Eternity Clauses as Tools for Exclusionary Constitutional Projects

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There has been undoubted growth not just in scholarly interest in unamendability, but also in its judicial use around the world.[1] Courts from across the world have at least considered, if not fully embraced, doctrines of unconstitutional constitutional amendment, either in the form of enforcing a formal constitutional eternity clause or seeking to defend implicitly immutable constitutional principles and basic structures. This has happened not least in response to current variations of democratic backsliding and populist constitutional amendment abuse.[2] One underlying assumption underpinning this interest has been that unamendability will serve as democratic safeguard against misuse of constitutional amendment procedures and can unmask concealed attempts at constitutional replacement or "dismemberment".[3]

In this chapter, I want to remind us that unamendability itself can be prone to abuse. Taking the constitutional politics surrounding unamendability seriously reveals it to be open to misuse and instrumentalised at the stage of constitutional drafting, as a consequence of dynamics in the constituent assembly or drafting body, or indeed later, when a basic structure doctrine may emerge. As we have long known about constitutional rigidity mechanisms in general, they will on balance serve to insulate elites and have been relied on to stifle much-needed democratic change rather than protect against democratic erosion.[4] The Asian case studies so comprehensively covered in this volume, several of which I draw on in this chapter as well, amply show this ambivalence within the practice of unamendability.

I should clarify that I am not arguing that unamendability is *always* likely to be abused, whether by the political branches or the courts, and can never serve a positive defensive function. Mine is a reminder that this can and does happen, and that the constitutional contexts where unamendability has most appeal – divided, post-conflict, fragile – are *also* the contexts most likely to result in the abuse of unamendability.[5] The paradox then is that it is precisely where most needed that unamendability may be most vulnerable, and most likely to provide cover for – rather than protect against – the erosion of democratic and rule of law safeguards.

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[1] Yaniv Roznai, *Unconstitutional Constitutional Amendments, The Limits of Amendment Powers* (OUP 2017); Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021).

[2] Suteu (2021), 152-159; Pietro Faraguna, 'Populism and Constitutional Amendment' in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti, and Fabio Pacini (eds), Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas (Palgrave Macmillan 2020); Tamar Hostovsky Brandes, 'International law in domestic courts in an era of populism' 2019 17:2 *International Journal of Constitutional Law* 576, 589-590; David Landau, 'Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine' (2018) 12:2 *Law & Ethics of Human Rights* 225.

[3] Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale Journal of International Law* 1.

[4] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2009).

[5] For an earlier exploration of unamendability in post-conflict and post-authoritarian contexts, see Silvia Suteu, 'Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making' (2017) 6 *Global Constitutionalism* 63.

Such re-evaluations are beginning to be felt necessary more broadly. Scholars now acknowledge that we have been so focused on identifying and combatting abusive constitutionalism that we have ignored the possibility of abusive judicial review – of judicial intervention itself contributing to democratic backsliding rather than protecting from it.[6] This chapter can therefore be read as complementing this emerging literature that seeks to re-evaluate the functions and operation of constitutional unamendability.

My argument thus proceeds in three steps. First, by exploring the constitutional politics of constitution-making resulting in the adoption of eternity clauses, I find the latter often to be the products of intense political bargaining. Eternity clauses then become facilitators and guarantors of the hard-fought political pact, entrenching bargaining imbalances and exclusion rather than, or sometimes alongside, democratic, rule of law, and human rights guarantees. Second, I show that entrenchment of majoritarian and exclusionary values and principles, including via eternity clauses and unamendability doctrines, is most likely to happen in fraught constitutional contexts: those that are divided, fragile, and affected by conflict. Third, I show how constitutional review of unamendability in such contexts may well exacerbate rather than help mitigate these problems.

I draw on a number of Asian case studies, especially Thailand, Nepal, India, and Bangladesh, as they help illustrate different varieties of my exclusionary unamendability thesis. Part 1 highlights the exclusionary potential of entrenching certain state characteristics – in the case of Thailand, monarchism and the role of the King as Head of State – and their propensity to lead to fewer avenues for democratic change. Part 2 looks at Nepal's case as one in which constitutional entrenchment and constitutional nationalism are intertwined and have been over various constitution-making iterations. Part 3 explores the rise of judicial turf protecting through recourse to unamendability, specifically invocations of judicial independence as part of basic structure doctrines in India and Bangladesh. While exclusionary unamendability is not a distinctly Asian problem by any means, the spread of unconstitutional constitutional amendment doctrines in the region over recent years makes it especially ripe for this type of analysis.

1. Fundamental state characteristics and undemocratic amendment: Thailand's unamendable monarchy

Reading constitutions as products of political bargaining is not new.[7] Constitution-making processes are not only enmeshed with political deal-making, they sometimes become *the* site of contestation and gamesmanship. The interplay between constitutions and constitutionalism, on the one hand, and political settlements, on the other, becomes especially evident during periods of transition. This is when "dilemmas of statecraft" are open for negotiation and mechanisms for conflict resolution become newly embedded into the constitutional and legal framework, with eternity clauses as one such repository.[8]

It is then not surprising to see these political bargaining dynamics and compromises reflected in the constitutional text, including in its provisions on constitutional courts and amendment. Political insurance theories developed around constitutional judicial review have sought to understand why political actors involved in constitution-making processes would voluntarily accept limitations on their

[6] Rosalind Dixon and David Landau, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 *UC Davis Law Review* 1313; David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis LR* 189.
[7] Jon Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (2000) 2:2 *University of Pennsylvania Journal of Constitutional Law* 345.
[8] Christine Bell, 'Bargaining on Constitutions – Political Settlements and Constitutional State-building' (2017) 6:1 *Global Constitutionalism* 13.

scope for action by independent courts.[9] Their explanation is that court interventions act as assurance to all sides in the event of loss of political office or political influence, as well as to prevent political persecution.[10] More recently, such theories have been applied beyond the constitution-making context to constitutional amendment.[11] These theories have tended to see constitutional review as a potential bulwark against constitutional amendments that seek to undo the original constitutional bargain. In other words, judicial intervention has been seen as a potential positive force in the face of attempts to remove the original form of political insurance in the constitution, such as amendments to remove bicameralism or presidential term limits.

However, what has remained under-appreciated is the extent to which the same bargaining dynamics in constitution-making may result in constitutional incoherence as well as exclusion in constitutional amendment rules generally, and eternity clauses specifically.[12] Post-conflict constitutions are especially prone to this type of incoherence, as they are hard-fought patchwork documents that often must facilitate state- and peace-building in contexts of weak institutional capacity.[13] The same is true for other constitutional contexts characterised by deep societal division and institutional weakness. As Stephen Gardbaum has argued about importing constitutional review (especially in its strong form) in such contexts, this may result in "unnecessary pressures and strains in an already difficult context."[14] The same should be asked about eternity clauses and, relatedly, the prospects of courts developing unconstitutional constitutional amendment doctrines.

As I have argued more extensively elsewhere, it can and does happen that inconsistent provisions are entrenched within the same constitution, including unamendable ones.[15] In fact, with eternity clauses often drafted as a key site of value pronouncements, we find them sometimes enshrining a commitment to democracy alongside authoritarian features, or a commitment to minority rights alongside entrenchment of state characteristics that may serve to restrict these rights, such as an official religion or language. This seriously complicates readings of constitutional unamendability as a repository of constitutional identity.[16] What emerges is a picture not just of disharmony among and iterative contestation of constitutional values, but of the textual entrenchment of exclusion that from the start blocks the possibility of correction through amendment.

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[9] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

[10] Tom Ginsburg and Rosalind Dixon, 'The Forms and Limits of Constitutions as Political Insurance' (2017) 15:4 *International Journal of Constitutional Law* 988.

[11] Sergio Verdugo, 'The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution' (2019) 17:4 *International Journal of Constitutional Law* 1098 and Dante Gatmaytan, '*Judicial Review of Constitutional Amendments: The Insurance Theory in Post-Marcos Philippines*' (2011) 1:1 *Philippine Law and Society Review* 74.

[12] For a similar argument applied to the Romanian Constitution and its eternity clause, see Silvia Suteu, 'The Multinational State That Wasn't: The Constitutional Definition of Romania as a National State' (2017b) 11:3 *Vienna Journal on International Constitutional Law* 413. Similarly on Israel, see Mazen Masri, 'Unamendability in Israel: A Critical Perspective' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 169.

[13] Donald L. Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States', *William and Mary Law Review* 49:4 (2008) 1213. See also Joanne Wallis, *Constitution Making during State Building* (CUP 2014).

[14] Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?', *Columbia Journal of Transnational Law* 53 (2015) 285, 289-290.

[15] Suteu (2021), 58-59, 100-103.

[16] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

This does not deny the positive role eternity clauses may play, both at the time of constitutional drafting – when they can perform a political insurance role facilitating agreement on a final draft – and as textual hooks for an unconstitutional constitutional amendment doctrine developed later on – such as to prevent democratic backsliding and abusive constitutionalism. However, mine is a reminder that more often than appreciated, eternity clauses will not (just) be repositories of the lofty goods of constitutionalism such as democratic values, separation of powers, and the rule of law. As negotiated and deeply political instruments, they are sometimes also sites of exclusion. Crucially, this happens within otherwise democratic, if imperfect, constitutional texts. Moreover, as will be shown in Part 3 , the institutional conditions that need to obtain for judicial interventions in the name of unamendability to reinforce, rather than themselves undermine, democratic constitutionalism are demanding and may prove unstable over time.

A good case study to illustrate these points is that of Thailand, also discussed extensively in a chapter in this volume.[17] Thai constitutional politics reveal the problematic nature of otherwise seemingly innocuous eternity clauses. Successive Thai constitutions have proclaimed themselves democratic but have at the same time rendered the monarchical form of the state and the role of the King as the Head of the State unamendable, all in a volatile context characterised by frequent coups.[18] Section 255 of Thailand's 2017 Constitution thus prohibits "an amendment to the Constitution which amounts to changing the democratic regime of government with the King as Head of State or changing the form of the State." Its origins rest in the 1997 Thai Constitution, which otherwise had introduced many elements of liberal democracy including a long bill of rights and constitutional review. A product of political bargaining, the eternity clause must be understood as seeking to protect so-called 'Thai-style democracy', which not only entrenches the monarchy but also positions the military as 'guardian of the crown' and the judiciary as the 'faithful accomplice' of Thai-style democracy.[19]

The Thai eternity clause has been relied on as a formal ground to block repeated attempts to reform the system and actually correct undemocratic constitutional foundations of the constitution. The Constitutional Court has repeatedly stated that it sees itself as the guardian of the constitution and the rule of law with powers to review amendments, even without a mandate to do so in the constitutional text.[20] The Court struck down a series of amendments to the 2007 Constitution on both procedural and substantive grounds, including an attempt to reintroduce the directly elected senate.[21] Invoking counter-majoritarian and rule of law considerations, the Court thus brought in an unelected senate among the list of unamendable elements of the Thai Constitution. The Court thus developed its own, counter-majoritarian understanding of democracy, which it then deployed to protect the purported original spirit of the constitution. In so doing, it blocked constitutional change that would have rendered the constitution more rather than less democratic.

Thailand's example therefore raises questions about what happens to justifications of unamendability when we are dealing with unamendable constitutional norms that may not be democratic. Should courts embrace doctrines of unconstitutional constitutional amendment when the amendments

[17] Khemthong Tonsakulrungruang, 'Unamendability: Politics of Two Democracies in Thailand', XX. See also Bui Ngoc Son, 'Politics of Unconstitutional Constitutional Amendments: The Case of Thailand' in Henning Glaser (ed), *Identity and Change–The Basic Structure in Asian Constitutional Orders The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Nomos forthcoming).

[18] See generally, Eugenie Merieau, *Buddhist Constitutionalism in Thailand: When Rājadhammā Supersedes the Constitution* (Hart 2021); Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011), 1-37.

[19] Tonsakulrungruang, XX.

[20] Const Ct Decision 1/2557 (2014).

[21] Const Ct Decision 15-18/2556 (2013).

themselves are more democratic than the original constitution they try to change? The preservative logic of unamendability does not lead to easy answers in such contexts. As the chapter on Thailand in this volume also shows with respect to recent amendment attempts, the usual narrative of amendments potentially weakening democratic commitments does not hold for Thailand. Instead, as the author argues:

> In this case, the roles are reversed. The amendments represent the people's will to challenge the authoritarian legacy in the 2007 Constitution but the Constitutional Court's invocation of unamendability thwarted that will and entrenched authoritarianism, an abuse to liberal democratic constitutionalism indeed.[22]

One could retort that Thailand's case is less edifying because its constitution could be classified as undemocratic overall, so that unamendability in this context should not be taken as instructive.[23] However, as I argue in the next section, these types of constitutions are precisely where unamendability is most needed and most often found. It is in contexts where democracy is new, fragile, and contested that the 'lock on the door' function of unamendability[24] – whether enshrined in an eternity clause or a basic structure doctrine – becomes most salient. It is precisely in hybrid or contested democratic contexts that unamendability is paradoxically most needed and most prone to abuse. Indeed, one of the most often cited examples of unamendability in action, Turkey, similarly originated in a post-coup constitution whose democratic pedigree has always been dubious.[25] Others that could be added to this list, such as Bangladesh, are discussed elsewhere in this very volume.[26]

Moreover, it is again precisely in such contexts that another oft-repeated claim – that unamendability is merely a brake and cannot stop a renewed constitution-making process where this is deemed necessary – is similarly problematic. The Thai example shows that an imperfect constitution may be hugely difficult to amend, with risks of instability that make amendment rather than replacement the only avenue realistically open. In such instances, the constitutional politics of unamendability reveal the true viability of the road to constitutional revolution.

2. Eternity clauses and minority exclusion: unamendable constitutional nationalism in Nepal

Unamendability will play out differently in contexts that are divided, fragile, and conflict-affected, just as all constitutional institutions will, including the constitutional courts enforcing it.[27] Paradoxically, these are also the contexts most in need of unamendability's purported defensive and state-building promise. These are the contexts where constitutional democracy is still a work in progress and as such

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[22] Tonsakulrungruang, XX.

[23] Or, more generally, that Thai political and constitutional instability are due to borrowing from Western constitutionalism. Merieau (2021) disputes this, showing the root of this instability lies in precisely the indigenous Thai understanding of constitutionalism and of the Thai monarchy. See also Eugenie Merieau, 'Buddhist Constitutionalism in Thailand: When Rājadhammā Supersedes the Constitution' (2018) 13:2 *Asian Journal of Comparative Law* 283, 298-303.

[24] Roznai (2017), 133-134.

[25] Ersin Kalaycıoğlu, '*Kulturkampf* in Turkey: The Constitutional Referendum of 12 September 2010' (2012) 17:1 *South European Society and Politics* 1, 5. On Turkey's eternity clause and the recent constitutional reform in Turkey, see Oya Yegen, 'Debating Unamendability: Deadlock in Turkey's Constitution-Making Process' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 281.

[26] On Bangladesh's Article 7A as an "anti-coup protective clause", see Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 195, 218 and the same author's chapter in this volume.

[27] For a more extensive analysis of unamendability in post-conflict constitutions, see Suteu (2021), 48-82.

needs shoring up, including via legal and constitutional means. Typically, part of that apparatus will include strong commitments to human rights, some version of judicial review, and increasingly, a formal eternity clause.[28]

However, again a holistic interpretation of these constitutional commitments presents a more complicated picture, including of eternity clauses. This can be illustrated by challenging three prominent assumptions often found in understandings of constitution-making processes generally, and of unamendability specifically. The first is an assumption that the constitution-making process will give rise to a more or less consensual outcome, that allows us then to speak of the adopted constitution as an expression of a single, unified and pacified constituent power.[29] As the embodiment of the will of the people, eternity clauses are therefore not only important symbolic statements, but also to be enforced and operationalised against attempts at constitutional change. In reality, this is often not the case: not only do deep divisions and cleavages persist during constitution-making, but whose will, exactly, gets enshrined may not be obvious or indeed desirable. This may be the will of dominant political elites; of the winning side following a conflict; and, given the growing internationalisation of constitution-making, of external actors with varying degrees of influence over domestic politics.[30]

A second assumption is that democratic pluralism and peaceful electoral competition will quickly become the norm, whereas in many fragile, divided, and conflict-affected contexts, single party dominance or electoral volatility are often the norm. This is reflected not just in political forces' ability to abuse the amendment procedure, but also in their capacity to entrench their power, including through the courts. The same dominance risks being embedded in the constitutional text where these forces are able to pursue their political goals during the constitution-making process as well. For example, Maoist openness to multiparty democracy during Nepal's conflict went largely ignored by a government seeking to end the conflict with the former's military defeat.[31] Even where some degree of power-sharing is sought, this may be done instrumentally and without key elites such as the military relinquishing their dominance, as was the case in Myanmar.[32]

Finally, I have already mentioned a third assumption in the previous section: one of constitutional coherence and of a pacified constitutional identity, the latter instantiated in amendment rules and eternity clauses among other sites in the constitutional text.[33] The messy reality of constitutional politics around constitution-making, including deal-making and the possibility of domination by one set of forces seeking to entrench their position, cannot escape unamendable provisions. Thus, they are not always the constitutional ordering mechanism they are supposed to be, at the top of a neat constitutional hierarchy, and also do not always/only enshrine uncontested values and core principles of liberal constitutionalism. The most blatant example of this in a post-conflict context are

[28] Suteu (2021), 55-58; Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2003), 200.
[29] Vicki Jackson, '"Constituent Power" or Degrees of Legitimacy?' (2018) 12:3 *Vienna Journal of International Constitutional Law* 319; Zoran Oklopcic, 'Constitutional Theory and Cognitive Estrangement: Beyond Revolutions, Amendments and Constitutional Moments' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 51, 60.
[30] On the latter, see Suteu (2021), 163-178.
[31] Madurika Rasaratnam and Mara Malagodi, 'Eyes Wide Shut: Persistent Conflict and Liberal Peace-building in Nepal and Sri Lanka' (2012) 12:3 *Conflict, Security & Development* 299.
[32] Aurel Croissan and Jil Kamerling, 'Why Do Military Regimes Institutionalize? Constitution-making and Elections as Political Survival Strategy in Myanmar' (2013) 21:2 *Asian Journal of Political Science* 105.
[33] Another such site typically cited are constitutional preambles. See Suteu (2021), 98-100.

constitutionalised amnesties and immunities for past coup and wartime leaders, which has on occasion been 'eternalised'.[34]

We could briefly return to Thailand's example here. The 2007 Thai Constitution was contested by democratic forces in the country as the result of the 2006 coup, but nevertheless embraced by many as necessary "to get the country going".[35] The hope was to be able to draft a truly 'popular' constitution later. The relatively low bar for constitutional amendment initially set in the constitution would have been reassuring in this sense. This reminds us that constitution-making is a creature of compromise, and drafting decisions must be seen diachronically. Rather than a single, easily identifiable constituent moment encapsulating a constituent will (including via an eternity clause), constitution-making often reflects a concatenation of decisions; some express in the draft, others not; and of expectations, some of permanence and some of change.[36] The Thai Constitutional Court's invocation of original constituent power to block the 2013 constitutional amendment that would have restored a fully-elected senate, seen in its broader constitutional political context, therefore becomes problematic. Such arguments would be even more disputable regarding the 2017 Constitution, which was adopted only once new king Vajiralongkorn's demand for recognition of his power to intervene in politics was enshrined in the draft, post-referendum approval. "Whose will does this constitution represent?",[37] indeed.

Another instructive case here would be Nepal. The 2015 Constitution of Nepal contains a doubly-entrenched eternity clause. Article 274(1) thus declares: "This Constitution shall not be amended in way that contravenes with self-rule of Nepal, sovereignty, territorial integrity and sovereignty vested in people." Article 274(2) then protects the former from amendment. Such double unamendability is rarer but not unheard of, with Honduras's eternity clause – which on top of double entrenchment also contained criminal sanctions for even proposing prohibited constitutional amendments – being perhaps the best known.[38] The Nepalese eternity clause can only be fully understood in context, one that stretches back decades given the country's constitutional instability, as well as holistically, in conjunction with other constitutional provisions on sovereignty, territory, and minority rights. Only then is its exclusionary potential revealed.

The 2015 Constitution was the culmination of a protracted constitution-making process. Emerging after three decades of monarchic autocracy, the country's 1990 Constitution was meant to pave the way to democracy and guarantee fundamental rights.[39] A decade-long civil war from 1996-2006 led to the abrogation of the 1990 Constitution in 2007, replaced by an Interim Constitution that was meant to be quickly superseded by a new draft prepared by a constituent assembly.[40] The 240-year old Hindu monarchy was also abolished in 2008. The new constitution was to remove the hegemony of the upper caste communities that had been entrenched in the 1990 document, as well as to finally achieve social justice and the political inclusion of previously marginalised groups and communities.[41]

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[34] Ibid, 77-81.

[35] Tonsakulrungruang, XX.

[36] Another example here is that of the Indian Constitution, whose drafters had expected to be subject to amendment and improvement over time. Granville Austin

[37] Tonsakulrungruang, XX.

[38] Landau (2018).

[39] Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal (1990-2007)* (Oxford University Press 2013).

[40] Ibid, 6.

[41] Yash Ghai, 'Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?' (2011) 18:3 *International Journal on Minority and Group Rights* 309 and Malagodi (2013).

It was also to seal the transition to a secular federal republic.[42] Despite repeated extensions, this first constituent process (2008-2012) collapsed.[43] The current constitution is the result of a second constituent process operating from 2013-2015.[44]

Nepal's is thus a case of non-linear constitutional negotiations, and it illustrates the difficulties of pursuing peace-building alongside constitution-building.[45] Its 2015 Constitution has been the object of significant contestation, which helps contextualise the otherwise innocuous seeming constitutional eternity clause. One core locus of contestation has been citizenship. Previous progress on allowing the passing of citizenship along matrilineal lines was reversed in the 2015 Constitution.[46] The latter contains exclusionary citizenship provisions that constrain Nepali women's ability to pass on their citizenship to their children (Part 2 of the Constitution). This choice, in spite of years of protest and mobilisation by the women's movement, is steeped in fears over the 'Indianization' of Nepal via frequent cross-border marriages between Madhesi women and Indian men in the Terai region.[47] In other words, a sovereigntist territorial logic permeates gendered citizenship arrangements that perpetuate exclusion and discrimination.

Another focal point of contestation has been the constitutionalisation of federalism in the new Constitution (Preamble and Article 4(1)). Federalism was first introduced in Nepal in its 2007 Interim Constitution following mass protests, and has, from the onset, been enmeshed with identity politics.[48] During negotiations in the second constituent assembly, opinion was divided between those looking to federalism as a vehicle to secure the inclusion of previously marginalised communities and those fearing it would destabilise and, in its ethnic form, Balkanize Nepalese society.[49] Protests surrounding federal demands continued throughout the workings of the assembly, which only managed to fast-track its drafting in the aftermath of the 2015 earthquakes.[50] The eventual compromise set up three levels of government – federal, provincial, and local – and, faced with continued protests and amendments tabled before the draft had even been ratified, actually named and demarcated the federal units.[51]

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[42] Mara Malagodi, 'The End of a National Monarchy: Nepal's Recent Constitutional Transition from Hindu Kingdom to Secular Federal Republic' (2011) *Studies in Ethnicity and Nationalism* 234.

[43] For a discussion of dynamics within that first constituent process, including the significant interventions of the Nepalese Supreme Court, see Mara Malagodi's chapter in this volume, XX.

[44] For a perspective on the two constituent processes in Nepal from the point of view of public participation, see Abrak Saati, 'Participatory Constitution-Building in Nepal – A Comparison of the 2008-2012 and the 2013-2015 Process' (2017) 10:4 *Journal of Politics and Law* 29.

[45] Rohan Edrisinha, 'Challenges of Post Peace Agreement Constitution Making: Some Lessons from Nepal' (2017) 9:3 *Journal of Human Rights Practice* 436; Bell (2017).

[46] 'Progress' in this context is relative. The 1990 Constitution had included exclusionary provisions on matrilineal citizenship transfer, but constitutional litigation and the silence of the post-2007 interim constitution allowed for some advances in this area. See Mara Malagodi, 'Challenges and opportunities of gender equality litigation in Nepal' (2018) 16:2 *International Journal of Constitutional Law* 527, 546-548.

[47] Ibid; Barbara Grossman-Thompson and Dannah Dennis, 'Citizenship in the Name of the Mother: Nationalism, Social Exclusion, and Gender in Contemporary Nepal' (2017) 25:4 *positions: Asia critique* 795.

[48] Though as Malagodi has argued, that earlier constitutionalisation was meant to appease these demands without leading to change in practice and "Nepal remained *de facto* a unitary state." Mara Malagodi, '"Godot Has Arrived!" Federal Restructuring in Nepal' in George Anderson and Sujit Choudhry (eds), Territory and Power in Constitutional Transitions (OUP 2019) 161, 168.

[49] Ibid, 172.

[50] Ibid, 176 and Michael Hutt, 'Before the Dust Settled: Is Nepal's 2015 Settlement a Seismic Constitution?' (2020) 20:3 *Conflict, Security & Development* 379.

[51] See fuller discussion of why 'the federal question' was the single most contentious issue throughout Nepal's post-2007 constitutional negotiations in Mara Malagodi, 'The Rejection of Constitutional Incrementalism in

As Yaniv Roznai and I have shown elsewhere, eternity clauses on territory – such as declaring territorial integrity unamendable, as Article 274(1) of Nepal's Constitution also does – can be ambiguous and unenforceable.[52] However, they typically indicate deep anxieties about the constitutional self-definition of the state and adopt a defensive stance towards perceived infringements on sovereignty, both internal and external. I have also argued elsewhere that these types of eternity clauses often also entrench a nation-state logic and that, rather than remaining symbolic statements of state sovereignty, have been enforced judicially to block constitutional overhaul.[53]

The legal continuities of constitutional nationalism in Nepal mean that an ethnocultural understanding of the nation, initially transposed into the 1990 constitutional settlement, continues to permeate the constitutional system.[54] The 2015 Constitution has not only not quelled contestation, especially around the state's federal features and citizenship, but contestation has continued and now plays out in the arena of constitutional amendment. The Madhesi community, in particular, is fighting for greater constitutional recognition and inclusion, as well as more proportionate representation in parliament. As a consequence, the constitution was amended in January 2016, a mere four months after its ratification, to respond to some of these demands.[55] However, because the amendment had failed to address their core demand of a fresh demarcation of provincial boundaries, the Madhesi parties walked out of the vote on the bill. In June 2020, a second amendment was passed, enshrining in the constitution a new map to be used in the Coat of Arms of Nepal.[56] The new map depicts three regions, disputed with India, as part of Nepalese territory. The amendment bill was certified by Nepal's President as not trespassing against the eternity clause and signed into law in spite of India's objections that it amounted to an "artificial enlargement" of national borders.[57] Other as yet unsuccessful attempts at constitutional amendment include pushing for recognition of linguistic diversity, remedying the discriminatory citizenship rules, and again increasing the proportional representation of the Madhesi community.[58] Crucially then, these dynamics persist despite the eternity clause. There have even been calls to amend Article 274 itself, insofar as it is perceived to hinder the revision of provincial boundaries.[59]

3. Basic structure doctrines and judicial turf protection: unamendable judicial supremacy in judicial appointments in India

Nepal's Federalisation' (2018) 46 *Federal Law Review* 521 and Rohan Edrisinha, 'Debating Federalism in Sri Lanka and Nepal' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism Law and Politics in South Asia* (CUP 2015) 291.

[52] Yaniv Roznai and Silvia Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16:3 *German Law Journal* 542.

[53] Silvia Suteu, 'The Multinational State That Wasn't: The Constitutional Definition of Romania as a National State' (2017b) 11:3 *Vienna Journal on International Constitutional Law* 413.

[54] Malagodi (2013).

[55] Constitution of Nepal (First Amendment 2072) Bill. Articles 42, 84, and 286 were then amended to guarantee to the Madhesi community the right to participate in state bodies and the legislature on the basis of the principle of proportional inclusion and to increase the number of parliamentary seats allocated to the southern region.

[56] Constitution of Nepal (First Amendment 2072) Bill.

[57] 'Nepal's President Signs Bill to Redraw Map Incorporating 3 Indian Areas' *The Week* (18 June 2020), https://www.theweek.in/wire-updates/international/2020/06/18/fgn44-nepal-map-president.html.

[58] 'Nepali Congress Registers Its Own Constitution Amendment Bill' *Kathmandu Post* (3 June 2020), https://tkpo.st/2U4Zkfy.

[59] Ram Kumar Kamat, 'FA Seeks Removal of Provisions of Article 274' *The Himalayan Times* (5 January 2017), https://thehimalayantimes.com/nepal/federal-alliance-seeks-removal-of-provisions-of-article-274.

Much ink has been spilled describing the emergence, evolution, and transnational migration of India's basic structure doctrine.[60] The doctrine is premised on the idea of implicit rather than explicit constitutional unamendability, whereby even in the absence of a formal eternity clause in the constitutional text, an unamendable set of constitutional commitments is read into the constitution as forming its core or constitutional identity.[61] The basic structure doctrine has had a rich 'career' since its early days in the *Kesavananda Bharati* case,[62] directly or indirectly influencing constitutional developments throughout the world and most notably in neighbouring Bangladesh and Pakistan,[63] and most recently in Malaysia and Singapore.[64] It has influenced constitutional debates and adjudication even where the doctrine has so far been rejected.[65]

Given this extensive scholarly activity on the Indian basic structure doctrine, only a brief account of one of its aspects will be highlighted here. Among the various elements the Indian Supreme Court has read into the constitutional basic structure has long been judicial independence. It is not the principle of judicial independence and its centrality to Indian constitutionalism that has been problematic, but the way in which the Indian Supreme Court has chosen to operationalise this principle in practice. The so-called *National Judicial Appointments Commission (NJAC)* or *Fourth Judges* case concerned a review of the Ninety-ninth Amendment to the Indian Constitution which sought to replace the collegium system of judicial appointments with a NJAC and thereby remove judicial supremacy in this arena.[66] The NJAC would retain as members the Chief Justice of India and two other senior justices, but would also include the union minister of law and justice, and two 'eminent persons'.[67] Two members could veto an appointment. The reform was meant to increase transparency and accountability in judicial appointments.[68]

The Indian Supreme Court struck down the amendment. It argued that by removing judicial supremacy in the judicial appointments process, the amendment would undermine judicial independence and therefore violate the basic structure doctrine. The Court interpreted the constitutional duty of the Indian President to consult with senior justices in the judicial appointment process, enshrined in Article 124(2) of the Constitution, as implying a mandatory duty to follow that advice. The Court's

[60] See chapter by Surya Deva in this volume, XX, and, *inter alia*, Madhav Khosla, 'Constitutional Amendment' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 232; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (OUP 2009); Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure"' in Zoya Hasan, E. Sridharan and R. Sudarshan, eds., *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black 2002) 179.

[61] Jacobsohn (2010). On implicit unamendability and unconstitutional constitutional amendment doctrines, see Suteu (2021), 119-160 and Roznai (2017), 39-70.

[62] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

[63] On which see chapters by Ridwanul Hoque, XX, and Matthew J. Nelson, XX, in this volume.

[64] Jaclyn N. Neo, 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia', *Asian Journal of Comparative Law* 15 (2020) 69; Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020). See also chapter by HP Lee on Malaysia in this volume, XX.

[65] Gary J. Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press 2014) 180.

[66] *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 4 SCC 1.

[67] The two eminent persons would be selected from a panel consisting of the Chief Justice, the prime minister and the leader of the opposition in the Lok Sabha (the lower house of the Indian Parliament).

[68] Po Jen Yap and Rehan Abeyratne, 'Judicial Self-dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) *International Journal of Constitutional Law*; Rehan Abeyratne, "Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective" (2017) 49 *George Washington International Law Review* 569.

concern with averting any political involvement in judicial appointments has been shown to contradict recent Indian constitutional realities: the President's cabinet had actually had the final say in the matter until this was changed via the Supreme Court's case law in 1993.[69]

Thus, the case operated a significant doctrinal and conceptual move from the uncontested protection of judicial independence as part of the basic structure to its equation with judicial supremacy in the judicial appointments procedure. Rehan Abeyratne has found that India is unique in affording such primacy to senior justices and argues that this system must be understood in the country's unique historical context.[70] Some readings of the *NJAC* case see it as less about judicial turf protection and more as an attempt to preserve the principle that parliamentary action remains subject to justification.[71] However, it is difficult to avoid the conclusion that the Indian Supreme Court sought to guard the status quo for institutional rather than principled reasons. As Surya Deva shows, the outcome has been a stalemate with both the executive and the judiciary claiming supremacy in the judicial appointments process.[72]

It is hard not to draw parallels to similar cases of basic structure doctrines being invoked to review changes to judicial appointments, as notably has happened in Bangladesh and Pakistan.[73] As Po Jen Yap and Rehan Abeyratne have argued, it may be possible to draw distinctions between these two cases and the Indian one, insofar as in the former two, judicial intervention can more plausibly be seen as a restoration of democratic control and removal of political influence over judicial appointments.[74]

However, similar interventions by constitutional courts reviewing and striking down changes to judicial appointments processes have also happened in constitutional systems less directly indebted to the basic structure doctrine and may be more worrying.[75] For example, in 2016, the Colombian Constitutional Court struck down constitutional amendments as against the constitutional replacement doctrine originally developed in the area of executive term limits.[76] It thereby struck down the newly-created 'Judicial Governance Council', with competences in the governance and administration of the judiciary, and the 'Commission of *Aforados'*, whose mandate includes prosecuting criminal and disciplinary offenses by senior justices. The amendments were found to contravene the principles of self-government of the judiciary, judicial independence, and the

[69] Abeyratne (2017), 611. In fact, it has been argued that the council system of judicial self-government is not only not the only institutional design option to ensure judicial independence, but may have unintended negative consequences. See David Kosar, *Perils of Judicial Self- Government in Transitional Societies* (CUP 2016) and Aida Torres Perez, 'Judicial Self- Government and Judicial Independence: The Political Capture of the General Council of the Judiciary in Spain' (2018) 19:7 *German Law Journal* 1769.

[70] Abeyratne (2017), 570.

[71] Khosla (2016), 245.

[72] Deva (2021), XX.

[73] *Bangladesh v. Asaduzzaman Siddiqui* (2017) Civil Appeal No. 6 of 2017 (AD) (Bangl.) and *Munir Hussain Bhatti v. Federation of Pakistan*, (2011) PLD (SC) 407 (Pak.). See discussion in Suteu (2021), 147-151 and Yap and Abeyratne (2021).

[74] Yap and Abeyratne (2021).

[75] Similar developments in Slovakia, where the Constitutional Court has also invalidated a new vetting procedure for judicial appointments in 2019, will not be covered here for reasons of space. See Decision PL. ÚS 21/2014 of the Slovak Constitutional Court and discussion in Suteu (2021), 150.

[76] Decision C-285 of June 1, 2016 and Decision C-373 of July 13, 2016. See discussion in Mario Alberto Cajas-Sarria, 'Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016' (2017) 5:3 *The Theory and Practice of Legislation* 245. On the Colombian constitutional replacement doctrine generally, see Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11:2 *International Journal of Constitutional Law* 339.

separation of powers. The political backlash was swift.[77] The doctrinal robustness of the Court's intervention has also been challenged, given that the new institutions retained a diverse judicial membership and would have at least been plausible replacements for their predecessors.[78] As in the Indian case, the public policy justifications behind the reform included enhancing judicial accountability, transparency, and efficiency.

What these decisions illustrate is that our expectations of judicial interventions in the name of unamendability – in this case, of unamendable judicial independence principles – must be contextualised and even tempered. Understanding the basic structure doctrine and its progenies as protecting constitutionalism and democracy no longer suffices. The *NJAC* case and others like it remind us of the reality of judicial politics playing out in the constitutional arena. Apex courts will, under the best of circumstances, act as guardians of liberal constitutionalism, independent of political influence, and will exercise self-restraint in substantive review of amendments, only striking them down under the most exceptional circumstances. The Malaysian case law discussed elsewhere in this volume illustrates courts coming short of striking down constitutional amendments, but nevertheless making recourse to the basic structure doctrine to protect judicial review as an essential constitutional element.[79] However, the battles over judicial supremacy in judicial appointments highlight that courts also engage in "self-dealing" and deploy doctrinal means to protect their institutional self-interest.[80] This reality becomes even more complicated in situations of court capture and/or institutional weakness, where such interests and the means to pursue them may even more overtly depart from doctrinal rigour and democratic constitutional principles.[81] My intention here has been narrower: to highlight the affinity between judicial turf protection and doctrines of constitutional unamendability. Unamendability can thus be deployed by courts as a veto power against perceived attempts to diminish their influence, even where the justification for the necessity of amendment strike down is tenuous at best.

Conclusion

Several conclusions emerge on the basis of the case studies discussed above and throughout this volume. The first is that studying the constitutional politics surrounding unamendability greatly enriches our understanding of the meaning, interpretation, and effects of constitutional eternity clauses and unconstitutional constitutional amendment doctrines. While this may at first glance seem obvious, it serves as a useful corrective to overly doctrinal readings of unamendability. It also serves as a warning against overly formalistic understandings, especially when it comes to textual eternity clauses. As the examples discussed here have shown, the text will only ever be one part of the story. It must be complemented by a contextual appreciation of the political bargains preceding and influencing constitution-making, as well as of the constitutional and political tugs of war that will ensue, including centred on unamendable provisions. Nepal's example is revealing here, insofar as the 2015 Nepalese Constitution and its eternity clause are fully understood only when looking back at the protracted process of constitution-making amidst complex patterns of interplay between constitutional nationalism and legal exclusion.

[77] Cajas-Sarria (2017), 267.
[78] Ibid, 267-268.
[79] Lee, XX.
[80] Yap and Abeyratne (2021).
[81] For a discussion of such dynamics playing out in the Hungarian context of democratic backsliding, including through the development of a distorted doctrine of constitutional identity review, see Suteu (2021), 152-159.

Moreover and relatedly, my analysis has also pointed to the need for holistic interpretation when assessing constitutional unamendability. Studying eternity clauses in isolation, not just of the broader constitutional and political context but also of the broader constitutional architecture, risks obscuring subtle details about how an eternity clause or unamendability doctrine interacts with other elements of the constitutional set-up. Thailand is a case in point here. The Thai Constitution's entrenchment of the monarchy only reveals its true meaning when the interconnectedness of the monarch, military, and courts is appreciated. This institutional edifice must be contextualised further by understanding the specificities of 'Thai-style democracy' and its various iterations.

Finally, I would emphasise the need to adopt a longitudinal view when reconstructing the evolution of unconstitutional constitutional amendment doctrines. Contrary to the lawyerly impulse to focus on case by case developments, a longer term view will be conducive to a richer but also more realistic assessment of the fate of eternity clauses and unamendability doctrines. As the Indian example shows with regard to the basic structure doctrine, understandings of unamendability will not necessarily develop linearly. We are increasingly seeing unconstitutional constitutional amendment doctrines deployed not in exceptional circumstances threatening the very core of democratic constitutionalism, but also as mechanisms of judicial turf protection and self-dealing. These developments may not negate the potential usefulness of unamendability as a stopgap against erosion of democratic constitutionalism; they do demand heightened awareness of the delicate institutional dynamics that determine how courts operationalise unamendability over time.

My intervention in this chapter is to issue a call for more caution about unreflectively and uncritically endorsing unamendability as a tool reinforcing democratic constitutionalism, especially at a time of ever-growing attacks on democracy. While eternity clauses and doctrines of implicit unamendability may serve useful defensive roles, we must also not look away from their 'dark side' – whether in the form of textually enshrining constitutional exclusion and preventing democratic advances, or as a tool of unrestrained judicial self-empowerment. A thorough grounding in constitutional politics as advocated throughout this volume performs precisely this sobering function.