Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Principle

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Abstract

What is the implication of designating territorial integrity as an "eternal" constitutional principle? This article reflects on the protection of territorial integrity in the Ukrainian constitution, and especially within its provision of unamendability, against the backdrop of the 2014 Crimean crisis. It investigates the aims and limits of territorial integrity as an unamendable principle in the face of a double threat: internal in the form of a secessionist movement and external in the shape of forceful annexation of territory. The article argues that the preservative promise of unamendable territorial integrity is severely curtailed by this double vulnerability, even when backed by a constitutional court with far-reaching powers of judicial review. The article concludes that the uncertainty surrounding territorial change in constitutional law and theory is not alleviated by unamendable protections of territorial integrity.

Keywords

Territorial integrity; eternity clauses; secession; entrenchment; unamendability; crimea.
Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Principle

Yaniv Roznai & Silvia Suteu

“East-Central European constitutions play like songs of the liturgy on a very old gramophone. You hear the expected music performed in the service of constitutionalism, but you hear it with a crackle in the background. The performance is old-fashioned in order to receive the nulla obstat of the Council of Europe and sometimes (when territorial integrity comes up) the soprano’s voice suffers from hysteria.”

András Sajó, Reforming Prince Potemkin, 2 E. EUR. CONST. REV. 126 (1993)

A. Introduction

Ukraine’s 2014 crisis began as anti-governmental protests which led to the removal of Ukraine’s former president, Viktor Yanukovich on February 2014, after which pro-Russian militias in Crimea took control over strategic facilities and Crimea’s administrative borders with the rest of Ukraine. On 1 March 2014 the Russian State Duma approved a request by President Vladimir Putin to use Russian forces across Ukraine with the stated reason of saving Russian lives. Later, Russian and pro-Russian forces gradually took over Ukrainian military sites and the main official institutions in Crimea. On 6 March 2014, the Supreme Council of the Autonomous Republic of Crimea adopted a resolution, “On the All-Crimean Referendum”, on the basis of Articles 18(1)(7) and 26(2)(3) of the Crimean constitution. This resolution was meant to provide the legal basis for a referendum on independence, to be held on 16 March 2014, but was promptly contested by both Ukrainian and international voices. On 11 March 2014, Crimea’s parliament approved a resolution on the independence of Crimea, “if a decision to become part of Russia [was] made at the referendum of the 16 March 2014”. The resolution declared Crimea as an independent, sovereign state and

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2 Article 18(1)(7) provides that the Autonomous Republic may “call and hold republican (local) referendums upon matters coming under the terms of reference of the Autonomous Republic of Crimea.” Article 26(2)(3) provides that the Supreme Council may “pass a resolution upon holding a republican (local) referendum.”

requested the Russian Federation to accept the Republic of Crimea as a new constituent entity of the Russian Federation with a status of a republic.4

The Ukrainian government did not recognize the referendum, declaring it illegal.5 On 14 March 2014, the Ukrainian Constitutional Court found the Crimean referendum to be unconstitutional and ordered the Crimean authorities to immediately cease all preparations for it.6 On 20 March 2014, the same court declared the resolution of the parliament of Crimea “on the declaration of independence” to be unconstitutional.7 On 15 March 2014, the Council of Europe’s Venice Commission for Democracy through Law (Venice Commission) opined that the referendum would be unconstitutional and illegitimate.8 A draft United Nations Security Council resolution urging states not to recognize the results of the referendum failed to pass on 15 March 2014 following Russia’s veto and China’s abstention.9 On 27 March 2014, the United Nations General Assembly adopted Resolution 68/262 in which it emphasized “that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.”10

Notwithstanding these condemnations, on 16 March 2014, Crimea’s local authorities held a referendum on whether Crimea should secede from Ukraine to join the Russian Federation. A day later, it was announced that 97 percent of the population had voted to join Russia. Consequently, the Russian President Vladimir Putin signed a decree recognizing Crimea as an independent state and signed agreements with Crimea’s leadership declaring Crimea and the city of Sevastopol part of the Russian Federation. Subsequently, the Russian Parliament adopted a law accepting the new regions as parts of the Russian Federation.11 By March 2015,

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5 On 7 March 2014, acting President Turchynov signed a decree suspending the Crimean Parliament’s Order of 6 March 2014 to hold a referendum on territorial integrity and the Crimean Parliament’s resolution authorizing the 16 March referendum, as violating the Ukrainian Constitution and laws. On 11 March 2014, the Ukrainian Parliament issued a statement demanding that the Crimean Parliament immediately revise its resolution to comply with the national law. Moreover, Ukraine’s Minister of Justice, Ombudsman and Chair of the Council of Judges, have all publicly condemned the referendum as unconstitutional. See Bilych et al, supra note 1, at 21.
11 Human Rights Watch, Rights in Retreat – Abuses in Crimea 35 (November 2014). The historic and ethnic relationship shared by Russia and Crimea could explain the interest and the will of the government in Moscow to act on behalf of the Russian community in the Crimea, and conversely a sympathy within Crimea towards Russia. See e.g. Philip Chase, Conflict in the Crimea: An Examination of Ethnic Conflict under the Contemporary Model of Sovereignty, 34 COLUM. J. TRANSNAT’L L. 219, 227-229, 243 (1996); Roman Solchanyk, Crimea: Between Ukraine and Russia, in CRIMEA: DYNAMICS, CHALLENGES AND PROSPECTS 3, 4 (Maria Drohobycky ed., 1995). For a study on the trust-building between the Crimean population and Russia and the promotion of pro-Russian separatism in Crimea see Lada L. Roslycky, Russia’s smart power in Crimea: sowing the seeds of trust, 11(3) SOUTHEAST EUR. & BLACK SEA STUD. 299 (2011).
even President Putin was ready to admit that the plan “to bring Crimea back into Russia” had been orchestrated weeks before the referendum.\textsuperscript{12}

The 2014 conflict surrounding the status of Crimea not only reflects a contentious political issue both in Ukraine and in Russia and between the two countries,\textsuperscript{13} but also raises imperative questions from a constitutional theory perspective. Of those, one will be the particular focus of this contribution: the tension between the unamendable commitment to territorial integrity in Ukraine’s constitution and the reality of the country’s territorial fragmentation following the 2014 Crimean crisis. We are thus interested in the protection of territory, as inscribed in the eternity clause of Ukraine’s constitution, as an instantiation of the question raised by Zoran Oklopcic in his contribution to this volume: “what happens to the authority of… a constitutional order when a fluid and malleable identity fractures and disappears, and when competing political identities crystalize, instead?”\textsuperscript{14}

This article reflects on the protection of territorial integrity in the Ukrainian constitution, and especially within its provision of unamendability, against the backdrop of the 2014 Crimean crisis. At the general level, we examine whether constitutional theory can offer answers when confronted with the apparent inefficacy of a constitutional claim to eternity. More specifically, we focus on what the Ukrainian case can teach us about the implications of designating territorial integrity or indivisibility of a state as an eternal/unamendable constitutional principle.\textsuperscript{15} Building on insights from the Crimean crisis, we argue that the unamendable protection of territorial integrity is an especially ineffective type of eternity clause since it is subject to both the internal threat of secession and the external risk of forceful annexation. The preservative promise of unamendable territorial integrity is severely curtailed by this double vulnerability, even when backed by a constitutional court with far-reaching powers of judicial review. Territorial integrity as an eternal constitutional principle then remains merely aspirational. Moreover, we argue that the act of entrenching territorial protection as an unamendable principle is in clear tension with the idea of popular sovereignty and with mechanisms for expressing popular will. This tension provides further evidence to support Stephen Tierney’s insight that the principle of democracy is deeply unsettling for

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\textsuperscript{12} Putin reveals secrets of Russia’s Crimea takeover plot, BBC NEWS (9 March 2015), http://www.bbc.co.uk/news/world-europe-31796226

\textsuperscript{13} See generally Chase, supra note 11; Natalie Mychajlyszyn, The OSCE in Crimea, 9 Helsinki Monitor 30, 36-37 (1998); Doris Wydra, The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-determination, 10 Int’l J. Minority and Group Rights 111 (2003); David R. Marples and David F. Duke, Ukraine, Russia, and the question of Crimea, 23(2) Nationalities Papers: J. Nationalism & Ethnicity 261 (1995). Interestingly, it has been argued that the primary source of instability in Crimea lies with Ukrainian political and commercial interests and not with ethnic claims or geopolitics. See Tetyana Malyarenko and David J. Galbreath, Crimea: Competing Self-Determination Movements and the Politics at the Centre, 65(5) Europe-Asia Studies 912 (2013).

\textsuperscript{14} Zoran Oklopcic, The crisis in Ukraine beyond the paradox of constitutionalism: From territorial rights and territorial integrity to early-conflict constitution making, this volume at ?

\textsuperscript{15} In this paper we use the term unamendability to describe the limitation on the constitutional amendment power from amending certain principles or institutions. Provisions which explicitly protect constitutional subjects from amendments are often termed “eternity clauses”. For a note on this terminology and its normative implication see Yaniv Roznai, Unamendability and The Genetic Code of The Constitution, Eur. Rev. Pub. L. (forthcoming, 2015). Also, we use the terms “territorial indivisibility” and “territorial integrity” interchangeably. Nevertheless, it can be argued that there is a distinction between territorial indivisibility and territorial integrity. The former emphasises the negation of secession whereas the latter carries a dual aspect: internal – which opposes secession and external – which emphasises protection against foreign aggression or forcible encroachment of the territory. See European Commission for Democracy Through Law (Venice Commission), Self-Determination and Secession in Constitutional Law, Report Adopted by the Commission at its 41th meeting 4-5 (Venice, 10-11 December 1999), CDL-INF (2000) 2, http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-INF(2000)002-e
constitutional law. The uncertainty surrounding territorial change in constitutional law and theory, we conclude, is not alleviated by unamendable protections of territorial integrity.

The article proceeds by an examination of the constitutional protection of territorial integrity in Ukraine’s constitutional architecture (section B). We do so in several steps. First, we explore Ukraine’s general constitutional arrangements of territorial organization and Crimea’s place within those. Second, we focus on the unamendability protection of the territorial integrity within the Ukrainian constitution. Third, we study the concurrent adoption of constitutional review of proposed constitutional amendments in Ukraine and its relevance to the protection of unamendability. In Section C we outline the functions of unamendable constitutional provisions and further analyze the unamendability of territorial integrity in a comparative perspective. Section D builds on insights from the previous sections in order to draw out major lessons from the Crimean crisis, regarding the tension between popular sovereignty and commitments to unamendability of the territorial integrity, as well as the limited effectiveness and risks of unamendability in the area of territorial integrity. Section E concludes.

B. Ukraine and the Unamendability of Territorial Integrity

I. Territorial Arrangements in the Ukrainian Constitution

The territorial question surrounding the (re-)emergence of a state is often ignored by constitutional commentators, who tend to grapple with the question of who is “we, the people” instead. Thus, it is perhaps surprising to note that a complex definitional attempt was not made at the time of Ukraine’s independence, which some scholars have termed an “overwhelming indifference to the so-called ‘national question’”, that is, who and on what terms constituted the “nation”. Others have pointed to the rejection by Ukrainian leaders at that time of notions of “Ukraine for Ukrainians” and their adherence instead to a project of “statehood for all of its peoples”; this in turn is said to have paid off in the overwhelming vote in favor of independence. What resulted in the early days of independence was thus “a pluralist, civic approach to the conception of a political community”, and ethnos was shunned in favor of “a political-territorial conception of nationhood”.

Once the constitution-making process got under way in the mid-nineties, however, the question of the nature of the political community displayed its true contested colors. Pitted against each other were the political Right in Ukraine, with its emphasis on the “Ukrainian people” as the distinctive and titular majority, and the political Left, which spoke of the “people of Ukraine” in an attempt to define it in territorial terms. According to the former,

16 Stephen Tierney, Sovereignty Claims and Referendum Democracy: Pluralizing constituent power in multinational societies, this volume at 2
17 An exception here is Zoran Oklopcic, Provincializing Constitutional Pluralism, 5(3) Transnational Legal Theory 331-363 (2014).
20 Wolczuk, supra note 18, at 90.
21 Id., at 167 et seq.
national minorities were accepted and protected as “state-forming communities”, but the new civic nation was to be built around the core, Ukrainian, *ethnos*. Conversely, the Left wanted a supra-ethnic definition of the people, wherein multi-ethnicity could be asserted and preserved.

Without a centrist alternative and needing to reach a compromise, the Right’s position was enshrined in the Ukrainian constitution, notably in its preamble and provisions on state language and symbols. For this reason, some have listed Ukraine among those post-communist countries having enshrined “a dubious and contested definition of nationhood” in their constitution. More importantly, this brief foray into the debates surrounding constitution-drafting in Ukraine highlights the disputed nature of the political community in whose name the constitutional text was to be enacted. Such clashes between “competing and mutually exclusive models of statehood” serve to further illustrate the incursions between state- and constitution-making which Oklopcic discusses in this volume. As we note below, the constitutional arrangements surrounding Crimea’s status further strengthened this notion of a civic state, to the exclusion of competing (and not insignificant) visions.

The territorial question relates not just to the enforcement of external boundaries which statehood requires, but also to the internal administrative map reflecting and/or holding together the polity. This internal structure is occasionally also shrouded in unamendability, whether of the unitary state (such as in Romania) or of the federal structure (such as in Germany and Brazil). While Ukraine’s provision of unamendability speaks of “territorial indivisibility” without further specification, Article 2 of the constitution defines Ukraine as a unitary state and refers to its territory “within its present border” as indivisible and inviolable. A short excursion into Ukraine’s territorial arrangements, and the special status afforded Crimea, will reveal them to have been less clear-cut.

Territorial integrity, as a central feature within Ukrainian constitutionalism, already appeared in the 1990 Declaration of the State Sovereignty of Ukraine alongside other important principles such as national state sovereignty and self-determination. The Act of Ukraine’s Independence Declaration of August 1991 expressly states that “the territory of Ukraine is

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22 Id., at 171.
23 Id., at 171.
24 Id., at 171. Although the preamble speaks of which “the Ukrainian people — citizens of Ukraine of all nationalities”, thus seemingly striking a compromise between the two positions, other provisions in the constitution refer to the centrality of the Ukrainian nation to the state and the latter’s duty to support its consolidation and development (art. 11). See id., at 228.
26 WOLCZUK, supra note 18, 180.
27 Oklopcic, supra note 14, at. See also Culic, supra note 25, at 57, speaking of state-building in post-communist states as “vigorou...” associated to a “remedial and assertive nationalism”.
28 WOLCZUK, supra note 18, at 95.
31 See below Section B.II.
The principle continued to be a central feature during the constitution-making process. The draft constitution of 27 May 1993 embodied the “fundamental political accommodation made to Crimea over the spring and summer of 1992 to curb the threat of Crimean secession.” In the draft constitution as amended on 26 October 1993, the first chapter entitled “Fundamentals of Constitutional Order” was modified to “General Provisions” and extended by the addition of various articles. Ukraine’s sovereignty was added in Article 2, and its second part was complemented with the statement on the integrity and inviolability of the territory of the state. Territorial integrity is considered such an important public interest that it is also recognized in the constitution – alongside national security and public order – as a legitimate interest which justifies the limitation of fundamental rights, such as freedom of thought and speech.

Chapter IX of the Ukrainian constitution of 1996 specifies the state’s territorial structure. According to Article 132, “the territorial structure of Ukraine is based on the principles of unity and integrity of state territory [and] combination of centralization and decentralization in the exercise of state power.” According to Article 133, “the system of the administrative and territorial structure of Ukraine is composed of the Autonomous Republic of Crimea, oblasts, districts, cities, city districts, settlements and villages.”

Ukraine’s choice of a unitary territorial model was not inevitable. Indeed, as one author put it, “[a]t first sight, Ukraine is custom-made for far-reaching regionalization or even federalism.” The same author describes the eventual choice for a unitary state as stemming from a desire to “return to Europe”, but in the early days of independence, Ukraine’s political elites wavered between centralization and federalism. The latter was promoted by its supporters as a solution to regional economic needs, as a means to bolster the democratic credentials of the new state, and as an answer to multi-ethnicity. The federal idea eventually lost out during constitutional drafting, for several reasons. Strategically, its supporters appear to have failed to put forth an alliance to promote it. More fundamentally, however, it was seen as a destabilizing force – in the former (federal) Soviet Union, resulting in dissolution; in Russia, given the bloody experience with separatist forces; and in Ukraine, on account of federalism’s potential to perpetuate, mobilize and legitimate centrifugal forces in the country. As Oleh Protsyk describes it, “the unwillingness to decentralize also was informed by expectations that such a policy would intensify destructive centrifugal tendencies in a polity that was only recently established and whose regional differences were strong and

37 On local governments in Ukraine see generally, S. Sertiogina, Constitutional-Legal Regulation of Local Self-Government in Ukraine and Directions for its Improvement, 2012 LAW UKR. LEGAL J. 65 (2012).
38 Kataryna Wolczuk, Catching up with ‘Europe’? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine, 12(2) REGIONAL & FEDERAL STUDIES 65 (2002).
39 WOLCZUK, supra note 18, at 151.
40 Id., at 152.
41 This is also reflected in the fact that of all former Soviet states, only Russia has a federal structure today. Interestingly, Russian Fundamental Laws of 1906 – its first attempt of constitutionalism – which was initiated by the Tsar in order to maintain order and authority, declared that: “the Russian state is one and indivisible.” See William Partlett and Eric Ip, The Death of Socialist Law (2015, copy with authors).
Federalism thus became taboo for the political establishment. In the end, a unitary territory was perceived to be more likely to lead to an integrated society and to subordinate sub-state interests to those of the center. Within this unitary framework, decentralization and the regulation of self-government were also left underdeveloped, not so much “for a fear of rigidity and over-regulation, but rather the lack of a coherent conception of the territorial distribution of power and centre-periphery relations”.46

The striking exception to all this is Crimea, which enjoys – as the only region where the majority of the population belongs to an ethnic minority – a special status with significant independence, albeit remaining a constituent part of Ukraine. The historical background is important. Crimea has held a special status both in the USSR and in independent Ukraine. Its multi-ethnic composition and geostrategic location have ensured this throughout its modern history, with the region being granted a special autonomy status at various times in its history.48 The region’s ethnoterritorial distinctiveness, in fact, has been said to provide the rationale for its post-Soviet autonomy, even if the latter has been “defined in territorial rather than ethnic terms.”49 In 1954, the Soviet Union transferred the Crimean peninsula from the Russian Socialist Federative Soviet Republic to the administration of the Ukrainian Soviet Socialist Republic. This marked what some have termed “the real beginning of Crimea’s link to the Ukrainian state.” Known as the “gift”, the rationale for this transfer remains elusive and its continued currency in Russian and Ukrainian politics makes Crimea an example “of how some Soviet-era decisions, especially those involving boundary changes or shifts in competences, assumed a radically different dynamic in the post-Soviet era.” Subsequent to the transfer, Crimea became a territory of the Ukrainian Soviet Socialist Republic within the Soviet Union and remained so for 37 years until 1991 with the collapse of the USSR. When Ukraine gained its status as an independent nation, Crimea’s status was constitutionally renegotiated in what turned out to be a protracted process. It was finally granted the status of an “autonomous republic” with the 1996 adoption of the Ukrainian constitution.

Whereas the initial draft of the Ukrainian Constitution comprised of merely limited autonomy rights granting Crimea the status of a rayon, a constitutional framework was created especially for the Autonomous Republic of Crimea within Chapter X of the new constitution. The protracted negotiation process between the center and Crimean authorities, culminating in granting the region this autonomy status and the adoption of its constitution in 1998, has been pointed to as a potential explanation for the avoidance of conflict in the region in the aftermath of Ukraine’s independence. Gwendolyn Sasse has made this argument, explaining that the stop-go institutionalization of Crimean autonomy post-1990 played an important conflict-preventing role. The process was mired in confusion over who exercised

43 Oleh Protsyk, Majority-Minority Relations in the Ukraine, 7 JEMIE (2008), at 1, 8.
45 WOLCZUK, supra note 18, at 244.
46 Id., at 241.
48 SASSE: supra note 44, at 83.
49 Id., at 106.
50 Id.
51 Id. at 96.
52 See id. at 175-200.
53 Wydra, supra note 13, at 124.
54 SASSE: supra note 44, at 10.
legitimate authority in the region, she argues, but the very fact that power players attempted to resolve the issue constitutionally is significant.\textsuperscript{55}

Chapter X regulates the relations between Ukraine and Crimea and defines the regional legal authority of Simferopol vis-à-vis the central government in Kiev. It emphasizes the territorial unity of Ukraine and defines Crimea as an inseparable constituent part of Ukraine. Crimea’s authority is determined by and derived from the Ukrainian constitution which sets its limitations. While Crimea is entitled to have its own constitution, neither the latter nor other laws can contradict the constitution or the laws of Ukraine (Article 135).\textsuperscript{56} According to Article 136, the authority, procedures and operation of Crimea’s governmental institutions are determined by the constitutions and laws of Ukraine and by legal acts of the Verkhovna Rada [Parliament] of the Autonomous Republic of Crimea according to its competencies, which are mainly of local importance (Article 137).\textsuperscript{57}

In the same vein, the Crimean constitution’s first Article declares that the Autonomous Republic is an integral part of Ukraine and must govern itself in accordance with the constitution.\textsuperscript{58} Article 2(2) of the constitution expressly states that in a conflict between normative acts of the Republic of Crimea and the constitution of Ukraine, the latter prevails since it is supreme over all other laws and regulations.\textsuperscript{59} This precedence can be illustrated with at least one significant decision of the Ukrainian Constitutional Court, which in 2001 invalidated parts of four Crimean normative acts and declared that only the Verkhovna Rada in Kiev could be called “parliament”; the Crimean Verkhovna Rada was merely the “representative organ” of the Autonomous Republic of Crimea and the region’s constitution one of many of its “normative-legal acts”.\textsuperscript{60} Moreover, the Crimean constitution invokes “state guarantees of the status, powers and the right of property of the Autonomous Republic of Crimea” (Article 3.2), a clear effort on the part of regional authorities to prevent any downgrading of the region’s status.\textsuperscript{61} However, there is nothing to echo this in the Ukrainian constitution, leaving the region’s status vulnerable to action taken at the center.\textsuperscript{62}

The constitutional commitment to a unitary state “a priori excludes any form of local, territorial autonomy of a federal type.”\textsuperscript{63} As such, the existence of the Autonomous Region of Crimea within a state so ardently declared unitary highlights the potentially contradictory nature of Ukraine’s state-building project: “strengthening central state capacity within an institutionalized state unit inherited from the Soviet period, while simultaneously engaging with sub-national demands for more autonomy.”\textsuperscript{64} The tension between centralization and decentralization was inscribed in the Ukrainian constitution when this asymmetric autonomy arrangement was set up.\textsuperscript{65} Thus, the special status of Crimea has led commentators to refer to Ukraine as a “state of regions”, an example of a “federalised society”, or a “regionalised unitary state”.\textsuperscript{66} This was seen with skepticism by those worried it would result in “years of

\textsuperscript{55} Id. at 175.
\textsuperscript{56} See also Bilych et al, supra note 1, at 20-21.
\textsuperscript{57} Wydra, supra note 13, at 124-125.
activity/constituciya-ARK
\textsuperscript{59} Id. at Art. 2(2).
\textsuperscript{60} Decision No. 1-rp/2001 of the Constitutional Court of Ukraine, dd. 27 February 2001. See also Sasse supra note 44, at 206.
\textsuperscript{61} Sasse supra note 44, at 202.
\textsuperscript{62} Id. at 204.
\textsuperscript{63} Paul Blokker, Constitutional Politics, Constitutional Texts and Democratic Variety in Central and Eastern Europe, Sussex European Institute Working Paper No. 105 20-1 (September 2008).
\textsuperscript{64} Sasse, supra note 42, at 70.
\textsuperscript{65} Id., at 70.
\textsuperscript{66} Id., at 69 and 96.
constitutional litigation and political instability”, 67 but could also be seen as an unavoidable compromise given Crimea’s historical separateness. Moreover, authors like Sasse writing before the 2014 crisis saw this only partially elaborated autonomous status as a guarantee of Crimea posing “less of a threat to the Ukrainian state, and [being] therefore less likely to be contested or eroded by the center;” 68 in other words, part of a “long game” Kiev played with Crimea in order to weaken the regionalist and separatist movements within the region. 69

Even where there is no contradiction between provisions on the center versus Crimea, the vagueness of the national constitution on the latter’s self-government competences raised the specter of Crimean autonomy remaining dependent on Kiev’s goodwill. 70 On the one hand, after the adoption of the Ukrainian constitution that recognized and constitutionalized Crimea’s special autonomous status, and the 1996 approval of the Crimean constitution by the Ukrainian Parliament, it appeared to many that the situations had been stabilized and that “secession is no longer an issue where Crimea is concerned.” 71 On the other hand, notwithstanding its autonomous status, Crimea remained in a constant political struggle with the center over the basics of governing. 72 Its different political options were evident during the 2002 demonstrations and the 2004 Orange Revolution, for instance, both of which seemed to “largely bypass[] Crimea.” 73

II. Territorial Integrity as an Unamendable Principle in the Ukrainian Constitution

The Ukrainian formal amendment procedure creates a constitutional hierarchy. At the bottom, there is a low threshold: a proposal by either the President or one-third of the national legislature, adoption by a majority of the national legislature, followed by a subsequent two thirds vote in the national legislature. At the middle level of the hierarchy, the constitution necessitates a proposal by either the President or two-thirds of the national legislature, adoption again by a two thirds vote in the national legislature, and ratification via national referendum in order to amend the constitution’s general principles, rules of elections and referendums, and the amendment procedure itself. Finally, at the summit of the constitutional hierarchy, there are human rights and freedoms, national independence, and territorial integrity which are formally unamendable. 74 As Article 157 of the 1996 constitution stipulates:

The Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial

68 SASSE supra note 44 at 256.
69 Id. at 255.
70 The Venice Commission, commenting on the 1996 constitutional draft of Ukraine, remarked that it “does not have many provisions on the matter [of Crimean autonomy] and leaves a large space of discretion to the Ukrainian legislator”. Venice Commission, Opinion on the Draft Constitution of Ukraine, CDL-INF(96) 6 p. 17 (17-18 May 1996).
71 Mychajlyszyn, supra note 13, at 36-37. Sasse, writing in 2007, also declared that “Kyiv has managed to integrate Crimea into the new Ukrainian polity.” SASSE supra note 44, at 3.
73 SASSE supra note 44, at 219.
The unamendable provision thus protects fundamental rights and the independence and territorial indivisibility of Ukraine from infringements by constitutional amendments.76

A crucial preliminary question would be whether we are discussing an eternity clause at all. This question arises because the unamendability is formulated as a principle – which is more a generalized guideline – rather than as a rule which requires strict compliance.77 Due to its elasticity and semantic openness, unamendability formulated as a general principle allows balancing and flexibility. As Denis Baranger remarked with reference to the French constitution, “there is nothing objective or merely procedural about such a standard as the ‘integrity of the territory’.78 Therefore, the content of the so-called eternal protection of territorial indivisibility may evolve and change with time and in a social context and allows debate, interpretation and reinterpretation over its meaning.

What is more, skeptics would argue that the commitment to territorial integrity is a declaration of principle referring purely to securing the country’s external borders and is thus by definition constitutionally unenforceable. In other words, it is akin to a declaration of independence: mostly declaratory in nature and vulnerable to political reality rendering it meaningless. However, this line of interpretation is only partially persuasive. First, one might argue that this commitment can be understood as imposing a constitutional duty on the state organs to defend the territorial integrity of the state or struggle for its re-establishment, especially if read together with Article 17 according to which a major function of the state is defending the sovereignty and territorial integrity of Ukraine.79 Second, and more importantly, this provision should be read in the context of the entire Ukrainian constitution, and especially in conjunction with the strong judicial review powers afforded to the constitutional court. Therefore, as we argue in greater detail in the following section, this eternity clause appears intended to function as more than a non-justiciable declaration of principle.

Ukraine’s provision of unamendability thus needs to be read against the background of the entire constitution, including the role of Ukraine’s constitutional court as guardian of the constitution and as protector of the territorial integrity. But before that, the unamendability of

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76 Albert, supra note 30, at 687; Albert, supra note 74, at 255. See also Rezie, supra note 36, at 75–81; Bohdan A. Futey, Comments on the Constitution of Ukraine, 5 E. EUR. CONST. REV. 29, 30 (1996).
79 Compare this with the following: Art. 104 of The Republic of Equatorial Guinea Const. (1991), according to which the territorial integrity shall not be subject to reform, in conjunction with Art. 16, according to which “All Equato-Guineans shall have the obligation to … defend [the state’s] … territorial integrity and national unity…”; The Bulgaria Const. (1991), according to Art. 2(2) of which “The territorial integrity of the Republic of Bulgaria shall be inviolable”, also recognises in the Preamble the “duty to guard the national and state integrity of Bulgaria”. See also Theodore Christakis, Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea, 75(1) ZAÖRV/HEIDELBERG JIL 75 (2015), http://ssrn.com/abstract=2531321 (arguing that more than 80 constitutions out of 108 the author reviewed, “have wording showing that any unilateral attempt to secede should be deemed anti-constitutional, and some of them even provide for the state to adopt concrete measures to combat secessionist activities.”)
territorial integrity must be squared with the (possibly contradictory) territorial arrangements inscribed in the Ukrainian constitution.

The challenge is that it is not straightforward how Article 157’s unamendable commitment to indivisibility, to the extent that it was meant as more than declarative, can be squared with the special provisions on Crimea. Although the latter’s status was confirmed as exceptional by all sides during the constitution-making process, maintaining Ukraine’s territorial integrity remained of equal if not higher concern. On the one hand, Article 134 of the constitution declares Crimea “an inseparable constituent part of Ukraine” (emphasis added). Similarly, the hard-fought constitution of the Autonomous Republic of Crimea speaks of the region as “an integral part of Ukraine” (Article 1(1)). On the other hand, Article 138(2) lists the organization and conduct of local referendums within the competence of Crimean authorities, while the Crimean constitution declares “sovereignty of the people” as a fundamental principle under article 2(1). More confounding still is Article 7(2) of the Republic’s constitution, which states:

The territory of the Autonomous Republic of Crimea may be changed if it should be so resolved by a republican (local) referendum and by a resolution of the Supreme Rada [Council] of the Autonomous Republic of Crimea pursuant to the Constitution of Ukraine.

The latter’s compliance with the constitution of Ukraine was certified by the Constitutional Court of Ukraine in the case on the constitution of the Autonomous Republic of Crimea of 2003.

Thus, the most plausible interpretation of “territorial indivisibility” is as compatible with, and respectful of, Crimea’s status. In other words, what the drafter plausibly sought to render “eternal” or unamendable was the external territorial status quo at the time of constitutional adoption, i.e. the integrity of Ukraine’s external boundaries, rather than limit internal territorial reorganization. The Venice Commission seems to support this interpretation: “[t]he state’s indivisibility is not to be confused with its unitary character, and therefore consorts with regionalism and federalism.”

Even if that were the case, however, events predating the 2014 Crimean referendum should have already raised the alarm concerning the constitutional text’s contradictions. One could see here the difficulty of recognizing only a limited popular sovereignty within a territorial unit and its propensity, according to how one views it, to set in motion extreme demands for secession or to be exploited in times of crisis.

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80 The characteristics of state’s indivisibility and unity are strongly linked. See Stéphane Pierré-Caps, Constitutional non-recognition of minorities in the context of unitary states: an insurmountable obstacle?, in The Participation of Minorities in Public Life 11, 11-12 (Council of Europe, 2011).
81 WOLCZUK, supra note 18, at 159.
84 The 1994 Crimean referendum went ahead despite being declared illegal by the Ukrainian electoral commission and President and returned positive answers to questions of greater autonomy for the region, of whether its citizens should hold dual citizenship (Ukrainian and Russian) and of whether the province’s President’s decrees should have the status of law. See MARK CLARENCE WALKER, The Strategic Use of Referendums: Power, Legitimacy, and Democracy 108 (2003).
To conclude this section, Crimea’s claim for independence is constitutionally in tension with Ukraine’s claim for territorial integrity.\(^85\) Notwithstanding the autonomous status of Crimea, the accepted understanding in Ukraine is that Regional Self-Government entities must be “loyal to and in compliance with territorial integrity.”\(^86\) Thus, even though many in Crimea consider Russia as their homeland, “the Ukrainian leadership, while accepting that Crimean Russians were oriented towards Russia, had always drawn the line on any attempt at infringing its territorial integrity.”\(^87\) Furthermore, the fear of “separatism, secession, country breakdown and disintegration” shaped Ukraine’s constitutional arrangements including its fundamental constitutional principles as reflected in Article 157, and its perception of minority issues.\(^88\)

Ukraine is by no means unique amidst post-communist countries in its sensitive constitutional balancing act: seeking to build a strong, unitary state while ensuring (sometimes reluctantly) minority accommodation in a multi-ethnic society.\(^89\) References to territorial integrity abound in post-communist constitutions, alongside declarations of political independence and an embrace of popular sovereignty.\(^90\) Moreover, the constitutional protection of territorial integrity helps to expose common fears of territorial disintegration and loss of independence. However, where they are accompanied by a constitutional court empowered to enforce such provisions, the unamendability of territorial integrity moves beyond mere proclamation and into constitutional doctrine.

III. The Constitutional Court as Guardian of the Territory

Ukraine constitutional system protects human rights and recognizes the practice of judicial review.\(^91\) Furthermore, in Ukraine, the Constitutional Court has not only authority of judicial review of ordinary legislation, but it can also give judgments on proposed constitutional amendments through \textit{a priori} judicial review.\(^92\) According to Article 159 of the Ukrainian constitution, a preliminary opinion of the Constitutional Court regarding the conformity of proposed amendments with the requirements of Articles 157 and 158 of the constitution – an \textit{ex ante} review – is an essential stage of the procedure, in order for a constitutional amendment to be adopted by the \textit{Verkhovna Rada}.\(^93\) In other words, the preventive review by the Constitutional Court of the compatibility of draft amendments to the requirements of

\(^{85}\) Jure Vidmar, \textit{Territorial Integrity and the Law of Statehood}, 44 GEO. WASH. INT’L L. REV. 697, 707 (2012) (stating that “All permanently populated territories have a parent State which is, in turn, protected by the principle of territorial integrity. It is thus impossible to make a claim for independence in the contemporary world without there being a competing claim to territorial integrity.”)


\(^{87}\) TARAS KUZIO, UKRAINE: STATE AND NATION BUILDING 87 (2002).


\(^{89}\) For an overview of post-communist countries having incorporated such constitutional provisions \textit{see} Culic, supra note 25, at 44-7.


\(^{92}\) \textit{See generally} ROZNAI, supra note 30; KEMAL GÖZLER, \textit{JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS – A COMPARATIVE STUDY} 5-7 (2008).

\(^{93}\) Tykhyy, supra note 91, at 207-208 (2011); GÁBOR HALMAI, \textit{PERSPECTIVES ON GLOBAL CONSTITUTIONALISM} 40 (2014); WOJCIECH SADURSKI, \textit{RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE} 25, fn. 116 (2014). On the Constitutional Court, \textit{see} more generally Futey, supra note 76.
Articles 157 and 158 is a prerequisite for the Verkhovna Rada to continue and adopt the proposed amendments. Thus, although the Constitutional Court’s discretion is limited by the explicit criteria for review as stipulated in the constitution (albeit always with some leeway since these are vague principles), the Constitutional Court is clearly granted a veto role within the amendment process. Indeed, in several opinions, the Constitutional Court has held that proposed amendments contradict the provision of unamendability and should be revised.

An example for the veto role of the Constitutional Court within the amendment process is its judgment of 30 September 2010. In 2004, the Ukrainian parliament considered an important constitutional amendment that aimed to make substantial changes in the organization of the executive branch. The draft amendment was duly submitted to the Constitutional Court which confirmed its admissibility. However, in the course of the parliamentary debates, the original text of the amendment was substantially modified, and the final version was adopted without being resubmitted to the Constitutional Court for its opinion. Six years later, the procedural validity of the 2004 amendment was challenged before the Constitutional Court. In its judgment, the Constitutional Court decided that since the amendment was revised and approved by the Verkhovna Rada without the obligatory opinion of the Constitutional Court, it was adopted in a procedural violation of Article 159 of the constitution; hence it was declared unconstitutional and void. But that case concerned a procedural review of the adoption of the amendment rather than a substantive review of its content.

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94 See Decision No. 13-rp/2008 of the Constitutional Court of Ukraine dd. 26 June 2008 in case upon the constitutional petition of 47 National Deputies of Ukraine concerning the conformity with the Constitution of Ukraine (constitutioality) of the provision of item 3.1, Chapter IV of the Law of Ukraine “On the Constitutional Court of Ukraine” (the case on the authority of the Constitutional Court of Ukraine); and also Case No.6-rp/2008 of the Constitutional Court of Ukraine dd. 16 April 2008 on the case upon a constitutional petition of the President of Ukraine concerning official interpretation of provisions of Arts. 5.2, 5.3, 69, 72.2, 74, 94.2 and 156.1 of the Constitution (case on adoption of the Constitution and laws of Ukraine at a referendum); cited in Yu Barabash, Constitutional Reform and Stability of the Constitutional System: Conflictological-Legal Analysis of Systemic Interlinkage, 2012 Law Ukr. Legal J. 116, 131 (2012). English summaries are available at: http://www.ccu.gov.ua/en/doccatalog/list?currDir=18147


96 See e.g. Opinion of the Constitutional Court of Ukraine No. 1-v/2012 dated July 10, 2012 in the case upon the appeal of the Verkhovna Rada of Ukraine on providing opinion regarding conformity of a draft-law on introducing amendments to the Constitution of Ukraine on immunity to requirements of Arts. 157 and 158 of the Constitution of Ukraine (case on introducing amendments to Arts. 80, 105, 126 and 149 of the Constitution of Ukraine) (finding the abolition of immunity of judges as infringing upon their ability to conduct an independent, objective and fair justice for the purpose protecting human and citizens’ rights and freedoms); Opinion of the Constitutional Court of Ukraine No. 1-v/2010 dated April 1, 2010 in the case upon the appeal of the Verkhovna Rada of Ukraine for providing opinion on the conformity of the draft-law on introducing amendments to the Constitution of Ukraine (concerning guaranteeing immunities to certain officials) with the provisions of Arts. 157 and 158 of the Constitution of Ukraine (case on introducing amendments to Arts. 80, 105 and 108 of the Constitution of Ukraine) (finding that providing liability exemption of People’s Deputies of Ukraine for statements that contain insult or defamation in Parliament and its bodies might violate fundamental rights and freedoms). See also Kampo, supra note 91, at 196.


99 Decision No. 20-rp/2010 of the Constitutional Court of Ukraine dated September 30, 2010 in the case upon the constitutional petition of 252 People’s Deputies of Ukraine concerning the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine “On Introducing Amendments to the Constitution of Ukraine” No. 2222-IV dated December 8, 2004 (case on observance of the procedure of introducing amendments the
Interestingly, the Venice Commission questioned the legality and legitimacy of that decision since the Constitutional Court conducted its review of the amendment after it entered into force while only possessing authority to conduct a preliminary review. However, in an earlier decision of 2008, the Constitutional Court held that – in order to adequately protect fundamental rights and freedoms, state independence and territorial integrity, and since the constitution did not restrict that possibility – it also possessed the competence to exercise ex post (rather than only ex-ante) constitutional review of amendments to the constitution, i.e. even after these are adopted by the Verkhovna Rada.

To conclude this section, in new democracies, constitutional courts often receive a central place as guarantors of the constitution and even of the democratic integrity in conflicted societies. The Ukrainian Constitutional Court often acts as a mediator between political actors. It is granted with a rare authority to take part in the constitutional amendment process and to protect the provision of unamendability; most constitutional courts do not explicitly possess such a competence. Put differently, the Constitutional Court is the legal guardian of territorial integrity (among other unamendable principles), and in its opinions on draft amendments it reviews whether draft laws “are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.” Of course, it might be

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100 See Opinion no. 599/2010 of the European Commission for Democracy Through Law (Venice Commission), On the Constitutional Situation in Ukraine, Adopted by the Venice Commission at its 85th Pleenary Session, Venice, paras. 31-32 (17-18 December 2010), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29044-c; The Venice Commission added, at paras. 35-36, that: “It also considers highly unusual that far-reaching constitutional amendments, including the change of the political system of the country - from a parliamentary system to a parliamentary-presidential one - are declared unconstitutional by a decision of the Constitutional Court after a period of 6 years. The Commission notes however, that neither the Constitution of Ukraine nor the Law on the Constitutional Court provide for a time-limit for contesting the constitutionality of a law before the CCU. As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law.”


102 Of course, in some jurisdictions, courts have taken upon themselves such a judicial role, even without an explicit authority in the constitution. See Yaniv Roznai, Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea, 61(3) Am. J. Comp. L. 657 (2013); Roznai, supra note 30; Gözler, supra note 92, at 5-7.

103 The involvement of courts in questions of territory is not in itself unique. See, e.g. the celebrated decision of the U.S. Supreme Court in State of Texas v. White, 74 U.S. 700 (1868). A more contemporary notable example is the Canadian Secession of Quebec case, in which the Supreme Court held that although a majority will of a people to secede, as expressed in a referendum, must be taken into a consideration, there are other important principles such as federalism, minority rights and the rule of law which must be observed. According to the rule of law principle, secession of a province should be carried out according to the Canadian constitutional rules which govern the amendment process. Moreover, the Court uncovered an unwritten duty to negotiate in the event of a formal amendment on secession. See Reference re the Secession of Quebec [1998] 2 SCR 217, http://scc-csc.lexum.com/décisions/scc-csc/scc-csc/en/item/1643/index.do; see also Peter H. Russell, Can the Canadians Be a Sovereign People? The

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questioned how the Constitutional Court can protect the unamendable principle when faced with significant external pressures or with an overly political issue, such as a referendum on the territory.\footnote{Cf. Holovaty, \textit{supra} note 91, at 281 (stating that “Where a decision involves a significant issue of executive authority, such as the recent referendum decision, there is a danger of significant external pressure being exerted on the Court to reach a decision favorable for the executive”). For a comprehensive study of political pressure on judicial independence in Ukraine see MARIA POPOVA, \textit{POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE} (2012).} What is clear is that this “judicial preview” mechanism demonstrates that the unamendability of the territorial indivisibility was intended to be judicially enforceable and not merely declaratory.

\section*{C. Formal Unamendability}

\subsection*{I. The Functions of Unamendability}

Formal unamendability usually takes place in the form of explicit constitutional provisions which designate certain constitutional subjects (such as principles, rules, institutions and symbols) as unamendable through the formal constitutional amendment process. There is a growing trend in global constitutionalism to provide for formal unamendability.\footnote{According to one study, between 1789 to 1944 almost 20 percent of all new constitutions included unamendable provisions, while almost 30 percent of new constitutions included such provisions between 1945 and 1988, and between 1989 to 2013 already over 50 percent of new constitutions include formal unamendable provisions. See Roznai, \textit{supra} note 15. Unamendability can also be implicit, judge-made through judicial decisions. See Roznai, \textit{supra} note 105; Roznai, \textit{supra} note 30; GÖZLER, \textit{supra} note 92.} The “new” constitutional orders in Central and Eastern Europe following the collapse of communism protect human rights and recognize the practice of judicial review.\footnote{See generally Wiktor Osiatynski, \textit{Rights in New constitutions of East Central Europe}, 26 \textit{COLUM. HUM. RTS. L. REV.} 111 (1994); HERMAN SCHWARTZ, \textit{THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE} (2002); SADURSKI, \textit{supra} note 93.} Although some have argued that it would be a mistake for these new democracies to import the German “fondness for unamendable provisions” since the vexing questions that they face ought to be resolved in the political sphere rather than in constitutional courts,\footnote{Stephen Holmes, \textit{Back to the Drawing Board – An Argument for Constitutional Postponement in Easter Europe}, 2 \textit{E. EUR. CONST. REV.} 21, 22 (1993).} many of them adopted provisions of unamendability.\footnote{See, for example, \textit{CZECH REPUBLIC CONST.} (1992), art. 9; \textit{KAZAKHSTAN CONST.} (1993), art. 91(2); \textit{MOLDOVA CONST.} (1994), art. 142; \textit{ROMANIA CONST.} (1991), art. 152(1). See also LEVENT GÖNENÇ, \textit{PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST COUNTRIES} 372 (2002). On constitutional revisions in Eastern Europe see Stephen Holmes and Cass R. Sunstein, \textit{The Politics of Constitutional Revision in Eastern Europe, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT} 275 (Sanford Levinson ed., 1995); Rett T. Ludwikowski, \textit{Constitutional Culture of the New East-Central European Democracies}, 29 \textit{GA. J. INT'L & COMP. L.} 1, 14-21 (2000-2001).} Among the states that incorporate provisions of unamendability, the Ukrainian case is quite exceptional in the role it assigns to the judiciary. The only other constitutions which empower the Constitutional Court to adjudicate initiatives for revising the Constitution \textit{a priori} to any amendment’s adoption are Kyrgyzstan,\footnote{In Kyrgyzstan, the Constitutional Court annulled in September 14, 2007, without explicit authority, two constitutional amendments on formal grounds. See \textit{Kyrgyzstan}, 28 \textit{THE WORLD OF PARLIAMENTS – QUARTERLY REVIEW OF THE INTER-PARLIAMENTARY UNION} 15 (2007). In 2011, a constitutional amendment endowed the Constitutional Court with an authority to provide its opinion during a preliminary review of constitutional amendments.} Kosovo\footnote{THE REPUBLIC OF KOSOVO \textit{CONST.} (2008), arts. 113(9) and 144(3) explicitly grant the Court authority of an \textit{a priori} review of proposed amendments and to examine whether proposed amendments diminish rights and freedoms} and Romania.\footnote{See \textit{LEVENT GÖNENÇ, PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST COUNTRIES} 372 (2002). On constitutional revisions in Eastern Europe see Stephen Holmes and Cass R. Sunstein, \textit{The Politics of Constitutional Revision in Eastern Europe, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT} 275 (Sanford Levinson ed., 1995); Rett T. Ludwikowski, \textit{Constitutional Culture of the New East-Central European Democracies}, 29 \textit{GA. J. INT'L & COMP. L.} 1, 14-21 (2000-2001).}
Unamendability fulfills various functions. Preservation of the constitutional order and its constitutive values is a principal aim of provisions on unamendability. Formal unamendability functions as a barrier to change, aiming to afford additional protection to certain principles by blocking the constitutional amendment process and in so doing averting possible alteration of basic constitutive principles and core features of the constitutional identity. Such protected fundamentals are considered by the constitution-drafts as worthy to last for generations. Unamendability not only points to the importance of the enshrined principle to the constitutional order, but it is also supposed to function as “a perfect protection against impulsive rashness”, reflecting a certain “amendophobia” that the amendment process might be abused in order to repeal societies’ basic values. At the very least, unamendability and its institutional enforcement through judicial review mechanisms may provide additional time for the people to reconsider their support for a change of their core principles, thereby hindering revolutionary movements. As Gregory Fox and Georg Nolte remark with reference to the German provision of unamendability, the framers of the German Basic Law believed that if a provision of unamendability “had been presented in the Weimar constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power. … given the traditional orderly and legalistic sentiment of the German people, this might have made the difference.”

Unamendability can also have a transformative function, contrary to its preservative one. This is the case when unamendability seeks to repudiate the past and guide the nation to a new path by providing it a fresh constitutional identity for a better future. It “endeavors to repudiate the past by setting the state on a new course and cementing that new vision into the character of the state and its people.” Unamendability provisions then not only reflect a constitutional commitment to certain enshrined principles but “promise a brighter future… [and] imagine a more perfect polity, the kind that the citizenry aspires to become and preserve.” Since the principles which are protected by this prospective unamendability might be at variance with the historical or prevailing social and cultural conceptions, system of values or conditions, this unamendability is often merely aspirational.
Whether unamendability is aspirational or a justiciable legal commitment, and regardless of the preservative or transformative functions of unamendability, there is one characteristic shared by these types of unamendability, which is their expressive value. Jon Elster notes that “the purpose of … unamendable clauses is … mainly symbolic”. Even if not judicially enforceable, or regarded as merely declaratory, unamendability creates the appearance of respect for the protected principle or institution and “makes a statement” regarding its importance to the constitutional order. By designating certain principles as unalterable, unamendability expresses the relative significance of the unamendable principles to the constitutional order compared to the other amendable principles. The unamendability of a principle or an institution sends a message to both internal and external observers regarding the state’s basic constitutional principles thereby conveying its symbolic value. As Richard Albert notes, formal unamendability “is the ultimate expression of importance that can be communicated by the constitutional text.” Therefore, unamendability carries an important symbolic, expressive and educational function.

Finally, unamendability can fulfill a certain deliberative task. At first glance it appears that by blocking mechanisms for modifying certain principles or rules, unamendability takes away citizens’ ability to participate in debates regarding society’s basic values, thereby risking impoverishing democratic debates. However, unamendability can actually force deliberation, hopefully public, before action is taken to either attempt to circumvent or ignore the unamendability. In other words, the declaration of unamendability remains important (even if conceived as eventually amendable or with a limited effect) since its removal still necessitates political and public deliberations regarding the protected constitutional values. True, it cannot serve as a complete bar against movements aiming to abolish unamendable principles, rules or institutions. Nevertheless, it is not completely unusable since it has a “chilling effect”, leading to hesitation before repealing it and may trigger political deliberation as to whether the amendment in question is compatible with society’s basic principles.

II. The Formal Unamendability of Territorial Integrity

The concept of territorial indivisibility was originally established as a monarchical principle of inheritance and succession to avoid division of the country among the monarch’s heirs. Interestingly, one of the earliest examples of unamendability of territorial integrity is related to the transition of Albania from republic to monarchy. The 1928 Fundamental Statute of the Kingdom of Albania expressly prohibited revisions to the inheritance of the throne, the capital, and to the characteristics of Albania as a democratic, parliamentary and hereditary monarchy.

126 See Elster, supra note 124, at 471 (1991); Albert, supra note 30, at 699-702. On the expressive function of amendment provisions see Albert, supra note 74.
monarchy; and as an independent and indivisible state, its territorial integrity as inviolable and its land as inalienable (Article 224(2)).

Nowadays, territorial integrity is connected to the state’s sovereignty and “right to exist”.

From a constitutional theory point of view, territory is one of the elements which make a state and is an important element of state authority. Since every polity wants to preserve its own existence and identity, it therefore appears prima facie clear why a state would want to protect its territorial integrity, alongside other core constitutional and democratic commitments, from possible incursions through amendments. For “substantive democracies”, tolerance finds its limits “when its core values are at stake.” Indeed, “even a tolerant democratic society must be able to police its fragile borders.” States are therefore reluctant to legitimize secessionist claims and have a general interest in preserving their own territorial integrity. The will of self-preservation and the fear of a country’s breakdown or disintegration are often reflected in the constitutional unamendability of territorial integrity or indivisibility.

Indeed, many states include within their constitution protection from amendments which might affect or violate the principle of “integrity and the unity of the national territory” in one term or another. These are mainly African and Eastern European states, with some Latin America and West European exceptions. All these national constitutions expressly protect the inviolability of existing territorial borders and reject the possibility of their change, not even through the formal rules prescribed in the constitution for its amendment. Given the centrality of the principle of territorial integrity in international law, as reflected by numerous contributions in this volume, it is not surprising that countries engaged in state-building processes would seek to incorporate it into their basic laws. Territorial integrity also takes center-stage in bilateral border agreements between post-communist states and their

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136 Chase, supra note 11, at 232-233.

137 See e.g. Algeria Const. (1989), art. 178(2) and (1976), art. 195(5); Angola Consts. (1975), art. 159(a) and (2010), art. 236(b); Benin Const. (1990), art. 156; Burkina Faso Consts. (1970), art. 106 and (1991), art. 165; Burundi Consts. (1992), art. 182 and (2005), art. 299; Cameroon Consts. (1972), art. 63 and (1961), art. 47; Cape Verde Const. (1992), art. 313; Chad Consts. (1996), art. 223, (1962), art. 75 and (1960), art. 68; Comoros Const. (2001), art. 42; The Republic of Congo Const. (1992), art. 178; Cote d’Ivoire Const. (1960), art. 73 and (2000), art. 127; Djibouti Const. (1992), art. 88; Equatorial Guinea Consts. (1991), art. 104, (1982), art. 134 and (1973), art. 157; Gabon Const. (1961), art. 70; Guinea-Bissau Const. (1984), art. 102; Madagascar Const. (2010), art. 163; Mali Consts. (1992), art. 118, (1974), art. 73 and (1960), art. 49; Mauritania Const. (1991), art. 99(3) and (1961), art. 54; Niger Const. (1960), art. 73; Rwanda Consts. (1991), art. 96(2), (1978), art. 91 and (1962), art. 107; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1979), art. 112(3); Togo Const. (1979), art. 53 and (1963), art. 85.


140 Portugal Const. (1976), art. 288; Turkey Const. (1982), arts. 3 and 4.

141 Albert, supra note 30, at 681.
neighbors, for similar reasons. This list shows that such unamendability commonly appears in constitutions of many states that were former colonial territories or formerly under foreign rule. In its external aspect, the unamendability of territorial integrity serves as a means to claim independence and sovereignty. In its internal aspect, the unamendability of territorial integrity expresses the state’s prioritization of national integrity over any self-determination claims which may arise.

However, the principle of territorial integrity does not necessarily derive from any constitutive principle of the physical existence of the state framework. In other words, a state can give up part of its territory thereby violating its territorial integrity and still continue to exist. Both Egypt and Israel continued to exist without the Sinai Peninsula just as the United Kingdom would continue to exist without Scotland; Canada would continue to exist without Quebec and so on. The question may thus be not one of physical existence but of identity:

The relationship between a country’s territory and its identity is in many ways similar to the relationship between an individual identity and his or her body. Our individual or collective selves are not the same as the bodies or territories we inhabit, yet there is a clear and undeniable connection between the two. There cannot be persons without bodies and no states without territory.

But as Nick Barber notes, a state can accommodate some change in its territorial features (as well as in other elements such as its members, institution and rules) without losing its identity. It is all a matter of extent and pace of the change. The question is therefore: would the state remain the same without the territory which was separated? If that answer is no, it might be claimed that if one of the basic rationales behind provisions of unamendability is to preserve a constitutional identity, then protecting the territorial integrity from amendments makes perfect sense. In the next section we analyze what the Crimean crisis can teach us about using unamendability in order to protect territorial integrity, and expose our principal objection to this mechanism in the area of territorial conflicts.

D. Unamendability and Territorial Conflicts: Lessons From Crimea

142 In Ukraine’s case, the Budapest Memorandums on Security Assurances concluded in 1994 included assurances against “the threat or use of force against the territorial integrity or political independence of Ukraine” by either Russia, the United States, or the UK. The deal was struck in order to facilitate Ukraine’s transfer of nuclear weapons on its territory to Russia and its ratification of the Nuclear Nonproliferation Treaty; it also included assurances to Belarus and Kazakhstan. See Budapest Memorandums on Security Assurances, 1994, Council on Foreign Relations, 5 December 1994, http://www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484


145 WEINTAL, supra note 30, at Ch. 1.

146 See Paul R. Williams, Abigail J, Avoryie and Carlie J. Armstrong, Earned Sovereignty Revisited: Creating a Strategic Framework for Managing Self-Determination Based Conflicts, 21(2) ILSA J INT’L & COMP. L 1, 2 (2015) (noting that “in the last twenty-five years nearly three-dozen new states have emerged. Some new states have arisen from the dissolution of states, while others have seceded from states which then continue to exist…”)


148 BARBER, supra note 133, at 141-142.

149 Ulrich K. Preuss, The Implications of “Eternity Clauses”: The German Experience, 44 ISRL. L. REV. 429, 445 (2011): “[Unamendable provisions] define the collective ‘self’ of the polity the ‘we the people.’ If the ‘eternal’ normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse”.

140
I. Unamendability of Territorial Integrity and Popular Sovereignty

The unamendability of the state’s territorial integrity may be justified by a republican commitment for achieving the idea of popular self-government. If certain preconditions such as equality of voting rights must be in place in order for a people to express itself, then these preconditions must be “put off the table”. Arguably, given the link between popular sovereignty and territory, territorial integrity is one such precondition. However, we claim that the Ukrainian experience demonstrates that the unamendability of territorial indivisibility is not required by popular constitutionalism and in fact might be in clear tension with popular sovereignty.

Ukraine’s constitution includes several mechanisms for the expression of popular will. Article 5 incorporates a general commitment to republicanism and popular sovereignty, stating that “The people are the bearers of sovereignty and the only source of power in Ukraine”, while Article 69 lists elections, referendums and “other forms of direct democracy” as means for the expression of popular will. Hence, the people exercise their power by the free expression of their will, particularly, through binding referendums. Admittedly, Ukraine’s experience with direct democracy has not always been praise-worthy. The 2000 national referendum on increased presidential powers and the introduction of an upper house of parliament, for instance, was criticized as a power struggle between president and parliament and as an instrumentalization of the referendum for anti-democratic purposes. What is important for our analysis is that Article 73 to the constitution explicitly links popular sovereignty to the notion of territory.

According to Article 73, “Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum,” while Article 85(2) indicates it is the Ukrainian Verkhovna Rada which can “designat[e] an All-Ukrainian referendum on issues determined by Article 73 of this Constitution.” The idea that no territorial change can take place without consent of “the people” finds its origins in the attachment and identification of the people with their territory and in the idea of popular sovereignty according to which the people are the true holders of sovereignty over their territory. Based upon Article 73 it seems clear that a local referendum could not resolve the issue of Crimea and Ukraine’s territorial integrity.

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151 Tykhiy, supra note 91, at 208-209.
154 The Law on National Referendum of 2012 lists the different referendum types and categorises those purporting to change the territory of Ukraine as “ratification referendums” (art. 3). Art. 20 of the law prohibits referendums on territorial changes brought about by popular initiative and reiterates the ban on modifications of the constitution’s rights protections, Ukraine’s independence and its territorial integrity.
155 El Ouali, supra note 132, at 118. This conceptual relationship between territorial indivisibility and national or popular sovereignty of course begs the preliminary demarcation of “a people” that is declared as “sovereign”. See e.g. Sofia Näsström, The Legitimacy of the People, 35(5) POLITICAL THEORY 624 (2007); and also the discussion on the fraught interaction between self-determination and territorial integrity in Tierney, supra note 16, at?.
From the point of view of constitutional theory, as Stephen Tierney has explored in his contribution to this volume, the question raised by the Crimean crisis is whether, despite being illegal, its 2014 referendum can plausibly be seen as legitimate. If we ascribe even partial legitimacy to the 2014 independence referendum in Crimea, it demonstrates what Stephen Tierney has previously argued, namely:

the danger of using referendums in deeply divided societies where they can serve to expose and indeed inflame what is often a dormant disjuncture between the boundaries of territorial government and the nature of the demos/demoi within that territory.157

While classifying Ukraine as a “deeply divided society” post-independence may be an exaggeration,158 the inflation of its ethno-linguistic cleavages exposed the vulnerability of the country’s incomplete internal state- and nation-building processes. Recent events have illustrated the dangers of assuming the “territorial boundaries of the demos…to be self-evident.”159 Conversely, if Crimea’s 2014 independence referendum is viewed as nothing more than a forceful annexation (“a seizure of territory under threat of force, i.e. as an unlawful annexation”160), the territorial boundaries of the state are revealed as never having been secure in the first place. As we elaborate in the next section, such vulnerabilities are obscured by the categorical language of Ukraine’s eternity clause and expose its content as more aspirational than preservative.

The main question for our purposes is how this commitment to popular sovereignty corresponds with the provision of unamendability protecting the territorial integrity. A commentator on the Ukrainian crisis has suggested that in order to avoid bloodshed Ukraine should reform its borders through a referendum: “Let the people decide. If eastern Ukraine really has an affinity for Russia, then let it become a part of Russia.”161 However, since the Ukrainian constitution defines Crimea as an inseparable constituent part of Ukraine (Article 134), and provides that “The territory of Ukraine within its present border is indivisible and inviolable” (Article 2), any secession of Crimea necessitates amending the constitution through a national referendum (as required by Article 156). Nonetheless, such an act would be prohibited by the provision of unamendability.162 Therefore, such a plan would be hindered by Ukraine’s provision of unamendability which protects territorial integrity from violation by reforms, especially when enforceable by the Constitutional Court as guardian of the unamendability.163

There are two possible solutions to solve this enigma, none of which is satisfactory. One solution would be the adoption of a new constitution through a whole new constituent

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158 On the complexity of identities in Ukraine, see Paul S. Pirie, National Identity and Politics in Southern and Eastern Ukraine, 48(7) EUROPE-ASIA STUD. 1079-1104 (1996). Some have even argued against oversimplifying the issue of regional diversity in Ukraine, claiming it served as “a key to Ukraine’s political stability” during its state-building process. Se Sasse, supra note 42, at 70.
159 TIERNEY, supra note 157, at 59.
160 Peters supra note 3.
162 Peters, supra note 3.
163 Andrew Cybruch, Ukraine’s Sovereignty and Territorial Integrity Are Settled, VNEWS (23 May 2014), http://www.vnews.com/home/11999951-95/letter-ukraines-sovereignty-and-territorial-integrity-are-settled
process which would be unbound by provisions of unamendability. Such an action might be considered a constitutional violation and thus unconstitutional under the current constitution but its authoritative legitimacy could be granted ex-post facto. Thus, as Stephen Tierney has discussed in this volume, (popular) legitimacy would again be relied upon to overcome a crisis in legality. A second solution, and a legal one, would be amending the amendment provision itself, through a national referendum as allowed by the constitution, in order to amend Article 157 and remove the unamendability of the territorial indivisibility; then, in the second stage, deciding through a national referendum on the possible division of the territory. This solution would be possible since Article 157, like most provisions of unamendability, is not self-entrenched and could thus be “amended out” of the constitution through a “double-amendment process”. Such an act would be legal from a formalistic perspective although its legitimacy would be questionable as it may be regarded as a “fraud upon the constitution.”

The dilemma can be manifested through the following hypothetical scenario (which is not a real possibility in Crimea as it is unlikely that Ukraine would agree to secession). We can imagine that the people of an autonomous region wish to secede, as manifested by a genuine local referendum. We can further suppose that such secession is debated within the political bodies which then proceed with a constitutional process for amending the constitution accordingly. And finally, through a national referendum (which is the appropriate procedure for deciding alterations to the territory of Ukraine according to Article 73), “the people” approve such an amendment. The sovereign people, the ultimate holders of constituent power, would thereby choose to alter the unalterable constitution passed in their name. This secession ratified by a constitutionally permissible national referendum would still violate Ukraine’s unamendable provisions and is thus impermissible, as the people themselves are bound by the unamendability. By barring constitutional reform which assails territorial integrity, unamendability attempts to place the state’s territory not only beyond ordinary politics, but also “beyond the popular will”. Hence, it is in clear tension with popular sovereignty.

Often, that is precisely the role of unamendability. Unamendability, as a counter-majoritarian institution, aims to neutralize the dangers of majoritarianism. It reflects the idea that certain principles, such as fundamental rights, rule of law and the democratic principle itself are not subject to the will of the majority which might be abused. By that, unamendability serves

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164 See ROZNAI, supra note 30.
166 Tierney, supra note 16, at.
168 This is one of the paradoxes of the constitutional order and constituent power. See generally MARTIN LOUGHLIN AND NEIL WALKER EDs., THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (2007); Zoran Oklopec, Book review - Martin Loughlin and Neil Walker, eds., The Paradox of Constitutionalism: Constituent Power and Constitutional Form, 6(2) Int’l J. Const. L. 358 (2008).
170 Albert, supra note 30, at 675.
not only to prevent abuse by leaders, but to serve as a pre-commitment mechanism of “the people” to protect itself against its own weaknesses and passions. However, these rationales do not apply to territorial integrity (at least not to a same extent). It thus remains unclear why not to allow the people this constitutional change which deals with the territory. As long as concern for minority rights is taken into consideration when dealing with negotiations in a context of secession, as Canada’s Supreme Court emphasized in its Secession Reference case, allowing the people to amend their constitution after political deliberation and approval through a national referendum would still maintain a high bar for that constitutional change while simultaneously satisfying the ideals of republican constitutionalism.

II. The Limited Effectiveness and Risks of Unamendability of Territorial Integrity

A major lesson from the crisis in Crimea is the limited effectiveness of attempts to settle territorial conflicts through unamendability. The unamendability of the territorial integrity principle within the Ukrainian constitution may be regarded as a mechanism aimed at preserving this principle by adding another layer of constitutional illegality to cover situations such as Crimea’s. It was meant to be preservative rather than merely declarative, and we can learn about its intended function from the role assigned to the Constitutional Court in protecting this judicially enforceable unamendability. Nonetheless, while the unamendable provision provided a legal hook on which to peg arguments against territorial change, neither Crimea nor Russia seemed particularly deterred in their course of action by threats of either constitutional or international illegality. Moreover, as noted earlier, Ukraine’s constitution already contained (arguably stronger) mechanisms encouraging national deliberation in the eventuality of redrawing the territorial map, not least referendums. The recourse to unamendability was therefore meant as an added safeguard but turned out to be no match for forces from both within and without.

The unamendability of the territorial integrity, which must be read in the context of the country’s complicated state- and nation-building post-independence process, carried also an aspirational aspect. Kiev used unamendability to deal with a complex territorial challenge and to entrench its long-term view of Crimea. The provision of unamendability expressed an aspiration for the resolution of this challenge – the full integration of Crimea within the Ukrainian state – more than an uncontested reality. Nevertheless, as mentioned earlier, the problem with aspirational unamendability is that its characteristics might be at odds with the prevailing culture or circumstances of the society.

174 See e.g. Oklopcic, supra note 14, at; Tierney, supra note 16, at. See also, generally, DAVID HALJAN, CONSTITUTIONALISING SECESSION (2014).
175 IKER GÖKHAN EN, SOVEREIGNTY REFERENDUMS IN INTERNATIONAL AND CONSTITUTIONAL LAW 142 (2015): “…referendums may fulfil an effective veto function whenever there is a threat to territorial integrity. Thus, a constitutional requirement for the consent of the majority as a condition for a territorial modification may be portrayed as a wise safeguard in the face of political realities.”
176 Of course, from this lack of deterrence one should not infer conclusions regarding the legality of the act. See Christakis, supra note 79 (“no self-respecting legal order can remain indifferent to the events that have marked Russia’s annexation of Crimea. Failure to react would send the message that ‘might makes right’ and would harm international relations because powerful states might henceforth be tempted to use force against their neighbors to provoke ‘blitz secessions’ and annex ethnic, linguistic, or religious ‘sister’ minorities who dream of becoming part of the ‘motherland’”)
177 SASSE supra note 44, at 16.
178 See JACOBSOHN, supra note, 123, at 128
incorporated as aspirational in the national constitution, but many of the region’s citizens may never have wanted to be part of Ukraine at all. The unamendability, which started out as a constitutional provision with preservative and aspirational functions, ended up being aspirational and nothing more.

True, all constitutional provisions of unamendability cannot have an absolute effect. In 1918, A. Lawrence Lowell wrote that “the device of providing that a law shall never be repealed is an old one, but I am not aware that it has ever been of any avail”. Likewise, Benjamin Akzin expressed his skepticism regarding the usefulness of eternity clauses since if “the demand for change were to become so strong … it is hardly imaginable that its protagonists would renounce their objectives only because the Constitution says that the provision is inviolable.” From a purely factual point, that is certainly correct. “In a conflict between law and power”, Hannah Arendt wrote, “it is seldom the law which will emerge as victory”. The ability of physical power to force prohibited changes – for example a forcible annexation of territory which would violate the territorial integrity or a forcible revolution to overcome unamendability – is unquestionable. No constitutional schemes – even such that expressly attempt to – can hinder for long the sway of real forces in public life. Therefore, constitutional unamendability is a question of both norm and fact, and from a legal perspective, the question remains whether such changes would be valid according to the constitutional system’s standards.

Whereas these statements are correct with regard to all provisions of unamendability, they are all the more relevant to the unamendable protection of territorial indivisibility. The constitutional protection of territorial integrity is Janus-faced. Externally, it looks to the relationship between states and to the protection of territorial integrity against external threats and use of force such as armed attacks, annexation and occupation. Internally, it aims to protect the territory against internal threats, mainly by limiting people’s claims to external self-determination by seceding which involve territorial change. There is thus a conceptual difference between the unamendability of territorial integrity versus unamendability of other principles such as fundamental rights, secularism, separation of powers, the form of government etc. The latter principles are all under domestic control, regulated by various governmental and institutional bodies, which allow – especially when accompanied by effective mechanisms of judicial review – for the enforcement of provisions of unamendability. For example, the Turkish Constitutional Court was able to protect the unamendable principle of secularism from infringements by governmental attempts to amend the constitution in order to abolish a headscarf ban in universities; the Czech Constitutional Court managed to protect the unamendable principle of the rule of law by invalidating an ad hoc constitutional act which called early elections by bypassing the established constitutional

179 A. LAWRENCE LOWELL, GREATER EUROPEAN GOVERNMENTS 103 (1918).
181 HANNAH ARENDT, ON REVOLUTION 142 (Penguin Classics, 2006).
These were all instances where basic constitutional principles were challenged by domestic institutions. However, territorial integrity faces a dual threat, internal and external, making it more vulnerable than other unamendable principles which depend only upon state authority. If the fear is that of voluntary ceding of territory under external pressure or coercion, what could be the utility of an unamendability clause on territorial integrity?

First, it may attach the stigma of (domestic) illegality to the breakaway unit or its annexing state, but that is not a very strong disincentive. And, from an international law point of view, “such constitutional provisions have no legal effect on the international order.” When combined with potentially plausible legitimacy claims, this deterrent becomes even less effective.

Second, the unamendability of territorial integrity might be regarded as a welcome mechanism for protecting democratic decision-making against “blackmail” by minorities. It allegedly shuts down the option for secession and, at the very least, enhances the bargaining position of those against separatism (if not interpreted as providing a duty to uphold the territorial integrity). As Cass Sunstein suggested, constitutions should not include a right to secede since protecting such a right equips minority groups with a strategic and even dangerous weapon and power of bargaining. Nevertheless even if one accepts Sunstein’s claim, there is an important difference between not including a right to secede within a constitution or even explicitly forbidding such a right, and absolutely entrenching territorial indivisibility as unamendable. As İlker Gökhan Şen writes:

> With the exception of […] rare cases, unilateral secession is forbidden by the quasitotality of the World Constitutions. This does not exclude, however, the constitutional regulation of the territorial modification of a state. It is not illogical to assume that the constituent power anticipate a future threat to the territorial integrity and prefer to frame a procedure to regulate against such an occurrence. Consequently, numerous constitutions include the referendum device as a condition for secession or other form of territorial alteration that may prove inevitable and irreversible.

The risk is that in terms of constitutional dynamics, unamendability might serve the exact opposite of its original preservative purpose: not only does it not prevent the changes, but by blocking any chance of achieving them through peaceful and political means it encourages the realization of these changes in an extra-constitutional manner. One study demonstrates that the lack of a strategic framework that produces peaceful resolutions to self-determination-based conflicts “grants independence to entities that fight their way to

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188 See also discussion in Tierney, supra note 16, at?.

191 Cass Sunstein, Constitutionalism and Secession, 58(2) UNI. CHI. L. REV. 633, 634 (1991): “To Place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberations in government; raise dramatically the stakes of day-today political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior; and exploitation; and, most generally, endanger the prospects for long-term self-government.”

192 See e.g. Andrew Friedman, Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies, 4 MEXICAN L. REV. 77, 93-96 (2011).
independence, which perpetuates violence and instability.” Accordingly, unamendability of territorial integrity is not only ineffective but might also frustrate attempts at peace-making.

It is true that unamendability in general may be more useful in normal times and in states where political players understand that they have to play according to the democratic rules of the game. In that respect, unamendability can be explained by the metaphor of a lock on a door. A lock cannot prevent housebreaking by a determined burglar equipped with good burglary tools, and even more so, the lock cannot prevent its own – and the entire door’s – destruction by sledgehammer or fire. On the other hand, there is no need for the safety-measure of a lock if we are dealing solely with honest people, because then there is no fear that any of them will attempt to break into one’s house. The lock’s utility is in deterring those who usually obey the accepted rules when said rules are accompanied by effective safety-measures. However, when such measures are missing and facing an easy opportunity to improve their condition at the expense of fellowmen, our burglar may succumb to the temptation to exploit this opportunity. The lock also has a psychological function: it is a mechanism we use in order to reassure ourselves that we are safe and protected.

Similarly, unamendability cannot block extra-constitutional measures. It is also not needed once the socio-political culture is that of self-restraint and lawfulness, since there is no fear of an attempt to change the political system’s fundamentals or to abuse powers. Unamendability is aimed at preventing the temptation. And in its aspirational aspect, unamendability makes us feel good about ourselves. Karl Loewenstein was not mistaken in his observation that in normal times, unamendability can function as a useful red light before political actors’ attempt to change the constitution but in times of crisis, unamendability is just a piece of paper which political reality could disregard or ignore.

E. Conclusion

Before concluding, a few disclaimers are warranted. In this paper, we are arguing neither against nor in favor of the general use of unamendability. We also do not argue in favor of or against the right to secede. We do claim that if constitutional designers wish to use the mechanisms of unamendability, they should reserve it for protecting the most basic principles of the democratic order, which can also be enforced and not ignored at will. Unamendability is a “complex and potentially controversial constitutional instrument, which should be

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194 Williams, Avoryie and Armstrong, supra note 146, at 21. Also, territorial conflicts are more likely to recur than other types of conflicts. See Suzanne Werner, The Precarious Nature of Peace: Resolving the Issues, Enforcing the Settlement, and Renegotiating the Terms, 43(3) AM. J. POL. SCI. 912, 915, 924 (1999).

195 Cf., Christakis, supra note 79 (“for Crimea, as probably for other very difficult cases that sour international relations... only a solution that is negotiated and freely accepted by all the protagonists will probably bring about a solution to this fierce conflict between unlawful effectivités and the law”).

196 See ROZNAI, supra note 30, at 217.


198 In fact, one of us has argued that unamendability rests upon a solid theoretical ground. See ROZNAI, supra note 30; Yaniv Roznai, Towards a Theory of Unamendability (February 24, 2015), http://ssrn.com/abstract=2569292; The other has investigated the democratic legitimacy of eternity clauses and found it to vary considerably according to the substance and method of adoption and repeal of such clauses. See SILVIA SUTEU, ETERNITY AND THE CONSTITUTION: THE PROMISE AND LIMITS OF ETERNITY CLAUSES (PhD thesis, Edinburgh University School of Law, forthcoming 2015).

199 Such recognition carries its own risks. See Christakis, supra note 79 (arguing that “accepting to extend a right of secession to the post-colonial context would open up Pandora’s box by allowing the world’s 6000 ethnic groups to claim a right of secession.”)
applied with care”, especially when it is used in order to protect the state’s territorial integrity.

Unamendability of territorial integrity is more vulnerable than other principles protected via constitutional eternity clauses. It is subjected to both the internal threat of secessionist movements and the external one of forceful annexation, both of which are plausible frames within which to cast the 2014 Crimean crisis. As the latter situation has shown, territorial unamendability is an especially ineffective example of eternity clauses’ preservative function. In fact, unamendability played no direct role in the current crisis which raises imperative questions regarding the ability or inability of constitutional law to effectively address and regulate issues relating to the indivisibility of a state’s territory. Crimea’s is also a case which exposes the limits of constitutional law and theory in the face of claims of popular sovereignty legitimized, however problematically, via referendums. Given “the deep pathology of uncertainty” in both constitutional and international law in this area, with various legal doctrines “overlapping and conflicting”, constitutionalizing territorial integrity as unamendable does little to clear the waters.

Additionally, the Ukrainian crisis exposes the vicious circle behind unamendability. We ascribe certain principles as unamendable because we know that these are the most fragile. Samuel Issacharoff is right in claiming that “which provisions are off the table for internal change generally reflects the birth pangs of that particular society.” Constitution-drafters design provisions so as to work exactly against the features of a state’s tradition and culture which could cause damage through the ordinary political process. We assign unamendability to those principles which are considered at risk. But unamendability itself cannot provide a complete – and in the case of territorial integrity, perhaps any effective – protection. Ignoring certain unamendable fundamental principles might lead to disrespect of other imperative unamendable principles. Weakening unamendable fundamental constitutional principles widens the gap between constitutional norms and constitutional reality, thereby challenging constitutional supremacy, undermining respect for the constitutional ordering itself, and destabilizing the entire constitution. When territorial integrity is under threat, and the entire constitutional order is jeopardized, our unamendable “lock on the door” will likely prove of weak make indeed.

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201 Tierney, supra note 16, at.

202 Issacharoff, supra note 135, at 1430. In that respect, Kim Lane Scheppele is correct in claiming that constitutions are not only future looking, but also reacting to past events. See Kim Lane Scheppele, A Constitution Between Past and Future, 49(4) WILLIAM AND MARY L. REV. 1377 (2008).