

YOUNG ACADEMICS

European
Legal Theory
3

Gürkan Çapar

Balancing Unconstitutional Constitutional Amendments



YOUNG ACADEMICS

European Legal Theory | 3

Edited by

Prof. Lorenz Schulz,

Prof. Maris Köpcke,

Prof. Migle Laukyte and

Prof. George Pavlakos

Gürkan Çapar

Balancing Unconstitutional Constitutional Amendments

With a Foreword by Prof. Miodrag Jovanović

Tectum Verlag

This publication was sponsored by the Frankfurt LLM programme in Legal Theory (Goethe University and European Academy of Legal Theory).

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

Gürkan Çapar
Balancing Unconstitutional Constitutional Amendments

Young Academics: European Legal Theory; Vol. 3

© Tectum – ein Verlag in der Nomos Verlagsgesellschaft, Baden-Baden 2024
ISBN 978-3-68900-220-6
ePDF 978-3-68900-221-3
ISSN 2944-3962

DOI: <https://doi.org/10.5771/9783689002213>

1st Edition 2024
© The Author

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden



Onlineversion
Tectum eLibrary



This work is licensed under a Creative Commons Attribution 4.0 International License.

Foreword

The material before the reader is the ultimate version of what used to be a successfully defended and subsequently awarded master thesis. In that respect, I might, somewhat unabashedly, infer that this is a final product of productive and collaborative work which I had with the author. In the process of writing a master thesis, Gürkan Çapar was not only willing to critically reflect upon all the comments and criticisms he was given, but he additionally improved his work with a devoted self-reflection, which was already back then a clear sign of scientific maturity. It is important to stress that his initial working plan had already been at a satisfactory stage, so all what was needed was persistent and meticulous development of the initial ideas. But this is often easier said than done. In the case of Gürkan Çapar, it turned for the better.

The author has opted for a topical and controversial research topic – theoretical grounding of unconstitutionality of constitutional amendments. This topic is at the crossroads of general legal theory, constitutional theory and political theory. At the same time, it is a constitutionally relevant topic, as the practice of several constitutional tribunals around the world demonstrates. In his monograph, the author successfully combines different methodological approaches. He starts with general problems of possible justification of one such doctrine. In doing so, he surveys the most relevant theoretical proposals in the field, highlighting both their strong and weak points. This is in the function of the development of the author's own, independent justificatory route. In the next step, he combines his approach with some of the tenets of Alexy's well-known Principles Theory. Finally, he successfully

Foreword

tests his theoretical framework using the case study of two re-election cases of the Colombian Constitutional Court.

The monograph before the reader is a rock-solid piece of scientific work. It demonstrates not only the high academic and research potential of the author, which he subsequently confirmed by successfully defending a Ph.D. thesis under the supervision of the renowned Professor Gianluigi Palombella, but, more generally, it also testifies to the overall quality of the LL.M. program in legal theory of the European Academy of Legal Theory, conducted at the Goethe University, Frankfurt.

Belgrade, October 12, 2024

Professor Miodrag Jovanović
Faculty of Law, University of Belgrade

Contents

Introduction	1
PART I: The Unconstitutional Constitutional Amendment Doctrine and Its Normative Justification	5
1. The Idea of Amending a constitution	5
1.1. Conceptual and Normative Questions	12
1.2. Constitutional Amendment and Replacement	15
1.3. Constituent power and legitimate political authority	18
2. The Normative Arguments for Limiting Amendment Power	25
2.1. Constitutionalism Constraint	29
2.2. Human Rights Constraint	40
2.3. Constitutional Identity Constraint	52

PART II: The Interpretive Legitimacy of the Unconstitutional Constitutional Amendment Doctrine	67
3. Three Suggestions for the Legitimate Use of UCAD	67
3.1. UCAD as a Solution to Abusive Constitutionalism	67
3.2. Treating Amendment Power as a Spectrum to Link Unamendability to the Amendment Procedure	74
3.3. Using Transnational Constitutionalism as a Second Check	79
3.4. Constitutional Dismemberment as an Alternative to UCAD	83
4. Amendment Power and Its Judicial Review as Formal Principles	91
4.1. Rules and Principles	92
4.2. The Problem of Formal Principles	97
4.3. How can Formal Principles be balanced?	105
4.4. Transfer of Klatt’s Five External Justification Criteria to the UCA Context	111
5. Colombian Re-Election Saga as an Example of Balancing Formal Principles	119
5.1. The First and Second Re-Election Cases	120
5.2. The Implementation of Formal Principles in the Re-Election Cases: Balancing Unconstitutional Constitutional Amendments	124

Contents

6. Conclusion	131
7. References	137
Acknowledgements	151

