

# Constitutional Narcissism on the Couch of Psychoanalysis

## Constitutional Unamendability in Portugal and Spain

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### Abstract

*Comparing the Portuguese Constitution, which has the longest unamendable clause in the world, with the silence of the Spanish Constitution regarding the language of eternity is indeed a fascinating exercise. Each state's quantum of constitutional change seems to be quite different. One can wonder how two neighbouring states that share a heavy history of right-wing dictatorships and transitioned to democracy forty years ago opted for such dissimilar constitutional designs. However, appearances are often misleading, and an effort should be done to unveil this curious mismatch.*

*Both legal orders suffer from what I call constitutional narcissism, which manifests itself through the urge to perpetuate the foundational constitutional moment. Unamendable clauses (Portugal) and quasi-unamendable clauses (Spain) recast one of constitutional theory's inner paradoxes: Can the constituent power of the people be petrified in one historical constituent decision and constrain future democratic transitions? And what if a volatile contemporary majority seeks to undermine the democratic process and run against the constitutional DNA achievements of the last centuries?*

*Even if the original version of the Portuguese Constitution prohibited several provisions from ever being amended, some of these provisions were indeed modified or removed in the 1989 constitutional amendment process. This occurred without major disagreement from the political organs, scholars, or the judiciary. Therefore, the vexata quaestio remains unanswered: Given their obsolescence or hindrance towards good governance, should entrenchment clauses be eliminated de jure (through a channelled constitutional amendment process, such as the double amendment procedure) or de facto (through a revolutionary process materialized outside of the constitutional framework)?*

**Keywords:** unamendable/ eternity clauses, de jure and de facto constitutional change, constitutional narcissism, foundational design, helicopter founding fathers, constitutional alma mater.

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## A Introduction

This is a particular auspicious time to undertake a project on hyper-rigidity and unamendability. Comparative constitutional law studies on constitutional amendment are fortunately thriving. In an impressive empirical research, Yaniv Roznai has collected information about unamendable clauses around the world.<sup>1</sup> He has concluded that, in the aftermath of World War II, “out of the 742 constitutions that were examined, 212 constitutions (28 per cent) include or included unamendable provisions”.<sup>2</sup> The author identified a growth not only in the unamendable clauses’ quantity but also on their *quality* (complexity and length).<sup>3</sup>

This article aims to cast theoretical light on the fragile balance between change and permanence by situating hyper-rigid constitutional amendment procedures at the crossroads of democracy and constitutionalism. Part B gathers several levels of increased constitutional change (constitutional interpretation, constitutional mutation, constitutional amendment, and constitution-making).

Part C focuses on constitutional permanence, addressing constitutional rigidity and the danger of semantic constitutions. This article examines the conceptual coherence and normative desirability of entrenchment clauses, highlighting the Portuguese Constitution, which has a remarkable, substantial limitations list. Although the Spanish Constitution does not incorporate an entrenchment clause, its constitutional amendment procedure is highly complex and rigid.

If democracy is a *pro tempore* phenomenon, which envisions the possibility of change, constitutionalism aims at permanence and stability. Constitutions are conceived to be long-lasting texts. In order to do so, constitutions must be adaptable to a mutable society, to changeable political views, idiosyncrasies, and so on. If the gap between what is written in the constitution and the constitutional reality is too significant, then a total amendment, or even the adoption of a new constitution, could be necessary.

When unamendable clauses become an ethereal, intangible core, they obstruct societal evolution and ironically betray their original intent of preserving the constitutional order. In so doing, entrenchment clauses become insurmountable obstacles to constitutional change, and the only way to surpass them is to breach the current constitutional order and to approve a new constitution. In this scenario, from a desirable, continuous constitutional *evolution*, there is an abrupt constitutional *revolution*. In practice, this sudden change can occur through a revolution or even a bloodless legal *coup d’État*.

Constitutional stagnation would mean an illegitimate differentiation between the “the people”: the constituent power would represent the illuminated people (the sovereign people at the time of the constitutional foundation) and the constitutional amendment power would in turn embody the subjugated people

1 Y. Roznai, ‘Amendment Power, Constituent Power, and Popular Sovereignty’, in R. Albert, X. Contiades & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017a, pp. 23–49, at p. 21.

2 *Ibid.*

3 *Ibid.*

(the current people).<sup>4</sup> It seems undeniable that the constitutional text should refrain from becoming “primary monologues rather than dialogues” between the founding fathers and the future generations.<sup>5</sup>

Part D suggests an innovative perspective on the Portuguese and Spanish hyper-rigid constitutional amendment procedures. Narcissistic traits in the exceedingly strict amending formulas of both constitutions will be acknowledged, even though this dysfunctionality has significant differences vis-à-vis each constitutional experience. The narcissism of the Portuguese foundational moment triggered a substantial divorce from the past and an ideological compromise: the transition to a classless society. I will argue that the Portuguese Constitution of 1976, being one of the last postmodern, revolutionary constitutions, is distinctly a *defensive* text, with singularities that set it apart from the rest of the European constitutions.

On the contrary, the Spanish Constitution of 1978 is in tune with the main European constitutional models. The Spanish constitutional hyper-rigidity reveals a *functional* approach that is the result of a coping mechanism for constitutional anxiety and fear of historical comebacks. As the lessons from the 1931 Constitution and the Civil War taught, and as the current crisis in Catalonia reflects, one of the most delicate problems of the Spanish constitutionalism is the regional structure of Spain.

## B Constitutional Change

The constitutional foundational moment is a constitution-making process, culminating either in a single constitutional text (codified constitution) or in several legislative acts with constitutional worth (uncodified constitution). However, the foundational stone is just a part (although the most magnificent one) of a continuous process.

For this reason, in terms of constitutional theory and political philosophy, we must return to the normative basics and ask not only what a constitution *is* but also what a constitution *can* and *should* be. We are prompted to revisit the core elements of constitutionalism, such as democracy, popular sovereignty, and rule of law.

Belonging to a generation that was born after the constituent foundational moment, I strongly believe that a constitution has more to offer than predetermined legal, political, and societal choices. So, what should constitutions offer, aside from their normativity and higher hierarchical status? Choices, adaptability, guidance, safety, and trust.

4 Stating that each constitution represents the people’s consensus. See K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. III, München, Verlag C. H. Beck, 1988, p. 122.

5 S. Ranchordás, ‘Constitutional Sunrise’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 177-197, p. 177. Accordingly, M. Nogueira de Brito, *A Constituição Constituinte: ensaio sobre o poder de revisão da Constituição*, Coimbra, 2000, p. 126.

I agree with Häberle's perspective of the constitution being the "thought of the possibilities" (*Möglichkeitsdenken*), which is consonant with the ideas of openness and mutability.<sup>6</sup> The way a constitutional text is accepted by future generations, easing or hindering constitutional change, tells us a lot about its legitimacy and normative force.

In the article 'Does history define the Constitution or does the Constitution define history?', I have argued for a reciprocal influence between the two.<sup>7</sup> Quite simply, no one doubts that historical events triggered constitutional revolutions and constitutional rebuilding (such as the liberal revolutions influenced the American and the French liberal constitutions). Yet, some constitutions tried to influence the course of history, with more or less success. For example, the original version of the current Portuguese Constitution aimed at building a utopian, classless society.<sup>8</sup>

The magic formula for a long-lasting and normative constitution is in the delicate balance between structural legal variability and the constitution's pretension of durability.<sup>9</sup> Rosalind Dixon and David Landau label this combination as "tiered constitutionalism".<sup>10</sup> As constitutions are not attuned with constitutional fossilization, they should be compatible with constitutional pluralism and adherence to multiple (and sometimes even conflicting) principles.<sup>11</sup> More importantly,

- 6 P. Häberle, *Verfassung als öffentlicher Prozeß – Materialien zu einer Verfassungstheorie der offenen Gesellschaft*, 2nd ed., Berlin, Duncker, & Humblot, 1996. With a similar approach, A. Anzon, 'La Corte costituzionale e il «diritto vivente»', in *Scritti su la Giustizia Costituzionale – In Onore di Vezio Crisafulli*, Padua, CEDAM, 1985, pp. 1-19, pp. 7-11; E.A. Young, 'The Constitution outside the Constitution', *Yale Law Journal*, Vol. 117, 2007, pp. 408-473, at p. 411.
- 7 C.S. Botelho, 'A História faz a Constituição ou a Constituição faz a História? – Reflexões sobre a História Constitucional portuguesa', *Revista do Instituto de Direito Brasileiro*, Vol. 2, No. 1, 2013, pp. 229-247.
- 8 There are other examples of the post-Soviet Eastern European constitutions that are mainly aspirational and have very little connection to reality. This devalues the constitution and the very purpose of a codified text. See R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal*, Vol. 31, 2008, pp. 27-29 and 35.
- 9 C.S. Botelho, *Os Direitos Sociais em Tempos de Crise – Ou revisitar as normas programáticas*, Coimbra, Almedina, 2015, p. 429; D. Wyduckel, 'Verfassung und Konstitutionalisierung – Zur Reichweite des Verfassungsbegriffs im Konstitutionalisierungsprozess', in H. Butzer, M. Kaltenborn, & W.H.S.F. Meyer (Eds.), *Organisation und Verfahren im sozialen Rechtsstaat – Festschrift für Friedrich E. Schnapp zum 70. Geburtstag*, Berlin, Duncker, & Humblot, 2008, pp. 893-924, at p. 895; N. Luhmann, *Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt am Main, Suhrkamp, 1999, pp. 130 and 145.
- 10 R. Dixon & D. Landau, 'Tiered Constitutional Design', *George Washington Law Review*, forthcoming. R. Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, Vol. 42, 2010, pp. 663-715, 709-712 discusses the idea of tiers and suggests the use of an 'entrenchment simulator' that recommends multiple levels of amendment difficulty.
- 11 G. Zagrebelsky, 'Storie e Costituzione', in G. Zagrebelsky, P.P. Portinaro, & J. Luther (Eds.), *Il Futuro della Costituzione*, Turin, Einaudi, 1996, pp. 35-82, pp. 81-82; R. Scholz, 'Konstitutionalisierte Politik oder politisierte Konstitution?', in *Realitätsprägung durch Verfassungsrecht – Kolloquium aus Anlass des 80. Geburtstages von Peter Lerche*, Berlin, Duncker, & Humblot, Berlin, pp. 9-16, at p. 10.

constitutions “should speak to all citizens, whatever their divergent paths to citizenship”.<sup>12</sup>

The heart of constitutional change lies in the democratic principle, bridging the past and the present. Some constitutions are more or less rigid; some have been amended several times or just a few. If we compare the German Constitution (1949) with the Spanish Constitution (1978) or with the Portuguese Constitution (1976), there are significant differences. The German Constitution was amended more than fifty times, whereas the Spanish Constitution was amended only twice and the Portuguese Constitution seven times.<sup>13</sup>

So how does the constitution adapt itself to the passing of time? How can a static constitutional text incorporate dynamic urges from external sources representing the living constitution?

The following figure will contemplate, in a decreasing order, levels of constitutional change difficulty: constitution-making, constitutional amendment, constitutional mutation, and constitutional interpretation. All of these constitutional processes belong, with different intensity, to *lato sensu* constituent power. I will begin with constitutional interpretation and follow the openness path until constitutional amendment, which happens when constitutional elasticity cannot adapt anymore to the changing circumstances of the societal or political ethos.

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Constitution-making

Constitutional amendment

Constitutional mutation

Constitutional interpretation

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*Amendment processes* are constitutional legitimacy enablers, as they allow people to revisit their constitution.<sup>14</sup> The formal process of revision might have several degrees of rigidity. Yaniv Roznai’s innovative thesis creates a very interesting metaphor of a “constitutional escalator” of procedural protections.<sup>15</sup>

This ‘escalator’ of rigidity can be foreseen in several requirements of constitutional reform: approval by multiple houses, supermajority rules, multiple rounds of voting, popular participation either direct (referendum) or indirect (after the

12 R. Albert, ‘Constitutional Handcuffs’, *Arizona State Law Journal*, Vol. 42, 2010, pp. 663-715, at p. 689.

13 This is the reason why some authors referred to a ‘euphoria’ of constitutional amendment in Germany. See P. Häberle, ‘Zeit und Verfassungsstaat – kulturwissenschaftlich betrachtet’, *JURA*, Vol. 1, 2000, pp. 1-10, pp. 2-3; R. Wahl, ‘Verfassungsgebung – Verfassungsänderung – Verfassungswandel I’, in R. Wahl (Ed.), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation – Vorträge bei deutsch-japanischen Symposien in Tokyo 2004 und Freiburg 2005*, Berlin, Duncker, & Humblot, 2010, pp. 29-48, pp. 37-38. See also G. Halmai, *Perspectives on Global Constitutionalism – The Use of Foreign and International Law*, Eleven International Publishing, 2014, p. 32.

14 X. Contiades & A. Fotiadou, ‘Amendment-metrics’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 219-240, at p. 227.

15 Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, Oxford, OUP, 2017b, pp. 164-168.

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dissolution of the current parliament, the new parliamentary composition should ratify the amendment), time frame for amendments, amongst others.

*Constitutional mutation* also favours constitutional evolution, but through a slower path and taking into consideration societal and cultural changes. Throughout a constitutional mutation, the constitutional interpreter confers a different meaning to the constitutional text, without altering it.<sup>16</sup> An example of a constitutional mutation is present in the ruling of the Portuguese Constitutional Court (PCC) regarding same-sex marriage.<sup>17</sup> The Portuguese Constitution protects marriage and family, but it does not literally state that marriage is a contract between a man and a woman. Therefore, when the parliament altered the Portuguese Civil Code's definition of marriage, to allow same-sex marriage, the question of the compatibility with the Portuguese Constitution arose.

The president of the Republic asked the PCC to conduct a prior review of the constitutionality of the norms contained in a Decree of the Assembly of the Republic, which was sent to him for enactment and which permitted civil marriage between persons of the same sex.<sup>18</sup>

The court reasoned that extending marriage to same-sex spouses did not

conflict with the recognition and protection of the family as a 'fundamental element of society', inasmuch as the Constitution undid the bond between the formation of a family and marriage, and offered its protection to the distinct family models which exist in our social reality. What is more, attributing the right to marry to persons of the same sex does not affect the freedom to enter into wedlock enjoyed by persons of different sexes, nor does it change neither the rights and duties which apply to those persons as a result of their marriage, nor the representation or image which they or the community may attribute to their matrimonial state.

The court, therefore, decided not to hold the Portuguese Civil Code norms unconstitutional.

*Constitutional interpretation*, whether or not it evolves to a concrete substantial constitutional mutation, is also a relevant tool of constitutional evolution. Constitutional justice plays a relevant role, through the judicial interpretation of the state's constitution and of other substantive (even if not formal) European or international constitutional norms. It is important not to forget the major role

16 A. Voßkuhle, 'Gibt es und wozu nutzt eine Lehre vom Verfassungswandel?', in R. Wahl (Ed.), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation – Vorträge bei deutsch-japanischen Symposien in Tokyo 2004 und Freiburg 2005*, Berlin, Duncker, & Humblot, 2010, pp. 201-210; Wyduckel, 2008, p. 894; Helmuth Schulze-Fielytz, 'Verfassung als Prozeß von Verfassungsänderungen ohne Verfassungstextänderungen', in R. Wahl (Ed.) *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation, cit.*, p. 219; Häberle, 2000, pp. 2-3.

17 Ruling no. 121/10, 08/04/2010.

18 In Ruling no. 359/2009, the PCC decided that the Portuguese Constitution does not oblige the law to allow same-sex marriages, and that both prohibiting them altogether and providing for a different regime would be legitimate.



played by other constitutional interpreters, such as the parliaments, executive bodies, and other political organs.<sup>19</sup>

Notwithstanding this, there are several particularities of the constitutional interpretation when compared with the interpretation of ordinary norms: (i) constitutional design is often abstract, blurry, and open to interpretation;<sup>20</sup> (ii) the laconic trait of some constitutional norms; (iii) high substantial density of constitutional norms; and (iv) the rigidity of constitutional norms.<sup>21</sup>

## C Constitutional Permanence

### I Constitutional Rigidity

An endogenous feature of lawmaking is the synchronic reasoning that tends to focus on a somehow limited time horizon: the near past, the present, and the immediate future. This temporal trait is especially evident in constitutional lawmaking, and there can be identified both static and dynamic characteristics.<sup>22</sup> If, in a retrospective view, the constitution aims to maintain its historical heritage, in a prospective look (*actio in distans*), it must allow enough openness to adapt itself to the evolution of the constitutional reality.

Constitutional rigidity is paramount for the stability of the constitutional text.<sup>23</sup> Empirical studies show a dangerous link between extreme constitutional flexibility and constitutional demise.<sup>24</sup> Since constitutionalism is a “matter of pru-

19 In Japan, the Cabinet Legislation Bureau interprets the constitution in a *quasi-judicially* binding way.

20 For V.F. Comella, ‘Una defensa de la rigidez constitucional’, *Doxa. Cuadernos de Filosofía del Derecho*, Vol. 23, 2000, pp. 29-47, p. 34, constitutional abstraction is a vital trait in a constitutional text, in order to maintain its democratic legitimacy. It is abstraction that allows the union of several generations under the same constitutional roof (p. 35). In a similar sense, see C.R. Sunstein, *A Constitution of Many Minds*, Princeton University Press, 2009, pp. 19-20.

21 C.S. Botelho, ‘O papel dos princípios na interpretação constitucional’, in M.L. Amaral & S.P. Bettencourt (Eds.), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, Coimbra, Almedina, I, 2016, pp. 59-86, pp. 75-82. See also M.A. Reyes, ‘La interpretación de la Constitución y el carácter objetivado del control jurisdiccional’, *Revista española de derecho constitucional*, Vol. 6, 1986, pp. 85-136, p. 109; M. Rosenfeld, ‘Constitutional adjudication in Europe and the United States: paradoxes and contrasts’, in G. Nolte (Ed.), *European and US Constitutionalism*, Cambridge University Press, 2005, pp. 197-238, at pp. 217-218; P. Holländer, ‘El principio de proporcionalidad: ¿variabilidad de su estructura?’, in J.-R. Sieckmann (Ed.) *La teoría principialista de los derechos fundamentales – Estudios sobre la teoría de los derechos fundamentales de Robert Alexy*, Madrid, Marcial Pons, 2011, pp. 207-222; R.C.V. Ooyen, *Politik und Verfassung – Beiträge zu einer politikwissenschaftlichen Verfassungslehre*, Wiesbaden, VS Verlag für Sozialwissenschaften, 2006, p. 24; U. Ramsauer, ‘Die Rolle der Grundrechte im System der subjektiven öffentlichen Rechte’, *Archiv des öffentlichen Rechts*, 111, 1986, pp. 501-536, at p. 513.

22 C.S. Botelho, *The Foundations and Traditions of Constitutional Amendment*, R. Albert, X. Contiades, & A. Fotaidou (Eds.), reviewed in *Católica Law Review*, 2018, pp. 129-134, at p. 131.

23 On the contrary, defending that one key to constitutional stability is flexibility, see Z. Elkins, T. Ginsburg, & J. Melton, *The Endurance of National Constitutions*, Cambridge University Press, 2009. To some, rigid constitutions might even provoke revolutionary processes. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Classics, 1982, pp. 666-667.

24 Roznai, 2017b, p. 5

ence”,<sup>25</sup>

it should be protected against a possible irritation of “amendmentitis”.<sup>26</sup> Likewise, the constitution must impose some boundaries and limits regarding provisions considered worth preserving.<sup>27</sup>

If the constitution is swept away by the unpredictability, manipulation, and the caprices of the given times, it will not be able to influence and to serve as a barometer of the legal, political, and societal tissue.<sup>28</sup> The ability of a constitution to withstand external shocks is a form of “constitutional resilience”.<sup>29</sup>

Scholars point out several advantages to the rigid model that usually accompanies written constitutions. First, rigidity keeps the constitution safe from democratic volatility of periodic majorities. Second, rigidity is a manifestation of the foundational trait of a constitution.<sup>30</sup>

The measure of rigidity – higher or lower – can be found in several aspects that shield the constitutional text from futile or impulsive changes. However, a Constitution that aims to “limit the *demos* power” must be very demanding regarding its amendability.<sup>31</sup>

## II *The Danger of Semantic Constitutions*

The *vexata quaestio* of how to balance an old constitutional text with new historical, societal, and political scenarios has occupied the mind of legal and philosophic scholars for decades.<sup>32</sup> One can remember how Karl Löwenstein, in his famous book *Verfassungslehre*, tried to discover the ‘magic formula’ of a lasting constitution. Löwenstein’s acknowledgement of how a constitutional text can lack norma-

25 M. Loughlin, *The Idea of Public Law*, Oxford, OUP, 2003, pp. 162-163.

26 K.M. Sullivan, ‘Constitutional Amendmentitis’, *The American Prospect*, Vol. 20, 1995.

27 Botelho, 2018, pp. 59-86; M.H. Kurik, ‘Die Theorie der Verfassungsentwicklung’, in R. Wahl (Ed.), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation – Vorträge bei deutsch-japanischen Symposien in Tokyo 2004 und Freiburg 2005*, Berlin, Duncker, & Humblot, 2010, pp. 13-28, at pp. 20-21.

28 J.R. Alamillo, ‘De la reforma constitucional y sus límites materiales. Consideraciones desde la Teoría del Estado y de la Constitución’, *Teoría y Realidad Constitucional*, Vol. 30, 2012, pp. 89-138, at p. 134, Nogueira de Brito, 2000, pp. 157, 161, and 164; P. Otero, *Direito Constitucional Português*, Coimbra, Almedina, 2010, p. 202; P. Badura, ‘Die Verfassung im Ganzen der Rechtsordnung und die Verfassungskonkretisierung durch Gesetz’, in J. Isensee & P. Kirchhof (Ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Heidelberg, C.F. Müller Juristischer Verlag, 1992, pp. 165-188; R. Medeiros, *A Constituição Portuguesa num Contexto Global*, Lisboa, Universidade Católica Editora, 2015, p. 210; W. Berns, *Taking the Constitution Seriously*, New York, Simon & Schuster, 1987, p. 236; Roznai, 2017b, p. 17.

29 X. Contiades & A. Fotiadou, ‘On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?’, *Vienna Journal of International Constitutional Law*, Vol. 9, No. 1, 2015, pp. 3-26.

30 A.B. Ortega & I.S. Guijarro, ‘Constitutional Change in Spain’, in X. Contiades (Ed.), *Engineering Constitutional Change – A Comparative Perspective on Europe, Canada and USA*, Routledge, 2013, pp. 299-323, at p. 299.

31 G.A. Ribeiro, ‘O paradoxo democrático na constituição portuguesa de 1976’, in M.L. Amaral & S.P. Bettencourt, *Estudos em Homenagem ao Presidente Rui Moura Ramos*, Coimbra, Almedina, 2016, pp. 121-148, at p. 131.

32 Botelho, 2018, p. 129.



tive content and have no strength to block the violation of fundamental rights encouraged him to develop the theory of the normative force of the constitution.<sup>33</sup>

Instead of a normative constitution, in which the constitutional text accompanies the constitutional reality (the famous “living constitution”), aspirational constitutionalism is often based on semantic constitutions.<sup>34</sup>

Aspirational constitutionalism, characterized for having a prolix fundamental rights catalogue and often accompanied by the restriction of governments’ freedom of action or by an uncontrolled judicial activism, can become sort of a “cult of constitutionalism”.<sup>35</sup> In this scenery, in each political turn, all the attention will “anxiously turn to the magic idea of the constitution, as if the solution to every problem depended exclusively on it”.<sup>36</sup>

The “quasi-religious”<sup>37</sup> idea of the constitution will often keep it as an object of devotion and above external stimuli. Perhaps, most dramatically, the sacred idea of the constitution could never pertain to the text itself, but to the people. “Popular choice” is therefore the only sacred “source of the text’s legitimacy”.<sup>38</sup>

In a semantic constitution, the constituent power tries to portray the historical and political moment of its elaboration, printing the memory and the resilience of a somehow mystical constituent moment eternally. This “impossible constitution”<sup>39</sup> will in turn promote a distressing lack of connection between the constitutional text and the constitutional reality.<sup>40</sup>

33 K. Löwenstein, *Verfassungslehre*, Mohr Siebeck, 2000, pp. 151-154.

34 C.S. Botelho, ‘Aspirações constitucionais e força normativa da Constituição – Requiem pelo «conceito ocidental da Constituição»?’, in M.A. Vaz, C.S. Botelho, L.H. Terrinha, & P. Coutinho (Eds.), *Jornadas nos Quarenta Anos da Constituição da República Portuguesa – Impacto e Evolução*, Porto, Universidade Católica Editora, 2017, pp. 17-50; K.L. Scheppele, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models’, *International Journal of Constitutional Law*, Vol. 1, No. 2, 2003, pp. 296-324, at p. 299; P. Häberle, *Das Menschenbild im Verfassungsstaat*, Berlin, Duncker, & Humbolt, 2008, pp. 29-30. For an interesting connection between aspirationalism and unamendability, see Roznai, 2017b, p. 32.

35 R. Albert, ‘The Cult of Constitutionalism’, *Florida State University Law Review*, Vol. 39, 2012, pp. 373-416.

36 R.E. Soares, ‘O conceito Ocidental de Constituição’, *Revista de Legislação e Jurisprudência*, Vol. 119, No. 1986, pp. 36-73. Considering that the strength of constitutionalism may sometimes be quite overstated, see J.Z. Benvindo, ‘«Revolutionary Reform» and the Seduction of Constitutionalism’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 157-173, at p. 168.

37 See P.W. Kahn, *Putting Liberalism in Its Place*, Princeton, Princeton University Press, 2005, p. 287; S. Levinson, *Constitutional Faith*, Princeton, Princeton University Press, 2011; X. Contiades & A. Fotiadou, ‘The Emergence of Comparative Constitutional Amendment as a New Discipline – Towards a Paradigm Shift’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 367-388, p. 377.

38 Albert, 2017, p. 677.

39 P.M. Pacheco, ‘La Constitución imposible: el gobierno de la economía en la experiencia constitucional española’, in J.R.E. Castillo (Ed.), *Las sombras del sistema constitucional español*, Trotta, 2003, pp. 293-320, p. 295. As L.H. Tribe & M. Dorf highlight, the constitution might be “mysterious”, but it certainly is not “mystical” (*On Reading the Constitution*, Cambridge, Harvard University Press, 1991, p. 18).

40 M.A. Vaz, *Teoria da Constituição – O que é a Constituição, hoje?*, 2nd ed., Porto, Universidade Católica Editora, 2015, pp. 73-77.

As a metaphor, we can think of the constituent power taking a picture of a concrete reality and trying very hard to perpetuate this reality through the times to come. However, history shows that, in an *intragenerational* and *intergenerational* perspective, the political and sociological sensibilities of one time are not necessarily bequeathed to the following decades.

When a constitution is not politically neutral and ideologically functionalizes its fundamental rights, it risks being overcome by democratic volatility.<sup>41</sup> In this situation, we do not stand for a genuine constitution, rather a symbolic one or, in Rainer Wahl's words, a "pseudo-Constitution".<sup>42</sup>

One of the common traits of semantic constitutions is the ritualistic approach of the amendment process.<sup>43</sup> Another trait of (forthcoming) semantic constitutions is, as we will explain next, the 'hyper-rigidity' of the constitutional text, which might develop pathological distortions (*see* constitutional narcissism, *infra* D).<sup>44</sup>

### III 'Hyper-rigidity': Unamendable or Eternal Clauses

#### 1 What Are Unamendable Clauses?

Unamendable clauses (also called 'entrenchment clauses', 'eternity clauses', or 'immutable clauses') portray a given constitutional identity and impose substantial limits to constitutional change. Thus, *e.g.*, republican/monarchical forms of government, federalist/unitary state, state's unity, or protection of fundamental rights and liberties.

As Richard Albert wrote, constitutional unamendability "tells us a lot about that constitution and its essential values".<sup>45</sup> When framers of the constitution portray the constitution as an accomplished and perfect set of norms, they forget that each constitution has a life of its own, which flows from the interaction of the society and the political players. There is no way to democratically block societal change and prevent self-governing. The more a constitutional text invests its energy in blocking change, the more severe that change will be.

Some scholars prefer to avoid the language of eternity – such as 'eternity clauses' – when referring to unamendable clauses, since unamendability can never restrict primary constituent power, which is, as Sieyès once described it, *omnipre-*

41 C.S. Botelho, 'Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Trilogy or Trinity?', *Comparative Constitutional Law and Administrative Law Quarterly*, Vol. 3, No. 4, 2017, pp. 62-87, at pp. 65-67.

42 Wahl, 2014, p. 31.

43 Contiades & Fotiadou, 2017, p. 378.

44 Using the expression "hyper-rigidity", *see* C.B. de Moraes, *Curso de Direito Constitucional – Teoria da Constituição em Tempo de Crise do Estado Social*, Vol. II, Coimbra, Coimbra Editora, 2014, p. 55.

45 R. Albert, 'Introduction: The State of the Art in Constitutional Amendment', in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 1-19, at p. 8. *See also* P. Suber, *The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change*, Peter Lang International Academic Publishers, Bern, 1990.

sent.<sup>46</sup> I will also avoid the use of the term ‘eternal’, although I do not entirely agree with the assertion. Something that is designed as eternal might change in the future, facing different circumstances. As a Brazilian poet, Vinicius de Moraes, once wrote: “may it [love] be endless while it lasts” (*que seja infinito enquanto dure*).

The constitutional designers’ intent may be “to formalise a bargain or to preserve a founding norm, to transform the state or to reconcile previously warring groups, or quite simply to express a constitutional value”.<sup>47</sup> Whatever the reason, it is important to emphasize that the first limit that derives from substantial limitation clauses is the prohibition of total amendments.<sup>48</sup> That reduces constitutional amendment to a *partial* process.

Constraining the power of constitutional amendment, although necessary to preserve stability, should never be done lightly, as it raises pertinent normative questions.<sup>49</sup> One can wonder which vital subjects are able to stand firm against removal or alteration, even by super-majorities. Borrowing John Locke’s expression, what are the “constitutional essentials” of each constitutional order?<sup>50</sup> Some of the eternity clauses are indeed vital traits in a democratic state (*e.g.*, the separation of the State and the Church), others connect with a specific political choice (federation/confederation or unitary state) or re-join with the old idea of a natural law above the national and international legal positivation (human dignity and natural rights).

The main intent of unamendable clauses might be an honest one: to attempt the preservation of political, juridical, and democratic conquests after decades of authoritarian or totalitarian regimes. They portray the constitutional fathers’ faith and distrust in political actors.<sup>51</sup> As I emphasize below, the Portuguese and Spanish constitutional history fits well in this picture of democratic transition. Unsurprisingly, though, the argument that unamendable clauses aim to preserve the good democratic traits can be reversed. By contrast, it can be designed to preserve social injustice, power asymmetry, and anti-democratic choices.<sup>52</sup>

For this reason, unamendable clauses, when perceived in an absolute way, hinder the stability that they were built to preserve. In an interesting metaphor,

46 F. Araújo, ‘Limites à revisão constitucional – um paradoxo?’, *Polis – Revista de Estudos Políticos*, Vol. 7-8, 1999, pp. 95-99, and Roznai, 2017b, p. 16.

47 Albert, 2017, pp. 7-8.

48 P.B. di Ruffia, ‘Sui limiti della revisione costituzionale’, in *Annali del Seminario giuridico dell’Università di Catania*, Napoli, Jovene, 1948, pp. 122-172, at p. 149.

49 O. Doyle, ‘Constraints on Constitutional Amendment Powers’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 73-95, at p. 95.

50 J. Rawls, *Political Liberalism*, New York, Columbia University Press, 2005, pp. 227-231.

51 D.J. Boudreaux & A.C. Pritchard, ‘Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process’, *Fordham Law Review*, Vol. 62, 1993, pp. 111-162, at p. 123; Roznai, 2017b, p. 17.

52 A.S. Pedra, ‘Un análisis sobre la intangibilidad de las cláusulas pétreas’, *Derechos y Libertades*, No. 22, 2010, pp. 241-260, at p. 251; Roznai, 2017a, p. 28.

Denis Baranger argues that “constitutional substance is like quicksilver: it slips from one’s grasp. Constitutional form is like crystal: it is easily broken”.<sup>53</sup>

But can we state that unamendable clauses force social breach and constitutional replacement? In other words, do they promote constitutional revolutions? The answer is still unclear, as some scholars remind us that a new constitutional order can emerge in a non-violent way, just like the example of some Latin American constitutions.<sup>54</sup>

## 2 Are Unamendable Clauses Intangible?

“(B)y fixing the palette of non-negotiable colors in its self-portrait”, unamendable clauses are armours against constitutional law’s contingency.<sup>55</sup> With contingency in mind, Luís Heleno Terrinha suggests that unamendable clauses’ added value is not what they portrait, but what they do not: their “latent possibilities”.<sup>56</sup> Accordingly, Xenophon Contiades refers to “the charm of the forbidden”, which can become appealingly desirable.<sup>57</sup>

Literature has been debating unamendable clauses’ significance and whether it is possible to alter or remove procedural and substantive amendment rules. We can identify three main lines of thought regarding unamendable clauses: (i) essentiality and immutability, (ii) mutability, and (iii) mitigation of their immutable trait.

The first thesis perpetuates *ad aeternum* the constitutional foundational moment and grounds itself on the distinction between original constituent power and derived constituent power.<sup>58</sup> Its well-known argument is that the authority to amend a constitution is inferior to that of the constituent power.<sup>59</sup> In this sense, the legitimacy of the constituent power justifies the imposition of con-

53 D. Baranger, ‘The Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)’, *Israel Law Review*, No. 44, 2011, pp. 389-428, at p. 290.

54 Such as the Colombian Constitution of 1991 or the Venezuelan Constitution of 1999. See H.N. Alcalá, ‘Consideraciones sobre poder constituyente y reforma de la Constitución en la teoría y la práctica constitucional’, *Revista Ius et Praxis*, Vol. 15, No. 1, 2008, pp. 229-262, at p. 249.

55 Albert, 2010, p. 700.

56 L.H. Terrinha, ‘Os limites materiais da revisão constitucional: reflexividade, reflexão e contingência do sistema jurídico-constitucional: Uma leitura teórico-sistémica do art. 288.º da Constituição da República Portuguesa’, in M.A. Vaz, C.S. Botelho, L.H. Terrinha, & P. Coutinho (Eds.), *Jornadas nos Quarenta Anos da Constituição da República Portuguesa – Impacto e Evolução*, Porto, Universidade Católica Editora, 2017, pp. 213-242, at p. 230.

57 X. Contiades, ‘Constitutional Change Engineering’, in X. Contiades (Ed.), *Engineering Constitutional Change – A Comparative Perspective on Europe, Canada and USA*, London, Routledge, 2013, pp. 1-5, at p. 4.

58 In Portugal, see J.J.G. Canotilho, ‘O problema da dupla revisão na Constituição Portuguesa’, *Separata da Revista Fronteira*, Coimbra, 1978, pp. 32-34, J.J.G. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, II, Coimbra Editora, 2010, pp. 1010-1019; Marcelo Rebelo de Sousa, ‘Partidos Políticos na Constituição’, *Estudos sobre a Constituição*, II, Lisboa, Pertrony, 1978, p. 71. Against the classification as ‘original’ or ‘derived’ power, very common in the South European literature, arguing that no constituent power is ever truly original, as it does not ever act *ab ovo* or “in a *tabula rasa* or as a pure vacuum”, see Roznai, 2017b, p. 121.

59 C.E. González, ‘Popular Sovereign versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment not Amend the Constitution?’, *Washington University Law Quarterly*, Vol. 80, 2002, pp. 127-242, at p. 131.

straints to the constituted order. Since the remote constituent ‘people’ “has left the house”, the only admissible way to breach these unamendable clauses is through a revolutionary process.<sup>60</sup>

The second thesis applies the temporal rule of *lex posterior derogat lex anterior* and favours the concepts of democratic constitutionalism and parliamentary sovereignty.<sup>61</sup> The impossibility to update the constitutional texts recalls the “dead hand problem” and questions the roots of democratic legitimacy.<sup>62</sup> Its premise is that the power to amend the constitution is not inferior to the power of creating one. There is no difference between the inaccessible “people at time-1-the founding generation” and the tangible “people at time-2”, who want to update the constitution in order to genuinely self-govern themselves.<sup>63</sup> The real nub of the critique is that having a ‘gone with the wind’ unlimited constituent power is a *contradictio in terminis*.

Intermediate theses try to balance eternity with some degree of changeability and empower derived constituent power as a genuine sovereign power.<sup>64</sup> In order to achieve this goal, some scholars interpret unamendable clauses as having an aggravated degree of rigidity. They are self-imposed limitations to the derived constituent power that can be altered by it. These clauses cannot be changed as long as they remain positivated in the constitutional text. Therefore, they can be altered, or even removed, just like any other constitutional norm. The only situation in which unamendable clauses could not be amended is if the entrenchment clauses’ list contemplated constitutional revision.<sup>65</sup>

A debate has started over the most recognized intermediate thesis, the ‘double revision theory’ (in Portuguese, *tese da dupla revisão*). This innovative thesis

- 60 T. Pereira, ‘Constituting the Amendment Power’, in R. Albert, X. Contiades, & A. Fotiadou (Ed.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 105-120, at p. 117. For a very interesting analysis on this topic, see Z. Oklopčić, ‘Constitutional Theory and Cognitive Estrangement – Beyond Revolutions, Amendments and Constitutional Moments’, in the same book, pp. 51-71.
- 61 J. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, London, Routledge, 2012, and Albert, 2010, pp. 663-715. In Portugal, see M. Caetano, *Constituições Portuguesas*, Verbo, 1994, p. 157.
- 62 J. Goldsworthy, ‘The Case for Originalism’, in G. Huscroft & B.W. Miller, *The Challenge of Originalism – Theories of Constitutional Interpretation*, Cambridge, Cambridge University Press, 2011, pp. 42-69, at p. 57; Dixon & Landau, 2010, p. 10.
- 63 L.M. Seidman, *On Constitutional Disobedience*, Oxford, Oxford University Press, 2013, p. 13; M. Tushnet, ‘Comment on Doyle’s Constraints on Constitutional Amendment Powers’, in R. Albert, X. Contiades, & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 97-104, at p. 101; Albert, 2010, pp. 677 and 698-699. Highlighting that the most relevant virtue of a self-governing people is precisely the capacity to amend a constitution; see S. Barber, *Constitutional Failure*, Lawrence, University Press of Kansas, 2014, p. 111.
- 64 J.E.M. Machado, ‘The Portuguese Constitution of 1976’, in X. Contiades (Ed.), *Engineering Constitutional Change – A Comparative Perspective on Europe, Canada and USA*, Routledge, 2013, pp. 273-298, at p. 286; J.B. Gouveia, *Manual de Direito Constitucional*, Coimbra, Almedina, 2005, p. 643; J. Miranda, *Manual de Direito Constitucional*, II, Coimbra Editora, 2002, p. 221; M.A. Reyes, *Constitución y Democracia*, Madrid, Tecnos, 1990, p. 36.
- 65 M.G.F. Filho, ‘Significação e alcance das cláusulas pétreas’, *Revista de Direito Administrativo*, No. 202, 1995, p. 15.

suggests that the procedure to eliminate unamendable clauses should be completed in two phases.<sup>66</sup> In the first phase, the inherent substantial limitation is removed from the entrenchment clause. In a second phase (therefore, a second formal amendment), there can be changes in other constitutional provisions related to the limitation that was removed.

Not persuaded with this reasoning, Yaniv Roznai reminds us that the amendment power belongs to “a grey area between the ordinary legislative power (*constituted power*) and the extraordinary *constituent power*”.<sup>67</sup> In accordance, unamendable clauses can never block the primary constituent power.<sup>68</sup> Roznai’s expressive statement is that “even rocks cannot withstand the volcanic outburst of the primary constituent power”.<sup>69</sup> With this assertion, the author concludes that the double amendment procedure should be rejected “on theoretical and practical grounds”.<sup>70</sup>

The main argument is that unamendable provisions “should be given a purposive interpretation according to which they are implicitly self-entrenched”;<sup>71</sup> otherwise, it is a type of *fraude à la Constitution* (*Verfassungsbeseitigung*). Such concern exhales the fear of totalitarian Weimar Republic’s comebacks.<sup>72</sup>

I do understand some of the arguments against the double amendment theory and why it has been called a “sly scheme”<sup>73</sup> or a “sleazy escape route”.<sup>74</sup> We may criticize the double revision theory for being an ungainly and unsophisticated intellectual thesis; however, there are some arguments worth considering.

*Primo*, it is an attempt to mitigate the rigidity of unamendable clauses and allow constitutional change without forcing the adoption of a new constitution. The revolutionary process of creating a new constitution may be seductive, but it has significant costs to the legality and the stability of the societal and institutional tissues.<sup>75</sup>

66 See generally, R. Albert, ‘Amending Constitutional Amendment Rules’, *International Journal of Constitutional Law*, Vol. 13, No. 3, 2015, pp. 655-685, at pp. 661-666. In favour, see A.A. Santos, ‘Los limites materiales a la revisión constitucional a la luz de la doctrina y del sentido común’, *Revista de Estudios Políticos*, Vol. 60-61, 1988, pp. 953-960, at p. 957; J. Miranda, *Teoria do Estado e da Constituição*, Coimbra, Coimbra Editora, 2002, pp. 604-607; S. Bonfigliu, ‘Sulla rigidità delle costituzioni. Il dibattito italiano e la prospettiva comparata’, *Diritto Pubblico*, Vol. 1, 2015, pp. 105-126, at p. 113. Against the theory of double revision, see L. Favoreu et al., *Droit Constitutionnel*, 5th ed., Paris, Dalloz, 2002, pp. 107-109. In Portugal, V. Moreira, *Constituição e Revisão Constitucional*, Lisboa, Caminho, 1980, pp. 106-108, argues that the double revision theory is “theoretically inconsistent, logically unsustainable and legally indefensible”.

67 Roznai, 2017a, p. 38.

68 Yaniv Roznai stresses this idea several times in his outstanding book *Unconstitutional Constitutional Amendments* 2017b, pp. 16, 111, 123 (just to name a few).

69 *Ibid*, p. 129.

70 *Ibid*, p. 141.

71 *Ibid*, p. 140.

72 Canotilho, 1978, p. 29.

73 A.R. Amar, *America’s Constitution: A Biography*, Random House, 2006, p. 293.

74 W.F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Johns Hopkins University Press, 2007, p. 504.

75 Tushnet, 2017, p. 99.



*Secondo*, if we argue that the double amendment procedure lacks substantial grounds and is a camouflaged *de facto* amendment, then the argument can become circular. In order to save the legal purity of the amendment process, we will force a constitutional revolution, which will also happen outside the *de jure* context and perhaps with higher costs to institutional and social stability.

I should clarify, though, that I do not imply that the *de facto* (practical) perspective should dethrone the normative one. Nevertheless, the double amendment thesis has the merit of giving some rest, although imperfectly, to the substantial concerns of the amendment process.

#### IV Portugal

##### 1 “Constitutional Dismemberment” in the Portuguese Transition to Democracy

In 1974 and after almost five decades of an authoritarian right-wing regime, a bloodless military coup (*Revolução dos Cravos*) marked the beginning of the Portuguese revolutionary transition towards democracy.<sup>76</sup>

The Portuguese Constitution received many foreign influences.<sup>77</sup> Concerning fundamental rights protection, the strong influence of the German *Grundgesetz* (1949) and the Italian Constitution (1947) is evident. As far as the extended social rights catalogue and economic constitution are concerned, one can trace this trait to the constitutional experience of the ex-Soviet Union. If the system of government (semi-presidential) was inspired on the French constitutional experience, the ‘*Provedor de Justiça*’ (Ombudsman) has a clear inspiration in the Nordic constitutional systems.

The Portuguese constitutional review model is hybrid, as it shares characteristics of the Kelsenian model and also traits of the American diffused model of judicial review. It is a clear vertical model of judicial justice, with a constitutional court on the top of the constitutional hierarchy. In comparison with the Italian, German, and Spanish systems of judicial review, the Portuguese system has some original features.<sup>78</sup> While the aforementioned states opted for a concentrated constitutional justice and to provide incidental control mechanisms in the form of preliminary review, Portugal confers judicial review powers to ordinary courts as well (Art. 204). Hence, an ordinary judge who finds a norm to be unconstitutional can dismiss that norm’s application in a concrete judicial process.

76 C.S. Botelho, ‘Portugal: The State of Liberal Democracy’, in R. Albert, D. Landau, P. Faraguna, & S. Drugda (Eds.), *2017 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2018, pp. 230-234.

77 C.S. Botelho, ‘Is There a Middle Ground between Constitutional Patriotism and Constitutional Cosmopolitanism? The Portuguese Constitutional Court and the Use of Foreign (Case) law’, in G.F. Ferrari (Ed.), *Use of Foreign and Comparative Law by Constitutional/Supreme Courts*, Brill, 2019, forthcoming.

78 J. Miranda, ‘As instituições políticas portuguesas’, in J.T. Tejada (Ed.), *La Constitución Portuguesa de 1976 – Un estudio académico treinta años después*, Madrid, Centro de Estudios Políticos y Constitucionales, 2006, pp. 35-72, at p. 41; J.M. Alexandrino, ‘Il sistema portoghese dei diritti e delle libertà fondamentali: zone franche nella tutela giurisdizionale’, *Diritto Pubblico Comparato ed Europeo*, 2003, pp. 272-284; M.L. Amaral, ‘Problemas da Judicial Review em Portugal’, *Themis*, VI, 2005, pp. 67-90, at p. 82.

So far, the Portuguese Constitution has undergone seven amendments. Its first version, approved in 1976, had a heavy ideological weight of Marxist-Leninist content.<sup>79</sup> To this day, our Constitution's Preamble is a perfect example of what Liav Orgad calls a "ceremonial-symbolic Preamble".<sup>80</sup> It states that "the Constituent Assembly affirms the Portuguese people's decision to (...) ensure the primacy of a democratic state based on the rule of law and *open up a path towards a socialist society*". To me, though, as the Portuguese Preamble lacks political neutrality, it should not be legally enforceable and is just a nonbinding historical and symbolic statement.

The constitutional text version of 1976 had norms such as "Portugal is a sovereign Republic ... committed to transformation into a classless society" (Art.1); "the Portuguese Republic is a Democratic State ... with the goal of assuring the transition to socialism through the creation of conditions for the exercise of power by the working classes" (Art. 2); "the law can regulate that the expropriation of landowners, owners, and entrepreneurs or shareholders does not give rise to any compensation" (Art. 82); "all nationalizations ... are irreversible conquests of the working classes" (Art. 83).

As the political and social tissue in Portugal began distancing itself from the Marxist-Leninist approach, such a politically compromised drafting could have led to a dangerous mismatch between the constitutional text and constitutional reality, which would culminate in the loss of normative force by the Portuguese Constitution.<sup>81</sup> Auspiciously, the brave steps towards ideological and political neutralization of the constitutional amendments of 1982 and 1989 reshaped the Portuguese Constitution and made it consonant with the substantive requirements of a truly democratic Rule of Law.<sup>82</sup> I utterly agree with Gonçalo Almeida Ribeiro, when he satires that "it is a romantic misconception to assume the perfect democratic genesis of the Portuguese constitutional system."<sup>83</sup>

The first constitutional amendment (1982) started the demilitarization process and established the Portuguese Constitutional Court (PCC).<sup>84</sup> This court replaced the "Council of revolution", a military organ with powers of constitutional review.<sup>85</sup> In 1982, for the first time in the Portuguese constitutional his-

79 See Botelho, 2015, pp. 256-258, J.C. da Costa, 'Tribunal Constitucional e debate público', in R.G. da Fonseca, C. Gomes, M.L. Rodrigues, P. Magalhães, & N. Garoupa (Eds.), *40 Anos de Políticas de Justiça em Portugal*, Coimbra, Almedina, 2016, pp. 113-141, at p. 120; J. Miranda, *Da Revolução à Constituição – Memórias da Assembleia Constituinte*, Lisboa, Princípia, 2015, pp. 181-272.

80 L. Orgad, 'The preamble in constitutional interpretation', *International Journal of Constitutional Law*, Vol. 8, No. 4, 2010, pp. 714-738, at pp. 722-723.

81 H.E. Hörster, 'O imposto complementar e o Estado de Direito', *Revista de Direito e Estudos Sociais*, III, 1977, pp. 37-136, at p. 93; Miranda, 2006, p. 107; Jörg Polakiewicz, 'Soziale Grundrechte and Staatszielbestimmungen in der Verfassungsordnung Italiens, Portugals und Spaniens', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1994, pp. 340-391, at p. 349.

82 L.P.P. Coutinho, *A Autoridade Moral da Constituição – Da Fundamentação da Validade do Direito Constitucional*, Coimbra, Coimbra Editora, 2009, pp. 429-450; Amaral, 2005, p. 88.

83 Ribeiro, 2016, p. 138.

84 Constitutional Law No. 1/82, from 30 September.

85 The Council of the Revolution had an advisory body – the Constitutional Commission – which was extinguished, in 1982, when the Constitutional Court was created.

tory, an autonomous constitutional jurisdiction was created. Another relevant suppression was Article 10 (constitutionalization of the revolutionary process), a quite singular norm in a comparative constitutional law perspective.

In addition, the 1989 amendment continued the demarxization process, removed politically biased expressions such as ‘classless society’, and allowed new forms of economic organization beyond socialism.<sup>86</sup>

If the constitutional nucleus did change, can we say that the Portuguese Constitution is still the same? I disagree with the vast majority of the Portuguese literature on this matter. To me, the Portuguese constitutional identity did change and for the better. In my point of view, the constitutional amendments of 1982 of 1989 are a perfect example of what Richard Albert brilliantly describes as “constitutional dismemberment”, which is a “deliberate effort to transform the *identity*, the *fundamental values* or the *architecture* of the constitution without breaking legal continuity”.<sup>87</sup>

## 2 Constitutional Amendment Rules

The Portuguese Constitution is rigid and includes several amendment rules (Arts. 284 to 289). It encloses formal (temporal, procedural, and circumstantial) and material limits.

The temporal limits establish a time period between revisions. According to Article 284, there should be a five-year gap between two *ordinary* amendments. The aim is to promote stability and a deep reflexion prior to any constitutional amendment. Regardless, the constitution also contemplates the possibility of suspending such constitutional hibernation on the grounds of an urgent and crucial change (*extraordinary* amendment) that cannot be postponed. This fast-track procedure abolishes temporal limitation but requires the increased legitimacy of a majority of at least four-fifths of all the parliament members.

Regarding the procedural limitations, the initiative to amend the constitution pertains only to the parliament. There can be no constitutional amendment by a referendum (Art. 115 para. 4a rejects it). In addition, the president of the Republic cannot refuse (through political veto) to enact a constitutional amendment, nor request its preventive control.<sup>88</sup>

For ordinary amendments, the initiative of just one parliament member is enough, although, for logistic purposes, once a draft revision of the constitution has been submitted, “any others have to be submitted within a time limit of thirty days” (Art. 285 para. 2). For the extraordinary amendment, an increased legitimacy of a majority of at least four-fifths of all the deputies is required (Art. 286 para. 2). This is the most severe majority demanded in the Portuguese Constitution.

86 Machado, 2013, p. 275.

87 R. Albert, ‘Constitutional Amendment and Dismemberment’, Vol. 43, No. 1, 2018, *Yale Journal of International Law*, pp. 1-84.

88 Respectively, Art. 286, paras. 3 and 278 of the Portuguese Constitution. See de Morais, 2014, pp. 295-298. With a different perspective, Machado, 2013, pp. 284-285 acknowledges “an implied constitutional power to the President to request the preventive judicial review of a constitutional amendment by the Constitutional Court and to veto it on the ground of its unconstitutionality”.

The approval of ordinary and extraordinary amendments requires supermajorities. For the ordinary amendment, Article 286 paragraph 1 requires a majority of two-thirds of the parliament members. Therefore, it is not possible to amend the Portuguese Constitution without the agreement of the two larger parties: the centre-right PSD (Social Democrat Party) and the centre-left PS (Socialist Party).

The circumstantial limitations (Art. 289) impede an amendment from happening during a state of siege or emergency, in which fundamental rights can be suspended (Art. 19).

### 3 *The Portuguese Notorious List of Substantial Limitations*

The tension between democracy and constitutionalism should be analysed carefully, given each state's concrete political and societal history.<sup>89</sup> Therefore, I agree with Oran Doyle when he suggests that these competing values ask for a resolution that is "heavily context-dependent".<sup>90</sup>

The Portuguese unamendable clause is so remarkable that it raises the pertinent question of its compatibility with a plural and democratic state.<sup>91</sup> In Portugal, constitutional unamendability means that these subjects cannot even be democratically debated through a proposal of amendment.<sup>92</sup>

Article 288 (former Art. 290) of the Portuguese Constitution establishes several substantial limitations to the amendment power.<sup>93</sup> This provision was approved by a significant majority, since only five parliament members of the conservative CDS-PP (Popular Party) voted against it.

The substantial limits to amendments are the following:

a) National independence and unity of the state; b) The republican form of government; c) Separation between church and state; d) Citizens' rights, freedoms and guarantees; e) The rights of workers, works councils, and trade unions; f) The coexistence between the public, private, and cooperative, and social sectors of ownership of the means of production; g) The existence of economic plans, within the framework of a mixed economy; h) The appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; i) Plural expression and political organisation, including political parties, and the right of democratic opposition; j) The separation and interdependence of the entities that exercise sovereignty; l) The subjection of legal norms to review of their positive constitutionality and of their unconstitu-

89 I.W. Sarlet, *A Eficácia dos Direitos Fundamentais – Uma Teoria Geral dos Direitos Fundamentais na Perspetiva Constitucional*, 12th Ed., Porto Alegre, Livraria do Advogado, 2015, p. 436.

90 Doyle, 2017, p. 95.

91 See F.L. Pires, *Teoria da Constituição de 1976 – A Transição Dualista*, Coimbra, 1988, p. 161; Medeiros, 2015, p. 213. P. Suber, at Araújo, 1999, classified this norm as "a distressing naivety" of the Portuguese constituent power.

92 Alerting to this not-so-irrelevant distinction, see Roznai, 2017b, pp. 22-23.

93 In the Portuguese constitutional history, only the republican constitution of 1911 established an entrenchment clause, which was the "republican form of government".

tionality by omission; *m*) The independence of the courts; *n*) The autonomy of local authorities; *o*) The political and administrative autonomy of the Azores' and Madeira's archipelagos.

The current version of the Portuguese Constitution contains 14 clauses of entrenchment, since some were removed or altered in the constitutional amendment of 1989. Therefore, it is quite clear that the unchangeable clause was indeed changed. After 1989, several amendment proposals of Article 288 were presented, but none of them was approved.<sup>94</sup>

The double revision thesis was, at least to some extent, incorporated in several constitutional amendment projects presented by the main political parties.<sup>95</sup> Clearly, this *de facto* contingency calmed down passionate debates regarding the scope of unamendable clauses.<sup>96</sup>

The Portuguese Constitution does not seem to allow a simultaneous double revision, which is the synchronized amendment of the entrenchment clause and of the principles and articles related to that limit.<sup>97</sup> However, the sheer fact is that the 1989 amendment did operate a simultaneous amendment, eliminating former paragraph *j*) from the substantial limits list and also some obsolete and politically biased norms that allowed only one form of economic organization.<sup>98</sup> At the same time, Article 81 of the Constitution was modified regarding 'nationalizations' and 'rural estate property', while other significant changes were introduced in the economic Constitution, concerning the 'structure of the means of production'.

The amendment of Article 288 is not surprising, since it was consistent with major constitutional amendments in several other provisions. As Yaniv Roznai very astutely points out, "one cannot expect unamendability to be any more operative than the constitution's other provisions."<sup>99</sup>

The collapse of communism and the political changes of the 1990s asked for a renewed understanding of what a constitution should be: not a government's programme, not a semantic constitution, but an open constitution. As the constitu-

94 In the constitutional amendments of 1992, 1997, and 2005, several amendment proposals were presented, from both right- and moderate-left-wing parties. See F.P. Gonçalves, 'La problemática de la revisión constitucional', in J.T. Tejada (Ed.), *La Constitución portuguesa de 1976 – Un estudio académico treinta años después*, Madrid, Centro de Estudios Políticos y Constitucionales, 2006, pp. 263-289, at p. 289.

95 Santos, 1998, p. 955.

96 de Moraes, 2014, p. 276; Gonçalves, 2006, p. 287.

97 Santos, 1998, p. 959.

98 Paragraph *j*) stated "the participation of grass-roots popular committees in the local government". Former version of paragraph *f*) entrenched "the principle of collective appropriation of the means of production, of the soil, of natural resources" and "the prohibition of monopolies and large rural estates" (currently paragraph *f*) and has a softer tone: "the coexistence of the public, private and cooperative and social sectors of ownership of the means of production". Former paragraph *g*) entrenched the "principle of democratic central planning of the economy" (now: "economic plans" "within the framework of a mixed economy"). See Machado, 2013, p. 286.

99 Roznai, 2017b, p. 132.

tional *praxis* did not take these limits into consideration, they became obsolete norms.<sup>100</sup>

As I have tried to explain previously, the first version of the Portuguese Constitution was not politically neutral. Carlos Blanco de Morais notes that the *political costs* of the “irreversibility of nationalizations” was over five billion Euros. This lesson should definitely be food for thought.<sup>101</sup>

The debate on whether it is possible to alter or remove procedural and substantive amendment rules still divides the Portuguese literature. Regarding amendments to procedural revision rules, there is no major disagreement; it can be done in consonance with the fundamental principles of the Portuguese Constitution.

The question that follows, thus, is: although *de facto* some eternity clauses were changed or removed, is it possible to *de jure* remove or alter them?

Many arguments are in favour of this solution. If rights, liberties, and guarantees, which are protected in Article 288, can be restricted by the parliament (or by the government with permission from the parliament) through Article 18 paragraph 2, *a fortiori*, the super-majority that constitutes the amendment power can revise them as well.<sup>102</sup> The proportionality imposition towards this restriction must come into consideration. For example, it could be admissible to amend the institutional structure of the judiciary as long as it did not compromise judicial independence or the separation of powers. Or, it might be foreseeable to enter into deeper stages of social integration in the European Union without breaching our national independence core.<sup>103</sup>

Despite the discussion about the value of unamendable clauses (*see above B III 2*), given the Portuguese’s astonishing list of substantial limitations, some

100 See R. Albert, ‘Constitutional Amendment by Constitutional Desuetude’, *American Journal of Comparative Law*, Vol. 62, No. 3, 2014, pp. 641-686. Another interesting perspective is the idea of “constitutional atrophy”. See A. Vermeule, ‘The Atrophy of Constitutional Powers’, *Oxford Journal of Legal Studies*, Vol. 32, No. 3, pp. 421-444.

101 de Morais, 2014, p. 56, note 100.

102 Regarding rights, liberties, and guarantees restrictions, *see* C.S. Botelho, ‘Anotação ao artigo 165 da Constituição’, in J. Miranda & R. Medeiros (Eds.), *Constituição Portuguesa Anotada*, Vol. II, Lisboa, Universidade Católica Editora, 2018, pp. 536-555.

103 Machado, 2013, p. 283. For a deeper understanding of constitutional pluralism through international and European Law lenses, *see* M.P. Maduro, ‘Three Claims of Constitutional Pluralism’, in M. Avbeli & J. Komárek (Eds.), *Constitutional Pluralism in the European Union and Beyond*, Portland, Hart Publishing, 2012, pp. 67-84.



scholars argue that not all of them have the same constitutional worth and divide them in first- or second-degree limits.<sup>104</sup>

First-degree limits are so fundamental that even if they were not listed as limits, they would still bound the constituent power. Their consecration on the constitutional text has merely declarative purpose. Blurry considerations of natural law or ‘universal legal conscience’ come to mind, although pure positivist theories deny the existence of substantial limits to the constituent power. Limits to constitution-making can also derive from international law compromises or *ius cogens* norms. In turn, second-degree limits or amiss limits, which are not genuine limits, as they do not portray the constitutional DNA. Therefore, their positivization has constitutive effects.

Instead of dividing the Portuguese entrenchment clause in different levels of unamendable worth and deciding which can or cannot be amended, perhaps we should consider Rui Medeiros’ thesis about the relativization of the unamendable clause.<sup>105</sup> Medeiros stands for a “principiological reading of the unamendability clause”. Furthermore, understanding the provisions of Article 288 as principles seems to be in consonance with the preparatory works of the constituent power.<sup>106</sup>

To give an example, in 1986, Portugal entered the European Community – now European Union – and the continuous political and economic integration could, to some, cause limitations to the sovereignty of the Portuguese state (para. a) of Art. 288) and to the economic constitution itself.<sup>107</sup> A ‘principiological reading’ that does not absolutize paragraph a) does allow for a dynamic understanding of the state’s sovereignty.

Material limits can be implicit as well. Scholars have identified some implicit limitations, such as: the protection of territorial integrity (inferred from the unity of the State),<sup>108</sup> the principle of irresponsibility of judges (derived from the prin-

104 de Morais, 2014, pp. 286-287 considers as part of the Portuguese constitutional identity the following subjects of Art. 288: national independence and unity of the state; republican form of government; rights, liberties, and guarantees’ regime; universal suffrage; pluralism of political organizations; separation and interdependence of the sovereign bodies; judicial independence; and autonomy of the local power. In addition, C.B. de Morais brings together some *implicit limitations*, such as the constitutional rigidity (that prohibits a total revision) and the social state principle regarding some basic social rights which derive from the human dignity principle (health, social security, and basic education). In an autopoetical perspective, see Terrinha, 2017, pp. 232-242. In turn, N. de Brito, 2000, pp. 397-440, has argued for immanent and absolute implicit limitations to both constituent and amendment power (principles related to the nuclear identity of the Portuguese Constitution).

105 Medeiros, 2015, pp. 207-219. Accordingly, A.P. Ayala, ‘La revisión de la Constitución económica: del radicalismo socializante a la integración económica en la UE’, in J.T. Tejada (Ed.), *La Constitución portuguesa de 1976 – Un estudio académico treinta años después*, Madrid, Centro de Estudios Políticos y Constitucionales, 2006, pp. 87-143, p. 108. In Brazil, see Sarlet, 2015, pp. 436-437.

106 Testifying such historical argument, Miranda, 2006, p. 352.

107 Machado, 2013, pp. 276 and 289.

108 Doyle, 2017, p. 94; Y. Roznai & S. Suteu, ‘The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle’, *German Law Journal*, Vol. 16, 2015, pp. 542-580, at p. 573, believe that the alteration of a polity such as territoriality should be done through existing constitutional processes.

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ciple of judicial independence and impartiality), and the prohibition of lifelong mandates (resulting from the democratic principle).<sup>109</sup>

## V Spain

### 1 *A Complex and Rigid Constitutional Amendment Procedure*

After the fall of Franco's dictatorship, which lasted between 1939 and 1975, the democratic Constitution of 1978 was enacted. The Spanish Constitution stipulates two different procedures of constitutional amendment (Title X – Arts.166 to 169). The constitution prescribes two types of constitutional amendment: an ordinary procedure, called “constitutional reform” (Art. 167), and a special or a qualified procedure (Art. 168), designated “constitutional revision”.<sup>110</sup>

According to Russel Patrick Plato, there is also a “differentiate amendability”, in which some constitutional provisions benefit from additional safeguards to amendability.<sup>111</sup> A constitutional revision through Article 168, even if it only intends to surgically alter an expression or a word, can potentially alter the Spanish constitutional DNA and therefore its core and identity.

The constitutional amendment initiative belongs to the government, to the two Chambers (Congress and Senate), and, with restrictions, to the Assemblies of the Autonomous Communities.<sup>112</sup> Popular initiative is excluded.<sup>113</sup>

The ordinary procedure is the default amendment mechanism. If the object of the amendment is not protected by Article 168, then it can be amended through the ordinary procedure. The bills on constitutional amendments must be approved by a majority of three-fifths of the members of each Chamber. If the Congress and the Senate disagree, a joint commission will be created to agree on a text that will be submitted to the Chambers to be approved by the same majority.<sup>114</sup> If the bill submitted to the Chambers does not reach the three-fifths majority, the Congress may approve the amendment by a two-thirds vote, as long as the text has obtained a favourable vote by an absolute majority of the Senate (Art. 167, para. 2).<sup>115</sup>

The electorate can intervene by referendum, if one-tenth of the members of either Chamber so requests.<sup>116</sup> Therefore, the popular reinforcement through referendum is only optional.

The extraordinary procedure, which can lead to a constitutional transition, has a higher degree of rigidity and is quite complex. The ratio of this exceptional procedure is to allow a total or partial amendment of the Spanish Constitution

109 Machado, 2013, p. 283.

110 Ortega & Guijarro, 2013, p. 302.

111 R.P. Plato, ‘Selective Entrenchment Function of Constitutional Amendment Rules’, *New York University Law Review*, Vol. 82, 2007, pp. 1470-1509, at p. 1489.

112 Arts. 87 and 166 of the Spanish Constitution.

113 Á.G. Morales, *Derecho Constitucional – Teoría de la Constitución y sistema de fuentes*, Madrid, Centro de Estudios Políticos y Constitucionales, 2011, p. 185.

114 Art. 167, para. 1.

115 Ortega & Guijarro, 2013, p. 305.

116 Art. 167, para. 3.

that affects the following articles: Articles 1 to 9 (principles and fundamental values of the constitutional order), Articles 15 to 29 (fundamental rights), and 55 to 65 (the monarchy). Even if the alteration of these articles is just cosmetic or insignificant, it must follow the route of the extraordinary procedure.<sup>117</sup>

The decision to carry out this procedure requires a two-third majority of the members of both Chambers. If we take a close look at the requirements of the aggravated process, it almost demands the same majority as the constituent foundational moment.<sup>118</sup> Once the amendment has been approved by the parliament, it shall be submitted to the ratification of the electorate by referendum.<sup>119</sup>

Similar to the Portuguese Constitution, there is also a circumstantial limitation (Art. 169) that prohibits amendments from being initiated in time of war or in the situations outlined in Article 116.

As the amendment provisions are part of the constitutional text, the Spanish doctrine has considered that the constitutional court can control the constitutionality of the process.<sup>120</sup> As Aharon Barak observes, the silence of many constitutional orders regarding a court's authority to review constitutional amendments did not lead several constitutional courts into concluding they lacked authority.<sup>121</sup>

## 2 *Extraordinary Procedure of Quasi-unamendable Clause?*

Since unamendable clauses were considered inefficient to block *de facto* actions and hinder political systems replacement, they were never established in Spanish constitutional history.<sup>122</sup> Instead of opting for an unamendable clause, but nevertheless wanting to preserve certain aspects of the democratic system, the Spanish Constitution opted for a qualified rigidity.<sup>123</sup> Some doctrine highlights the 'super-aggravated' trait of the qualified procedure.<sup>124</sup>

Although there are no eternity clauses, the rigidity level in Spain is high and the original constitutional design is to be well-preserved.<sup>125</sup> If anything, the highly demanding tone of the qualified procedure almost reminds us of an "invocation of the primary constituent power".<sup>126</sup> The effort to provide the Spanish Constitution with powerful formal limitations was a way of "glorifying it", pre-

117 Ortega & Guijarro, 2013, p. 306.

118 A.L. Basaguren, 'Encuesta sobre la reforma de la Constitución', *Teoría y Realidad Constitucional*, Vol. 29, 2012, pp. 11-88, p. 34.

119 Art. 168, para. 3.

120 Ortega & Guijarro, 2013, p. 309.

121 A. Barak, 'Unconstitutional Constitutional Amendments', *Israel Law Review*, Vol. 44, No. 3, 2011, pp. 321-341.

122 Ortega & Guijarro, 2013, p. 303.

123 *Ibid.*, p. 302.

124 F.B. Callejón, 'Poder constituyente y límites a la revisión constitucional vistos desde la España', *Nomos*, Vol. 2, 2016, pp. 1-22, p. 10; Bonfigliuo, 2015, p. 109. Albert, 2010, p. 705, probably would classify this entrenchment type as "heightened constitutional entrenchment".

125 Pedra, 2010, p. 243; Antonio Enrique Perez Luño, *Los derechos fundamentales*, 9th ed., Madrid, Tecnos, 2007, p. 69.

126 Roznai, 2017b, p. 38.

-serving its core purposes and putting the dipole constituent/constituted power in its place.<sup>127</sup>

In accordance, it is relevant to point out that the only two constitutional amendments carried out so far in Spain followed the ordinary procedure of constitutional amendment. The Spanish Constitution, therefore, prescribes a “selective rigidity” mechanism.<sup>128</sup>

As Víctor Ferreres Comella wrote, in Spain, the idea of constitutional amendment is somehow a “*tabu*”, since constitution-making was the aftermath of the civil war and of the disenchantment in the normative force of the constitution.<sup>129</sup> Collective memory and fear of revisiting an anti-democratic past played a huge role in keeping the constitution protected from change. As a result, the mummification of the constitution has become a sort of ‘Nash equilibrium’ that lacks incentive for change.<sup>130</sup>

If this constitutional attachment and exaltation was understandable during the 1980s, in the 1990s some constitutional amendment proposals were considered ‘disloyal’ to the democratic transition, ‘irresponsible’, or even a form of constitutional patriotism ‘desertion’.<sup>131</sup>

Some doctrine sharply warns that the Spanish Constitution is not only an ‘unchanged’ constitution but also an ‘unchangeable’ one.<sup>132</sup> This constitutional *ethos* had consequences on the quality of the Spanish democracy and on the discouragement of constitutional amendment initiatives. For precisely that reason, several constitutional norms are labelled as ‘perpetual,’ ‘obsolete,’ ‘surmounted,’ or ‘virtual’.<sup>133</sup>

Although the Spanish Constitution does not have an unamendable clause, Spanish literature identifies implicit limits to constitutional amendments, such as the principle of the rule of law, fundamental rights, separation of powers, and political decentralization.<sup>134</sup> Some of these limits could be related to the superior values of the legal order, namely “liberty, justice, equality, and political pluralism” (Art. 1, para. 1).<sup>135</sup>

The Spanish and the Portuguese constitutional history have a lot in common: constitutional distress in the 19th century, followed by republican experiences and long dictatorships in the 20th century, transition to democracy in the 70s,

127 J.F.L. Aguilar, ‘De la Constitución «irreformable» a la reforma constitucional «expres»’, *Teoría y Realidad Constitucional*, 12, 2012, pp. 199-218, p. 200.

128 About “selective rigidity” in general, see R. Albert, ‘The Expressive Function of Constitutional Amendment Rules’, *McGill Law Journal*, Vol. 59, No. 2, 2013, pp. 225-282. With a more sceptic vision of the “selective rigidity” argument and speaking in favour of a “uniform amendment process”, see Plato, 2007, pp. 1490-1493.

129 Comella, 2000 p. 32.

130 J.C.G. de Cara, ‘Encuesta sobre la reforma de la Constitución’, *Teoría y Realidad Constitucional*, Vol. 29, 2012, pp. 11-88, p. 23.

131 Aguilar, 2012, p. 201.

132 *Ibid.*, p. 205.

133 P.C. Vilallón, *La curiosidad del jurista persa, y otros estudios sobre la Constitución*, Madrid, Centro de Estudios Constitucionales, 2006, pp. 63-77.

134 Ortega & Guijarro, 2013, p. 303.

135 Morales, 2011, p. 188.

with decades of democratic consolidation so far.<sup>136</sup> Still, the question remains: Which idiosyncratic features of the Portuguese and Spanish constitutional orders justified the different profiles of constitutional change?

Unlike the revolutionary Portuguese Constitution, the Spanish constituent moment was not a *destruens* followed by a *construens*.<sup>137</sup> There was a substantial/material continuity that came from Franco's regime and in which the Crown played a significant role. The Spanish Constitution was the possible consensus that all parties knew was unattainable in the long run. It embodied a political commitment of peace with the harsh divisions of the tragic past, and all difficult questions and interpretations were sent to the future.<sup>138</sup> Therefore, there was a "strategic interest" in altering it as less as possible.<sup>139</sup>

This is certainly a kind of *functional* constitutional approach, as the overall result was an effort to keep the constitutional moment frozen – entrenchment of current *status quo*, because if the question was reopened, the constitution would have collapsed. As the lessons from the 1931 Constitution and the Civil War taught, one of the most delicate issues is the regional structure of Spain. To a large extent, the current crisis in Catalonia reflects that constitutional fragility. For sure, a more flexible constitutional design could implode the Spanish Constitution, as it happened in 1936.<sup>140</sup>

After years of dictatorship in Spain, the Spanish Constitution was able to affirm its normative force altogether, with a very demanding amendment process.<sup>141</sup> Clearly, the Spanish Constitution of 1978 was very well integrated in the European constitutional model and was considered an "elite construction".<sup>142</sup>

With a different mindset, the Portuguese Constitution was one of the last postmodern revolutionary constitutions.<sup>143</sup> There was a substantial divorce from the past and an ideological compromise. The Portuguese Constitution was the product of two quite distinct political compromises: liberal and socialist. The difficult compromise of divergent political elites and electorate can justify the Portuguese constitutional prolixity and the absence – in its original version – of a politically neutral approach.

The Portuguese Constitution is manifestly a *defensive* constitutional text, with singularities that set it apart from the rest of the European constitutions. This idea of defensiveness can be found in several constitutional traits: the long unamendable clause (Art. 288); the prolix catalogue of social rights, one of the

136 Ayala, 2006, p. 93.

137 E. García, 'Encuesta sobre la reforma de la Constitución', *Teoría y Realidad Constitucional*, Vol. 29, 2012, pp. 11-88, at p. 30.

138 E.G. de Enterría, 'La Constitución española como pacto social', *Impresiones sobre la Constitución de 1978*, Madrid, Fundación ICO, 2004, pp. 231-232; P. González-Trevijano, 'La reforma como defensa de la propia Constitución', Vol. 15, 2006, *Cuadernos de pensamiento político*, pp. 15-41, at p. 17.

139 Comella, 2000, p. 32.

140 I thank Nuno Garoupa for this helpful suggestion.

141 Aguilar, 2012, p. 200.

142 B. Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union', *British Journal of Political Science*, Vol. 45, No. 4, 2015, pp. 705-714.

143 Ayala, 2006, pp. 87-89.

widest social rights catalogue in the world and probably the widest in Europe (Arts. 58 to 79)<sup>144</sup>; the detailed economical constitution (Arts. 80 to 107); or even the semi-presidential form of government (different from the Spanish rationalized parliamentary system).

## D Constitutional Narcissism and Insecure Helicopter Founding Fathers

To recall Richard Albert's beautiful representation, constitutional amendment rules "are the gatekeepers to the constitutional text".<sup>145</sup> The more fragile a democracy is, the more easily the amendment process can succumb to a political circus.<sup>146</sup> Given its polymorphic trait, every constitutional order adapts its amendment rules to better suit its own constitutional identity and extra-constitutional matrix of political, historical, economical, religious, and idiosyncratic factors that make each Constitution truly unique.

Rosalind Dixon and David Landau show their concerns regarding unamendable clauses, as they can encourage political elites to find ways to outline these limitations and provoke institutional stability, which "may be more difficult to constrain, more destabilizing, or more damaging to judicial independence and the rule of law".<sup>147</sup>

Both the Portuguese substantial limitations clause and the Spanish high-rigidity level may cause some tension on the natural flow of constitutional dynamics. I called this dysfunctionality 'constitutional narcissism', which is a kind of delusional imagery of constituent holiness. I have identified narcissistic traits in the exceedingly strict amending formulas of both constitutions, which certainly may be successful in preventing misuses of amendment power but, at the same time, discourage legitimate renaissances of the constituent power.

In the similar way psychologists recognize a 'helicopter parenting' phenomenon in our overprotecting parenting generation, I ascertain, in this narcissist behaviour, a coping mechanism that I call 'helicopter founding fathers'. Constituent power, in a messianic and paternalistic move, wants to hover over the present

144 A. Ben-Bassat & M. Dahan, 'Social Rights in the Constitution and in Practice', *Journal of Comparative Economics*, Vol. 36, No. 1, 2008, pp. 103-119; J.M. Soria, 'Das Recht auf Sicherung des Existenzminimums', *Juristenzeitung*, Vol. 13, 2005, pp. 647-655; M.B. Vieira & F.C. da Silva, 'Getting Rights Right: Explaining social rights constitutionalization in revolutionary Portugal', *International Journal of Constitutional Law*, Vol. 11, No. 4, 2013, pp. 898-922, at pp. 898-899. Notice that, in Spain, social rights do not have the same 'fundamental rights' status, being somehow fundamental rights *in fieri*, depending on legislative implementation. See Botelho, 2015, pp. 203-207.

145 Albert, 2017, p. 1. Dixon, & Landau, 2010, p. 20 also mentioned the entrenchment clause as a "democratic safety-valve".

146 J.P. Royo, 'La reforma de la Constitución', *Revista de Derecho Político*, Vol. 22, 1986, pp. 7-60, at p. 60.

147 Dixon & Landau, 2010, p. 20.



and future people like a helicopter. Such insecure “generational paternalism”<sup>148</sup> constrains and discourages the present generation from making its decisions.<sup>149</sup>

Nevertheless, I must stress that I believe the narcissist pathology was dissimilar in the Portuguese and in the Spanish constitutional foundation. In Portugal, the original version of the constitution was revolutionary, exhaled self-confidence, and was politically compromised as the best and only viable popular choice: the transition to a socialist and classless society.

By contrast, in Spain, narcissism was more a result of constitutional anxiety, fear of historical comebacks, and apprehension towards the future. Borrowing Richard Albert’s thesis, the Portuguese foundational moment was a “transformational entrenchment” and the Spanish one was a “preservative entrenchment”, with some traits of “reconciliatory entrenchment” as well.<sup>150</sup>

The main difference between the Portuguese and the Spanish constitutional arena is the way of dealing with *de facto* changes in the political and societal issue that are not consistent with the constitutions’ boundaries. In the Portuguese scenario, nothing can be done, within the framework of the constitutional text, to transition to a different constitutional approach, such as replacing one political system by another.

On the contrary, the Spanish Constitution does not prescribe unamendable clauses, therefore allowing constitutional transformation. Nevertheless, no constitutional amendment has yet been proposed through the qualified procedure of Article 168. Hence, some scholars suggest that the article should be revised to lessen the rigidity level.

Another interesting difference between the Portuguese and the Spanish constitutions is that while the Portuguese Constitution differentiates between ordinary and extraordinary amendments, taking into consideration temporal limitations (an extraordinary amendment is done outside the five-year timeline frame), the Spanish Constitution distinguishes ordinary and qualified procedures through the object of the amendment (whose provisions or principles are at stake).

If the Portuguese Constitution does not require a referendum to complete the amendment process, the Spanish Constitution demands it for total or partial revisions under the qualified procedure of constitutional amendment (Art. 168).

In sum, unamendable clauses serve some purposes and are not intrinsically pernicious in a constitutional theory’s perspective. Having a few provisions immune to change does not immediately mean the dictatorship of the founding generation over the following ones. This remark purports to prove too much: the constitutional rigidity in tying the hands of present generations might prevent

148 C.S. Botelho, ‘A Tutela Constitucional das Gerações Futuras: Profilaxia Jurídica ou Saudades do Futuro’, in G.A. Ribeiro & J.P. da Silva (Eds.) *Justiça Entre Gerações*, Lisboa, Universidade Católica Editora, 2017, pp. 186-217, at p. 210.

149 Albert, 2010, p. 684, and Roznai, 2017b, p. 18.

150 Albert, 2010, pp. 666-667. Developing Richard Albert’s analysis, Roznai, 2017b, pp. 26-37 adds the ideas of “aspirational” and “bricolage.”

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radical or authoritarian political elites from “amputating the hands of future generations”.<sup>151</sup>

There are some subjects that are vital to constitutionalism. We may try several normative and intellectual approaches to what this nuclear core is: natural law, *ius cogens* international law, material constitution, constitutional DNA, liberal democracy, and so on. It is unarguable that the ‘people’ could decide to ignore their own constitutional text and surrender themselves to a nondemocratic government. However, in order to do that, the ‘people’ would have to break the constitutional core.

To me, the constitutional DNA from modern liberal constitutionalism shares a few ‘constitutional essentials’, such as the democratic principle, popular sovereignty, universal suffrage, political and personal rights and freedoms, and (in several constitutional traditions) social rights intrinsically connected to human dignity (minimum core of health, basic education, housing, and social security).<sup>152</sup> These essentials are the *alma mater* of modern constitutionalism.

Not only do I believe a constitution can self-impose formal and (even some reasonable) material limitations but I also sustain that these self-impositions can never be immune to change.<sup>153</sup> If the constitutional amendment process itself is entrenched, this would imply some constitutional theory distress. Given the fact that the constitution is the superior norm (*norma normarum*) of the internal legal order, we would have a new hierarchy inside the hierarchy: founding legitimacy above popular legitimacy.<sup>154</sup>

Should *hierarchical intra-constitutional short-circuits* be allowed? By hierarchical intra-constitutional short-circuits, I mean the attempt to elevate constitutional reform rules above the ‘regular’ constitutional norm status of each constitutional norm.<sup>155</sup> Therefore, if we automatically assume that amendment rules cannot be reformed, we are elevating them above the constitutional status. A new dipole would now arise in the constitutional text between original constitutional norms and revised constitutional norms. Amendment rules would be the barometer above the constitution itself, a kind of super-rules, “superconstitutional norms”,<sup>156</sup> or “code of the constitutional code”.<sup>157</sup>

I do not deny that substantial limitations to both constituent and amendment powers bring out constitutional prominences. The problem that I foresee regarding these super-constitutional provisions is that they are not able to cap-

151 L. Ferrajoli, ‘Democracia constitucional y derechos fundamentales. La rigidez de la constitución y sus garantías’, in L. Ferrajoli, J.J. Moreso, & M. Atienza (Eds.), *La teoría del derecho en el paradigma constitucional*, Madrid, Fundación Coloquio Jurídico Europeo, 2008, pp. 71-116, at p. 96.

152 In Portugal, the constitutional DNA can be found in the extra-systemic connection with the Universal Declaration of Human Rights (Art. 16, para. 2, of the Portuguese Constitution).

153 In this sense, Alf Ross, *Theorie der Rechtsquellen: Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen*, Leipzig, 1929, pp. 359-363.

154 See Albert, 2010, p. 708, for the expression “founding legitimacy” and the idea of “tiers of escalating significance among constitutional provisions”.

155 Callejón, 2016, pp. 8-9.

156 Concerning “superconstitutional norms”, see Plato, 2007, p. 1473. In a similar approach, see Albert, 2010, p. 683.

157 Terrinha, 2017, p. 223.

ture the entire material constitution *per se*, leaving relevant ‘constitutional essentials’ behind. To confirm this assertion, I outline how, in states with unamendable clauses, such as Portugal or Brazil, the discussion of adding implicit unamendable clauses remains omnipresent.<sup>158</sup>

## E Conclusions

I will conclude this article with the starting question: Given their obsolescence or hindrance towards good governance, should entrenchment clauses be eliminated *de jure* (through a channelled constitutional amendment process, such as the double amendment procedure) or *de facto* (through a revolutionary process materialising outside the constitutional framework)?

To me, a “good constitutional design”<sup>159</sup> should allow constitutional amendment power to surpass obsolete entrenchment clauses without breaking legal continuity, even if this means a selective rigidity. For one thing, some scholars alerted that in authoritarian transitions, there was the feasibility of constitutional order replacement as a substitute of amendment.<sup>160</sup>

It could also be quite ironic to replace a constitutional order for a new one just to eliminate one unamendable clause. With this in mind, Mark Tushnet identifies a “*pro tanto* constitutional replacement”.<sup>161</sup> That being said, if one should replace a republic for a monarchy, that would call for several amendments. But imagine the case of eliminating the Portuguese constitutional control by omission (entrenched in Art. 288), which is a procedure that has proven to be quite inefficient.<sup>162</sup> Or if the Portuguese preventive control (Arts. 278 and 289) were to be removed (as the Spanish Constitution did), should that minor change trigger the exercise of constituent power?

Moving away from petty constitutional problems, even if a state is facing a severe and persistent (economic, financial, or political) crisis, there should be an option to overcome it within the constraints of the legal order and its constitutional amendment rules.<sup>163</sup> To some extent, I agree with the possibility of total constitutional amendments that allow democratic constitutional transitions.<sup>164</sup>

If, metaphorically speaking, unamendable clauses were closed magical doors, we could wonder how to open them. Like Ali Baba’s cave, which could only be

158 In Brazil, see Sarlet, 2015, pp. 427-451.

159 Tushnet, 2017 p. 99.

160 D. Landau & R. Dixon, ‘Constraining Constitutional Change’, *Wake Forest Law Review*, 50, 2015, pp. 859-890, p. 867.

161 M. Tushnet, ‘Peasants with Pitchforks and Toilers with Twitter: Constitutional Revolution and the Constituent Power’, *International Journal of Constitutional Law*, Vol. 13, 2015, pp. 639-654.

162 Botelho, 2017, pp. 350-355, P. Otero, ‘Direitos económicos e sociais na Constituição de 1976: 35 anos de evolução constitucional’, *Tribunal Constitucional – 35º Aniversário da Constituição de 1976*, I, Coimbra, Coimbra Editora, 2006, pp. 37-55; J.B. Gouveia, ‘Inconstitucionalidade por omissão – Consultas directas aos cidadãos eleitores a nível local – Anotação ao Acórdão n° 36/90 do Tribunal Constitucional’, *O Direito*, Vol. 122, No. II, 1990, pp. 420, p. 424.

163 Albert, 2010, p. 684.

164 Medeiros, 2015, p. 219.

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open by a magical password, how might the closed door on *constitutional alma mater* be unbolted?

There are good reasons to agree with Richard Albert's assertion that citizens should be "given the key to unlock their constitutional handcuffs" that possibly will allow retreating from the foundational moment.<sup>165</sup> Otherwise, constitutionalism would "breathe in all of the available oxygen" and would choke "democracy into submission".<sup>166</sup> The "political self-understanding of the citizen", highlighted by Paul W. Kahn, is of paramount importance.<sup>167</sup>

The constitution is the most fascinating and intriguing norm, as it is a symphony of distinct *ethos*, aspirations, and political essentials. To preserve its normative trait, the constitution can never dissolve itself neither in pure dynamics nor in indifferent immutability.<sup>168</sup> On the opposite pole, imagining a constitution as a nonporous and hermetic building is inconsistent with what is expected from a constitutional text as a fragmentary or unfinished project. As Vital Moreira interestingly wrote, "unchangeable constitutions are only the imaginary ones, the purely semantic".<sup>169</sup>

Instead of unamendable clauses, which are "the strongest possible insulation from amendment",<sup>170</sup> formal constitutional rigidity might answer the major concerns of constitutional permanence.<sup>171</sup> Hence, if we blur the stern clear-cut distinction between constituent and constituted power, we may discover that the 'people' from the constituted power should also have the intrinsic right to self-governing and to "speak again within the *constituted* legal order".<sup>172</sup> As Xenophon Contiades and Alkmene Fotiadou very auspiciously wrote, "there is wisdom in the acceptance of imperfection, including constitutional imperfection".<sup>173</sup>

The ideal constitution can be compared to the mythological story of Pygmalion's love for the perfect woman. When Pygmalion finally met his ideal, flawless, divine woman, he tragically realized she was not real, but only a cold statue that he had been sculpting to please his desire for perfection. This story dreadfully reflects the most basic human desire for perfection and the torment of not being able to breathe perfectness into life.

165 Albert, 2010, p. 665.

166 Albert, 2010, p. 714. Accordingly, Medeiros, 2015, p. 213.

167 Kahn, 2005, p. 256. As P. Rangel, *O Estado do Estado – Ensaio de Política Constitucional sobre Justiça e Democracia*, Alfragide, Dom Quixote, Alfragide, 2009, p. 16 auspiciously wrote, "the Constitution is rewritten everyday and the politics – at least until a certain extent – appears as constituent constitutional politics" (free translation).

168 K. Hesse, *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland*, 20th ed., C.F. Müller, 1999, pp. 20-33.

169 V. Moreira, 'Revisão e revisões: a Constituição ainda é a mesma?', in *Anos da Constituição de 1976*, Coimbra, Coimbra Editora, 2000, p. 197.

170 Tushnet, 2017, p. 102.

171 A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Padova, CEDAM, 1997, p. 129.

172 Pereira, 2017, p. 118.

173 Contiades & Fotiadou, 2017, p. 373.

This article has endeavoured to show that the constitution is a “process of becoming” and not a mere “segment of being”.<sup>174</sup> One thing is stability; another is inalterability. One thing is constitutional maturity and durability; another is devaluation of the “invisible constitution”.<sup>175</sup> That being said, a perfect polity can perhaps never pertain to the imperfect boundaries of a constitutional text, but to the mutability, aspirations, and dreams that make life worth living.

174 Loughlin, 2003, p. 113. In fact, and as Albert, 2017, p. 676 reminds us, “if a constitution sequesters this fundamental right of self-definition from citizens, then a constitution cannot be what it is intended to be – a continuing autobiography, a project of discernment and an evolving self-portrait.”

175 L.H. Tribe, *The Invisible Constitution*, Oxford, OUP, 2008.