallibility of the human being that may find a remedy on experience. If applied to institutional matters, the concept implies that procedures for changing flawed institutions or counterbalancing human error should be constitutionally guaranteed.

For instance, it may happen that change is required due to a typographical error in the text, as occurred in the Caribbean country of Saint Lucia[134]. When disciplining the access to the appellate jurisdiction of the Caribbean Court of Justice, the text cross-referred to Section 107, instead of Section 108, consequently burdening the procedure with a referendum requirement instead of a parliamentary vote. The "fault" of the text was undoubtedly a drafting mistake. Nonetheless, the legislators could not circumvent the written procedures and had to emanate a referendum to proceed with the amendment. The remedy was eventually achieved by a court order to correct the text. In this case, the use of amendment procedures resulted in the reparation of imperfections.

Hence, one use of constitutional reform implies that "Amendment rules […] operate against the backdrop of human error"[135] and they are the instruments through which constitutional inadequacy and shortcomings in addressing political, social and economic issues affecting the community may be readjusted[136].

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[132] Lutz (n 66).

[133] Ibid 356.

[134] Albert (n 122).

[135] Ibid 42.

[136] Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability* in Roger D. Congleton and Birgitta Swedenborg (eds), Democratic Constitutional Design and Public Policy (MIT Press 2006).

As far as the deliberative process is concerned, amendment rules are required to enhance public debate and deliberation about the legal and constitutional decisions that best suit the common interest of the people and incentivize peaceful political transformations. This functional use has been called "pacifying purpose"[137] and dates back to the 1787 U.S. Federal Convention during which the Funding Father George Mason irrevocably acknowledged the irremediability of constitutional amendments and suggested making them regular and legally guaranteed in order to avoid violent change.

The third premise enumerated by Lutz deals with the need to preserve the higher stand of the Constitution in comparison to ordinary law by requiring more complex procedures to be set in place.

Constitutional amendment may be categorized into procedural (formal) or substantial provisions. In general, formal provisions create a "legal and transparent framework"[138] within which political actors can navigate to modify the Constitution. This framework lists special requirements such as thresholds of approval, quorum, temporal limitations, subject matter restrictions, and further conditions[139] that will be later detailed. They consist of the text-codified procedures of reform, that are, procedurally, what distinguishes ordinary law from a codified Constitution, namely formal amendment rules[140]. These rules thus entail also the way, the temporal restrictions, the agent, the place (in terms of the initiating institution or body of the polity), and the object of the constitutional text modification.

The formal circumstances under which the need for change may emerge are multiple and diverse. Moreover, it is argued that codified constitutional amendment rules are precisely set to "protect the present from the future"[141], and "precommit future political actors to the entrenched choices of the constitution's authors"[142], promoting continuity, as defined above, when change is forcibly required.

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[137] Albert (n 122).

[138] Contiades & Fotiadou (n 119) 119.

[139] Albert (n 122).

[140] Contiades & Fotiadou (n 119).

[141] Albert (n 122).

[142] Contiades & Fotiadou (n 119) 119.

The intent to preserve continuous harmony within social change is perfectly explained by the theory of precommitment established by Elster[143]. The theory, indeed, states that burdening amendment rules are often a symbol of distrust toward the successors. This feeling of distrust binds the future generation and finds its authoritative representation in the eternity clauses that will be later analyzed.

One eminent example of this kind is *The Fundamental Constitutions of Carolina*[144], codified by John Locke who made them unamendable witnessing an "inordinate confidence in their [the designers] own political wisdom coupled perhaps with an equally inordinate lack of confidence in successor generations"[145].

Along with this use of formal amendment, it does exist also the aim of making constitutional law predictable by building a precise and codified legal framework within which constitutional reform can occur, which usually follows the rules that will be presented thereafter.

Functionally, amendment rules represent the way lawmakers counterweight the judiciary's role in informal constitutional amendments definition. Dixon[146] argues that this function is twofold: it lets political actors to influence courts or to trump their decisions. Accordingly, the reforms circumvent previous courts judgments and bind them by new interpretations of the Constitution.

It is the case of *Oregon v. Mitchell*[147] through which the Supreme Court of the United States established a minimum voting age in the context of federal elections but did not do the same for state and local ones. The decision was circumvented and nullified by the Congress-adopted Twenty-Sixth Amendment that reversed the court judgment making the voting right of eighteen-years-old citizens and older in all the United States undeniable.

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[143] Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press 2000).

[144] The Fundamental Constitutions of Carolina: March 1, 1669, North Carolina Colonial records. Locke's Works (Eighth Edition).

[145] Ibid 43-44.

[146] Dixon (n 109).

[147] *Oregon v. Mitchell* [1970] 400 U.S. 112 SC.

Along with being a check-and-balance instrument, amendment rules may be functionally used to promote democracy by making democratic constitutional rewriting the way people can exert their counter-majoritarian rights[148].

Another functional use that has been paramount in recent history is the management of differences in a community. According to Contiades and Fotiadou[149], "formal amendment rules may also promote the substantive dimensions of democracy, namely its counter-majoritarian and minority-protecting purposes", supporting the rule of law and the stability of the Constitution as long as minority rights are guaranteed[150].

For instance, after the Socialist Federal Republic of Yugoslavia dissolved in 1992, a mosaic of conflictual cultures and political affiliations emerged. To manage this diversified framework, the amendment power was fragmented among Croats, Bosniaks, and Serbs whose overall participation in the constitutional reform procedure, crystalized in the requirement of a supermajority in the Parliamentary Assembly, was made a *conditio sine qua non* constitutional alteration cannot occur. Another evidence of differences' management is Kiribati, where a representative of the Banabans must forcibly give consent to the amendment affecting the related community.

Furthermore, amendment rules hold a symbolic function, that of promoting democracy[151]. It is an incontrovertible fact that constitutional reform implicitly carries the responsibility of giving the polity a way to express its inherent values. This use has been exemplified by the 2008 Cuban constitutional modification which proclaimed socialism as a fundamental feature of the country and by the Ukranian Constitution.

In the first case, from 2008 onwards, the Cuban Constitution has indicated its socialist foundations as being unamendable and has differentiates the latter from all the other sections of the text. By limiting amendment rules application to the other parts, constitutional reform has become a method of expressing a clear "constitutional hierarchy of importance"[152] according to which socialism is more important than the other values.

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[148] Albert (n 122).

[149] Contiades & Fotiadou (n 119) 121.

[150] Roger D. Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (Cambridge University Press 2011).

[151] Contiades & Fotiadou (n 119)

[152] Albert (n 122) 48.

In the Brazilian Constitution, a privileged position is devoted to federalism, like that of socialism and religion in the Cuban one[153].

Secondly, the Ukrainian constitutional text distinguishes human rights and freedoms, national independence, and territorial integrity from the other constitutional provisions by assessing the former as unamendable.

A similar situation of hierarchy is crystalized by constitutional texts that provide for several amendment procedures having different degrees of entrenchment for different parts of the Constitution. Evidence of this symbolic function may be detected in the Constitution of the Republic of South Africa which devotes the most demanding requirements to amendments affecting the constitutional declaration of values, whereas the other middle and lower entrenching rules are required to reform the Bill of Rights, the National Council of Provinces, the provincial matters, and all the other constitutional sections, respectively.

Indeed, the more firmly a provision is established, the greater its constitutional significance. Complete resistance to formal amendment, often referred to as unamendability, represents the most robust affirmation of a provision's importance[154].

Generally speaking, constitutional amendment occurs very frequently among world countries, and it is commonly preferred to constitutional revision, as shown in Figure 1.3.

[153] Contiades & Fotiadou (n 119).

[154] Ibid.

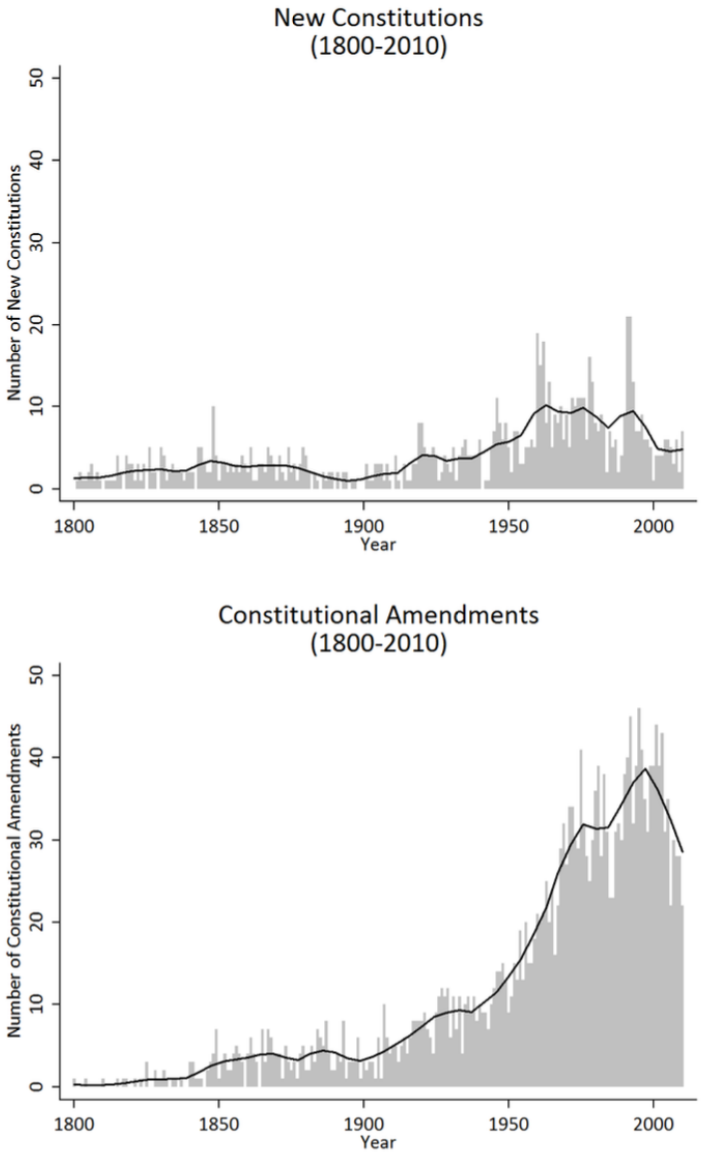

Figure 1.3. – Number of constitutional replacements and amendments per year

Source: Tom Ginsburg & James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty (Coase-Sandor Institute for Law & Economics Working Paper No. 682, 2014)

Every year, about five countries draft new Constitutions, whereas about thirty Constitutions are amended annually.

Since 1950, the number of global constitutional alterations has increased significantly. Certainly, this escalation has been triggered by the waves of new Constitutions adopted after World War II. It may be further assumed that the enlargement of rights whose constitutional protection was deemed fundamental (e.g. environmental

protection, equality rights, etc.) due to the new sensibilities of the 50s and 60s contributed to the increase in constitutional alterations.

According to the study of Elkins et al.[155], constitutional amendment prevails over replacement because of the interaction of three mutually reinforcing mechanisms in constitutional design that make Constitutions endure: inclusion, flexibility, and specificity.

First, involving citizens in the constitution-making process and promoting debate about inclusive constitutional provisions generate attachment to the text and knowledge about its content. Constitutions that are successful win over members of subsequent generations who did not initially approve of them, much less contribute to their formulation but are aware of the content that has been transmitted from past generations.

One eminent example of this kind is the Brazilian Constitution ratified in 1988 which witnessed "extraordinary public involvement"[156] through numerous citizens proposals. This led to the inclusion of 79 out of 117 rights in the text[157] and higher durability in comparison to the average endurance of Latin American Constitutions.

Second, adjustment methods to changing circumstances prevent pressure for constitutional revision.

Third, the degree of specificity in the text enhances clear and transparent knowledge and understating of its provisions, anticipating future social tension about debatable issues. Moreover, specificity ensures that the text remains up to date with current times. However, specificity is also required when the procedures detailing how constitutional change may occur are considered.

After having defined what amendment is, its political, social and jurisprudential functions, and the role it plays globally, in the next chapter, the procedural and substantial limits to amendment that constitutional orders are subjected to will be detailed. Indeed, it proves crucial to explore how Constitutions balance the need for stability and that for innovation, in order not to endanger democracy and investigate which are the risks of extreme rigidity or flexibility of the text. Amendment difficulty will be further measured, drawing from seminal studies conducted in the field, along with the scope of eternity clauses and their implications in contemporary Constitutions.

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[155] Elkins, Ginsburg, and Melton (n 64).

[156] Ibid 79.

[157] Comparative Constitutions Project (n 75).

2. Constitutional (Un)change

Currently, almost every Constitution in the world has developed procedural and substantive means of protection which limit, in terms of disciplining, the practice of amendment. Being "an instrument designed to solve the pre-commitment problem"[158] that is the issue according to which people should be distrusted because of their unpredictability, constitution-makers have always tried to find a balance between the desire to perpetuate a certain legal and social order and that of guaranteeing every generation the right to be governed by a new Constitution in a very Jeffersonian fashion[159].

According to Suteu, "Constitutions are drafted to endure"[160] but their basic provisions are not conceived neither to be "too easily discarded nor ossifying"[161].

Both procedural and substantial limits to constitutional amendment define what Nuno and Botelho call the *a priori* model of constitutional rigidity, distinguishing it from the *a posteriori* one that is embodied by the practice of judicial review of constitutional amendments[162].

However, as will be demonstrated, balancing rigidity and flexibility is not an easy practice, nor it is the intent of classifying countries on the grounds of the limits their Constitutions and their jurisprudential cultures pose to change.

Generally speaking, it may be assumed that stringent amendment rules which are deemed to constrain constitutional change, often trigger the opposite outcome by encouraging informal change via political compromise and judicial activism, especially in the definition of what becomes substantially unamendable.

All these concerns eventually generate more profound questions. The latter are usually related to democracy and to the dialogue between entrenchment clauses and European Law, albeit their realization is not always straightforward.

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[158] Rosenfeld & Sajó (n 1) 394.

[159] Ibid.

[160] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) 1.

[161] Ibid 1.

[162] Nuno Garoupa & Catarina Santos Botelho, *Measuring Procedural and Substantial Amendment Rules: An Empirical Exploration* (German Law Journal, Cambridge University Press 2021).

This Chapter thus explores the nuanced landscape of constitutional amendments, investigating the boundaries imposed by procedural intricacies and substantive principles. The latter are inherent to the constitutional order and exert a profound influence on the extent to which the foundational document can be altered. In this regard, examining the impact of eternity clauses on the mutability of constitutional frameworks becomes crucial in understanding how societies safeguard core tenets from transitory political whims.

Furthermore, the Chapter will deal with the judicial contribution in defining core values of the constitutional fabric, other than the ones explicitly stated in the text. This dynamic interaction between the judiciary and constitutional amendments sheds light on the evolving nature of constitutional interpretation and the judiciary's role in safeguarding the constitutional edifice.

Instead, extensive observations about the dialogue among limits to amendment, democracy, and European Law will be devoted to Chapter 3.

2.1. Limits to constitutional reform

2.1.1. Procedural limits to constitutional amendment

As already mentioned in Chapter 1, the procedural limits to constitutional amendment are those rules that create a clear framework disciplining how constitutional change may occur, constraining the maneuver of political agents. The procedural limits to constitutional amendment support the concept of rigidity of national Constitutions. Indeed, constitutional democracy joined together by having written and rigid Constitutions[163].

These limits have found diverse titles in the doctrine. For instance, they are commonly called "formal" amendment rules and can be clearly and easily detected in written constitutional texts. Although they are defined as rules enabling the practice of constitutional change, they may be further referred to as limits or hurdles[164]. In fact, "they simultaneously authorize political actors to improve the constitution, while limiting how and when political actors may do so"[165].

A unique categorization of these procedures is hard to be find in the doctrine. Several scholars tend to highlight different nuances and elaborate diverse categories which prove often instrumental to the theory of constitutional change they want to highlight.

Among the procedures Elster[166] and Lane[167] both enumerate absolute entrenchment or no change, adoption by a super or qualified majority in Parliament, delays, state ratification (as in federal systems samples), and ratification by referenda. Elster further adds the requirement of a higher quorum than for ordinary legislation whereas Lane highlights the necessity of a confirmation by a second decision.

Absolute entrenchment or no change refers to the practice of protecting rights, principles, and even the form of government or its democratic nature from alteration. These provisions thus become immune to change and acquire the status of eternity clauses. Later, this section will offer devoted space to their analysis.

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[163] Garoupa & Botelho (n 162).

[164] Elster (n 143).

[165] Contiades & Fotiadou (n 119) 117.

[166] Elster (n 143).

[167] Jan Erik Lane, *Constitutions and Political Theory* (Manchester University Press 2nd ed. 2011).

Super or qualified majority, instead, is regulated differently from one national experience to another and often refers to the majority of votes in the Parliament[168]. Commonly, it results in a two-thirds majority as required by German constitutional amendments which require that majority in both the lower and federal chambers (Bundestag and Bundesrat, implying that the Lander have a voice in any change made to the Constitution)[169], whereas France asks for a three-fifths or 60% majority.

As far as delays and the second decision confirmation are concerned, there are eminent examples in Scandinavian countries such as Norway where a parliament must adopt the amendments proposed by the previous parliament, and Sweden where amendment proposals must be ratified by two consecutive parliaments. Instead, in Bulgaria the amendment bill needs to be debated in the National Assembly within one to three months of its introduction. For a constitutional amendment to pass, it requires a three-fourths majority in three separate votes on different days. If a bill receives between two-thirds and three-fourths majority, it can be reintroduced after two to five months, and to pass at the new reading, it needs a two-thirds majority[170].

To further regulate the amendment process, a higher quorum of votes may be required. Commonly, the combination concretizes in a two-thirds quorum combined with a two-thirds majority[171]. The Canadian Constitution, which stands as one of the most difficult Constitutions to amend[172], entrenches amendment by requiring the two-thirds of provinces' approval (covering at least 50% of Canadian citizens) along with the federal parliament's consent[173].

The second confirmation requirement, instead, is defined by Lane as the means to achieve “constitutional inertia”[174] that is not achieved by eternity clauses deemed by the author as not advantageous. Another example of this kind is the Italian Constitution which requires approvals of the two chambers within three months[175].

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[168] Elster (n 143).

[169] Lane (n 167).

[170] Elster (n 143).

[171] Ibid.

[172] Garoupa & Botelho (n 162).

[173] Elster (n 143).

[174] Lane (n 167) 114.

[175] Ibid.

These "devices for constitutional precommitment"[176], as Elster defines the procedural limits to constitutional amendment, can be mixed and combined, in conjunction or disjunction. French Constitution, for instance, states that amendments may pass by a simple majority in parliament followed by a referendum, or by a three-fifths majority in parliament without requiring popular consent.

Norway, instead, merges the procedures by requiring both a delay and a supermajority. These latter two are considered by Elster the most common hurdles to constitutional change. Finland combines delay and second confirmation requiring first a simple majority approval, the elections, and a second two-thirds approval of the new parliament.

However, if the constitutional change is deemed urgent, the second confirmation procedure may be bypassed by a five-sixths majority decision in the first Parliament. In the U.S. constitutional order, Article V Section 1 governs the process of amending the Constitution. Lane defines the process as "the most complicated scheme resulting in high constitutional inertia"[177] combining supermajority, second confirmation, and outside involvement in the process. A two-thirds majority in both the Senate and the House of Representatives must vote for a constitutional change to be imposed by Congress.

Another option would be for the legislatures of two-thirds of the States to request the summoning of an *ad hominem* convention in order to make amendment proposals. Subsequently, in both scenarios, the proposed amendment needs to be approved by three-fourths of the State legislatures (or ratification conventions). The Congress proposes the ratification procedure. It is quite uncommon for the same party to dominate so many States and to hold such a sizable majority in both Houses, making the path an extraordinarily complicated process. This explains why only twenty-seven changes to the Constitution took place, ten of them at the same time.

Moreover, U.S. constitutional rigidity is reflected in the procedural way amendments are inserted in the Constitution. The country exemplifies what Albert[178] calls an *appendative model* of amendment codifications. This typology considers amendments as *addenda* to the master text of the Constitution whose originality is preserved at the expense of a cohesive harmonization between old and new. Indeed, the original words

[176] Elster (n 143) 104.

[177] Lane (n 167) 115.

[178] Albert (n 122).

and provisions are permanent and not replaced by modified rules, but merely nullified in their effect via added amendments entering into force at their place. As a result, the outcome of this model proves twofold: resisting change while witnessing it.

Another instrument of Lane's constitutional inertia is referendum which in cases such as the Romanian Constitution complicates the amendment procedure requiring a two-thirds majority decision in the parliament and a confirming referendum within thirty days.

According to Contiades & Fotiadou[179], it is further crucial to verify whether the referendum requires a simple majority which means the approval of 50% + 1 of those voting or an absolute majority, namely 50% + 1 of those registered or enabled to vote. In the first instance, the people are asked to express a non-compulsory opinion about constitutional matters, whereas in the second example popular approval is deemed as unwavering for constitutional change to occur. The two instances may fit the category of a "direct-democratic model"[180] of amendment in which the people have both the first and final say on constitutional change.

A further seminal contribution to the analysis of procedural limitations to constitutional change is that of Lijphart which is defined as "more parsimonious"[181] than the two above mentioned. The reason is that Lijphart's work is aimed at a comparison of constitutional change mechanisms, rather than at the establishment of a general rule.

The procedures involve the typical ordinary majority procedure which represents complete flexibility[182] and three mechanisms with a different degree of rigidity. They are: the two-thirds majority approval that underlies the necessity for the supporters of the amendment to outnumber the detractors by "a ratio of at least two to one"[183]; approval obtained by a majority that is less than two-thirds but still larger than 50% (such as a majority of 60% or a combination of a parliamentary majority and a referendum); approval by a majority that is greater than two-thirds (such as a 75% majority or a two-thirds majority plus sub-national legislature approval).

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[179] Contiades & Fotiadou (n 119).

[180] Ibid 59.

[181] Ibid 49.

[182] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 2nd ed. 2012).

[183] Ibid.

Lijphart's table (Figure 2.1) exemplifies the classification of thirty-six democracies based upon the requirement of majorities or supermajorities. The indexes in square brackets move between extreme rigidity (4.0) to extreme flexibility (1.0).

Thirty-six democracies classified by majorities or supermajorities required for constitutional amendment (1945-2010)		
1.0 ●——— *4.0* *Extreme flexibility* — *Extreme rigidity*		
Ordinary majorities [1.0]		
Iceland Israel New Zealand	United Kingdom Uruguay	(France before 1974) (Sweden before 1980)
Between two-thirds and ordinary majorities [2.0]		
Barbados Botswana Denmark	Greece Ireland Italy	France [1.7] Sweden [1.5] (France after 1974) (Sweden after 1980)
Two-thirds majorities or equivalent [3.0]		
Austria Bahamas Belgium Costa Rica Finland	India Jamaica Luxembourg Malta Mauritius	Netherlands Norway Portugal Spain Trinidad
Supermajorities greater than two-thirds [4.0]		
Argentina Australia Canada	Japan Korea Switzerland	United States Germany [3.5]

Figure 2.1. Thirty-six democracies classified by majorities or supermajorities required for constitutional amendment (1945-2010).

Source: Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries (Yale University Press 2nd ed. 2012) 208

The problem Lijphart envisages is linked to the supermajorities in Parliament that reflect only small popular majorities, and often represent even a single-party majority decision. This occurred in India, after the assassination of Indira Gandhi, when 48.1% of popular votes attributed 76.5% of parliament's seats to the Congress party.[184] Since the Indian Constitution requires a two-thirds majority approval to be amended and the winning party's deputies outnumbered this proportion in the parliament, logically any amendment proposals of the ruling majority would have been approved, and any proposals of the opponents would have faced hurdles to pass.

Drawing from these findings, it is assumed that constitutional rigidity has a mean index of 2.7. Within the sample, seven countries stand or stood below meaning that the balance between rigidity and flexibility in these countries proves in favor of the latter. They are France until 1974 and Sweden until 1980, Iceland, Uruguay, the United Kingdom, Israel, and New Zealand. Their Constitution is almost unentrenched and the related amendment process is governed by ordinary majorities and corresponds to a completely "elastic model"[185].

Seven countries, instead, stand above the mean index and they are the U.S. (the least flexible), Argentina, Canada, Australia, Switzerland, Japan, and Korea. These latter two have never been altered since their adoption in 1947 and 1987 respectively.

By endorsing this categorization, it may be assumed that less constrained constitutional amendment directly lowers the number of actors that should agree to the alteration which in turn corresponds to a more majoritarian political system[186].

In the middle, showing an index of 2.0, there are Denmark and Ireland. With a strong continuity from the original, which went into effect in 1849 and is now regarded as one of the oldest in the world, the 1953 Danish Constitution is the fourth one to be adopted in that country. Section 88 of the Constitution outlines the process for making amendments. A bill requesting a constitutional amendment is passed by Parliament, starting the process. The Parliament is then dissolved and a new one is chosen at that point. After receiving a second approval, the Bill must be adopted by the new Parliament without any amendments and put to a public referendum within six months. The majority of those voting must approve the bill in order for it to pass. If not, the threshold is lowered

[184] Lijphart (n 182).

[185] Contiades & Fotiadou (n 119) 59.

[186] Ibid.

to only 40% of those who cast ballots in favor. Afterward, the measure needs to be ratified by the monarchy in order to be included in the Constitution.

In addition to the path's intricacy, the Constitutional Act's extremely generic wording has made it possible to interpret it in a way that makes it relevant to this day, rendering amendment less urgent and less frequent than in other constitutional orders.

Among the changes to the 1953 version of the Constitution are the elimination of the Upper Chamber (and bicameralism), the ability for women to inherit the monarchy, and the previously mentioned lower quorum.

As regards Ireland, it is interesting to notice that the text presumably appears untouched and all the current provisions seem original. This is due to the culture of amendment codification that Irish constitutional drafters have endorsed. In the Irish Constitution, indeed, modifications to the text are never signaled. Additions, replacements, and removals of constitutional provisions are invisible to the reader. As a result, the only way to recognize amendments is to compare constitutional texts belonging to different periods. This invisible model of codification merges internal renovation with external resilience, preventing confusion, obsolescence, and harmonization concerns[187]. Actually, the text has experienced 23 amendments since its adoption in 1937[188].

In Spain, where the index instead comes to 3.0, two separate processes are included in the 1978 Constitution: one is for a partial amendment and the other is for a complete revision. An amendment needs the support of three-fifths of the members in both Houses, as stated in Section 167.

In the event that the Houses cannot agree, a Joint Committee is tasked with crafting a compromise text that will be put to a vote by both the Senate and the Congress. The Congress may be able to enact the amendment with a two-thirds majority if this does not result in a three-fifths majority in both houses but the bill still earned a simple majority in the Senate. In any event, if the Cortes Generales approve the amendment, one tenth of the members of each House may call a referendum to ratify the amendment within a period of fifteen days.

Although it has an index of 3.5 in the flexibility-rigidity spectrum, German *Grundgesetz* has been subjected to 38 amendments[189], including those pertaining to

[187] Albert (n 114).

[188] Comparative Constitutions Project (n 75).

[189] Ibid.

rearmament in 1956, emergency legislation in 1968, and significant reforms after reunification. The text, due to the historical roots underlying its adoption, has always held an index related to the number of constitutionally guaranteed rights exceeding the world's average[190].

2.1.2. Substantive limits to constitutional amendment

Along with written procedures, substantial limits constitute the *a priori* model of constitutional rigidity and refer to the substance of a polity, as the essential core of a society that is commonly deemed as immune to change. They may correspond both to explicit and implicit limitations.

The former are those provisions explicitly stated in the constitutional text and defined as "unamendable clauses, gag rules, immutable clauses, entrenchment clauses, or eternity clauses[191]", whereas the latter are those principles whose unamendability has been established, informally, via political or judicial activism.

In this latter regard, there is a greater probability of informal amendments to the constitutional regime through judicial interpretation in cases when the formal procedure of amendment is more stringent. Argentina is here explanatory as it is necessary that an act of Congress establishes a constitutional convention to begin the process of amendment. Being a difficult and structured mechanism of formal change, it is often circumvented by informal judicial interpretation[192].

The same situation crystallizes in Australia, where the Constitution was imposed by the British imperial power in 1900. A constitutional amendment is achieved only as long as the Australian Parliament proposes it, the majority of electors in the majority of the Australian States, and the overall majority of the country's electors give their consent. As a result of the complex formal procedure, since its enactment, the Constitution has been subjected to eight amendments in a 123-years-lifespan[193]. However, constitutional

[190] Comparative Constitutions Project (n 75).

[191] Garoupa & Botelho (n 162) 219.

[192] Mortimer N.S. Sellers, *Formal and Informal Constitutional Amendment* (Global Studies in Comparative Law 2020).

[193] Comparative Constitutions Project (n 75).

innovation and justice in terms of rights, democracy, and the rule of law have been secured through an active and just judicial culture[194].

Furthermore, an example witnessing the prevalence of substantive change on procedural one is Belgium where constitutional reform seems to rely on the substantive needs and demands of the communities, rather than on formal procedures. The instance of the 2011 Sixth State Reform exemplifies the matter. Indeed, the reform which profoundly modified the structure of the Senate, was the outcome of political compromise ensuring the consensus of the linguistic and geographical regions of the country, rather than the product of a formal amendment process. The Reform thus initiated a "new transitional provision in the clause regulating constitutional change"[195], taking place outside existing rules.

These typologies of constitutional change which rely more on substantial and informal alterations rather than on onerous procedural ones correspond to what Contiades & Fotiadou call an "evolutionary model" [196] that encompasses crucial political and judicial activism in the amendment process. This typology contrasts the "pragmatic model"[197] comprising an efficient and less onerous procedural process of constitutional alteration.

After having generally defined what substantial limits are, the next two paragraphs will provide specific examples of their explicit and implicit derivates.

[194] Sellers (n 192).

[195] Ibid 498.

[196] Contiades & Fotiadou (n 119) 59.

[197] Ibid.

2.2. Eternity clauses: a dive into explicit substantive protections

2.2.1. Historical roots of untouchable provisions

Eternity clauses are those constitutional provisions immune to change. They "represent a special mechanism of constitutional entrenchment, one which might be termed indefinite or limitless"[198]. Eternity clauses are located at the extreme side of the rigidity-flexibility spectrum and the drivers of their popularity in contemporary Constitutions possess precise historical connotations.

As demonstrated in Chapter 1, the American and French revolutionary experiences were paramount for the evolution of constitutional theory. The same occurred also for the development of the notion of eternity clauses. Already in 1776, Article 23 of the Constitution of New Jersey made eternal the provision that "establishes that the Election of Members of the Legislative Council & Assembly shall be annual"[199] (Section 3), ensures trial by jury (Section 22), opposes church establishment and gives equal civil rights to Protestants (Sections 18 and 19).

Moreover, in the same year, the Delaware Constitution assessed the Declaration of Rights, the name of the State, its bicameralism, the bound mandates of legislative officers and members, the abolishment of slaves' importation, and of religious sects as unamendable[200].

However, it was in 1884 that the "age of eternity clauses"[201] began, specifically when the 1875 French constitutional laws were amended by adding the limitation "The republican form of government cannot be made the subject of a proposition for revision"[202]. As a result, the republican nature of the French government was declared eternal to avoid the restoration of monarchy. Hence, for the first time in constitutional history, an amendment was clearly prohibited by an explicit constitutional limit.

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[198] Suteu (n 160) 1.

[199] Article 23 of 1776 New Jersey State Constitution (State of New Jersey Department of State 2011).

[200] Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea* (vol. 61 The American Journal of Comparative Law 2013).

[201] Rosenfeld & Sajó (n 1).

[202] Roznai (n 200) 663-664.

Two complemented theories influenced the decision of the French National Assembly, namely the limited maneuver of the amendment power that is a derived constituent power, and its distinction from the original constituent power theorized by Sieyès[203]. The latter is indeed exercised during a revolutionary period when the constitution-making process is commonly initiated, as mentioned above, whereas the former "is exercised under peaceful and legal circumstances"[204] in light of the procedural and substantive limits established by the Constitution.

From theory to facticity, in the aftermath of World War II, the practice of including unamendable provisions in the Constitution increased as a reaction to the atrocities of the fascist liberticide regimes. The aim was clear: to impede any anti-democratic amendment to be approved[205].

It is estimated that from 1789 to 1944 only 20% of the world's Constitutions provided for unamendability mechanisms, while between 1945 and 1988 the figure increased up to 25% to reach 50% since 1989[206].

The latter figure is quite coherent with Roznai's review of 192 constitutional texts which estimates that, up to 2011, 42% of Constitutions have included unamendable provisions in their texts. This reinforces the view of considering the inclusion of eternal provisions in a post-1945 Constitution a symbol of modernism, as it was the adoption of a constitutional text in the aftermath of American and French Revolutions[207].

Along with the growth in absolute numbers worldwide, the degree of length, detail, and complexity of unamendable provisions increased. Before World War II, there were 29.4 words on average per unamendable provision. After, instead, the figure shot up to 39.5.

Previously, unamendable provisions served primarily to safeguard the state's particular form of government. However, following World War II, with the creation of new states, restrictions on the amendment power were expanded to safeguard other aspects of democracy, most notably fundamental rights and freedoms[208].

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[203] Sieyès (n 61).

[204] Roznai (n 200) 665.

[205] Rosenfeld & Sajó (n 1).

[206] Albert (n 122).

[207] Roznai (n 200).

[208] Ibid.

In the following sub-paragraph precise evidence of the eternity clauses inclusion in contemporary Constitutions will be provided.

2.2.2. Samples of eternity clauses

As aforementioned, eternity clauses are those constitutional provisions located at the extreme side of the flexibility-rigidity spectrum, being the strongest device constitution-makers use to bind future generations to a certain configuration of power, order, and rights.

Although eternity clauses all share the same constraining nature, they differ in what they insulate from alteration. One may distinguish between open or general clauses and specific clauses.

The first commonly refers to provisions safeguarding the fundamental features of the State, namely the nature of the ruling regime[209] which can be identified as republican or monarchical, the territorial layout of the nation, such as federal or unitary, the degree of territorial integration, or the country's religious or secular connotations.

The second broad category corresponds to the clauses protecting fundamental rights, democratic values such as participation and pluralism, or the rule of law itself[210].

2.2.2.1.Fundamental features of the State

The protection of republicanism, along with being the most ancient eternity clause, further proves the most popular in constitutional practice. It accounts for "more than one hundred constitutions"[211] on the globe.

For instance, it is enshrined in Article 89 of the French Constitution[212] which resembles to the original 1884 amendment of Constitutional Laws, and in the Italian Constitution. The latter, at Article 139, irrevocably declares that "The form of Republic shall not be a matter for constitutional amendment"[213].

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[209] Elster (n 143).

[210] Suteu (n 160).

[211] Ibid 22.

[212] Constitution of France 1958, Art 89.

[213] Constitution of the Italian Republic 1947, Art 139.

In the same spirit stand Article 288(b) of Portugal's Constitution[214], Article 60(4) of the Brazilian Constitution[215], Article 268 of the Dominican Republic Constitution citing that "No modification to the Constitution may deal with the form of government which must always be civil, republican, democratic, and representative"[216], and Article 152(1) of the Romanian Constitution[217].

Conversely, monarchism is safeguarded by Article 120(c) of Bahrain's Constitution[218], and by the Constitution of Cambodia[219] in Articles 17 and 153, Morocco[220] in Article 175, and Thailand[221] in Section 255.

However, according to Suteu[222], the protection of monarchism profoundly differs from that of republicanism. Indeed, the first should be deemed as the preservation of an undemocratic structure of power in continuity with the past, while the second is rooted in its opposition, as a reaction to the former, and as a commitment to the people's constituent power and to the democratic choice.

In this regard, turning back to the Italian case, the protection of republicanism has acquired different meanings in the doctrine and fueled debate. According to Cartabia and Lupo[223], republican choice derived from 1946 referendum does not uniquely represent a reaction to the Fascist regime but should be conceived as the choice of a democratic form of State. Consequently, as stated by Article 1 of the Italian Constitution, the choice establishes that sovereignty belongs to and is exercised by the people, implying more fundamental principles to be insulated from amendment rather than just the republican form of state. This implicit limit to constitutional change will be among the subjects of the next section.

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[214] Constitution of the Portuguese Republic 1976, Art 288 para b.

[215] Constitution of the Federative Republic of Brazil 1988, Art 60 para 4.

[216] Constitution of the Dominican Republic 2015, Art 268.

[217] Constitution of Romania 1991, Art 152 para 1.

[218] Constitution of the Kingdom of Bahrain 2002, Art 120 para c.

[219] Constitution of the Kingdom of Cambodia 1993, Artt 17 and 153.

[220] Constitution of the Kingdom of Morocco 2011, Art 175.

[221] Constitution of the Kingdom of Thailand 2017, S 255.

[222] Suteu (n 160).

[223] Marta Cartabia & Nicola Lupo, *The Constitution of Italy: A Contextual Analysis* (Hart 2022).

As far as territorial architecture and unitary statehood are concerned, federalism deserves particular scrutiny. German *Grundgesetz*[224] establishes at Article 20(1) of the Basic Law the federal organization of the State. This Article acquires absolute entrenchment, along with other basic principles, through Article 79(3)[225].

The Brazilian Constitution, instead, at Article 60(4)(I) declares that "No proposed constitutional amendment shall be considered that is aimed at abolishing the following: [I] the federalist form of the National Government".

In both instances, federalism and the federal power deriving from it have been instrumental for the confirmation of the constitutional review of amendments by the German Constitutional Court and Brazilian Supreme Federal Court[226].

Regarding the unitary nature of the State to be protected by eternity clauses, eminent examples encompass Article 236(d) of Angola's Constitution[227], Article 102(a) of Guinea-Bissau's one[228], Articles 91(2) and 152(1) of respectively Kazakhstan[229] and Romania[230]'s Constitutions. The aim is straightforward: to safeguard "any centrifugal forces"[231].

Turning to the unamendability of territorial integrity, it proves particularly popular in post-colonial, post-authoritarian, and post-communist countries[232]. Evidence may be detected in Azerbaijan's Constitution[233] at Article 158, along with Article 142 of Moldavian[234], Article 100 of Tajikistan's[235], Article 248 of El Salvador[236]'s Constitution, and in the aforementioned eternity clauses of Kazakhstan, Romania, and Portugal.

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[224] *Grundgesetz*, Basic Law for the Federal Republic of Germany 1949.

[225] Lane (n 167).

[226] Suteu (n 160).

[227] Constitution of the Republic of Angola 2010, Art 236 para d.

[228] Constitution of the Republic of Guinea Bissau 1984, Art 102 para a.

[229] Constitution of the Republic of Kazakhstan 1995, Art 91 para 2.

[230] Constitution of Romania 1991, Art 152 para 1.

[231] Suteu (n 160) 28.

[232] Ibid.

[233] Constitution of the Republic of Azerbaijan 1995, Art 158.

[234] Constitution of the Republic of Moldova 1994, Art 142.

[235] Constitution of the Republic of Tajikistan 1994, Art 100.

[236] Constitution of the Republic of El Salvador 1983, Art 248.

Then, the Constitution of Ukraine[237] also declares at Article 157(1) that "the *liquidation of the independence* and *violation of the territorial indivisibility of Ukraine*"[238] is entirely banned.

Territorial indivisibility is deemed crucial for a country's survival against both external and internal dismemberment forces as witnessed by Kurdish separatist claims in Turkey, and in Ukraine in 2014 with the question of Crimea and the 2022 Russian invasion.

Furthermore, unamendability may also refer to religion, secularism, or language.[239] The first materializes in Article 234(3) of Algerian[240], Article 177 of Iranian[241], and Article 1 of Tunisian[242] Constitutions, along with the already enumerated Bahrein's and Moroccan eternity clauses. In these countries Islam is recognized as official religion of the State and its status is irrevocable.

Conversely, secularism or the separation of church and state is enshrined in the eternity clauses of Angola and Portugal, and in Article 4 and Article 220 of respectively the Turkish[243] and Congolese[244] Constitutions.

Moreover, no alteration to the official language of the State may occur in Algeria whose Constitution at Article 234(4)(5)[245] states, among other principles, that "Arabic as the national and official language" and "Tamazight as a national and official language" cannot be amended. The same occurs in Bahrain, Moldova, Romania, and Turkey.

2.2.2.2.Rights, democratic values, and the rule of law

The second category deals with the absolute entrenchment of clauses protecting rights, democratic values, and the rule of law in general. To exemplifies this, exploring

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[237] Constitution of Ukraine 1996, Art 157(1).

[238] Michael Hein, *Impeding constitutional amendments: why are entrenchment clauses codified in contemporary constitutions?* (Macmillan Publishers Ltd 2018).

[239] Roznai (n 200).

[240] Constitution of the People's Democratic Republic of Algeria 2020, Art 234 para 3.

[241] Constitution of the Islamic Republic of Iran 1979, Art 177.

[242] Constitution of Tunisia 2014, Art 1.

[243] Constitution of the Republic of Turkey 1982, Art 4.

[244] Constitution of the Democratic Republic of the Congo 2005, Art 220.

[245] Constitution of Algeria (n 231) para 4-5.

Article 79(3) of the German Constitution (*Grundgesetz*), that is German eternity clause, is instrumental. The Article establishes that "Amendments to [this] Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible"[246].

The entrenched Articles establish the inviolability of human rights and dignity, their legally binding force for the legislature, the judiciary and the executive (Article 1), the sovereignty of the people that originates and binds State authority through elections, the democratic and federal nature of the State, and the right of resistance of constitutional disruptive actions (Article 20). This means that those rights are completely immune to change.

The same situation of irrevocability configures into the Bulgarian Constitution at Article 57 which declares that fundamental rights are unchangeable[247].

Controversial examples of specific eternity clauses are Article 175 of Niger's Constitution which declares the irrevocability of Article 185 granting amnesties "to the authors, co-authors and accomplices of the coup d'Etat of eighteen (18) February 2010"[248], although the subjects of this protection are defined as "perpetrators of human rights violations"[249].

Interestingly, the 2003 Constitution of Qatar is unique[250], as Articles 145 and 147 insulate the state's inheritance and the Emir's functions from change, and Article 146 states that "The provisions relevant to the rights and public freedoms may not be subject to request for amendment, except within the limitations intended to grant more rights and guarantees for the interest of the citizen"[251] establishing a threshold for rights that can be only incremented.

Ecuador's Constitution with Article 84 and 441 states that an amendment shall not "endanger the rights recognized by the Constitution"[252] and "does not alter the fundamental structure or the nature and constituent elements of the State, does not set

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[246] *Grundgesetz* (n 224) Art 79 para 3.

[247] Elster (n 143).

[248] Constitution of the Republic of Niger 2010, Art 185.

[249] Roznai (n 200) 669.

[250] Ibid.

[251] Permanent Constitution of the State of Qatar 2003, Art 146.

[252] Constitution of the Republic of Ecuador 2008, Art 84.

constraints on rights and guarantees, and does not change the procedure for amending the Constitution"[253].

However, the more specific the eternity clause, the more constraints on democracy. The tension between constitutionalism and democracy also derives from this. Portuguese eternity clause is here explanatory. Indeed, the longest unamendable clause in the world[254] is Article 288 of Portugal's Constitution. It states that "Constitutional revision must respect: a) National independence and unity of the state; b) The republican form of government; c) Separation between church and state; d) Citizens' rights, freedoms and guarantees; e) The rights of workers, works councils, and trade unions; f) The coexistence between the public, private, and cooperative, and social sectors of ownership of the means of production; g) The existence of economic plans, within the framework of a mixed economy; h) The appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; i) Plural expression and political organisation, including political parties, and the right of democratic opposition; j) The separation and interdependence of the entities that exercise sovereignty; l) The subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission; m) The independence of the courts; n) The autonomy of local authorities; o) The political and administrative autonomy of the Azores' and Madeira's archipelagos".[255] This means that multiple subjects cannot be democratically debated in Portugal, because of their unamendability[256] and risk, more than in other constituencies, of becoming outdated.

The "hyper-rigidity" brought about by a long and detailed explicit clause may lead one to agree with Botelho who argues that "[…] each Constitution has a life of its own, which flows from the interaction of the society and the political players. There is no way to democratically block societal change and prevent self-governing. The more a

[253] Ibid Art 441.

[254] Garoupa & Botelho (n 162).

[255] Constitution of the Portuguese Republic (n 205) Art 288.

[256] Catarina Santos Botelho, *Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain* (European Journal of Law Reform 2019).

constitutional text invests its energy in blocking change, the more severe that change will be"[257].

Albeit even Portuguese Article 288 was amended in 1989 in the context of a comprehensive alteration of the Constitution and its "obsolete and politically biased norms"[258]. Indeed, the political and economic configuration of Portugal was inconsistent with 90' political changes and the eternity clause was *de facto* innovated. Notwithstanding, it remains *de jure* untouchable in today's practice.

Interestingly, on the other side of the eternity clauses' specificity spectrum stand those entrenchment provisions committed to the spirit of the Constitution. For instance, Norway's Constitution, that is the second oldest Constitution in the world after the U.S. one, declares in Article 121 that an amendment cannot "[…] contradict the principles embodied in this Constitution" or "alter the spirit of the Constitution […]"[259]. The clause purposely leaves blurry contours on the distinction between explicit limits to constitutional change, namely eternity clauses, and implicit ones[260] and it "ranks among the most open-ended of all existing clauses on substantively nonamendable norms"[261].

This particular type of clauses generally encourages judicial activism in adopting the doctrine of implicit limits and establishing the unamendability of principles and values not explicitly stated in the constitutional text. This latter doctrine will be the topic of next paragraph.

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[257] Botelho (n 256) 14.

[258] Ibid 25.

[259] Constitution of the Kingdom of Norway 1814, Art 121.

[260] Suteu (n 160).

[261] Eivind Smith, *Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway* (vol 44 Israel Law Review 2011) 373.

2.3. Implicit limits to constitutional amendment

As far as constitutional reform is concerned, it has been highlighted that, worldwide, multiple ways of legally materializing innovation exist. The suitability to reflect societal change differs from one constitutional order to the other and it is commonly conditioned to the legalistic procedural aspects of each constitutional text.

However, constitutional change is further subject to implicit limitations, frequently established via an *a posteriori* model of judicial review of constitutionality. These constraints make a proposed change permissible in procedure but illegal in facticity because it materially transgresses an implicit boundary.

A Constitutional Court usually classifies it as an unconstitutional constitutional amendment. In a manner akin to the judicial scrutiny of legislation, constitutional courts are tasked with determining whether or not such amendments are constitutional.

Commonly, countries adhere to the traditional philosophy of amendments, which states that any modification that complies with the procedural conditions outlined in the Constitution is legitimate. For example, this is valid in Switzerland, Australia, and Canada.

Nonetheless, the Supreme or Constitutional Court may rule that an otherwise lawful amendment is invalid in highly developed constitutional states like the United States, Germany, South Africa, and India due to implicit limitations.

Therefore, a procedurally valid amendment may be discarded by its unconstitutionality. The concept is rooted in the doctrine of the basic structure, primarily generated by the Indian Supreme Court jurisprudence. In the following sub-paragraph, this doctrinal approach will be explored.

2.3.1. Basic structure doctrine

The Indian Constitution has been frequently defined as an "ever-evolving living document"[262]. Indeed, it exhibits an integrative model of amendment codification. According to this approach, amendments are entirely integrated into the master constitutional text, and "once inserted into the existing constitution, these amendments can replace, alter, add, or delete text"[263]. This model enhances transparency and clarity,

[262] Albert (n 122) 237.

[263] Ibid 236.

producing a harmonious constitutional text. The latter also reflects the conservatism of the Indian Supreme Court's doctrine establishing implicit limits to constitutional change.

This complementarity results in a text that appears coherent to the living facticity of Indian polity while resilient to changes carrying fundamental meaning. The Indian Supreme Court, indeed, argued that it possesses an "unwritten mandate to protect the basic structure of the Constitution against unconstitutional constitutional amendments"[264].

One example that perfectly fits the category is the Indian Constitutional system generated by the adoption of the post-independence Indian Constitution on 26th January 1950 and its basic structure doctrine. This doctrine is the result of a protracted land reform dispute between the judiciary and the legislature[265]. Several Indian states established laws to promote agricultural reform in the years after the Constitution was ratified. In that context, the "*zamindari* system," which previously allowed wealthy landowners known as *zamindars* to extort taxes from smaller landowners, was eliminated by the legislative amendments. The government was also able to offer varying rates of compensation for the acquisition of land thanks to the reforms.

However, landowners opposed the legislative measures, arguing in court that they had equal rights to their property. Parliament responded by enacting the 1951 Constitution (First Amendment) Act[266]. The latter modified the Indian Constitution's sections about Fundamental Rights in several ways. It made it clear that the principle of equality does not exclude the adoption of legislation that gives special consideration to the weaker segments of society, validated *zamindari* abolition measures, and gave ways to limit freedom of speech and expression.

In 1952, the Supreme Court also dismissed an attempt to declare the First Amendment unconstitutional on the grounds that constitutional changes could not be used to violate fundamental rights. Crucially, though, a few years later, the Supreme Court determined that any private property acquired by the government for a public purpose had to be paid a just equivalent and that the determination of what constituted a reasonable equivalent could be challenged in court. The Constitution (Fourth Amendment) Act was

[264] Rosenfeld & Sajó (n 1) 396.

[265] Masterman & Schütze (n 7).

[266] Ibid.

subsequently passed by Parliament, shielding the entire process of the state's acquisition of private property from court scrutiny.[267]

The Supreme Court heard challenges to constitutional amendments about land reform in a sequence of cases that started in 1951 with *Sankari Prasad v. Union of India* and ended in 1973 with *Kesavananda Bharati v. State of Kerala*[268].

Throughout this period, two pillars of the Indian constitutional order have been established by the Supreme Court: the express limits to constitutional amendments stated in Article 13 which made them subject to judicial review, and the implied limits to constitutional amendments which became subject to basic structure review.

The latter review is precisely related to the *Kesavananda* case which stands as the seminal initiator of the basic structure doctrine. The Supreme Court, indeed, concurred that Constitutional innovation would have never occurred if amendments affected the basic features or the basic structure of the Constitution.

The constitutional features that have been explicitly considered unamendable by Chief Justice Sikri were namely the supremacy of the Constitution, the republican and democratic form of government, secularism, the separation of powers between the legislative, the executive and the judiciary, and lastly federalism[269].

However, judicial activism of the Supreme Court in assessing further concepts as irremovable has generated strong criticism among scholars, undermining the very legitimacy of the doctrine. Indeed, the Court has been frequently accused of acting *ultra vires,* using its power of judicial review "beyond constitutional boundaries"[270].

One of the reasons underlying the scope widening of the doctrine is the lack of unanimous agreement about the nature of the basic constitutional features, along with the legal methods to identify them. Consequently, the scope of the basic structure proves blurry and indefinite, although its application has been consistent throughout the years, as witnessed by paramount litigations such *as Indira Gandhi v. Raj Narain* and *Minerva Mills v. Union of India*[271].

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[267] Masterman & Schütze (n 7).

[268] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: a study of the Basic Structure Doctrine* (Oxford University Press 2010).

[269] Masterman & Schütze (n 7).

[270] Krishnaswamy (n 268) xvi.

[271] Ibid.

It was precisely after these latter cases that the basic structure doctrine's legitimacy seemed to have been restored. In fact, the doctrine resulted in a powerful instrument in the hand of judges to limit government usurpation of fundamental rights during the 1975-1977 state of emergence.

This represented an extremely significant development in Indian constitutional history. The Congress Party's leader and third Prime Minister of India, Indira Gandhi, had narrowly prevailed in the 1967 election. Mrs. Gandhi led the Congress Party to a more convincing election victory in 1971, despite her lack of favor with some Party members. But the Allahabad High Court quickly heard a challenge to her election to the Parliament on the grounds that she had engaged in election fraud. The government proclaimed a state of emergency after the Court nullified her election and before the Supreme Court could rule on the merits of her appeal. Soon after, multiple constitutional changes were passed, thereby shielding a number of government actions from judicial examination. These included legislation pertaining to censorship, the election of a Prime Minister, and other policies that violated fundamental rights.

In the Election case, *Indira Gandhi v. Raj Narain*, the Supreme Court ruled that the Thirty-Ninth Amendment, which attempted to shield the Speaker and Prime Minister elections from judicial review, was an unconstitutional constitutional amendment because it went against the fundamental framework of the Constitution[272].

Therefore, the application of the basic structure doctrine in the constitutionality review of amendment may prove fundamental in avoiding constitutional anti-democratic alterations.

Simultaneously, it may also represent a powerful instrument of abuse that constrains beyond reasonability the amendment attempts to the Constitution. After its establishment, the doctrine has been implemented in several constituencies which will be detailed hereafter.

2.3.2. Italian *interpretazione sistemica*

Evidence of the application of the doctrine may be detected in the Italian experience. After the enactment of the 1948 Italian Constitution, the eternity clause

[272] Masterman & Schütze (n 7).

enshrined in Article 139 began to be interpreted in an expansive way, through what is commonly referred to as *interpretazione sistemica* [273] (systemic interpretation).

Consequently, Article 139 is read in function of Articles 1 and 2 of the constitutional text which highlight the democratic nature of the State, the sovereignty of the people, and the inviolable rights of the individual. As a matter of fact, the scope of Article 139 has been expanded to include what the doctrine calls implied limits to constitutional amendment.

The approach has been further endorsed by the Constitutional Court in the exercise of review of constitutionality of amendments, via the eminent judgment 1146/1988[274] which established that "La Costituzione italiana contiene alcuni principi supremi che non possono essere sovvertiti o modificati nel loro contenuto essenziale neppure da leggi di revisione costituzionale o da altre leggi costituzionali. Tali sono tanto i principi che la stessa Costituzione esplicitamente prevede come limiti assoluti al potere di revisione costituzionale, quale la forma repubblicana (art. 139 Cost.), quanto i principi che, pur non essendo espressamente menzionati fra quelli non assoggettabili al procedimento di revisione costituzionale, appartengono all'essenza dei valori supremi sui quali si fonda la Costituzione italiana"[275].

Therefore, the principles of democracy, inviolable rights, and the core of the Constitution itself have been declared untouchable values[276] whose supremacy poses limits even to the direct effect European Law is meant to have on the country. This tension has been extensively debated in the context of the *controlimiti* doctrine which will be explored in Chapter 3.

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[273] Dawn Oliver & Carlo Fusaro, *How Constitutions Change: A Comparative Study* (Hart Publishing 2013).

[274] Judgment no. 1146 [1988], Italian Constitutional Court.

[275] Judgment no. 1146 [1988], Italian Constitutional Court, para 2.1. Free English translation: "*The Italian Constitution contains certain supreme principles that cannot be subverted or modified in their essential content even by constitutional revision laws or other constitutional laws. These are both the principles that the Constitution itself explicitly provides for as absolute limits to the power of constitutional revision, such as the republican form (Article 139 of the Constitution), and the principles that, although not expressly mentioned among those that cannot be subjected to the constitutional revision procedure, belong to the essence of the supreme values on which the Italian Constitution is based*".

[276] Oliver & Fusaro (n 273).

2.3.3. German jurisprudence

Along with the aforementioned experiences, Germany's Constitutional Court first significant ruling, the 1951 *Southwest State* case, further provides evidence for the implicit limits theory.

On that particular occasion, the Federal Constitutional Court used Rudolf Smend's integration theory of the Constitution, in similarity with the Italian *interpretazione sistemica.* This theory holds that the Constitution should be viewed as a single, internally cohesive entity. This means that every clause in the *Grundgesetz* needs to be read in a way that makes sense in relation to the rest of the document. This approach has generated a speculative idea according to which a hierarchy internal to constitutional law exists.

As a consequence, certain fundamental concepts in the Constitution are considered so crucial that they cannot be changed. Since some constitutional provisions are lower on the hierarchy than others, the Court has the authority to declare them void if they conflict with the more fundamental ideas.

The 2004 Eavesdropping case is one of the more recent incidents. In 1998, Article 13 of the German Constitution which guaranteed the inviolability of the home was amended. A third paragraph to the article was added and it curtailed the related right, allowing public authorities to place bug-listening devices in the houses of serious crime suspects[277].

In 2004, the amendment was opposed on the grounds that it might be interpreted as violating both Article 1's human dignity concept and Article 79's eternity clause. Indeed, it was argued before the Court that the new Article 13(3) violated the immortality clause and constituted an illegal constitutional change because the inviolability of the home is directly linked to human dignity.

However, the First Senate of the German Constitutional Court reached a different conclusion from the one expected. The court emphasized the strong relationship existing between the inviolability of the home and the principle of human dignity. This connection creates an area of intimacy that every citizen is entitled to, along with an untouchable right to privacy[278]. Despite guaranteeing all these principles, the Court has ultimately

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[277] Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case* (vol. 3 International Journal of Constitutional Law 2005).

[278] Ibid.

assessed the amended Article 13(3) as conforming to the challenged eternity clause because it only authorized the legislator to pass provisions in line with human dignity's value.

The Court thus concurred that eavesdropping operations targeting present or future crimes were not considered as belonging to the area of intimacy of citizens and consequently to their inviolable right to human dignity. As a result, the First Senate interpreted the 1998 amendment "in a manner consistent with the Basic Law's fundamental principles and its systems of values"[279]. Besides, if a provision or a constitutional modification proves open to different interpretations that even make it unconstitutional, it is relevant to advocate for the interpretative approach in line with the essential values of the constitutional text.

Further German judgments on human dignity immutability deserve proper mention. For instance, the Air-Transport Security Act of 2004 was challenged before the Federal Constitutional Court due to arguably permitting the intentional killing of a crime's victims perpetrated by the State. According to the complainants, the Act was violating their fundamental rights to human dignity and to life. The Court[280] declared the complaint admissible since the infringement of the human dignity clause of Article 1(1) GG immediately accounts for unconstitutionality, given the ultimate protection of this fundamental value considered unamendable beyond reasonable doubt[281].

Moreover, the inviolability of human dignity has been affirmed by: the 1979 ruling on the Prisoners' Right to Vote[282]; the 1980 Pardon Refusal Case[283]; the 1986 Xenia case[284]; the 2010 decision on Data Retention[285]; the 2019 judgment on Surrogacy Ban[286]. The 1975 Constitutional Court's ruling on Abortion[287] and the 1994 decision on the Right

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[279] Nohlen (n 277) 683.

[280] 1 BvR 357/05

[281] Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act* (Cambridge University Press 2019).

[282] BVerfGE 58, 208

[283] BVerfGE 53, 30

[284] BVerfGE 72, 200

[285] BVerfGE 125, 260

[286] 2 BvR 328, 17

[287] BVerfGE 39, 1

to Die[288] which both relate to an issue of human dignity violation will be detailed in Chapter 3.

Generally speaking, implicit limits to constitutional amendment appear enriched by the inviolable principles of a Constitution. This wider practice and its indefinite scope further constrain the space of maneuver of constitutional change.

2.3.4. The Venice Commission

Further evidence of contraposition between procedure and substance exists in the Venice Commission's opinion on Slovenia's constitutional matters. The independent consultative body of the Council of Europe, known as the Venice Commission or the European Commission for Democracy through Law, is entrusted with giving Co-member states legal advice regarding their legislative initiatives. It upholds the democratic, human rights, and rule of law ideals that are central to constitutionalism. A member state may request the Venice Commission's advice on proposed or passed laws. While the advice is not legally binding, most States heed it.

The Venice Commission has eminently ruled upon a case pertaining 1991 Slovenian Constitution. The text did not contain any provision disciplining the electoral system. During the first political elections, a proportional system instituted by statutory law was employed and eventually produced certain instability issues. For this reason, three different political groups promoted a referendum on the electoral system which was effectively held in 1996. The referendum provided for three distinct proposals: a mixed system, a double-round majoritarian system, and a proportional system. After consulting on the issue, the Constitutional Court decided to keep the three referenda intact. As a result, the majority system, which attracted the greatest preference, only received 44.5% of the total votes[289]. Despite its initial dismissal, the referendum and the winning majority system were declared accepted by the Constitutional Court in 1998. The Court asked the National Assembly to pass legislation to put it into effect. Given that a two-thirds majority is required under the Constitution to alter the electoral legislation, the Assembly was unable to come to a consensus. In order to break the deadlock, in 2000 the National

[288] BVerfGE 94, 49

[289] Danica Fink-Hafner & Meta Novak, *Party Fragmentation, the Proportional System and Democracy in Slovenia* (vol. 20 Political Studies Review 2022).

Assembly amended Article 80 of the Constitution, establishing a proportional system with a threshold of 4%, contrary to the public will expressed by the referendum's result.

Subsequently, on that constitutional amendment's compatibility with European democratic principles, the Slovenian government asked the Venice Commission to formulate a judgment. The three rapporteurs considered two factors: the hierarchy of sources of law and the possibility of a constitutional deadlock and crisis in the activities of a young representative democracy.

With its preliminary legislative nature, the referendum was inferior to the Constitution. The referendum was superseded by the amendment, which was approved in accordance with the constitutional process. The Commission noted in the *obiter dicta* that the Constitutional Court and legislators bear the duty of ensuring that democracy's paralysis is prevented. It highlighted the Italian Constitutional Court's case law, which states that an electoral statute cannot be entirely repealed by referendum since doing so risks impeding Parliament and preventing future elections[290].

The Commission was merely required to determine if the constitutional amendment, which was the Slovenian Assembly's response to a constitutional impasse, was inconsistent with European democratic norms, which it was not. Since it is not its responsibility, it did not, for example, apply the doctrine of unconstitutional constitutional amendment to determine if the amendment was consistent with the core values of the Slovenian Constitution.

Indeed, even if adhering to procedural requirements, the amendment can be deemed unconstitutional because it disregarded the referendum results and the Constitutional Court's verdict, transgressing both democratic and legal principles. This is made even more obvious because, similar to altering the election code, the constitutional amendment required a two-thirds majority to be approved. This was done to avoid enacting a majoritarian system that the majority of parties find objectionable.

2.3.5. Basic Structure Doctrine in Kenya: the Building Bridges Initiative

The 2010 Constitution of Kenya does not provide for eternity clauses establishing the explicit unamendability of certain principles. However, Article 259(3) states that

[290] Hafner & Novak (n 289).

"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking […]"[291].

This Article, read in compliance with Article 257 (the popular initiative mechanism), Article 256 (the legislative route to amendment), and 255 (listing the substantive areas where constitutional change will require a referendum) incentives the debate on whether Kenya's constitutional adjudication should rely on the basic structure doctrine[292].

The question emerged in the context of Kenya's Building Bridges Initiative (BBI) which was launched in 2018 as a response to the political challenges and divisions that developed after the 2017 general elections in Kenya. The initiative was a result of a handshake between President Uhuru Kenyatta and opposition leader Raila Odinga. Its main objectives included addressing issues such as ethnic antagonism, lack of national ethos, inclusivity, devolution, and divisive elections. The Initiative aimed to foster national unity, address historical injustices, and propose constitutional amendments to enhance inclusivity and representation. It involved a series of public consultations and engagements across the country to gather views from Kenyans on potential reforms.

In 2020, a BBI popular initiative to amend the 2010 Constitution was sent, in the form of a draft Amendment Bill, to the Independent Electoral and Boundaries Commission. One of the many improvements included in the measure was the insertion of Part 2(A) in the Constitution declaring in Article 151(A)(1) that "There shall be a Prime Minister appointed by the President […]"[293].

Arguably, the creation of the new position of the *Prime Minister* would have privileged President Kenyatta who may have run for it in the event that he had lost the presidency. Therefore, the Bill, which sought to change the 2010 Kenyan Constitution in a comprehensive manner, was at issue over its constitutionality[294].

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[291] Constitution of Kenya 2010, Art 259 para 3.

[292] Silvia Suteu, *The BBI Judgment: Of Basic Structure Doctrines and Participatory Constitution-Making* (African Law Matters 2022).

[293] The Constitution of Kenya (Amendment) Bill 2020, 9.

[294] Gautam Bhatia, *Basic Structure and Tiered Amendment Processes: The Kenyan Supreme Court's BBI Ruling* (African Law Matters 2022).

Consequently, the Supreme Court of Kenya rendered a historic decision in the "Building Bridges Initiative" case on April 5, 2022[295]. The Supreme Court ruled that the bill was unconstitutional and irregular since the introduction process did not fulfill the constitutional requirement of public participation.

Because of the "tiered amendment process" outlined in Articles 255–257 of the Kenyan Constitution, concerns about legitimacy were magnified in the Kenyan setting. This "tiered amendment process" states that some significant, ingrained clauses of the Kenyan Constitution (found in Article 255) cannot be changed merely by parliamentary supermajorities, but rather call for the direct participation of the People in a referendum or a progressive participatory procedure called the "popular initiative" (Article 257)[296].

It can be argued that the Kenyan Constitution's drafters explicitly outlined a process by which the document's "basic structure" could be changed, given that the document clearly lays out ingrained provisions that cannot be changed absent an act of direct democracy by the people.

Therefore, the Supreme Court believed that the Kenyan Constitution's founders had already taken into consideration and addressed the reasons why a jurisdiction would require a basic structural concept.

In the end, the basic structure concept was rejected by the Supreme Court. It interpreted the Kenyan people's deliberate decision to strike a balance between rigidity and flexibility short of unamendability, as demonstrated by the drafters' silence on the subject and by the tiered amendment design[297].

Moreover, the constitutional text has abundantly shown its tenacity in the face of 21 prior amendment proposals. In an attempt to resolve this complex issue, the Supreme Court rejected the need for a basic structure concept while simultaneously dismissing the BBI package on the grounds that the President had hijacked the popular initiative mechanism for personal interest[298].

Kenya's experience proves particularly explanatory of the clashes between the limits to constitutional change and democracy. Indeed, according to Suteu[299],

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[295] Petition No. 3 [2022] Supreme Court of Kenya.

[296] Bathia (n 294).

[297] Suteu (n 292).

[298] Ibid.

[299] Ibid.

“Unamendability has an often forgotten dark side: while we may wish it to be deployed as a means of last resort in the face of anti-democratic constitutional subterfuge, in reality it frequently ends up a tool to entrench exclusionary values and elite hold on power”.

In the BBI context, the entrenchment provisions, namely the tiered design, required to amend the principles of Article 255 through a highly difficult and democratic amendment process, were not sufficient to avoid political usurpation. The clash between unamendability and democracy will be investigated in the next chapter, along with the eternity clauses' dialogue with European Law.

2.3.6. Context-based unamendability

The historical context in which a Constitution has been drafted may generate specific limits to constitutional amendment. An illustrative example is the Constitution of Japan, which stands in the global arena as the Constitution that has lasted longer without being affected by neither amendment nor revision[300].

The text has also gained the fame of “pacifist Constitution” since it explicitly identifies the renunciation to war as a sovereign right of the Japanese country. It precisely cites that “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized”[301].

This provision has been considered unamendable, due to the historical context in which it was generated. Indeed, the Constitution has been promulgated in 1946 during the American occupation of the land with the intent of preventing other sources of friction and consequent destruction has occurred during World War II[302].

Hence, given the relevance of the context and the nature of the Constitution originating from an International Agreement, both Articles 9 and 96 (the latter disciplining the amendment process) are deemed as not subject to change. Consequently, alteration to these provisions would amount to a total revision of the Constitution, whose procedures are not covered by the text. Since the Japanese constitutional amendment

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[300] ISDP, *Amending Japan’s Pacifist Diet* (Institute for Security & Development Policy 2018).

[301] Constitution of Japan 1946, Art 9.

[302] Ibid.

process proves particularly complex, as it was mentioned above, a rewriting of the text would encounter even more hurdles.

Politics and international forces play a crucial role in the debate whether the Articles can be amended or not. Geopolitically, Japan is historically associated to "imperialism and wartime aggression"[303] and modifying its pacifist tenure is viewed by neighboring China, North Korea and South Korea as a threat. As a result, amendment is likely to significantly increase tensions in the region.

Therefore, the Japanese Constitution coheres to another pattern of substantive limits to amendability, namely the one relying on historical roots and political forces. In Japan, indeed, the question of core values' alteration results in "a matter of constitutional politics"[304] influenced by both historical and geopolitical elements of controversy.

[303] ISDP (n 300) 7.

[304] Albert (n 130) 668.

2.4. Measuring amendment difficulty

As demonstrated by the previous paragraphs, constitutional change is subject to procedural and substantial limits. Both kinds of entrenchment differ from one constitutional experience to another and produce what Lane[305] calls "constitutional inertia".

The latter is characterized by pros and cons. On the one hand, it undergoes the *lex superior* argument about the superiority of constitutional provisions identifying some principles as non-amendable. On the other hand, it clashes with two other legitimate principles: the idea of parliamentary sovereignty and democracy as the sovereignty of the people.

Minorities may use constitutional inertia to further their own agendas. Constitutionalism and democracy, which is understood to mean either simple majority rule or the sovereignty of parliament, are at odds in this instance.

Constitutional inertia, considered as amendment difficulty, has been measured by Contiades and Fotiadou using a typology based on models that differs from the classic ones of Lane, Elster, or Lijphart. The models have been already mentioned in the previous paragraphs but may be summarized as follows: elastic, evolutionary, pragmatic, distrust, and direct-democratic[306]. This categorization specifically pertains to amendment difficulty regarding the first four models and the distribution of constitutional power for the fifth one.

Establishing this classification, Contiades and Fotiadou made a great contribution to the question of whether the balance between rigidity and flexibility may fit models or typologies. Indeed, they demonstrated that while a country perfectly fits a category, it carries some specific features that marginally stand it apart from the original model.

For instance, the direct-democratic model is merged with the evolutionary one in Japan, and mixed with the pragmatic model in Ireland, while Italy juxtaposes it with a distrust model, namely complex amending formulas accompanied by a political culture that faces difficulties in finding a compromise. In the latter case, the referendum represents a balancing instrument between procedural limits and substantial ones[307].

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[305] Lane (n 167).

[306] Contiades & Fotiadou (n 119).

[307] Contiades & Fotiadou (n 119).

Italy further exemplifies the categorization's difficulty as representing a combination of integrative and disaggregative paradigms in amendments codification. The Constitution is thus codified in a manner that allows for amendments through the special method that permits text changes, as well as by the approval of independently codified legislation that modifies the meaning of the Constitution while maintaining the original language. In this regard, 20 disaggregated constitutional measures and 14 incorporated amendments were adopted by reformers in the first 65 years after Italy's 1947 Constitution came into effect[308].

Classifying amendments and their limits generates dynamism and faces relevant hurdles. Indeed, diverse aspects should be considered in the practice, that are not always predictable at first sight.

Whenever constitutional change and the rigidity-flexibility spectrum are explored in function to the risk of paralysis, their analysis irremediably discloses two paradigms: one related to democracy and the other linked to the dialogue with supranational legislation.

Specifically, the question of eternity clauses and generally the notion of unamendability may clash with the guarantee of democratic choice and the compliance of national legislation with European Law. Drawing from the elements previously provided in the dissertation, these dynamics will be debated in Chapter 3.

[308] Albert (n 122).

3. Beyond eternity clauses: the tension with Democracy and European Law

In the intricate tapestry of constitutionalism, the notion of unamendability stands as a powerful sentinel, guarding the core tenets and principles enshrined within a legal order. However, since these principles are subject to societal change and as supranational law may exert direct effect in certain constitutional orders, a captivating and contentious clash opposing unamendability against the very essence of democratic ideals and the nuanced landscape of European law is disclosed.

As already mentioned in Chapter 1, democracies, by their nature, embrace the fluidity of change, allowing the will of the people to mold the legal foundations that govern society. Constitutional change does occur according to specific procedures enumerated in the constitutional text or complying with the requirements established by the jurisprudence, as shown in Chapter 2. Unamendability, on the other hand, resists change as it represents a commitment to safeguarding certain fundamental values deemed immutable, transcending public opinion. In this regard, Section 1 of this Chapter will proceed from the exploration of the fervent precommitment debate fueling scholars of unamendability to the pragmatic analysis of constitutional experiences in which eternity clauses have been paramount to the protection of democracy.

Subsequently, the dissertation will delve into the tension between the unamendable right to life and the generation of new rights that countries worldwide have been recently subjected to. The investigation will attempt to uncover the hardness in finding a balance between past and new, between the being and the becoming, specifically considering the right to abortion and that of euthanasia, without endangering the democratic nature of certain constitutional orders.

Ultimately, always taking into account matters of tension, the Chapter will be concluded with the rulings of the German and Italian Constitutional Courts in eminent adjudications concerning the clash between National and European Law in which arguments based on identity have been juxtaposed to that of unamendability.

In this chapter standing at the end of the dissertation, a nuanced exploration of diverse conflicts dissecting the intricate interplay between unamendability, democracy, and European law will be provided to unravel the complexities surrounding this clash,

seeking a deeper understanding of its implications for constitutional governance and the broader European legal landscape.

3.1. When Eternity Clauses clash with democracy

3.1.1. The precommitment debate

It is worth establishing a definition of precommitment. As anticipated in Chapter 1 and 2, precommitment refers to the intent of preserving a certain social order and structure of power within change. The theory, referred to as "constrain theory", has been established by Elster[309]. According to him, burdening amendment rules, with eternity clauses as *apotheosis*, are often a symbol of distrust toward the successors and a rational instrument to counteract future passions in terms of every emotion or sensation that is contrary to reason. Passion or *akrasia*[310], indeed, may encourage non-rational actions of future generations that could, hypothetically, endanger the democratic nature of a constitutional order.

Holmes perfectly explains the issue: "Present-day citizens are myopic; they have little self-control, are sadly undisciplined and are always prone to sacrifice enduring principles to short-run pleasures and benefits. A constitution is the institutionalized cure for this chronic myopia"[311].

Hence, precommitment is precisely rooted in the intent of Constitution drafters to "resolve the question of constitutional structure not just for ourselves [the drafters, the living generation] but for posterity"[312] as they do not trust successors of the political community enough to leave a blank space, a space of maneuver. Indeed, people may act in the future in a way that is counterproductive to their long-term self-interest and may even be reckless or dangerous[313].

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[309] Elster (n 143).

[310] Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2009) 193. Translation: *"The Greek word 'akrasia' is usually said to translate literally as 'lack of self-control', but it has come to be used as a general term for the phenomenon known as weakness of will, or incontinence, the disposition to act contrary to one's own considered judgment about what it is best to do"* (Routledge Encyclopedia of Philosophy).

[311] Stephen Holmes, *Precommitment and the Paradox of Democracy* (Cambridge University Press 1988) 196.

[312] Lawrence G. Sager, *The Birth Logic of a Democratic Constitution* (Cambridge University Press 2001) 124.

[313] Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process* (Fordham Law Review 1993).

Sager calls it “generational chauvinism” that is needed in the context of an ever-evolving Constitution “obdurate to change”[314]. Precommitment, in this view, should not be confused with time-freezing obstinance. Conversely, it corresponds to the intent of admitting change but at certain conditions. Due to the Constitution’s need for change, “[…] the founding generation [is] constrained to broad issues of structure and general propositions of political justice”[315].

To justify the precommitment practice, Elster uses the suicide metaphor: "Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy"[316]. Although extending the founders’ influence over time is deemed irremediable because of the nature of the human being, drafters are forced to reduce the substantive scope of this influence. To this end, amendment rules are utilized. Elster, indeed, identifies the procedural limits of delays and supermajorities as “the core of constitutional precommitment”[317].

However, Contiades and Fotiadou prefer employing eternity clauses to describe the contours of the notion and cite that “The strongest ‘precommitment’ device is a subject-matter restriction on formal amendment, which constitutional designers entrench to privilege something in the constitutional design by making it unamendable”[318]. In summary, by reason of the unpredictability of future generations, constitutionalism results in holding the aim of alleviating the danger of people’s downfall[319].

However, while avoiding societal suicide, constitutional precommitment alarmingly constrains democratic choice. As a result, the democratic legitimacy of precommitment theory is considerably debated. Supporters of the concept like Holmes argue that “Precommitment is justified because it does not enslave but rather enfranchises future generations”[320]. According to this view, judicial activism in constitutional interpretation plays a relevant role, guaranteeing that the past and the present are

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[314] Sager (n 312) 124.

[315] Ibid 124.

[316] John Potter Stockton, in a debate over the Ku Klux Klan Act of 1871, as cited by Elster (n 134) 89.

[317] Elster (n 143) 115.

[318] Contiades & Fotiadou (n 119) 119.

[319] Suteu (n 160).

[320] Holmes (n 311).

democratically reconciled[321]. Moreover, although there are provisions whose unamendability is constitutionally secured, "[…] extraconstitutional action always remains possible"[322], that is the possibility for the people to subvert a given constitutional order.

In this fervent framework of debate, the clash between precommitment (eternity clauses in particular) with democracy proves inevitable. Indeed, "both [debating] sides agree that there exists a deep, almost irreconcilable tension between constitutionalism and democracy"[323], albeit Elster acknowledges the existence of this tension only "when the agents that exercise the precommitment functions are insulated from democratic control"[324].

It is worth recalling Jefferson's assumption that "the earth belongs to the living and not to the dead"[325] mentioned in Chapter 1 to explain the argument on the subject. Endorsing this view, Thomas Paine argued that "Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow"[326].

Both views are joined by what Holmes calls the "Paine-Jefferson formula"[327], markedly counterbalanced by precommitment supporters who hold to adopt a larger view on the issue. The latter, indeed, consider the formula convincible only if restricted to the short run, namely to the instance of generation *a* succeeding generation *b*. Instead, in the event that generation *c* is taken into account, the Paine-Jefferson formula appears obsolete. According to Holmes, precommitment precisely adjusts the equation by widening its scope of application. It follows that "By means of a constitution, generation *a* can help generation *c* protect itself from being sold into slavery [antidemocratic

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[321] Suteu (n 160).

[322] Elster (n 143) 94.

[323] Holmes (n 311) 197.

[324] Elster (n 143) 165.

[325] Brennan (n 103) 937.

[326] Thomas Paine, *The Rights Of Man*, (HarperTorch 2015) 1.

[327] Holmes (n 311).

outcome] by generation *b*"[328] and "To grant power to all future majorities, of course, a constitution must limit the power of any given majority"[329]. Put in these terms, the argument would proceed that just as Constitutions are not intended to be suicide pacts, so too are amendment procedures designed to prevent democracy's self-detonation. Therefore, eternity clauses, as precommitment's *apotheosis* are designed to lock the door to democracy's implosion[330].

The tension between unamendability and democracy further crystalizes in the precommitment detractors' belief that unamendability betrays "the essential and attractive democratic function"[331] of the capacity to change fundamental laws and institutions. Schwartzberg, who stands among those criticizing the theory, argues that the intent or impulse to alter constitutional norms is not necessarily generated by *akrasia*, namely Elster's unpredictable passion, but it should be conceived as a "a critical activity of democracy"[332]. Indeed, the author considers entrenchment as jeopardizing progress, both moral and legal, as people equate certain unamendable norms to infallibility.

The problem of constitutional unamendability is made more intricate when another typical purpose of constitutional amendment, that has already been presented in Chapter 1, is taken into account: serving as a safety valve by enabling "the people" to circumvent unfavorable judicial rulings through constitutional politics and heightened majorities. This safety valve could be severed if courts are able to review modifications in addition to unamendability, leaving "the people" without a way to challenge the court's decision. The political branches might then resort to more damaging or unstable tactics, such as packing or undermining a court or even changing the current Constitution[333].

Unamendability in the forms of unconstitutional constitutional amendment doctrine is deemed controversial when translated through democracy's lenses, as it faces "obvious problems from the standpoint of democratic theory" and "takes away this safety valve by allowing courts to strike down even constitutional amendments"[334]. However,

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[328] Holmes (n 311) 226.

[329] Ibid.

[330] Suteu (n 160).

[331] Schwartzberg (n 310) 193.

[332] Ibid.

[333] Contiades & Fotiadou (n 119).

[334] David Landau, *Abusive Constitutionalism* (UC Davis Law Review 2013) 233.

its justifiability is better understood when abusive constitutionalism is struck down by the doctrine itself[335], as done by the Indian Supreme Court against Indira Gandhi emergency clauses previously outlined in this dissertation.

As demonstrated by the fervent debate, there exists no unanimous response to the question of whether eternity clauses, as precommitment devices, survive the test of democracy. Both sides thus possess reasonable argumentations shielding their views, at least in theory. In the following section, instead, unamendability will draw its justifications from concrete constitutional contexts.

3.1.2. Unamendability as safeguard

In Chapter 1 the uses of constitutional amendment have been extensively outlined. Indeed, highlighting the importance of the uses of constitutional change proves instrumental in explaining the grounds on which an amendment is legitimate and constitutionally justifiable. The same occurs with constitutional "unchange", namely those situations in which alteration is antagonized. Constitutional modification may hence be constrained by the existence of eternity clauses or the judicial rejection of a procedurally legal amendment due to its substantial unconstitutionality. The meaning and uses of these devices will be here exemplified.

Certain eternity clauses are deemed to precisely protect the democratic nature of the form of government, as in the case of Italy and Germany. In this regard, instead of considering what unamendability prevents, it is better to acknowledge what it permits. A relevant role is here played by militant democracy which is a concept in political theory referring to a democratic system that actively defends itself against internal and external threats, including those posed by anti-democratic forces. The idea is rooted in the belief that certain actions and measures are necessary to protect the democratic system from being subverted or destroyed by individuals or groups seeking to exploit democratic processes to undermine democracy itself. Since it originated in post-World War II Germany as a reaction to the emergence of Nazi authoritarianism, the idea of militant democracy is frequently linked to that country.

However, as it entails striking a balance between the need to advocate for individual liberties and rights and the necessity to defend democracy, the theory is divisive.

[335] Landau (n 334).

Opponents contend that these policies could be abused to target political opponents or stifle dissent, underscoring the need for their prudent and cautious application.

As a result, unamendability as a safeguard materializes when party bans, term limits, and minority rights are completely insulated from change. In the first instance, parties are deemed unconstitutional whenever they represent a reasonable threat to the constitutional order, thus when they are perceived as anti-democratic[336].

In Italy, claims about the urgency of banning neofascist parties gained momentum in recent history. Specifically, the issue was uncovered by international newspapers firstly in their analysis of Forza Nuova's aggression of CGIL headquarters in Rome during the 2021 demonstration against COVID-19 health passes for workers[337]. Secondly, they dealt with the 2024 annual gathering of extreme-right militants in front of the Italian Social Movement (MSI) former headquarters in Acca Laurentia Street in Rome[338].

Controversy precisely emerges in a context of neither clear nor undisputed constitutional commitment of political parties to democratic values and methods[339]. Reference to political parties do exist in the Italian Constitution: Article 49 establishes that "Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes"[340], Article 98 makes unconstitutional merging judicial, military, or diplomatic affiliation with the political one[341], whereas Article XII states that "It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party […]"[342]. As demonstrated, no specific methods or connotations are acknowledged by the Constitution which has left political parties *legibus*

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[336] Suteu (n 160).

[337] Angelo Amante, *Italian senate asks government to ban Forza Nuova neofascist party* (Reuters 2021) available at https://www.reuters.com/world/europe/italian-senate-asks-government-ban-forza-nuova-neofascist-party-2021-10-20/.

[338] Angela Giuffrida, *Meloni urged to ban neofascist groups after crowds filmed saluting in Rome* (The Guardian 2024) available at https://www.theguardian.com/world/2024/jan/08/meloni-urged-to-ban-neofascist-groups-after-crowds-filmed-saluting-in-rome.

[339] Maria Chiara Pacini & Daniela Romée Piccio, *Party Regulation in Italy and its effects* (vol 26 Working Paper Series on the Legal Regulation of Political Parties 2012).

[340] Constitution of the Italian Republic (n 213) Art 49.

[341] Ibid Art 98.

[342] Ibid Art XII.

soluti for the sake of finding a compromise among the opposing political voices of post-war II[343].

Conversely, German *Grundgesetz,* drawing from the failure of the Weimar Constitution, has employed a robust approach toward political parties regulation. Article 21(1) constitutionally regulates political parties, recognizing them as active agents in the formation of people's political will[344], whereas Article 21(2) assesses the unconstitutionality of those parties "[…] 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 […]"[345]. Following this rather stringent regulation, parties have been banned twice by the German Constitutional Court in the post-war history of the German Federation. Specifically, in 1952[346] and 1956[347], the Socialist Reich Party and the Communist Party were prohibited on the grounds of their anti-democratic values and unconstitutionality. In this regard, not only the Federal Constitutional Court established its doctrine in party-bans, but also adopted a comprehensive approach by considering both Article 21 and the unamendability clause of Article 79(3) as interacting in the constitutional protection of democracy[348].

In the context of party-bans, the case of Turkey proves even more consistent. Turkish constitutional order has witnessed twenty-two party-bans in the period between 1961 and 2019[349]. The Turkish Constitutional Court has banned separatist or religious-promoting parties on the grounds that they breached the constitutional unamendable provisions of Articles 2 and 3 about territorial integrity and secularism[350]. Indeed, Article 4, namely the eternity clause of the Turkish Constitution, declares that "The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their

[343] Pacini & Piccio (n 339).

[344] Suteu (n 160).

[345] *Grundgesetz* (n 224) Art 21 para 3.

[346] 2 BVerfGE 1 (1952).

[347] 5 BVerfGE 85 (1956).

[348] Suteu (n 160).

[349] Ibid.

[350] Ibid.

amendment be proposed"[351]. On the same line of argument, in 2008[352], Turkey's Constitutional Court declared that constitutional revisions intended to lift the headscarf prohibition at colleges were illegal because they violated the secularism principle, which is protected by the constitution[353].

Notwithstanding, according to Landau[354], party-banning clauses are not as effective as tiered procedures for amendment and judicial review of amendment constitutionality, commonly none as unconstitutional constitutional amendment doctrine. Indeed, Landau states that "The movements and parties that bear the fruit of abusive constitutionalism are generally too big, and their platforms too ambiguous, to be reasonably banned from the political sphere"[355]. Abusive constitutionalism will be further defined in this section.

As regards unamendability protecting the rule of law, the Czech Constitutional Court jurisprudence is illustrative. The eternity provision of Article 9(2) of the Czech Constitution states that "Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible"[356]. According to the Constitutional Court, this Article was challenged by a case involving a constitutional act in which early parliamentary elections were scheduled and the lower chamber of Parliament was dissolved before its term began. A member of the parliament had started the process, claiming that his personal right to serve out the entirety of his mandate had been infringed[357]. Article 35 of the Czech Constitution contained a procedure for an early dissolution of parliament, but it had not been used in this case. Furthermore, the petitioner claimed that the constitutional act had breached the "substantive core" of the document, which he defined as the principles of non-retroactivity, universality, and predictability of legislation[358]. The claims that the constitutional act was an insult to the identity of the constitution and the integrity of Czech democracy were accepted by the Constitutional Court, who rejected the rights-based challenge. The ruling attempted to support both the

[351] Constitution of the Republic of Turkey 1982, Art 4.

[352] Judgment no. 16 and 116 [2008], Turkish Constitutional Court.

[353] Contiades & Fotiadou (n 119).

[354] Landau (334).

[355] Ibid 217.

[356] Constitution of the Czech Republic 1993, Art 9 para 2.

[357] Suteu (n 160).

[358] Ibid.

court's authority to decide whether the legislation in question was constitutional and the universality and non-retroactivity of the rule of law as components of a "material core" that the court was tasked with policing. In delivering its judgment[359], the Court established its competence on the review of Article 9(2) and introduced the ground of a material structure doctrine[360].

Unamendability, jointly with the power of the courts to review the constitutionality of amendments, is a tool to protect democracy against abusive constitutionalism. The latter is defined as "the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before"[361].

Landau provides one example of successive reaction to abusive constitutionalism that occurred in recent history. Colombian President Alvaro Uribe Velez tried to overrule the democratic safety valve of limited presidential mandate to one term. Indeed, profiting from high popularity and consensus, he succeeded in proposing a constitutional amendment to extend the presidential mandate to two terms. Procedurally, it was easy for him to overcome the required absolute majority of Congress in two consecutive sessions, and when asked to judge the constitutionality of that amendment, the Constitutional Court was not able to reject it. However, when the same occurred four years later, in the attempt to further extend the mandate to three terms, the Court concurred that there were substantial limits to the constitutional amendment justified on the grounds of democratic erosion of the Colombian institutions[362]. In this precise case, the adoption of the unconstitutional constitutional amendment doctrine and the implied unamendability of the democratic nature of the institutions resulted in a safeguard for the Colombian constitutional order.

Another instance of that kind is exemplified by the Taiwanese experience. In 1999, the Fifth Amendment to Taiwan's Constitution was anonymously voted and consequently enacted by the Third National Assembly of the country. The latter decided to change the Constitution by establishing that the next National Assembly would have been chosen by the political parties leveraging upon their share of votes in the election. As a result, the amendment rendered the National Assembly a nonelected body, whose term was further

[359] Judgment no. 27 [2009] Pl. ÚS.

[360] Suteu (n 160).

[361] Landau (n 334) 195.

[362] Ibid.

extended up to two additional years[363]. However, the amendment was declared unconstitutional by Interpretation No. 499/2000 of the Council of Grand Justices (the Constitutional Court of Taiwan) on the grounds of its violation of basic and unamendable tenets of the Constitution, namely the democratic nature of the Republic, people's sovereignty, and fundamental rights[364].

Furthermore, Uganda's experience strengthens the employment of unamendability as a democratic safeguard. In 2018, the Constitutional Court of Uganda concurred that a constitutional amendment abolishing presidential age limits and extending the mandates' term of members of the Parliament was unconstitutional and void[365]. Indeed, the amendment was deemed as diminishing "the spirit of the Ugandan Constitution"[366].

Interestingly, there is a further use unamendability may conform to, that of being a "warning sign"[367]. For instance, it was the case of a 2017 judgment delivered by the Israeli High Court of Justice upon the constitutionality of the fifth temporary order of amendment to the Basic Law altering the annual budget rule to a biennial one enacted by the Knesset. The Court did not strike down the amendment, but issued a nullification notice for the future attempts of amending the Basic Law through a temporary order. By doing this, the Courts warned the Knesset "not to abuse its constituent powers in the future"[368].

Therefore, unamendability, which may take the form of eternity clauses or unconstitutional constitutional amendment adjudication, proves instrumental in "protecting democracies from collapsing into autocratic power"[369]. Even though the risk of strangling people's will should not be underestimated, the ability to protect democracy is perfectly represented by them. As in the entirety of constitutional concerns, balance is required, and pursuing a specific purpose may be done at the expense of other equally valuable principles. This is particularly relevant when supreme values such as the right to

[363] Contiades & Fotiadou (n 119).

[364] Ibid.

[365] Ibid.

[366] Ibid 159.

[367] Ibid.

[368] Ibid 160.

[369] Ibid 157.

life are challenged by the attempt to renovate the constitutional order with the inclusion of new rights, as will be explained in the following section.

3.2. The unamendable right to life: new challenges

Defining eternity clauses as the major degree of rigidity of a constitutional text generates several questions when interactions with other constitutional principles are concerned. Eternity clauses, being the entrenchment device for supreme values whose importance in the related constitutional order requires special protection, are placed atop of a hierarchy of norms.

Along with unamendable values, also those provisions that need a tiered amendment process, as explained in Chapter 1, contribute to the establishment of what Suteu defines as a "constitution-within-a-constitution"[370], namely an organization of norms where eternity clauses are located at the apex due to the greater importance of the values they protect. Thus, they exemplify the ordering mechanism employed to satisfy the drafters' "desire for a gradation even within higher law"[371].

Arguably, this constitutional hierarchy proves somewhat troublesome as some fundamental rights may be protected at the expense of other values located below in the hierarchy. This is especially true in the instance of constitutional innovations and the inclusion of new rights deemed to necessitate constitutional relevance. In this context, considering again constitutional theory as the science of the "being-becoming"[372] (see Chapter 1) alarmingly leads to the question of whether the becoming, namely the newly constitutionalized rights, are coherent with the being, such as the eternally and primarily protected values.

As Figure 3.1 perfectly shows, in 1946 the median Constitution guaranteed twenty rights, whereas in 2016 the same number doubled up to forty-one[373].

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[370] Suteu (n 160) 107.

[371] Ibid.

[372] Wintgens (n 11).

[373] Adam S. Chilton & Mila Versteeg, *How Constitutional Rights Matter* (Oxford Academic 2020).

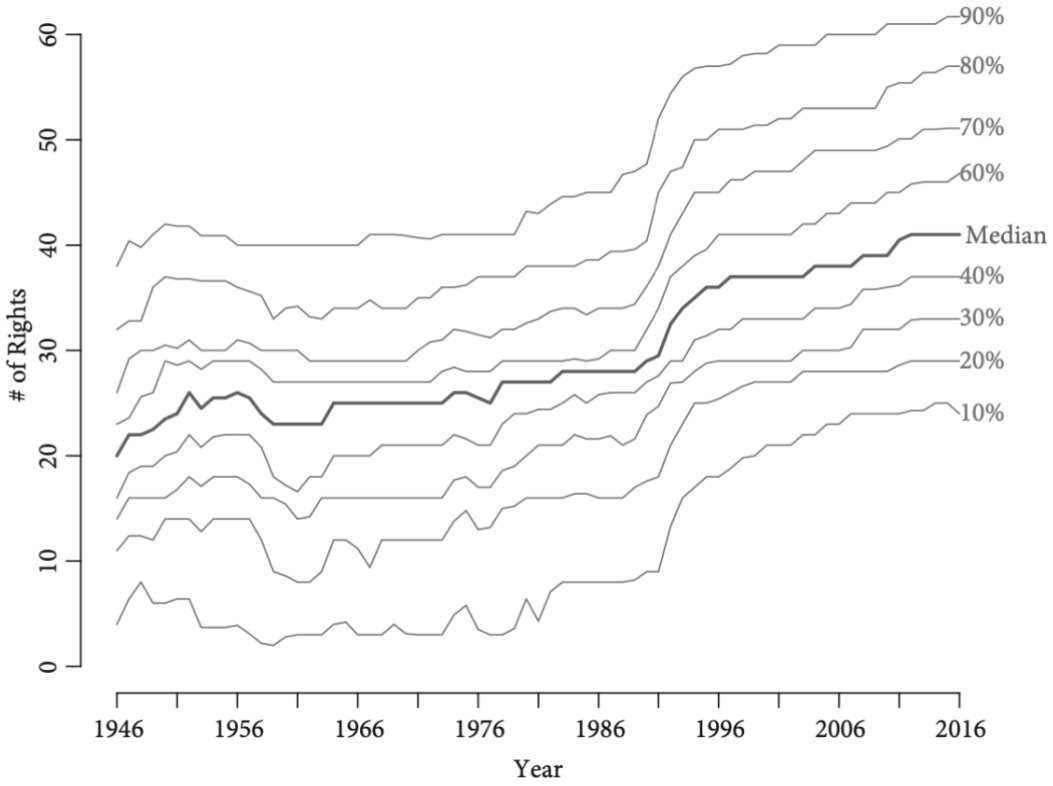

Figure 3.1. – The proliferation of constitutional rights, 1946 – 2016

Source: Adam S. Chilton & Mila Versteeg, How Constitutional Rights Matter (Oxford Academic 2020) 83.

Therefore, as a consequence of the dramatic increase in the general inclusion of rights in the world's Constitutions which appears particularly concentrated in recent times, conflict in the interaction between constitutionally protected rights and newly adopted legislation arose. In this context, eternity clauses protecting unamendable values of a polity play the role of "constitutional handcuffs"[374]. Reflection of this kind may be conducted around the dialogue between the right to life and those to abortion and euthanasia. In the next subparagraphs attention will be devoted to the issue.

3.2.1. Human dignity and abortion: how to reconcile

To explain to what extent positive change in a constitutional order may be constrained by the existence of unamendable provisions or intangible structure, access to abortion proves particularly relevant. Abortion may be defined as the practice of pregnancy termination after which an embryo or a fetus ceases to exist. According to

[374] Richard Albert, *Constitutional Handcuffs* (Arizona State Law Journal 2010).

those conceiving life from the very moment of conception, abortion stands in marked contrast with the right to life. Thus, being a divisive matter, "Constitutions tend to be silent about abortion"[375].

However, tension arises also due to the lack of specificity about the term "life". Indeed, it is commonly undefined the moment in which life begins[376]. According to international treaties such as the 1948 Universal Declaration of Human Rights and the 1950 European Convention on Human Rights, respectively "Everyone has the right to life, liberty and security of person"[377] and "Everyone's right to life shall be protected by law […]"[378]. Even the 1969 American Convention on Human Rights which mentions conception in the definition of the right to life only regulates it via general terms citing that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception"[379].

As a result, controversy exists about whether the embryo and fetus should be considered as human beings consequently entitled to the right to life. The debate is fervent and divergent interpretations of the admissibility and constitutionality of pro-abortion laws are frequent. Even when the impasse has been overcome, the depth of the debate proves detrimental to the right to abortion, as in the United States experience where the Supreme Court constitutionalized abortion in 1973. Indeed, "due to differences in opinions, constitutionalizing a rule may provoke *greater* controversy rather than less, as *Roe v. Wade* arguably did."[380] In this context, precommitment in embedding the right to abortion in the Constitution as a mechanism to remove abortion from public debate has generated more costs rather than benefits[381]. Consequently, since 2017, the Supreme Court judgment[382] making abortion a constitutional right has been circumvented by "more

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[375] Contiades & Fotiadou (n 119) 348.

[376] Agnès Guillaume, Clémentine Rossier and Paul Reeve, *Abortion Around the World: An Overview of Legislation, Measures, Trends, and Consequences* (Institut National d'Etudes Démographiques 2018).

[377] *Universal Declaration of Human Rights* 1948, Art 3.

[378] *European Convention on Human Rights* 1950, Art 2 para 1.

[379] *American Convention on Human Rights* 1969, Art 4 para 1.

[380] Boudreaux & Pritchard (n 313) 126.

[381] Ibid.

[382] *Roe v. Wade*, 410 U.S. 113 (1973).

than half of all states [U.S. federation]" which have "limited access to abortion by imposing new rules […] and bans on the use of public funds for abortions"[383].

Debate has emerged in Germany too, where the country's unwavering devotion to human dignity has fostered constituent debate in its constitutional jurisprudence, and diverse rulings including provisions such as lifetime imprisonment, counter-terrorism and abortion have been delivered by the Federal Constitutional Court. It is worth reminding that Article 1 of the *Grundgesetz* establishes the inviolability of human dignity that encounters the right to life and is deemed unamendable by Article 79(3), namely the German eternity clause. In 1975, the Constitutional Court of the *BRD*[384] was asked to rule about the constitutionality of provisions liberalizing the access to abortion for West German Women[385]. As occurred in Mexico where the rights to life of both the fetus and the woman have been weighted leading to the outweighing of the woman as a living being on the embryo as a potential life[386], the German Constitutional Court chose the way of balancing two rights, namely the right to self-determination of the woman against the right to life of the fetus[387]. Although both were related to the unamendable principle of human dignity, the Court ordered the continuation of abortion criminalization because the right to life was considered to always be more important than the need for individual autonomy[388].

Interestingly, before reunification, abortion was a more liberalized practice in East Germany rather than in the West. Consequently, after 1990 German constitutional order needed to be reconciled on the question of whether to permit abortion or not. Thus, afterward, the Federal Constitutional Court did not change its view on abortion as a matter of human dignity but acknowledged that Parliament had the right to determine how best to further the interests of the fetus, declaring that "In accordance with the inalienable principles prevalent in a state governed by the rule of law, a justifying circumstance will apply to an exceptional situation only if the existence of its conditions must be ascertained

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[383] Agnès Guillaume, Clémentine Rossier, and Paul Reeve (n 376) 235.

[384] The *Bundesrepublik Deutschland* indicated West Germany before the reunification.

[385] Suteu (n 160).

[386] Agnès Guillaume, Clémentine Rossier, and Paul Reeve (n 376).

[387] Suteu. (n 160).

[388] 39 BVerfGE 1 ('*Abortion I'*).

by the state"[389] and that "The extent of the obligation to protect unborn human life must be determined with a view, on the one hand, to the importance and need for protection of the legal value to be protected and, on the other hand, to competing legal values. Listed among the legal values affected by the right to life on the part of the unborn are - proceeding from the right of the pregnant woman to protection of and respect for her human dignity (Article 1, Paragraph 1 of the Basic Law) - above all, her right to life and physical inviolability (Article 2, Paragraph 2 of the Basic Law) and her right to free development of her personality (Article 2, Paragraph 1 of the Basic Law). However, the woman cannot claim constitutionally protected legal status under Article 4, Paragraph 1 of the Basic Law for the act of killing of the unborn which is involved in a pregnancy termination"[390]. Thus, despite being permitted in practice due to legal loopholes, abortion is nonetheless banned in Germany. Constitutionally, the right to life of the fetus and the supremacy of human dignity, as guaranteed by Article 1(1) of the German Basic Law and reinforced by its unchangeable status, acted as a trump against other interests[391].

Both the U.S. and German experiences exemplified to what extent Supreme Courts are challenged with the task of balancing unamendable values such as the right to life with new rights. In the event that the balance is shifted toward the constitutionalization of a new right, as occurred with abortion through *Roe v. Wade,* the legislator does not cease to reflect the majority's will and attempts to circumvent Supreme judgments via the instruments provided by the law.

Conversely, when a new right does not find a location in the constitutional hierarchy of norms due to its apparent unconstitutionality, as occurred in Germany, the Constitutional Court's interpretation plays the essential role of creating the lawful methods of reconciling an unamendable provision, such as the right to human dignity, with ordinary legislation disciplining abortion. A similar paradigm may be detected in the interaction between the right to life and that of euthanasia.

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[389] 88 BVerfGE 203 ('*Abortion II'*).

[390] Ibid.

[391] Suteu (n 160).

3.2.2. The Right to Life and Euthanasia: how to reconcile

The balance between the right to life and access to abortion is not the only instance of tension between unamendable provisions and the innovation of rights. Indeed, further attention should be devoted to the right to end one's own life.

To explain how the two interact, it may be useful to refer to the case of Italy where the issue has recently gained momentum. The 1947 Italian Constitution has been considered one of the "most generous"[392] Constitutions in terms of rights inclusion if compared to the simultaneously adopted texts. Nonetheless, generosity does not resist the test of time and social change. According to Cartabia and Lupo, while "social life evolves and new needs emerge requiring protection"[393], "New understandings of issues related to human dignity have also given rise to requests for new rights concerning marriage, family, reproduction and end of life"[394].

Consequently, seminal Italian Constitutional Court judgments provided for new implications and applications of old codified rights, in light of an "evolutive interpretation"[395]. The latter has been employed by defining the Constitution as a living document. This has been testified by the comprehensive understanding of Article 2 of the Constitution which states that "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"[396]. In this regard, the right to life has been included among those inviolable principles whose non-explicit protection does not jeopardize the foundational tenure implicitly ensured by the Italian constitutional text[397].

Having established that the right to life belongs to the inviolable rights enshrined in the Constitution and to the supreme values on which the constitutional text is founded[398], and having expressed the superior and privileged standing of this right in the hierarchy of

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[392] Cartabia & Lupo (n 223) 218.

[393] Ibid.

[394] Ibid.

[395] Ibid 220.

[396] Constitution of the Italian Republic (n 213), Art 2.

[397] Judgment no. 223 [1996] Italian Constitutional Court.

[398] Judgment no. 35 [1997] Italian Constitutional Court.

the Italian Constitutional order[399], its unamendability has been thus expressed by the Court's jurisprudence.

However, tension has emerged when this right has been used by the Constitutional Court to counterbalance the right to end one's own life through the practice of euthanasia which generated the issue of *finevita*[400], consistently debated in current times. In Italy, euthanasia, namely the deliberate, painless process of causing someone who is conscious, capable of understanding the consequences of their actions, and who expressly asks it to die, is illegal as it violates Article 579 of the Criminal Code[401].

On the contrary, the practice of assisted suicide, which refers to the process by which the individual making the request, while still fully capable of thinking, administers the fatal medication to themselves in order to end their own suffering, is legal under certain precise conditions established by Judgment 242/2019 of the Italian Constitutional Court. Before the ruling, the practice was prohibited by Article 580 of the Criminal Code. However, the Court has declared "unconstitutional Article 580 of the Criminal Code, in so far as it does not exclude the punishment of those who […] facilitates the fulfilment of the autonomously and freely formed intent to commit suicide of a person fully capable of making free and informed decisions kept alive by life-support treatments and suffering from an incurable illness which is a source of physical or psychological suffering that he or she considers intolerable, provided that these conditions and the method of implementation have been verified by a public national health service facility after consulting the territorially competent ethics committee"[402].

In its reasoning, the Constitutional Court referred to Articles 2 and 8 of the European Convention on Human Rights, respectively guaranteeing the right to life and

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[399] Judgment no. 1146 [1988] Italian Constitutional Court.

[400] Since the Constitutional Judgment 242/2019 has established the constitutionality of the practice of assisted suicide, a legislative proposal was delivered to the Italian Parliament where on 10th March 2021, it received the endorsement of the Chamber of Deputies. Currently, it is still under the evaluation of the Senate, whose decision will determine the adoption of the law disciplining the practice.

[401] Maricla Marrone, Pietro Berardi, Biagio Solarino, Davide Ferorelli, Serena Corradi, Maria Silvestre, Benedetta Pia De Luca, Alessandra Stellacci, and Alessandro Dell'Erba, *Italian Legal Euthanasia: Unconstitutionality of the Referendum and Analysis of the "Italian" Problem* (Frontiers in Sociology 2022).

[402] Judgment no. 242 [2019] Italian Constitutional Court.

the right to respect for private and family life, home and correspondence, and expanded by acknowledging the evolution of the jurisprudence on the matters related to these Articles. Specifically, the Court considered the express acknowledgment of the ECHR of the right of "decide by what means and at what point in time his life will end"[403]. The Court thus concluded that "within the specific area under consideration, an absolute ban on assisted suicide ends up unjustifiably and unreasonably restricting patients' freedom of self-determination in choosing treatments, including those intended to free them from suffering, which flows from Articles 2, 13 and 32(2) of the Constitution, ultimately imposing upon them one single way of taking leave of life"[404].

Thus, the Court, adopting an evolutive approach toward the meaning of the inviolable right to life which falls under the guarantees of Article 2 of the Italian Constitution, has somewhat reconciled the right to life with the right to die, under certain specific circumstances, namely "incurable illness, serious physical or psychological suffering, dependence on life-support treatment, and the ability to make free and informed decisions, to have been medically assessed"[405]. Subsequently, the Constitutional Court has intimated the Parliament to legislate about the issue of *finevita* on the grounds of the unconstitutionality of Article 580 of the Penal Code.

However, legislative inertia has triggered the initiative of the popular referendum *Euthanasia Legale – Liberi fino alla fine*[406] challenging the partial prohibition of Article 579 of the Criminal Code, thus calling for the decriminalization of the practice of euthanasia. The referendum's admissibility was evaluated by the Constitutional Court which eventually issued the 50/2022 judgment declaring the referendum inadmissible. The Court concurred that "Discipline come quella dell'art. 579 cod. pen., poste a tutela della vita, non possono, pertanto, essere puramente e semplicemente abrogate, facendo così venir meno le istanze di protezione di quest'ultima a tutto vantaggio della libertà di autodeterminazione individuale"[407]. In this case, according to the Italian constitutional

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[403] Ibid.

[404] Judgment no. 242 [2019] Italian Constitutional Court.

[405] Ibid.

[406] Free English translation: *Legal Euthanasia - Free until the end.*

[407] Judgment no. 50 [2022] Italian Constitutional Court. *Free English translation: "provisions such as Article 579 of the Criminal Code, set up to protect life, cannot, therefore, be purely and*

jurisprudence, euthanasia has not overcome the test of the right to life, being considered completely in contrast to the latter's unamenable and supreme tenure.

The same grounds related to the unamendability of the right to life have been instrumental in declaring the inadmissibility of a referendum[408] concerning abortion and challenging the limits to the termination of pregnancy in the first ninety days, and the exclusive use of public facilities[409].

Thus, as demonstrated by the German jurisprudence about abortion and the Italian Constitutional case law on euthanasia and assisted suicide, once a right is considered unamendable, being located at the apex of the hierarchy of rights of a constitutional order or belonging to the latter's foundational values, it proves hard to challenge its interpretation in light of an evolution of the social life and values of the polity. Even when an evolutive approach is adopted by the Supreme Courts, as occurred both in the U.S., Germany and Italy, constrained space of maneuver is left to the inclusion of innovative guarantees or to the assessment of their constitutionality.

Hence, whenever social change is concerned, the interaction between unamendable and disruptive new principles results in a controversial act of reconciliation aimed at counterbalancing democracy and its limits.

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simply abrogated, thus causing the instances of its protection to lapse to the benefit of individual freedom of self-determination"

[408] Judgment no. 35 [1997] Italian Constitutional Court.

[409] Judgment no. 50 [2022] Italian Constitutional Court: "Già in occasione di uno dei referendum sull'interruzione della gravidanza, questa Corte ha del resto dichiarato inammissibile la richiesta referendaria, richiamando la necessità di una tutela minima per situazioni che tale tutela esigono secondo la Costituzione, con specifico riferimento al diritto alla vita (sentenza n. 35 del 1997)". *Free English translation: "Already on the occasion of one of the referenda on the interruption of pregnancy, this Court has declared the referendum request inadmissible, recalling the need for minimum protection for situations that require such protection according to the Constitution, with specific reference to the right to life (Judgment No 35 of 1997)".*

3.3. National Eternity Clauses and European Law

3.3.1. German *Grundgesetz:* Solange I and II Judgments and subsequent evolution

As demonstrated above, tension arises when unamendability interacts with democratic concerns. Similarly, the interaction between eternity clauses and supranational legislation, particularly European Law, generates tautness.

Primarily, it is fundamental to refer to the origin of this tension, which is the European Union motto "united in diversity"[410], enshrined in Article 4(2) of the Treaty on European Union. Article 4(2) is also known as the "national identity clause" and was originally introduced by the Maastricht Treaty in 1992. The clause ensures that integration into the Union is counterbalanced by the preservation of national particularities forging countries' identity and has been often employed to challenge European Union Law application in Member States constituencies. In order to establish constitutional boundaries for EU law's precedence, constitutional adjudicators have invoked constitutional identity, reinforcing their own standing in the EU's judicial power structure[411]. Here the conflict arises.

The primacy of European Union Law has been developed through the eminent jurisprudential adjudications *Van Gend en Loos v Nederlandse Administratie der Belastingen*[412] and *Costa v ENEL*[413], and subsequently reinforced by *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel (Solange I)*[414], *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[415], and *Marleasing SA v La Comercial Internacional de Alimentacion SA*[416].

Generally speaking, the Court ruled that the laws passed by EU institutions had the power to establish legal rights that could be brought before Member State courts by both natural and legal persons. Therefore, EU law is directly applicable in Members States

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[410] Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022).

[411] Ibid.

[412] Case 26/62 [1963] Court of Justice of the European Union.

[413] Case 6/64 [1964] Court of Justice of the European Union.

[414] Case 11/70 [1970] Court of Justice of the European Union ('S*olange I')*.

[415] Case 106/77 [1978] Court of Justice of the European Union.

[416] Case C-106/89 [1990] Court of Justice of the European Union.

constituencies. The Court expanded upon the notion of direct effect and recognized that the objectives of the treaties would be compromised if national law could supersede EU law. Since the Member States limited their sovereign rights when they transferred some authorities to the EU, EU norms must supersede any national law, including Constitutions, in order for them to be effective[417]. The Court made it clear that all national acts, regardless of when they were adopted, must be subject to the priority of EU law. National laws are not immediately nullified or invalidated when EU law supersedes conflicting national laws[418]. However, as long as the dominant EU standards are in effect, national agencies and courts must decline to implement those requirements.

"The principle of primacy therefore seeks to ensure that people are uniformly protected by an EU law across all EU territories"[419]. Therefore, whenever constitutional identity principles protected by either implicit (basic structure doctrine) or explicit limits (eternity clauses) are challenged by European Union Law which, according to the established jurisprudence, prevails on national legislation, how the tension should be solved?

To give an explanation, the *Salange Saga,* namely a series of judgments delivered by the German Constitutional Court and witnessing the dialogue between national unamendability and supranational rules will be here presented. *Solange I* was the first case of the German Constitutional Court to mention the notion of constitutional identity. The case deals with *Internationale Handelsgesellschaft*, a company engaged in import and export. The firm acquired a license for 20,000 metric tons of maize meal valid until December 31, 1967, as to the provisions of Regulation No. 120/67, disciplining the cereals market. At the moment of the license's expiration, the company had provided about 11,000 metric tons of cereals. Afterward, in accordance with Regulation No. 473/67/EEC, *Einfuhrund Vorratsstelle für Getreide und Futtermittel*[420] declared the deposit forfeited. In a preliminary ruling about the case, the Court of Justice of the European Union (CJEU) confirmed the legality of the contested Council Regulation and expanded by concurring that fundamental rights are fully integrated into the general

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[417] *Primacy of EU Law (Precedence, Supremacy)* (EUR-Lex) available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:primacy_of_eu_law.

[418] Ibid.

[419] Ibid.

[420] Free English translation: *The grain and feed import and storage Centre.*

principles of European Community law. The CJEU also confirmed the principle of the supremacy of European Community law over national constitutional provisions and consequently over the fundamental rights protected by them.

However, the German company filed a lawsuit to the Administrative Court in opposition to this ruling. The German Administrative Court halted the proceedings and forwarded inquiries to the *Bundesverfassungsgericht* (German Constitutional Court)[421]. It asked whether the disputed EEC regulation stating that the deposit is forfeited if an export license is not used to the fullest extent possible and is only to be released in the event of a force majeure is in line with German Basic Law.

Hence, German Constitutional Court should have ruled upon the legality of the acceptance of a EC law contrasting German Constitution's fundamental principles[422] that are protected by Article 79(3). Nonetheless, in this specific first case, the Constitutional Court did not refer to the German eternity clause in its attempts to establish precise limits to the European Law precedence. Specifically, since "the scope of EU's competence at that time did not extend to the protection of fundamental rights"[423] it rather declared its unquestionable leverage and constitutional role in protecting its constitutional identity. In its adjudication, the Court used the framework of Article 24(1) of the *Grundgesetz* regarding the transfer of German sovereignty to international organizations which stood as the constitutional basis for European integration[424]. Therefore, as there was a lack of adequate protection at the EC level, "it decided that, in principle, a regulation had to be in conformity with the fundamental rights of the GG [*Grundgesetz*]"[425]. The Court held that the GG's general context had to be taken into consideration while construing and interpreting article 24(1). This means that, in place of a constitutional amendment, the legislation of an international organization cannot alter the core elements of the Constitution, which form its identity, according to article 24(1) GG. This fundamental

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[421] Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, and Jan Wouters, *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016).

[422] Ibid.

[423] Bobić (n 410) 132.

[424] Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law* (Oxford University Press and New York University School of Law 2016).

[425] Ibid 426.

structure is thought to be immutable[426]. The Court concurred that article 24(1) GG does not give any jurisdiction for the German legislative or for the legislation of an international organization to change the fundamental framework of the Constitution by amending the European treaties[427].

The same "holistic interpretation"[428] has been adopted by the German Constitutional Court in 1986 *Solange II* case in which it stated that "The power conferred by Article 24(1) of the Constitution, however, is not without limits under constitutional law. The provision does not confer a power to surrender by way of ceding sovereignty to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into the structure which makes it up […]"[429].

Besides, the *saga* continued with the *Maastricht*[430] and *Lisbon*[431] judgments and the case law *Solange III* and *Solange IV* which provided more clarification and expanded with the delineation of the separate competences. They addressed, more precisely, the question of whether the EU was operating beyond its authority, acting *ultra vires*[432]. The idea of "constitutional identity" initially vanished from the Constitutional Court's lexicon after the *Solange II* ruling. The introduction of article 23(1) GG in 1992 as the legal foundation for the transfer of sovereign functions to the European level may be one factor contributing to this. Article 23(1) GG specifically acknowledges Article 79(3) GG's eternal clause as a restriction on European integration[433].

In this context, the *Maastricht* ruling of the Court proves paramount. In this decision, the Court considered whether ratifying the Treaty of Maastricht or participating in the European integration process in general, complied with German Constitution. The Court began establishing broad restrictions on the transfer of sovereignty rights to the European level on the grounds of the German eternity clause in conjunction with Article

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[426] Polzin (n 424).

[427] Ibid.

[428] Suteu (n 160) 114.

[429] 73 BVerfGE 339, 22 October 1986.

[430] 89 BVerfGE 155, 12 October 1993.

[431] 2 BvE 2/ 08, 30 June 2009.

[432] Ryngaert et al. (n 421).

[433] Polzin (n 424).

20(1). Based on article 79(3), these constraints included the principle of democracy and, as explained in an earlier *obiter dictum*, the loss of German statehood. These standards have been the focal points of the debate on the boundaries of European integration within German constitutional law ever since[434]. The court explicitly rejected the possibility of a legislative amendment of Article 79(3) supported by a popular referendum. It is interesting to note that the court also examined the limitations of the eternity clause itself, concluding that it could only be overcome by a revolutionary act of novel constitution-making[435].

Instead, the *Lisbon case law* concerns four complaints from members of the extreme left and right of the political spectrum. 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 were the three acts that were challenged in the complaints as being unconstitutional. The plaintiffs sought a reassessment of the Lisbon Treaty itself rather than focusing on a particular injury. The Court chose to conduct what amounted to an abstract review[436]. However, the majority of the Court's analysis that matters in this case was provided in *obiter dicta* remarks made during the investigation into whether the applicants' rights under Article 38(1) had been infringed upon by violations of Articles 20(1), 20(2), 23(1), and 79(3). The judges spoke of an "inalienable constitutional identity," which only the Court was authorized to defend against violations, even through European integration[437].

The Court went so far as to discover an additional kind of judicial review known as "identity review," which it may use in addition to the *ultra vires* assessment of EU law to assess whether the latter is consistent with Germany's unalienable values under Article 79(3). Thus, the Court clarified that it might eventually rule that German law is exempt from European law. There were boundaries to the primacy of EU law, and the eternal clause in Germany strengthened those boundaries. Although the Court acknowledged that the legislature might establish “an additional type of proceedings before the Federal Constitutional Court that is specifically tailored to ultra vires review and identity

[434] Polzin (n 424).

[435] Suteu (n 160).

[436] Ibid.

[437] Ibid.

review"[438], observers have correctly pointed out that the ruling appears to grant the Court authority over identity control[439].

Therefore, as far as constitutional unamendability is concerned, the *Lisbon* judgment established the conditionality of European Law evolution to the German eternity clause. Although it remains unquestionable that "the powers of review reserved for the Federal Constitutional Court have to be exercised with restraint and in a manner open to European integration"[440], the ruling proves in strong opposition to the principle of EU Law primacy over national, even constitutional legislation.

At the same time, Bobić argues that controversy in this supranational-national dialogue is solved by considering the ruling as best fitting "the pluralist heterarchical scheme"[441] which ensures that Member States constitutional values are safeguarded within a European integrated framework.

One may even attempt to couple the German Constitutional Court's inclination with the principle of supremacy of European Law but it seems that the efforts produce only one outcome: that of controversy. The latter was reinforced in 2020, when the Court delivered the *PSPP* judgment. Following the WHO declaration defining Covid-19 as a pandemic, the Governing Council of the European Central Bank (ECB) adopted joint monetary policy provisions aimed immediately increasing liquidity in the euro financial system area, stimulating households and enterprises' access to bank loans, and broadening the private asset purchases of the Union[442]. Simultaneously, ECB President Lagarde extinguished countries' high hopes by stating that ECB aid should not exceed the Bank's mission and tasks, limiting the scope of financial assistance to Member States and disrupting the idea of a last resort financial body. The markets immediately and negatively reacted, and financial fragmentation among countries widened. To reassure markets, the ECB launched the Pandemic Emergency Purchase Programme (PEPP) to ensure that EU countries encounter low funding costs in the emergency period and to reinforce and

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[438] 2 BvE 2/ 08, 30 June 2009.

[439] Suteu (n 160).

[440] Bobić (n 410) 136.

[441] Ibid.

[442] Annamaria Viterbo, *The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank* (vol. 5 European Papers 2020).

finance the already existing Public Sector Purchase Programme (PSPP)[443]. Both the Programmes demonstrated extreme flexibility towards the high indebted Member States like Italy. This seemed "at odds with the interpretation of the monetary financing prohibition given by the BVerfG [German Constitutional Court] in its recent judgment"[444].

Indeed, on 5th May 2020, the Federal Constitutional Court ruled that the ECB was acting *ultra vires*, exceeding its monetary policy powers. The Court believed that an unforeseeable risk of national budget-sharing commitments beyond those approved by the *Bundestag* existed. This risk was contrary to Germany's constitutional identity principle enshrined in Articles 23(1) and 79(3) eternity clause of the *Grundgesetz*. The question relied on the fact that "the decision is of relevance here as it includes identity based arguments used in a way that detracts from the balancing between constitutional and EU law demands and is possibly absolute, unilateral, and thus destructive"[445].

Hence, in the *PSPP* ruling, the German Constitutional Court confirmed again that Article 79(3) establishes the boundaries of European integration and that the *Bundestag*'s fiscal authority is part of the unalienable democratic principle. If the German government were to retroactively change European legislation to give European institutions greater authority, they could only do so within the parameters of the German eternity clause[446].

3.3.2. Italian Constitution: The Taricco Judgement

The dialogue between European Union Law and Member States' constitutional principles may be further explored through the lenses of other Constitutional Courts worldwide. As early adopters of identity review, the Czech Constitutional Court developed its body of case law to support a substantive constitutional core anchored in the eternal clause. When the Czech Court ruled in 2012 that the European Court of Justice's *Landtova* decision was *ultra vires*, it went one step further and effectively disapplied European law. A European Court of Justice ruling was also overturned by the

[443] Viterbo (n 442).

[444] Ibid 678.

[445] Bobić (n 410) 136.

[446] Suteu (n 160).

Danish Supreme Court in 2016 on the grounds that it violated long-standing labor law precepts. Belgian and French courts have also invoked the idea[447].

In the Italian experience, specifically, the question was tackled during the *Taricco Saga*[448], a series of judgments that proved paramount in defining the Italian attitude in the dialogue. The rulings, indeed, generated the *controlimiti* doctrine, namely the establishment of precise limits to the effects the Community legislation may produce on national unamendability. As a result, "the fundamental principles of the Italian constitutional order and the inalienable rights of man stand as a limit to EU action"[449].

The *Saga* started in 2014 when *Cuneo*'s Tribunal (an ordinary Italian court) submitted a preliminary reference to the CJEU, regarding criminal procedures for VAT fraud in the champagne sector. The national judge questioned whether Italian regulations governing the statute of limitations for financial and tax offenses were consistent with EU law[450]. The much-discussed *ex-Cirielli* law 251/ 2005 had altered the limitation system, with the latter greatly reducing the duration of limitation periods, and "leading to *de facto* impunity in the event where proceedings were interrupted"[451]. The referring court claimed that this was not because of the particulars of the case but rather a larger systemic issue with the Italian criminal justice system, which is especially noticeable when it comes to criminal cases involving financial and economic crimes.

Therefore, the court requested that the CJEU rule on whether the new limiting constraints violated Directive 2006/112 and other Treaty provisions. Moreover, the Court referred to Article 325(1) TFEU stating that EU countries "shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States"[452]. To ensure effective protection, it was thus the duty of the national ordinary courts to assess the suitability of national provisions

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[447] Suteu (n 160).

[448] C-105/14 [2015] Court of Justice of the European Union. C-42/17 [2017] CJEU. Judgment no. 24 [2017] Italian Constitutional Court.

[449] Bobić (n 410) 151.

[450] Matteo Bonelli, *The Taricco saga and the consolidation of judicial dialogue in the European Union* (vol. 25 Maastricht Journal of European and Comparative Law 2018).

[451] Bobić 151.

[452] *Treaty on the Function of the European Union* [2007], Art 325 para 1.

in providing "effective and dissuasive sanctions in cases of serious frauds affecting the Union's financial interests"[453].

Hence, the CJEU, in *Taricco I* judgement, concurred that in cases of a lack of effectiveness of domestic legislation, the referring court should disapply national laws to safeguard the Union's interests. In this context, the new limits provisions should be disapplied in order to safeguard the fundamental principles enshrined in the EU Treaties. In particular, the principle of legality and proportionality of criminal offenses and penalties is enshrined in Article 49 of the EU Charter of Fundamental Rights[454].

Therefore, the CJEU concluded that the accused's rights are unaffected by the decision not to shorten the statute of limitations because they relate to procedural rather than substantive criminal law and are therefore exempt from the ban on non-retroactivity. This part of the decision was precisely in contrast to the case law of the Italian *Corte Costituzionale* pertaining to Article 25 of the Italian Constitution[455]. The latter, indeed, cites that "No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law"[456].

According to the *Corte Costituzionale,* the principle of non-retroactivity of Article 25 did also apply to provisions disciplining limitation periods. The Court's jurisprudence "explicitly denied that amendments to limitation periods could be applied retroactively *in peius*"[457]. However, CJEU judgment precisely required the opposite.

As a result, national Italian courts began to either comply with EU Law primacy or to disapprove the ruling by applying national legislation. The conflict between EU law and Italian Constitutional provisions generated turmoil in the Italian constitutional order. Despite the European ruling, the *Corte Costituzionale*[458] advanced by evoking the *controlimiti* doctrine which consists in accepting the primacy of EU law while limiting it to the respect of supreme principles and fundamental rights of the Italian constitutional

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[453] Bonelli (n 450) 360.

[454] Bobić (n 410).

[455] Ibid.

[456] Constitution of the Italian Republic (n 213), Art 25.

[457] Bonelli (n 450) 361.

[458] Judgment no. 24 [2017] Italian Constitutional Court.

order. Among those supreme values the principle of legality in criminal law stands[459]. The doctrine was presented into the preliminary ruling submitted to the CJEU by the *Corte Costituzionale* which asked for clarifications on the issue. Indeed, two sets of arguments were brought before the Court. One revolved around the respect for national constitutional identity on the grounds of Article 4(2) TEU. The notion was used to introduce the *controlimiti* doctrine and to ask for formal recognition. The other dealt with the question of whether the interpretation of Article 325 TFEU should be reinterpreted by the CJEU in the light of its compatibility with Article 49 of the EU Charter of Fundamental Rights.

Answering the reference request, the CJEU delivered the 2017 *Taricco II* judgment. Albeit the Court did not retreat from the *Taricco I* ruling, it limited the scope of the obligation to disapply national laws when they are not sufficiently effective and dissuasive in contrasting fraud crimes[460]. Consequently, the *Corte Costituzionale* did not resort to the *controlimiti* doctrine to find legitimation for the disapplication of EU Law in national courts whenever supreme unamendable principles of the Italian constitutional order are put at stake.

However, Scholtes strongly criticized how German and Italian Constitutional Courts used unamendability to strike down supranational legislation. According to the author, reducing constitutional identity arguments to arguments grounded on unamendability is unlikely to provide a sufficient basis. An argument for constitutional identity against transnational law that does not rely on eternity clauses or unamendability theories is plausible[461].

A change in constitutional identity brought about by transnational legal integration necessitates different, and possibly more extensive, normative concerns than a simple constitutional amendment. The former raises issues of democratic legitimacy that the latter does not address[462].

When an amendment or other form of constitutional change originates from the wider transnational polity outside the boundaries of the particular constitutional community rather than from within that democratic space, it significantly weakens the prevalent normative critique of unamendability, which holds that it counterproductively

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[459] Bonelli (n 450).

[460] Ibid.

[461] Julian Scholtes, *Abusing Constitutional Identity* (Cambridge University Press 2021).

[462] Ibid.

elevates and insulates parts of the constitutional text at the expense of the democratic space[463]. The global argument from constitutional identity seems to aim instead at guaranteeing domestic democratic space, yet unamendability serves to ensure constitutional pre-commitment against rash democratic decisions domestically[464].

Accordingly, Suteu[465] recognizes that the interpretation of eternity clauses as used by national courts to resist the integration efforts of the European Union in light of identity arguments differs from the view prevailing among the scholars. This may be instrumental in the sociological sense but should be carefully employed by legal bodies. Indeed, with the intent of creating a foundation myth whose identity is eternally protected by unamendable provisions, courts produce a complex and constructed conflict between national and supranational authorities. The tension eventually results in a diversified and blurry patchwork of dialogue among unreconcilable orders.

[463] Scholtes (n 461).

[464] Ibid.

[465] Suteu (n 160).

Concluding remarks

The dissertation has attempted to reconcile conflicting elements pertaining to the constitutional sphere and especially focused on the question of change.

Evidence has demonstrated that the purpose of defining what a Constitution is may face theoretical hurdles, given the intricate tapestry of speculation around the topic. The temporal scale on which the concept has been theoretically and pragmatically constructed renders this objective more complex than one may predict.

Indeed, the concept has acquired several meanings, moving from being a product of a polity describing its functions and characteristics to being the creator of the body politic, prescribing how the State shall operate. This first conflict between the descriptive and prescriptive nature of the constitutional text has been solved via the adoption of both views. Today's understanding of the Constitution is thus twofold: its provisions prescribe governing rules by reflecting the description of how constitutional matters should be addressed given by the people's consensus at the moment of the constitutional genesis.

Ultimately, the dual product-creator paradigm is enriched by another essential element, such as the people. Hence, the Constitution becomes the product of the general and popular will generating, in turn, the body politic. Being the "socially-postulated" creation of the popular authority, it is tasked to protect rights and values in which people recognize themselves. In this evolution, the changing conceptual course represented by the American and French Revolutions and the precepts developed by liberal constitutionalism have been emblematic.

The role people play in Constitution drafting is distinctive, being the constitutional text meant to survive. The positive correlation existing between public participation and the lifespan of a Constitution has been demonstrated throughout the dissertation.

Since the Constitution is intended to endure, it does not play a role confined to the regulation of the present. *Per contra,* it irrevocably relates to the future and provides precise patterns of social evolution. It is a science of "being-becoming", adapting itself and the institutions it establishes to change.

Proving considerably permeated by societal implications, it is absurd to define it as a mere written text. On the contrary, it should be conceived as the representation of deeper and ever-evolving values, as Mortati assumes, lying beyond its formal connotation and establishing the core identity of the polity.

This identity deserves proper protection which is secured through the higher standing of the Constitution in the legal hierarchy of the State. In this way, a supreme source of authority and supreme values are guaranteed by a supreme collocation and supervised by the judicial review of constitutionality.

However, in Jefferson's words, the world belongs to the living. Thus, to enable the people to govern themselves the way they favor, the possibility of amendment of these principles is recognized by constitutional theory and practice.

Despite this, constitutional innovation is precisely disciplined by rules and limits which ensures that change occurs in continuity with the past constitutional order. Disruptive forces of alteration, indeed, are deemed as triggering discontinuity and destroying constitutional identity, impairing popular sovereignty and the very existence of the State. Radical changes fracturing the harmonious passage from a previous version of the constitutional text and a subsequent one are thus prevented on a rigidity-flexibility spectrum that requires balance. Thus, demands of change are weighted with the need for stability. Both present advantages and disadvantages.

Rigidity, namely the adoption of heavy amendment procedures, promotes democratic self-government and prevents the monopolization of discussions about how to change institutions in the public debate which hinders effective collective action. Stability also facilitates the preservation of minority rights throughout time and insulates constitutional issues from the political attempts of temporary majorities to entrench themselves in power. It thus possesses an important counter-majoritarian role.

However, a more rigid adaptability to change may not be as rapid as the pace of social, economic, and technological development, triggering the obsolescence of laws and constitutional values. Therefore, a certain degree of flexibility is irremediably required.

Legal norms obsolesce is prevented by the amendment process enabling the people and the lawmakers to update the Constitution without incurring the adoption of a new one. Amendment readjusts constitutional inadequacy and is useful in rectifying human error that occurred during the constitution-making process. Constitutional reform provides the polity a way to express its inherent values. It ensures peaceful and negotiated change within a constitutional order as holding an eminent "pacifying purpose".

For all these reasons, constitutional amendment has historically prevailed over replacement. The interaction of inclusion, flexibility, and specificity as mutually reinforcing mechanisms in constitutional design commonly make Constitutions endure.

Constitutions endure also because they determine what is not and will never formally be subject to change. However, since the Constitution has been here identified as more than a purely legal document, unamendability is not only expressed by constitutional eternity clauses but rather refers to a wider identity framework. The latter is established by Supreme or Constitutional courts through the practice of unconstitutional constitutional amendment.

In this regard, the dissertation has uncovered an interesting pattern. Frequently, amendment rules that are deemed to constrain constitutional change supporting rigidity, often trigger the opposite outcome by encouraging informal reform. This materializes in political compromise and judicial activism, especially active in the definition of what becomes substantially unamendable. Indeed, in cases when the formal procedure of amendment is more stringent, the probability of informal amendments through judicial interpretation is greater.

On one hand, the space of maneuver given to the courts in limiting constitutional innovation has endangered democracy, as occurred in India. After the basic structure review has been established, the Indian Supreme Court has been frequently accused of acting *ultra vires* in making a certain structure of power or certain traditional values survive the test of time.

On the other hand, the Australian and Danish cases proved the contrary. Both are characterized by complex amendment procedures. However, this has not prevented the update of the Constitution to the present day. The former has witnessed the reinforcement of justice in terms of rights, democracy, and the rule of law due to an active and just judicial culture. The latter, due to an extremely generic wording in its Constitutional Act, has made it possible to judicially interpret constitutional provisions in a way that makes it relevant to this day, rendering amendment less urgent and less frequent than in other constitutional orders. Blurry contours on constitutional change are further characteristic of the Norwegian Constitution and index of intense judicial activism.

Therefore, unamendability's function is twofold. It provides the most robust protection of supreme values which avoids constitutional anti-democratic alterations, as occurred in Germany and Italy with the reorganization of nazist and fascist parties, or in Latin America with liberticidal backlashes.

Simultaneously it endangers the people's space of maneuver, being the strongest precommitment device a generation may employ to express its distrust towards future

generations. Indeed, making certain principles eternal makes them an imposition over whosoever will exist thereafter.

Additionally, unamendability may resort to an instrument for courts and political majorities to act against each other abusing the original meaning of unamendability and making their personal interests prevail over those of the people.

However, even when innovation appears non-suitable, both formally and informally as in the case of the Portuguese eternity clause, a polity is not able, *de facto,* to prevent change. When the political wind changed and the international circumstances required it to, a specific and long eternity clause which was, *de jure,* untouchable was factually adapted to the evolved framework of the country. Portugal's experience perfectly explains that there is no way to block societal change, to prevent the democratic evolution of people's beliefs.

Related evidence has been detected also in the interaction between immutable principles and the new rights and sensibilities that emerged in current times. The instances of the rights to abortion and euthanasia explain that, although a new right appears unconstitutional and does not find a location in the constitutional hierarchy of norms, the court's interpretation plays the essential role of attempting to balance democracy and its limits creating the lawful methods of reconciliation.

As a result, the dissertation has ultimately demonstrated that constitutional change does not only occur in one way. The public participation in the shell's *genesis* and in the definition of the constitutional amendment process is crucial in originally creating a democratic constitutional order. Subsequently, when innovation is required during the life of the Constitution other factors, if employed correctly, secure the democratic change of norms.

Moreover, drawing from the work's findings, it may be assumed that in the event innovation appears unattainable, the interaction of more than one actor in the evolution of constitutional norms is an important safeguard of democracy, at least domestically.

Indeed, when the dialogue between national and supranational courts is concerned, as in the cases of the *Solange* and *Taricco Sagas*, one court finds itself forced to take a step back. This has been done by the CJEU, whose initial contrasting standing has been modeled on the national demands of protecting domestic identities and supreme values even if opposing European legislation. However, controversy has been generated also due to the absence of a European Constitution that has established an unambiguous hierarchy of norms.

In conclusion, the Jeffersonian idea of conceiving the Constitution as automatically expiring after a certain period is not the only solution to the domestic democracy-unamendability paradigm. It is incontrovertible that people should unconditionally be enabled to withdraw their consent to laws belonging to the past generation. But since the boundaries of unamendability have proven extremely fine, there exist different configurations in which the need for change may find proper legal expression.

The question of constitutional change is intricate and often controversial. For this reason, no unique prescriptive response might be given to the rigidity-flexibility dilemma. Balance revealed itself as the only instrument of reconciliation, the only possible narrative among the diverse tensions that have been presented in the dissertation. Finally, there seems to be not only one shell in the sea of constitutionalism.

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