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Unamendability and The Genetic Code of The Constitution
Yaniv Roznai

Abstract – An increasing number of constitutions contain “unamendable provisions” in order, inter alia, to protect essential characteristics of the constitutional order or principles perceived as being at risk of repeal via the democratic process. The paper examines unamendable provisions. In order to do so, it studies the text of unamendable provisions which were and are stipulated in 735 former and current written national constitutions. It reviews the origins, structure and content of unamendable provisions, seeking any content-based or material links among them. It also analyzes the characteristics of unamendable provisions and identifies various features of unamendability such as preservation, transformation, aspiration, conflict-management and bricolage. Unamendable provisions fulfill certain functions and reflect the important symbolic value of certain constitutional principles or institutions. It is argued that these limitations, which tie the past, present and future of a polity, are utilized, in a way, to preserve a core of a nation’s constitutional identity thus comprising its “genetic code”.

Keywords – unamendability, eternity clauses, constitutional identity, global constitutionalism, constitutional design.

1. Introduction

The amendment process is a method for reconciling the tension between stability and flexibility. ‘A state without the means of some change’, Edmund Burke wrote, “is without the means of its conservation”1. One way in which constitution-makers balance stability and flexibility is by designing different amendment processes for different provisions2. They separate the constitutional subjects so that the majority of ordinary provisions require a simple amendment procedure, whilst a minority provisions that are deemed more fundamental or protection-worthy, enjoy a special protection3. They are more difficult to amend or are even considered “unamendable”, i.e. their amendment is prohibited4.

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4 IVO D. DUCHARÈC, Rights & Liberties in the World Today – Constitutional Promise and Reality, Chio Press, 32-36 (1973); CHRISTOPH, BEZEMEK, Constitutional Core(s): Amendments, Entrenchments, Eternities and
This article focuses on the latter type of cases. It aims to conceptualize “unamendable provisions” and explain their characters. In order to do so, I have collected explicit substantive limitations on constitutional amendments that were and are stipulated in 735 former and current written national constitutions. Thus, this article unavoidably focuses on constitutional texts. This approach surely has disadvantages. Apart from telling only portion of the story, it threatens equally all constitutions (regardless of the period or environment in which they were enacted) although they have not all enjoyed (and enjoy) the same level of authority and effectiveness. This, I believe, does not endanger my limited enterprise. First, as others have demonstrated, the constitutional text itself matters for both practical and symbolic reasons. Moreover, while formulating such a general conceptualization carries with it certain drawbacks relating to its minimal intention, the collecting of worldwide constitutions is valuable for the development of a general theory – as presented in this work – which conceptualizes and explains the broad and diverse types of unamendable provisions.

This project is both comparative and theoretical. It is comparative, not in the traditional sense of conducting case studies of one or two foreign legal systems but in examining various constitutional provisions substantively limiting amendments (contra to procedural limitations) through “multiple descriptions of the same constitutional phenomena across countries”. I specifically chose this particular approach in order to point to a comprehensive pattern of a “constitutional behaviour”. This process is theory-driven in the sense that it aims to draw an explanatory theory from this comparative practice. The framework which contextualizes the theoretical approach of this work is constitutional theory, which aims to “identify the character of actual existing constitutional arrangements” and “offer an explanation of character of the practice”. This investigation is important both because the inclusion...
of unamendable provisions within a constitution has become an important element of modern constitutional design and of global constitutionalism, and since in recent decades unamendable provisions have expanded in terms of their detail, currently covering a wide range of topics. This growing phenomenon demands careful attention.

The article is developed in the following way: the first section examines unamendable provisions. In order to do so, it reviews in Section 2 the origins of unamendable provisions and supplies a general overview of this global constitutional phenomenon. It is argued that unamendability has become a prominent feature of modern constitutional design. Section 3 then describes the structure and content of unamendable provisions, seeking any content-based or material links among them. Finally, Section 4 analyses the characteristics of unamendable provisions. It argues that unamendable provisions have different characteristics of preservation, transformation, aspiration, conflict and bricolage, all carrying both expressive and functional importance for creating and maintaining constitutional identity. Unamendable provisions are a complex and controversial constitutional mechanism. However, it is not the aim of this article to argue whether unamendable provisions are necessarily good or bad, or to engage with their effectiveness or enforceability, important as these issues are, but rather to study explicit limitations on the amendment power as a growing phenomenon of global constitutionalism.

2. Unamendable Provisions

John Locke, who in 1669 wrote “The Fundamental Constitution” of the colony of Carolina, provided that it “shall be and remain the sacred and unalterable form and rule of government of Carolina forever”. Treating the entire constitution as unamendable derives either from ascribing it to a superhuman source, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection. Nowadays, such “delusions of unamendable grandeur” no
longer exist\textsuperscript{16}. However, whereas completely rigid constitutions are presently uncommon, in many constitutions the amendment of certain provisions is strictly prohibited.

In the literature, provisions that prohibit amending certain subjects are often referred to as “immutable”, “unchangeable”, “unalterable”, “irrevocable”, “perpetual”, or most commonly— drawing from the German term \textit{ewigkeitsgarantie} – “eternal”\textsuperscript{17}. I prefer the term “unamendable”. The terminology should not be dismissed as mere semantics; it bears normative implications. The other terms imply everlasting provisions, but this implication is inaccurate. These provisions are neither eternal nor unchangeable (even Locke’s “sacred and unalterable form and rule of government of Carolina forever” was largely ignored by 1700). While unamendable provisions serve as a mechanism for limiting the amendment power, they do not – and cannot – limit the \textit{primary constituent power}.\textsuperscript{18}

Even unamendable provisions are subject to changes introduced by extra-constitutional forces. Moreover, their content can also “change” through judicial interpretation. The Brazilian terminology – which refers to these provisions as “stone clauses”, “petrous clauses” (\textit{cláusula pétrea})\textsuperscript{19} to express their rigidity – is more accurate in that respect since even rocks cannot withstand the volcanic outburst of the \textit{primary constituent power}. Therefore, in order to describe the legal situation more accurately, I refer to these provisions as “unamendable”.

Unamendable provisions function as a “barrier of change” (\textit{veränderungssperre})\textsuperscript{20}. They reflect the idea that certain constitutional subjects ought to be protected from alteration. Different motives for the creation of unamendable provisions can be suggested. \textit{First}, each polity wants to preserve its own existence and identity. Presumably, constitution-makers regarded the content of specific provisions to be so pivotal to the essence of the constitution or to the state’s existence and identity that they should endure for generations\textsuperscript{21}. Unamendable provisions are meant to provide “hermetic protection” and block even the constitutional amendment process, thereby preventing violations of certain basic constitutive principles via the majoritarian procedure. Thus they reflect the idea that a nation’s identity and constitutive narrative should not be subjugated to the majority’s

\textsuperscript{16} \textsc{Sanford Levinson}, Designing an Amendment Process, in: \textsc{John Ferejohn/Jack N. Rakove/Jonathan Riley} (eds), \textit{Constitutional Culture and Democratic Rule}, CUP, 272 (2001). Nowadays, amendment procedures are a universally recognised constitutional method. See \textsc{Donald S. Lutz}, Toward a Theory of Constitutional Amendment, 88(2) \textit{Am. Pol. Sci. Rev.} 355, 356 (1994) (“The innovation of an amendment process … has diffused throughout the world to the point where less than 4% of all national constitutions lack a provision for a formal amending process”) (referring to \textsc{Henc van Maarseveen/Ger van der Tang}, \textit{Written Constitutions: Computerized Comparative Study}, Brill, 80 (1978)).

\textsuperscript{17} \textsc{Juliane Kokott}, From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law, in: \textsc{Christian Strack} (ed), \textit{Constitutionalism, Universalism, and Democracy: a Comparative Analysis}, Nomos Verlagsges, 71, 109 (1999).

\textsuperscript{18} By its nature, the primary constituent power which is the power to constitute a new constitutional order is unlimited be prior constitutional rules. See \textsc{Yaniv Roznai}, The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments, 62 \textit{I.C.L.Q.} 557 (2013); \textsc{Roznai}, supra note 13, at 132-170.

\textsuperscript{19} \textsc{Conrado Hübner Mendes}, Judicial Review of Constitutional Amendments in the Brazilian Supreme Court, 17 \textit{Fla. J. Int’l. L.} 449, 451 (2005).

\textsuperscript{20} \textsc{Daniela Muth}, Basic Conceptions of the Legal System: A Critical Comparison between New Zealand and Germany, 10 \textit{Canterbury L. Rev.} 152, 157 (2004).

caprices. Second, constitution-drafters need to design constitutional provisions so as to work exactly against the features of a state’s tradition and culture which would probably cause damage through the ordinary political process. Hence, some values that are material to the constitutional order might be considered as open to abuse, especially in light of prior experience, and thus be deemed unamendable. Arnold Brecht, writing in the context of post-WWII Germany, suggested that:

For preventing the possibility the majority rule will be abused to authorize barbaric measure ... it would be advisable for the new German constitution (and for any other democratic constitution to be enacted in the future) to contain certain sacrosanct principles and standards [which] ... could not be impaired even by constitutional amendments. They should include fundamental principles regarding respect for the dignity of man, the prohibition of cruelties and tortures, the preclusion of ex post facto laws, equality before the law, and the democratic principle that the law itself cannot validly discriminate for reasons of faith or race.

Unamendable provisions thus reflect a kind of distrust of those who wield the amendment power. Third, constitution-makers are motivated by their personal desires and beliefs. They also have individual and institutional interests in seeing their power protected. Unamendable provisions can function as a useful tool for political actors to preserve power asymmetry. Lastly, constitution-makers have an interest in protecting certain constitutional subjects that threaten to tear society apart if opened to political debate. The functional and expressive characteristics of unamendable provisions are analysed and elaborated below in Section 4C.

It is told that after implementing extensive reforms, Lycurgus, Sparta’s great lawgiver, administered an oath that his laws would be observed without alterations until his return from a journey to the oracle. After the oracle reassured him that his laws were good for the people, he sent her words to Sparta and sacrificed his life to perpetuate his laws, which indeed lasted for 500 years. The contemporary relevance of this ancient story is not only due to the idea of ‘immutable’ laws, but also because of the lawmaker’s motives. Just as Lycurgus wanted his laws to last forever since he believed they were good for his people, so too modern unamendable provisions largely reflect a kind of paternalistic idea according to which constitution-makers know “what is best” for the people and “enshrine” those well-esteemed principles or institutions. The environment in which constitutions

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24 ARNOLD BRECHT, Federalism and Regionalism in Germany – The Division of Prussia, OUP, 138 (1945).
emerge profoundly influences the character and composition of any unamendable provision included in
the text. This article shows, however, that there are similarities in the content, aims, and characteristics
of many of the world’s unamendable provisions.

3. Origins and Development

The idea of entrenched laws is not novel. One notable example is the Pennsylvania Charter of
Privileges of 1701, which declared in Art. VIII that:

Because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their
Consciences as aforesaid, I do hereby solemnly declare, promise and grant, for me, my Heirs
and Assigns, That the First Article of this Charter relating to Liberty of Conscience, and
every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept
and remain, without any Alteration, inviolably for ever.

This unamendability, Gerhard Casper remarks, “posed the ultimate conundrum of
constitutionalism-the possibility of unconstitutional constitutional amendments.”

The modern constitutionalist form of unamendability emerged at the end of the 18th century.
According to the 1776 Constitution of New Jersey, members of the Legislative Council, or House of
Assembly, had to take an oath not to “annul or repeal” the provisions for annual elections, the articles
opposing church establishment and conferring equal civil rights on all Protestants, and trial by jury
(Art. 23). The 1776 Delaware Constitution prohibited amendments to the declaration of rights, the
articles establishing the state’s name, the bicameral legislature, the legislature’s power over its own
officers and members, the ban on slave importation, and the establishment of any one religious sect
(Art. 30). Explicit limitations on amendments were included in Art. V of the U.S. Federal
Constitution, which originally forbade abolition of the African slave trade prior to 1808, and prohibits,
without time limits, the deprivation of a state of its equal representation in the Senate without its
consent.

In France, the 1791 Constitution’s Preamble stated that the National Assembly “abolishes
irrevocably the institutions which were injurious to liberty and equality of rights”. Moreover, Title VII,
section 7, stated that the members of the Assembly of Revision individually take an oath to maintain
the constitution with all their power. The terminology of “irrevocability” and “maintenance” implies
perpetuity. In 1798, the Constitution of the Swiss Helvetic Republic, imposed by the French and which

28 Ancient Athenians entrenched certain financial decrees, treaties and alliances in order to enhance their
credibility in the eyes of potential allies. See SCHWARTZBERG, supra note 26, at 32, 101-103. The Cromwellian
Constitution of 1653 recognised fundamental and unchangeable laws. See A.V. DICEY, General Characteristics
of English Constitutionalism: Six Unpublished Lectures, PETER RAINA (ed.), Peter Lang, 103 (2009); CARL J.
FRIEDRICH, Constitutional Government and Democracy – Theory and Practice in Europe and America, 4th ed.,
Blaisdell Pub. Co., 136 (1968); SCHWARTZBERG, supra note 26, at 101-3. In Hungary, the Act VIII of 1741 on
the liberties and privileges of noblemen was declared to be unamendable. See ZOLTÁN SZENTE, The Historic
Origins of the National Assembly in Hungary, 8 Historia Constitutional 227, 239 (2007).
31 See MARC W. KRUMAN, Between Authority and Liberty: State Constitution-Making in Revolutionary America,
UNC Press Books, 56 (1999). For a useful study of amending the U.S. State Constitutions see WALTER F. DODD,
The Revision and Amendment of State Constitutions, Johns Hopkins Press (1910).
was based on the French revolutionary model\textsuperscript{33}, declared that “the form of government, whatever modifications it may undergo, shall at all times be a representative democracy” (Art. 2)\textsuperscript{34}. Yet, it was in 1884 when the idea that the amendment power should be substantially and explicitly limited first appeared in a French constitution. On 14 August of that year, the French Parliament assembled as the National Assembly in order to revise the constitutional law of 1875, which represented the Third Republic and marked the end of monarchism and Bonapartism\textsuperscript{35}. By then, it was clear that France desired a republican form of government\textsuperscript{36}. The constitutional law of 1875 was then amended, adding to Art. 8(3) the following: “The republican form of government cannot be made the subject of a proposition for revision”\textsuperscript{37}, in order to “prevent the destruction of the republic by constitutional means”\textsuperscript{38}. This formulation repeated itself in the Constitution of 1946 (Art. 95) and, with different wording, in the Constitution of 1958: “The republican form of government shall not be the object of any amendment” (Art. 89).

Another early constitution which included an unamendable provision is the Constitution of Norway of 1814, which stipulated that amendments “must never ... contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution” (Art. 112)\textsuperscript{39}. The idea of “shielding” certain subjects from amendments enjoyed growing popularity both in America and in Europe. During the first half of the 19th century, Latin American states in particular, influenced by ideas from the American and French revolutions, widely used unamendable provisions in order to protect certain principles. The Mexican Constitution of 1824 stated that “[t]he Religion of the Mexican Nation is, and shall be perpetually, the Apostical Roman Catholic” (Art. 3), and that the provisions which establish the “Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed” (Art. 171)\textsuperscript{40}. It was later suggested that this provision was inserted into the constitution in order to guard against “popular levy

\begin{thebibliography}{99}
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\bibitem{Anderson} \textsc{Frank Malloy Anderson}, \textit{The Constitutions and Other Select Documents Illustrative of the History of France 1789-1907}, Wilson, 640 (1908).
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\textsuperscript{35} \textsc{David Bates}, Poltica Unity and the Spirit of Law: Juridical concepts of the State in the Late Third Republic, 28(1) \textit{French Historical Studies} 69 (2005).
\textsuperscript{37} \textsc{Frank Malloy Anderson}, \textit{The Constitutions and Other Select Documents Illustrative of the History of France 1789-1907}, Wilson, 640 (1908).
\textsuperscript{38} \textsc{A. Lawrence Lowell}, \textit{Greater European Governments}, Harvard University Press, 103 (1918).
\textsuperscript{40} The original basis of the Mexican Constitution was the Spanish Constitution of 1812, which Mexico departed from by adopting a federal republican form of government, influenced by the U.S. Constitution; albeit some evident distinctions exist between the two constitutions, such as the establishment of a state religion. See \textsc{James Q. Dealey}, The Spanish Source of the Mexican Constitution of 1824, 3(3) \textit{The Quarterly of the Texas State Historical Association} 161, 168 (1900); \textsc{J. Lloyd Mecham}, The Origins of Federalism in Mexico, 18(2) \textit{The Hispanic American Historical Rev.} 164, 177-179 (1938); \textsc{Watson Smith}, Influences from the United States on the Mexican Constitution of 1824, 4(2) \textit{Arizona and the West} 113 (1962); \textsc{Farnham Bishop}, \textit{Our First War in Mexico}, Applewood Books, 17 (2009).
and legislative caprice. The technique of prohibiting the amendment of certain state features, such as the form of government, separation of powers, and state religion, spread like a fire in a thistle field: the Constitution of Venezuela of 1830, again influenced by American and French ideas, protected the form of government; and the Peruvian Constitution of 1839 (Art. 183), Bolivian Constitution of 1848 (Art. 91), Ecuador’s Constitution of 1843 (Art. 110), Honduras Constitution of 1848 (Art. 91), the Dominican Republic’s Constitution of 1865 (Art. 139) and El Salvador’s Constitution of 1886 (Art. 148) have all explicitly limited the amending of certain constitutional subjects.

As my collection of unamendable provisions confirms, Claude Klein was correct to claim that “the idea of protecting the regime through a limitation of the amendment power had great successes,” at least in the sense that unamendable provisions have become a popular constitutional design that cross continents and different legal systems.

As my research demonstrates, in the first wave of constitutionalism, between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas in the second wave of constitutionalism, between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted in the third wave of constitutionalism, between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions. It seems that just as having a formal constitution virtually became a symbol of modernism following the American and French revolutions, so too in the aftermath of WWII did having an unamendable provision become a universal fashion.

Not only did unamendable provisions grow in numbers; they grew also in length, complexity, and detail. Before WWII, the average length of an unamendable provision was 29.4 words, but after WWII, the average number of words in an unamendable provision is 39.5. Whereas in the past, unamendable provisions protected mainly the state’s form of government, after WWII, with the new wave of constitutionalism and the emergence of new states, unamendable provisions were extended to protect many features of a democratic government, including fundamental rights and freedoms. Indeed, before WWII, only three constitutions included explicit limits on amending rights, while after WWII, nearly 30% of unamendable provisions referred to basic rights. Perhaps the most famous example is Art. 79(3) of the German Basic Law (1949). Written against the background of the Weimar

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42 WILLIAM W. JR. Pierson, Foreign Influences on Venezuelan Political Thought, 1830-1930, 15(1) The Hispanic American Historical Rev. 3 (1935).
43 KLEIN, supra note 36, at 61.
44 Hourquebie estimated that nearly 40% of world constitutions include explicit limitations on constitutional amendments. See FABRICE HOURQUEBIE, Pouvoir Constituant Derive et Controle du Respect des Limites, The VII World Congress of the International Association of Constitutional Law (13 June 2007) <www.droitconstitutionnel.org/athenes/hourquebie.pdf>
45 One has to be cautious that these numbers include those multiple constitutions of a same state. In other words, if State X had Y Constitutions – all included unamendable provisions – all Y Constitutions were included in the collection and in the counting. This might lead to a standard deviation.
48 Honduras Const. (1848), art. 91; Mexico Const. (1824), art. 171; Panama Const. (1841), art. 163.
Constitution’s experience, Art. 79(3) prohibits amendments affecting the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state. The content of unamendable provisions is examined below in section 4B.


A. Structure

Unamendable provisions limit the holder of the constitutional amendment power. They prohibit the amendment power from exercising its power with regard to certain constitutional subjects. They create a space in which that power is not permitted to enter. Different techniques for protecting constitutional subjects from amendments exist. The majority of constitutions explicitly protect certain constitutional subjects (principles or institutions). Some constitutions refer specifically to certain constitutional provisions, prohibiting any amendments to them. Others combine these two approaches to unamendability. Albeit rarely, some constitutions do not protect specific constitutional subjects from amendments, but rather a more general “spirit of the constitution,” “spirit of the preamble,” “fundamental structure of the constitution,” or “the nature and constituent elements of the state.”

The formulation of unamendability as rules that demand strict compliance or as principles that are more generalized guidelines might carry decisive importance for their enforcement and application. Unamendability which is designed as a legal directive demands a strict compliance and requires a yes-or-no decision on its breach. It thus imposes a stricter margin of interpretation to the courts, but at the same time grants added legitimacy for their judicial enforcement. In contrast, unamendability which is designed as principles is a far more flexible approach since the elasticity and semantic openness of principles allow their content to evolve with time and allow courts a greater margin of discretion and interpretive recreation.

Most unamendable provisions are located within the amendment provision, but unamendability can also appear as an independent provision or inferred from a provision declaring the subject’s “eternal” character. Moreover, provisions that stipulate extraordinary conditions for their

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49 On the German unamendable clause, see Helmut Goerlich, Concept of Special Protection For Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany, 1 NuJS L. Rev. 397 (2008); Schwartzberg, supra note 26, at 153-183.
51 See, for example, Bahrain Const. (1973), art. 120c; Greek Const. (1975), art. 110(1); Guatemala Const. (1985), art. 281.
52 Norway Const. (1814), art. 112(1).
53 Nepal Const. (1990), art. 116(1).
55 Ecuador Const. (2008), art. 441.
56 I elaborate on this point in Roznai, supra note 13, at 199-201.
57 See, for example, Turkish Const. (1982), art. 4.
58 See, for example, China Const. (1923), art. 1: “The Republic of China shall be a unified republic forever”; Venezuela Const. (1999), art. 6: “The government … is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates”. See also Allan R. Brewer-Carias, Models of Constitutional Review (Reform and Amendments) in Latin America – A Comparative
amendment may also be regarded as unamendable. For example, Iran’s “Supplementary Fundamental Laws” of 1907 specified that Art. 2, which stated, generally, that laws must never be contrary to the sacred precepts of Islam, “shall continue unchanged until the appearance of His Holiness the Proof of the Age (may God hasten his glad Advent!)” 59, thus requiring the intervention of a super-human factor (the advent of the Twelfth Imam) in order to allow its amendment. Similarly, Art. V of the U.S. Constitution, according to which “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”, seems to be a de facto unamendable provision, as it is hard to imagine a state giving its consent for such an act.

The act that is prohibited by unamendable provisions varies among different constitutions. While most constitutions simply prohibit “amending” or “revising” certain constitutional subjects, some state that amendments must “respect” or “safeguard” certain constitutional subjects60. Often, the prohibited act is not “amending” certain subjects, but rather the mere “proposal” of amendments61. Whereas the ultimate result of these two limitations seems similar, presumably the latter limitation positions the barrier to the prohibited change at an earlier phase than the actual act of amendment, i.e. at the beginning of the political process, so that the proposed change cannot even be debated.

Finally, most of the world’s unamendable provisions are non-self-entrenched provisions, i.e. they establish the unamendability of certain constitutional subjects but they are themselves not entrenched62. In order to avoid the legal option of overcoming unamendability through a “double-amendment process”63, some unamendable provisions are self-entrenched, i.e. by their express terms they not only prohibit amendments of certain subjects, but also prohibit amendments to themselves64 - a “double entrenchment mechanism”65.

B. Content

The content of unamendable provisions varies, but despite some minor exceptions, one can identify several common components66. The first notable protected group is the form and system of government.

Analysis, paper prepared for the VII IACL World Congress on Constitutional Law, Santiago de Chile, 25 (January 2004).
60 See, for example, Angola Const. (2010), art. 236; Portugal Const. (1976), art. 288.
61 See, for example, the difference between the French protections of the republican form of government in the Constitutions of 1958, art. 89(5) and 1946, art. 95.
62 This is, for example, the situation with regard to Bulgarian Const. (1991), art. 57; the German Basic Law (1949), art. 7; the Romanian Const. (1991), art. 14. See JON ELSTER, Ulysses Unbound – Studies in Rationality, Precommitment, and Constraints, Cambridge University Press, 102 (2000).
66 For an analysis, see the works of MARIE-FRANCOISE RIGAUX, La Theorie Des Limites Materielles A L’Exercice De La Fonction Constituante, Larcier 46-51 (1985); WEINTAL, Eternal Clauses in the Constitution, supra note 22, at 62-108.
More than 100 constitutions protect the “republican” form of government. A “monarchical” form of government is also protected, as well as “amiri”, “a crowned democracy”, “constitutional monarchy”, and “a democratic regime of government with king as head of the State”.

The second notable group is the state’s political or governmental structure. Some constitutions explicitly protect the state’s federal structure, the equality of representation of states in the Senate, the unitary structure, the bicameral system or local autonomy. Provisions upholding the democratic order are often unamendable, and unamendable provisions also protect other principles such as “separation of powers”, “rule of law”, “independence of courts” and “judicial review of statutes”. Some unamendable provisions protect the “sovereignty of the people”, while many constitutions stipulate that the government is “elective” and “representative”, protecting the modes and characteristics of elections and representation, such as “multiparty or pluralistic system”.

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67 Bahrain Const. (1973), art. 120c; Cambodia Const. (1993), art. 153; Kyrgyzstan Const. (1993), art. 85(3)(5); Laos Const. (1947), art. 43; Libya Const. (1951), art. 197; Moroccan Consts. (2011), art. 175, (1992), art. 100, (1972), art. 106.

68 Kuwait Const. (1962), art. 175.

69 Greece Const. (1952), art. 108.

70 Thailand Const. (2007), art. 291(1).

71 Brazil Const. (1891), art. 90(4); Portugal Const. (1976), art. 288; Timor-Leste Const. (2002), art. 156.


74 Algeria Const. (1989), art. 178; Armenia Const. (1995), art. 114; Cameroon Const. (1972), art. 63; Czech Republic Const. (1992), art. 9; Dominican Republic Const. (2002-2003), art. 119; Ecuador Const. (1967), Art. 258; Equatorial Guinea Const (1991), Art. 104; Eritrea Const. (1952), Art. 91(2); Ethiopia Const. (1952), art. 91(2); Gabon Const. (1990), art. 72; Germany Const. (1949), art. 79(3); Guatemala Const. (1985), art. 281; Haiti Const.(1987), art. 284(4); Iran Const. (1979), art. 177; Moroccan Const. (2011), art. 175; Mozambique Const. (2004), art. 292; Rwanda Consts. (1991), art. 96(2); (1978), art. 91; (1962), art. 107; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1960), art. 105; Tajikistan Const. (1994), art. 100; Thailand Const. (2007), art. 291(1); Timor Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.

75 Angola Const. (2010), art. 236; Brazil Const. (1988), art. 60(4); Cape Verde Const. (1992), art. 313; Chad Const. (1996), art 223; Chad Const. (1989), art. 202; Guinea Const. (2010), art. 154; Greece Const. (1995), art. 91; Madagascar Const. (2010), art. 163; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste (East Timor) Const. (2002), art. 156.

76 Angola Const. (2010), art. 236; Armenia Const. (1995), art. 114; Cameroon Const. (1972), art. 63; Czech Republic Const. (1992), art. 9; Dominican Republic Const. (2002-2003), art. 119; Ecuador Const. (1967), Art. 258; Equatorial Guinea Const (1991), Art. 104; Eritrea Const. (1952), Art. 91(2); Ethiopia Const. (1952), art. 91(2); Gabon Const. (1990), art. 72; Germany Const. (1949), art. 79(3); Guatemala Const. (1985), art. 281; Haiti Const.(1987), art. 284(4); Iran Const. (1979), art. 177; Moroccan Const. (2011), art. 175; Mozambique Const. (2004), art. 292; Rwanda Consts. (1991), art. 96(2); (1978), art. 91; (1962), art. 107; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1960), art. 105; Tajikistan Const. (1994), art. 100; Thailand Const. (2007), art. 291(1); Timor Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.

77 Angola Const. (2010), art. 236; Brazil Const. (1988), art. 60(4); Cape Verde Const. (1992), art. 313; Chad Const. (1996), art, 223; Chad Const. (1989), art. 202; Guinea Const. (2010), art. 154; Greece Const. (1995), art. 91; Madagascar Const. (2010), art. 163; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste (East Timor) Const. (2002), art. 156.

78 Angola Const. (2010), art. 236; Armenia Const. (1995), art. 114; Cameroon Const. (1972), art. 63; Czech Republic Const. (1992), art. 9; Dominican Republic Const. (2002-2003), art. 119; Ecuador Const. (1967), Art. 258; Equatorial Guinea Const (1991), Art. 104; Eritrea Const. (1952), Art. 91(2); Ethiopia Const. (1952), art. 91(2); Gabon Const. (1990), art. 72; Germany Const. (1949), art. 79(3); Guatemala Const. (1985), art. 281; Haiti Const.(1987), art. 284(4); Iran Const. (1979), art. 177; Moroccan Const. (2011), art. 175; Mozambique Const. (2004), art. 292; Rwanda Consts. (1991), art. 96(2); (1978), art. 91; (1962), art. 107; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1960), art. 105; Tajikistan Const. (1994), art. 100; Thailand Const. (2007), art. 291(1); Timor Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.
and “universal”, “direct”, “secret”, “free” or “equal” suffrage. Others protect constitutional rules regarding the head of state’s term limits (number and duration) or eligibility criteria for election.

The third prominent component is the state’s fundamental ideology or “identity”. The state’s religious character is often protected from amendments. Some protect Islam as the state’s religion, while others protect the “Roman Catholic Apostolic”. In contrast, many constitutions protect the “secular” nature of the state or the principle of “separation between the state and churches”. With regard to ideology, some constitutions explicitly prohibit amendment to their “social” or “socialist character” or to their “social justice” or “socialist” foundations. In some states, formal lineaments that are strongly connected to collective identity are protected from change, such as the official language, the flag, the national anthem, the capital, or even the date of the proclamation of independence.

The fourth notable group is that of basic rights. Many constitutions protect “fundamental rights and freedoms”. Others protect a more specific set of rights, such as “human dignity”, “freedom and equality”, “liberty”, “liberty of the press” and “the right of workers and trade unions”.

The fifth notable group is that of the state’s integrity. Many constitutions protect one or more of the following principles: “national unity”, “territorial integrity”, the “state’s existence”,

84 Angola Const. (2010), art 236; Brazil Const. (1988), art. 60(4); Guatemala Const. (1965), art. 267; Mozambique Const. (2004), art 292; Niger Const. (2010), art. 177; Portugal Const. (1976), art. 288; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste Const. (2002), art 156.
86 Afghanistan Const. (2004), art. 149; Algeria Const. (1989), art. 178; Bahrain Const. (1973), art. 120(c); Iran Consts. (1907), art. 2; (1979), art. 177; Morocco Const. (2011), art. 175.
87 Ecuador Const. (1869), art 115; Mexico Const. (1824), art. 3.
89 Angola Const. (2010), art. 236; (1975), art. 159; Niger Const. (2010), art. 177; (2009), art. 152; (1996), art. 125; (1992), art. 124; Portugal Const. (1976), art 288.
90 See, for example, Algeria Const. (1976), art. 195; Armenia Const. (1995), art. 114; Cuba Const. (1976); Madagascar Const. (1975), art. 108; Somalia Const. (1979), art. 112(3).
91 See, for example, Algeria Const. (1989), art. 178; Bahrain Const. (1973), art. 120(c); Romania Const. (1991), art. 148; Turkey Const. (1982), art. 4.
92 See, for example, Timor-Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.
93 See, for example, Turkey Const. (1982), art. 4.
94 See, for example, Turkey Const. (1982), art. 4.
95 See, for example, Timor-Leste Const. (2002), art. 156.
97 See, for example, Angola Const. (2010), art 236; Germany Const. (1949), art 79(3).
98 See, for example, Bahrain Const. (1973), art. 120(c); Kuwait Const. (1962), art. 175; Laos Const. (1947), art. 43.
99 See, for example, Tonga Const. (1875), art. 79.
100 See, for example, Mexico Const. (1824), art. 171.
101 See, for example, Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288.
“sovereignty”, or “independence”\textsuperscript{102}. These principles commonly appear in the constitutions of states that were former colonial territories in order to claim their independence and sovereignty. Also, unamendable provisions regarding territorial integrity might express a state’s prioritization of national integrity over self-determination claims that may arise\textsuperscript{103}.

Lastly, some constitutions protect unique constitutional subjects, such as immunities, amnesties, reconciliation and peace agreements\textsuperscript{104}, mandatory international law norms\textsuperscript{105}, the institution of chieftaincy\textsuperscript{106}, taxation\textsuperscript{107}, or rules governing nationality\textsuperscript{108}.

It appears that one can identify two types of protected principles: universal and particular. Such protected principles are universal not in the sense that they are common to all world constitutions, but rather, that they are considered common to all modern democratic societies, such as separation of powers and human dignity. Others, such as federalism, official language, and religion, might be regarded as particular because they reflect specific ideals and values of a distinct political culture\textsuperscript{109}.

**C. Characteristics**

This part analyses the functions and meanings of unamendable provisions. Following and advancing the works of Richard Albert and Beau Breslin, it identifies five features of unamendability which are not necessarily exclusive and often overlap\textsuperscript{110}. The perspective through which unamendable provisions are examined is therefore a combination of both functional and expressive approaches\textsuperscript{111}. I directly link the two terms, as there are qualities between them that overlap. An unamendable provision can have a certain function to fulfil, but at the same time that unamendability reflects certain cultural values. Indeed, the mere expression of unamendability itself fulfils a certain educational and symbolic function. Richard Albert is correct in claiming that just as constitutions carry out expressive functions serving as important symbols for the polity\textsuperscript{112}, the unamendability of a principle or an institution

\textsuperscript{102} See, for example, Angola Consts. (1975), art. 159; (2006), art. 206; Azerbaijan Const. (1995), art. 158; Burundi Consts. (2005), art. 299; (1992), art. 207; Cameroon Const. (1972), art. 63; Cape Verde Const. (1992), art. 313; Chad Consts. (1996), art. 223; (1989), art. 202; Cote d’Ivoire Const. (1960), art. 92; Cuba Const. (1940); Djibouti Const. (1992), art. 88; Equatorial Guinea Const. (1991), art. 104; Kazakhstan Const. (1993), art. 91; Madagascar Const. (2010), art. 163; Mauritania Const. (1991), art. 99; Guatemala Const. (1985), art. 281; Mexico Const. (1984), art. 171; Moldova Const. (1994), art. 142; Mozambique Const. (2004), art. 192; Portugal Const. (2010), art. 288; Romania Const. (1991), art. 148; Rwanda Consts. (2003), art. 193; (1991), art. 96; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1979), art. 112(3); Tajikistan Const. (1994), art. 100; Timor-Leste Const. (2002), art. 156.

\textsuperscript{103} On the unamendability of territorial integrity see Yaniv Roznai/Silvia Suteu, Eternal Territory? The Crimea Crisis and Ukraine’s Territorial Integrity as an Unamendable Principle, German L. J. (forthcoming 2015).

\textsuperscript{104} See, for example, Fiji Const. (1990), art. 164(5); Niger Consts. (2010), art. 177; (2009), art. 152; Burundi Const. (2005), art. 299; Sudan Const. (2005), art. 224(2).

\textsuperscript{105} See, for example, Switzerland Const. (1999), arts. 193(4), 194(2).

\textsuperscript{106} See, for example, Ghana Const. (1969), art. 169(3).

\textsuperscript{107} See, for example, Ghana Const. (1969), art. 169(3).

\textsuperscript{108} See, for example, Mozambique Const. (2004), art. 292.

\textsuperscript{109} Weintal, Eternal Clauses in the Constitution, supra note 22, at 20-25, 62-108.

\textsuperscript{110} Albert, supra note 21, at 678-69, identifies 3 characteristics of entrenchment: preservative, transformational and reconciliatory. Breslin, supra note 7, identifies various roles of constitutions, such as transformative, aspirational, empowering and limiting, and as managing political conflicts.

\textsuperscript{111} For an explanation of expressivism and functionalism in comparative constitutional law see Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L. J. 1225 (1999).

conveys its symbolic value\textsuperscript{113}. It sends a message both domestically to the citizens and to external observers regarding the state’s basic constitutional principles\textsuperscript{114}. Jon Elster notes that “the purpose of ... unamendable clauses is ... mainly symbolic”\textsuperscript{115}. If nothing else, unamendability creates the appearance of respect for that principle or institution and “makes a statement” regarding its importance to the constitutional order\textsuperscript{116}.

(i) Preservative

Preservation of core constitutional values is the most common aim of unamendable provisions. As every political order is established with a clear ambition to preserve itself, the first identified and central goal of unamendable provisions is to preserve the primary constitutive values of the constitutional order\textsuperscript{117}. Unamendable provisions protect an inviolable core that ensures the constitution’s stability and permanence, and preserve it against changes that might annihilate its essential nucleus or cause disruption to the constitutional order itself\textsuperscript{118}. Unamendable provisions, Ulrich Preuss claim, “Define the essential elements of the foundation myth. In other words, they define the collective ‘self.’ of the polity—the ‘we the people.’ If the ‘eternal’ normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse.”\textsuperscript{119}

One can identify different kinds of preservative unamendability. When unamendable provisions protect democracy or human rights, their basic underlying idea is that of a “militant democracy”\textsuperscript{120}— evincing the fear that unfettered democracy will allow its own destruction\textsuperscript{121}. Unamendable provisions, as one commentator notes, “are the outcome of the experience of western constitutionalism to create safeguards to the preservation of constitutional democracy against the

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\textsuperscript{115} ELSTER, ibid, at 471.


\textsuperscript{117} ALBERT, supra note 21, at 678-685.


\textsuperscript{121} SCHWARTZBERG, supra note 26, at 7, 21 terms this “democratic autophagy”. GREGORY H. FOX/GEORG NOLTE, Intolerable Democracies, 36 Harv. Int’l L. J. 1 (1995), call it “intolerant democracy”.

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authoritarian encroachments or totalitarian takeover. Thus, they reflect some kind of what I term “Amendophobia”: the fear that the amendment provision would be abused to abrogate the core values of society. In this sense, unamendable provisions aim not only to prevent abuse of the system by leaders who wish to fulfil their own ambitions, but also to serve as a pre-commitment mechanism of the “people” to protect itself against its own weaknesses and passions. We limit ourselves so that in times when we might lose control of our reasonable judgment we will not be able to amend the constitution in a way that we will later regret. Ulysses and the Sirens is often the metaphor used to illustrate this idea: “[w]hen Ulysses bound himself to the mast and had his rowers put wax in their ears, it was to make it impossible for him to succumb to the song of the sirens.” Making certain subjects immune to amendment, Jon Elster notes, is “a perfect protection against impulsive rashness.” However, Elster reminds us, unamendable provisions “do not bind in a strict sense, because extraconstitutional action always remains possible.” Indeed, as Silvia Suteu at I have wrote elsewhere, from a factual rather normative perspective, unamendability has a limited ability to block extra-constitutional means.

Unamendable provisions can not only limit governmental power, but also empower it. When unamendable provisions protect the rights of a monarch, the principle of inherited rules, and succession to the throne, they serve as a mechanism to preserve the existing power of the rulers rather than limit it. The Constitution of Albania of 1928, for example, stipulates that Art. 50, according to which “The King of the Albanians is His Majesty Zog I, of the illustrious Albania family of Zogu” cannot be amended (Art. 224). The unamendability of the throne is also common in some of the Arab countries’ constitutions. This is a manifestation of the more general character of the Arab world’s constitutionalism in which written constitutions enhance rather than limit governmental power.

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126 This is often termed “Peter when sober imposes chains on Peter when drunk”. However, it is doubtful whether a constitution drafted in times of crises was indeed drafted by “sober” constitution-makers. See Jon Elster, Ways of Constitution-Making, in: Axel Hadenius (ed.), Democracy’s Victory and Crisis, CUP, 123, 135 (1997); Elster, supra note 25, at 370.


129 Elster, Ulysses Unbound, supra note 127, at 94.

130 Roznai/Suteu, supra note 103.

131 See, for example, Bahrain Const. (1973), art. 120(c); Jordan Const. (1952), art. 126(2); Libya Const. (1951), art. 197; Qatar Const. (2004), art. 145; Morocco Consts. (1970, 1972, 1992), arts. 100, 106, 100, respectively.

Political actors can also use preservative unamendability as a tool in order to preserve power asymmetry. Parties enshrine existing political majority preferences in the constitution in such a way that it cannot be amended in order to protect against future alterations of the decisions that they advocated for if they subsequently become a minority. Examples of such unamendability could be the French unamendability of republicanism, which marked the triumph of the republicans over the monarchists, or the Mexican unamendability of confederalism, which marked the victory of the Mexican federal party over the Centralists after a long struggle that existed between the two parties over the country’s formation.

(ii) Transformative

Unamendability aims to assist in transforming political communities. In its extreme form, it is used to assist creating and maintaining a wholly new political entity. For example, a unique type of unamendable provision appears in constitutions of independent entities created as part of multilateral agreements. For example, by the Zurich treaty of February 1959, Greece, Turkey, and Great Britain guaranteed Cyprus’s independence, territorial integrity, and security. The treaty was then incorporated within the Constitution of 1960 (Art. 181), and its basic articles were declared unamendable (Art. 182.1). The treaty’s provisions have been constitutionally nationalized, and simultaneously the basic constitutional principles have been internationalized so that they can only be amended by an agreement between the parties to the Zurich treaty. Likewise, Hong Kong’s Basic Law of 1990 (effective as of 1997), which can be amended by the National People’s Congress of the People’s Republic of China, prohibits in Art. 159(3) amendments that contravene the established basic policies of China regarding Hong Kong as formulated in the Sino-British Joint Declaration of 1984 and in the Basic Law’s

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134 Cf., JACK KNIGHT, Institutionalizing Constitutional Interpretation, in: JOHN FERE JOHN/JACK N. RAKOVE/JONATHAN RILEY (eds.), Constitutional Culture and Democratic Rule, CUP, 361, 367 (2001): “Flexibility for future interests to determine the effects of constitutional provisions is unlikely to be in the interest of those who are presently in the majority but destined to be in the minority in the future. Drafters with such expectations will prefer, rather, to constrain the effects of future actions.”


137 On constitutional transformation see BRESLIN, supra note 7, at 30-45.


Preamble. This self-limitation provision not only forms a bridge to connect Hong Kong and Beijing, but also safeguards Hong Kong’s key elements of autonomy.

The more dominant character of unamendable provisions, however, is their ability to transform polities. New constitutions aim to mark a dividing line between the past and the future, representing a new era and an attempt to cultivate a distinct political community. Reacting to past events, constitution-makers mainly have in mind the previous regime’s failures, atrocities and abuses. Constitutions “reflect fear, originating in, and related to, the previous political regime”, and their guarantees reflect “the institutional negation of the oppression recently endured”. Emerging out of previous and dysfunctional regimes, new constitutional unamendable provisions largely react to the faults of past political leaders as an attempt to undo historical injustice. Unamendable provisions therefore have much to teach us about a country’s past (and often grave) experiences. The technique of explicitly limiting the amendment power, which migrated among different jurisdictions, at time retained its original expression, whereas on other occasions it absorbed local content, primarily as a response to prior events and past experiences, reflecting the drafters’ ambitions to direct the nation away from past tragedies into a more “just” future.

There are many examples of this “negative” role that unamendable provisions play, as a lasting reminder of recent past devastations, and as an attempt to transform – and never return to – “legacies of past injustice”. The post WWII constitutions, Carl Friedrich claimed, were motivated by “a negative distaste for a sordid past”. Elsewhere, Friedrich described the constitutional efforts to block the option of reverting to a grave past:

Since the experience of totalitarian dictatorship proved more terrible, the antagonism aroused by it was correspondingly more fanatic. From this experience there arose a constitution-making sentiment, a constituent power, so to speak, which was very strongly determined to bar the recurrence of any such transformation of a free society into voluntary servitude.

140 YASH GHAI, The Legal Foundations of Hong Kong’s Autonomy: Building on Sand, 29(1) The Asia Pacific Journal of Public Administration 3, 7 (2007). It has been argued that since the Basic Law is a statute, this provision itself can be repealed or amended by simple legislation. See OWEN M. FISS, Hong Kong Democracy, 36(3) Colum. J. Trans’l L. 493, 497-498 (1998).

141 RODA MUSHKAT, Hong Kong as an International Legal Person, 6(1) Emory Int’l Rev. 105, 135 (1992). On the Basic Law as a bridge to connect Hong-Kong and China see FU HUALING/RICHARD CULLEN, But Hong Kong Should Seek A Better Way…, 2 Hong Kong J. 1, 3 (2006).


144 ALBERT, supra note 21, at 685-693; RUTI TEITEL, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L. J. 2014 (2009), was right to claim that “the conception of justice that emerges is contextual: What is deemed just is contingent and informed by prior injustice”.


146 FRIEDRICH, supra note 28, at 151.

Indeed, the German Basic Law’s unamendability of democracy and human dignity must be understood against the background of the Weimar Constitution, Nazi rule and the Holocaust. Even the German unamendability of federalism can be understood not only as a result of insistence by the allied forces, but also due to the German drafters’ realization that one of the Weimar’s constitutional failures was the suspension of federalism.

Another example is the new constitutional orders in Central and Eastern Europe upon the collapse of communism, which protect human rights and recognize the practice of judicial review. Although some have argued that it would be a mistake for these new democracies to import the German “fondness for unamendable provisions”, since the vexing questions that they face ought to be resolved in the political sphere rather than in constitutional courts, many of them adopted unamendable provisions. In the post-communist states, unamendability is to be understood in light of a “bitter experience” and as a rejection of the past when constitutions were utilized as political weapons.

Greece could be another example for how the country’s past impacted unamendable provisions. Greek Constitutions have traditionally been characterized by a high degree of rigidity. Whereas the Constitution of 1844 did not include any revision procedure, the Constitutions of 1864 (Art. 107), 1911 (Art. 108) and 1927 (Art. 125) prohibited revisions of the entire constitution, allowing revisions only of non-fundamental provisions. The Constitution of 1952 prohibited the revision of the entire constitution along with those provisions: “which determine the regime as that of a crowned democracy as well as its fundamental provisions” (Art. 108). Between the years 1967-1974, Greece was ruled by a dictatorship, an experience that strongly influenced Greek constitutional limitation on the possibility of parliamentary obstruction. Consequently, the Constitution of 1975 specified certain

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unamendable principles, such as the form of government as a parliamentary republic, separation of powers, and certain fundamental rights and freedoms (Art. 110.1).

Lastly, in Africa, during the continent’s first few decades of independence, African leaders frequently amended their constitution in order to further their own political agendas, which undermined constitutionalism and constitutional stability. In an effort to break from the past, many African states’ constitutions now include unamendable provisions protecting human rights and limiting presidential terms. A similar unamendability of term limits exists in some Latin American states in response to a problematic history of military coups, authoritarian rule, and leaders’ efforts to seize control of the state. Constitutional unamendability of presidential term limits not only highlights their normative importance, but also raises the political costs of trying to abrogate them.

All these are examples of what Kim Lane Scheppele terms “aversive constitutionalism” or “a not-that constitutional theory” which highlights and condemns the evils of the prior regime which define by negative example the core of what the new constitutional order stands for: “…negative theory starts from the premise that, whatever else the new constitution may mean, it must mean at a minimum that the abuses of the past regime are not allowed to continue. The precise abuses of the prior regime of horror fill in the content of abstract terms in the text.” The new constitutional provisions are then defined by the negative example of the old regime and the new constitutional identity stands first and foremost as a repudiation of the negative immediate past. Therefore, the transformative feature of unamendability wears “multifocal lenses”. It is simultaneously short-sighted and long-sighted, backward and forward-looking. It plays two conflicting roles: positive and negative. On the negative side, unamendable provisions represent the destruction of an existing political design. On the positive side, unamendable provisions represent the birth of a new and different version of the polity – and this is the aspirational feature of unamendability.


FOMBAD, supra note 124, at 28.

157 See, for example, Democratic Republic of Congo Const. (2005), art. 220; Namibia Const. (1990), art. 131. See generally ALBERT, supra note 21, at 19-20.


160 Based upon the unamenable provision prohibiting any amendment concerning presidential term limits, in 25 May 2009, the Constitutional Court of Niger declared as unconstitutional a call for a referendum, which would have suspended the constitution and allow the President to continue in office as an interim president for a period of three years. See Cour Constitutionnelle AVIS n. 02/CC of 26.05.2009 <http://cour-constitutionnelle-niger.org/documents/avis/2009/avis_n_002_cc_2009.pdf>


162 SCHEPPELE, supra note 145, at 255. See also SCHEPPELE, supra note 149, at 300.

163 Cf., SCHEPPELE, supra note 142, at 1379 and TEITEL, supra note 144, at 2015, 2057.
Unamendable provisions offer a “shorthand record” of the memories and hopes of their framers. They both “reflect the birth pangs of that particular society,” and promise a brighter future. András Sajó explains that when constitutions affirm an emerging national identity, they aim, *inter alia*, to make selections that will cause the people to feel good, in contrast with the feelings of fear and outrage about past abuses. Likewise, unamendable provisions imagine a more perfect polity, the kind that the citizenry aspires to become and preserve. If a constitution “reflects the triumphs and disappointments of a nation’s past and embodies its hope for the future,” this is properly illustrated by the constitution’s unamendable provisions. Aspirational unamendability, as Richard Albert writes, “endeavours to repudiate the past by setting the state on a new course and cementing that new vision into the character of the state and its people.” Of course this aspirational characteristic might be at odds with the prevailing culture or conditions of society.

A notable example is the Brazilian Constitution of 1988. This constitution, which includes broad unamendability of federalism, suffrage, separation of powers, and individual rights (Art. 60.4), functioned as a transition to democracy after twenty-one years of military rule from 1964 to 1985. As a direct response to the military junta’s government, the Brazilian Constitution not only represents recommitment to constitutionalism, but also “points to the future and it shows where it wants to get to.” This example also illustrates why the various features of unamendability are overlapping and not exclusive. The unamendable provision in the Brazilian Constitution, which reflects an aspirational character, can also be characterized as transformative since they were adopted as a direct response to the former military dictatorship. The constitutional aspirations for a fresh design, as we have seen, are inevitably informed by the faults and mistakes of the past. Therefore, the aspirational and transformative aspects of unamendability are strongly connected, the two-sides of a same coin.

Unamendable provisions can be used to manage certain conflicts, for example, by functioning as “gag rules” for silencing contentious issues. Even in democratic societies – where the desire is to publicly debate disputes and to use political mechanisms for decision-making – there might be strong rationales not to openly debate certain disputes. A dispute might be so severe that a public debate would not bring...
about an accepted solution, but rather, might excite negative feelings and deepen social divisions. As Holmes explains, “by tying our tongues about a sensitive question, we can secure forms of co-operation and fellowship otherwise beyond reach.” In such cases, silencing can play a positive role.

Contrary to preservative unamendability, conflictual unamendability does not protect grandiose values. Rather, it protects issues that are a “bone of contention” in society, such that if they were open to constitutional debate might tear the bonds of community. They anchor compromises that no one really likes; yet the society can agree about their necessity under the existing circumstances. The best example of this function could be Art. V of the U.S. Constitution, which originally protected the African slave trade. The unamendability of this provision was the result of a compromise because South Carolina and Georgia would not consent to an immediate prohibition of slave trafficking. Insisting on ending slavery at the constitutional convention might have resulted in the collapse of the entire constitutional enterprise.

The unamendability of equal suffrage in Art. V also reflects a compromise rather than a constitutive principle, aimed to moderate the smaller states’ fear that they would be overrun by larger states. As Adam Samaha notes, “the most entrenched textual norm is equal representation in the Senate for every state, but no one appears to believe this provision is the most central moral value in our law.” In that respect, James Fleming was correct in observing that American unamendability “hardly looks like constitutive principle of a constitutional order”, and in offering the alternative role of Art. V as reflecting “deep compromises with our Constitution’s constitutive principles”.

A much less known example comes from the Kingdom of Tonga. Tonga’s Constitution of 1875, which is still in force, prohibits amendments that “affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles” (Art. 79). This unamendability can only be understood from a historical perspective. The Constitution of 1875 transformed the prior chieftainship into a kingship and established a new aristocracy, which was composed of selected former chiefs. The aristocracy was actually established in an attempt to settle the on-going conflicts over power and keep

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178 SAPIR, supra note 176, at 224.
179 For the background of the constitutional accommodation with regard to slavery see Paul Finkelman, The Founders and Slavery: Little Ventured, Little Gained, 13 Yale J. L. & Human. 413 (2001).
180 SCHWARTZBERG, supra note 26, at 129-139.
181 SCHWARTZBERG, supra note 26, at 139-143.
183 James E. Fleming, We the Exceptional American People, 11 Const. Comment. 355, 362-363 (1994-1995). In light of Fleming’s observation one can understand Richard Albert’s assertion that: “In Germany, as in other constitutional states where a provision is deliberately entrenched against formal amendment, unamendability is an informed choice reflected in the constitutional design of the master text. In contrast, the unamendability of the Equal Suffrage Clause derives from constitutional politics, not constitutional design.” See Albert, supra note 9, at 199.
184 On the independent state of Tonga see Guy Powels, Tonga, Asia-Pac Const. Y.B. 286 (1993).
185 In 2004, the Supreme Court of Tonga faced a challenge to a constitutional amendment carving exceptions to freedom of speech and press which are, as the Supreme Court held, included within “the law of liberty” which is protected by art. 79. Since some of the justifications for restricting expression were excessively wide and vague (such as “the public interest” or “cultural traditions of the Kingdom”), they were declared unconstitutional and void. See Taione and Others v Kingdom of Tonga, [2004] TOSC 48, [2005] 4 LRC 661; 32 Commw. L. Bull. 156 (2006).
peace between the king and the former chiefs, who would otherwise have remained without any authority. The unamendability of nobility both reflects this compromise and perpetuates the traditional privileges of chiefs in Tonga’s modern day aristocracy.\footnote{\textit{Tim Rene Salomon}, Modern Equality vs. Traditional Nobility in Tonga, 40 \textit{Victoria U. Wellington L. Rev.} 376 (2009-2010). See generally \textit{George E. Marcus}, Succession Disputes and the Position of the Nobility in Modern Tonga, 47(3) \textit{Oceania} 220 (1977) and continuation in 47(4) \textit{Oceania} 284 (1977).}

Importantly, along with their advantages, unamendable provisions as gag rules carry the risk that whatever is silenced might explode in the future.\footnote{\textit{Rumyana Kolarova}, Tacit Agreement in the Bulgarian Transition to Democracy: Minority Rights and Constitutionalism, 1993 \textit{U. Chi. L. Sch. Roundtable} 23, 51 (1993).} The silencing tactic thus has the practical disadvantage of intensifying the tension with regard to delicate issues, a process that might end in an uncontrolled revolutionary explosion, which the gag rule was originally intended to prevent.\footnote{\textit{Holmes}, supra note 177, at 25-26. On temporal limits see \textit{Julian N. Eule}, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 12 \textit{Law & Social Inquiry} 381, 384-385 (1987); \textit{Ozan Varol}, Temporary Constitutions, 102 \textit{Cal. L. Rev.} 409 (2014).} Therefore, it might be argued that it is perhaps better to use a “sunset provision”, a temporal unamendability, which allows the removal of the contentious issue from the public agenda for a while without long-term restraints.\footnote{On the risk of using extra-constitutional means to overcome unamendability see \textit{Roznai}, supra note 13, at 213-214.} Of course, the risk of using revolutionary forcible means to override unamendability is not unique to gag rules, but it is certainly exacerbated in these cases.\footnote{\textit{Kirsti Samuels}, Postwar Constitution Building – Opportunities and Challenges, in: Roland Paris/Timothy D. Sisk (eds.), \textit{The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations Security and Governance Series}, Taylor & Francis, 173 (2009).}

The second way through which unamendable provisions can assist in solving conflicts is by serving as a tool for reconciliation in post-conflict societies. Constitution building can play a vital role in post-conflict societies, as can unamendable provisions. This can be attempted by ensuring that peace agreements, immunities that have been granted, or the principle of reconciliation itself are protected from amendment. Burundi, a country which has constantly suffered from internal civil wars and major political instabilities,\footnote{See \textit{Guglielmo Vedira}, Ethnicity, Conflict and Constitutional Change in Rwanda and Burundi, in: Mads Andenas (ed.), \textit{The Creation and Amendment of Constitutional Norms}, BIICL, 302 (2000); Ebenezer Akwanga/Kale Ewusi, \textit{Burundi’s Negative Peace: The Shadow of a Broken Continent in the Era of Nepad}, Trafford Publishing 8-20 (2010).} prohibits in its Constitution of 2005 amendments which would undermine reconciliation (Art. 299), probably in order to support the efforts undertaken by Burundians to bring about national reconciliation, as provided under the 2000 Arusha Peace and Reconciliation Agreement. In Sudan, a country that since its independence has been suffering from internal wars over its national identity, the second major civil war (1982-2005) ended with a Comprehensive Peace Agreement between the government of Sudan and the Sudan People’s Liberation Movement, which initiated a six-year interim period at the end of which the people of southern Sudan were given opportunity to exercise their right of self-determination through a referendum.\footnote{\textit{Francis M. Deng}, Sudan: A Nation in Turbulent Search of Itself, 603 \textit{Annals, Aaps} 155 (2006).} In order to protect the peace agreement, the Constitution of 2005 prohibited amendments that affect the peace agreement without the approval of both signatory parties (Art. 224.2).
As a way of leaving the past behind and starting anew, reconciliation could also be fostered through unamendable provisions by protecting immunities granted for prior wrongful acts by members of conflicting groups. For example, both Niger’s Constitutions of 1999 (Art. 139) and 2009 (Art. 152) protect amnesties granted to the perpetrators of human rights violations, which occurred during the coups of 27 January 1996 and 9 April 1999. Although it was argued that this impunity has undermined the rule of law, this technique was repeated in the Constitution of 2010 (Art. 177), which prohibits amendments to the amnesty granted to perpetrators of the coup of 18 February 2010. This provision was meant to guard the ruling junta and its military backers from being hunted down once they quit power. Another example is Fiji, in which the Constitution of 1990 granted immunity to all members of the security forces involved in the military coup in 1987, and prohibited any amendments to the granted immunity (Art. 164.5). Whereas the grant of amnesties is a recognized (albeit divisive) mechanism in post-conflict transformation, establishing amnesties as unamendable principles raises them to the highest level of entrenchment.

(v) Bricolage

Anthropologist Claude Lévi-Strauss coined the term “bricolage”, meaning borrowing from what is readily at hand. Mark Tushnet applies the term “bricolage” to the constitution-making context, to describe the situation when “[a] constitution is assembled from provisions that a constitution’s drafters selected almost at random from whatever happened to be at hand when the time came to deal with a particular problem.” Since constitution-makers use whatever available materials are at hand to solve urgent problems, “bricolage” shifts the focus from constitutional harmony to constitutional compromise and contingency. It reflects the tendency of constitutional borrowing in the modern constitutional design.

It must be re-emphasised that unamendable provisions do not always reflect the basic principles of that political regime. Some do, but as the conflictual characteristic of unamendability demonstrates, the protected values could simply be indicative of a compromise and therefore ought to be viewed within the historical context of contingency. Others may simply be the result of constitutional borrowing. An historical review of unamendable provisions strengthens the argument that unamendability exemplifies the wider phenomenon of constitutional “borrowing” or

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195 See ALBERT, supra note 21, at 693-698.
197 New Niger constitution gets thumbs-up, Times Live (3 November 2010), <http://www.timeslive.co.za/africa/article741751.ece/New-Niger-constitution-gets-thumbs-up>
201 TUSHNET, supra note 111, at 1287.
“migration”, most notably in post-colonial constitutions. Africa is the clearest example for this. While certain African states include in their constitutions unamendable provisions, the influence of French and Portuguese origins is evident, as these provisions appear mainly in Francophone and Lusophone countries, with minimal Anglophone exceptions.

Portugal and Brazil are notable examples of both “recipients” and “donors” of unamendable provisions. Portugal’s Constitution of 1911 abolished the monarchy and established its first republican government. Fearing the monarchists’ counter-reaction and remembering the monarchy’s abuse of power, the constitution-makers stipulated that amendments which purport to abolish the republican form of government cannot be admitted to discussion (Art. 82.2). This limitation, which was omitted in the Constitution of 1933, is similar to earlier French and Brazilian limitations. Indeed, the Brazilian and French constitutional models played a vital role in the making of the Portuguese Constitution of 1911, which, as one commentator noted, “resembled a conglomeration of Republican systems in France, Brazil, and Switzerland”. The current Constitution of 1976 is exceptional insofar as it includes the most detailed unamendable provision, protecting no less than fourteen subject matters from amendment, and some of them, like the rights of workers and trade unions, are unique (Art. 288). The only countries that have similarly detailed and unique unamendable provisions are those that were formerly Portuguese colonies.

Brazil also has a long history of explicitly limiting the amendment power. The Constitution of 1891 was a democratic constitution enacted soon after the abolition of the Unitarian monarchy.

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205 PETER SUBER, The Paradox Of Self-Amendment: A Study Of Logic, Law, Omnipotence, and Change, Peter Lang Publishing, 9 (1990), wrote that unamendable provisions are likely to appear in constitutions which were imposed by a foreign or imperial power since “a sovereign people will not ordinarily want to limit its power to make law”. This is not completely accurate as many self-drafted constitutions include such provisions.


209 Namibia Const. (1990), art. 131.


214 LUIS PEDRA, supra note 19, at 452; PEDRA, supra note 118, at 222.

Inspired by the French and U.S. Constitutions\textsuperscript{216}, it prohibited amendments “tending to abolish the republican federal form or the equality of representation of the states in the senate” (Art. 90.4). Additionally, during the 1988 constitution-making process, three major Portuguese constitutionalists visited the country, bringing the experience of the Portuguese constitutional process\textsuperscript{217}. Indeed, influenced by Portugal, the current Brazilian Constitution includes a broad unamendable provision. These events demonstrate the borrowing of explicit limits on amendment powers.

Finally, a quick look at the collection of world unamendable provisions reveals that many of the unamendable provisions simply repeat themselves (often with slight changes) in a nation’s subsequent constitutions. This again demonstrates the “bricolage” idea of using unamendable provisions that “are at hand”. An obvious example is the Dominican Republic in which the exact same unamendable provision repeats itself in thirteen constitutions from 1907 to 2002, and a similar (but not identical) provision repeats itself in ten constitutions from 1865 to 1896. Such repetition seems more like an expression of historical or cultural convention than necessarily reflecting the result of a constructive, rational constitution-making process. Therefore, one should be cautious in always imputing unamendable provisions a high degree of productive prudence\textsuperscript{218}.

5. Conclusion

Unamendability is undeniably a “complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order”\textsuperscript{219}. Indeed, alongside the legal issue rests the policy question of whether adopting unamendable provisions as a constitutional strategy in order to protect the constitutional order is favourable. There is no clear answer to that question. The proverb \textit{Malum est consilium quod mutari non potest} (“it is a bad plan that is incapable of change”) may apply with great force to constitutional design. Whereas for some states unamendable provisions could form a protective shield for the constitution’s nucleon to remain essential\textsuperscript{220}, for others, unamendability might lead to dangerous extra-constitutional means in order to force a change\textsuperscript{221}.

\textsuperscript{216} MAIA, supra note 172, at 61.
\textsuperscript{218} Cf., A. V. DICEY, \textit{Will the Form of Parliamentary Government be Permanent?}, 13 \textit{Harv. L. Rev.} 67, 71 (1899-1900) (stating the a constitution’s form of government “has in many cases been determined not by any rational conviction that a particular kind of government was adapted to meet the wants of a given people, but by the unconscious desire of constitution makers to follow the reigning fashion of their day…”)
\textsuperscript{221} FRIEDMAN, supra note 162, at 93-96.
Moreover, as the Venice Commission maintained, explicit limitations on constitutional amendments are not a necessary element of constitutionalism. Nonetheless, as I pointed out in this article, an increasing number of constitutions contain explicit material limitations on the constitutional amendment power in order, *inter alia*, to protect essential characteristics of the constitutional order or principles perceived as being at great risk of repeal via the democratic process, in light of historical circumstances. Neil Walker correctly remarked that unamendability “tells a story about a people and its common purpose that not only resonates with more general and powerful myths of peoplehood but which is partly vindicated by the historical record that constitutional law itself creates”.

“A constitution”, Peter Häberle states, “is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of cultural heritage and the foundation of its expectations.” A nation’s constitutional identity is defined by the intermingling of universal values with the nation’s particularistic history, customs, values and aspirations. Importantly, constitutional identity is never a static thing but emerges from the interplay of inevitably disharmonic elements. It can always be reinterpreted and reconstructed.

One method through which a constitutional identity can evolve with time is the constitutional amendment process. Indeed, the amendment process is not merely a technical mechanism of balancing constitutional stability and flexibility, but it directly implicates the nature of the constitutional system. A constitutional identity is changeable, but is “resistant to its own destruction”. Aiming at preventing certain changes, unamendable provisions can be regarded as efforts for maintaining a state’s constitutional identity. They thus reflect a nation’s will to remain faithful to a “basic structure” that comprises its constitutional identity:

Every constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity... These superconstitutional provisions could be referred to as the genetic code of the constitutional

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223 FLEMING, supra note 183, at 362-363.
231 JACOBSON, supra note 226, at 363.
232 Of course by maintaining a certain constitutional identity, one may claim that unamendable provisions hinder rather than develop other identities. While this is true, one must also remember that unamendable provisions are open to interpretation by which courts can give unamendable principles modern and developed meanings. What republicanism meant in France in 1791 is infinitely different from what it means nowadays, and the Norwegian Constitution’s spirit and principles are not necessarily those of 1814, but the present ones. See DENIS BARANGER, The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof), 44 Isr. L. Rev. 389, 421 (2011); TORKEL OPSAHL, The Reflection of Social Values in the Constitutional History of Norway - Some Illustrations, 15 Holdsworth L. Rev. 181, 185-186 (1991-1992).
arrangements$^{233}$. Unamendable provisions tie the past, present, and future, and carry out expressive functions serving as important symbols for the polity. A single look at unamendability can teach us a great deal about the polity. Thus, in many ways, these *noli me tangere* provisions comprise the genetic code of the constitution.