

Review of Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism*

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Silvia Suteu's illuminating book is well known among scholars who focus their research on constitutional change. Despite the fact that the last decade has seen the publication of many important and influential works in the field of constitutional theory and comparative constitutional law analyzing constitution making,² constitutional change,³ constitutional undamendability,⁴ and the durability of constitutions in general,⁵ until the publication of Silvia Suteu's book, there was no comprehensive work dealing specifically with eternity clauses. However, the book offers much more than an in-depth analysis of the theory and practice of eternity clauses, a classic institution of constitutional entrenchment and constitutional design. In addition to a thorough analysis of all aspects of eternity clauses from the perspective of the fundamental questions of democracy, the author offers insightful reflections on all relevant recent discourses in constitutional theory and current challenges in comparative constitutional law. *Eternity Clauses in Democratic Constitutionalism* deserves the attention of a wider readership, also underlined by the ICON-S (International Society of Public Law) Best Book Prize, awarded to the author in 2023.

The book is organized around three main themes: eternity clauses in constitution-making, eternity clauses in constitutional adjudication, and eternity clauses in contemporary constitutional reform processes. Following these themes, the author focuses on what she considers to be the most relevant issues in the field, such as the protection of fundamental democratic values against future challenges, post-conflict settlements, the relationship of eternity clauses to constitutional identity and substantive doctrines of unamendability, the international context surrounding constitutional stability, participatory techniques related to constitutional change, and the challenge of abandoning eternity clauses. Silvia Suteu's main approach to all these themes and topics is a constant and firm commitment to democratic values. Eternity clauses in general, their functioning in the scenarios examined, and in relation to the legal concepts highlighted are all analyzed through the lens of democratic legitimacy. In doing so, the author remains within the field of legal discourse but creates a sense of discomfort on the part of the reader, as all the institutions, procedures, and doctrines discussed are analyzed from an unusual perspective compared to classical interpretations of them.

In the context of the first theme (eternity clauses in constitution-making), when discussing eternity clauses in the light of the concept of militant democracy, Suteu draws attention to the fact that unamendable provisions can be seen as "the embodiment of a lack of trust in the capacity of the political process to self-regulate."⁶ In this context, the lack of trust refers to fundamental characteristics of the state, such as republicanism, monarchism, federalism or the unitary state, but also to certain fundamental characteristics of society, such as religious or linguistic rights. The author claims that the selection of these values can also be undemocratic, as these "seemingly non-threatening, unchangeable provisions...can have very real consequences for those left out."⁷ Suteu is also critical of the abstract formulation of these principles as "a black box of abstract commitments"

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²Sujit Choudry and Tom Ginsburg, eds., *Constitution Making* (Edward Elgar Publishing, 2016).

³Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019).

⁴Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2019).

⁵Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2012).

⁶Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press, 2021), 20.

⁷*Ibid.*, 45.

with uncertain consequences.⁸ The main concern is that the militant democratic ethos behind the eternity clauses does not always correlate with the potential to strengthen democracy. Conversely, eternity clauses may even protect a discriminatory status quo.

Suteu's extensive knowledge of constitutional theory is highlighted in the chapter devoted to the subject of eternity in constitutional adjudication. Even though the central theme of the book does not require it, the author communicates intensively with the robust literature focusing on the concept of constitutional identity and implicit unamendability (as opposed to explicit unamendability reflected in the eternity clause). In relation to constitutional identity, Suteu explains that eternity clauses, where they exist, function as repositories of constitutional identity, but regardless of this relationship, constitutional adjudication based on constitutional identity is problematic. The indeterminacy of the concept "makes it difficult to clarify when and how it will be unlawfully trespassed."⁹ In the author's view, concepts of implicit unamendability are judicially created doctrines that function in many ways similarly to explicit eternity clauses. Issues relating to the basic structure, constitutional replacement, or "minimum core" doctrines—as judicially created doctrines—are all analyzed from the perspective of democratic challenge. This democratic challenge is made more complex by taking into account both the national and the supranational perspective (e.g., by considering the "transnational referent" and other transnational norms¹⁰).

Within the theme of contemporary constitutional reform processes, the sub-chapters on the internationalized nature of constitution-making and participation are both unique in linking relevant but underdeveloped issues to constitutional theory in general and to unamendability in particular. In doing so, the author offers in-depth analyses in the fields of international law (e.g., the various transnational actors and norms that influence constitution-making) and political theory (e.g., reflections on innovative participatory techniques) and links these particularities to the question of unamendability. The analysis is completed with a subchapter focusing on relinquishing of eternity, a unique theoretical issue which, in the case of explicit eternity clauses, is by definition illegal.¹¹ The author discusses in detail the approaches that reflect this challenge, e.g., by overturning judicial doctrines of unamendability, through deliberation or repeal. This challenge is particularly difficult because "eternity clauses are most necessary, and common, in places where constitutional contestation as well as democratic fragility are likely to be high."¹²

All the themes and specific issues examined reflect the author's main position, her strong commitment to democratic values: every aspect of the issue under consideration is analyzed from the perspective of democratic legitimacy. The author's view is not value-neutral: she warns in a fearful tone that constitutional unamendability is not always "a neutral instrument for defending liberal constitutional commitments and liberal democracy itself."¹³ The author's other strong commitment, reflected in the book, is to normativity and the conscientious use of legal language in cases that reflect constitutional stability. She is cautious about using the concept of constitutional identity in a legal sense, which is why, in her view, "once constitutional identity claims enter the courtroom...we find ourselves in the slippery situation."¹⁴ Suteu is also realistic in suggesting certain doctrinal arrangements to be taken into account, e.g., reflecting on the importance of the legal-cultural milieu when examining whether a court can adopt a discursive stance on which reasoned judgments are based.¹⁵ The author maintains her critical stance throughout the text. For example, when discussing certain doctrinal features that can be considered progressive, she always contrasts them with other perspectives with which they may be in conflict (e.g., highlighting the tension between participatory constitution-making that enhances legitimacy and the challenge of minority protection¹⁶).

⁸Ibid., 49.

⁹Ibid., 123.

¹⁰Ibid., 149-152, 188-193.

¹¹Ibid., 234.

¹²Ibid., 251.

¹³Ibid., 8.

¹⁴Ibid., 124.

¹⁵Ibid., 152.

¹⁶Ibid., 232.

The perspective of the book is global: the constitutions of 83 countries, several international treaties, cases from 27 countries and several international courts are analyzed in detail. In the author's words, this approach, which also reflects on non-traditional jurisdictions, allows "insights from the periphery"¹⁷ to be taken into account. Thus, in addition to a detailed analysis of the functioning of the basic structure doctrine in India, its reception is also discussed in the context of Bangladesh, Pakistan, Taiwan, Malaysia, Singapore and Sri Lanka. In analyzing the selected issues in relation to the eternity clauses, Suteu engages in meaningful discussion with the classic and contemporary authors in the broad field of constitutional theory and comparative constitutional law. As a result, the book reflects a robust literature in the field. The author's holistic approach is reflected in the text, which not only examines its subject from the perspective of theory and practice, but also raises the question of effectiveness (e.g., in the case of post-conflict eternity clauses enacted under pressure¹⁸) and protection of constitutional values (e.g., in the case of the problematic reference to constitutional identity in a context that supports autocratic tendencies¹⁹). According to Suteu, the holistic approach is also a requirement addressed to the courts, as their task is to "look at the entire constitutional edifice."²⁰

The author strikes the right balance between being precise and not dwelling on irrelevant details when richly illustrating her arguments with cases. This approach of linking theoretical analysis with relevant practice from around the world is present throughout the book—a major reason for its readability. Certain illustrative cases are also the most interesting parts of the book, e.g., when discussing the question of unamendable term limits and the related practice of political leaders from Colombia to Honduras,²¹ the democratic backsliding in Hungary,²² or case studies on unamendability and participation in constitutional change in South Africa, Kenya, Iceland or Tunisia.²³

Another special feature of the book is that it highlights all the tensions surrounding the issues discussed. For example, "exclusionary eternity clauses often coexist with liberal democratic constitutional commitments,"²⁴ eternity clauses often reflect "strategic compromise" especially in the case of post-conflict constitutions,²⁵ the "peace versus justice" debate in relation to amnesties contained in post-conflict constitutions,²⁶ the agnostic or normative nature of constitutional identity,²⁷ the "sliding authority of different parts of the constitution,"²⁸ democratic, rights-protecting, pluralist, and exclusionary elements of eternity clauses,²⁹ legitimate and illegitimate constitutional change in the light of implicit unamendability,³⁰ finding the right balance between interventionism and self-restraint in the case of the courts,³¹ the internal and external justifications of substantive unconstitutional constitutional amendment doctrines,³² as well as the tension between the domestic and international perspectives on the same constitutional issue.³³

The style of the book is reader-friendly: Suteu uses a vocabulary that is precise and nuanced in constitutional theory, but at the same time easy to follow when reading various arguments, explanations, or summaries of case studies. Certain terms used by the author precisely capture the meaning of the phenomenon under study and express it in a way that opens the door to a

¹⁷Ibid., 3.

¹⁸Ibid., 85.

¹⁹Ibid., 124.

²⁰Ibid., 146.

²¹Ibid., 72-80.

²²Ibid., 159-162.

²³Ibid., 215-229.

²⁴Ibid., 8.

²⁵Ibid., 61.

²⁶Ibid., 84.

²⁷Ibid., 99.

²⁸Ibid., 107.

²⁹Ibid., 111.

³⁰Ibid., 128.

³¹Ibid., 152.

³²Ibid., 179.

³³Ibid., 190.

popular language of constitutional law, e.g., constitutions as “contested documents,”³⁴ “eternity clause as political insurance,”³⁵ “normative superstructure within the constitution,”³⁶ “radical indeterminacy,”³⁷ the doctrine as a “last resort against extreme legislative action,”³⁸ “external constituents,”³⁹ “bad faith reliance on international legal norms,”⁴⁰ “supranational unconstitutional amendment doctrine,”⁴¹ and “multi-stage constitution-making.”⁴² The table of cases, the table of legislation, and the index with the relevant keywords provide easy access to all the relevant information the reader needs.

The book is undoubtedly an indispensable and significant point of reference in the field of constitutional theory and comparative constitutional law, as well as for practical work, based on the main themes of the book, in the field of constitution-making, constitutional adjudication, and constitutional reform. Besides clarifying the main functions of eternity clauses, such as the expressive function,⁴³ the ordering function that establishes a hierarchy of constitutional values,⁴⁴ the preservative function,⁴⁵ and the defensive function⁴⁶ in relation to certain constitutional values, the book also offers an important lesson: the general requirement to challenge all legal concepts and institutions surrounding constitutions from the perspective of democratic decision-making.

The book is a valuable contribution to our common knowledge in this field that will stand the test of time, even though certain explanations and assessments contained in the book may no longer be relevant due to the passage of time or political changes (e.g., the powers of the Supreme Court of Afghanistan⁴⁷). These particularities do not weaken the persuasiveness of the general arguments made in the book. The reader may be left with a feeling of lack in one respect: the author has relegated herself to the background of the text, so that alongside her explicit and firm commitment to democratic legitimacy and constitutional values, her vision of society, of optimal deliberative and adjudicative processes related to constitution-making, constitutional amendment, and constitutional adjudication, remains hidden.

Eternity Clauses in Democratic Constitutionalism invites the reader “to reorient . . . attention to the most troubling aspect of unamendability: its deep tension with democratic constitutionalism.”⁴⁸ The author’s calls for a more critical engagement with the fundamental democratic problems raised by unamendability, for more modest expectations, and for the study of this field in the light of constitutional politics alongside constitutional doctrine⁴⁹ are worth considering.

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³⁴Ibid., 4.

³⁵Ibid., 72.

³⁶Ibid., 124.

³⁷Ibid., 130.

³⁸Ibid., 145.

³⁹Ibid., 174.

⁴⁰Ibid., 196.

⁴¹Ibid., 186.

⁴²Ibid., 216.

⁴³Ibid., 102.

⁴⁴Ibid., 106.

⁴⁵Ibid., 112.

⁴⁶Ibid., 126.

⁴⁷Ibid., 65.

⁴⁸Ibid., 264.

⁴⁹Ibid., 266.

Suteu, Silvia. *Eternity Clauses in Democratic Constitutionalism*. Oxford University Press, 2021.