

# Eternity clauses in post-conflict and post-authoritarian constitution-making: Promise and limits

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**Abstract:** The literature on entrenchment as a means to achieve constitutional endurance has grown in recent years, as has the scholarship on unamendable provisions as a mechanism intended to safeguard the constitutional project. However, little attention has been paid to the promise and limits of eternity clauses in transitional settings. Their appeal in this context is great. In an effort to safeguard hard-fought agreements, drafters often declare unamendable what they consider the fundamentals to the political deal: the number of presidential term limits, the commitment to human rights and to democracy, the form of the state (whether republican or monarchical), the territorial integrity of the state, the territorial division of power, secularism or the official religion. This article explores the distinctive role and problems posed by eternity clauses in transitional constitution-building, as guarantees of the pre-constitutional political settlement in such fragile periods. The article also compares unamendability to other techniques of constitution-making in uncertain times, such as sunset clauses, deferring hard choices and other forms of constitutional incrementalism.

**Keywords:** constitutional amendment; eternity clauses; political settlements; political transitions; Tunisia

## I. Introduction

Institutional mechanisms adopted in search of the twin goals of legitimacy and longevity of constitutions show great variety. Within that variety, constitutional amendment procedures have gained increasing attention in recent scholarship, having been called just as important as ‘standard topics of institutional design’.<sup>1</sup> Their multiple purposes include entrenching the

<sup>1</sup> S Levinson, ‘Designing an Amendment Process’ in J Ferejohn *et al.*, *Constitutional Culture and Democratic Rule* (Cambridge University Press, Cambridge, 2001) 275.

constitution, structuring its change, and ‘precommitting’ political actors, but such clauses also serve as sites of expression of constitutional values.<sup>2</sup> Within these, unamendable provisions (also known as ‘eternity clauses’) have also attracted constitution-makers’ interest.<sup>3</sup> They are a type of constitutional provision or judicial doctrine which insulates from amendment certain principles or rights enshrined in a constitution. They represent a special mechanism of constitutional entrenchment, one which might be termed indefinite or limitless. The example of an eternity clause typically given is Germany, whose Article 79(3) or *Ewigkeitsklausel* declares the inviolability of human dignity and of human rights, as well as of the democratic, federal, and social nature of the German state, the electoral nature of the German democracy, and the rule of law. There are also judicial doctrines of implied substantive limits on amendment, such as India’s basic structure doctrine or the Czech Constitutional Court’s substantive core doctrine.<sup>4</sup> Such judicial constructs are informed by analogous considerations and operate in a similar fashion to formal clauses.

The rise of formal unamendable provisions has been constant in constitutions around the world, with one study estimating that 42 per cent (or 82 out of 192) of post-World War II constitutions adopted until 2011

<sup>2</sup> R Albert, ‘The Expressive Function of Constitutional Amendment Rules’ (2013) 59(2) *McGill Law Journal* 230–1. See also, generally, M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, New York, NY, 2010) and GJ Jacobsohn, *Constitutional Identity* (Harvard University Press, Cambridge, MA, 2010) (both discussing unamendable provisions as embodying commitments to the constitutional identity of a given polity).

<sup>3</sup> See, *inter alia*, PJ Yap, ‘The Conundrum of Unconstitutional Constitutional Amendments’ (2015) 4(1) *Global Constitutionalism* 114; C Bernal, ‘Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine’ (2013) 11(2) *International Journal of Constitutional Law* 339; Y Roznai, ‘Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea’ (2013) 61 *American Journal of Comparative Law* 657; G Halmai, ‘Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?’ (2012) 19(2) *Constellations* 182; Y Roznai and S Yolcu, ‘An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision’ (2012) 10(1) *International Journal of Constitutional Law* 175; MF Mohallem, ‘Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts’ Authority’ (2011) 15(5) *The International Journal of Human Rights* 765; R Albert, ‘Constitutional Handcuffs’ (2010) 42(3) *Arizona State Law Journal* 663; R Albert, ‘Nonconstitutional Amendments’ (2009) 22(1) *The Canadian Journal of Law and Jurisprudence* 5; and K Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press, Bursa, 2008).

<sup>4</sup> See, *inter alia*, S Krishnaswamy, *Democracy and Constitutionalism in India: A Study on the Basic Structure Doctrine* (Oxford University Press, New Delhi, 2009); and K Williams, ‘When a Constitutional Amendment Violates the “Substantive Core”: The Czech Constitutional Court’s September 2009 Early Elections Decision’ (2011) 36 *Review of Central and Eastern European Law* 33.

incorporate some type of eternity clause, and 32 per cent (or 172 out of 537) of constitutions of all time doing so.<sup>5</sup> Even more significantly, this trend does not appear to be abating. The two most recently adopted constitutions – Tunisia’s 2014 and Nepal’s 2015 constitutions – both incorporated formally unamendable clauses. The spread of judicial doctrines of unamendability has similarly continued, with the Pakistani Supreme Court adopting its own version of a basic structure doctrine in 2015.<sup>6</sup> Significantly, their incidence amidst post-conflict and post-authoritarian constitutions seems to suggest that eternity clauses have become an especially attractive tool to constitution-makers.

In what follows, I propose to examine the rise of unamendable commitments in constitutions resulting from political transitions and to suggest a third goal they pursue in these contexts: that of facilitating and later safeguarding a political settlement. The technique of taking certain agreements off the table in a nascent constitution has long been employed as a mechanism of constitutional design in transitional situations.<sup>7</sup> In such contexts, a political agreement between rival parties is both hard-fought and especially fragile. As such, I will argue, the promise of constitutional unamendability is taken as a guarantee of the terms of the agreement both before and after the adoption of the new fundamental law.

This role of eternity clauses – as themselves an instrument of political negotiation and conflict resolution – has thus far been ignored by the growing literature on unamendability. Insofar as this literature has addressed their inclusion in post-conflict constitutions, it has focused on ‘reconciliatory’ elements such as unamendable amnesties,<sup>8</sup> without considering the different dynamics of post-conflict constitution-making and the resulting difference in justifications for, and expectations from, unamendability in these basic laws. One author has noted the role of higher amendment thresholds in facilitating ‘a political bargain entered into by the constitutional designers for the sake of ratifying an otherwise “unratifiable” constitution’.<sup>9</sup> The case he discusses is that of the US constitution’s entrenchment of state voting rights in Article V, explaining the heightened level of protection as a condition precedent to the Union itself.<sup>10</sup> Beyond this insight, however, the literature on eternity clauses has not explored how they may condition

<sup>5</sup> Roznai (n 3) 667.

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

<sup>7</sup> L Aucoin, ‘Introduction’ in LE Miller and L Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute for Peace, Washington, DC, 2010) xviii.

<sup>8</sup> Albert, ‘Constitutional Handcuffs’ (n 3) 666–7.

<sup>9</sup> Albert (n 2) 245.

<sup>10</sup> *Ibid.*

political compromises underlying constitution-making today. This article seeks to fill this gap by investigating the bargaining dynamics conditioning political settlements in the contexts where most of today's new constitutions are being written: post-conflict and post-authoritarian transitions.

The article further argues that eternity clauses pose problems of a different nature from other conflict resolution techniques which have found their way into constitutions. If taken seriously, these clauses remain at the heart of the political settlement, both as the embodiment of its core elements and as guarantees of the settlement's survival. Unamendability, however, is a qualitatively different choice from deep entrenchment such as a supermajority requirement for constitutional amendment or a sunset clause. It purports to forever close off certain avenues for constitutional change in a manner which may safeguard the political settlement in the first instance but severely frustrate its development further down the road – in particular when longer-term demands of peace require the elite pact to give way to some more normative commitment to constitutionalism.

In part because eternity clauses are a fairly common constitutional feature, constitution-makers in post-conflict settings may not always be aware of the full array of implications flowing from the inclusion of such clauses in constitutions, nor of how these provisions fit within the broader constitutional architecture – notably with institutions for constitutional openness (such as legislative initiative provisions) and for constitutional enforcement (such as constitutional review). Formal unamendability tends to result in the empowerment of constitutional courts, by way of constitutional review of amendments on substantive grounds, in a manner these bodies may not have been equipped for. In this sense, then, this article also links to the contributions of Jenna Sapiano and Tom Gerald Daly 'in this issue' and their studies of the judicial role in the jurisprudence of peace and democratisation.

I proceed by first outlining the prospects and limits of eternity clauses as mechanisms of constitutional rigidity, and how these may be influenced by the special dynamics of political settlements in conflict-affected and post-authoritarian contexts. I then propose to look at substantive elements declared unamendable by taking Tunisia's recently adopted constitution as an example. I explore the complex bargaining behind the adoption of Tunisian unamendable provisions in their final form. I also suggest that the choices of what to declare unalterable in the basic law mirror the concerns of constitution-makers in other post-authoritarian and post-conflict settings. Thus, declarations of immutability of certain fundamental characteristics of the state, of human rights commitments, or of executive term limits are frequent in emerging or fragile democracies and there is growing evidence of how these operate in practice. Eternity clauses may thus

be read as indicators of what drafters have considered to be the ‘public goods of constitutionalism’ which Christine Bell discussed in her article. However, they may simultaneously operate to reduce the risk for elites in entering the new dispensation: presidential term limits and human rights provisions appear to give some protection against either party using the new order to reinstate or achieve a reversion to domination. Unlike in the Tunisian constitution, amnesties granted to former warring parties are also sometimes constitutionalised as unamendable and I briefly touch upon these as a more overt confirmation of the elite pact.

The final part of the article explores potential alternatives to eternity clauses in post-conflict constitutions. Rather than aiming at prescriptive conclusions, this section considers alternate design choices which also pursue constitutional legitimacy and endurance. These include: interim constitutions (discussed in greater depth by Charmaine Rodrigues in this issue); sunset clauses; as well as deferral; deliberate ambiguity; or silence. Where evidence is available, I explain why these were not chosen in Tunisia but were preferred in other transitional contexts. Based on this brief analysis, I suggest that more work is needed in order to evaluate the extent to which these options are viable alternatives to unamendability’s capacity to broker, and promise to safeguard, the political settlement. The article concludes by reiterating the need to complement our understandings of the recourse to unamendability in constitution-making with insights from post-conflict and post-authoritarian processes. Within these, eternity clauses play a distinctive and possibly unique role as guarantees of the pre-constitutional political settlement and as such may be justified on political and not merely normative grounds.

## II. Constitution-making in political transitions

Constitution-making in political transitions as referred to in this article pertains to both post-conflict and post-authoritarian contexts in which a democratic constitution is adopted with a view to entrenching a new political settlement. As the introductory piece to this special issue makes clear, there are overlaps between the burdens placed on post-conflict and democratisation constitutions: they both must accommodate antagonists – whether warring parties or powerful elites – and introduce new political and legal institutions which can navigate between old and new political settlements. Understanding the politics of doing politics in fragile and conflict-affected states is a key step towards untangling the delicate and often seemingly contradictory compromises enshrined in their resulting constitutions. I acknowledge here that the concept of transition to democracy is itself problematic, seeing as it relies on a thin notion of democracy and

on a workable distinction between a non-democratic starting point and a democratic end point.<sup>11</sup> Daly in this issue provides a more comprehensive explanation of the utility of the concept of transition, as well as of the broader concept of democratisation. For the purposes of this article, the reader should retain the use of ‘transition constitution-making’ as an umbrella-concept denoting the processes of negotiating, drafting, and ratifying new constitutions in countries emerging from violent conflict or authoritarian regimes.

Several distinctive features of post-conflict and post-authoritarian constitution-making can be considered likely to have an impact on the negotiation and content of eternity clauses. While these are not necessarily exclusive to such transitional context, they tend to be exacerbated in such a setting. I will highlight three such features.

First, the constitution-making process may be more contested than constitutional reform in established democracies, and as such the legitimacy of the final product may be more readily called into question. The threat of a return to violence, or indeed, the continued violence as background to constitutional negotiations, have an impact on both the process and the substance of constitutions drafted in these conditions. The time frame for negotiations may thus be shorter; the chance of compromise smaller due to heightened polarisation and potential imbalances of power; and the pressure on the constitution to ‘deliver’ greater.<sup>12</sup> On the one hand, negotiating fundamental constitutional norms of the sort included in eternity clauses may not be ideal in such a setting. As Vivien Hart has argued, Canada could sustain 30 years of constitutional conversation around Quebec’s secession, but Northern Ireland or South Africa could not hope to do the same.<sup>13</sup> On the other hand, and as this article will later argue, it is precisely agreement on those fundamentals, and on their immutability, which may ensure that a political settlement is reached at all and a constitution is adopted. Eternity clauses thus embody the potential tension between the political pacts having made the new constitution possible and the normative elements of the constitutional framework.

<sup>11</sup> A Bonime-Blanc, ‘Constitution Making and Democratization: The Spanish Paradigm’ in Miller and Aucoin (n 7) 417. See also JJ Linz and A Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press, Baltimore, MD, 1996) 3 (defining the end point of a democratic transition); and, broadly, JJ Linz, ‘Transitions to Democracy’ (1990) 13(3) *The Washington Quarterly* 143.

<sup>12</sup> See J Widner, ‘Constitution-Writing in Post-Conflict Settings: An Overview’ (2008) 49(4) *William and Mary Law Review* 1513.

<sup>13</sup> V Hart, ‘Constitution-Making and the Transformation of Conflict’ (2001) 26(2) *Peace & Change* 165.

Second, the functions post-conflict and post-authoritarian constitutions are expected to play are complex. Post-conflict constitutions are expected to drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict. [They] must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.<sup>14</sup>

Post-authoritarian constitutions are similarly tasked with instituting a new political regime, whose viability may well be determined by the ‘momentous decisions’ of the constitution-makers.<sup>15</sup> In addition to the institutional engineering other constitutions are expected to provide, post-conflict and post-authoritarian basic laws are also tasked with providing recognition – they are ‘to recognize, include, give voice to, equalize, or advantage, and to exclude, silence, or stigmatize people and peoples’.<sup>16</sup> These constitutions thus bear the dual burden of encapsulating an elite pact while also performing the role of a peace agreement.<sup>17</sup> As will be seen below, certain types of eternity clauses are distinctly aimed at achieving reconciliation, such as those enshrining amnesties as unamendable. Others, including unexpected ones such as unamendable commitments to religion, may also be read as rectifying past oppression.

Third and finally, in all cases of post-conflict and post-authoritarian drafting, the resulting constitutions are ‘heavily negotiated outcome[s], often involving an exchange of incommensurables rather than a coherent plan for conflict reduction’.<sup>18</sup> Such constitution-making takes place in times of crisis and is shaped by the constraints resulting from this, by the numerous biases of drafters, as well as by generally weak institutional capacity.<sup>19</sup> As a consequence, what results is more often ‘partial or even conflicting innovations’ rather than ‘the adoption of coherent designs

<sup>14</sup> K Samuels, ‘Post-Conflict Peace-Building and Constitution-Making’ (2006) 26(2) *Chicago Journal of International Law* 2.

<sup>15</sup> Bonime-Blanc in Miller and Aucoin (n 7) 422.

<sup>16</sup> Hart (n 13) 156.

<sup>17</sup> On the complex interplay between peace agreements and constitutions, see C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, Oxford, 2008) 19; and F Ní Aoláin, DF Haynes and N Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press, Oxford, 2011) 204.

<sup>18</sup> DL Horowitz, ‘Conciliatory Institutions and Constitutional Processes in Post-Conflict States’ (2008) 49(4) *William and Mary Law Review* 1230.

<sup>19</sup> *Ibid* 1227–30.

whose elements reinforce each other'.<sup>20</sup> Given this likely incoherence, eternity clauses may not play the role of structuring devices they have performed in other constitutional orders, such as Germany.<sup>21</sup> Declaring a hierarchy of norms within the constitution, atop of which are certain unamendable principles, may prove more problematic in a disjointed document. The case of Tunisia's unamendable commitment to Islam as its official religion, sitting as it does alongside protections of religious freedom but also of the state's role as guardian of religion, will serve as an illustration of such potential incompatibilities.

Other articles in this issue, notably those by Rodrigues and Sapiano, take up the distinctiveness of post-conflict constitution-making and responses to it more fully. Daly engages with the democratisation context more generally to discuss the heavy burdens placed on constitutional courts in new and fragile democracies. My analysis, while acknowledging the distinctiveness of the transitional setting, will also seek to identify overlaps – in aims, mechanisms, and implementation – between eternity clauses resulting from post-conflict and post-authoritarian constitution-making and those adopted in more peaceful times. As such, examples used to illustrate the promises and limits of eternity clauses will not be limited to unamendability in post-conflict constitutions. This approach warns against easy assumptions over what might or might not work in post-conflict and post-authoritarian constitutions and acknowledges that all constitutions, to an extent, are the product of (often violent) crisis.<sup>22</sup> All constitution-makers are concerned with achieving durability, and for the constitution to ensure societal stability. However, the distinctiveness of the transitional context becomes clear when one understands eternity clauses as facilitating bargaining and compromise during negotiations and as constitutionalising the *sine qua non*s of the political settlement. To the extent that this settlement would not have been possible without it, unamendability thus shows itself as especially attractive in transitional settings and justifiable on strategic and political rather than normative grounds.

### III. Tunisia's 2014 constitution and unamendable commitments in post-conflict constitutions

Tunisia's 2014 constitution is one of two recently adopted basic laws incorporating a formal eternity clause (the other is Nepal's constitution,

<sup>20</sup> Ibid 1226–7.

<sup>21</sup> For a discussion of the problems of eternity clauses creating an internal constitutional hierarchy, see Albert, 'Constitutional Handcuffs' (n 3) 683–4.

<sup>22</sup> JE Finn, *Constitutions in Crisis: Political Violence and the Rule of Law: Political Violence and the Rule of Law* (Oxford University Press, Oxford, 1991).



ratified in September 2015, whose Article 274 serves this function). It was drafted during an intensive and prolonged process, following the ousting of president Ben Ali and the so-called ‘Jasmine Revolution’ in 2011.<sup>23</sup> Heavy expectations loomed over the constitutional assembly elected in October 2011, which simultaneously had to draft a new fundamental law and act as transitional legislative body.<sup>24</sup> Opinions differed widely on how long the assembly had to deliberate,<sup>25</sup> though in the end it completed its work in two years. The final constitution was adopted in January 2014 by a two-thirds majority of the assembly but was not submitted to popular referendum. It would bring to an end what some have seen as a period of ‘extraordinary politics’ in which the Tunisian people actively reconstituted society.<sup>26</sup> Despite its shortcomings, Tunisia’s is thus far the only instance of a successful transition amidst the Arab Spring countries, and as a consequence has been promoted as a model for the rest.<sup>27</sup> The Nobel Prize Committee, awarding the Nobel Peace Prize for 2015 to the Tunisian National Dialogue Quartet, praised it for having ‘paved the way for a peaceful dialogue between the citizens, the political parties and the authorities and helped to find consensus-based solutions to a wide range of challenges across political and religious divides’.<sup>28</sup>

The reality of the Tunisian constitution-making process was, however, far messier. It was not immediately clear that a new constitution was to be drafted, with evidence suggesting that the initial transitional government

<sup>23</sup> For more on the drafting process, see ‘The Constitution-Making Process in Tunisia: Final Report 2011–2014’, The Carter Center, 15 April 2015, 68–71 (hereinafter ‘Carter Center Report’), available at <[http://www.cartercenter.org/news/publications/peace/democracy\\_publications/tunisia-peace-reports.html](http://www.cartercenter.org/news/publications/peace/democracy_publications/tunisia-peace-reports.html)>; and J Gluck and M Brandt, ‘Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring’ (United States Institute of Peace, Washington, DC, 2015) 7–10, available at <<http://www.usip.org/publications/participatory-and-inclusive-constitution-making>>.

<sup>24</sup> See *Loi Constituyente no. 2011-6 du 16 décembre 2011, portant organisation provisoire des pouvoirs publics*; and *Décret-loi no. 2011-14 du 23 mars 2011, portant organisation provisoire des pouvoirs publics*.

<sup>25</sup> E Gamha, ‘Tunisia’s Constituent Assembly: How Long Will It Last?’, *Tunisia Live*, 10 October 2011, available at <<http://www.tunisia-live.net/2011/10/10/constituent-assembly-what-about-its-duration/>>.

<sup>26</sup> S Zemni, ‘The Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making’ (2015) 20(1) *Mediterranean Politics* 2.

<sup>27</sup> S Stearns, ‘Kerry: Tunisia’s New Constitution Is Model for Arab World’, *Voice of America*, 18 February 2014, available at <<http://www.voanews.com/content/kerry-visits-tunisia-amid-democratic-transition/1853607.html>>.

<sup>28</sup> The Nobel Committee, ‘The Nobel Peace Prize for 2015’, Press Release, 10 October 2015, available at <[http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2015/press.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2015/press.html)>.

had intended only to reform the 1959 constitution.<sup>29</sup> Even once the constituent assembly was in place, consensus could only be reached after significant bargaining between the main players: the majority Islamist block centred on the Ennahda party; the liberal, centre-left Union for Tunisia, the main (secular) opposition force; and the Popular Front, a smaller socialist and ecological block.<sup>30</sup> The primary main source of tension during the constitution-making process was the place afforded religion in the new constitution. Despite early promises from the Ennahda party following its electoral success in the October 2011 elections that it would not seek to change the constitution to impose sharia, and from the opposition that it would not refer to secularism explicitly, as will be seen, the drafting process brought to light the deep fears and distrust held by the parties.<sup>31</sup> These misgivings were not helped by the fact that a leaked early Ennahda draft of the constitution had actually included a sharia provision.<sup>32</sup> Some scholars have argued that religion should not be viewed as the only division between the drafting parties, nor as one as rigid as it has been made to seem.<sup>33</sup> It has instead been argued that a better predictor of the positions of political actors during Tunisia's transitional period were economic cleavages, namely the stance on neoliberal reform agendas held by each party.<sup>34</sup> Thus, despite the main aim of the Jasmine Revolution being economic, an economic revolution in Tunisia has been said to have been relegated to an elusive 'second phase'.<sup>35</sup> As the conclusion to this article shows, the consequences of this choice may be graver than anticipated.

All actors involved in the Tunisian constitution-making process had to compromise on core demands in exchange for gains elsewhere. On the religious question, the main Islamist party Ennahda and secularist parties had to find common ground by giving in on issues such as whether to

<sup>29</sup> C Sarsar, 'The Transitional Governments' in H Redissi *et al.* (eds), *La transition démocratique en Tunisie, Etat des lieux: Les acteurs* (Diwen Edition, Tunis, 2012) 15–34 cited in A Boubakri, 'Interpreting the Tunisian Revolution: Beyond Bou'azizi' in L Sadiki (ed), *Routledge Handbook of the Arab Spring: Rethinking Democratization* (Routledge, Abingdon, 2015) 74.

<sup>30</sup> M Rousselin, 'Is Religion Truly the Main Source of Cleavage in the Tunisian Party Landscape?' in M Rousselin and C Smith (eds), *The Tunisian Constitutional Process: Main Actors and Key Issues* (Centre for Global Cooperation Research Global Dialogues 7, Duisburg, 2015) 37.

<sup>31</sup> T Heneghan, 'Tunisia's Islamist-Led Government Rejects Laws to Enforce Religion', *Tunis Reuters*, 5 November 2011, available at <<https://www.alarabiya.net/articles/2011/11/05/175612.html>>. See also Carter Center Report (23) 80; and M Böckenförde, 'The Dynamics of Comprehensive Constitution-Building: Religion and the Concept of Twin Tolerations in Tunisia' in Rousselin and Smith (n 30) 27.

<sup>32</sup> Böckenförde (n 31) fn 15.

<sup>33</sup> *Ibid* 27.

<sup>34</sup> Rousselin (n 30) 36.

<sup>35</sup> *Ibid* 39.

include references to sharia and the position attributed to human rights in the constitution, respectively.<sup>36</sup> The bargain they struck is reflected in the unamendable provisions discussed shortly. Another, equally contested site of negotiations concerned the choice of system of government. Ennahda, relying on its projected strength at the polls, would have opted for a parliamentary system, whereas other, smaller parties thought a semi-presidential system in which the president was to be directly elected would give them a better chance to capture the office.<sup>37</sup> Without compromises on these issues, achieved by way of many iterations of constitutional drafts debated extensively in the constituent assembly and within broader society, there would not have been a ratified constitution. Indeed, bargaining dynamics and deal-making between moderates and the ruling elites,<sup>38</sup> including the non-exclusion of old elites from the political process<sup>39</sup> and the ability of moderates to marginalise radicals on both sides,<sup>40</sup> have been heralded as key explanatory factors for the success of Tunisia's transition more generally. The international community also pushed forward the constitution-making process. The United Nations, for example, did so not just by way of financial support, but also by various agencies sending letters and recommendations to members of the constituent assembly and to the government calling for the inclusion or modification of individual provisions on human rights or judicial independence.<sup>41</sup> The Venice Commission of the Council of Europe also intervened, at the request of the

<sup>36</sup> M Hachemaoui, 'Tunisia at a Crossroads: Which Rules for Which Transition?', SWP Research Paper, German Institute for International and Security Affairs, August 2013, 25, available at <[http://www.swp-berlin.org/en/publications/swp-research-papers/swp-research-paper-detail/article/tunisia\\_which\\_rules\\_for\\_which\\_transition.html](http://www.swp-berlin.org/en/publications/swp-research-papers/swp-research-paper-detail/article/tunisia_which_rules_for_which_transition.html)>.

<sup>37</sup> Ibid 26–7. See also ML Marks, 'Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution', Brookings Doha Center Analysis Paper, No 10, February 2014, 26–8, available at <<http://www.brookings.edu/research/papers/2014/02/10-ennahda-tunisia-constitution-marks>>.

<sup>38</sup> R Hinnebusch, 'Introduction: Understanding the Consequences of the Arab Uprisings – Starting Points and Divergent Trajectories' (2015) 22(2) *Democratization* 212; and F Volpi and E Stein, 'Islamism and the State after the Arab Uprisings: Between People Power and State Power' (2015) 22(2) *Democratization* 287.

<sup>39</sup> E Goldberg, 'Arab Transitions and the Old Elite', *The Washington Post*, 9 December 2014, available at <<https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/09/arab-transitions-and-the-old-elite/>>.

<sup>40</sup> R Hinnebusch, 'Globalization, Democratization, and the Arab Uprising: The International Factor in MENA's Failed Democratization' (2015) 22(2) *Democratization* 350.

<sup>41</sup> 'The UN Constitutional: A Newsletter on United Nations Constitutional Support', Issue 2, Spring/Summer 2014, 16–17, available at <[http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional\\_Issue2.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional_Issue2.pdf)>. See also S Besbes, 'L'ONU – Acteur du Processus Transitionnel en Tunisie', Tunisia in Transition: German-Arab Research Group, Working Paper, December 2013, 6, available at <<http://tunisia-in-transition.org/wp-content/uploads/2014/04/Working-Paper-Salma.pdf>>.

Tunisian government, by issuing a full report on a later draft of the constitution, indicating provisions it thought problematic from the point of view of international human rights standards.<sup>42</sup>

Read in light of this complicated process, the new constitution's provisions on unamendability gain new significance. When considered as part of such political pact-making, they appear as the culmination of strategic positioning by the parties to negotiations rather than, or alongside, being the embodiment of normative aspirations for the new polity.

Up until the final debate in the plenary of the constituent assembly, drafts of the Tunisian constitution had included a separate eternity clause. As Table 1 shows, these iterations referred to the same issues (Islam as the religion of the state, Arabic as the official language, the nature of the state as republican and civil, human rights and freedoms, and presidential term limits) with little variation. This consistency may indicate early and persistent agreement among drafters as to the necessity of unamendability in their constitution, even while it did not survive in this form in the ratified constitution.

In the end, Tunisian drafters resorted to attaching these declarations of unamendability individually to each affected article, rendering them now scattered throughout the text: in Article 1, which declares the characteristics of the Tunisian state ('Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican.');

in Article 2 on the civil nature of the state ('Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law.');

in Article 49, the constitution's general rights limitation clause ('There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.');

and finally in Article 75, banning amendments that would increase the number or length of presidential terms.

The main reason for this drafting choice was to preserve the ambiguous formulation of Article 1. As it stands, and as it had been incorporated in the 1959 constitution, Article 1 leaves the reference to religion deliberately vague: it is unclear whether Islam is being mentioned as the religion of the state as political structure, or whether a statement of fact (Tunisia as a majority Islamic country) is meant instead (more on this in the following section). In each formulation in the four preceding drafts of the constitution, this ambiguity had been lost: Islam had been explicitly named as 'the religion of the state', and thus the initial function played by Article 1 – as

<sup>42</sup> 'Opinion on the Final Draft Constitution of the Republic of Tunisia Adopted by the Venice Commission at its 96th Plenary Session (Venice, 11–12 October 2013)', CDL-AD(2013)032, 17 October 2013 (hereinafter 'Opinion on the Final Draft Constitution of the Republic of Tunisia').

Table 1. Iterations of the eternity clause in Tunisia’s constitutional drafts<sup>43</sup>

| First Draft, 14 August 2012   | Second Draft, 14 December 2012  | Third Draft, 22 April 2013   | Fourth Draft, 1 June 2013  |
|---|---|--|--|
| Article 9.3   | Article 148   | Article 136  | Article 141  |
| Unamendable components  | Unamendable components  | Unamendable components   | Unamendable components   |
| No amendment to the Constitution may be prejudice to:                               | No amendment to the Constitution may b[ring] prejudice to:                          | No amendment to the Constitution may bring prejudice to:                               | No amendment to the Constitution may bring prejudice to:                               |
| Islam, being the religion of the state.   | Islam, being the religion of the state.   | Islam, being the religion of the state.  | Islam, being the religion of the state.  |
| The Arabic language, being the official language.                                   | The Arabic language, being the official language.                                   | The Arabic language, being the official language.                                      | The Arabic language, being the official language.                                      |
| The republican nature of the regime.  | The republican nature of the regime.  | The republican system.   | The republican system.   |
| The civil capacity of the state.  | The civil capacity of the state.  | The state’s civil nature.  | The state’s civil nature.  |
| Human rights gains and freedoms guaranteed under the present Constitution.          | Gains of human rights and freedoms guaranteed under the present Constitution.       | Acquired human rights and freedoms that are guaranteed under the present Constitution. | Acquired human rights and freedoms that are guaranteed under the present Constitution. |
| The number and duration of presidential terms. Such may not be subject to increase. | The number and duration of presidential terms. Such may not be subject to increase. | The number and duration of presidential terms, and their increase.                     | The number and duration of presidential terms.   |

<sup>43</sup> The texts of the drafts may be found at ‘Constitutional history of Tunisia’, *ConstitutionNet*, available at <<http://www.constitutionnet.org/country/constitutional-history-tunisia>>.

a tool inducing early consensus and reassuring both Islamist and secularists that the constitution would preserve their interests – was lost.

Another important concern for drafters was instituting a well-functioning, independent judiciary. A constitutional court with extensive competencies was to be set up (Title V. Part II of the constitution) and was to act as guarantor of the new democratic dispensation (see also Daly's contribution in this issue). Its mandate includes *ex ante* and *ex post* constitutional review (Article 120), reviewing presidential impeachment (Article 88) and declarations of states of emergency (Article 80), and playing the role of arbiter in disputes over executive powers (Article 101). Previous drafts had narrower provisions on access to the court, for instance, only permitting the president to call for *ex ante* review.<sup>44</sup> The court replaced the previous, weaker Constitutional Council and was strongly advocated for by international actors, who promoted it as 'a step towards establishing effective democratic institutions'<sup>45</sup> and as constituting now 'a standard component of a democracy'.<sup>46</sup> The Venice Commission, in an opinion on the draft constitution, welcomed the creation of the new court and its extensive competences but encouraged wider access to initiating constitutional review procedures.<sup>47</sup> The reliance on entrenchment, including via unamendable provisions, goes hand in hand with the creation of a strong constitutional court which can give teeth to such commitments.<sup>48</sup> The constitutional court has been entrusted with a key role in consolidating Tunisian democracy but two years since the entry into force of the new basic law, the parliament still had not passed the necessary law on the functioning of the court.<sup>49</sup>

I will now turn to the principles declared unamendable by Tunisia's basic law and examine the considerations behind their adoption, including

<sup>44</sup> Art 114(1) of the Draft Constitution of the Tunisian Republic, 22 April 2013.

<sup>45</sup> 'Enhancing the Rule of Law and Guaranteeing Human Rights in the Constitution: A Report on the Constitutional Reform Process in Tunisia', International Commission of Jurists, 2013, available at <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf>>.

<sup>46</sup> 'Constitutional Review in New Democracies', The Center for Constitutional Transitions and Democracy Reporting International, Briefing Paper No 40, September 2013, 1, available at <[http://constitutionaltransitions.org/wp-content/uploads/2013/10/CT-DRI-BP-EN\\_Constitutional\\_Review\\_in\\_New\\_Democracies\\_2013.pdf](http://constitutionaltransitions.org/wp-content/uploads/2013/10/CT-DRI-BP-EN_Constitutional_Review_in_New_Democracies_2013.pdf)>.

<sup>47</sup> Opinion on the Final Draft Constitution of the Republic of Tunisia, paras 165–82.

<sup>48</sup> See, generally, Gözler (n 3).

<sup>49</sup> Y Bellamine, 'Tunisie - Projet et proposition de loi sur la Cour Constitutionnelle: Ce qu'il faut savoir', *Huffington Post Tunisie*, 1 September 2015, available at <[http://www.huffpostmaghreb.com/2015/09/01/projet-proposition-loi-cour-constitutionnelle\\_n\\_8071672.html](http://www.huffpostmaghreb.com/2015/09/01/projet-proposition-loi-cour-constitutionnelle_n_8071672.html)>. See also 'Opinion on the Draft Institutional Law of the Constitutional Court of Tunisia Adopted by the Venice Commission at its 104th Plenary Session (Venice, 23–24 October 2015), CDL-AD(2015)024, 26 October 2015.

bargains struck over their formulation. I will also briefly explore how similar provisions have fared in other contexts and draw out potential lessons for these clauses' interpretation in future Tunisian constitutional jurisprudence.

### *Unamendable state characteristics*

Certain characteristics of the Tunisian state are placed outside the power of amendment by Articles 1 and 2 in the constitution. It will not be surprising that they, and especially Article 1, were among the most controversial during drafting given that they purport to delineate the state's identity. Among the elements declared unamendable, the assertion of the state's 'free, independent, sovereign' nature appears straightforward, as does the fact that it is 'based on citizenship, the will of the people, and the supremacy of law'. They are akin to declarations of sovereignty and independence as being unamendable incorporated in several post-colonial or post-Soviet constitutions, such as in Article 292 of the constitution of Mozambique or in Article 114 of that of Armenia. Less clear is whether such declarations carry any more weight than they would were they incorporated in preambles. After all, the preservation of a country's sovereignty and independence, just like of its territorial integrity (another principle occasionally listed as unamendable in the basic laws of newly independent states) will depend at least in part on external forces beyond the control of internal state organs.<sup>50</sup>

Also seemingly uncontroversial is the declaration of the system of government as republican. A similar provision had been included in Tunisia's former constitution, the 1959 post-independence text, under Article 76. It had entrenched the departure from the previous monarchical system and had been likely influenced by Tunisia's colonial power, France, whose constitution states in Article 89 that: 'The republican form of government shall not be the object of any amendment.' The unamendable commitment to republicanism is also among the most widespread eternity clauses, with one study counting more than 100 constitutions having such a clause.<sup>51</sup> The origin of such clauses seems to be the fear of a return of the

<sup>50</sup> An example would include Ukraine's art 157, which barred amendments 'oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine'. The 2014 Crimean crisis was a blunt demonstration of the impotence of state independence or territorial integrity as constitutional principles and exposed them as serving a mostly aspirational function. See Y Roznai and S Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16(3) *German Law Journal* 570.

<sup>51</sup> Y Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, a thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, London, February 2014, at 30.

monarchy in the immediate aftermath of the transition to republicanism.<sup>52</sup> For all its influence, both as a colonial power and as a widely imitated constitutional model, France's experience with 'eternal' republicanism does not tell us very much about how such a clause might work in practice, including in Tunisia. This is because the *Conseil Constitutionnel* has consistently refused to engage in the review of constitutional amendments.<sup>53</sup> However, while virtually eradicated in France, monarchism has not fully disappeared from other republics. For example, calls for monarchical restoration exist in Libya, where a constitutional monarchy has been advocated as the solution to the country's turmoil.<sup>54</sup> Thus, while republicanism may seem a particularly uncontested unamendable constitutional commitment, and raised little debate among Tunisian drafters, one cannot assume it is without consequence simply because a return to monarchy appears impossible at a given time. Moreover, whether the republicanism principle will have been trespassed will also depend on how broadly the constitutional court interprets such transgression. It could also be that curtailing rights of political participation or altering the separation of powers to such an extent as to *de facto* extinguish popular sovereignty, or even the open-ended delegation of governmental authority,<sup>55</sup> would be deemed violations of the commitment to republicanism.

Unamendable declarations of an official language such as Tunisia's are to be found in a number of constitutions, including post-authoritarian ones.<sup>56</sup> When commenting on the Tunisian draft, the Venice Commission thought 'this provision requires no particular comment',<sup>57</sup> presumably because it deemed it a statement of fact in the same vein as that on an official religion (see below). Indeed, given the linguistic homogeneity of the country, Arabic may have been a unifying element of identity rather than a divisive one. Turkey, however, exemplifies how such a clause can

<sup>52</sup> D Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)' (2011) 44 *Israeli Law Review* 403.

<sup>53</sup> Decision No 62-20DC, 6 November 1962; Decision No 92-308DC, 9 April 1992; and Decision No 2003-469DC, 26 March 2003. See also discussion in Baranger *ibid* 391–8.

<sup>54</sup> M Eljarh, 'What if Libya's Political Dialogue Fails?', *Atlantic Council*, 2 October 2015, available at <<http://www.atlanticcouncil.org/blogs/menasource/what-if-libya-s-political-dialogue-fails/>>; and J Tilouine, 'Libye: le Guide est mort, vive le roi!', *Jeune Afrique*, 30 April 2014, available at <<http://www.jeuneafrique.com/133647/politique/libye-le-guide-est-mort-vive-le-roi/>>.

<sup>55</sup> Laurence Tribe discusses this scenario as a potential violation of art IV, section 4 of the US constitution, which declares that 'the United States shall guarantee to every State ... a Republican Form of Government'; L Tribe, *The Invisible Constitution* (Oxford University Press, Oxford, 2008) 90.

<sup>56</sup> See art 178 of the constitution of Algeria, art 120 of that of Bahrain, art 143 of that of Moldova, art 152 of that of Romania, and art 4 of that of Turkey.

<sup>57</sup> Opinion on the Final Draft Constitution of the Republic of Tunisia, para 211.



result in discriminatory enforcement against minorities.<sup>58</sup> The Turkish Constitutional Court has invoked the language element of the eternity clause to deem calls for the use of the Kurdish language as ‘a display of separatism’ and direct affronts to the unity of the nation.<sup>59</sup> Insofar as Tunisia’s eternity clause will not be similarly interpreted to discriminate against the language rights of minorities, its inclusion in the 2014 constitution will not pose immediate concern.

By far the most disputed of all the elements of state identity rendered unamendable in the constitution has been the reference to religion in Article 1. Three aspects of Tunisia’s unamendable commitment to Islam are noteworthy. The first is that it was the result of much negotiation between opposing parties. Ennahda initially pursued the constitutionalisation of sharia but faced fierce opposition from civil society as well as from secularist parties. Ben Jafaar, the president of the constituent assembly, threatened to leave the coalition if the clause concerning sharia was not withdrawn; he referred to the provision on Tunisia being a civil state (Article 2) as a ‘red line not to be trespassed’.<sup>60</sup> It may be true, as some have argued, that the main fault line during negotiations was not so much around religious issues, but around entrenching gains against the old elite.<sup>61</sup> To Ennahda members and supporters, entrenching Islam may have amounted to a guarantee against persecution on religious grounds as the Ben Ali regime had engaged in. As such, its entrenchment may have been less about ideology and more about adopting ‘political “fencing” measures that would preserve the gains of the revolution and ... keep the country from sliding back into an authoritarianism that targets religiously minded individuals’.<sup>62</sup> The bargain between these two seemingly incompatible positions was reached in March 2012, when the Shura Council of the Ennahda party renounced the constitutionalisation of sharia in exchange for secularists renouncing the constitutionalisation of the Universal Declaration of Human Rights and agreeing to language in the preamble that watered down the scope of rights protection (more on this shortly).<sup>63</sup>

The second important aspect to note, then, is how Article 1’s mention of religion sits within the larger constitutional apparatus. Optimists view it as

<sup>58</sup> See also M Schwartzberg, *Democracy and Legal Change* (Cambridge University Press, New York, 2009) at 47 for a similar point on the entrenchment of official languages in Azerbaijan and Romania.

<sup>59</sup> Case No 1992/1 (Political Party Dissolution), Decision No: 1993/1, 14 July 1993, cited in D Kogacioglu, ‘Progress, Unity, and Democracy: Dissolving Political Parties in Turkey’ (2004) 38(3) *Law & Society Review* 459 and, generally, 445, 447.

<sup>60</sup> Hachemaoui (n 36) 25.

<sup>61</sup> Marks (n 37) 15, 17.

<sup>62</sup> *Ibid* 17.

<sup>63</sup> Hachemaoui (n 36) 25.

being tempered by the declaration of the state's civil nature, although whether all sides mean the same thing when interpreting the principle of civil state is doubtful.<sup>64</sup> The Venice Commission has attempted to reconcile official endorsements of religion with principles of non-discrimination. It found the declaration of an official religion in the Tunisian constitution of 2014 to be a mere statement of fact to the extent that it only recognises that Islam is the religion of the majority of citizens.<sup>65</sup> However, the inclusion of this declaration as an unamendable principle, coupled with the unamendable civil nature of the state and with other provisions on religion in the constitution – notably Article 6, which stipulates that ‘The state is the guardian of religion.’ – may become problematic.<sup>66</sup> Tunisian authorities have explained the intent behind Article 6 to be for the state to be responsible for the maintenance of religious infrastructure and the remuneration of religious ministers, in line with similar provisions in other national constitutions.<sup>67</sup> Nevertheless, the ambiguous language of the Tunisian text, coupled with potential incongruities between the various provisions on religion, may lead to discriminatory interpretation. This ambiguity has led one commentator to observe that: ‘The response of the Tunisian draft constitution to the fundamental question of the polity – a community of believers or citizens? – remains ambivalent.’<sup>68</sup>

A third and final aspect worthy of mention here is the relationship between Article 1 in the constitution of 2014 and Article 1 in the 1959 constitution. Their language is identical, save for the inclusion of unamendability in the new constitution. However, there is more than meets the eye behind this resemblance. The mere fact of being able to discuss such core issues related to religion and identity was novel, with the chair of the Rights and Liberties Committee in the constituent assembly observing that ‘[in the past] we couldn't have a real conversation, let alone determine the boundaries of these issues’.<sup>69</sup> As stated, the language of the current Article 1 was chosen very carefully, however, so as to leave open whose religion Islam actually is: Tunisia's (as a statement of fact) or the state's (carrying with it the

<sup>64</sup> The main difference between Islamists and secularists on this point has been said to be their respective attitudes to individual rights: as an end in themselves for the latter, versus as only instruments for the moral development of the community for the former. See N Marzouki, ‘From Resistance to Governance: The Category of Civility in the Political Theory of Tunisian Islamists’ in N Gana (ed), *The Making of the Tunisian Revolution: Contexts, Architects, Prospects* (Edinburgh University Press, Edinburgh, 2013) 212–13.

<sup>65</sup> Opinion on the Final Draft Constitution of the Republic of Tunisia, para 15.

<sup>66</sup> *Ibid*, paras 27–37.

<sup>67</sup> *Ibid*, para 32.

<sup>68</sup> Hachemaoui (n 36) 26.

<sup>69</sup> Farida Laabidi cited in Marks (n 37) 21.

endorsement of state power). This has been deemed evidence of ‘strategic positioning’ of the drafters, resulting in normative flexibility.<sup>70</sup> It clearly leaves the resolution of this ambiguity in concrete cases to the future constitutional court, whose role becomes that much more important.<sup>71</sup> The new language may also be read as a correction, by way of constitutional law, of past constitutional jurisprudence. Under the old constitution, the previous Article 1 had been interpreted as altering Tunisia’s Personal Status Law (which had instituted significant departures from Islamic family law) to limit inheritance, property, and various parental rights according to Islamic law.<sup>72</sup> The identity in language between these two constitutions is therefore misleading if not analysed in the wider jurisprudential context.

References to official religion as unamendable such as in Tunisia’s Article 1 are not unprecedented and parallels come in two guises: the entrenchment of an official religion<sup>73</sup> and the unamendable protection of secularism or of the separation of church and state.<sup>74</sup> More problematic than Tunisia’s ambiguous reference to religion as unamendable are eternity clauses which entrench religious sources of law. For example, in Afghanistan’s 2004 post-conflict constitution, Article 149 reads, in part: ‘The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.’ The problem with such a clause is that it raises the difficulty of delineating the boundaries of religious principles and their infringement. This difficulty is even more complex in the Afghan constitution, which combines Islam and international law as sources of law (Articles 3 and 7, respectively), without guidance as to how they are to be reconciled if in conflict.<sup>75</sup>

Scholars have listed both official religion and secularism amidst the elements of preservative eternity clauses, seeing them as ‘an expression of

<sup>70</sup> E Bousbih and A Yaalaoui, ‘The Interplay of Politics and Religion in the New Tunisian Constitution: A Legal Analysis’ in Rousselin and Smith (n 30) 20 and 17.

<sup>71</sup> Ibid 22 and Böckenförde (n 31) 28.

<sup>72</sup> M Ben Lamine, ‘L’interprétation de l’article 1er de la Constitution tunisienne au regard de la liberté de conscience: Quel risque?’, CCMO: Cercle des Chercheurs sur le Moyen-Orient, 19 October 2010, 2, available at <<https://cerclechercheursmoyenorient.wordpress.com/2010/10/19/linterpretation-de-larticle-1er-de-la-constitution-tunisienne-au-regard-de-la-liberte-de-conscience-quel-risque/>>.

<sup>73</sup> Such as the entrenchment of Islam in the constitutions of Algeria (art 178), Bahrain (art 120), Iran (art 177) or Morocco (art 100).

<sup>74</sup> Such as the entrenchment of secularism in the Constitutions of Angola (art 236), Congo (art 220), Portugal (art 288) or Turkey (art 4).

<sup>75</sup> On this point, see MQ Hashimzai, ‘The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan’ in R Grote and TJ Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford, 2012) 671–2. See also KM Abou El Fadl *et al.*, *Democracy and Islam in the New Constitution of Afghanistan* (RAND, Santa Monica, CA, 2003).

the importance of religion or non-religion in that constitutional regime, either as a reflection only of the views of the constitutional drafters or of the views of citizens as well'.<sup>76</sup> This argument is reminiscent of those who view religion as expressive of constitutional identity, whether by achieving official status or by its banishment from public life in the form of a commitment to secularism.<sup>77</sup> Either way, the decision is viewed as fundamental to the nature of the state. The full significance of Tunisia's unamendable commitment to Islam will only become apparent once interpreted in practice. Only once a challenge is brought and the constitutional court delineates the boundaries of this provision will we know whether the political agreement behind its current formulation in Article 1 will hold. Only then will it be clearer whether it builds in eternal conflict or whether it enables the transformation of relationships or a more modest achievement of stable government.

### *Unamendable human rights and freedoms*

Article 49 in the Tunisian constitution, the rights limitations clause, also precludes amendments that would 'undermine the human rights and freedoms guaranteed in this Constitution'. As noted above, individual rights protections were a battleground during constitutional negotiations, with secularists having to give ground in order for Islamists to back away from calls for the constitutionalisation of sharia. This tussle occurred not just over the eternity clause, but was also evident in compromises over the preamble, the freedom of conscience and belief, and the constitutional requirement to criminalise blasphemy. The preamble of the third draft, for example, referred to '[b]uilding on the fundamentals and the open and moderate objectives of Islam, on sublime human values, and on universal human rights that are in harmony with the Tunisian people's cultural specificity'. This qualification of rights protections according to cultural specificities was opposed by lawyers and civil society members, as well as by international human rights organisations fearing that such language afforded authorities great discretion to limit human rights.<sup>78</sup> The current preamble maintains a reference to 'the teachings of Islam' but removes references to cultural specificities as qualifiers of rights protections. The right to freedom of

<sup>76</sup> R Albert, 'The Unamendable Core of the United States Constitution' in A Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer, Budapest, 2015) 5, available at <<http://works.bepress.com/richardalbert/46/>>.

<sup>77</sup> See Jacobsohn (n 2).

<sup>78</sup> Hachemaoui (n 36) 25; and Human Rights Watch, 'Tunisia: Revise the Draft Constitution: An Analysis of Human Rights Concerns', 13 May 2013, available at <<https://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>>.

conscience and belief also only appeared in the final draft, after sustained pressure from domestic and international actors.<sup>79</sup> Renouncing the criminalisation of blasphemy, however, may have been an even more difficult hurdle for Islamists to overcome. This constitutional commitment has been said to have amounted to a defensive stance of Ennahda members after years of abuses by the old regime.<sup>80</sup> In the end, however, they compromised and accepted that the constitution was not the appropriate locus for such prohibitory language.<sup>81</sup> Whether the balance between this issue and protections of freedom of expression and conscience has been struck coherently has been contested<sup>82</sup> and will become clearer once constitutional jurisprudence builds on this matter.

Eternity clauses entrenching human rights commitments are numerous, in particular in post-conflict and post-authoritarian constitutions.<sup>83</sup> The language used in these provisions differs considerably, however, ranging from provisions precluding any amendment to, more frequently, requirements that amendments not lessen human rights protection. A different, and arguably more rigid, type of such clause is Article X.2 of the constitution of Bosnia and Herzegovina, which stipulates that no amendment is possible to the provision enshrining the supremacy and direct applicability of the European Convention of Human Rights and its Protocols in the Bosnian constitutional system.

The preponderance of new democracies amidst countries on this list has led some scholars to interpret unamendable commitments to human rights as serving a transformative function: ‘These examples suggest how formal unamendability may be used to help transform a state’s default posture from rights infringement to rights enforcement.’<sup>84</sup> However, Tunisia’s provision, and others’, speaks not of outright unamendability of human

<sup>79</sup> Human Rights Watch (n 78).

<sup>80</sup> Marks (n 37) 25.

<sup>81</sup> Ibid 26.

<sup>82</sup> See C Gall, ‘Tunisian Constitution, Praised for Balance, Nears Passage’, *The New York Times*, 14 January 2014, available at <<http://www.nytimes.com/2014/01/15/world/africa/tunisian-constitution-praised-for-balance-nears-passage.html>>; and S Mersch, ‘Tunisia’s Compromise Constitution’, Carnegie Endowment for International Peace, 21 January 2014, available at <<http://carnegieendowment.org/sada/?fa=54260>>.

<sup>83</sup> See Algeria (art 178(5)), Angola (art 236(e)), Brazil (art 60(4)IV), the Central African Republic (art 101), Chad (art 223), Congo (art 185), the Democratic Republic of Congo (art 220), Ethiopia (art 10), Guatemala (art 40 rendered unamendable by art 281), Kosovo (art 144(3)), Moldova (art 142(2)), Morocco (art 175), Mozambique (art 292(d)), Namibia (art 131), Portugal (art 288(d)), Qatar (art 146), Romania (art 152(2)), Russia (art 135(1)), São Tomé and Príncipe (art 154(d)), Somalia (art 112(3)(d)), Turkey (art 2 rendered unamendable by art 4) and Ukraine (art 157).

<sup>84</sup> Albert (n 76) 6. See also Albert, ‘Constitutional Handcuffs’ (n 3) 685–7.

rights, but of a ban on amendments that would ‘undermine’ existing rights guarantees. This is not an unprecedented drafting choice and may also be found in other post-conflict constitutions, such as in Article 149(2) of Afghanistan’s basic law, which declares that: ‘The amendment of the fundamental rights of the people are permitted only in order to make them more effective.’ It is thus best understood as a ‘non-regression’ or ‘standstill’ clause.<sup>85</sup> In other words, as instituting a minimum standard of rights protection rather than as rendering human rights and freedoms untouchable. Such an interpretation also seems to have been developed in the case of Germany’s Article 79(3), with the German Constitutional Court having declared it to prohibit ‘a fundamental abandonment of the principles mentioned therein’.<sup>86</sup>

How this provision will be interpreted in Tunisia’s context will therefore depend on how its constitutional court interprets the prohibition on ‘undermining’ rights. However, given that the very wording itself signifies a compromise between two competing constitutional identities, the Court’s role will inevitably be understood in political as well as legal terms, with reference to how it maintains or tilts the balance between secularist and Islamist interests. The Court is likely to take as its starting point a minimum standard of protection against which to evaluate new amendments, and if so, it might ground this standard in international law and comparative experience. Such transnational elements have come to permeate discussions of eternity clause enforcement in a number of different fora. These fora include: when a supranational human rights court has intervened in cases springing from the contestation of unamendable norms, such as the European Court of Human Rights in a case involving Turkey’s unamendable secularism;<sup>87</sup> when national courts themselves appeal to (and perhaps misrepresent) international human rights norms in order to justify changes to unamendable commitments, such as to executive term limits in Honduras (more on this below); and when international bodies evaluate the enforcement of unamendable provisions against a country’s international rule of law commitments, such as the Venice Commission with regard to Turkey.<sup>88</sup>

<sup>85</sup> N-LA Lorenz, X Groussot and GT Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff, Leiden, 2013) 209.

<sup>86</sup> *The Klass case* (30 BVerfGE 1, 24 (1970)), cited in ‘Final Draft Report: On Constitutional Amendment Procedures’, European Commission for Democracy through Law (Venice Commission), CDL(2009)168, 4 December 2009, fn 161.

<sup>87</sup> *Şahin v Turkey* App No 44774/98, 10 November 2005.

<sup>88</sup> ‘Democratisation Process in Turkey in the Light of a New Constitution’, Conference ‘Turkey in Europe’, Keynote Speech by Mr Gianni Buquicchio, President of the Venice Commission of the Council of Europe, 2 November 2010, available at <[http://www.venice.coe.int/Newsletter/NEWSLETTER\\_2010\\_04/8\\_Speech\\_TUR\\_EN.html](http://www.venice.coe.int/Newsletter/NEWSLETTER_2010_04/8_Speech_TUR_EN.html)>.

Constitutional scholarship has started to take notice of these developments and to put forth defences of international interventions in this field<sup>89</sup> or theories which suggest the appropriate limits, rooted in transnational values, of doctrines of unconstitutional constitutional amendment.<sup>90</sup> In all these defences, eternity clauses have been interpreted as being in line with the country's international commitments, and the appeal to the transnational as essentially positive. One can also imagine international interventions frustrating, or being perceived as frustrating, good faith attempts at constitutional change which touch upon unamendable human rights commitments.<sup>91</sup> The case of *Sejdić and Finić*, discussed more amply in Sapiano's contribution to this issue, illustrates just how different national and international courts may reason when it comes to fundamental questions of a polity's human rights commitments.<sup>92</sup> Such disagreement may be unavoidable when courts are called upon to decide 'first-order' questions of the constitutional system.<sup>93</sup> It also cautions against expecting the inclusion of an unamendable minimum human rights standard in the constitution to lead to predictable and stable constitutional development in any given polity.

### *Unamendable executive term limits*

Article 75 in Tunisia's constitution contains one of the clearest instances of eternity clauses adopted for the purpose of protecting the integrity of the political settlement: unamendable executive term limits. The previous regime has been described as 'one of the most personalistic' models of authoritarian governance in the region,<sup>94</sup> with president Ben Ali repeatedly amending the 1959 constitution to allow for his re-election.<sup>95</sup> In such a

<sup>89</sup> L Garlicki and ZA Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44 *Israel Law Review* 343.

<sup>90</sup> R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 606.

<sup>91</sup> An example not involving human rights is the *Lisbon* decision, Case No 2 BvE 2/08, 30 June 2009, in which Germany's Constitutional Court pushed back against European integration on the grounds that it infringed upon the country's unamendable constitutional identity as rooted in art 79(3) of the constitution.

<sup>92</sup> See Constitutional Court of Bosnia and Herzegovina, Case No AP-2678/06, 29 September 2006; and Case of Sejdić and Finić v Bosnia and Herzegovina, App Nos 27996/06 and 34836/06, 22 December 2009.

<sup>93</sup> S Issacharoff, 'Constitutional Courts and Democratic Hedging', 99 *The Georgetown Journal* (2011) 971.

<sup>94</sup> F Volpi, 'Explaining (and Re-explaining) Political Change in the Middle East during the Arab Spring: Trajectories of Democratization and of Authoritarianism in the Maghreb' (2012) 20(6) *Democratization* 978.

<sup>95</sup> WM Habeeb, *The Middle East in Turmoil: Conflict, Revolution, and Change* (Greenwood, Santa Barbara, CA, 2012) 157.

context, fears of the re-emergence of a strong-man regime dominated negotiations over limitations on executive powers, not just via Article 75, but also via the choice of semi-presidentialism as the form of government.<sup>96</sup> Similar considerations explain the adoption of clauses on unamendable executive terms in Latin American and African countries trying to overcome a history of executive overstay and coups.<sup>97</sup>

Significantly, regional human rights bodies have also embraced prohibitions on amendments to executive term limits. Article 23 of the African Charter on Democracy, Elections and Governance, for example, lists ‘Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government’ as illegal and a cause for sanctions from the Union. The Venice Commission has defended executive term limits as ‘an important guarantee against any authoritarian dysfunctioning in a country’ and welcomed Tunisia’s Article 75 given that the country’s ‘democratic structures and their cultural foundations have not yet been consolidated’.<sup>98</sup> Scholars have similarly interpreted such clauses as inherently linked to countries’ experience with coups and military rule and to their desire to create functioning democracies.<sup>99</sup> They may be viewed as an extreme version of bans on executive term extension, which are quite common in constitutions around the world, especially in presidential and semi-presidential systems.<sup>100</sup> The Twenty-second Amendment to the United States constitution, Article 6 of the French constitution and Article 52 of the German Basic Law are examples of such clauses in three of the most influential fundamental laws. Limitations on the number and length of term limits have been found to be on the rise,<sup>101</sup> and they have come to be called ‘one of the defining features of democracy’.<sup>102</sup>

How unamendable term limits such as Tunisia’s work in practice is less straightforward, however. On the one hand, these types of rules present obvious advantages, particularly in the long run: ideally, they ensure rotation of office, limit incumbent advantage in elections, and encourage

<sup>96</sup> Marks (n 37) 28.

<sup>97</sup> Among these are: the Central African Republic (art 108), El Salvador (art 248), Guatemala (art 281), Honduras (art 374), Mauritania (art 99), Guinea (art 154), Madagascar (art 163), Niger (art 136), Qatar (art 147), The Republic of Congo (art 185) and Rwanda (art 193).

<sup>98</sup> Opinion on the Final Draft Constitution of the Republic of Tunisia, para 215.

<sup>99</sup> Albert, ‘Constitutional Handcuffs’ (n 3) 688.

<sup>100</sup> G Maltz, ‘The Case for Presidential Term Limits’ (2007) 18(1) *Journal of Democracy* 128.

<sup>101</sup> T Ginsburg, J Melton and Z Elkins, ‘On the Evasion of Executive Term Limits’ (2011) 52(6) *William and Mary Law Review* 1840.

<sup>102</sup> Maltz (n 100) 129.



political competition; conversely, they can be viewed as an illiberal constraint on citizens' choice, discouraging experienced governance and underestimating the potential disruptive role of ex-leaders, and are potentially abused.<sup>103</sup> They are sometimes suspected of inducing constitutional predicaments rather than preventing them, because they may not reduce the likelihood of presidents overstaying – they merely transform presidential overstay into a more acute form of constitutional crisis.<sup>104</sup> Some empirical studies testing these assumptions have called term limits 'surprisingly effective in constraining executives from extending their terms, at least in democracies'.<sup>105</sup> Moreover, the very bluntness, black and white nature of these rules may be linked to their successful enforcement.<sup>106</sup> The same empirical studies, however, indicate that, while not 'associated with the death or disability of democracy', term limits may in some circumstances trigger early constitutional replacement.<sup>107</sup>

Honduras's 2009 constitutional crisis and deposition of President Manuel Zelaya may yield lessons for Tunisia's emerging democracy. The Honduran crisis brought to the fore precisely how destabilising presidential term limits may be in a fragile democracy, especially when they are declared unamendable. Zelaya had attempted to organise a non-binding public consultation around the holding of a referendum on whether to set up a body tasked with changing the constitution's term limit, but was opposed by the judiciary, parliament and the military. Despite his protestations to the contrary, many in the country saw this as Zelaya's attempt to override the one-term limit. This included the Constitutional Chamber of the Honduran Supreme Court, which held that the proposed referendum could not go ahead as it was in breach of the constitutional term limit. The constitutional crisis resulted in the president's forceful removal from office by the military and exile.<sup>108</sup> A Supreme Court judge would justify this as nothing more than the military carrying out a lawful arrest warrant<sup>109</sup> and many agreed that, while the methods employed were unfortunate, there was also a very real threat to democracy had plans to override the executive

<sup>103</sup> Ginsburg, Melton and Elkins (n 101) 1818–27.

<sup>104</sup> See T Ginsburg, Z Elkins and J Melton, 'Do Executive Term Limits Cause Constitutional Crises?' in T Ginsburg (ed), *Comparative Constitutional Design*, (Cambridge University Press, Cambridge, 2012) 370.

<sup>105</sup> Ginsburg, Melton and Elkins (n 101) 1814.

<sup>106</sup> *Ibid* 1868.

<sup>107</sup> *Ibid* 1814.

<sup>108</sup> For an overview of events, see 'Q&A: Political crisis in Honduras', *BBC News*, 27 January 2010, available at <<http://news.bbc.co.uk/1/hi/world/americas/8124154.stm>>.

<sup>109</sup> J Goodman and B Schmidt, 'Honduras Supreme Court Judge Defends President Ouster (Update1)', *Bloomberg*, 1 July 2009.

term ban gone ahead.<sup>110</sup> Others, however – including eventually the United States – understood the arrest and removal of Zelaya as a form of coup or unconstitutional regime change.

The role played in the crisis by the Honduran constitution's eternity clause on executive term limits (Article 374) is therefore complicated.<sup>111</sup> Some commentators saw the term limit provision and its double entrenchment as the immediate cause for the 2009 crisis precisely because it made for indeterminacy.<sup>112</sup> Others were careful to distinguish between the substantive prohibition on term limit extension and the 'second-order proscriptions on debate or proposal of amendments'.<sup>113</sup> The latter opined that, while some core issues may best be protected by taking them off the table, term limits 'do not seem so contentious as to prohibit all discussion of [such limits]'.<sup>114</sup> Others still, placing Honduras in a wider Latin American context, saw Zelaya's bid as an effort at 'constitutional subterfuge': using the cover of legality to break down constitutional barriers to their re-election.<sup>115</sup> Perhaps a more nuanced interpretation would be that the conflicting claims of legitimacy – Zelaya's on the basis of his popularity in office and that of his opposition on the grounds of clear constitutional language – were not and could not be reconciled on the basis of the constitution's eternity clause. The Supreme Court intervened in a context of deep political divisions within the country, attempting to halt the capture of the state by one side, and was thus accused of enabling its capture by the other. Whether the eternity clause, or any constitutional mechanism for that matter, could be relied on to resolve this type of fundamental dispute is doubtful.

<sup>110</sup> See D Cassel, 'Honduras: Coup d'Etat in Constitutional Clothing?' (2009) 13(9) *ASIL* 29 July; M Llanos and L Marsteintredet, 'Epilogue: The Breakdown of Zelaya's Presidency: Honduras in Comparative Perspective' in M Llanos and L Marsteintredet, (eds), *Presidential Breakdowns in Latin America. Causes and Outcomes of Executive Instability in Developing Democracies* (Palgrave Macmillan, New York, NY, 2010) 229; JM Ruhl, 'Honduras Unravels' (2010) 21(2) *Journal of Democracy* 93; and FM Walsh, 'The Honduran Constitution Is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal' (2010) 38 *Georgia Journal of International and Comparative Law* 339.

<sup>111</sup> The prohibition on re-election is compounded by additional constitutional provisions which attach severe penalties to its breach or attempted breach (see arts 239 and 42).

<sup>112</sup> Albert, 'Constitutional Handcuffs' (n 3) 692. He states: 'It was none other than this constitutional clause that pit the leading popular democratic institution in Honduras—the presidency—versus the other national democratic institutions, namely the legislature, courts, and leading independent bodies.'

<sup>113</sup> T Ginsburg, 'The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment', Comparative Constitutions Project, 12 August 2009, <[www.comparativeconstitutions.org/2009/08/puzzle-of-unamendable-provisions-debate.html](http://www.comparativeconstitutions.org/2009/08/puzzle-of-unamendable-provisions-debate.html)>.

<sup>114</sup> *Ibid.*

<sup>115</sup> FD Colburn and A Trejos, 'Democracy Undermined: Constitutional Subterfuge in Latin America' (2010) 57(3) *Dissent* 11.

This reading may have been borne out by subsequent developments in Honduras. In a 2015 decision, the Constitutional Chamber of the Honduran Supreme Court (with a different composition to 2009) declared the ban on presidential re-election unconstitutional and effectively repealed Article 239.<sup>116</sup> It found the article to be in conflict with the freedoms of speech and thought; to unduly limit political participation and debates; to be contrary to international human rights obligations; and to have been relevant at an earlier time, but no longer because Honduras had stabilized its democracy. Moreover, the court relied on the recommendations of the truth commission set up by Zelaya's successor to clarify the events of 2009 and to make proposals meant to prevent such crises.<sup>117</sup> The latter had found the actions of the military in ousting Zelaya to have been illegal and unjustifiable and called for comprehensive constitutional reform. This decision not only made curious use of the unconstitutional constitutional amendment doctrine – declaring a provision of the constitution itself unconstitutional, not an amendment – but it also invoked international human rights standards in a dubious manner, and possibly against their core purposes.<sup>118</sup> It may also have shown unamendability to be surmountable when faced with enough political pressure and arguments about its newfound irrelevance.<sup>119</sup>

Honduras's case is instructive primarily in showing how serious the consequences of unamendable executive term limits can be, or else how limited their capacity to withstand pressures to capture the presidential office in divided societies. The inclusion of these clauses in the constitution may lead to crisis when actors wishing to repeal such an eternity clause gain sufficient power but find themselves in a standoff with other political actors or with the judiciary. The relevance of debates on the wisdom of entrenching executive term limits has been proven no more recently than during 2015, when a number of African countries struggled with contestations of limits on presidential re-election. For example, the

<sup>116</sup> Corte Suprema de Justicia, Sala de lo Constitucional, 22 April 2015, available at <<http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>>. See also L. Marsteintredet, 'The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions', *I-CONnect Blog*, 2 May 2015, available at <<http://www.iconnectblog.com/2015/05/marsteintredet-on-honduras/>>.

<sup>117</sup> Comisión de la Verdad y la Reconciliación (CVR), 'Hallazgos y recomendaciones Para que los hechos no se repitan', July 2011, <<https://www.oas.org/es/sap/docs/DSDME/2011/CVR/Honduras%20-%20Informe%20CVR%20-%20RECOMENDACIONES.pdf>>.

<sup>118</sup> D. Landau, 'The Honduran Constitutional Chamber's Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?', *I-CONnect Blog*, 6 May 2015, available at <<http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary/>>.

<sup>119</sup> Marsteintredet (n 116).

announcement that Burundi's president would seek a third term in violation of the constitutional limit of two sparked violent clashes in the country; it was subsequently approved by the country's Constitutional Court but challenged before the Court of the East African Community in July 2015.<sup>120</sup> Rwanda's president similarly set in motion a process of constitutional change when he indicated a wish to be elected for a third term.<sup>121</sup> While these two post-conflict constitutions do not formally render term limits unamendable, they serve to highlight the continued relevance of constitutional mechanisms for containing executive usurpation.<sup>122</sup> It is unsurprising, therefore, that Tunisia, a country emerging from decades of authoritarian rule, would seek to protect its nascent multiparty democracy by entrenching limits on executive power. Whether those limits could withstand a crisis such as Honduras's is not a given and will depend to a great extent on balance of power considerations at the time.

### *Unamendable amnesties*

Also potentially attractive to post-conflict and post-authoritarian constitution-makers are amnesties absolving certain groups and their leaders from responsibility for past actions. The constitutionalisation of amnesties for human rights violations was first achieved in South Africa, where it was made conditional upon the fulfilment of certain conditions such as public apology and voluntary confession.<sup>123</sup> Amnesties have been elevated to unamendability in basic laws such as the 2010 constitution of Niger or the 2013 Fijian basic law.<sup>124</sup> The former protected Article 185, which had declared that 'An amnesty is granted to the authors, co-authors and accomplices of the coup d'état of eighteen (18) February 2010.' The latter included extensive provisions on immunities and amnesties for conduct during the 2006 Fijian coup d'état and declared a 2010 decree

<sup>120</sup> 'East Africa: Burundi - Application Against President Third Term Bid Filed in Court of EAC', *allAfrica*, 8 July 2015, available at <<http://allafrica.com/stories/201507081720.html>>.

<sup>121</sup> 'Rwanda Court Backs Scrapping Presidential Term Limits', *BBC News*, 8 October 2015, available at <<http://www.bbc.co.uk/news/world-africa-34477023>>.

<sup>122</sup> See also AT Hengari, 'Presidential Term Limits: A New African Foreign Policy Challenge', Policy Briefing 138, Foreign Policy Programme, June 2015, available at <<http://www.saiia.org.za/policy-briefings/presidential-term-limits-a-new-african-foreign-policy-challenge>>.

<sup>123</sup> On the first instance of constitutionalisation of amnesties, in South Africa, see DR Mekonnen and SM Weldehaimanot, 'Transitional Constitutionalism: Comparing the Eritrean and South African Experience', Paper presented at ANCL-RADC Annual Conference on 'The Internationalisation of Constitutional Law', Rabat, Morocco, 2–5 February 2011 at 10.

<sup>124</sup> Albert (n 76) 6; T Ginsburg and Y Ngenge, 'The Judiciary and Constitution Building in 2013' in S Bisarya (ed), *Constitution Building: A Global Review (2013)* (International IDEA, Stockholm, 2014) 32; and Albert, 'Constitutional Handcuffs' (n 3) 693–8.

having provided for these immunities and amnesties as not subject to review (Chapter X). In Tunisia, the approach taken was precisely to stipulate that no amnesties would prevent transitional justice (Article 148(9)), although that article was not declared unamendable.<sup>125</sup>

Amnesties may be viewed as the best example of how the normative aspirations of a constitution – to the consolidation of democracy, the rule of law, and human rights protections – come into tension with the elite deals necessary for political settlements in post-conflict settings. On the one hand, the intention behind the entrenchment of such amnesties seems clear: it provides guarantees to formerly warring parties that they will not face prosecution once the new constitution comes into force and as such ensures their buy-in for the broader political settlement. Some scholars agree and view these as a separate type of eternity clause they call ‘reconciliatory’, whose aim is:

to avoid a contentious and potentially destabilizing criminal or civil prosecution of wrongdoers by putting prosecution off the table altogether. The goal is instead to allow opposing factions to start afresh, free from threat of legal action, and sometimes in tandem with a Truth and Reconciliation Commission to give victims the opportunity to air their views and to record their memories but without invoking the consequence of legal duty and violation.<sup>126</sup>

Other scholars, writing on the Fijian provisions, point to their origin in backlash against a Court of Appeal decision declaring the 2006 seizure of power as illegal; the 2013 Fijian constitution thus sought to legitimate the regime but also to curtail the expansion of judicial power.<sup>127</sup>

On the other hand, the constitutionalisation of amnesties will not extinguish the complexity involved in addressing past wrongdoings during post-conflict transitions. The South African Constitutional Court acknowledged as much in a case involving a challenge to amnesties for criminal and civil liabilities granted to perpetrators having disclosed the truth about past atrocities.<sup>128</sup>

<sup>125</sup> Indeed, subsequent developments have shown how precarious the transitional justice system instituted in Tunisia may be, with a draft law being proposed in 2015 to grant amnesties to former elites accused of corruption and other economic crimes. See A Guellali, ‘Tunisia: Transitional Justice in the Crosshairs’, *OpenDemocracy*, 8 September 2015, available at <<https://www.opendemocracy.net/arab-awakening/amna-guellali/tunisia-transitional-justice-in-crosshairs>>; and H Saleh, ‘Tunisia Struggles to Hold Former Regime to Account’, *Financial Times*, 24 February 2016, available at <<https://www.ft.com/content/501f8704-d34a-11e5-8887-98e7feb46f27>>.

<sup>126</sup> Albert (n 76) 6.

<sup>127</sup> Ginsburg and Ngenge (n 124) 32.

<sup>128</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC), 25 July 1996.

The Court upheld the granting of amnesties but limited its analysis to a review of constitutionality, while at the same time acknowledging that the case involved

a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future ... It is an act calling for a judgment falling substantially within the domain of those entrusted with law-making in the era preceding and during the transition period.<sup>129</sup>

In other words, the Court deferred judgment on the appropriateness of amnesties as reconciliation devices to lawmakers and restrained its own intervention on the matter to a constitutionality check, but perhaps with inadequate consideration of international human rights law.

Unamendability in this case thus primarily serves to indicate the commitment of drafters to maintaining amnesties beyond the ratification of the new constitution. Such pledges are especially important to minority or weaker parties, who may otherwise fear that the majority would amend constitutional amnesties once the basic law is ratified. The granting of amnesties in general carries legitimacy problems which hark back to peace versus justice debates and to controversies over the rise of individual criminal responsibility in international law.<sup>130</sup> Alternatively, problems may arise if an eternity clause enshrining amnesties is one-sided, for instance where amnesties are granted to one party to the conflict but not to the other. The few examples of unamendable amnesties we have thus far suggest that the primary objective behind their adoption is reaching agreement around a political settlement and the legitimisation of a new regime, all of which are sought before the adoption of the new constitution. How such unamendability would fare were it to be seriously contested post-ratification remains at the level of speculation for now. Without a doubt, however, any such contestation would expose the uneasy relationship between the political agreement having made the constitution possible and the latter's normative aspirations.

#### IV. Alternatives to unamendability in post-conflict constitution-making

Given the many unknowns of unamendability highlighted in section III, and the possibility that it fails to conserve the consensus which makes the

<sup>129</sup> Ibid, para 21.

<sup>130</sup> See discussions in F Lessa and LA Payne, *Amnesty in the Age of Human Rights Accountability* (Cambridge University Press, Cambridge, 2012); and M Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, Cambridge, 2009).

constitution possible, are there more attractive design tools which may achieve the same endurance of the political settlement while avoiding the pitfalls of too rigid a constitution? Conversely, is the entire pursuit of one or more discrete institutions of constitutional survival misdirected? Given the fragility of post-conflict and post-authoritarian political settlements and the weak institutional milieus in which they operate, should we instead focus on strategies to bring about a democratic constitutional culture rather than on placing certain commitments outside the reach of constitutional amendment? Are there constitutional design options which combine these two aims? These questions will be briefly explored here, with the caveat that this is merely a preliminary foray into the matter. The discussion is intended to place eternity clauses within a broader constellation of constitutional mechanisms for entrenchment or expression and as such to raise questions about the utility of resorting to unamendability. References are again made to the Tunisian case and, where evidence of this exists, to the concrete reasons why drafters there discarded these alternatives and chose unamendability instead. The reader should not expect prescriptions based on this unavoidably cursory exploration, but begin considering what renders the promise of eternity clauses distinctive as a tool for reaching and entrenching political settlements in transitional contexts.

### *Interim constitutions*

Several alternative institutions have been used with a view to preserving an initial agreement. One such tool, interim constitutions, has been discussed in detail by Rodrigues in this issue and by other scholars.<sup>131</sup> They act as mediating tools, gaining more time for the constitution-making process and may facilitate the adoption of ‘a more durable and more optimized constitution’.<sup>132</sup> Rodrigues’s argument – that given the extremely fluid political and security environments in which post-conflict constitution-making occurs, the drafting process itself should have some in-built fluidity such as the use of an interim constitution – resonates with other scholars’ advocacy for a ‘multi-track constitutionalism’.<sup>133</sup> It is an argument with particular relevance to eternity clauses and can work in two ways. Insofar as eternity

<sup>131</sup> See discussions in O Varol, ‘Temporary Constitutions’ (2014) 102(2) *California Law Review* 409; and V Jackson, ‘What’s in a Name? Reflections on Timing, Naming, and Constitution-making’ (2008) 49(4) *William and Mary Law Review* 1249. For an in-depth analysis of interim constitutions in conflict-affected settings, see K Zulueta-Fülscher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools* (International IDEA Policy Paper, Stockholm, October 2015).

<sup>132</sup> Varol (n 131) 418.

<sup>133</sup> A Arato, ‘Multi-Track Constitutionalism Beyond Carl Schmitt’ (2011) 18(3) *Constellations* 324.

clauses aim to insulate from amendment values or principles deemed essential to the polity, their drafting may benefit from a more inclusive and transparent process once conditions on the ground are more stable. A society-wide debate on whether unamendable language or religion are opportune may stand better chances of taking place once the situation has become more peaceful in the country.

Conversely, interim constitutions may themselves contain unamendable commitments which are then taken up, or not, in the permanent constitution. This was in a sense the method adopted in South Africa<sup>134</sup> and arguably, given the initial temporary nature of the Basic Law, in Germany.<sup>135</sup> An interim constitution may have the advantage of securing consensus around certain non-negotiable principles without which there may not be any political settlement at all. Given that the 1996 South African constitution does not contain an eternity clause, the inclusion of such immutable principles in its 1993 interim constitution (Section 74) functioned similarly to a sunset clause. The permanent South African constitution includes a differentiated amendment procedure with a high threshold of 75 per cent for amendments to Article 1, which lists the values underpinning the state, the supremacy of the constitution, citizenship, the national anthem and flag, and the official languages, and to Article 74, which stipulates the amendment procedure itself. Thus, constitution-makers in South Africa opted for a high degree of entrenchment of certain values but not complete unamendability. They also entrusted the interpretation of the new constitution to an empowered constitutional court, whose task it would be to act as guarantor of rights and democracy.<sup>136</sup>

<sup>134</sup> For the full list of constitutional principles which guided the South African constitution-making process, see (Interim) Constitution of the Republic of South Africa, Act 200 of 1993, Sched 4.

<sup>135</sup> However, it has been argued that the temporary nature of the German Basic Law was meant in a geographic sense and did not refer to its substantive commitments: '[t]he Basic Law in general and especially the decision to institute democracy as well as for the rule of law was ... definite'. W Heun, *The Constitution of Germany: A Contextual Analysis* (Hart Publishing, Oxford, 2011) 10. See also E Benda, 'The Protection of Human Dignity (Article 1 of the Basic Law)' in *Fifty Years of German Basic Law: The New Departure for Germany*, Conference Report (American Institute for Contemporary German Studies, Johns Hopkins University, Washington, DC, 1999) 36.

<sup>136</sup> See, broadly, T Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, Cambridge, 2013). Despite this initial choice against total unamendability, the South African Constitutional Court has repeatedly had to consider whether to embrace a doctrine of substantive limits on amendment. See most recently *United Democratic Movement v President of the Republic of South Africa and Others* (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179, 4 October 2002. See also discussion in A Govindjee and R Kruger, 'The Basic Structure Doctrine Debate: South African Explorations' in SS Jain and S Narayan (eds), *Basic Structure Constitutionalism: Revisiting Kesavananda Bharati* (Eastern Book Company, New Delhi, 2011) 209.



After the Jasmine Revolution, the newly elected Tunisian legislature also assumed the role of constituent assembly, invalidated the 1959 constitution, and instituted a provisional legal regime, under which the basics of power arrangements in the state were stipulated together with the working rules of the constituent assembly itself.<sup>137</sup> This transitional legal regime has been criticised as insufficient for the needs of the post-authoritarian Tunisian context and as containing discriminatory provisions, and the absence of a mechanism of judicial review has in particular been pointed to as problematic.<sup>138</sup> Presumably, drafters were well aware of the option of adopting more comprehensive interim legal provisions. Neighbouring Egypt had itself adopted a fraught Constitutional Declaration in March 2011 and Iraq had also experimented with the well-known (and also fraught) Transitional Administrative Law. The level of detail and scope of issues covered by interim constitutions in conflict-affected states has historically varied,<sup>139</sup> and Tunisia's choice to invest its post-revolutionary energy into drafting a new permanent constitution was likely a deliberate choice.

### *Sunset clauses*

Sunset clauses are another alternative to eternity clauses and may be understood as mechanisms of temporary absolute rigidity which are set to expire at a given point in time or once certain conditions have been fulfilled.<sup>140</sup> One of the best-known examples of constitutional sunset clauses was incorporated into the constitution of the United States: amendments to Article I, Section 9, clauses 1 and 4, which protected the importation of slaves and prohibited some capitation taxes, were prohibited until 1808.<sup>141</sup> The lineage of this type of law-making, however, goes back as far as ancient Athens, and continues to be employed in constitutional design today.<sup>142</sup> The presumed advantage of sunset clauses is that they allow stability to trump constitutional flexibility, but not indefinitely.

<sup>137</sup> For a more in-depth discussion, see Carter Center Report (n 23) 25.

<sup>138</sup> 'Tunisian Constituent Assembly Adopts Provisional Constitution', *ConstitutionNet.org*, 12 December 2011, available at <<http://www.constitutionnet.org/news/tunisian-constituent-assembly-adopts-provisional-constitution>>; and Carter Center Report (n 23) 56.

<sup>139</sup> Zulueta-Fülscher (n 131) 18.

<sup>140</sup> For a detailed account of the use of sunset clauses in legislation, see S Ranchordas, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar, Cheltenham, 2015).

<sup>141</sup> See P Suber, *Paradox of Self-Amendment* (Peter Lang Publishing, Bern, 1990) section 14, 'Amendment by Sunset Clause'.

<sup>142</sup> See Z Elkins, T Ginsburg and J Melton, *The Endurance of National Constitutions* (Cambridge University Press, Cambridge, 2009) 13; and Schwartzberg (n 58) 11–12.

The implicit suppositions behind their use are that something significant will change in the intervening period, that entrenchment is required during democratic consolidation but will not be later, and that the need for ‘gag rules’ will diminish and spirits will cool.<sup>143</sup> Jennifer Widner has highlighted the potential utility of sunset clauses in post-conflict situations for precisely their capacity to reduce passions and has given the examples of South Africa, Bougainville and Uganda as places where sunset clauses have played a positive role in constitutional transitions.<sup>144</sup> Interestingly, the second Tunisian draft had included a sunset clause alongside an unamendability provision, banning amendments for a period of five years after the constitution would enter into force.<sup>145</sup> Entrenching the hard-fought gains of the drafting process was clearly on the minds of its architects.

When compared to eternity clauses, on their face, sunset provisions seem to achieve many of the same objectives without the downsides of long-term rigidity: they may facilitate and safeguard initial agreement without frustrating constitutional evolution further down the road. However, to the extent that unamendability is resorted to precisely so as to preclude any renegotiation of principles, irrespective of democratic consolidation or any changes in circumstances, then sunset clauses may not be adequate replacements. Indeed, sunset clauses themselves have been viewed as especially rigid constraints on future generations to the extent that they may trigger the artificial abandonment of an otherwise well-functioning constitution.<sup>146</sup> More significant, however, is the fact that sunset clauses are accompanied by much insecurity: the delicate balance of powers achieved at the time of drafting the constitution may change dramatically by the time a sunset clause is set to expire. Parties to a political settlement may thus not wish to take the risk of their initial bargain unravelling in a context in which they do not wield sufficient power and may opt for permanent unamendability instead. In Tunisia’s case, the final compromise on Article 1 may be especially sensitive to changes in the balance of power, as may be the unamendable presidential term limit.

### *Deferral*

Other means of reaching agreement over a constitution which may function as alternatives to unamendability may be less obvious. One mechanism would be deferral, understood as the deliberate choice of drafters to

<sup>143</sup> Schwartzberg (n 58) 12.

<sup>144</sup> Widner (n 12) 1534.

<sup>145</sup> Art 147 of the Draft Constitution of the Republic of Tunisia, 14 December 2012.

<sup>146</sup> Elkins, Ginsburg and Melton (n 142) 13.

postpone deciding on certain contentious elements of constitutional design and defensible on grounds similar to those underpinning sunset clauses: that a solution can be reached once passions subside. There is some evidence that in cases where deferral was not embraced in the constitutional design, the likelihood of ‘significant pressures for whole-scale constitutional replacement, as opposed to amendment’ increased.<sup>147</sup>

Applying this to eternity clauses which were adopted in a non-inclusive, contested manner, one might expect them to be the source of continued instability in the polity and potentially to trigger early constitutional replacement. More generally, the literature on incrementalism suggests that not deciding everything during drafting may allow for the gradual development of consensus which a more specific initial draft would preclude.<sup>148</sup> However, in cases where *no* initial consensus is possible without certain ironclad guarantees, included in the eternity clause, prospects for *more* consensus down the line may not be better. To the extent that unamendable provisions in the constitution provide assurances without which constitutional negotiations would break down, deferral of the principles these provisions enshrine may not be a feasible solution. Considering this option in the case of Tunisia, it is impossible to imagine a political settlement being reached at all if the most contentious issues during negotiations, later declared unamendable, had been postponed. The climate of insecurity and distrust among the political actors have likely prevented deferral from amounting to a meaningful constitutional design option, at least with regard to the elements of the eternity clause.

### *Ambiguity*

Similar to deferral is deliberate ambiguity in constitutional language. It is a mechanism for accommodating diversity in spite of deep uncertainty at the time of drafting a new constitution. The Indian constitution, for example, had to fit but also unify a diverse society rife with religious, social, ethnic, linguistic, and regional tensions, a mission accomplished via what one scholar has termed ‘constructive ambiguity’: embracing such conflicts and importing them into the constitution via the deliberately ambiguous formulation of constitutional provisions.<sup>149</sup> This was a strategy

<sup>147</sup> R Dixon and T Ginsburg, ‘Deciding Not to Decide: Deferral in Constitutional Design’ (2011) 9(3–4) *Journal of International Constitutional Law* 645.

<sup>148</sup> On incrementalism as a useful mechanism of constitutional design in divided societies, see H Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, Cambridge, 2011). See also M Tushnet, ‘Constitution-Making: An Introduction’ (2013) 91 *Texas Law Review* 2007–12.

<sup>149</sup> Lerner (n 148) 149 and generally 109–51.

to accommodate diversity and allow room for the uncertainties at the time of founding (such as the fate of Muslims in newly independent India) and led to the development of a distinctive type of legal pluralism.<sup>150</sup> Ambiguity has broader application and has been used as a tool in the constitutional adjudication of contentious issues such as subnational secessionist claims.<sup>151</sup>

In a sense, ambiguity is already embedded in eternity clauses by their very nature: unamendable commitments to democracy, the rule of law, or human rights will only lose their vagueness once operationalized in legislation or case law. In the case of other unamendable provisions such as executive term limits, it is precisely their unambiguous statement which renders them appealing to drafters. However, describing the relationship between the state and an official religion or language in more ambiguous language such as in the Tunisian constitution does may leave room for more inclusive constitutional evolution. This ‘semantic ambiguity’ in the Tunisian constitution was a deliberate choice made by drafters who sought compromise on the religious framework, and was coupled with the ‘terminological polysemy of Article 6’ (which declares the state the ‘guardian of the sacred’).<sup>152</sup> This shows ambiguity to not necessarily be an alternative to eternity clauses but to be compatible with them.

### *Silence*

Both deferral and ambiguity are cousins of another, perhaps more controversial drafting technique: constitutional silence. Also termed ‘abeyances’, constitutional silences have been explored as useful in mediating constitutional crises.<sup>153</sup> They have been referred to as ‘an intermediate layer of obscurity’, between uncodified custom and positive law, which ‘accommodates those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity’.<sup>154</sup> Vicki Jackson has also recently speculated on the potential usefulness of silence in constitution-making.<sup>155</sup>

<sup>150</sup> Ibid 149.

<sup>151</sup> C Erk and AG Gagnon, ‘Constitutional Ambiguity and Federal Trust: Codification of Federalism in Canada, Spain and Belgium’ (2000) 10(1) *Regional & Federal Studies* 92.

<sup>152</sup> Bousbih and Yaalaoui (n 70) 17, 19.

<sup>153</sup> M Foley, *The Silence of Constitutions: Gaps, ‘Abeyances’ and Political Temperament in the Maintenance of Government* (Routledge, Abingdon, 2011 [1989]).

<sup>154</sup> Ibid 8–9.

<sup>155</sup> V Jackson, ICON-Society Annual Conference, New York, 1 July 2015.

Thus, whereas deferral postpones decisions on disputed matters and ambiguity addresses them in purposefully obscure language, constitutional silence implies drafters say nothing at all on a particular issue. In that way, it is the starkest alternative to eternity clauses. In practice, opting for silence might take the form of no provision at all on official languages, religion, or on other controversial state characteristics. Presumably, some of these could be legislated on at a later time, but not constitutionalising them may lower the stakes of such later negotiations. However, the meaning of silence in the constitutional text will invariably depend upon its subsequent interpretation. This would in turn raise the stakes of negotiations over the body entrusted with such interpretation, presumably a constitutional court, with the battleground over safeguarding the political settlement fought over issues of judicial appointments, independence, and powers. This is already apparent in Tunisia, where the draft law to finally establish the new constitutional court has generated fierce debate. Moreover, the same conditions of uncertainty which reduced the likelihood of drafters in post-conflict settings resorting to deferral or ambiguity may also apply to silence. To the extent that their concern is precisely with enshrining the hard-fought political agreement into the constitution, they are unlikely to be content with not doing this explicitly, or to risk its undoing by way of later judicial interpretation.

## V. Conclusion

The recourse to constitutional unamendability has hitherto been explained on mostly normative grounds and in terms that emphasise the importance of fundamental value commitments for the development and endurance of constitutionalism in a given order. Less attention has been paid to eternity clauses as tools of elite pacting, particularly in post-conflict settings. As Jonathan Di John and James Putzel remind us, the political settlements which precede the ratification of new constitutions should not be idealised as embodying a ‘common understanding between elites’ – they are instead the result of arduous bargaining and contending claims that are resolved only partially and incrementally.<sup>156</sup> This article has argued that these bargains are especially difficult during transitional constitution-making, and that unamendability in such constitutions plays a distinctive role. Eternity clauses thus serve as guarantees which facilitate the pre-constitutional political

<sup>156</sup> J Di John and J Putzel, ‘Political Settlements’, Issues Paper, (Governance and Social Development Resource Centre, University of Birmingham, June 2009) 4, available at <<http://core.ac.uk/download/pdf/103642.pdf>>.

agreement necessary for the constitution to come into being, and offer reassurance to parties that their interests will not be amended out of the fundamental law once it is adopted. It is a promise which other, less rigid mechanisms of constitutional design may not be able fulfil. Moreover, by exploring other transitional contexts where eternity clauses have been adopted, this article has argued that these provisions may have unpredictable consequences. In other words, unamendable provisions may facilitate an initial political settlement, but the latter's survival will nevertheless depend on subsequent dynamics (especially their interpretation by constitutional courts).

The case of Tunisia has been used as illustration for the distinctive problems and prospects of unamendability in a transitional constitution. The 2014 constitution has been heralded as a significant achievement on the country's path to democratisation. Commitments to human rights standards and the curtailment of executive power were hard-fought and may be seen as attempts to minimise the risk of authoritarian backsliding. However, this article has shown that other unamendable provisions on the identity of the state, notably its relationship to religion, may prove to be more problematic because they speak to ongoing contestation and a fragile elite pact over the nature of the state. The ability of such clauses to protect the political settlement can only be proven in practice and depends on constitutional interpretation. Given that the law on a Tunisian constitutional court has still not been adopted as of the time of writing means there is still some way to go before constitutional jurisprudence can shed light on these issues. The constitution's capacity to balance forces within Tunisian society may be tested sooner than its drafters may have expected, however. Threats to the delicate bargains struck in the constitution already loom, such as the rise of the radical Islamist group Ansar al-Sharia, spurred by Salafism's appeal to marginalised groups,<sup>157</sup> or the parliamentary crisis triggered by the November 2015 resignation of members of parliament due to fears that the president was trying to institute a new dynasty.<sup>158</sup> How Tunisia's constitution fares in the face of such challenges will tell us much, not just about the utility of eternity clauses in transitional constitution-making, but about the capacity of constitutions themselves to safeguard the political settlements which made them possible in the first place.

<sup>157</sup> Volpi and Stein (n 38) 280, 289.

<sup>158</sup> C McCormick-Cavanagh, 'Tunisia MPs Resign to Stop Creation of "Dynastic Legacy" by Country's President', *The Middle East Eye*, 9 November 2015, available at: <<http://www.middleeasteye.net/news/tunisia-mp-says-mass-resignations-aimed-stopping-dynastic-legacy-country-president-2059371519/>>.