

Reform Forum's Note

UNAMENDABLE PROVISIONS OF THE CONSTITUTION AND THE TERRITORIAL INTEGRITY OF UKRAINE

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ABSTRACT

Background: Unamendable constitutional provisions arose with the appearance of the first constitutions in the USA and Norway, but did not become widespread. The unamendability of a republican form of government, included in the Constitution of France in 1885, continued this tradition. Such provisions became more widespread after the Second World War. Countries that gained independence began to include a mention of territorial integrity in such provisions. Ukraine belongs to such countries (the Constitution of 1996). Since 2014, Ukraine has faced encroachment on its territorial integrity by an aggressor state – its eastern neighbor. Given these circumstances, the study of the nature and meaning of unamendable provisions of a constitution has particular relevance.

Methods: The following methods were used in the work to research the main approaches to the unamendable provisions of the constitution. The system-structural method was useful when providing a structural characterisation of the concept of unamendable provisions, as well as its varieties, establishing a relationship with other concepts (multilevel constitutional design). The logical-legal method made it possible to discover the positions of scientists regarding an optimal list of unamendable provisions, the possible violation of such provisions in the situation of a constitutional revolution, and the positions of the Constitutional Court of Ukraine regarding the protection of territorial integrity in Ukraine. The comparative method was used to study the experience of foreign countries.

Results and Conclusions: The paper analysed the legal consequences of violation of territorial integrity, concluding that military aggression, occupation and unacknowledged annexation of part of Ukrainian territory by Russia is not a reason to refuse territorial integrity as an unamendable provision of the Constitution of Ukraine. On the contrary, the protection of this provision should be strengthened.

1 INTRODUCTION

Formal rules for constitutional amendments have existed since the first written constitutions. However, the requirements ensuring unamendability of provisions of the constitution were not widespread from the beginning, although the situation has changed significantly over the course of several centuries. We refer to the so-called unamendable constitutional provisions that prohibit, in one form or another, amendment to the constitution. The first instance of such was in the United States, where for the first time an unchanged position was enshrined in Art. V of the US Constitution – no state without its consent can be deprived of an equal right to vote in the Senate with other states¹. The second constitution was the Basic Law of Norway in 1814. According to Art. 112 of the Constitution of the Kingdom of Norway, the proposed amendments should not contradict the constitutional principles, but relate only to the change of individual provisions that do not change the content of the Constitution². Material requirements for constitutional changes became more widespread only in the 20th

1 For more information about the history of the unamendable provisions see: M Hein, 'Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism' (2019) 3(21) European Journal of Law Reform 226-242.

2 Constitution of the Kingdom of Norway, Constitution of the countries of the world: Swiss Confederation, Kingdom of Norway, Finland Republic (OVK 2021) 124.

century. In Ukraine, such unamendable provisions are enshrined in Art. 157 and 158 of the Constitution of Ukraine of 1996³.

2 UNAMENDABLE PROVISIONS AND UNAMENDABILITY OF THE CONSTITUTION: GENERAL REMARKS

We must immediately clarify the terminology. We operate with the term “unamendable provisions”, which is frequently used in English legal literature⁴. Unamendable provisions limit the power to amend the constitution, they prohibit the use of such power in relation to certain constitutional subjects, principles or institutions⁵.

Instead of the term “unamendable provisions” other terms can also be used: warning about the invariance, warning about eternity, formula (clause, guarantee) of eternity or unamendability (“eternity clause” – eng.⁶, “Ewigkeitsgarantie” – germ.). The term “eternity clause” is used directly in the decisions of the Federal Constitutional Court of Germany. As indicated by the FCS of Germany in the decision regarding the Lisbon Treaty (Judgment of 30 June 2009, para. 214)⁷:

“With the so-called eternity guarantee, the Basic Law reacts on the one hand to historical experiences of a gradual or even abrupt erosion of the liberal substance of a basic democratic order (freiheitlichen Substanz einer demokratischen Grundordnung). However, it also makes it clear that the constitution of Germany, in accordance with international developments, has had a universal basis since the United Nations came into existence, which should not be changeable through positive law”.

Unamendable provisions are also called “absolute entrenchment” – para. 89, 201, 206, 219 of the Report on Constitutional Amendment adopted by the Venice Commission⁸ (hereinafter – Report CDL-AD(2010)001-e). In all cases, we are talking about the provisions of the constitution which prohibit making changes to it. We will later identify all the given formulations using the generalised term “unamendable provisions” or “formula of unamendability”. However, when we mention the author’s position, the term used by this author will be used. The terminology of the Venice Commission is also preserved.

Another important aspect is that unamendable provisions may not only be formally established in a positive constitutional text. Foreign experience testifies to a significant role in the formulation of unchanging positions of judges who interpret a positive constitutional text. In this case, the constituent power speaks not only through the positive text of the constitution, but also through judges (for the Kelsenian model of constitutional control – judges of the constitutional court). As an example, we can name the doctrine of the basic structure of the constitution (India)⁹ and the doctrine of substitution of the constitution

3 Constitution of Ukraine, July 28 1996 <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>> accessed 20 November 2022.

4 Y Roznai, *Unconstitutional constitutional amendments* (Oxford University Press 2017).15.

5 Y Roznai, *Unconstitutional constitutional amendments*. (Oxford University Press 2017) 21.

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

7 BVerfGE 123, 267 - Lissabon <<https://www.servat.unibe.ch/dfr/bv/123267.html>> accessed 20 November 2022.

8 CDL-AD(2010)001-e. Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009). <[https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad\(2010\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e)> accessed 20 November 2022.

9 S Krishnaswamy, *Democracy and constitutionalism in India: a study of the basic structure doctrine*. (Oxford University Press 2010, 2010) 244.

(Colombia)¹⁰, developed by the judicial bodies of these nations. In these cases, implicit unamendable provisions are formed. We must take into account such cases while giving the general characteristics of unamendable provisions; however, unfortunately, there is no opportunity to dwell on such cases in detail within the framework of this article.

The literature also uses the term “unamendability”. Unamendability can be associated with certain positive and explicitly expressed provisions in the text of the constitution, but it can also be manifested in implicit provisions formulated by judicial bodies (in both cases, explicitly or implicitly expressed unamendability is characterised by us through the prism of unamendable provisions).

Richard Albert and Bertil Emrah Oder denote by the term “unamendability” a certain state, that is, a set of characteristics that ensure their own unamendability in both practice and result¹¹. Unamendability appears in a very broad sense – as a combination of a number of factors. At the same time, such unamendability itself does not follow only from unamendable norms per se, but also encompasses other factors and circumstances.

The absolutely unamendable and reinforced procedure for amending specific provisions are singled out, which is almost “unamendable” in practice (para. 216 Report CDL-AD(2010)001-e). The last thesis of the Venice Commission can be developed through the idea that constitutional design is often multi-layered. According to Rosalind Dixon and David Landau, multi-level constitutional design aims to combine the advantages of rigidity and flexibility by creating rules for making different constitutional amendments to different parts of the constitution¹².

At the same time, it is possible to cite the position of Michael Hein, who singles out a general concept of “entrenchment clauses”, and two varieties within it. First, “general prohibitions of amendments”, and also “general constraints on amendments”, which distinguish two or more groups of constitutional subjects to which different strict rules of amendment apply¹³. The first variety is what we call unamendable provisions, the second variety is the same multi-level constitutional design mentioned above by Dixon and Landau.

We consider unamendable provisions narrowly, that is, as absolutely unamendable. Let us now turn to the explicit options for enshrining such provisions (formulae of unamendability) in foreign constitutions.

Yuriy Barabash¹⁴ names two trends in the constitutional consolidation of unamendable provisions: the establishment of a clear list of such provisions and the consolidation of only general wording regarding the limitation in constitutional reform¹⁵.

It is worth paying attention to the approach of the Venice Commission, which distinguishes between *provisions* and *principles*. A relatively small number of constitutions contain rules that certain provisions cannot be changed – this means that any proposed amendment to the formulation of a provision is unacceptable. A more extensive method, however, is to enshrine that certain principles in the constitution cannot be changed. This is a much more

10 K Bernal, ‘Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine’ (2013) 2(11) International Journal of Constitutional Law 339–357.

11 R Albert, ‘Constructive Unamendability in Canada and the United States’ (2014) 67 Supreme Court Law Review 188-193; R Albert, B. E Oder (eds.) An Unamendable Constitution? Unamendability in Constitutional Democracies. (Springer 2018) 5.

12 R Dixon, D Landau, ‘Tiered Constitutional Design’ (2018) 2(86) The George Washington Law Review 438.

13 Hein, M. Op. cit. 227.

14 I Barabash, The state-legal conflicts in the theory and practice of constitutional law (Pravo 2008), 161.

15 It is clear from the context that we use “unamendable provisions».

flexible approach that allows some degree of change as long as the basic elements of the protected principles are maintained (para. 209 Report CDL-AD(2010)001-e).

An example of *provisions*, in the above sense of the Venice Commission, are the unamendable provisions of the Turkish constitution, which indicates the norms to which changes cannot be made¹⁶. Countries whose constitutions contain the *principles* are France, Italy, the Czech Republic, Portugal, and Ukraine (para. 210-214 Report CDL-AD(2010)001-e).

3 UNAMENDABLE PROVISIONS AND THE CONSTITUTIONAL REVOLUTION

Different views on the interpretation of the concept of constitutional revolution were given attention by Gary Jeffrey Jacobsohn and Yaniv Roznai. In the sphere of public law, the analytical structure has rarely suffered such widespread but insufficiently theoretical application as the term “constitutional revolution”. This is an idea that has been generously applied to various issues that are not similar in significant aspects¹⁷.

We can cite the meaning that Mark Tushnet uses. He describes the situation of compliance with procedural continuity, but as a meaningful break in continuity. Sometimes ordinary constitutional processes can be used in the service of revolutionary transformation. Successful revolutions change the identity of the state, and we can determine whether the constituent power was carried out retrospectively, applying the criteria for success¹⁸.

From a formal point of view, as Carl Schmitt wrote, the legitimacy of the constitution does not mean that the constitution was created according to previous constitutional laws. It is unthinkable that a new constitution, which is a new fundamental political decision, would subordinate itself to the previous constitution and place itself in dependence on it¹⁹.

The Venice Commission in the Report CDL-AD(2010)001 (para. 22) claims:

“Sometimes even unlawful constitutional reform or revolutionary acts may be considered legitimate and necessary, for example in order to introduce democratic governance in non-democratic countries or overcome other obstacles to democratic development. Originally unconstitutional acts of change may also gain widespread acceptance and legitimacy over time, just as perfectly and democratically drafted constitutions may be in need of radical reform over time.”

All historical evidence indicates that for constitutions that function over any period of time, absolute entrenchment will never be absolute in practice. If circumstances change enough, or if the political pressure gets too strong, even “unamendable” rules will be changed – one way or another. In such situations, constitutional unamendability may even have the negative effect of unduly prolonging conflicts, thereby simultaneously exerting more pressure and increasing the costs to society of eventual necessary reform (para. 219 Report CDL-AD(2010)001-e by the Venice Commission).

According to Konrad Hesse, no constitution can be preserved by prohibiting certain changes to the constitution if it loses its normative force²⁰. The Basic Law’s claim to the permanent inviolability of its main content is based on the fact that the pre-legal foundation of belief in

16 This approach is also used in the Constitution of the Republic of Cyprus.

17 G.J Jacobsohn, Y Roznai, Constitutional revolution. (Yale University Press 2020) 17.

18 M Tushnet, ‘Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power’ (2015) 4(13) International Journal of Constitutional Law 642-643.

19 Schmitt C, *Verfassungslehre* (Duncker & Humblot 2017) 88.

20 Hesse K, *Basics of Constitutional Law of Germany* (Legal literature 1981), 328.

legitimacy is preserved. If it disintegrates, the requirement for the validity of the constitution loses its effect. Even constitutions are mortal (Josef Isensee)²¹. These opinions are quite understandable in the case of the previously mentioned break in continuity and the creation of a situation of constitutional revolution. In fact, according to Mark Tushnet, the decision of the nation to change the unamendable provision can be interpreted as an attempt to change the current government in a revolutionary way. Since constitutions are inevitably imperfect, they cannot fulfill the ambitious goal of some of its creators - which is to help avoid revolution²².

The theory of constitutional unamendability defines a fundamental difference between primary constituent power and secondary constituent power. The latter is limited by unamendability, and the former, which is perceived as the constitutional-democratic power of the people, is not limited by unamendability (Yaniv Roznai)²³.

Therefore, unamendable provisions by their nature relate primarily to the introduction of amendments to the constitution, and they can be questioned only by a constitutional revolution - the introduction of textual changes that violate unamendable principles or the formation of a new interpretation of unamendable provisions with an unamendable text. It is also widely believed that the unamendable provisions do not work in the case of a complete revision of the constitution according to the procedure established in it, as well as in the case of adoption of a new constitution outside the existing rules²⁴.

In connection with the above, there is often some criticism in the literature aimed at the use of the term "eternity". According to Yaniv Roznai, the term "eternity clause" is inaccurate:

"These provisions are neither eternal nor unchangeable. While they serve as a mechanism for limiting the amendment power, they do not – and cannot – limit the primary constituent power. Even unamendable provisions are subject to changes introduced by extra-constitutional forces. Moreover, their content can also 'change' through judicial interpretation."²⁵

Roznai argues that the best term is from the Brazilian constitution, which calls the relevant provisions the "petrous clauses". In the original Spanish "cláusula pétrea" means stone clause or stone provisions²⁶.

In our opinion, both "stone" and "eternity" are certain metaphors that have acquired legal status. The specific term used to indicate the relevant phenomenon may vary depending on the country, relevant national legal traditions, and legal techniques. Such metaphors denote legal presumptions ("stone", "eternity"), and such presumptions can, of course, be refuted if they fail to provide the appropriate unamendability in practice. As long as the presumptions are not refuted, they should be taken seriously and recognised as unamendable provisions, "formulas of eternity", etc.

21 J Isensee, P Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. Band XII: Normativität und Schutz der Verfassung. (C.F. Müller Verlag 2014) 37.

22 M Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power' (2015) 4(13) *International Journal of Constitutional Law* 641-642.

23 Y Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in book: Albert R, Contiades X, Fotiadou A (eds.) *The foundations and traditions of constitutional amendment* (Hart Publishing 2017) 23.

24 There is a discussion on this issue. For example, the Swiss Constitution of 18 April 1999 extends its unamendable principles to both amendments and the adoption of a new constitution (Art 193: 'The mandatory provisions of international law must not be violated'). However, the detailed analysis of this discussion is not included in the subject of the study of this article.

25 Y Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD diss., the London School of Economics 2014) 23-24.

26 Y Roznai, *Unconstitutional constitutional amendments*. (Oxford University Press 2017) 129.

It is believed that the effect of unamendable provisions can be neutralised not only when adopting a new constitution according to existing procedure, by the primary constituent power, or by a constitutional revolution. This is the idea of the so-called “double amendment”. It means that the provision that establishes unamendability (formula of unamendability) is repealed or changed first, then those provisions that were protected by the formula of unamendability are changed, losing their special protection after the first amendment²⁷.

Let us start with an interesting analogy given by J. Bryce. The ancient Greek republics sometimes passed laws that contained the clause that anyone who proposed their repeal would be punished by death. Therefore, anyone who sought to repeal such a law began with a proposal to repeal the law that threatens execution²⁸.

At the beginning of the 20th century, the Ukrainian scientist in exile V. Starosolsky questioned the meaning of absolute bans on changing the constitution in 1923:

“Do they make it impossible to change the constitution from the point of view of law, or is it possible to change the constitution legally despite them? After all, there is still an opportunity to change, first of all, the ban itself, and then the resolutions to which this ban applies.”²⁹

Richard Albert points out that Art. V of the US Constitution creates the possibility of amending the guaranteed provision itself to circumvent the guarantee itself³⁰.

“Double amendment” is rather a hypothetical construction, as its implementation is very difficult in practice. Meanwhile, the Constitution of Portugal was recently amended to the formula of unamendability in one time (one of the unamendable provisions (k) from Art. 288 of the Constitution of Portugal was removed), although the introduction of such changes was quite controversial³¹. In 2017, changes to the formula of unamendability were made in Kazakhstan but were later revoked in 2022. The changes were opportunistic and related to guaranteeing the status of President Nazarbayev³². Thus, although rather isolated, unamendable provisions themselves can be changed, as evidenced by relevant cases from practice.

According to Yaniv Roznai, if unamendable provisions that are not self-entrenched can be easily changed through the double amendment procedure, this does not make explicit unamendability useless. At a minimum, unamendability adds a procedural hurdle, and thus better protection of a fixed value or rule as the double amendment process is still procedurally more complex and possibly more time-consuming than the single amendment process³³.

There are arguments for directly establishing the immutability of the formula of unamendability itself. As András Sajó and Renáta Uitz aptly put it, the norm of protection

27 See more: R Albert, ‘Amending constitutional amendment rules’ (2015) 3 (13) *International Journal of Constitutional Law* 655–685.

28 D Bryce, *American Republic*: In 3 parts Part 1. National Government (Printing House V. F. Richtep 1889), 402.

29 V Starosolsky, *State and political law*. Part 2 (Lohos Ukraine 2017), 186.

30 R Albert, ‘Amending constitutional amendment rules’ (2015) 3 (13) *International Journal of Constitutional Law* 663.

31 See more: X Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 287-288; M Hein, ‘Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism’ (2019) 3(21) *European Journal of Law Reform* 237.

32 H Berchenko, T Slinko, Y Tkachenko, V Kobryn, ‘Preliminary Judicial Control of Amendments to the Constitution: Comparative Study’ (2022) 4(16) *Access to Justice in Eastern Europe*.

33 Y Roznai, ‘The Uses and Abuses of Constitutional Unamendability’ in book: Contiades X, Fotiadou A (eds.), *Routledge handbook of comparative constitutional change* (Routledge 2021) 165.

without “protection” is the Achilles’ heel of the constitution³⁴. It is very difficult to find direct instructions in foreign constitutions to prohibit changes to the very rules of making changes or certain unamendable provisions. The exception is part 2 of Art. X of the Constitution of Bosnia and Herzegovina, according to which no amendments to this Constitution may cancel or limit any of the rights and freedoms referred to in Art. II of this Constitution, or change this clause³⁵.

At the same time, it is important not to forget that amendment rules can change informally and Richard Albert names this as uncodified changes to formal amendment rules³⁶. Moreover, the content of the formula of unamendability can evolve with the help of the practice of its application (formation of custom) or judicial interpretation.

Thus, immutability can lose its meaning as a result of its direct denial, without formal rejection or cancellation. In April 2015, the Constitutional Chamber of the Supreme Court of Honduras decided that the article of the constitution, which was not subject to revision and related to the limitation of the term in office of the president, does not have legal force³⁷.

In our opinion, the change or cancellation of the unamendable provision itself seems illegal. If this is allowed, the unamendable provision is quite the opposite and simply creates certain complications in the form of the need to make a “double amendment” - first to cancel the unamendability provision, and then to change or cancel some specific regulatory provision of the constitution. Despite the above examples of Portugal and Kazakhstan, where this happened, these cases appear to be illegal. The Portuguese example did not become the subject of constitutional control, so such changes did not have a legal assessment. And last but not least, the “oversaturation” of the Portuguese constitution with unamendable provisions played its role in the very idea of corresponding changes, which once again raises the question of the need to include only the most important norms/principles in the corresponding unamendable list. However, the Kazakh case, where the corresponding changes to the formula of unamendability were recognised as constitutional, remains quite unique today.

Changing or cancelling the formula of unamendability is a rather controversial idea. Konrad Hesse, while considering the Basic Law of the Federal Republic of Germany, notes that it is impossible to remove the force of Art. 79, paragraph 3, by the fact that it can be removed during constitutional changes³⁸.

Aharon Barak also thought about the possibility of changing the formula of unamendability in the constitution. He draws attention to the concept of the basic structure of the constitution and emphasises that if the material requirement for such structure of the constitution is fixed, not only in the provision on amendments to the constitution but also in the whole constitution, then the amendment to the provision on amendments is insufficient, since the amendment would be unconstitutional. If the basic structure requirement is indeed implied by the language of the whole constitution, then a new constitution is needed to remove the basic structure requirement³⁹.

34 A Sajo, R Uitz, *The constitution of freedom: an introduction to legal constitutionalism* (Oxford University Press 2017) 50.

35 Constitution of Bosnia and Herzegovina (of November 21, 1995), *Constitutions of the countries of the world: Republic of Slovenia, Bosnia and Herzegovina, Republic of North Macedonia* (OVK, 2021) 94.

36 R Albert, *Constitutional Amendments Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 136-138.

37 A Sajo, R Uitz, *The constitution of freedom: an introduction to legal constitutionalism* (Oxford University Press 2017) 50.

38 K Hesse, *Basics of Constitutional Law of Germany* (Legal literature 1981), 331.

39 A Barak, ‘Unconstitutional Constitutional Amendments’ (2019) 3 (44) *Israel Law Review* 335.

4 WHAT PROVISIONS SHOULD BE UNAMENDABLE?

Let us now draw attention to the radical approach. There is a critical attitude towards the very formulas of eternity. Andrew Arato highlights the fact that constitutional insurance in the form of rules of perpetuity and immutable constitutions may not be tenable.⁴⁰ In his opinion, empirically, the post-sovereign paradigm is unlikely to lead to provisions about eternity⁴¹. In our opinion, the proposed rejection of eternity formulas seems impossible and impractical.

We are faced with a difficult dilemma. Unamendable provisions should play a regulatory function. At the same time, excessive and unjustified admiration for unamendability can play a bad joke on it – no one will take it seriously and we risk getting many such paradoxical cases, like those that were cited in Portugal, Kazakhstan, and also in Honduras.

Yaniv Roznai defends the idea that the more similar the democratic characteristics of the powers to make changes to the properties of the primary constitutional power, the less it should be limited. And vice versa: the closer it is to the legislative power, the more it should be bound by restrictions⁴². A similar opinion related to constitutional control is expressed by Gary Jeffrey Jacobsohn. The degree in which we decide to give courts responsibility for judicial control over amendments to the Constitution should at least depend partly on the relative ease or difficulties of amending the document⁴³.

According to the Venice Commission (Report CDL-AD(2010)001-e), it should be possible to discuss and amend not only constitutional provisions on government, but also provisions on fundamental rights and all other parts of the constitution (para. 248). Constitutions that were originally adopted by undemocratic regimes should be open to democratic debate, reassessment and relatively flexible amendment (para. 247). Among the special principles protected by unamendability there usually can be found one or several of the following: a fundamental democratic (or republican) form of government, a federal structure, sovereignty, territorial integrity, and certain fundamental rights and freedoms (para. 215).

In any case, the establishment of unamendable provisions is the sovereign right of the constituent power. As scientists, we can only talk about the expediency of fixing certain provisions in certain societies as unamendable, as well as the (in)efficiency of an excessively broad or excessively narrow list. Of course, such provisions function in the specific conditions of the political system, parliamentarism, legal culture and customs. The main issue is that they act in the conditions of a specific judicial power, whose representatives are given the right to verify compliance with unamendable provisions when amendments are made to the constitution (in the absence of a direct instruction, they themselves recognise such a right; less often, they refuse to recognise it).

40 A Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017) 418.

41 A Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017) 412.

42 Y Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in book: Albert R, Contiades X, Fotiadou A (eds.) *The foundations and traditions of constitutional amendment* (Hart Publishing 2017); Y Roznai, *Unconstitutional constitutional amendments*. (Oxford University Press 2017) 162.

43 G.J Jacobsohn, 'An unconstitutional constitution? A comparative perspective' 2006 3(14) *International Journal of Constitutional Law* 487.

5 TERRITORIAL INTEGRITY: UKRAINIAN EXPERIENCE OF CONSOLIDATION AND PROTECTION

As previously mentioned, territorial integrity is often recognised as an unamendable provision of the Constitution. So, for example, in Art. 152 of the Constitution of Romania, named the “Limits of revision”, among other things, it is stipulated that territorial integrity cannot be subject to revision⁴⁴. According to Art. 288 of the Constitution of Portugal, laws on the revision of the Constitution must respect the national independence and unity of the state (paragraph a.)⁴⁵.

Many constitutions protect one or more of the following principles: “national unity”, “territorial integrity”, “existence of a state”, “sovereignty” or “independence”⁴⁶. Yaniv Roznai names 29 such constitutions that have been in force at different times and continue to be in force, which include Angola, Azerbaijan, Burundi, Cameroon, Cape Verde, Chad, Côte d’Ivoire, Cuba, Djibouti, Equatorial Guinea, Kazakhstan, Guatemala, Madagascar, Mauritania, Mexico, Moldova, Mozambique, Nepal, Portugal, Romania, Rwanda, Sao Tome and Principe, Somalia, Tajikistan, and Timor-Leste⁴⁷.

Silvia Suteu believes that although the justification for the existence of such provisions is difficult, they can be united under the aegis of the protection of the state: the territory, being an integral part of the life of the nation, its protection becomes commensurate with the survival of the state. It is crucial that these provisions should not be combined with the provisions on the unitary (as opposed to federal) character of the state. While the latter relate to administrative-territorial organisation, territorial integrity refers to a more fundamental desire to ensure the survival of the state⁴⁸.

In Ukraine, territorial integrity is an immutable principle: according to Art. 157 of the Constitution, it cannot be changed if the changes are aimed at eliminating independence or violating territorial integrity. Obviously, the reason for the emergence of this norm was that for the Ukrainian people, independence and territorial integrity have great value and are connected with real survival. Having been absorbed by various empires for many decades, Ukraine finally became independent in 1991 and its borders were internationally recognised. At the same time, internal and external threats to encroachment on independence and territorial integrity have not disappeared.

The Constitutional Court of Ukraine carries out preliminary control over draft laws on amendments to the Constitution on the subject of their compliance with the requirements of Art. 157 and 158 of the Constitution of Ukraine⁴⁹. However, in its entire history, the Constitutional Court of Ukraine has never established a violation of territorial integrity in draft laws submitted to the parliament. The closest to this was the situation with the consideration of the draft law on the decentralisation of power (conclusion of July 30,

44 Constitution of Romania <<https://www.presidency.ro/en/the-constitution-of-romania>> accessed 20 November 2022.

45 Constitution of the Portuguese Republic, Constitution of the countries of the world: Italian Republic, Vatican City State, Kingdom of Spain, Portuguese Republic (OVK 2021), 315.

46 Y Roznai, ‘Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers’ (PhD diss., the London School of Economics 2014) 33.

47 Y Roznai, *Unconstitutional constitutional amendments*. (Oxford University Press 2017) 25.

48 S Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) 30.

49 H Berchenko, ‘Preliminary control over changes to the Constitution: legal positions of the Constitutional Court of Ukraine’ (2019) 6-1 *Law and Society* 9-16; H Berchenko, ‘Reservation of the Constitutional Court of Ukraine as an element of the procedure for introducing amendments to the Constitution of Ukraine’ (2020) 66 *Actual Problems of Politics* 118-123.

2015)⁵⁰. At that time, it was proposed to supplement Chapter XV “Transitional Provisions” of the Constitution of Ukraine with paragraph 18 of this content:

“Features of local self-government in certain districts of Donetsk and Luhansk regions are determined by a separate law.”

These changes were obviously aimed at implementing the Minsk agreements concluded in 2015. On this occasion, four judges of the Constitutional Court of Ukraine expressed their separate opinions. In particular, judge M. Melnyk drew attention to the possible violation of territorial integrity by the proposed changes. The changes themselves were never adopted.

The territory of Ukraine within the existing border is integral and inviolable - as is stated in Part 3 of Art. 2 of the Constitution of Ukraine. The protection of territorial integrity by the Constitutional Court of Ukraine was manifested in 2014, when it adopted two decisions:

- in the case based on the constitutional submissions of the Acting President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine and the Human Rights Commissioner of the Verkhovna Rada of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea “On holding a Crimean-wide referendum” (the case of holding a local referendum in the Autonomous Republic of Crimea) from March 14 2014⁵¹;
- in the case of the constitutional submission of the Acting President of Ukraine and the Chairman of the Verkhovna Rada of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea “On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol” from March 20 2014⁵².

Both acts of the Verkhovna Rada of the Autonomous Republic of Crimea, which were recognised as unconstitutional, violated the territorial integrity of Ukraine.

The Constitution of Ukraine in Art. 37 also embedded the protection of territorial integrity into the mechanism of banning political parties and other associations. It is forbidden to form associations, and the activities of those formed should be prohibited if their program objectives or actions are aimed at eliminating the independence of Ukraine or violating the sovereignty or territorial integrity of the state. These provisions can be called a manifestation of militant democracy (democracy capable of defending itself) and a logical continuation of the recognition of territorial integrity as an unchanging principle. At the same time, the Constitutional Court of Ukraine, unlike many European constitutional courts, does not consider cases on the prohibition of associations of citizens, and these cases have been referred to administrative courts since 2005. The corresponding practice is already quite significant⁵³.

In a number of decisions, the Constitutional Court of Ukraine recognised the principle of protecting territorial integrity as a legitimate goal for applying the concept of “militant democracy”. In the decision of July 16 2019, in the case of the constitutional submission of 46 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine

50 Conclusion of the Constitutional Court of Ukraine of July 30 2015, <<https://zakon.rada.gov.ua/laws/show/v002v710-15#Text>> accessed 20 November 2022.

51 Judgment of the Constitutional Court of Ukraine of March 14 2014, No 2-pn/2014 <<https://zakon.rada.gov.ua/laws/show/v002p710-14#Text>> accessed 20 November 2022.

52 Judgment of the Constitutional Court of Ukraine of March 20 2014, No 3-pn/2014 <<https://zakon.rada.gov.ua/laws/show/v003p710-14#Text>> accessed 20 November 2022.

53 Y Barabash, H Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9:3(28) *Baltic Journal of European Studies* 3-24.

(constitutionality) of the Law of Ukraine “On Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their symbols”⁵⁴ (paragraph 2 point 11 and paragraph 3 point 14 of the motivational part) the Constitutional Court of Ukraine declared:

“...illegal armed formations use the symbols of the communist regime to oppose Ukrainian state symbols and the idea of Ukrainian statehood, to discredit the idea of democracy, pose a real threat to human rights, the state sovereignty of Ukraine and its territorial integrity.”

“...the red star and other symbols of the communist regime are widely used in the temporarily occupied territories of Ukraine by the armed forces of the Russian Federation, illegal armed formations created, supported and financed by the Russian Federation, as well as self-proclaimed bodies under the control of the Russian Federation, which usurped power functions in these territories and that is why it is a real threat to the state sovereignty of Ukraine, its territorial integrity and democratic constitutional system.”

In the decision of December 21 2021, No 3-p/2021⁵⁵ in the case of the constitutional submission of 47 People’s Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of Art. 6 of the Law of Ukraine “On Television and Radio Broadcasting”, Art.s 15, 15-1, 26 of the Law of Ukraine “On Cinematography” (paragraph 2, paragraph 4 and paragraph 1, paragraph 5 of the motivational part) the Constitutional Court of Ukraine also declared:

“For a long time, the Russian Federation pursued an unfriendly state policy towards Ukraine, and in 2014 grossly violated the state sovereignty and territorial integrity of Ukraine, the norms of international law and its international commitments.”

“In view of the fact that since 2014 the occupying state has grossly violated the norms of international law, the state sovereignty and territorial integrity of Ukraine, occupied the Autonomous Republic of Crimea, the city of Sevastopol and certain areas of the Donetsk and Luhansk regions, as well as taking into account the threats that Ukraine faces as a victim of the aggressive state policy of the Russian Federation, the central bodies of the executive power of Ukraine may have the appropriate discretionary powers and carry out normative regulation of the procedure for entering a person into the List of persons who pose a threat to national security, in particular, by adopting subordinate regulations.”

At the same time, there is an ambiguous attitude towards the Ukrainian formula of unamendability in scientific circles. Yaniv Roznai and Silvia Suteu argue that the unamendable protection of territorial integrity is a particularly ineffective type of eternity clause, as it is subject to both the internal threat of secession and the external risk of forcible annexation⁵⁶. It is argued that one can hardly imagine a rougher demonstration of the impotence of territorial integrity as a constitutional principle and, perhaps, the impotence of law in general, than in this case. In the opinion of Konstantinos Pilpilidis, which he expressed specifically in the aspect of protecting territorial integrity, non-observance of the provisions on eternity causes contempt for the entire constitution⁵⁷.

54 Judgment of the Constitutional Court of Ukraine of July 16 2019, No 9-p/2019 <<https://zakon.rada.gov.ua/laws/show/v009p710-19#Text>> accessed 20 November 2022.

55 Judgment of the Constitutional Court of Ukraine of December 21 2021, No 3-p/2021 <<https://zakon.rada.gov.ua/laws/show/va03p710-21#Text>> accessed 20 November 2022.

56 Y Roznai, S Suteu, ‘The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle’ (2015) 03(16) German Law Journal 542; Roznai Y, Unconstitutional constitutional amendments. (Oxford University Press 2017) 131.

57 K Pilpilidis, ‘A Constitution for Eternity: An Economic Theory of Explicit Unamendability’ in book: R Albert, B.E Oder (eds.), An Unamendable Constitution? Unamendability in Constitutional Democracies. (Springer, 2018) 72.

We cannot leave the above criticism unanswered. It is true that “Ukraine’s continuing dependence on Russia stems from the hundreds of years that the Ukrainians were governed by the Russian Empire and later the USSR.”⁵⁸ However, we emphasise that it would be a mistake in the conditions of temporary occupation to seriously consider the case of 2014 as a legitimate decision on the independence of the “people of Crimea”, as well as the case of 2022 with quasi “referendums” in the territories of the Donetsk, Luhansk, Kherson and Zaporizhzhia regions temporarily occupied by Russia. That is, we do not accept the idea of the appearance in 2014 and later in 2022 of new subjects of constituent power within the boundaries of separate territories occupied by Russia and their fictitious implementation of either the primary constituent power or the carrying out of a legitimate constitutional revolution. In short, in reality, all of this led to the accession (annexation) of the relevant territories by Russia and was not recognised by Ukraine and the UN.

It is no accident that we have so meticulously analysed the cases described in the literature when the clause on unamendability is considered to be no longer valid. Although these cases remain debatable, none of these cases is related to the occupation and unrecognised annexation by one state of the territory of another sovereign state.

In this regard, one cannot fail to mention the constitutional right to resistance, which is quite widespread in the world but was not directly reflected in the text of the Constitution of Ukraine⁵⁹. The fundamental question lies in the relationship between the principle of efficiency, proclaimed by Hans Kelsen, and the principle of legitimacy. It is our deep conviction that the principle of effectiveness should have meaning in combination with the principle of legitimacy, and not replace it.

In certain situations, it is indeed possible to use the doctrine of “effective control”, but this does not mean that we recognise such control by Russia of the occupied territories as legitimate. In fact, in 2014, a temporary occupation and subsequent unrecognised annexation of the territory of Ukraine by another state took place⁶⁰. Likewise, the 2022 quasi-referendums on joining the Russian Federation in the temporarily occupied part of the territory of four regions of Ukraine (Donetsk, Luhansk, Kherson, and Zaporizhzhia), which were announced and organised by the temporary occupying Russian authorities, also led to an unrecognised and illegal annexation. That is why, in our opinion, the external threat to the Ukrainian formula of unamendability is not a sufficient reason for changing or abandoning the formula itself. The movement for the de-occupation of the territory is the practical embodiment of this formula in real life, the protection of the principle of legitimacy against the crude “right of force”, no matter how difficult this path may be.

6 CONCLUSIONS

Although unamendable provisions have become a common feature of constitutional design, not all constitutions contain unamendable provisions. Multilevel constitutional design (in the terminology of Rosalind Dixon and David Landau) can be considered a competitor of unamendable provisions. The key problems associated with the constitutionalisation of unamendable provisions are related to the establishment of an optimal list that would correspond to national specificities, as well as the creation of protection mechanisms.

58 I Barabash, O Serdiuk, V Steshenko, ‘Ukraine in European human rights regime: Breaking path dependence from Russia’ in book: *The EU in the 21st Century: Challenges and Opportunities for the European Integration Process* (Springer International Publishing 2020) 247 – 270.

59 H Berchenko, *Constitutional Right to Resist* (2020) 4 Problems of Legality 18-30.

60 O Zadorozhnyi, *Crimea’s Anexia - an International Crime* (K.I.S. 2015).

There are cases where unamendable provisions lose their force. Therefore, we should emphasise the need to not exaggerate the role of the semantics of the words “eternity” and “unamendability”; nor should we overestimate the regulatory influence of unamendable provisions or consider them as a kind of panacea for the protection of certain values. Unamendable provisions/principles can cease to be valid in the event of changes being made under the condition of a constitutional revolution (both formal, i.e., through the establishment of a new regulation; and informal, through a new interpretation of existing norms) and adoption of a new constitution with or without compliance with the current procedure. Another case discussed in this context is the application of the double correction mechanism. It is worth noting that the legality of such a development of events is not universally recognised in all cases.

Violation by the aggressor state of the territorial integrity of Ukraine as an unamendable provision of its Constitution is unequivocally illegitimate and unlawful. We emphasise that such a gross violation by an external force does not mean discrediting the formula of unamendability itself and does not necessitate the rejection of such a formula - as a whole, or as individual elements - in the Constitution of Ukraine. It only means that the Constitution must be restored. However, the opposite option, which is a rejection of the very principle of territorial integrity or recognition of its declarative nature (fictitiousness), would mean a rejection and discreditation of the Constitution.

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