

## UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS – REVIEW OF YANIV ROZNAI’S BOOK

### ABSTRACT

*Yaniv Roznai’s* “Unconstitutional Constitutional Amendments, The Limits of Amendment Powers” (Oxford University Press, 2017) analyses the increasing tendency in global constitutionalism on limitations of formal amendments to the constitutions. The book starts with a table of jurisprudence, legislation and instruments. It also includes the rules on unamendable provisions of various national constitutions, and a bibliography. Part I of the book concerns comparative constitutional unamendability, Part II deals with the theory of constitutional unamendability, and Part III with enforcing constitutional unamendability. The author offers his views in the conclusion concerning unconstitutional constitutional amendments.

### I. CONSTITUTIONAL AMENDMENTS, THE IMPORTANCE OF UNAMENDED PROVISIONS

The book discusses in detail the importance of constitutional amendments and unamended provisions, and emphasises that the formula of amendments is primarily important to maintain a balance between stability and the change. However, amendment rules are not merely a technical mechanism of balancing constitutional stability and flexibility.<sup>1</sup> The book also provides a detailed analysis of the structure,<sup>2</sup> content<sup>3</sup> and objectives of unamendable provisions.<sup>4</sup>

### II. THE “BASIC STRUCTURE DOCTRINE”

The book examines in detail the so-called “Basic Structure Doctrine”. The author points out that in countries where constitutions do not contain unamendable provisions, the courts have identified<sup>5</sup> a certain constitutional core or set of basic constitutional

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<sup>1</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments, The Limits of Amendment Powers* (Oxford University Press 2017) 5.

<sup>2</sup> *ibid*, 22.

<sup>3</sup> *ibid*, 23.

<sup>4</sup> *ibid*, 26-36.

<sup>5</sup> *ibid*, 69.

principles that form a constitutional identity, which cannot be abrogated through the constitutional amendment process.<sup>6</sup> The book examines in detail the case law of more than 15 countries on different continents, where this doctrine has migrated from India.<sup>7</sup>

### III. SUPRANATIONAL LIMITATIONS

In the author’s opinion, constitutional amendments should be subject to certain supranational limitations, such as international human rights law and regional law in Europe, which may play a central role in the judicial review of constitutional amendments. Article 193(4) and Article 194(2) of the 1999 Constitution of Switzerland are cited as examples.<sup>8</sup>

### IV. SEPARATION OF POWERS AND CONSTITUTIONAL AMENDMENTS

The book discusses the vertical separation of powers between the primary power and the secondary power<sup>9</sup> and notes that the constitutional amendment power should not be equated with the primary constituent power. It is a delegated power and, based on its nature, it should be limited.<sup>10</sup> The amendment power was introduced to preserve the constitution rather than to destroy it. Thus, even in the absence of an explicit unamendability, the power “to amend” the Constitution cannot be clearly used to abrogate the Constitution. That would be seen as a breach of trust.<sup>11</sup>

### V. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The book develops a noteworthy view that it supposedly contradicts the separation of powers, although the judicial review of constitutional amendments is consistent with the principle of vertical separation of powers that exists between the primary constituent power and the secondary power.<sup>12</sup> Judicial review is necessary, among other things, for the effective separation of powers,<sup>13</sup> and the court must interpret the constitution to fulfil its role.<sup>14</sup> The judicial review of amendments ensures the normative supremacy of

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<sup>6</sup> *ibid*, 70.

<sup>7</sup> *ibid*, 47-68.

<sup>8</sup> *ibid*, 71.

<sup>9</sup> *ibid*, 133-134.

<sup>10</sup> *ibid*, 135.

<sup>11</sup> *ibid*, 142.

<sup>12</sup> *ibid*, 180.

<sup>13</sup> *ibid*, 181.

<sup>14</sup> *ibid*, 181.

the primary constituent power's decisions, namely 'the people's' supreme will.<sup>15</sup> The author points out that courts should intervene in the case of political process failure... By its intervention, the court prevents the tyranny of the majority.<sup>16</sup> In a democratic society, the court has the power to annul even constitutional amendments when there are failures in the work of democratic institutions. For example, situation in which the parliament, which was elected for a limited time period, amends the constitution according to the amendment procedure in order to prolong its own term.<sup>17</sup> In this respect, the doctrine of constitutional unamendability can be seen as a safeguard of the primary constituent power of the "people".<sup>18</sup>

## **VI. JUDICIAL ACTIVISM**

The issue of constitutional amendment review is of great interest to us. As noted in the book, the constitution can directly grant this power to the court,<sup>19</sup> although most constitutions are silent on this issue. They simply do not regulate this issue. Faced with such an issue, the court cannot avoid taking a decision. A court has to fill this gap and clarify the silence.<sup>20</sup> Courts in Germany, Brazil and the Czech Republic have done so, although, in other countries, such as Slovenia and Georgia, courts have ruled that it is outside the jurisdiction of the court. Other courts (India, Bangladesh, Kenya, Colombia, Peru, Taiwan and Belize) have held that the court, as the guardian of the constitution, has a duty to enforce such implied unamendability and ... facing silence regarding unamendability, a court's decision regarding a limited amendment power may only derive from judicial activism or daring.<sup>21</sup>

## **VII. DIFFERENT PROCEDURES: ORDINARY AMENDMENTS AND "TOTAL REVISION"**

The book discusses another topical issue – when there is a general procedure for ordinary amendments and, separately, a more complicated "people's" procedure for the "complete revision" of the constitution or a revision of certain "basic principles".<sup>22</sup> According to the work, such formal distinctions allow for judicial intervention in the case of the violation of these procedures.<sup>23</sup>

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<sup>15</sup> *ibid*, 183.

<sup>16</sup> *ibid*, 184.

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid*, 196.

<sup>19</sup> *ibid*, 197-198.

<sup>20</sup> *ibid*, 202.

<sup>21</sup> *ibid*, 209.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid*, 210.

The book is interesting in terms of teaching constitutional law, research and the development of the constitutional review of constitutional amendments in Georgia. This review will stimulate interest in the book and encourage academic debate on the most relevant issues discussed in it.