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DEAD HAND CONSTITUTIONALISM: THE DANGER OF ETERNITY CLAUSES IN NEW DEMOCRACIES

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Abstract. *The 2009 Honduran constitutional crisis, in which sitting President Manuel Zelaya was captured from the Presidential Palace and flown to Costa Rica under the cover of night, illuminated the danger of entrenched and eternity clauses in fledgling democracies. This article discusses the way such clauses have been used in the past, identifying three general categories of historical eternity clauses. These categories include clauses that address the character of the government, the spirit or principles of the constitutional regime and finally the character of the country. The article also discusses potential problems that arise when such clauses are written into Constitutions of transitional democratic regimes.*

Key Words: *Eternity clause, entrenched clause, constitutional development, amendment process, democracy, Honduras.*

Resumen. *La crisis constitucional de Honduras en 2009, en la cual el presidente en turno, Manuel Zelaya, fue capturado en el Palacio Presidencial y llevado a Costa Rica en el transcurso de la noche, reveló el peligro que conlleva la existencia de las "cláusulas de eternidad" para las democracias nuevas. Este artículo analiza la manera en que dichas cláusulas han sido utilizadas en el pasado, identificando tres categorías generales que históricamente las caracterizan. Estas categorías distinguen entre cláusulas que abarcan el sistema de gobierno, el espíritu o los principios del régimen constitucional y, finalmente, el carácter del país. Este artículo también analiza los problemas potenciales con las cláusulas de eternidad en contextos de transición democrática.*

Palabras clave: *Cláusulas de eternidad, desarrollo constitucional, reforma del Estado, Manuel Zelaya, democracia, Honduras.*

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I. Introduction

On June 28, 2009, a group of soldiers entered the residence of Honduran president Manuel Zelaya in Tegucigalpa. Over the next several hours, Mr. Zelaya would be taken from his residence while still in his pajamas and forced onto a plane bound for San Jose, Costa Rica.[1] While the event would set off months of political distress and wrangling to attempt to figure out who the rightful head of the country was, the legal issues that led up to that fateful moment shed tremendous light on the state of constitutional development in the Global South and throughout the world.

During the Cold War, as in many Latin American countries, Honduras had experienced much political turmoil. This included successive experiments with military rule and several coups. Finally, in 1980, during a decade long period of military rule, a Constituent Assembly was elected to draft a Constitution. This Constitution would come into effect in 1982, just a week after the election of a civilian president.[2]

The Constitution of Honduras does many things. As any country's Constitution should, it creates guaranteed rights for the people of Honduras. The document sets up the government and how it should work. Among the decisions that were made by the Constituent Assembly, it was determined that a Presidential term should last four years and no president can run for reelection.[3]

However, the country's experience during the Cold War had influenced the Constituent Assembly and colored its views. Among these views was a firsthand understanding that elected officials do not always relinquish power on their own volition, often even changing the law in an effort to hold on to

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[1] Elisabeth Malkin, *Honduran President is Ousted in Coup*, N. Y. Times, June 28, 2009, *available at* http://www.nytimes.com/2009/06/29/world/americas/29honduras.html?_r=1 (last visited June 30, 2011).

[2] U.S. Dept. of State Bureau of Western Hemisphere Affairs, *Background Note: Honduras: History*, http://www.state.gov/r/pa/ei/bgn/1922.htm#history.

[3] Honduran Constitution, articles 237, 239.

and consolidate their own power.[4] With this in mind, the Constitution was drafted containing article 374, which states in that the Constitution "may not be reformed, in any case […] the constitutional articles that relate to […] the presidential term […]".[5]

The first use of an unamendable constitutional provision began with the world's first experiment in democratic constitutionalism, the American Constitution of 1787. In this document, without the consent of the state being prejudiced, no act can change a state's equal suffrage in the United States Senate.[6] While this particular stipulation may seem simple, "entrenched" or "eternity" clauses have become an extremely complex and vastly important element of modern constitutional design. Such provisions can be found in foundational documents from throughout the world related to many different areas of law.

Often such entrenched principles are related to a country's past experiences. For example, one of the first modern constitutions to contain an eternity clause was Germany, in its first Constitution after the National Socialist Party ran rampant throughout Europe.[7] The entrenched elements of this document mainly create assurance that such atrocities will never again be committed.[8] Similarly, eternity clauses can be used to cement a national identity. This is the case of Constitution of Turkey, which contains the assurance that the secular identity of the Constitution cannot be altered.[9]

While such provisions can have tremendous benefits, such as the preservation of unity and the protection from tyranny presented above, there is often a complaint of "dead hand" democracy, in which constitutional decisions made by past generations cannot be changed by the current population, without regard to the current demographic or political feeling.[10] Additionally, past societies have been adamant in entrusting all lawmaking to the current populace. As Melissa Schwartzberg writes, the ancient Athenians believed in an "ideology of pragmatic innovation" that would have been fundamentally altered by entrenchment.[11] While this may be contrary to modern constitutionalism, it does demonstrate the risk involved in the creation of eternity clauses.

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[4] Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 Loy. U. Chi. L. J. 327, N. 96 (2010).

[5] Honduran Constitution, article 374.

[6] U.S. Constitution, article 5.

[7] *See* Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 Flor. J. Int'l. L. 169, 208 (2008).

[8] *See Id*.

[9] Posting of Tom Ginsburg to ComparativeConstitutions.org, http://www.comparativeconstitutions.org/2009/08/puzzle-of-unamendable-provisions-debate.html (Aug. 12, 2009).

[10] *See generally* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Penn. L. R. 1025, 1033 (2010).

[11] Melissa Schwartzberg, Democracy and Legal Change 31 (2007).

By creating an eternity clause, the constitutional drafters reduce "pragmatic innovation" of the country's future leaders.

This type of decision is particularly dangerous when applied to social or moral choices that can change with future generations. Take, for example, the Corwin Amendment to the United States Constitution during the run up to the United States Civil War. If the amendment had been ratified in 1861, it would have forbidden the Federal Government from abolishing or interfering with slavery.[12] As an entrenched amendment, the amendment could not have been altered. Needless to say, such a moral judgment is an unacceptable exercise of "dead hand" democracy.

Such complaints pose particular problems in the developing world where the temptation to use extra-constitutional means for achieving goals is much stronger. There is a strong correlation between low income countries and the potential for civil war, coup or continuing civil strife.[13] The study of unamendable provisions is vital for constitutional analysis because when such provisions fail, they "[…] risk the unintended consequence of premature constitutional death […],"[14] an all too realistic possibility in the already fragile political system of new democracies.

This is precisely the purpose of this article. In examining past eternity clauses, one can hope to establish a rough sketch of what makes a successful one. The first step in doing this will be to examine three particular types of eternity clauses. The first is what will be referred to as the "character of government" clause. In such sections, it is determined that the government will be run or designed a certain way. Such clauses can ingrain term limits or power sharing agreements, protecting them from alteration for the whole of the constitutional regime. The second such provision that will be discussed is perhaps the most important. I will call these sections "spirit" or "principle" clauses. There are several democracies in the world that have either included stipulations that the "spirit" or "principles" of the Constitution cannot be altered and, in extreme settings, the Judiciary has struck down amendments on grounds that said amendments fundamentally alter the judicially determined spirit of the constitution. Finally, we will analyze what will be referred to as the "character of country" clause. In such stipulations, mentioned above for Turkey, the drafters of the Constitution envision a type of country that cannot be changed.

After examining the above types, this paper will analyze what lessons can be drawn from the successes and failures of the three types. Hopefully, this will create a window into the importance of careful analysis when creating

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[12] Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Col. J. L. & Soc. Prob. 251, 276 (1996).

[13] *See generally* Paul Collier, *The Bottom Billion*, at 17-19 (73% of the world's poorest people live in countries that have either recently been in a civil war or currently are involved in one. Additionally, by halving a country's income, its statistical likelihood of civil war is doubled).

[14] *See* Ginsburg, *supra* note 9.

eternity clauses in new democracies. Whether taking certain issues completely off the table is a positive thing for developing countries or not is certainly a matter for debate; however, whenever that decision is made there should be a tremendous amount of thought beforehand. Additionally, this study should provide some insight on what happened in Honduras in June of 2009.

II. Case Studies & Categories

It is important to note that the categorization of eternity clauses is an imperfect science. There are many entrenched provisions that could feasibly be included in all three of the sections below. Many of these clauses contain elements about the way a given government is crafted in an effort to determine the country's character. Other clauses also either expressly include or have been interpreted to include a designation of what the inviolable spirit or principle of a Constitution is. Despite this difficulty, I have attempted to break them down into what I believe is the element of the clause that is the most important and worthwhile to our analysis.

1. *Character of Government Clauses*

The two major "character of government" clauses that will be discussed in detail here are article 5, the guarantee of equal suffrage in the United States Senate, and the 2009 constitutional crisis in Honduras mentioned above. Despite being relatively similar provisions, the American guarantee of equal suffrage (each American state has two senators and two votes in the Senate without regard to population) has been relatively uncontroversial for more than two hundred years while the Honduran eternity clause was unable to last three decades without being the subject of well-deserved international headlines.

Briefly, the "Connecticut Compromise of 1787" was a part of the U.S. Constitutional Convention that would assuage the fears of smaller states that they would be overrun by larger states in any type of national union. This agreement created the bicameral legislature with a lower house, consisting of state representatives based on population and an upper house that would have two members from each state. Additionally, this clause was permanently entrenched in order to ensure that larger states would not simply amend the Constitution after the smaller states had joined the union.

The language of the clause reads "[…] Congress […] shall propose amendments to this Constitution […] provided that […] no state, without its consent, shall be deprived of its equal suffrage in the Senate."[15] In the long constitutional history of the United States, this clause has not received much attention. It is presumed that based on the history of the provision including

[15] U.S. Constitution, article 5.

the Constitutional Convention debate and the debate over ratification, legal scholars and historians have very little doubt as to what was intended by the clause.[16] In this rather peculiar case, the entrenched stipulation regarding the makeup of the United States Senate has caused virtually no strife or interest from litigants or politicians in the more than two hundred years of American Constitutional history.

The second example of a "character of government" clause is the Honduran Constitutional entrenchment of the presidential term limit. As previously mentioned, the Honduran Constitution limits each president to a single four-year term. It is further clarified that this particular provision cannot be altered by amendment.[17] In fact, the Constitution stipulates that any elected official who attempts to alter this restriction be immediately removed from office and banned from public office for ten years.[18]

While this clause may seem relatively innocuous, it is not without complications. The background that resulted in a pajama-clad Manuel Zelaya being deposed and flown to San Jose sheds certain light on the care that must be exercised when imposing even the most seemingly straightforward eternity clauses, especially in new democracies or the developing world.

The Constitution of Honduras places a great deal of importance on citizen participation in democracy. The Constitution specifically establishes that referenda and plebiscite are "[…] of vital importance in national life."[19] Similarly, the Constitution makes citizen participation in these exercises mandatory.[20] Additionally, under article 5 of the Constitution, the president of the Republic has the right to call for such citizen consultation.

It is the combination of vital citizen participation and the entrenched Presidential Term Limit that triggered the removal of President Zelaya from office. Zelaya, in the lead up to the country's 2009 general elections, proposed a ballot referendum. This referendum asked whether the citizenry supported convening a new National Constituent Assembly that would draft a new constitution. This new Constitution would allow a president to serve more than one term in office. This referendum was adjudged to be illegal by nearly every legal body in Honduras including the Judiciary, the Bar Association and many others.[21]

In response to these rulings, then-President Zelaya withdrew his attempt to hold a referendum and instead chose to order an "opinion poll."[22] It is

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[16] *See generally* Vincent J. Samar, *Can a Constitutional Amendment be Unconstitutional?*, 33 Ok. C. Uni. L. R. 667 (2008).

[17] *Id.* article 374.

[18] *Id.* articles 237-239.

[19] *Id.* article 5.

[20] *Id.*

[21] *See* Miguel A. Estrada, *Honduras' Non-Coup*, LA Times, July 10, 2009, at 2, *available at* http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10.

[22] *Id.*

important to note that the "opinion poll" would not, in itself, convene a new National Constituent Assembly. Instead, the ballot would merely ask voters if they wanted to hold a referendum in the 2009 general elections to that effect.[23]

The change in the referendum did not modify the Honduran Supreme Court determination that President Zelaya was illegally abusing his power. Just days before the ballot was to take place, the Supreme Court of Honduras issued a warrant to the military, calling for the president's arrest.[24] This warrant lead to President Zelaya's previously discussed arrest and deportation.

It is important to realize that even seemingly innocuous eternity clauses can cause tremendous upheaval. While the clause seemed to simply lock in a permanent term limit for future presidents of the small, Central American country, complications arose when Mr. Zelaya either did not understand the breadth of that restriction or chose to ignore it. Whether it is to be called a coup or a legal state action, Mr. Zelaya's actions and the response of the Supreme Court and the Honduran Military with regard to the state's eternity clause brought about the premature removal from office of a sitting president. Regardless of one's personal feelings towards Mr. Zelaya and his actions, a president's forcible removal from office by the nation's military is not the desired end of a Constitutional regime.

2. *Spirit or Principles Clauses*

The second type of eternity clause to be analyzed is the prohibition from introducing any amendment that will fundamentally alter either the "spirit" or the "principles" of the Constitution. Such prohibitions exist in many advanced democracies throughout the world. In this paper, the experiences (and non-experiences) of India, Germany, Norway, France and Italy will be discussed.

India is a much different case than those discussed above. Its importance to the analysis of eternity clauses stems from what would be referred to in American jurisprudence as an activist judiciary. In its relevant part, article 368 of the Indian Constitution states "Notwithstanding anything in this Constitution, Parliament may […] amend by way of addition, variation or repeal any provision of this Constitution […]."[25] While this may seem straightforward, the Indian Supreme Court interpreted it to include another stipulation. In *Kesavananda Bharati v. State of Kerala*, the Supreme Court stated that while

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[23] *See* Will Weissert, *Honduran Leader Pushes ahead with Divisive Vote*, NEWSVINE.COM, June 25, 2009, http://www.newsvine.com/_news/2009/06/25/2968321-honduran-leader-pushes-ahead-with-divisive-vote.

[24] *See* Estrada, *supra* note 21.

[25] Indian Constitution, article 368(1)

the Constitution allows amendment to any provision, it "[…] does not enable Parliament to alter its basic structure or the framework of the Constitution."[26]

It was through this decision that the "basic structure" doctrine was born into Indian legal parlance. By the reasoning of the Supreme Court, the term "amend," as written in the Constitution, does not include the ability to fundamentally change the character of the Constitution. Any amendment that would create this vast a change is not just an amendment, it is something more.[27]

In this way, the drafters of the Indian Constitution may not have contemplated the fact that they were including a "spirit" or "principle" type of eternity clause when they wrote the Constitution; however, recent legal history in India has treated the document as though one were contained. Thus, for our purposes, the treatment given to it by the Supreme Court is the same as if the words were included on the document.

When considering the Court's decision, it is useful to examine the political context that brought about the Basic Structure doctrine. Perhaps most important for the doctrine structure is the relative ease with which the Indian Parliament has traditionally amended the Constitution. Through 2005, in only fifty-five years of existence, there have been more than ninety amendments to the Constitution,[28] a tremendous contrast to the difficulty of amending constitutions in many constitutional regimes. Thus, through the ease of the amendment process, it was prone to abuse by overzealous members of Parliament.[29]

In *Bharati*, the Indian Supreme Court was asked to examine three amendments all of which would have greatly enhanced Parliamentary power. The first of these was the 24th Amendment undoing a past Supreme Court case by amending the Constitution to allow for constitutional amendments that take away from the fundamental rights section of the constitution. Secondly, the 29th Amendment immunized land reform statutes from judicial review and finally the 25th Amendment allowed all state and federal statutes to avoid judicial review of the governing body simply by stating they were "Directive Principles of State Policy."[30]

Delivering its opinion on April 24, 1973, the Court determined that the first two amendments were constitutional, stating that there is nothing inherently unconstitutional about insulating certain statutes from judicial review. However, the Court's reasoning on the 25th Amendment brought about the "Basic Structure" doctrine. In the reasoning of Justice Khanna,

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[26] Kesavananda Bharati v. State of Kerala, AIR 1973 S.C. 1461, 1510.

[27] *See* Sam Brooke, *Constitution Making and Immutable Principles*, at 63, *available at* http://dl.tufts.edu/view_pdf.jsp?pid=tufts:UA015.012.DO.00074.

[28] The 93rd Amendment was passed in 2005 and came into effect on Jan. 20, 2006.

[29] *See* Brooke, *supra* note 27, at 65.

[30] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 Yale J. Int'l L. 207, 226 (2009).

> […] the word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form […] Provision regarding the amendment of the Constitution does not […] embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by article 368.[31]

Ingrained in this opinion is a judicial reading of what the basic structure of the Indian Constitution contains. The Justices signing onto the majority opinion included federalism, rule of law, the separation of powers, secularism and judicial independence. This was not meant to be exclusive, but there was also no test or method given that would allow a future court to determine whether something was a part of the "Basic Structure."[32]

This ruling would inflame passions both for and against the amendments. It should also be noted that the fervor for and against the basic structure doctrine did not escape the Judiciary. In fact, the case had been reviewed without a petition to the High Court, something that frustrated many of the Justices.[33]

While those in favor of radically changing the country's Constitution claimed that it was Indira Gandhi's "defeat," Ms. Gandhi acted quickly to prove them wrong. The day following the decision the government appointed the most senior Justice from the dissent to become the next Chief Justice.[34] Before that time, nearly since the birth of modern India the next most senior justice had ascended to the Chief Justice seat of the Supreme Court. In this case, three more senior justices were passed over in favor of the pro-government A.N. Ray. All three Justices immediately resigned in protest.[35] As tensions continued to run high, critics accused Ms. Gandhi of attempting to undermine judicial independence.[36]

The doctrine would again be tested in 1975 during another period of high political tension in India. Prime Minister Indira Gandhi declared emergency rule, consolidating her power after a court adjudged her previous election to

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[31] *Id.* at 227 (quoting Kesavananda Bharati v. State of Kerala, *supra* note 26, at 1860).

[32] *Id.*

[33] Venkatesh Nayak, *The Basic Structure of the Indian Constitution* 8, Human Rights Initiative, http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf.

[34] Chief Justice Sikri, the Chief Justice of the Court and a member of the majority opinion, was due to retire two days after the opinion was released.

[35] *See* Inder Malhotra, *Whose Constitution is it Anyway?*, Indian Express, Aug. 7, 2009, *available at* http://www.indianexpress.com/news/whose-constitution-is-it-anyway/499111/0.

[36] *Id.*

have been fraudulent.[37] The emergency rule gave the Prime Minister and her cabinet vast powers to pass legislation. The group would use this emergency power to pass the 39th Amendment, insulating all elections from judicial review. However, on appeal in the fraud case against Ms. Gandhi, the Indian Supreme Court found the amendment to have violated the basic structure of the Indian Constitution.

Demonstrating the difficulty with vagueness in "spirit" or "principle" eternity clauses, the learned Justices of the Indian Supreme Court could not agree on just what element of the "Basic Structure" doctrine was offended by the amendment. Interpretations from the Justices included that the amendment was an affront to the rule of law, that the principle of democracy was wounded because it prevented free and fair elections, and finally that the principle of judicial independence was frustrated along with the dismissal of judicial review.[38]

In recent litigation involving the "Basic Structure," the Supreme Court of India has maintained the concept and has even extended it to other areas. For example, in *Minerva Mills* the Court struck down an amendment that would completely strip all courts of the power to review any amendments. This decision lead commentators to believe that there was a minimum core of judicial review that would forever be protected as part of the "Basic Structure."[39]

In comparison to the tremendous experience of India above, Germany has had very little turmoil with regard to its eternity clause. Article 79 of the German Basic Law creates a set of principles that are inviolable, even by Constitutional Amendment. These include human dignity, other human rights, the dissolution of the Federal State and the principle of popular sovereignty, among others.[40] The entrenchment of human rights and dignity is generally seen as a response to the Nazi belief in rights of the community over human rights.[41] Collectively, the concepts entrenched in Germany's eternity clause have come to be known as the "immutable principles."[42]

Unfortunately for our analysis, jurisprudence at the Federal Constitutional Court of Germany regarding the eternity clause is extremely limited. In three cases that have been presented before the Court, an incredibly broad interpretation of the clause has been proposed repeatedly, though there is some doubt whether it is the current state of the law. As observed by Sam Brooke,

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[37] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE J. INT'L L. 207, 228 (2009).

[38] *Id.* at 229.

[39] *Id.*

[40] German Basic Law, articles 1, 20 ,79(3),

[41] Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 FLOR. J. INT'L. L. 169, 208 (2008).

[42] Brooke, *supra* note 27, at 68.

> […] such concepts as human dignity, the separation of powers, and the rule of law, could all serve as grounds for declaring an amendment unconstitutional. Other concepts, such as militant democracy, the party state, justice, and the idea of a moral code, are viewed by commentators as being underlying principles of the German Constitution, and thus, they, too, could hypothetically be invoked to void an amendment.[43]

Such a broad reading of the entrenchment clause is particularly significant when one compares the large number of possible "immutable principles" with the potentially expansive reach of the amendment. In fact, the wording of article 79 section 3 uses terminology that refers to any amendment which "touches" articles 1 or 20.[44] This language could open the door for an interpretation that would not require an amendment to violate the principles in order to be struck down. Instead, this reading would allow the Federal Constitutional Court to strike down amendments that merely affect the fundamental principles, regardless of what that effect is,[45] a proposition that would no doubt create tremendous tension between the elected branches and the Judiciary.

To date, however, the Court has chosen to interpret the eternity clause quite narrowly. Despite the insistence of a group of four dissenting Justices, the Court refused to use the "immutable principles" clause to strike down an amendment that allowed secret electronic wiretapping and took jurisdiction of lawsuits surrounding wiretapping from the courts to an administrative panel created by Parliament.[46] While the Court was willing to put strict restrictions on the process, it found that the use of wiretaps were an important part of anti-terrorism investigation and therefore did not run afoul of the inviolable right of human dignity.[47]

In the German example, we see an interpretation that differs sharply from the Indian case. While the "immutable principle" doctrine has the potential to be extremely broad and could affect nearly every amendment to the Basic Law, the Federal Constitutional Court has chosen to read it narrowly. While the Court has not used the eternity clause to strike down amendments that run afoul of the "immutable principles," it has used the article to ensure strict limits are placed on perceived violations of human dignity. While this approach shows tremendous deference to the elected branches of German government, it also ensures that they are bound by the Basic Law.[48]

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[43] *Id.* at 62.

[44] Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 Int'l. J. Con. L. 680, n. 20 (2005).

[45] *See id.* at 684.

[46] *See id.* at 685.

[47] *See id.*

[48] Brooke, *supra* note 27, at 60 ("[i]n the *improbable* event that a provision of the Basic Law

On the other extreme, in sharp contrast to India, sit Norway, Italy and France. The Constitution of Norway reads, in relevant part, "[…] amendment 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 […]."[49] While this broad and aspirational statement provides a guide for the judiciary to ensure that the character of the Constitution remains fundamentally the same, it has been almost completely ignored by the country's courts. The common interpretation of the provision is that it is simply a guide for the legislature. In fact, that section of article 112 had been determined to be un-justiciable by the Norwegian judiciary.[50]

The same is true for the prohibitions in the French and Italian Constitutions. Both have provisions that forbid amendments to the Constitution that change the Republican form of government.[51] While it is not clear whether these provisions are justiciable, their value in court has never been determined. Whether that means that the respective nations find them of limited value or they are unenforceable in the judiciary is unknown.[52]

It may seem at first glance that the Italian and French Constitution's demand that the Republican form of government never be changed is either a "character of country" or a "character of government" eternity clause. I have placed it in this category because of the political reality behind the language of the Constitution. While like the Italian and French constitutions, the Turkish Constitution also demands that the Republican form of government never be changed, political reality has proven the Constitutional requirement of secularism much more important, putting it clearly within the "character of country" archetype. In the case of France and Italy, the lack of political and legal attention paid to the clauses makes it a much broader "spirit" or "principles" type of eternity clause.

Above we see the full range of judicial methods for handling broad "spirit" and "principle" eternity clauses. While the clause was created by the Indian Judiciary, the first served to protect the Judicial Branch against an overzealous parliament. This interpretation lead to extreme conflict between the Judiciary and the two elected branches of government, where the executive power attempted to "suborn" the Judiciary that was using the clause to strike down amendments in pursuit of government policy.[53] The second possible interpretation, chosen by the German Constitutional Court is an effort to take the middle road. While the article has not been used to strike down amendments, it has been used as a reminder of the Court's power to keep the Par-

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exceeded the outer limits of the higher-law principle of justice, it would be the Court's duty to strike it down". (quoting *Southwest State Case* 1 BverfGE 14 (1951)) (Emphasis added)).

[49] Norwegian Constitution, article 112(1).

[50] Brooke, *supra* note 27, at 68.

[51] *See* Italian Constitution, article 139; French Constitution, article 89(5).

[52] *See* Brooke, *supra* note 27, at 71.

[53] Inder Malhotra, *supra* note 35.

liament within the bounds of the Basic Law and to set limits on challenged amendments. Finally, Norway, Italy and France have all chosen to interpret the clause to mean virtually nothing. At most, the countries have interpreted the broad terminology to be a loose guidance to the legislature, rather than a justiciable requirement of their respective Constitutions.[54] This approach has not created vast rifts or tensions between the judiciary and the elected branches of government.

3. *Character of Country Clauses*

The predominant example of a "character of country" eternity clause is found in the Turkish Constitution. Pursuant to article 4, there are several "irrevocable provisions" in the first three articles of the Turkish Constitution.[55] These provisions include the Republican form of government and the characteristics of the Republic, including democracy and secularism.[56] A brief look at the history of the Republic of Turkey provides an important glimpse into this proviso.

In 1923, a General Assembly officially declared the Republic of Turkey. Prior to this time, the Turkish people and the land surrounding Constantinople was the center of the Ottoman Empire, an Islamic Caliphate. At the founding of the modern state, the Caliphate was abolished and replaced with a Republican form of government. Mustafa Kemal Ataturk was declared president of the young Republic. Five years later, in 1928, the clause in the Constitution retaining Islam as the state religion was removed and the Republic of Turkey officially adopted its secularist stance. Finally, five years after this, Ataturk died while enormously popular, as the president and military leader of the Turkish Republic.[57]

During these ten years, Turkey experienced a rapid transition from an Islamic Caliphate to a Western-style secular democracy. With this incredible transition came an extreme popular nationalism that centered on the ability of the once Islamist state to join the modernized international community in such a short period of time.[58]

It must be noted that since 1960, there have been three military coups in the Turkish Republic. A major reason that is often given for these coups is that the military sees itself as the protector of Ataturk's legacy and the protector of the country's secular nationalist identity. Whenever an elected government

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[54] *See* Brooke, supra note 27, at 68, 70-1.

[55] Turkish Constitution, article 4.

[56] *Id.* articles 1, 2.

[57] *Turkey Timeline*, BBC News, Feb. 27, 2010, http://news.bbc.co.uk/2/hi/europe/1023189.stm.

[58] *See generally* Nazim Irem, *Turkish Conservative Modernism: Birth of a Nationalist Quest for Cultural Renewal*, 34 Int'l J. Mid. E. Stud. 87 (2002).

strays too far from the so-called Kemalist model, the military stages a coup to put the country back on the secular track. In line with this political reality, the current Constitution was written after the most recent coup in 1982.

The Justices of the Constitutional Court have not been forced to deal with any direct challenges to secular identity, such as an amendment to create a state religion or merely remove the clause involving secularism. However, there have been many amendments struck down under the secularism requirement during Turkey's long and tumultuous history. In the interest of brevity, this paper will only discuss the most recent conflicts between the elected branches and the Constitutional Court.

The current dominant party in Turkish Politics is the Justice and Development Party ("AKP"). While the party leadership denies the label, often, especially in Western media, this party has been portrayed as a religious party with "Islamist Roots."[59] That title, along with the policy of the party, has frequently put it at odds with the country's Constitution and military. While it is well beyond the scope of this paper to determine whether this label is a fair or correct one, the party has pushed forward legislation and amendment packages that have appealed to its "conservative" social agenda.[60] This party currently holds the majority of seats in Turkey's unicameral legislature, the Grand National Assembly of Turkey as well as the seats of executive power including the prime minister and president.

The first experience of the ruling AKP with the Constitutional Court was in regard to the country's decades-old ban on Islamic headscarves. The ban did not allow the garments to be worn by public employees. An amendment to the ban, passed in 1997, also forbade female students at Turkish universities from wearing headscarves. It had been a campaign promise of Prime Minister Erdogan that he would rescind the ban.[61]

On February 9, 2008, the Grand National Assembly voted to ease the ban to allow women in Turkish universities to wear headscarves, in line with the prime minister's promise.[62] This was, however, only the first step in the drama that would unfold regarding the religious garments.

On appeal to the Constitutional Court, the amendment was annulled on grounds that it offends the Constitution's secular requirement.[63] While this was a tremendous defeat to the AKP's policy goals, it was not the most im-

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[59] *New to Turkish Politics? Here's a Rough Primer*, Turkish Daily News, July 23, 2007, *available at* http://arama.hurriyet.com.tr/arsivnews.aspx?id=-610584.

[60] *Id.*

[61] *See* Annette Grossbongardt, *Turkish Prime Minister Erdogan: Leader Says Headscarf Ban at Universities 'Unfortunate'*, Spiegel Online, Sept. 20, 2007, http://www.spiegel.de/international/world/0,1518,506896,00.html.

[62] *Turkey Eases ban on Headscarves*, BBC News, Feb. 9, 2008, http://news.bbc.co.uk/2/hi/europe/7236128.stm.

[63] *Court Annuls Turkish scarf reform*, BBC News, June 5, 2008, http://news.bbc.co.uk/2/hi/europe/7438348.stm.

portant potential outcome of the amendment for the Party. In response to the "violation" of secular principles, Turkey's chief prosecutor brought a case against the Party for anti-secular activities, a charge that could carry with it the party's disbanding and the lustration of up to seventy-one members of the AKP.[64]

While such a heavy handed punishment may seem extreme, it is not unprecedented in Turkish law. Throughout the course of the Constitutional Court's history, it has used its article 69 authority to dissolve parties for violating the entrenched principles with relative frequency. In fact, two parties had previously been dissolved for advocating the end of the headscarf ban.[65] Luckily for the AKP, the party was able to avoid immediate dissolution at the hands of the Court. As an illustration of how profoundly the Court takes its responsibility to uphold secularism, if one more member of the eleven Justice Constitutional Court had voted in favor of dissolution, the party would have been disbanded.[66]

As previously mentioned, this was only the *first* experience of the AKP with the Turkish Constitutional Court. Over the past few years the ruling AKP has proposed a series of amendments that would fundamentally change the country's Constitution.[67] There are tremendous arguments as to the positive and negative aspects of these reforms. As a brief rundown, the ruling party claims that the reforms are necessary to bring the country in line with traditional democracies in an effort to join the European Union; however, the opposition parties claim that the moves are just an attempt by the AKP and Prime Minister Erdogan to consolidate power.[68] Again, it is well outside the scope of this paper to comment on the arguments of each side; however, I will discuss the potential effect of the amendments on the relationship between the elected branches and the Judiciary.

The package includes twenty-six amendments designed to fundamentally alter the country's judiciary. It has been alleged that these amendments would greatly expand the president's power by allowing the executive to appoint a

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[64] *Id.*

[65] Yusuf Şevki Hakyemez, *Constitutional Court and the closure of Political Parties in Turkey*, Today's Zaman, May 13, 2008, *available at* http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=141728 ("[…] Welfare Party [RP, 1998] and the Virtue Party [FP, 2001] because they advocated the lifting of the headscarf ban. In the Welfare Party decision, moreover, its advocacy of the plurality of legal systems, and its reception to the Residence of the Prime Ministry of those who were wearing clothes, which violated the Revolution Laws, were held to be grounds for dissolution.").

[66] *See* Alex Stevenson, *Turkey Party AKP Saved from Extinction*, In The News, July 31, 2008. http://www.inthenews.co.uk/news/world/features/view-from-abroad/analysis-nine-lives-turkeys-akp-$1234119.htm.

[67] *See* Sabrina Tavernise & Sebnem Arsu, *In Turkey, Proposed Changes aim at Old Guard*, N. Y. Times, April 2, 2010, *available at* http://www.nytimes.com/2010/04/03/world/europe/03turkey.html.

[68] *See id.*

greater number of Justices on the Constitutional Court.[69] Such a possibility frightens staunch Turkish secularists, as the current president is a member of the AKP whom the Constitutional Court had previously forbidden from taking part in elections.[70]

The amendment package has not been ignored by the secularist Judiciary and military in the country, either. When asked about the reforms, a prosecutor of the Court of Appeals stated that "the secular democratic state in Turkey is in danger,"[71] a not-so-subtle hint of the watchful eye of prosecutors over the AKP's policy.

While it is unclear which came first in Turkey, the fervent secular nationalist identity or the entrenched clause, an entrenched clause in the country's foundational document can be used to cement a national identity. In the current case, that secular national identity has played a tremendous role in the shaping of Turkish politics and the creation of Turkish policy.

The Constitutional Court has played an important role in maintaining the character of the country envisioned by the Turkish Constitution. It is important to note that interfering with a country's "secular" character is not an exact standard; however, as the AKP is quickly learning, it does have tremendous consequences, including the potential dissolution of a ruling party.

The vagueness of the eternity clause is a reminder of the "spirit" or "principles" entrenchments above, with the addition of the passion that religion and secularism can enflame. Such ardor can allow for the creation of a "keeper" of that identity. In the case of Turkey, the self-appointed keepers of that identity, the military, have used a stray from the secular nationalist character as a justification for three coups over the past half century.

Viewed in the light of new democracies, this is a particularly dangerous proposition. In the event that the drafters of a new Constitution create an identity that will forever define the country's character, they simply cannot know what will become of the burgeoning democracy. Even if the drafters can truly be said to be speaking for the people they represent at the time and the country is overwhelmingly of the character that is stated, entrenching the identity ensures that that identity can never be modified, even if the State's populace and/or national identity were to significantly change. This, of course, is in addition to the fundamental vagueness and lack of democracy associated with judicial interpretation of what does and does not offend the character of the country, discussed in great detail in the "Spirit" or "Principles" section.

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[69] *See id.*

[70] *See* Ercan Yavuz, *Evidence Indicates Ergenekon Tried to Block Presidential Election*, Today's Zaman, July 31, 2008, *available at* http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=148988.

[71] Sabrina Tavernise & Sebnem Arsu, *In Turkey, Proposed Changes aim at Old Guard*, N. Y. Times, April 2, 2010, *available at* http://www.nytimes.com/2010/04/03/world/europe/03turkey.html.

III. Conclusions

There is a unique context in every law, every regulation and, of course, every Constitution that must take into account the social and economic history of the country, prevailing norms of behavior, conflict and hundreds, if not thousands, of other factors. With this in mind, this paper will not presume to be able to provide a checklist of things that must be contained or considered when crafting a constitutional eternity clause. However, the case studies above do shed a certain amount of light on things that must be avoided if the clause is not to encourage extra-constitutional means of achieving goals contrary to the entrenched clauses.

The first lesson that must be discussed may seem obvious to any reader of the case studies above. That is, the melding of high enforcement by the Judiciary and constitutional vagueness is dangerous for constitutional survival. If an eternity clause that is extremely vague is included, it gives the (often unelected) judiciary a tremendous amount of power while tying the hands of the elected branches. Judicial review is not only a common element of new democracies, it is an imperative one; however, that review cannot be allowed to completely control policy choices by the executive or legislative branches. While conflict between the branches of government is inherent in any regime with a set of checks and balances, tremendous conflict, such as that brought about by vagueness in India, could trigger greater problems elsewhere in the developing world.

Consider, for example, the Turkish example above. The broad language of the secularism clause gives the Judiciary a vast amount of power. The Judiciary has chosen to apply this power by not only striking down legislation and constitutional amendments, but also by disbanding political parties. This level of interference from a judiciary could be difficult for the differing powers and factions of a new democracy to accept.

This is in sharp contrast to the Italian or French examples in which, either implicitly or explicitly, the countries Judiciaries realized that the language of the eternity clause was overly broad and would give judges too much power. In exercising restraint, the Judiciary was able to escape the inevitable conflict that would come from a stringent enforcement of an overly vague clause. If a French judge were able to strike down a constitutional amendment every time it offended his or her sense of Republican government, the country could be headed down a dangerous road. The same can be said of Norway and Germany's relative lack of enforcement of their respective principles.

It is not a difficult proposition to ensure that eternity clauses are sufficiently specific, but what about Constitution writers who wish to make broad and aspirational statements about the future of the country? How does one guard against the possibility that a judiciary will use these articles as justiciable? Perhaps the easiest way is simply to use language that ensures the clauses are interpreted in the way they are intended. For example, imagine the conflict

and civil strife that can be saved simply by changing a proposed article to the Constitution from "*There shall be no amendments that conflict with the Republican form of government*," to "*It is the responsibility of the legislature to ensure that no amendments conflict with the Republican form of government*." Where the former has the potential to be used by a judiciary to strike down amendments that it feels interfere with its own vision of Republican government, the latter ensures that anyone interpreting such a Constitution knows that the Republican governance clause is meant as guidance for the legislature and nothing more.

While it is difficult to ensure that an activist judiciary does not read a "basic structure" into a Constitution without textual basis, as was the case in India, there are ways to discourage such action. One method would be to include in the section that sets forth how the Constitution is amended a clause that explains that all parts of the Constitution can be amended except what is specifically made off limits by entrenchment and eternity clauses.

In order to avoid the argument from *Bharati* that when something is outside the Constitution's basic structure it is not an amendment, it is more, a final stipulation to the amendment procedure could be included to state that "*any modification to the Constitution that uses the process set forth above is considered an amendment*." Another method would also be to simply include a clause that states that there are no "basic structures" or "immutable principles" that are not enumerated in the Constitution; however, this may have dangerous and unintended consequences.

The second lesson to be drawn from the examples above is that entrenchment clauses should not be used in countries with a clear history of coups or other extra-constitutional regime changes. This is especially prevalent for countries that have a recent history of coups. Contrast, for a moment, the examples given by the American "Connecticut Compromise" and the Honduran eternity clause above. While both are substantially similar in form, the latter was taken advantage of by a politician accused of attempting to consolidate his power. The former has never experienced tremendous problems.

Regardless of the specificity of an eternity clause, there is no way to ensure that all possible avenues it *could* be violated will be addressed. Prior to June of 2009, many people would have been of the opinion that a constitutional clause could not be made any more specific than the Honduran provision on presidential term limits. It is now readily apparent that there are ways to frustrate this goal and violate the spirit of the law without violating its letter.

Once an eternity clause creates gridlock or conflict, the temptation to alter the Constitution is immense. In states where coups have historically been a viable option for constitutional change, this temptation can foment a desire to use extra-constitutional means for constitutional modification or even regime change. Greater still is the temptation to go outside the Constitution when partnered with a country where coups took place in recent memory. The current politicians most involved with the current constitutional gridlock and angst will often have been a part of the last coup and therefore, will consider

a coup as a possibility and be adept at its commission.[72] At the very least, current politicians (and the current military) will have experienced the effects of the last extra-constitutional regime change.

In states transitioning to democracy from the turbulent system that had gripped Honduras, involving experiments with democracy, coups and military juntas, gridlock should be avoided. While there is considerable scholarly debate as to the cause of gridlock in differing democratic regimes in the developing world, there tends to be a consensus that such gridlock is a dangerous thing, especially in the case of countries with a history of coups.[73]

The final lesson that I believe can be drawn from the above cases is the danger of enshrining an unchanging identity in a heterogeneous society. It may seem that Turkey is an errant example of religious diversity; however, the recent struggles show the trouble that can arise. 99.8% of Turkey's population is Muslim;[74] however, as in all religions, there are varying degrees of religious practice. The country contains devout Muslims who wear headscarves, non-religious Muslims and every type of observer in between. This can create great problems in a country as committed to secularism as in the case of Turkey.[75]

By enshrining this identity in the country's Constitution, it forever put forth the image that non-religious Muslims will be favored by the political and legal systems. This is further enhanced by the actions of the Constitutional Court in dissolving political parties for non-secular actions and reinstating the ban on headscarves.

Turkish nationals who support social policy influenced by Islam are not some small minority of backwards Turks. In fact, they are the majority, electing and re-electing the AKP, a party that has pledged to change many secularist policies during its electoral campaign. However, any attempt to change this entrenched clause will be struck down by the Constitutional Court, or, in the worst potential case, the military.

For a moment, envision this possibility in the context of a new democracy. Much as was the case in Turkey, it may be the case that the new ruling elite's commonality is that they all believe the country should have a certain identity. It is even possible that this is an inclusive identity. However, in a heterogeneous

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[72] *See generally PBS* Newshour, PBS Broadcast, June 17, 2009, http://www.pbs.org/newshour/bb/middle_east/jan-june09/iran2_06-17.html (Reza Aslan discussing the ability of the leaders of the Iranian Resistance to use the same tactics as the 1979 Revolution because of their participation and, indeed leadership, within it).

[73] *See generally* José Cheibub, *Minority Governments, Deadlock Situations, and the Survival of Presidential Democracies*, 35 Comp. Pol. Stud. 284 (2002).

[74] CIA World Factbook, *Turkey*, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html#People.

[75] Sebnem Arsu, *Generation Faithful – Youthful Voice Stirs Challenge to Secular Turks*, New York Times, Oct. 13, 2008, *available at* http://www.nytimes.com/2008/10/14/world/europe/14turkey.html?pagewanted=2&_r=1.

society, there are bound to be those who do not feel a part of this common identity. Indeed these rifts are bound to only grow with time. While the first generation of people may only have a few dissenters, future generations may gain more support. Entrenching an identity within the Constitution ensures that future generations must abide by the common identity of the drafters, without regard to the country's current populace or national identity. While always dangerous, this is particularly problematic in diverse societies.

This potential lesson assumes that entrenched "character of country" clauses are made in good faith. Any eternity clause regarding the country's identity that either intentionally or implicitly alienates a minority group is inherently wrong in its own right and can create even greater problems for the fledgling democracy, one that is likely to have no remedy other than a completely new Constitution and political system.[76]

There is no perfect constitution. Readers of history or scholars of comparative law are well aware of this. Any founding legal document requires a tremendous amount of interpretation and amendment in order to be a coherent part of national policy. Additionally, many constitutions simply do not reflect social or political realities.

This does not, however, mean that it is unimportant to intensely scrutinize every singular detail when drafting a new constitution. In countries with histories of civil wars, strife or coups, this is particularly important in an effort to end the cycle of extra-constitutional regime change. One such choice is the inclusion or omission of any sort of eternity clause. As previously mentioned, these clauses have been used to do many different things from set a general guide to the legislature to creating affirmative obligations on amendments. As unanamendable provisions, they have particular dangers that are not associated with other, amendable, sections of new constitutions.

The inclusion of eternity clauses within a new Constitution ensures that whatever topic is kept off limits cannot be changed by future generations. This, rather simply, means that in order to change the particular entrenched clause, the future generations must create an entirely new constitution, whether through constitutional means or through illegitimate means such as a coup or civil war. These possibilities do not warrant the conclusion that all entrenched clauses are a poor decision for constitutional drafters. It could be that in some societies some topics are better left out of the "marketplace of ideas." Removing topics from debate does, however, require tremendous amounts of care in order to avoid extreme conflict and a potential "premature death"[77] of a constitutional regime and potentially of the country's experiment with democracy.

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[76] One example of this kind of action is South Africa's Apartheid regime. Instead of a good faith character of country clause, the white minority wrote a series of laws and amendments ensuring that the Black African minority was subjugated. This could only be fully changed through a new Constitution and the ills of the Apartheid era are still being remedied today.

[77] *See* Ginsburg, *supra* note 9.

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