

# **Entrenchment Illusion: The Curious Case of Egypt's Constitutional Entrenchment Clause**

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## **Abstract**

Constitutional architects usually include in constitutional texts an unamendable clause known as constitutional entrenchment. A constitutional entrenchment serves different purposes such as, shielding and preserving high valued constitutional norms and distancing the state from past autocratic practices. The study of constitutional entrenchment has attracted great attention in recent years since it restricts the power of constitutional amendment and thus the basic concepts of democracy. This article aims to provide a critical analysis to the entrenchment clause of Egypt's current Constitution of 2014 through tracing constitutional entrenchment in different comparative jurisdictions. In doing so, the article examines the paradoxical-unprecedented language of Egypt's constitutional entrenchment clause and its significance on the entire constitutional structure for being non-self-entrenchment. The article also discusses the position of the Egyptian Supreme Constitutional Court regarding reviewing the constitutionality of constitutional amendments and acts.

## **INTRODUCTION**

Most of the world's constitutions permit reviewing the constitutionality of statutes for assuring their consistency with the constitution in a process known as judicial review. However, the question of whether the process of judicial review accommodates reviewing the constitutionality of constitutional amendments generates great discrepancy in comparative constitutional law.

At first sight, the idea of subjecting a constitutional amendment to the process of judicial review to test its consistency with the constitution seems odd. William Harris described the peculiarity of the concept arguing, "the question of whether an amendment to the constitution could be unconstitutional seems to be a riddle, a paradox or an incoherency."<sup>1</sup> That is, as one may argue, it contradicts the pure nature of the judicial review process, which is usually concerned with

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<sup>1</sup> WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 169 (1993).

reviewing the constitutionality of ordinary-legislative statutes and executive regulations and ordinances.

However, recent studies and debates suggest that defining the nature as well as the content of constitutional amendments and whether certain limitations should be imposed on the amendment power plays a pivotal role in determining and/or preserving the constitutional identity of a given country.<sup>2</sup>

The idea of favoring a limited amendment power for the sake of constitutional identity has already been the subject of extensive debates in numerous countries.<sup>3</sup> Further, top courts of some countries such as, Brazil, Germany, India, and Turkey have already nullified proposed constitutional amendments for being in conflict with the purpose of the constitution.

One of the most effective ways to limit the amendment power is through constitutional entrenchment whereby constitutional architects include in the constitution a provision that renders amending or repealing certain constitutional norms, deemed to be super constitutional, through formal amendment rules inconceivably. Constitutional entrenchment has recently occupied a great portion of scholarly constitutional law debates especially from a comparative perspective regarding how constitutions of different states would curb the amendment power in favor of protecting some high-valued constitutional principles from being altered.

Some scholars regard constitutional entrenchment as being an effective mechanism to preserve the state's constitutional identity by shielding some fundamental principles such as, the form of the state, the official religion, presidential term, rule of law, democracy, and individuals rights.<sup>4</sup> However, some scholars have argued that the concept of constitutional entrenchment contradicts the basic principles of democracy because it seizes the right of the public to amend the constitution.<sup>5</sup>

In part I of this article, I will discuss the relation between constitutional entrenchment and democracy, and the different forms of constitutional entrenchments. I will also provide a comparative overview regarding the form

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<sup>2</sup> See, e.g., Claude Klein, *Is There a Need for an Amending Power Theory?*, 13 ISR. L. REV. (1978).

<sup>3</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 659 (2013).

<sup>4</sup> Nicolas W. Barber, *Why Entrench?*, 14 INT'L J. CONST. L. (forthcoming, 2016).

<sup>5</sup> *Id.*

and the content of constitutional entrenchment provisions in the constitutions of some selected countries in an attempt to demonstrate how a constitutional entrenchment can go beyond the limit of being a mere restriction on the amendment practices to being a device to preserve the notion of superconstitutionalism and thus, to maintain constitutional identities.

Part II of the article sets the constitutional entrenchment provision of the Egyptian Constitution of 2014 as a case study. In this part, I intend to demonstrate how an entrenchment can be used after popular uprisings to distant the future of a country from past practices prior to the uprising. In this part, I will introduce the paradox of Egypt's entrenchment posing the question of whether it really intends to protect some of the most super constitutional principles or just mere private-factional interests. In doing so, I will shed significant light on the dangers that Egypt's entrenchment possesses as being a non-self-entrenched provision.

Eventually, the article examines the approach of the Egyptian Supreme Constitutional Court in reviewing the constitutionality of constitutional amendments so as to protect the non-self-entrenched provision. The article will also cite the practices of some comparative constitutional models such as the Brazilian, the Czech, the Indian, the Romanian, and the Turkish models in dealing with this issue.

## **I. CONSTITUTIONAL ENTRENCHMENT: SETTING THE BOUNDARIES**

In the constitution-making process, constitutional drafters may agree to render certain constitutional provisions unamendable. These unamendable provisions are also called entrenchment,<sup>6</sup> eternity,<sup>7</sup> nonamendable,<sup>8</sup> and

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<sup>6</sup> See e.g. Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. (2003); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 887 (2011); Russell Patrick Plato, *Selective Entrenchment Against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, 82 N.Y.U. L. REV. (2007); Scott J. Bowman, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 FORDHAM L. REV. 1017, 1028 (2004).

<sup>7</sup> See e.g. Robert J. Delahunty, *The Battle of Mars and Venus: Why do American and European Attitudes Toward International Law Differ?*, 4 LOY. INT'L L. REV. 11, 29-30 (2006); Andrew Friedman, *Dead Hand Constitutionalism: Honduras and the Danger of Eternity Clauses in New Democracies*, 4 MEX. L. REV. 77, 79 (2010); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 846

perpetuity<sup>9</sup> provisions.<sup>10</sup> In this article, these forms of unamendability will be referred to as entrenchment provisions or clauses. Having said that, a constitutional entrenchment provision is immune to an amendment in that it can be amended neither by constitutional amendment rules as prescribed in the constitutional text or by a legislative action nor by judicial construction.

This understanding of entrenchment provisions must be distinguished from other competing concepts. Specifically, as noted by Richard Albert, a constitutional entrenchment provision should not be confused with other constitutional provisions that require certain kinds of supermajorities to be amended or revoked.<sup>11</sup> For example, based on Arend Lijphart's study of constitutional amendment difficulty, the constitutions of five democracies, Australia, Canada, Japan, Switzerland, and the United States, occupied the top list as regard to their rigidity (4.0) for requiring supermajorities beyond the famous two-third majority to render an amendment to be rendered valid.<sup>12</sup> However, this does not refute that fact that all these rigid constitutions can be amended if their hard standards of amendability have somehow been reached. Similarly, a constitutional entrenchment provision should be distinguished from constitutional provisions that are unlikely to be amended or repealed just because their amendment standards are significantly hard to be met.<sup>13</sup> For instance, according to Donald Lutz's index of constitutional amendment difficulty, the Constitution of the United States ranked as the most rigid scoring (5.10) followed by Sweden and Venezuela (tied at 4.75), Australia (4.65), and Costa Rica

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(1991); Christian Joerges, *A European Union of, by and for the Citizens: How Can Europe Provide for better Participation of its Citizens?*, 16 Y.B. POLISH EUR. STUD. 141, 151 (2013).

<sup>8</sup> See e.g. Craig Scot, *The Transnationalization of Truth: A Meditation on Sri Lanka and Honduras*, 5 ETHICS IN ACTION 36, 42, 46 (2011); KATHARINA DIEHL, JOHANNA MANTEL, MATTHIAS REUSS & JAN SCHMIDT, MAX PLANCK MANUALS ON CONSTITUTION BUILDING: STRUCTURES AND PRINCIPLES OF A CONSTITUTION 2ND ED. 103 (2009); Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1862 (2004).

<sup>9</sup> See e.g. RUTI G. TEITEL, TRANSITIONAL JUSTICE 274 (2000); HEINRICH AUGUST WINKLER, GERMANY: THE LONG ROAD WEST: VOLUME 2: 1933-1990 124 (2000); Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769 (2014); Gunnar Beek, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN. ST. INT'L L. REV. 615, 615, n. 2 (2007).

<sup>10</sup> Richard Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J. 38 (2008).

<sup>11</sup> *Id.*, at 38-39.

<sup>12</sup> AREND LIJPHART, PATTERNS OF DEMOCRACY 220 (Yale University Press, 1999).

<sup>13</sup> Albert, *Supra* note 10, at 39.

(4.10).<sup>14</sup> Despite their strong rigidity, these constitutions are, nevertheless, still amendable if their amendment formula has been achieved. An entrenchment constitutional provision, likewise, is different from a constitutional provision that requires special involvement either from the legislature or the general public or both.<sup>15</sup> For example, in protecting a parliamentary electoral system, the Constitution of Israel (1958) shields the procedures for electing members of the Knesset from an amendment except if a parliamentary majority vote is reached.<sup>16</sup> In addition, the Constitution of Ghana (1996) requires for an “entrenched” provision to be amended the approval of the State Council as well as the Parliament before being approved at a popular referendum.<sup>17</sup> Finally, a constitutional entrenchment is also different from other constitutional provisions that are regarded unamendable simply because of the absence of a rule to organize their amendment procedures, like the situation in the interim and concluding provisions of the Russian Constitution.<sup>18</sup>

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<sup>14</sup> DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 170 (Cambridge University Press, 2006); Donald S. Lutz, *Toward a Theory of Constitution Amendment*, 88 AM. POL. SCI. REV. 355, 369 (1994).

<sup>15</sup> Albert, *Supra* note 10, at 39.

<sup>16</sup> See The Constitution of Israel, 1958, Section 4 of the “Basic Law: The Knesset” which provides “The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset.” Thus, at least 61 positive votes out of 120 votes in the Knesset in order to amend the article, being the very least among most entrenchments notwithstanding.

<sup>17</sup> See The Constitution of the Republic of Ghana, 1996, c. 25, art. 290 stating “(2) A bill for the amendment of an entrenched provision shall, before Parliament proceeds to consider it, be referred by the Speaker to the Council of State for its advice and the Council of State shall render advice on the bill within thirty days after receiving it. (3) The bill shall be published in the *Gazette* but shall not be introduced into Parliament until the expiry of six months after the publication in the *Gazette* under this clause. (4) After the bill has been read the first time in Parliament it shall not be proceeded with further unless it has been submitted to a referendum held throughout Ghana and at least forty percent of the persons entitled to vote, voted at the referendum and at least seventy-five percent of the persons who voted cast their votes in favour of the passing of the bill. (5) Where the bill is approved at the referendum, Parliament shall pass it. (6) Where a bill for the amendment of an entrenched provision has been passed by Parliament in accordance with this article, the President shall assent to it.” Likewise, The Lithuanian Constitution, (1992), ch. XIV, art. 148 provides “The provision of Article 1 of the Constitution “the State of Lithuania shall be an independent democratic republic” may only be altered by referendum if not less than 3/4 [three-fourths] of the citizens of Lithuania with the electoral right vote in favor thereof. The provisions of the First Chapter “The State of Lithuania” and the Fourteenth Chapter “Alteration of the Constitution” may be altered only by referendum.”

<sup>18</sup> Albert, *Supra* note 10, at 39.

## II. ENTRENCHMENT VS. DEMOCRACY

After determining the meaning of constitutional entrenchment and setting the boundaries between it and other competing concepts, now comes the question of what is the wisdom behind ruling out formal amendments concerning certain constitutional provisions. More precisely, why do constitutions tend to entrench some of their provisions?

In his *Social Contract* (1762), Jean-Jacques Rousseau drew a picture of an ideal community where a group of free citizens living in a small state in which democracy could be practiced directly by them as they share responsibility for the whole of the community.<sup>19</sup> Direct democracy, which means “delegation of political decisions to the ordinary voter,”<sup>20</sup> was the outcome of the doctrine of the consent of the governed.<sup>21</sup> The main theory of Rousseau and that of direct democracy is that the people being subject to the laws, ought to be their authors.<sup>22</sup> For being an unrealistic model of democracy to be applied nowadays, mostly because of the remarkable increase in population and the demand need of specialization in modern communities where power overlaps, direct democracy was replaced by other models such as, representative democracy (indirect democracy) and sensible democracy (semi-direct democracy).<sup>23</sup>

The disappearance of direct democracy and the retreat of the people's direct involvement gave a way for the emergence of some mechanisms through which people can practice democracy within certain specific limits. One of these mechanisms is constitutions. Despite the fact that constitutionalism, as Neil

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<sup>19</sup> ERNEST BARKER ED., *SOCIAL CONTRACT: LOCKE, HUME AND ROUSSEAU* (Oxford University Press, 1962); *see also* RICHARD FRALIN, *ROUSSEAU AND REPRESENTATION* (Columbia University Press, 1978).

<sup>20</sup> Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13 (1997).

<sup>21</sup> The earliest known direct democracy could be dated to Ancient Athens where ancient Athenians practiced authority directly in a popular assembly deciding over political affairs and war and peace matters, and concluding treaties. They also reserved for themselves the power to appoint judges and monitoring them. Direct democracy was also evident in Ancient Rome where systems of citizen lawmaking and citizen veto of legislature-made law had developed. *See* H. H. SCULLARD & M. CARY, *A HISTORY OF ROME: DOWN TO THE REIGN OF CONSTANTINE* (St. Martin's Press, 1967).

<sup>22</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 39 (Harvard University Press, 1999).

<sup>23</sup> For more information, *see generally* *Id.*; BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (University of California Press, 1984); FRANK PARSONS ET AL., *A PRIMER OF DIRECT-LEGISLATION* (1906); DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE* 169 (1912).

Walker puts it, “came first and foremost to be defined in functional opposition to absolutism, as a guarantee of limited (by law) government as opposed to *unlimited* government,”<sup>24</sup> constitutionalism and democracy indeed have been construed as being internally related and congenitally opposed. They are related because the very simple aim of constitutions is to set forth rules of democracy in a given state.<sup>25</sup> They oppose each other, nevertheless, because constitutions impose restrictions on the ability of the people to rule themselves and further constrain the power of the people to change or reform democracy itself.<sup>26</sup>

Whereas constitutionalism, largely, aims to constitute how a given state ought to function politically, it does so by limiting the political power of the people through legal means enshrined in different types of constitutions,<sup>27</sup> the matter that creates a real tension with the basic concept of democracy as the rule of the people.<sup>28</sup> It should be noted that since the advent of written constitutions, constitutionalism has been a tool to advance countermajoritarian that it restricts the practice of democracy and imposes further limits on the will of the people and expressions.<sup>29</sup> Whereas democracy only concerns with the collective will of the general public, constitutionalism, in an attempt to loosen the dangers of majoritarianism, chooses to neutralize the popular will by constraining actions of the general public and curbing their ambitions.<sup>30</sup>

Being only concerned with the consent of the governed, democracy distances itself from constitutionalism in that it tends to concentrate power it asserts in that popular preferences must flow from the majoritarian rule and

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<sup>24</sup> Neil Walker, *Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship*, 3 NETH. J. LEGAL PHIL. 206, 209 (2010).

<sup>25</sup> See generally RICHARD BELLAMY, ED., *CONSTITUTIONALISM AND DEMOCRACY* (Ashgate Dartmouth, 2006).

<sup>26</sup> *Id.*

<sup>27</sup> Legal theorist Phillip Allot distinguishes between three types of constitutions: “the legal constitution (a structure and system of retained acts of will), the real constitution (the constitution as actualised in the current social process, a structure and a system of power), and the ideal constitution (a constitution as it presents to society an idea of what society might be.” PHILLIP ALLOT, *EUNOMIA, NEW ORDER FOR A NEW WORLD* 2ND ED. 135-136 (Oxford University Press, 2001).

<sup>28</sup> Wouter G. Werner, *Democracy, Constitutionalism and the Question of Authority*, 3 NETH. J. LEGAL PHIL. 267, 269 (2010); José Julián Álvarez González, *Another Look at the Discretionary Constitution*, 71 REV. JUR. U.P.R. 1, 22 (2002); James E. Fleming, *The Missing Selves in Constitutional Self-Government*, 71 FORDHAM L. REV. 1789, 1793 (2003); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 219 n.35 (1993).

<sup>29</sup> Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 664 (2010).

<sup>30</sup> *Id.*

regards countermajoritarian as being an attempt to seize the will of the people.<sup>31</sup> In limiting the dangers of majoritarianism, constitutionalists have invented some concepts and devices such as, legislative representation, federalism, and judicial review. The latter, in particular, has always been a perceived obstacle in the way of constitutionalists as constitutionalism's opponents condemn the power of the judiciary to invalidate laws that are the product of the will of the majority.

To help soften the severity of judicial review and indeed loosening the tension between constitutionalism and democracy, constitutionalists tend to limit the scope of judicial review by rendering parliamentary legislation superior so that courts cannot review them.<sup>32</sup> Others instruct courts to avoid invalidating legislation by declaring them just incompatible,<sup>33</sup> or by interpreting them in such a way as not to create a conflict with the constitution.<sup>34</sup>

Perhaps constitutional entrenchment is the most powerful tool for constitutionalism to impose limitations on the sovereignty of people. Precisely, in a legal fashion, the power to amend the constitution is a remarkable solution that decisively settles the rivalry in favor of democracy since the authority to amend the constitution is indeed one of the constituent powers in the hands of the people

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<sup>31</sup> *See Id.* In reviewing Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, Randy Barnett highlights the countermajoritarian feature of the U.S. Constitution arguing, "It is counter-majoritarian *by design*. Precisely because the founders feared majoritarian fecklessness and abuse, they inserted the veto points to which Levinson objects. Most people today—whether left, right, or libertarian—still fear majoritarian rule. They believe they have more to fear from their political opponents gaining power than they have to gain from putting their friends in office. Indeed, many Americans revere the Constitution precisely because of its counter-majoritarianism—the checks and balances adopted by the founders." RANDY E. BARNETT, *CONSTITUTIONAL CONVENTIONS* 52-54 (Claremont Rev. Books, 2007).

<sup>32</sup> According to the English theory of Parliamentary Supremacy, laws passed by the Parliament of the United Kingdom are regarded as "primary legislations" that are immune from being reviewed by courts unless they are contrary to the law of the European Union.

<sup>33</sup> *See, e.g.*, The United Kingdom Human Rights Act of 1998, § 4 stating, "If the court is satisfied—(a)that the provision is incompatible with a Convention right, and (b)that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility."

<sup>34</sup> According to Article 190 of the Swiss Constitution of 1999, which provides "The Federal Supreme Court and the other authorities applying the law shall follow the federal statutes and international law," courts have the power to review the constitutionality of federal statutes, but will construct statutes so as not to render them inconsistent with the Constitution.



to practice their sovereignty.<sup>35</sup> To see the point more clearly, unlike constituted power, which is a power created and established by the constitutional text itself, constituent power is actually the power of the people to consent to create a constitution.<sup>36</sup> Emmanuel Joseph Siey s describes the constituent power saying “in each of its parts a constitution is not the work of a constituted power but a constituent power.”<sup>37</sup>

Accordingly, the phenomenon of constitutional unamendability, which is created by virtue of entrenching certain provisions in the constitutional text, possesses an imminent threat to the constituent power to such an extent that it confiscates citizenry right in amending the constitution. Having this in mind, now I will pose the same question I posed earlier with a little twist: being one of the main drawbacks of constitutionalism that undermines democratic values, why are most of the world’s constitutional architects eager to construct unamendable provisions in the constitutions?

### III. PURPOSES OF ENTRENCHMENT

For a constitution to entrench some of its provisions, it intends to protect certain principles from being altered or subverted. These principles are seen as being of great importance that they help shape and define the state to such an extent that they need to be shielded in the constitution.

Entrenchment provisions could be used to preserve the fundamental structure of the state, i.e. federalism, unitarism, pillarisation, or secularism. The German Basic Law, for example, aims to preserve the federal structure of the state through an unamendable constitutional provision, which reads as follow: “Amendments to this Basic Law affecting the division of the Federation into L nder [and] their participation on principle in the legislative process...shall be inadmissible.”<sup>38</sup> Thus, according to this provision, the organization of Germany as a federal republic is permanently maintained and even the most compelling popular majorities cannot alter it pursuant to this constitutional order. In addition,

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<sup>35</sup> See Claude Klein, A propos Constituent Power: Some General Views in a Modern Context, *in* National Constitutions in the Era of Integration 31, 40 (Antero Jyr nki ed., 1999).

<sup>36</sup> See Yaniv Roznai describing constituent power to mean “the immediate expression of the nation and thus its representative.” Roznai, *supra* note 3, at 664.

<sup>37</sup> EMMANUEL JOSEPH SIEY S, POLITICAL WRITINGS 136 (2003).

<sup>38</sup> GRUNDGESETZ DER BUNDESREPUBLIK DEUTSCHLAND [BASIC LAW], c. VII, art 79(3) (Germany, 1949) [Hereinafter: The German Basic Law].

in order to ensure the good function of federalism, the German unamendable provision prohibits amendments that deny the constituent states of Germany, Länder, a voice in the legislative process. Likewise, the Constitution of Brazil (1988) followed the Basic German Law in entrenching the federal structure of the state when it stipulated in Article 60 that “No proposed constitutional amendment shall be considered that is aimed at abolishing the following: (I) the federalist form of the National Government...”<sup>39</sup> Equally, in preserving the fundamental structure of the state, the Romania Constitution of 1991 forbids constitutional amendments that seek to change the Romanian unitary system.<sup>40</sup> Similarly, the Portuguese Constitution shields the principle of secularism by prohibiting amendments revoking the separation between church and state.<sup>41</sup>

Moreover, an entrenchment clause could be deployed to protect the form of government in a given state, i.e. republicanism, monarchy, or amiri.<sup>42</sup> For instance, the Egyptian Constitutions of 1923 and 1930 shield the representative parliamentary system and the throne’s inheritance against amendments.<sup>43</sup> Moreover, the Italian Constitution of 1948 and the French Constitution of 1958 ban any constitutional amendment to revoke the republic form of the state.<sup>44</sup> Likewise, the Greek Constitution of 1975 and the Turkish Constitution of 1981 prohibit any constitutional amendment to change the designation of Greece and Turkey as parliamentary republics.<sup>45</sup> In addition, Constitutions of some

<sup>39</sup> CONSTITUIÇÃO FEDERAL [CONST.], artigo [art.] 60(§4º) (Brazil).

<sup>40</sup> CONSTITUȚIA ROMÂNIEI [CONST.] art. 152(1) (Romania).

<sup>41</sup> “Constitutional revision laws shall respect: ... (c) The separation between church and state.” PORTUGAL CONST. art. 288(c) (1976).

<sup>42</sup> Roznai, *supra* note 3, at 667.

<sup>43</sup> “The King and each of both Houses may propose the revision of the present Constitution by amending or omitting one or more provisions thereof, or adding other provisions. However, the provisions on the representative parliamentary system of government, the throne’s inheritance, and the principles of freedom and equality provided for hereby may not be proposed for revision.” EGYPT CONSTS., arts. 156 & 145 (1923 & 1930).

<sup>44</sup> “The republican form [of the State] cannot be a matter of constitutional revision.” LA COSTITUZIONE [CONST.] art. 139 (Italy). “The republican form of government shall not be the object of any amendment.” LA CONSTITUTION [CONST.] tit. XVI, art. 89 (France).

<sup>45</sup> “The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26.” ARTHRO [ART.] 110(1) SYNT. [CONST.] (Greece); “The provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.” TÜRKİYE CUMHURİYETİ ANAYASASI [CONST.] part I, art. 4 (Turkey).

monarchies such as Bahrain, Morocco, and Qatar make any amendment to the monarchy system of government inadmissible.<sup>46</sup> Further, the Constitution of Kuwait declares the “Amiri Regime” in the state immune against any amendment attempt.<sup>47</sup>

Other features that could be protected by constitutional entrenchments are those related to the “self-identity of the state.” For example, some constitutions like that of Afghanistan, Algeria, Iran, and Tunisia entrench the official religion of the state.<sup>48</sup> Similarly, some states like Bahrain, Romania, and Turkey choose to entrench the official language of the state in their constitutions.<sup>49</sup>

Constitutional designers may also use entrenchment provisions to protect a wide range of constitutional rights and freedoms as well as sovereignty of people. Under the Constitution of Romania (1991), for example, constitutional amendments resulting in the elimination of citizenry rights and freedoms granted by the constitution are void.<sup>50</sup> The Bosnian and Herzegovinian Constitution (1995) likewise declares all civil and political rights unamendable.<sup>51</sup> The Namibian Constitution similarly shields constitutional rights and liberties against any amendment.<sup>52</sup> Similarly, the Egyptian Constitutions of 1923 and 1930 declare principles of freedom and equality unamendable.<sup>53</sup> Finally, consider the Constitution of Armenia (1995) that makes the principle of sovereignty of people unamendable.<sup>54</sup> In fact, this kind of entrenchment is most likely to be adopted by

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<sup>46</sup> “It is not permissible to propose an amendment to Article 2 of this Constitution, and it is not permissible under any circumstances to propose the amendment of the constitutional monarchy and the principle of inherited rule in Bahrain, as well as the bicameral system and the principles of freedom and equality established in this Constitution.” BAHRAIN CONST. c. VI, art. 120(c) (1973); “No revision may infringe the provisions...on the monarchic form of the State.” MOROCCO CONST. art. 175 (2011); “The provisions relevant to the governance and inheritance of the State may not be subject to a request for amendment.” QATAR CONST. art. 145 (2003).

<sup>47</sup> “Provisions relating to the Amiri Regime in Kuwait...” KUWAIT CONST., art. 175 (1962).

<sup>48</sup> See AFGHANISTAN CONST., ch. X, art. 149 (2004), ALGERIA CONST., tit IV, art 178(3) (1989), IRAN CONST, art 177 (1980), and TUNISIA CONST., art 1 (2014).

<sup>49</sup> See BAHRAIN CONST. c. VI, art. 120(c) (1973), CONSTITUȚIA ROMÂNIEI [CONST.], tit. VII, art. 152(1) (Romania, 1991); TÜRKİYE CUMHURİYETİ ANAYASASI [CONST.] part I, art. 4 (Turkey, 1981).

<sup>50</sup> CONSTITUȚIA ROMÂNIEI [CONST.], tit. VII, art. 152(2) (Romania).

<sup>51</sup> BOSNIA & HERZEGOVINA CONST., art. X, § 2.

<sup>52</sup> NAMIBIA CONST, ch XIX, art. 131 (1990).

<sup>53</sup> EGYPT CONSTS, n. 43.

<sup>54</sup> ARMENIA CONST., art. 114 (1995).

a state wishing to distance itself from a past era distinguished by an authoritarian rule and teemed with rights infringements. Such constitutional entrenchments, indeed, are seen as the state's commitment to honor individual's rights and liberties by guaranteeing the values entrenched in the constitutional provision, and to urge future generations and political leaders to fully respect these values.<sup>55</sup>

A constitutional entrenchment provision could also serve a temporary purpose that is to make a certain principle, value, or resolution unamendable for a defined period of time. Such entrenchment is likely to be deployed to reach a compromise in an attempt to bring dissonant political actors together.<sup>56</sup> An example of this constitutional entrenchment could be found in Article V of the United States Constitution stating that, "Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." Article I, Section 9, Clause 1 authorizes states to trade in slaves and prohibits Congress from passing laws that restrict slave importation.<sup>57</sup> Article 1, Section 9, Clause 4 asserts that taxation would be apportioned based on state populations.<sup>58</sup> Pursuant to Article V, both clauses were unamendable from the year of the Constitution was adopted (1789) and prior to the year 1808. Likewise, in a more explicit fashion, Cape Verde included in its Constitution a constitutional entrenchment provision that shields the entire Constitution against amendment for five years from the date of its promulgation.<sup>59</sup> Similarly, the Egyptian Constitution of 1930 bans introducing amendments to the constitutional text for the period of 10 years from the time of its adoption.<sup>60</sup>

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<sup>55</sup> See Richard Albert, *The Unamendable Core of the United States Constitution*, in ANDRÁS KOLTAY, ED., *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION*, at 4 (Forthcoming, 2015), available at <http://ssrn.com/abstract=2601646>.

<sup>56</sup> *Id.*; see Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 644 (2011).

<sup>57</sup> "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST., art I, § 9, cl 1.

<sup>58</sup> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST., art I, § 9, cl 4.

<sup>59</sup> Albert, *supra* note 55, at 5. "This Constitution may be revised, in whole or in part, by the National Assembly after five years from the date of its promulgation." CAPE VERDE CONST., part VI, tit III, art 309(1) (1980).

<sup>60</sup> (Amendments to this Constitution may not be introduced in the first ten years following its adoption." EGYPT CONST., art. 156 (1930).

Further, constitutional entrenchment can be used to achieve peace by loosening the severity of hatred between two or more rival factions. For example, some countries would confer unamendable amnesty upon a political faction after a revolution, coup d'etat, or a period of political segregation.<sup>61</sup> An example of this is the Constitution of Niger of 2010, which entrenches in Article 175 an unamendable amnesty provision found in Article 185 for those who participated in the coup d'Etat of February 2010.<sup>62</sup>

Finally, some constitutions adopt some general constitutional entrenchment provisions with the purpose of protecting some highly valued constitutional principles.<sup>63</sup> The Constitution of Norway (1814) entrenches the spirit of the constitution making any amendment to alter this spirit inadmissible.<sup>64</sup> Additionally, the Cuban Constitution of 1976 entrenches the principles of socialism and the social revolutionary political system.<sup>65</sup> The Constitution of Nepal of 1990 likewise entrenches spirit of the Preamble of the Constitution.<sup>66</sup>

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<sup>61</sup> Albert, *supra* note 29, at 667.

<sup>62</sup> "Article 185 of this Constitution may not be made the object of any revision." "An amnesty is granted to the authors, co-authors and accomplices of the coup d'Etat of eighteen (18) February 2010. A law will be voted, to this effect, during the first (1st) session of the National Assembly." NIGER CONST., tit XII & XIV, art.(s) 175 & 185. Likewise, Niger superseded Constitution of 1999 granted an unamendable amnesty provision of authors and co-authors of the two coups of January 1996 and April 1999. NIGER CONST., tit XII, art.(s) 136 & 141.

<sup>63</sup> Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L. J. 225, 254 (2013).

<sup>64</sup> "...Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution..." GRUNNLOVEN [CONST.], art. 121 (Norway).

<sup>65</sup> "This Constitution can only be modified by the National Assembly of People's Power...except [where the modification] regards the political, social and economic system, whose irrevocable character is established in Article 3 of Chapter I..." "Socialism and the social revolutionary political system instituted in this Constitution, proven by years of heroic resistance against all kinds of aggression and the economic war engaged by the government of the mightiest imperialistic power that has ever existed, and having demonstrated its ability to transform the country and create an entirely new and just society, shall be irrevocable, and Cuba shall never return to capitalism." CONST., ch. I & XV, art.(s) 3 & 137 (Cuba).

<sup>66</sup> "A bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament: Provided that this Article shall not be subject to amendment." CONST., part 19, art. 116(1) (Nepal).

The Constitution of France of 1958 deploys constitutional unamendability to protect the integrity of the French territory.<sup>67</sup>

In fact, the idea of constitutional entrenchment is not a new doctrine in the constitutional law arena; however, such invaded South America early in the nineteenth century when Latin states borrowed it from the U.S. Constitution.<sup>68</sup> The Mexican Constitution of 1824 entrenches principles like the official religion of the state, form of government, liberties, and division of power.<sup>69</sup> Moreover, the Venezuelan Constitution of 1830 shields the republic form of government as well as popular representation by restricting the power of Congress to alter such principles through constitutional amendments.<sup>70</sup>

The idea of protecting constitutional highly valued principles by limiting the constitutional amendment power has originated mainly because of the “Basic Structure Doctrine” that certain constitutional principles must be conclusively unamendable.<sup>71</sup> Carlo Fusaro and Dawn Oliver cited the Basic Structure Doctrine to *legitimately* justify constitutional unamendability arguing that:

[E]very constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity: this explains the tendency in many constitutional arrangements to identify a set of supraconstitutional provisions which the constitution’s text itself, or even more frequently the courts (by induction), state cannot be amended or suppressed.

Apart from a constitutional entrenchment that is intended to protect an internal structure or identity of the state such as, federalism, republicanism,

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<sup>67</sup> “No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy.” LA CONSTITUTION [CONST.] tit. XVI, art. 89 (France).

<sup>68</sup> Roznai, *supra* note 3, at 665.

<sup>69</sup> “The Religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic.” “the Articles of this Constitution, and of the Constituent Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed.” CONSTITUCIÓN [CONST.] Artículo [art.] 3 & 171 (Mexico).

<sup>70</sup> “The authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternate.” CONST., art. 228 (Venezuela).

<sup>71</sup> See Yaniv Roznai, The Migration of the Indian Basic Structure Doctrine, in MALIK LOKENDRA ED., JUDICIAL ACTIVISM IN INDIA: A Festschrift in Honour of Justice V. R. Krishna Iyer 240 (2012).

official religion, and secularism to preserve a certain political platform,<sup>72</sup> a careful examination of constitutional entrenchment provisions reveals that they are mostly designed to protect a pack of universal principles that are likely to distinguish modern democracies such as human dignity, individuals liberties, separation of powers, and rule of law.<sup>73</sup>

#### IV. FORMS OF CONSTITUTIONAL UNAMENDABILITY

As illustrated earlier, according to Donald Lutz's and Arend Lijphart's study of constitutional amendment difficulty, some constitutions may be regarded as being flexible since they adopt easy constitutional amendment rules. Other constitutions are regarded to be rigid thus they require difficult standards to be reached for a constitutional amendment to be rendered successful. However, it should be noted that regarding this last category of constitutions, rigidity should be construed to mean unamendability simply because, as explained earlier, even the most rigid constitution still possesses amendment rules and standards, though difficult and complicated, if reached, a constitutional amendment is consequently reached.

Speaking from a constitutional law perspective, rigidity is a constitutional feature to distinguish between a written constitution and a legislative bill with the purpose of giving the former more prestigious position than the latter.<sup>74</sup> Precisely, prescribing rules that are difficult to be achieved for amending written constitutions than that prescribed for amending legislative bills is logically justified given the fact that written constitutions are considered the basic and supreme law of any given country. Although, constitutions of some countries like New Zealand, which could be amended by a simple legislative majority,<sup>75</sup> might contradict with this view, this does not refute the common mainstream idea that constitutional amendment rules are one of the basic features that characterize a written constitution as being the supreme law of the country.

Unlike New Zealand, countries like the United States and Canada stand at the top level of the rigidity scale in terms of constitutional amendment. For instance, proposing a constitutional amendment to the U.S. Constitution must be

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<sup>72</sup> Gary J. Jacobsohn, *The Formation of Constitutional Identities*, in *COMPARATIVE CONSTITUTIONAL LAW* 129-142 (Tom Ginsburg & Rosalin Dixon eds., 2011).

<sup>73</sup> Roznai, *supra* note 3, at 714.

<sup>74</sup> See Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 *S.C.L.R.* 181, 186 (2014).

<sup>75</sup> Lutz, *supra* note 14, at 125, 170, 176.

by either the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures, which eventually needs to be ratified by three-fourths of the States (38 of 50 States).<sup>76</sup> The Constitution of Canada likewise is teemed with rigidity when it comes to amendment rules.<sup>77</sup> For instance, the default amendment procedure in the Canadian Constitution requires the approval of both houses of Parliament as well as that of at least two-thirds of the provinces.<sup>78</sup> The Canadian Constitution also adopts another alternative procedure to amend itself, which seems to be more difficult than the previous one. According to this alternative amendment procedure, the approval of both house of Parliament as well as that legislative assembly of each province is needed.<sup>79</sup> Further, the Constitution also introduces another amendment rule where the consent of both houses of Parliament as well as the legislative

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<sup>76</sup> “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST., art. V.

<sup>77</sup> Walter Dellinger described the Constitution of Canada as being “unduly rigid [and that] it affords little or no possibility of reforming those existing institutions of government which play a critical role in the amendment process.” Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 L. & CONTEMP. PROBS. 283, 300 (1982). Further, Bettina Petersohn argued that federalizing constitutional change in Canada has made amending the Constitution nearly impossible. Bettina Petersohn, *Constitutional Reform and Federal Dynamics: Causes and Effects*, in ARTHUR BENZ & JÖRG BROSCHEK, EDs., FEDERAL DYNAMICS: CONTINUITY, CHANGE, AND THE VARIETIES OF FEDERALISM 316 (2013).

<sup>78</sup> “An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by (a) resolutions of the Senate and House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.” *Constitution Act, 1867*, part V, s. 38.

<sup>79</sup> “An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force; (c) subject to section 43, the use of the English or the French language; (d) the composition of the Supreme Court of Canada; and e. an amendment to this Part.” *Id.* at s. 41.



assembly of one or more provinces affected by the proposed amendment is required for an amendment to be passed.<sup>80</sup> However, these formal amendment procedures do not conclude the story of constitutional amendment in Canada because further rigidity features could be imposed by the judiciary.<sup>81</sup>

In fact, this hard rigidity found in both the American and Canadian Constitutions regarding amendment procedures means that amending them could be hard.<sup>82</sup> However, such strong rigidity should not be understood to mean that amending these two Constitutions is impossible but it should be construed to mean that they are entirely “entrenched” Constitutions. More precisely, as noted earlier, exaggerated supermajorities required for amending a written constitution should not be regarded as constitutional entrenchment that shields the constitution from amendments. Thus, despite the fact that constitutional rigidity could be turned from being a feature that characterize written constitution into being a flaw that undermines one of the most democratic rights, which is the right to amend the constitution, because of the extravagance with formal amendment rules, such rigidity does not live up to configure the constitution to a nonamendable text.

As much as constitutional entrenchment provisions come to serve different purposes, they also take different forms. Many scholarly efforts have been exerted in an attempt to classify constitutional unamendability. Nevertheless, constitutional law scholars have never reached a conclusive agreement regarding the classification of forms of constitutional unamendability. Perhaps this is a normal consequence to the broadness of the topic as well as the fact that most scholars lack a decisive terminology to classify various forms of unamendability.<sup>83</sup> However, as Richard Albert observed that most of the

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<sup>80</sup> “An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including (a) any alteration to boundaries between provinces, and (b) any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.” *Id.* at s. 41.

<sup>81</sup> Albert, *supra* note 74, at 186-187.

<sup>82</sup> See Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, ALTA. L. REV. (2015) (arguing that the Constitution of Canada is probably the world’s most difficult democratic constitution to be amended by formal constitutional amendment procedures.)

<sup>83</sup> Albert, *supra* note 74, at 188.

constitutional entrenchment provisions could be classified in terms of kind and degree.<sup>84</sup>

In her notable work “Democracy and Legal Change,” Melissa Schwartzberg developed an interesting formula for the classification of constitutional entrenchment. In her classification, Schwartzberg depended on two main criteria: (1) the entrenchment degree of permanence,<sup>85</sup> and (2) the entrenchment subject matter.<sup>86</sup> Accordingly, Schwartzberg classified constitutional entrenchment into temporary and formal.<sup>87</sup> Schwartzberg went further to classify temporary entrenchment into “limited” and “unlimited” entrenchment,<sup>88</sup> and formal entrenchment into “formally specified” or “implicitly enforced.”<sup>89</sup> According to Schwartzberg, such classification could be subdivided into four categories: (1) formal, time-unlimited entrenchment; (2) formal, time-limited entrenchment; (3) de facto entrenchment; and (4) implicit entrenchment.<sup>90</sup>

For Schwartzberg, it is obvious that classifying constitutional entrenchment into temporary and then limited and unlimited entrenchment is a matter of permanence. However, classifying constitutional entrenchment into formal and then de facto and implicit entrenchment concerns the methodology adopted to entrench the provision as well as the subject matter of the entrenchment.

Specifically, an entrenchment could be textually defined in the constitutional text without being timely restricted.<sup>91</sup> Pursuant to Schwartzberg’s classification, this entrenchment is called formal, time-unlimited entrenchment. The German entrenchment clause, which preserves the federal structure of the state, is an example of a formal, time-unlimited entrenchment.<sup>92</sup> Likewise, the Italian and French Constitutions are entrenching the republic form of government.<sup>93</sup>

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<sup>84</sup> Albert, *supra* note 29, at 670.

<sup>85</sup> MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 8 (2007).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 8-16.

<sup>91</sup> *Id.* at 8-11; Albert, *supra* note 74, at 188.

<sup>92</sup> The German Basic Law, *supra* note 38.

<sup>93</sup> See *supra* note 44.

Constitutional architects could also design an entrenchment provision where it is also textually defined; however, with the intention to last for a temporary period of time. This kind of entrenchment is called formal, time-limited entrenchment in Schwartzberg's classification. A stark example of this kind of entrenchment is Article V of the U.S. Constitution, which entrenched the slave trade only until the year 1808.<sup>94</sup> Similarly, the Constitution of Cape Verde includes an entrenchment provision that entrenches the entire Constitution against amendments for five years from the date of its ratification.<sup>95</sup>

According to Schwartzberg, a de facto entrenchment introduces a constitutional provision that is not textually entrenched; yet, is unamendable because of the hard standards required for its amendment.<sup>96</sup> Schwartzberg cited Article V of the U.S. Constitution, which protects the equal suffrage of states in the Senate as an example of the de facto entrenchment.<sup>97</sup> However, as noted earlier, such provisions should not be regarded as constitutional entrenchment provisions since "high procedural barriers to change"<sup>98</sup> should not be construed to mean absolute constitutional unamendability.

Eventually, implicit entrenchment assumes that a certain principle or norm has become so fundamental to such an extent that amending it would transform the regime.<sup>99</sup> Implicit entrenchment could also be deployed to help protecting a deeply rooted principle or norm in a given society that its amendment is inconceivable.<sup>100</sup>

Richard Albert conducted another interesting classification of constitutional unamendability.<sup>101</sup> Unlike Melissa Schwartzberg, whose classification mainly depended on the entrenchment degree of permanence with a timid reference to the subject matter of the entrenchment, Albert not only cites the entrenchment degree of permanence, but also pays a great deal of attention to

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<sup>94</sup> U.S. CONST., *supra* note 76; SCHWARTZBERG, *supra* note 85, at 11.

<sup>95</sup> CAPE VERDE CONST., *supra* note, 59.

<sup>96</sup> SCHWARTZBERG, *supra* note 85, at 12.

<sup>97</sup> U.S. CONST., *supra* note 76; SCHWARTZBERG, *supra* note 85, at 12.

<sup>98</sup> SCHWARTZBERG, *supra* note 85, at 12.

<sup>99</sup> *Id.* at 13-16; Albert, *supra* note 74, at 189.

<sup>100</sup> Albert, *supra* note 74, at 189.

<sup>101</sup> Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 S.C.L.R. 181, 189-194 (2014).

the subject matter of the entrenchment and the interest the entrenchment aims to protect.<sup>102</sup>

Albert classifies constitutional unamendability into (1) substantive unamendability, (2) procedural unamendability, and (3) temporary unamendability.<sup>103</sup> According to Albert, a constitutional entrenchment provision that is substantively unamendable imposes restrictions on the subject matter of the protected rule or principle.<sup>104</sup> Constitutional entrenchments that make federalism or republicanism unamendable are substantive unamendable clauses since they restrict what can be amended. Procedural unamendability concerns the procedures of formal amendment in which the constitutional provision is actually entrenched pursuant to the formal amendment rules.<sup>105</sup> Finally, temporary unamendability introduces a constitutional provision that is entrenched only for a certain period of time.<sup>106</sup>

Albert then classifies each form of unamendability into formal, informal, and theoretical unamendable provisions.<sup>107</sup> According to him, in a formal substantive unamendable provision, the subject matter is textually entrenched in the constitutional text.<sup>108</sup> An informal substantive unamendable provision refers to a binding judicial decision/interpretation from the highest court.<sup>109</sup> An example of this kind of unamendability is the 2009 decision of the Czech Constitutional Court ruling that Constitutional Act no.195/2009, regarding shortening the term of the Office of the Chamber of Deputies, was unconstitutional because it was an individual and retroactive act, and thus violated the unamendable provision of Art. 9(2) entrenching the requirements of a democratic state.<sup>110</sup> Further, the

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 189.

<sup>105</sup> *Id.* at 191.

<sup>106</sup> *Id.* at 192.

<sup>107</sup> *Id.*, at 189-194.

<sup>108</sup> *Id.* at 190.

<sup>109</sup> *Id.*

<sup>110</sup> Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, 2009/09/10 - Pl. ÚS 27/09, [http://www.usoud.cz/en/decisions/?tx\\_ttnews%5Btt\\_news%5D=468&cHash=b239af8f32f409fe77493adf911e665f](http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=468&cHash=b239af8f32f409fe77493adf911e665f); see also Kieran Williams, *When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court's September 2009 Early Elections Decision*, 36 REV. CEN. & EAST EUR. L. 33 (2011); Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections Following the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*, 8 VIENNA J. INT'L CONST. LAW (2014). "The substantive requisites of the democratic, law-

decision of the Indian Supreme Court in the landmark case of *Minerva Mills Ltd. v. Union of India*,<sup>111</sup> which held that the 42nd Amendment of the Indian Constitution was unconstitutional because it violated the basic structure of the constitution,<sup>112</sup> could be constructed as an informal substantive unamendability. Finally, theoretical substantive unamendability introduces scholarly constitutional theories as a restriction on the ability to limit certain constitutional principles or rules.<sup>113</sup> For example, a wide range of constitutional scholars assert that constitutional principles like human dignity, rule of law, separation of powers, and fundamental freedoms should not be subject to amendment.

Likewise, Albert divided procedural unamendability into formal, informal, and theoretical unamendability. Formal procedural unamendability introduces a procedural unamendability that is stipulated in the text.<sup>114</sup> The Ukrainian Constitution, for example, makes itself unamendable in the event of martial law or a state of emergency: “The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.”<sup>115</sup> Informal procedural unamendability is the outcome of unrealistically hard formal amendment rules, which make amending the constitutional provision inconceivable.<sup>116</sup> Theoretical procedural unamendability concerns with the distinction between constitutional amendment and constitutional revision.<sup>117</sup> The German jurist Carl Schmitt illustrated the difference between constitutional amendment and revision arguing that:

[I]t is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy.<sup>118</sup>

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abiding State may not be amended.” Č, ch. 1, art. 9(2), ÚSTAVY ČR [CONST.] (Czech Republic).

<sup>111</sup> 1980 AIR 1789, 1981 SCR (1) 206.

<sup>112</sup> *Id.*

<sup>113</sup> Albert, *supra* note 74, at 191.

<sup>114</sup> *Id.*

<sup>115</sup> UKRAINE CONST., ch. XIII, art. 157 (1996).

<sup>116</sup> Albert, *supra* note 74, at 191. As explained earlier I reluctantly consider these provisions as nonamendable constitutional provisions.

<sup>117</sup> *Id.* at 192.

<sup>118</sup> CARL SCHMITT, LEGALITY AND LEGITIMACY 58-60 (2004).

Further, according to Schmitt, constitutional amendment is permissible “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”<sup>119</sup> Consequently, constitutional amendment is only concerned with “fine-tuning what is already in place.”<sup>120</sup> However, constitutional revision most likely results in an overall change in the structure of the entire constitution, a matter that must be left to the constituent power. Thus, a constitutional revision by the constituent power is required to alter some constitutional principles that are hard to change with a mere constitutional amendment.<sup>121</sup>

Finally, Albert noted that all of the previous forms of constitutional unamendability could be either temporary or permanent unamendability.<sup>122</sup> Specifically, formal substantive unamendability could be temporary as it is in Article V of the U.S. Constitution or in Article 309(1) of the Cape Verdean Constitution. Formal substantive unamendability could also be permanent, such as the entrenchment provisions of the Italian, German, and French Constitutions.<sup>123</sup>

Likewise, informal substantive and procedural unamendability are sometime temporary when a high court decides to set aside its previous precedent that a certain constitutional provision is unamendable.<sup>124</sup> Theoretical unamendability may also be temporary since, as Albert argues, constitutional scholars could base their theories on temporary or permanent standards.<sup>125</sup>

Next, we will use these different classifications to categorize the unamendability clause of the Egyptian Constitution of 2014.

## V. EGYPT’S CONSTITUTIONAL ENTRENCHMENT

The Egyptian Constitution of 2014 was not the only precedent to entrench a constitutional provision among the various Arabian constitutions.<sup>126</sup>

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<sup>119</sup> *Id.* at 150.

<sup>120</sup> Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1750-1752 (2005).

<sup>121</sup> Albert, *supra* note 74, at 192.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 193.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g.*, ALG. CONST., tit. IV, art. 178(3) (1989), BAHR. CONST., ch. VI, art. 120(c) (d) (2002), DJIB. CONST., tit. XII, art. 92 (1992), JORDAN CONST., ch. 9, art. 126(2) (1952), MAURITANIA CONST., tit. XI, art. 99 (1991), MOROCCO CONST., tit. XIII, art. 175 (2011), SOMAL. CONST., ch. 15, tit. I, art. 132(1) (2) (2012), TUNIS. CONST., tit(s). 1, 2 & 4, art(s). (1), (2), (49) & (75) (2014).

However, we can assertively say that Egypt's constitutional entrenchment provision is the most interesting, yet puzzling, entrenchment in terms of classification and significance.

Egypt's Constitution of 2014 contains an unamendable clause that could be found in the text of Article 226, Section 5, which reads as follow: "In all cases, texts pertaining to the re-election of President of the Republic or the principles of freedom or equality stipulated in this Constitution may not be amended, unless the amendment brings more guarantees."<sup>127</sup>

#### **A. Classifying Egypt's Entrenchment Provision**

A careful examination of the entrenchment provision of Article 226, Section 5 discloses that it fits under many forms of constitutional unamendability. Specifically, under Schwartzberg's classification of constitutional unamendability, this entrenchment could be classified as a formal unamendable provision since it textually entrenches rules of presidential re-election and principles of freedom and equality. Additionally, this entrenchment could also be regarded as a conditional unamendable provision because the permanence of the entrenched rules and principles is conditioned upon whether the proposed amendment introduces more guarantees.

Considering Albert's classifications of constitutional unamendability, the entrenchment provision of Article 226, Section 5 could be classified as a substantive formal unamendability.<sup>128</sup> It is formal because it textually entrenches the protected subject matter in the constitutional text.<sup>129</sup> It is also substantive since it restricts what could be amended: rules of presidential re-election and principles of freedom and equality.<sup>130</sup>

Judging Article 226, Section 5's entrenchment provision from the perspective of its purpose, I am reluctant to call it a preservative unamendable provision because I have no record that the constitutional drafters intended to preserve principles of freedom and equality, or rules of presidential reelection. However, this entrenchment could be regarded as a transformational unamendability. Transformational unamendability is a form of constitutional entrenchment that seeks to abandon certain practices or beliefs from the past and

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<sup>127</sup> EGYPT CONST. art. 226, s.5 (2014)

<sup>128</sup> See *supra* section IV.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

adopt a new principle or ideology that helps to redefine the state's constitutional identity.<sup>131</sup> Egypt is still going through the early phases of democratization. After the Egyptian Revolution in 2011, which ended thirty years of repression under President Hosni Mubarak's regime, and the ousting of President Mohamed Morsi in 2013, which ended the regime of the Muslim Brotherhood in Egypt, Egyptians found themselves with the serious challenge of drafting a more democratic constitution – one that maintains individual rights and freedoms, and a peaceful rule-based alternation of power. Consequently, rules governing presidential terms and the principles of equality and individual freedoms are deemed important and pretentious for post-revolutionary Egypt; thus, they need to be entrenched in the constitutional text.

Notwithstanding the entrenchment clause found in Section 5 of Article 226, the Article mainly sets forth rules of constitutional formal amendment. More precisely, in the 2014 Egyptian Constitution, Article 226 falls under the General & Transitional Provisions, with the first four sections of the Article stating how the Constitution could be amended:

The amendment of one or more articles of the Constitution may be requested by the President of the Republic or one-fifth of the members of the House of Representatives. The request shall specify the articles requested to be amended and the reasons for such amendment.

In all cases, the House of Representatives shall discuss the amendment request within 30 days from the date of its receipt. The House shall issue its decision to accept the request in whole or in part by a majority of its members.

If the request is rejected, the same articles may not be requested to be amended again before the next legislative term.

If the amendment request is approved by the House, it shall discuss the text of the articles requested to be amended within 60 days from the date of approval. If approved by a two-thirds majority of the house's members, the amendment shall be put to a public referendum within 30 days from the date the approval is issued. The amendment shall be effective from the date on which the referendum's result and the approval of a valid majority of the participants in the referendum are announced.<sup>132</sup>

The question right now regards the significance of listing the entrenchment clause in the same Article that deals with formal amendment rules. Apart from my doubt that Egypt's constitutional drafters intended to do so,

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<sup>131</sup> *Id.*

<sup>132</sup> EGYPT CONST., art. 226, §§ 1,2,3 & 4.



including an entrenchment clause in the article that prescribes constitutional formal amendment rules is no more than a reference that such clause could fall under the category of procedural constitutional entrenchments. Reading the five sections of Article 226 altogether illustrates that Section 5's entrenchment is a formal procedural unamendable clause — prohibiting formal amendment in connection with less guarantees to rules of presidential re-election and principles of freedom and equality — which is textually codified in the constitutional text. However, classifying Article 226, Section 5 as a procedural unamendability is challenged by the fact that the Article does not shield its entrenched principles for a specific period of time in which amending these principles within this period is prohibited.

Nevertheless, the permanence of the entrenchment provision found in Article 226, Section 5 is actually limited by a purported amendment that brings more guarantees and protection to the entrenched rules and principles. Having said that, Article 226, Section 5 could be regarded as a procedural conditioned unamendability that prohibits formal amendment unless the proposed amendment confers more guarantees.

### **B. Purpose of the Entrenchment Provision**

What did the constitutional drafters in Egypt try to achieve by the entrenchment provision? According to Article 226, Section 5, the entrenched-unamendable norms are rules that govern presidential re-election and principles of freedom and equality. Thus, despite the fact that in Egypt's long constitutional history, the position of Islamic Sharia and the form of the state were the most often confronted,<sup>133</sup> unlike the Tunisian Constitution, which shares the same circumstances and year of adoption with the Egyptian Constitution, Article 226, Section 5 of the Egyptian Constitution chose neither to entrench the state official religion, Islam, nor the form of the state.<sup>134</sup> However, as already mentioned,

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<sup>133</sup> With a long constitutional history dating to 1882 when it was an Ottoman province, Egypt is considered to be the oldest constitutional state in the Arab world. Under the monarchy system, Egypt had two constitutions, those of 1923 and 1930. After the abolition of the monarchy and the declaration of the republic in 1952, Egypt underwent the drafting and application of six constitutions, those of 1956, 1958, 1964, 1971, 2012, and 2014.

<sup>134</sup> Article 1 of the Tunisian Constitution reads, "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended." TUNISIA CONST., tit. 1, art. 1 (2014).

Article 226, Section 5 entrenches rules of presidential reelection and principles of freedom and equality.

However, before proceeding to speculate on why the constitutional drafters chose particularly to entrench rules of presidential reelection and principles of freedom and equality, I should note that the notion of “superconstitutionalism,” a mechanism to provide rigid amendment procedures that protects high-valued constitutional principles,<sup>135</sup> is not an intruder in the content of the Egyptian legislation. More specifically, Egypt’s current Constitution of 2014 acknowledges the concept of “superstatute” when Article 121 requires a two-thirds special majority to pass laws deemed complementary to the Constitution, laws regulating elections, political parties, the judiciary, judicial bodies and organizations, and rights and freedoms.<sup>136</sup>

Accordingly, Article 221 regards laws complementary to the Constitution as super statutes – high-valued statutes – requiring a two-thirds majority vote in the House of Representatives for their issuance and amendment, rather than the normal majority vote required for other statutes. Article 226, Section 5 also considers rules of presidential reelection and principles of freedoms and equality as being super-constitutional norms that need to be protected to a degree greater than the baseline prescribed for other rules and principles mentioned in the Constitution, and thus shields them from formal amendments unless these amendments add more guarantees.

Egypt’s approach of entrenching rules governing presidential term is not new or unusual. The Constitutions of El-Salvador and Guatemala did it long before the Egyptian Constitution.<sup>137</sup> The Egyptian Constitution’s rules governing

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<sup>135</sup> Russell Patrick Plato, *Selective Entrenchment Against Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, NYU L. REV. 1470, 1473 (2007).

<sup>136</sup> “The Laws deemed complementary to the Constitution shall be issued by a majority of two thirds of the House members. Laws regulating presidential or parliamentary or municipal elections, political parties, the judiciary, related to judicial bodies and judicial organizations, and those regulating the rights and freedoms stipulated in the Constitution shall be deemed complementary to the Constitution.” EGYPT CONST., art. 121, § 4.

<sup>137</sup> “Under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and to the principle that a President cannot succeed himself, be amended.” EL SAL. CONST., tit. IX, art. 248. “In no case may Article 140, 141, 165 paragraph (g), 186, and 187 be reformed, nor may any question concerning the republican form of government, [or] to the principle of the non-reelection for the exercise of the Presidency of the Republic be raised in any form, neither may the effectiveness or application of the Articles that provide for alternating the tenure

presidential terms are asserted in Article 140, which reads, “The President of the Republic shall be elected for a period of four calendar years, commencing from the day following the termination of the term of his predecessor. The President may only be reelected once.”

A careful reading of Article 226, Section 5 reveals that it does not entrench the first presidential term, only the second-term. Although we lack records from the drafting process on why the constitutional drafters chose to do so, perhaps it was a result of the fear common among Egyptians regarding presidents remaining in power by bending the constitution, and ignoring their promises not to exceed their prescribed term and to handover the presidency. For instance, in 1980, President Mohammad Anwar el-Sadat amended Article 77 of the 1971 Constitution after feeling constrained by its language, which limited the President to two six-year terms.<sup>138</sup> After the approval of the amendment, the phrase “the President may be reelected for other successive terms” was added to Article 77.<sup>139</sup> President Hosni Mubarak likewise used this article to remain in power for nearly thirty years.

Accordingly, perhaps entrenching the limit of the presidential second-term was an attempt to provide more curbs on presidents’ ambitions and to prevent another dictatorship in Egypt. Further, by entrenching the presidential second-term, constitutional drafters might seek to protect the state democratic structure from emotional Egyptians who may admire a certain president and urge for his continuation beyond the four-year term.

On the other hand, Article 226, Section 5 entrenches principles of freedom and equality. It seems that entrenching these principles was an attempt to distance the new post-revolutionary Egypt from the authoritarian regimes of President Mubarak, who ruled the country under emergency law for almost thirty years, and the Muslim Brotherhood, who further restricted freedoms and infringed on human rights.

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of the Presidency of the Republic be suspended or their content be changed or modified in any other way.” GUAT. CONST., tit. VII, art. 281 (1985).

<sup>138</sup> Mohamed Abdelaal, *Religious Constitutionalism in Egypt*, 37 FLETCHER F. WORLD AFF. 35, 36 (2013).

<sup>139</sup> *Id.*

The Constitution of 2014 acknowledges human dignity,<sup>140</sup> individual freedom,<sup>141</sup> the sanctity of private life,<sup>142</sup> freedom of movement,<sup>143</sup> freedom of belief,<sup>144</sup> freedom of expression,<sup>145</sup> freedom of press,<sup>146</sup> and right to assemble<sup>147</sup> and participate in political life.<sup>148</sup> Accordingly, entrenching such freedoms and rights could be construed as compensation for violations and infringements suffered by Egyptians during the last two toppled regimes. It also means a reassurance to Egyptians that their democratic rights and freedoms would be constitutionally guaranteed.

Likewise, the approach of Article 226, Section 5 in entrenching principle of equality is another attempt to ensure the distinction of Egypt from past practices and its transformation towards a more democratic republic. In fact, the importance of entrenching the principle of equality is manifested in examining its development in Egypt's former two Constitutions – 1971 and 2012. For instance, Article 33 of the 2012 Constitution read, “[a]ll citizens are equal before the law. They have equal public rights and duties without discrimination.” Article 33 omitted the phrase “without discrimination between them [the citizens] due to sex, ethnic origin, language, religion or creed” found in Article 40 of the 1971

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<sup>140</sup> EGYPT CONST., art. 51 (2014).

<sup>141</sup> *Id.*, at art(s). 54 & 55.

<sup>142</sup> *Id.* at art. 57.

<sup>143</sup> *Id.* at art. 62.

<sup>144</sup> *Id.*, at art. 64. In fact, a provision that could be seen as curtailing freedom of belief is Article 3 of the Egyptian Constitution, which reads, “[t]he canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders.” One could argue that this article restricts freedom of belief since it acknowledges only Christianity and Judaism as religions beside Islam, to be the main source of legislation in matters related to their believers' personal status law, and thus ignoring other faiths in Egypt. Consequently, those who do not believe in Christianity or Judaism are not allowed to be judged according to the canon rules of their faiths in matters related to their personal affairs and would be subject to Islamic law. Indeed, I regard acknowledging only Christianity and Judaism as divine religions to be recognized beside Islam is a matter of “state's ideology,” which has nothing to do with restricting freedom of belief since such freedom is absolutely guaranteed by virtue of Article 64, which states “freedom of belief is absolute.” See Mohamed Abdelaal, *Egypt's Constitution: What went Wrong?*, 7 VIENNA J. INT'L CONST. L. 200, 207-208 (2013).

<sup>145</sup> EGYPT CONST., art. 65.

<sup>146</sup> *Id.* at art. 70.

<sup>147</sup> *Id.* at art. 73.

<sup>148</sup> *Id.* at art. 74.

Constitution.<sup>149</sup> Thus, a careful reading to Article 33 of the 2012 Constitution, which was drafted during the Muslim Brotherhood regime, reveals that it does not fully guarantee equality between citizens, allowing discrimination between them based on different grounds such as, sex, religion, or ethnic origin.<sup>150</sup>

Consequently, in an attempt to remedy this anomaly, Article 53 of the 2014 Constitution, which amended the 2012 Constitution, emphasized the principle of equality between all citizens and restored the phrase from Article 33 of the 1971 Constitution – “without discrimination between them [the citizens] due to sex, ethnic origin, language, religion or creed.” Article 53 also prohibits discrimination based on some new grounds, such as “disability, social class, political or geographic affiliation.” Further, to confer more protection and avoid any attempt to sabotage its content, as mentioned earlier, Article 226, Section 5 of the 2014 Constitution entrenched the principle of equality.

### C. Egypt’s Entrenchment Provision: A Puzzled Language

As mentioned above, the last portion of Article 226, Section 5, which reads, “unless the amendment brings more guarantees,” serves as a limitation on the permanency of the unamendable clause. Accordingly, unlike in Article V of the U.S. Constitution, the unamendable clause in Article 226, Section 5 of the Egyptian Constitution is substantively limited rather than time-limited.

Most constitutions that choose to limit the applicability of their unamendable provisions will do so using a prescribed period of time, after which the entrenchment expires. However, some constitutions adopt the same approach introduced by the Egyptian Constitution in limiting the applicability of their entrenchment provisions on substantive grounds rather than rendering its expiration dependent on the lapse of a defined period of time.

For instance, Article X of the Bosnian and Herzegovinian Constitution reads, “No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.”<sup>151</sup> Article 131 of the Namibian Constitution likewise states,

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<sup>149</sup> Article 40 of the 1971 Constitution reads, “[t]hey [the citizens] have equal rights and duties without discrimination between them due to sex, ethnic origin, language, religion or creed.”

<sup>150</sup> Perhaps this approach was driven by Egypt’s Islamists’ strict ideology that women and non-Muslims not be eligible to run for the office of the president. *See* Abdelaal, *supra* note 144, at 209-210.

<sup>151</sup> BOSNIA AND HERZEGOVINA CONST., art. X(2) (1995).

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in the Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.<sup>152</sup>

Similarly, Article 157 of the Ukrainian Constitution provides, “The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms...”<sup>153</sup>

A careful examination of these three constitutional articles reveals that the Constitutions of Bosnia and Herzegovina, Namibia, and Ukraine could be changed by formal amendment if such amendments improve the rights and freedoms prescribed in the constitutional text. By including Article 226, Section 5 of the Egyptian Constitution, which allows formal amendment as long as it provides more guarantees to rules of presidential re-election and principles of freedom and equality, we can conclude that the four articles do not absolutely shield the entrenched principles from formal amendment. More precisely, the four articles are not decisively unamendable provisions since they allow formal amendment that confers more protection to the entrenched principles and rules.

However, the content of Article 226, Section 5 of the Egyptian Constitution is different from the *unrestricted* unamendable natures of the entrenchment clauses found in the Bosnian and Herzegovinian, the Namibian, and the Ukrainian Constitutions in that it begs the question, what if the purported amendment grants more guarantees to the entrenched principles? Perhaps it is the explicit language of Article 226, Section 5, “unless the amendment brings more guarantees,” which none of the comparable mentioned constitutional articles use, that urges us not to consider the article as a fully entrenchment provision. Indeed, one can argue that regardless of whether a constitution explicitly or implicitly makes its entrenchment clause unequivocally unamendable, the outcome is the same: there is still a room for formal amendment rules to change the entrenched principles. Such an argument is not without merit; nevertheless, the explicit language of Article 226, Section 5 is a drafting defect by Egypt’s constitutional drafters that is likely to generate tough constitutional dilemmas.

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<sup>152</sup> NAMIBIA CONST., ch. 19, art. 131 (1990).

<sup>153</sup> UKRAINE CONST., ch. XIII, art 157 (1996).

As confusing as it might be, perhaps the language of Article 226, Section 5 helps loosen the illegitimate tang of constitutional entrenchments because after all, these proposed amendments, alleged to confer more guarantees on the entrenched principles, would be subject to the approval of the general public in a popular referendum. Two questions arise: what amendment brings more guarantees, and who determines whether the amendment brings more guarantees? The answers to these questions highlight the paradox of Egypt's constitutional entrenchment created by the too-explicit language of Article 226, Section 5.

As mentioned before, Article 140 of the Constitution limits the president to a presidency term of four calendar years with the possibility of one reelection. Article 226, Section 5 obviously entrenches the four-year reelection term, not the original first term. By setting the entrenched four-year reelection term to the standard of amendability provided by Article 226, Section 5, the amendment brings more guarantees, and prompts the question: how could an amendment confer more guarantees to the presidency reelection term?

A constitutional amendment that limits the four-year reelection term could be considered a guarantee against tyranny and dictatorship. Alternatively, a constitutional amendment that extends the presidential reelection term beyond the prescribed four years, or even opens it for indefinite period of time, could provide more guarantees for popular president, in war, or in unstable times.

A paradoxical situation could be raised considering what amendment brings more guarantees to the entrenched principle of equality. For instance, despite the fact that Egypt's current Constitution of 2014 declares all citizens equal before the law, acknowledging the same rights and duties to all of them,<sup>154</sup> it favors some categories, such as workers, farmers,<sup>155</sup> youths, Christians, disabled individuals, and migrants, thus the Egyptian State must seek their

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<sup>154</sup> "Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason. Discrimination and incitement to hate are crimes punishable by law. The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose." *Id.* at art. 53.

<sup>155</sup> "The state grants workers and farmers appropriate representation in the first House of Representatives to be elected after this Constitution is adopted, in the manner specified by law." *Id.* at art. 243.

appropriate representation in the first House of Representatives.<sup>156</sup> Further, the Constitution requires workers and farmers to be represented in local councils by no less than 50 percent.<sup>157</sup>

One could claim that a constitutional amendment that abolishes this kind of preferential treatment would certainly introduce more guarantees to the principle of equality. However, there is an argument that Egyptian Christians, youths, and disabled people are likely not to be represented in the parliament without the intervention of the State to guarantee such representation and thus, a constitutional amendment that heightens this preferential treatment should be considered as bringing more guarantees to the entrenched principle of equality.

Similarly, preferential treatment in favor of women is also evident in the Constitution. For example, after directing the State to achieve equality between women and men in politics,<sup>158</sup> the Constitution commands the State to guarantee an appropriate representation of women in the Houses of Representatives.<sup>159</sup>

The same questions and arguments raised above apply here. Particularly, should a constitutional amendment that abolishes the State's guarantee of women's parliamentary representation be regarded as a guarantee in favor of the principle of equality, or should a constitutional amendment that empowers the State with further mechanisms to ensure women's representation in the parliament brings guarantees to the principle of equality, given Egyptian women status of being politically sidelined.

The second question regarding who declares whether the purported amendment confers more guarantees on the entrenched principles is in fact a question of who has the authority to interpret the constitutional amendment.

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<sup>156</sup> "The state grants youth, Christians, persons with disability and expatriate Egyptians appropriate representation in the first House of Representatives to be elected after this Constitution is adopted, in the manner specified by law." *Id.* at art. 244.

<sup>157</sup> "Every local unit elects a local council by direct, secret ballot for a term of four years. A candidate must be no younger than 21 years old. The law regulates other conditions for candidacy and procedures of election, provided that one quarter of the seats are allocated to youth under 35 years old, one quarter is allocated for women, workers and farmers are represented by no less than 50 percent of the total number of seats, and these percentages include a proper representation of Christians and people with disability." *Id.* at art 180.

<sup>158</sup> "The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution." *Id.* at art. 11.

<sup>159</sup> "The state commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination." *Id.*



Usually the constitutional or supreme court of a given country reserves to that authority. However, this is not always the case; some countries' constitutions assign the legislature this task.<sup>160</sup> In the Egyptian system, all courts are allowed to interpret the constitution and thus constitutional amendments. Yet more than any other court, the Supreme Constitutional Court is likely to interpret the constitution pursuant to its power of judicial review.

#### **D. Amending the Constitutional Entrenchment**

Given that the entrenched principles of Article 226, Section 5 are not fully shielded against formal amendments, can the entire entrenchment clause of Article 226, Section 5 be amended?

This question raises the dilemma of a non-self-entrenched provision, which introduces a situation where the constitutional provision entrenches certain super constitutional principles without being itself entrenched against amendment. Unlike the entrenchment provisions of the Nigerian<sup>161</sup> and the Tunisian Constitutions,<sup>162</sup> most of the world's constitutions adopt non self-entrenched provisions.

Before addressing the question of whether the non-self-entrenched provision of Article 226, Section 5 could be amended, I want to pause at some scholars' distinctions between amending and repealing the entrenchment provision.<sup>163</sup> There is no doubt that an amendment to repeal the entrenchment provision would result in a constitutional violation if the entrenchment provision

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<sup>160</sup> For example, consider Article 121 of the Norwegian Constitution of 1814 which authorizes the legislature, the Storting, to determine whether to accept or refuse a proposed constitutional amendment.

<sup>161</sup> After entrenching the form of the State, the multiparty system, and the principle of separation of State and religion, Article 175 of the Nigerian Constitution entrenched itself against amendment. "No procedure of revision may be engaged or followed when the integrity of the territory is infringed. The republican form of the State, the multiparty system, the principle of the separation of State and religion and the provisions of paragraphs 1 and 2 of Article 47 and of Article 185 of this Constitution may not be made the object of any revision. No procedure of revision of this Article is receivable." NIGER CONST., tit. XII, art. 175 (2010).

<sup>162</sup> Besides entrenching the sovereignty of the State and its form, the official religion and language, the principle of supremacy of law and the will of the people, Articles 1 and 2 of the Tunisian Constitution entrenched themselves from being amendment. "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended."; "Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law. This article might not be amended." TUNISIA CONST., tit. 1, arts. 1 & 2.

<sup>163</sup> See e.g., Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* § 9 (1990).

forbids both the amendment of the entrenched principles and rules as well as the repeal of itself.<sup>164</sup>

Repealing a self-entrenched unamendable provision should only be done by constituent power through an act or revolution; nevertheless, an attempt to argue that amending the unamendable entrenchment provision is something different from entirely repealing it. Such an argument is unlikely to generate any productive argument since the power to repeal to implicitly include the power to amend. As Douglas Linder rightly argues, “only a hide-bound formalist would contend that the difference [between one and two amendments] is significant.”<sup>165</sup>

Now back to the main question: can a non-self-entrenchment provision be amended or entirely repealed? A practical approach would answer this question affirmatively. Consider, for instance, the entrenchment provision of the Portuguese Constitution of 1976 (Article 288) that was amended in 1989 to omit several economic restrictions, including the entrenched principle of collective ownership,<sup>166</sup> in a process described to undermine “the standard meaning” and the enforceability of the Constitution.<sup>167</sup>

However, states have developed mechanisms to triumph over problems created by a non-self-entrenchment provision rendering it unamendable,

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<sup>164</sup> *Id.*

<sup>165</sup> Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 729 (1981).

<sup>166</sup> Yaniv Roznai, *Amending ‘Unamendable’ Provisions*, CONSTITUTION MAKING & CONSTITUTIONAL CHANGE, <http://constitutional-change.com/amending-unamendable-provisions/>. Article 288 of the Portuguese Constitution of 1976 includes a long list of principles that are shielded against amendments. According to the article the amending power must respect: (a) National independence and the unity of the State; (b) The republican form of government; (c) The separation of the Churches from the State; (d) The rights, freedoms, and safeguards of the citizens; (e) The rights of the workers, workers' committees, and trade unions; (f) The co-existence of the public, the private, and the cooperative and social sectors, with respect to the property of the means of production; (g) The existence of economic plans within the framework of a mixed economy; (h) Universal, direct, secret, and periodical suffrage for the appointment of the elected members of the organs of supreme authority, the autonomous regions, and the organs of local government, as well as the system of proportional representation; (i) Plurality of expression and political organization, including political parties and the right to a democratic opposition; (j) Separation and interdependence of the organs of supreme authority; (l) The scrutiny of legal provisions for active unconstitutionality and unconstitutionality by omission; (m) The independence of the courts; (n) The autonomy of local authorities; (o) The political and administrative autonomy of the archipelagos of the Azores and Madeira.

<sup>167</sup> Paulo Ferreira Da Cunha, *Constitutional Sociology and Politics: Theories and Memories*, 5 SILESIAN J. LEGAL STUD. 11, 25 (2013).

notwithstanding its language, which suggests the amendment possibility. These mechanisms can be classified into theoretical and judicial mechanisms.

*1. Theoretical Unamendability (Fraude à la constitution)*

According to the French theorist Georges Liet-Veaux, any attempt to amend the constitutional entrenchment provision, including the strategy adopted by the political actors in amending it, is considered a “fraude à la constitution,”<sup>168</sup> i.e., “fraud upon the constitution.”<sup>169</sup> However, before proceeding further, I should note that I am not concerned with the “political barriers” that might render the amendment of the entrenchment provision *practically* inconceivable despite being *formally* amendable pursuant to its plain language.

For Liet-Veaux, “fraude à la constitution” happens when the language of the text is respected while the spirit of the institution is undermined.<sup>170</sup> Thus, constitutional architects commit fraud against the constitution when they strictly adhere to the text of the provision that permits amendments while ignoring its content that logically prohibits such amendments.<sup>171</sup> Georges Burdeau rightly argues that the amendment/revision process should neither hijack the power of the revised text nor ruin the foundation of its existing political system.<sup>172</sup>

It is worthwhile to mention that since a fraud against the constitution is achieved when the plain language of the constitutional entrenchment provision is interpreted with great formality so as to justify an outcome that is apparently inconsistent with the purpose of the entrenchment;<sup>173</sup> such fraud is not linked with certain circumstances or a particular period. That is, it may occur in either permanent or transitional constitutions.<sup>174</sup> Further, it can be committed to subvert either a transformational entrenchment that helps transform the state to a more

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<sup>168</sup> Georges Liet-Veaux, *La 'fraude à la constitution': Essai d'une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France*, 59 REVUE DU DROIT ET DE SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 116, 145 (1943).

<sup>169</sup> OLIVER WENDELL HOLMES, RICHARD A. POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 153 (1992); Richard S. Kay, *Constituent Authority*, AM. J. COMP. L. 715, 734 (2011).

<sup>170</sup> Liet-Veaux, *supra* note 168.

<sup>171</sup> *Id.*; Albert, *supra* note 74, at 209.

<sup>172</sup> “l'organe révisionniste ne saurait sans commettre un détournement de pouvoir, ruiner les bases fondamentales du système politique auquel est liée son existence.” GEORGES BURDEAU, TRAITÉ DE SCIENCE POLITIQUE 238 (Tome IV, 1952).

<sup>173</sup> Albert, *supra* note 74, at 209.

<sup>174</sup> *Id.*

democratic rule, or a preservative entrenchment that preserves a high-valued constitutional principle in an already democratic state.

## 2. *Constitutional Fraud in Egypt*

The non-self-entrenched provision of Article 226, Section 5 is indeed amendable as a sort of constitutional fraud by using the formal amendment rules. To illustrate how a constitutional fraud may happen, consider the hypothesis that formal amendment rules have been triggered to amend rules of a presidential re-election term. That is, the President or one-fifth of the members of the House of Representatives propose a constitutional amendment to omit the four-year presidential re-election term, thus rendering the president eligible to be reelected to indefinite periods of time. Pursuant to Article 266, Section 5, the proposed amendment would have to confer more guarantees on the rules of presidential re-election. Now, imagine that the House of Representative failed to reach a majority vote to put the amendment into discussion, or failed to reach the two-thirds majority vote required to pass the amendment under the pretext that the purported amendment undermines the guarantees intended to be achieved by the four-years presidential re-election rule. Here, Article 226, Section 5 would have reached its purpose by protecting the rule of presidential re-election by effectively entrenching it against formal amendment.

However, as mentioned earlier, Article 266, Section 5 is not self-entrenched, which means that it is not shielded against formal amendment. Accordingly, in an attempt to circumvent its utmost purpose, interest groups and political actors could limit the significance and the scope of the entrenched principles of Article 226, Section 5 by deploying formal amendment rules to amend or abolish Article 226, Section 5 itself. This could be done by a double amendment procedure whereby the entrenchment provision is to be repealed by a constitutional amendment firstly, and, as a second step, the entrenched principles are to be amended since they are no longer protected from formal amendment.

In fact, the two-step double amendment procedure is legal since it does not constitute a constitutional violation.<sup>175</sup> Nevertheless, the double amendment

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<sup>175</sup> In illustrating the stakes of using the double amendment procedure to amend Article V of the United States Constitution, Akhil Amar admits that the procedure “would have satisfied the literal text of Article V.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 293 (2005).

procedure remains illegitimate.<sup>176</sup> Even though the double amendment procedure appears to be consistent with the constitutional text, it subverts the constitution by circumventing the prescribed limits to ignore the constitutional purposes. It is true that deploying formal amendment rules to repeal Article 226, Section 5 of the Egyptian Constitution seems consistent with the language of the article itself; however, such approach hides a wicked intent to use the non-self-entrenchment to bypass the protection conferred to some of the high-valued constitutional principles. The double amendment procedure, therefore, constitutes a constitutional fraud.

### 3. *Judicial Unamendability*

A non-self-entrenched provision could also be protected judicially through the ability of constitutional courts to perform their power to review the constitutionality of constitutional amendments and acts. At the outset, the idea of reviewing the constitutionality of constitutional amendments or acts seems absurd since they possess the same power as the constitution itself; however, the number of constitutional courts that have engaged in reviewing proposed constitutional amendments and acts negates any doubt regarding this kind of judicial review.

Comparative judicial precedents show that constitutional courts have actually invalidated constitutional amendments and acts either on procedural or substantive grounds. A constitutional court may procedurally invalidate a constitutional amendment if it fails to meet the requirements and standards prescribed in the formal amendment rule laid down in the constitutional text, or if it fails to reach the prescribed majority required to pass it.<sup>177</sup> On the other hand, a constitutional court may hold a constitutional amendment substantively unconstitutional if it is inconsistent with the content, meaning, or purpose of the constitutional text.<sup>178</sup>

The United States Supreme Court has reviewed whether amendments are procedurally consistent with the Constitution. In 1939, for example, in a challenge concerning the constitutionality of Kansas's ratification process of the

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<sup>176</sup> Albert, *supra* note 74, at 210.

<sup>177</sup> Albert, *supra* note 55, at 22.

<sup>178</sup> *Id.* at 19.

Child Labor Amendment,<sup>179</sup> the Court addressed the discrepant length of time between the proposal and ratification to determine whether the Child Labor Amendment was ratified according to rules laid out by Article V of the U.S. Constitution.<sup>180</sup> The Court declared that it was not its task to consider this matter and concluded that because there was no established deadline regarding when state legislatures must act to ratify the constitutional amendment, solely Congress could preside over the issue.<sup>181</sup>

On the other hand, constitutional courts have also engaged in invalidating constitutional amendments and acts on substantive grounds for being inconsistent with the content, the meaning, or the purpose of the Constitution. For instance, in *Golaknath v. State of Punjab*, the Indian Supreme Court decided that a constitutional amendment that violates the fundamental rights granted in the Constitution should be held unconstitutional.<sup>182</sup> In rendering its decision, the Court claimed that a constitutional amendment is a “law” within the meaning of Article 13 of the Constitution, and should be voided if it undermined fundamental rights.<sup>183</sup> Six years later, the *Golaknath* decision was overruled in *Kesavananda Bharati v. State of Kerala*.<sup>184</sup> In *Kesavananda*, the Indian Supreme Court declared the *Golaknath* ruling wrong and held that a constitutional

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<sup>179</sup> The Child Labor Amendment, which authorizes Congress “to limit, regulate, and prohibit the labor of persons under eighteen years of age,” was proposed in 1924 and is a still-pending amendment to the United States Constitution. The amendment failed to reach the three-fourths majority of the states required to ratify constitutional amendments. See Grace Abbott, *The Child Labor Amendment-I*, 220 THE NORTH AM REV 223, 223 (1924).

<sup>180</sup> *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

<sup>181</sup> *Id.* at 452. The Turkish Constitutional Court has also nullified constitutional amendments on procedural grounds. In 1970, the Court invalidated a constitutional amendment, which omits the requirement that a convicted person with certain offenses must be pardoned first before being eligible to run for the parliamentary election—the pardon requirement was included in the Turkish Constitution of 1961—for its failure in reaching the required majority in the legislature. Turkish Constitutional Court, June 16, 1970, Case No. 1970/31, 8 AMKD 313 (1970). For more information regarding the position of the Turkish Constitutional Court in reviewing constitutional amendments, see Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV 321, 322-325 (2011).

<sup>182</sup> *GolakNath v. Punjab*, AIR 1967 SC 1643.

<sup>183</sup> To reach such decision, the Indian Court cited Article 13 of the 1964 Constitution, which reads, “The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” The Court then argued that the word “law” in the article applies on amendments to the constitution, since a constitutional amendment is after all a type of law. *Id.*

<sup>184</sup> *Kesavananda Bharati v. State of Kerala*, 1973 AIR 1461 (India).

amendment was not a law within the particular meaning of Article 13 of the Constitution; however, a constitutional amendment must be nullified if it violated the basic structure of the Constitution.<sup>185</sup> After the *Kesavananda* ruling, the “basic structure doctrine” was used by the Indian Court in several cases to strike down constitutional amendments that violated the substance of the constitution.<sup>186</sup>

Similarly, the Constitutional Court of the Czech Republic asserted their authority to review the constitutionality of constitutional amendments and acts to determine whether they were substantively in conflict with the constitution. In 2009, for instance, the Czech Constitutional Court declared the Constitutional Act No. 195/2009 Coll., which shortens the term of the Chamber of Deputies, unconstitutional for being in direct conflict with “the essential requirements for a democratic state” entrenched in Article 9(2) of the 1992 Czech Constitution.<sup>187</sup>

The practice of invalidating constitutional amendments is also evident in the decisions of the Brazilian Supreme Court. In invalidating the Constitutional Amendment February 17, 1993, the Supreme Court argued, “[a] constitutional amendment, which is emanated from a derived constituent, when violative of the original Constitution, may be declared unconstitutional by the Supreme Court, which is the guardian of the Constitution.”<sup>188</sup>

In Austria, the Constitutional Court also gave itself the authority to declare constitutional amendments void if they violate the Constitution. In 2001, the Court nullified a provision of a constitutional law, which declared statutes of the *Länder*, regarding the organization of the jurisdiction of the organs established to review the awards of public contracts, constitutional, on the

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<sup>185</sup> The Court held that “the power to amend the Constitution does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity.” *Id.* at 1260.

<sup>186</sup> See, e.g., *Indira Nehru Gandhi v. Raj Narain*, 1975 AIR 2299 (India); *Minerva Mills Ltd. v. India*, 1980 AIR 1789 (India). For more information about unconstitutional constitutional amendments and the basic structure doctrine in India, see SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, 44 L. & POL. IN AFR., ASIA & LATIN AM. 273, 273–276 (2011).

<sup>187</sup> See *supra* note 110.

<sup>188</sup> ADIN 939-7 DF. Luciano Maia, *The Creation and Amendment Process in the Brazilian Constitution*, in MADS ANDENAS ED. THE CREATION AND THE AMENDMENT OF CONSTITUTIONAL NORMS 54, 9 (2000).

grounds that it conflicted with the principles of the rule of law for depriving the Constitution's from its normative power.<sup>189</sup>

It should be noted that most of these constitutional courts have granted themselves the authority to review the constitutionality of constitutional amendments without being disputed by either the executive or the legislature, and without waiting for their constitutions to ward them such authority. However, constitutions of certain states have explicitly granted constitutional courts the power of judicially reviewing constitutional amendments. For example, Article 146(a) of the Romanian Constitution of 1991, per the 2003 revised version, authorizes the constitutional court to adjudicate on initiative to revise the constitution.<sup>190</sup> Likewise, Article 148(1) of the Turkish Constitution of 1982 empowers the Turkish Constitutional Court the power to test the constitutionality of constitutional amendments.<sup>191</sup>

#### **E. The Power of the Egyptian Supreme Constitutional Court in Reviewing Constitutional Amendments**

Having established that Article 226, Section 5 of the 2014 Egyptian Constitution is a non-self-entrenched provision that entrenches some high-valued constitutional norms, rules of presidential reelection, and principles of equality and freedom, a competent body is needed to set the boundaries between constitutional and unconstitutional amendments that may undermine the norms entrenched therein. The Egyptian legislature might be such a competent body; however, like in most democracies, the power of judicial review in Egypt has

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<sup>189</sup> The Court held that “all legislation of the *Länder* on the organization and jurisdiction of institutions in the field of public procurement review exempt from the Federal Constitution. Thus the Constitution should be deprived or its normative power for this part of the legal order.” KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 38-39 (2008).

<sup>190</sup> “The Constitutional Court has the following functions: (a) to pronounce on the constitutionality of laws before their promulgation upon request of the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Attorney, at least 50 deputies or 25 senators, as well as on its own initiative [ex officio] on proposals for the amendment of the Constitution.” CONSTITUȚIA ROMÂNIEI, tit. V, art. 146(a) (Romania).

<sup>191</sup> “The Constitutional Court shall examine the constitutionality in respect of both form and substance of laws, decrees having force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging the unconstitutionality as to the form or substance of decrees having force of law, issued during a state of emergency, martial law or in time of war.” TÜRKİYE CUMHURİYETİ ANAYASASI [CONST.] part III, art. 148(1) (Turkey).



always been delegated to the highest court, the Supreme Constitutional Court. Accordingly, the question is how Egypt's Supreme Constitutional Court defines its position towards reviewing the constitutionality of constitutional amendments.

The Constitution of 2014 determines the jurisdiction of the Supreme Constitutional Court as follows:

- (1) decide on the constitutionality of laws and regulations; (2) interpret legislative texts; and (3) adjudicate disputes regarding affairs of its members, disputes pertaining to the implementation of its rulings and decisions, disputes between judicial bodies and entities with judicial mandate and disputes that raise implementation of two final contradictory rulings.<sup>192</sup>

Further, Law No. 48/1979, regarding the establishment of the Supreme Constitutional Court and the determination of its procedures and jurisdiction, summarizes the Court's jurisdiction to be reviewing the constitutionality of laws and regulations, interpreting legislative bills, and interpreting laws and presidential decrees that have the authority of law.<sup>193</sup> To a great extent, the concept of reviewing the constitutionality of constitutional amendments is urged by the idea of proactive judicial review, whereby a constitutional court is authorized to proactively examine the constitutionality of laws and amendments before they come into effect.<sup>194</sup> By contrast, the Constitution of 2014 and Law No. 48/1979 acknowledge the idea of subsequent judicial review; that is, the authority of the Court to test the constitutionality of laws and regulations after their issuance and in regard to an ongoing judicial case where a constitutional challenge is raised.<sup>195</sup>

Moreover, when addressing the Court's jurisdiction, neither the Constitution nor Law No. 48/1979 mentions the authority of the Court to review

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<sup>192</sup> EGYPT CONST., art. 192.

<sup>193</sup> "The Supreme Constitutional Court solely has the power to: (1) determine the constitutionality of the laws and regulations; (2) decide on the disputes over the competent authority among the judicial bodies or authorities of judicial competence and; (3) decide on the disputes that might take place as to carrying out two final contradictory rulings where one of the aforementioned rulings has been issued by one of the judicial body and the other by another body of judicial competence." "The Supreme Constitutional Court alone has the power to interpret the laws issued by the Legislative Authority and the decrees issued by the Head of the State in case of any divergence as regards their implementation." Law No. 48/1979, *Al-Jarida Al-Rismiyyah*, arts 25 & 26.

<sup>194</sup> Mohamed Abdelaal, *Constitutionality of Constitution Acts in Egypt: Can The Egyptian Supreme Constitutional Court Extend its Jurisdiction?*, JURIST ACAD., Oct. 9, 2014, <http://jurist.org/academic/2014/10/mohamed-abdelaal-egyptian-court.php>

<sup>195</sup> *Id.*

the constitutionality of constitutional amendments. Thus, unlike in Romania and Turkey, the Egyptian Supreme Constitutional Court has never been granted such authority by virtue of the constitutional text.

The last possibility is to consider whether like the Czech, Brazilian, and Indiana Constitutional Courts, the Egyptian Constitutional Court has granted itself the power to review the constitutionality of a constitutional amendment so as to protect the non-self-entrenched provision of Article 226, Section 5 making it an informal entrenchment.

In a recent decision, in 2007, the Court held that:

Since the Constitution is the manifestation of the popular will along the regional reach of the State, its provisions top the lower ranked legal rules. These legal rules, whether promulgated by the legislature or the executive according to the constitutional limits, must respect the constitutional provisions and be consistent with them. Subsequently, it was logical for the legislature as well as the constitutional legislator to limit the authority of the Supreme Constitutional Court regarding reviewing the constitutional legitimacy on the legislative texts only. And, therefore, subjecting the Constitution to the Court's censorship power oversteps the prescribed limits of the Court's mandate.<sup>196</sup>

Although the Court does not explicitly express its refusal to exercise its power of judicial review over constitutional amendments, such a refusal is implicit in the Court's refrain from reviewing the Constitution itself, since constitutional amendments are constitutional texts, after all. A careful examination of this ruling reveals that the Court based its decision – that reviewing the Constitution is beyond its mandate – on the principle of constitutional supremacy. In reaching its decision, the Court cited the fact that the constitutional provisions are superior to other legal rules made either by the legislature or by the executive, and that these rules must be consistent with the constitutional provisions. Thus, the Court argued, these legal rules, not the Constitution, are the appropriate field for the Court to practice its power of judicial review.

I disagree with this ruling not only because the Court denied itself the right to subject constitutional amendments to the power of judicial, but also because it rested its decision on a blatantly unpalatable reason – constitutional supremacy. Constitutional supremacy is more likely to be protected by subjecting

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<sup>196</sup> Supreme Constitutional Court, Case no. 76, Judicial Year 29 (Oct. 1, 2007), [http://hccourt.gov.eg/Pages/Rules/Rules\\_Search.aspx#rule\\_text\\_1](http://hccourt.gov.eg/Pages/Rules/Rules_Search.aspx#rule_text_1)

constitutional amendments to the Court's review test to make sure that they are not in conflict with the Constitution's basic structure or high-valued principles.

Interestingly, the Honduran Constitution of 1982 contained an unamendable provision that prohibits presidential reelection<sup>197</sup> before being declared inapplicable by the Constitutional Chamber of the Honduran Supreme Court in 2015.<sup>198</sup> Despite the apparent difference between the unamendable provision of the Honduran Constitution and the Egyptian Constitution in that the former bans presidential reelection while the latter shields the prescribed presidential reelection term against future amendments, the Honduran Supreme Court, unlike the Egyptian Constitutional Court, satisfied itself with the power of reviewing the constitutional texts and thus power of interpreting the constitution, including the unamendable provision.

The dilemma of reviewing the constitutionality of constitutional amendments and acts in Egypt was evident in 2012 when the now-ousted President Mohamed Morsi of the Muslim Brotherhood issued the unilateral 2012 Constitutional Declaration on November 22, 2012. The Declaration, which immunized the Constituent Assembly responsible for drafting the 2012 constitution and prevented it from being dissolved by the judiciary and or challenged in court,<sup>199</sup> also immunized most of the presidential decrees and ordinances<sup>200</sup> and dismissed the prosecutor general, in violation to the Judiciary Act,<sup>201</sup> resulting in a huge disagreement between the judiciary and the

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<sup>197</sup> "The foregoing article, this article, the Articles of the Constitution relating to the form of government, national territory, the presidential term, the prohibition from reelection to the presidency of the republic, the citizen who has served as president under any title, and to persons who may not be president of the republic for the subsequent period may not be amended." HONDURAS CONST., art. 374 (1982).

<sup>198</sup> Corte Suprema de Justicia – Sala de Lo Constitucional Tegucigalpa, Municipio del Distrito Central, veintidos de abril de dos mil quince [Supreme Court –Constitutional Chamber Tegucigalpa, Central District, 22 April of 2014], <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

<sup>199</sup> "No judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly." CONSTITUTIONAL DECLARATION OF 2012, art. V (Egypt).

<sup>200</sup> "The President may take the necessary actions and measures to protect the country and the goals of the revolution." *Id.* at art. VI.

<sup>201</sup> "The prosecutor-general is to be appointed from among the members of the judiciary by the President of the Republic for a period of four years commencing from the date of office and is subject to the general conditions of being appointed as a judge and should not be under the age of 40. This provision applies to the one currently holding the position with immediate effect." *Id.* at art. III.

president.<sup>202</sup> Such a disagreement was the result of the Declaration's direct conflict with the 2011 Constitutional Declaration issued by the Supreme Council of the Armed Forces (SCAF) and approved in a popular referendum after the Revolution of 2011 to serve as the country's fundamental law until the drafting of a new constitution, besides its authoritarian rules.

In fact, the way the Supreme Constitutional Court responded to the Declaration reflected its position established in the previously mentioned ruling towards reviewing constitutional amendments and acts. Specifically, the Court's reaction did not go beyond denouncing the Declaration, arguing that it was no more than an attempt from President Morsi to unconstitutionally seize more powers and to degrade the judiciary without taking any further step towards judicial action. The Court's reaction was to some extent expected, given its 2007 self-restricting ruling that reviewing constitutional amendments and acts falls beyond its mandate.

However, the country would have avoided a huge insurgency if the Court had decided to refrain from its 2007 ruling and given itself with the power to review, and nullify, the constitutionality of Morsi's 2012 Unilateral Declaration. Further, a judicial precedent whereby the Court nullified the 2012 Declaration and established the Court's authority to review the constitutionality of constitutional amendment would have acted as a safeguard against any attempt to subvert the meaning and purpose of the non-self-entrenched provision of Article 266, Section 5 in the 2014 Constitution, rendering it an informal entrenchment provision preventing future constitutional fraud.

#### CONCLUSION

Undoubtedly, Egypt's constitutional drafters were not subtle in drafting Article 226, Section 5 as a non-self-entrenched provision. In a country such as Egypt, where people are still trudging towards democracy after two popular uprisings, a non-self-entrenched constitutional provision that shields some of the most high-valued constitutional principles must be protected from sabotage amendments and wicked intentions.

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<sup>202</sup> The Supreme Judicial Council stated the declaration was an "unprecedented assault on the independence of the judiciary and its rulings." *Egypt's top judges slam Morsi's new powers*, CBS NEWS, Nov. 24, 2012, [http://www.cbsnews.com/8301-202\\_162-57553859/egypts-top-judges-slam-morsis-new-powers/?pageNum=2](http://www.cbsnews.com/8301-202_162-57553859/egypts-top-judges-slam-morsis-new-powers/?pageNum=2).

Formal amendment rules could bear the solution for this problem. For example, Article 226, Section 5 could be amended to avoid formal amendment by adding the phrase, “and this Section may not be amended.” Likewise, formal amendment rules could be used to introduce a constitutional amendment to the text of Article 192 of the Constitution, which determines the jurisdiction of the Supreme Constitutional Court, granting the Court the power to proactively check the constitutionality of constitutional amendments before they come into force.

Further, the idea of the Court’s supremacy in constitutional interpretation could be used to introduce an amendment to either the Court’s law or the Constitution itself in such a way that allows the Court to exercise a proactive judicial review whenever a constitutional amendment is proposed. Such an amendment could introduce a mechanism wherein the government is obliged to refer the proposed constitutional amendment to the Court for review before it comes into effect.<sup>203</sup> The mechanism is well known in Canada: the Canadian government referred an issue to the Canadian Supreme Court in *Reference re Senate Reform*, 2014 SCC 32, and the Court held that the Constitution could not be amended to change the duration of senatorial terms.<sup>204</sup>

One other possible solution is that the Supreme Constitutional Court departs from its 2007 ruling and extends its jurisdiction by holding that reviewing the constitutionality of constitutional amendments falls within its duties as a court of last resort in constitutional matters. One could argue that the executive and the legislature would most likely challenge such an unprecedented ruling, saying that the Court stepped beyond its jurisdiction as laid down in the Constitution and the Court’s Law no. 48/1979.<sup>205</sup> However, such an argument could be refuted on the grounds that the Court’s decisions are final and cannot be appealed.

Finally, Egyptian constitutional jurisprudence needs to step up its rhetoric by promoting the idea of reviewing the constitutionality of constitutional amendments through the condemnation of the dangers of a non-self-entrenched constitutional provision that it may lead to a fraud upon the constitution.

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<sup>203</sup> See Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, QUEEN’S L.J. (forthcoming, 2016).

<sup>204</sup> *Reference re Senate Reform*, 2014 SCC 32, <http://www.canlii.org/en/ca/scc/doc/2014/2014scc32/2014scc32.html>.

<sup>205</sup> See Abdelaal, *supra* note 194.