YOUNG ACADEMICS

European Legal Theory 3

Gürkan Çapar

Balancing Unconstitutional Constitutional Amendments

Tectum

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

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

Onlineversion
Tectum eLibrary

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

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

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, Unviersity of Belgrade

Contents

Introduction

The rise of populism and its consequences—such as democratic backsliding, the erosion of constitutional principles, and the weakening of the rule of law—are among the most pressing issues facing comparative constitutional scholars today. Addressing these emerging challenges brings to the agenda the unconstitutional constitutional amendment doctrine (UCAD) as the most promising remedy for the 'third counter-wave of democracy'. However, a fundamental problem with UCAD is how to apply it effectively without undermining constitutional democracy, given that it is often criticized and found illegitimate from the perspective of democratic principles.

The main purpose of this thesis is to offer a convincing response to this legitimacy critique, presenting the normative arguments supporting the judicial review of constitutional amendments. To this end, it presents a normative argument that amendment power is subject to three different limitations: i) constitutionalism constraints, ii) human rights constraints, and iii) constitutional identity constraints (chapter 2). This normative argument explains why the courts are justified in using the UCAD without defending an unlimited and extra-juridical constituent power that limits the amendment power. In contrast, the thesis suggests that amendment power is legally limited not because it derives from a Schmittian constituent power but because from a constituent power subject to limitations imposed by the normative concept of constitutionalism and a set of international human rights norms that acquire the status of jus cogens. Additionally, the thesis provides further clarification as to how UCAD is founded on two partially conflicting principles: constitutional continuity and innovation (Chapter 1). Thus, the UCAD should be viewed as an attempt to find a balance between

these two different principles, suggesting further implications for the way in which the courts review the constitutionality of constitutional amendments. Simply, the courts are expected to observe these two principles when they bring the UCAD to bear on quashing an amendment as unconstitutional.

The second part of the thesis is primarily concerned with this interpretive legitimacy question, i.e., how should the courts use UCAD in a legitimate manner without any prejudice to the capacity of a political authority to update a constitutional system, namely, amendment power? Despite the scholarly attention this question has received from constitutional lawyers (Chapter 3), it is difficult to say that it has been addressed from the perspective of legal and political philosophy. For example, Yaniv Roznai links unamendability to both the amendment process and judicial review, ultimately proposing a 'spectrum of judicial review' paired with a 'spectrum of amendment power'. Rosalind Dixon and David Landau recommend incorporating transnational norms as a secondary check to prevent courts from misusing UCAD. Richard Albert, taking a more cautious and critical approach, advocates designing a 'constitutional dismemberment' rule as an alternative to UCAD. While these contributions are undoubtedly valuable, this thesis suggests that a comprehensive interpretive methodology that can be applied across diverse contexts when determining how and when courts should use UCAD is needed.

To fill this gap, this thesis suggests taking advantage of Robert Alexy's principles theory and balancing formula in explaining how to strike a balance between proposed constitutional amendments and unamendable principles (or between constitutional innovation and continuity) (Chapter 4). As such, the thesis creates a bridge between constitutional theory and legal/political philosophy. It not only exploits and benefits from Robert Alexy's principles theory but also contributes to his scholarship by extending proportionality analysis and balancing, which are typically applied in rights-based adjudication, to the conflicts of competence questions arising among different legal orders, as well as different legal institutions belonging to the same legal order. In this

context, this thesis suggests applying the balancing formula to resolve conflicts between two different formal principles: i) the competence to amend a constitution (amendment power) and ii) the competence to review if amendment power is exercised in accordance with the existing constitution. It also takes the Colombian Constitutional Court's two different re-election cases as examples illustrating how to use formal principles in balancing unconstitutional constitutional amendments (Chapter 5). Here, it draws on, and benefits from, Matthias Klatt's scholarship about the role that formal principles play in maintaining the cooperative and mutually supportive relationships among ECtHR, the ECJ, and national courts in the 'Bermuda Judicial Triangle'.

PART I:
The Unconstitutional Constitutional Amendment Doctrine and Its Normative Justification

1. The Idea of Amending a constitution

The idea of changing a constitution through a constitutional amendment procedure is one of the most innovative aspects of modern constitutional democracies. It not only provides flexibility to a constitution but also frees the constitution-makers from the burden of addressing numerous issues simultaneously. A constitutional amendment also allows future generations to update the constitution in response to unforeseen yet pressing and sometimes urgent problems. More importantly, it can achieve this without creating a temporal gap within the constitutional framework, avoiding any rupture—in other words, it operates in accordance with the rules of the existing constitutional system. Accordingly, the most important aspect of constitutional amendment, in my opinion, lies in its ability to allow political authorities to keep themselves updated when they deliver services to their citizens and solve societal problems. Unlike other ways of keeping a political system updated and responsive to the demands of a political community, a constitutional amendment does so without jeopardizing the stability and continuity of the political system, i.e., in sync with the rules of the existing constitution.

As such, there seem to be two mutually supporting yet partially conflicting principles undergirding the idea of constitutional amendment: i) constitutional continuity and ii) constitutional adaptation (innova-

tion/renovation)[1]. Indeed, they are the two basic principles guiding any interpretive activity whose purpose is to explain the meaning of textual legal materials to provide an understanding of their content[2]. As unambiguously put by Raz, all interpretive activities are characterized by duality in that they strive to 'be true to an original that is being interpreted and to be open to innovation'[3]. This 'double-sided' or Janus-faced' nature of interpretation also finds its way in constitutional interpretation, whose primary purpose is to explain how to find an equilibrium between constitutional continuity (historical reasons) and constitutional innovation (forward-looking reasons)[4]. As aptly put by Raz, constitutional interpretation exists in a dialogical tension between these two partially conflicting reasons because it 'lives in spaces where fidelity to an original and openness to novelty mix'[5].

It is the mere possibility to amend a constitution and update it in sync with the pressing social and political needs that render a constitutional system stable and resilient[6]. For this reason, I think that Tushnet has a point when he suggests treating a constitutional amendment as 'an alternative to revolutionary "abolition"'[7]. From this perspective, a constitutional amendment is like periodic democratic elections: Both

1 For detailed explanations for the role that the reasons for innovation and stability play in interpreting legal texts, see Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP, 2009) 299–322.

2 As noted by Raz, 'a good interpretation provides understanding, not merely knowledge', which makes it different than providing explanation for the 'semantic meaning' of a textual document. Ibid 301.

3 Ibid 354.

4 Ibid.

5 Ibid 357.

6 'It was, after all, Edmund Burke, the prophet of conservatism, who asserted that "a state without the means of some change is without the means of its own conservation (citation omitted).' Walter F. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 163. Albert argues that 'unamendability presuppose perfection in the design'. Albert (n 14) 23.

7 Mark Tushnet, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar Publishing 2019) 318.

serve to ensure the continuity of political authority without radical breaks and interruptions and act as a relief valve, reducing the pressure on the political system. Nevertheless, they differ in their temporal scope: While regular elections help political authorities adjust themselves to the demands of people in the short to medium term, constitutional amendments work to adapt the constitutional framework in which a political authority operates to long-term socioeconomic and political changes.

From the perspective of innovation, it is clear to me that all rules are required to be updated in response to the changing social, economic, and political circumstances simply because they are designed to guide individuals and tell them what to do and not to do. Constitutional rules are not the exception to this rule. It arises from the very nature of a constitutional order as a rule-based system of guiding human behaviour that should be updated from time to time. It is simply all but impossible to present a convincing argument for a constitutional order whose authority and legitimacy are free from temporal limitations. Political actors are driven to update their constitutional rules for many different reasons, including the need to eliminate obsolete, defective, and conflicting rules to create a coherent set of constitutional rules[8]. For instance, Raz argues that even those constitutional rules that 'directly implement unconditional moral imperatives' are to be updated from time to time because their authority is not long-lasting, contrary to the general assumption[9]. To this we may also add the need to eliminate these constitutional rules, which are viewed as morally indefensible and problematic (e.g., discriminatory norms based on gender and race), even though they were originally found morally acceptable according to the social norms prevalent in a particular political community. All in

8 Raz (n 1) 317–318. He also makes a distinction between merit and nonmerit reasons for constitutional change. While the merit reasons give political actors content-based reasons to change a constitution (e.g. defective and immoral constitutional provisions), the nonmerit reasons underscore the need for a constitutional change for other reasons such as transforming a society, 'infus(ing) a spirit of optimism in a new future, or gaining the 'allegiance of some segment of the population'. Ibid, 365.

9 Ibid 340.

all, no constitution enjoys timeless authority because it is often written by fallible individuals and social institutions subject to various temporal cognitive limitations[10]. This is aptly put by Raz when he noted that 'no human institution has authority to make laws which last forever, or for a very long time'[11].

The acknowledgment that 'fallibility is part of the conditions of ordinary knowledge' implies that individuals need to adopt what Raz calls the 'attitude of critical rationality', which involves being ready to revise and correct ordinary beliefs[12]. The attitude of critical rationality has further implications for political institutions in the sense that they are better to be designed in such a way as to "allow adequate opportunities for periodic re-evaluation of public policies"[13]. It is worth underscoring that the attitude of critical rationality is not so much concerned with "the substance of political choices" (e.g., whether they are made in tune with best scientific evidence) as it is with "the structures of institutions and the processes of decision-making"[14]. It encourages individuals to establish mechanisms for periodically evaluating the performance of authorities simply because not only individuals but also authorities are fallible. As Green persuasively puts it, our fallibility in judging what morality requires necessitates designing political institutions with mechanisms that allow the *detection, reduction, and correctio*n of errors and mistaken policies. The attitude of critical rationality suggests that we need to avoid institutions that perpetuate errors and include mechanisms enabling the revision of thoughts about the legitimacy of political authorities. In essence, it emphasizes the importance of avoiding "ratchet-like institutions that turn inevitable errors into incorrigible ones"[15] and promoting mechanisms that enable us to revise our

10 Ibid 341.
11 Ibid 343.
12 Joseph Raz, *The Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 100–102.
13 Ibid 102.
14 Ibid.
15 Leslie Green, 'The Nature of Limited Government' in John Keown and Robert P. George (eds) *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 202.

thoughts about the legitimacy of our political authorities. Seen in this light, we may easily argue that constitutional amendment rules are a necessary addendum to constitutions because we are rational human beings capable of our cognitive limitations when designing our political institutions.

While the possibility of amending a constitution ensures that political authority operates in a constitutional framework responsive to the demands of a political community[16], the limitations imposed on amendment power serve to support constitutional continuity/stability. From the perspective of constitutional continuity, there are several reasons for constitution-makers to render certain provisions unamendable and to immunize them against any kind of formal amendment[17]. Unamendability (or eternity) clauses may serve to protect a previous constitutional bargain, to preserve the core features of the constitutional identity or to transform society in line with the aspirations of the founding fathers[18]. Additionally, they may reflect the symbolic value attributed to a constitutional system by its citizens, an attitude that is conducive to altering the disposition that citizens have toward their political authority by giving them additional reasons for obeying its authority. To illustrate, Raz argues that there are different reasons (e.g., expertise and coordination) for bestowing legitimacy to a constitutional system, one of which has to do with the symbolic value that constitu-

16 Drawing on the argument that 'innovative interpretations provide for change confined within a continuing framework', Raz notes: 'The law is aware of the need for change, and for various methods of change. Innovative legal interpretation allows for change within continuity. It is particularly useful to achieve greater integration, and interstitial adjustment within existing legal frameworks.' Raz (n 1) 317, 319.

17 According to Richard Albert, the underlying reason for entrenching certain provisions stems from the tension between constitutionalism and democracy. While constitutionalism handcuffs democracy, amendment power serves as the key to release these handcuffs and resolve the tension in favour of democracy. In this context, Albert sees entrenchment clauses as a way to discard the key and freeze this tension between constitutionalism and democracy. Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Ariz. St. LJ* 663, 664–667.

18 Richard Albert, 'The Unamendable Core of the United States Constitution' in András Koltay (ed) *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015) 15–17.

tions acquire through the maintenance of established social practices[19]. Even though it does not suffice to shoulder the justificatory burden necessary to establish the legitimacy of a constitutional system[20], the symbolic value of a constitution may support its legitimacy by giving individuals additional reasons to respect and protect the existing constitutional system[21].

From here, it follows that there are valid reasons to support the continuity and stability of the constitutional system with its existing rituals and traditions simply because it is meant to 'provide a framework for the public life of a country, giving it direction and shape' in the long term[22]. Even so, this does not amount to saying that there are no other reasons to change the norms belonging to a constitutional system, particularly when it is deemed illegitimate from a normative perspective[23]. Accordingly, the concern for constitutional stability/continuity fails to establish the legitimacy of a constitutional system, although it prompts individuals to adopt a conservative attitude toward their political authority[24]. Be that as it may, any constitutional system is expected to find a balance between innovation and continuity. The most common way of doing so is to establish clear rules on how to amend a constitution (amendment rules) and entrench some constitutional provisions as unamendable. Hence, the power to amend a constitution

19 Raz (n 1) 341.

20 Ibid 342–343.

21 He confines this self-legitimating effect of constitutional practices to the cases when constitution '*remain within the boundaries set by moral principles*', that is, when 'moral principles under- determine the content of constitutions'. Ibid 348, 350.

22 Ibid 350.

23 'The desirability of stability does not establish that the constitution is legitimate. It applies even to illegitimate constitutions. … Things are different if the constitution is morally legitimate… the arguments from underdeterminacy and from stability combine to legitimate the constitution and provide a reason for keeping the constitutional tradition going as it is.' Ibid 351–352. Other moral reasons may outweigh constitutional stability and give a political community reasons to have recourse to extra-constitutional means of constitutional amendment such as revolutionary constitution-making, see; Victor M. Muñiz-Fraticelli, 'The Problem of a Perpetual Constitution' in Alex Gosseries and Lukas H. Meyer (eds) *Intergenerational Justice* (OUP 2009) 405–408.

24 Ibid 350.

and unamendable principles (or eternity clauses) are the two sides of the same coin[25].

Constitutional theory is primarily interested in providing a normative answer to the following questions: i) What are the normative conditions under which a constitutional system is entitled to exercise (legitimate) authority over individuals? and ii) What are the interpretive principles guiding constitutional adjudication?[26]. Nevertheless, it is misleading to assume that a constitutional theory is 'blind to the basic realities of life', namely, social facts, for the simple reason that constitutions are often contaminated by a manifold of 'short-term' political considerations[27]. As such, it seems necessary to address not only normative but also conceptual questions that acknowledge that a constitutional system has a history and evolves over time. For instance, it is worth examining whether a constitutional amendment rule is of the same hierarchical level as the constitutional norm it is meant to substitute. Eternity clauses are often said to express certain values, conveying the message that they are 'more highly valued than those not granted the same protection'[28] because they distance themselves from ordinary constitutional provisions. This leads to the conclusion that they are hierarchically positioned at a higher normative level than ordinary constitutional norms are. Therefore, constitutional amendments are expected to be congruent with unamendable principles because the latter places some substantive limits on the power to amend a constitution. We may argue, therefore, that the validity of a constitutional

25 This is aptly stated by Waluchow and Kyritsis as follows: 'Entrenchment not only facilitates a degree of stability and predictability over time (a characteristic aspiration of constitutional regimes), it is arguably a requirement of *the very possibility* of constitutionally limited government'. Will Waluchow and Dimitrios Kyritsis, 'Constitutionalism' in Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Summer 2023 Edition), URL = <https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>.

26 For Raz, constitutional theory is divided into two broad categories, which, respectively explore the conditions of legitimate constitutional authority and the normative principles that guide constitutional interpretation. Raz (n 1) 328.

27 Ibid 327.

28 Albert (n 18) 17.

amendment depends not only on the proper exercise of this authority (or competence) but also on its congruence with unamendable principles. A logical consequence of this line of reasoning is to assert that another competent authority (e.g., a constitutional or supreme court) can declare this amendment unconstitutional on the basis that it is incongruent with unamendable principles.

However, behind all these arguments, there is a prior conceptual problem to address: can a constitutional amendment be deemed unconstitutional? Simply, the very idea of amending the constitution reveals a paradoxical situation: if the constitutional amendment is itself part of the existing constitution and stands on the same hierarchical level with it, how can it be said to be contrary to the constitution?[29] Is it possible for a part of a whole to be contrary to the whole? Could anyone be in contradiction with oneself?

1.1. Conceptual and Normative Questions

In the last 50 years, some courts, following the successful and well-known example of the Indian Supreme Court, have offered positive responses to these questions and contributed greatly to disentangling this alleged paradox[30]. For instance, the Indian Supreme Court has relied on the argument that some constitutional norms are to be distinguished from other ordinary constitutional provisions because they determine the basic principles on which a constitution is itself founded[31]. These distinctive constitutional norms give a constitution its unique identity,

29 Stone labels this paradox as contradiction thesis, see Adrienne Stone, 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' (2018) 12 *ICL Journal* 357, 358–359.

30 For a quite interesting reading of why the UCAD has been a success story, see Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 *The American Journal of Comparative Law* 657.

31 For a summary of the Indian experience with the UCA doctrine, Surya Deva, 'Constitutional Politics over (un)constitutional amendments' in Rehan Abeyratne and Ngoc Son Bui (eds) *The Law and Politics of Unconstitutional Amendments in Asia* (Routledge 2021) 189.

a feature that helps separate it from the constitutions of other states (geographically), as well as from the preexisting and forthcoming ones (temporally). Therefore, any constitutional amendment encroaching upon these distinctive constitutional provisions is to be held unconstitutional because it undermines the fundamental principles or the basic structure on which a constitution is founded[32]. Despite the apparent brightness of this doctrinal solution, known in the literature as the basic structure doctrine[33], one may rightly ask if it is justifiable from a moral perspective or whether it is consistent with the demands of democratic legitimacy. In other words, some normative questions also exist to address even when the idea that a constitutional amendment may be unconstitutional is admitted as a conceptual possibility. For example, one can raise the following question: which legal institution should have the authority/competence to decide whether a constitutional amendment is unconstitutional? (the institutional-legitimacy question) Alternatively, one may discuss the legitimacy of interpretive methods to be used when this power to decide a constitutional amendment unconstitutional is exercised. (interpretive-legitimacy question).

The literature on constitutional amendments is filled with examples that bring these normative questions to the forefront to challenge the legitimacy of UCAD[34]. We may roughly divide the literature into two camps depending on how they answer the question of whether imposing limits on power to amend a constitution is justified. While

32 Roznai notes that 'a constitutional principle or institution is so basic to the constitutional order that to change it, and thereby look at the whole constitution, would be to change the entire constitutional identity'. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 148.

33 Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2010).

34 This challenge is particularly evident in Commonwealth countries, where the legal system is based on parliamentary supremacy rather than constitutional supremacy. Similarly, in the United States, this issue is widely debated under the concept of the 'countermajoritarian difficulty'. For a key proponent of this concept, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986). For a discussion on the conflict between constitutionalism and democracy, see Miodrag A. Jovanović (ed), *Constitutional Review and Democracy* (Eleven International Publishing, 2015).

some find it morally acceptable and justified to render certain constitutional norms unamendable, others consider this problematic from the perspective of democratic legitimacy. The latter often relies on the argument that unamendable provisions are illegitimate because they limit 'the universe of constitutional possibilities open to those whom the constitution governs'[35]. It is even said that entrenching unamendable principles in a constitution is a form of constitutional 'hijack(ing)', as it interferes with one of the most important rights upon which our modern constitutional democracies are founded: the right to self-governance or democratic governance.[36]

In contrast, the former challenges these arguments, asserting that unamendable principles are legitimate because they protect the interests of future generations and allow them to exercise the same democratic rights enjoyed by previous generations. For them, UCAD is grounded in the value of equality among generations, as it serves to provide equal opportunity to each generation to govern themselves according to the rules they choose: 'One generation cannot subject its laws to future generations'[37]. This line of thought finds its best expression in Thomas Jefferson, who once suggested making a new constitution every 19 years, which is the lifespan of a generation[38]. Drawing on the argument that each 'generation must be as free to act for itself, in all cases, as the ages and generations that preceded it'[39], Jefferson concludes that each generation only has conditional possession

35 Albert (n 18) 13. See also; Richard Albert, 'Nonconstitutional Amendments' (2009) 22 *Can. JL & Jurisprudence* 1, 5, 9–10, and Richard Albert, 'Counterconstitutionalism (2008) 31 *Dalhousie LJ* 1, 47–48.

36 Albert (n 18) 13.

37 France: Declaration of the Right of Man and the Citizen Article 28, 26 August 1789, available at: https://www.refworld.org/docid/3ae6b52410.html [accessed 28 June 2020].

38 Letter from Thomas Jefferson to James Madison. 'The Earth Belongs to the Living' (Paris, Sept. 6, 1789). For similar examples see, Tushnet (n 7) 324. For a recent defence of the idea of perpetual constitution, Muñiz-Fraticelli, (n 23) 377.

39 Thomas, Paine, 'The Rights of Man' in Philip S. Foner (ed) *The Life and Major Writings of Thomas Paine* (Citadel Press 1961) 251.

of the earth, holding it *'in usufruct'*[40]. In this sense, to hold the earth in usufruct means that the living may use it so long as they do so 'without injuring or impairing its useful fruitfulness in such a way or to such a degree that posterity cannot use or enjoy it'. Just as 'a trustee or steward during his tenure does not diminish the integrity or value of the thing owned, but if possible, augments and improves it'[41], so too does this apply to constitutional amendments. The qualifying phrase 'in usufruct' thus places an essential limitation on what the living may do with and to the portion of the earth they occupy during their lifetime[42]. This line of thought allows us to see that there are moral limits to amending a constitution, as each generation is equally entitled to be governed by rules made by themselves.

1.2. Constitutional Amendment and Replacement

Let me proceed with exploring if it is conceptually possible to find a constitutional amendment unconstitutional, that is, if a constitutional amendment may be contrary to the existing constitutional norms. As already mentioned above, any constitutional amendment mechanism serves to preserve the continuity of a political authority while allowing for constitutional alteration and renovation, provided that they are consistent with the existing constitutional framework. This finds its best expression in the etymological origin of the word amend, which means 'to correct and improve', not 'to deconstitute and reconstitute' nor 'to replace one system with another or abandon its primary principles'[43]. It is therefore no coincidence that the idea of constitutional

40 Julian P. Boyd (ed), *The Papers of Thomas Jefferson, Volume 15: March 1789 to November 1789 (Vol. 53)* (Princeton University Press 2018) (emphasis in the original).

41 Terence Ball, '"The earth belongs to the living": Thomas Jefferson and the problem of intergenerational relations' (2000) 9 *Environmental Politics* 61, 67.

42 Ibid 66.

43 Murphy (n 6) 177.

amendment presumes the existence of a constitution that preserves its identity despite the validity of constitutional amendments[44].

Some constitutions draw a distinction between a partial and total amendment, on the one hand, and an amendment and a replacement, on the other[45]. For example, Article 30 of the Argentine Constitution stipulates that '(t)he constitution may be amended in its entirety or in any of its parts', and the Nicaraguan Constitution distinguishes between a partial reform and total revision[46]. This distinction may also be observed in numerous constitutions, such as the constitutions of Austria, Switzerland, Spain, Ecuador, and California[47]. Discrimination between amendments and replacements enables us to see that a constitution is not merely the sum of each and every constitutional norm. A constitution *in toto* is simply more than the aggregate sum of all its particular provisions. This finds its best expression in the distinction that Schmitt offers between a (total) constitution and a constitutional law:

> *'The authority to "amend the constitution" granted by constitutional legislation means that other constitutional provisions can substitute for individual or multiple provisions. They may do so, however, only under the presupposition that the identity and continuity of the con-*

44 José L. Martí, 'Two different ideas of constitutional identity: Identity of the constitution v. identity of the people' in Alejandro S. Arnáiz and Carina Alcoberro (eds), *National Constitutional Identity and European Integration* (Cambridge: Intersentia 2013) 20.

45 See for example article 147 of the Venezuelan Constitution stipulating that '(t)he original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution'.

46 Constitucion de la Nacion Argentina, art. 30 (Aug. 22, 1994). See also Constitution of the Democratic Socialist Republic of Sri Lanka, Chapter XII (providing different procedures to amend a constitutional provision and repeal/replace the constitution); Constitution of the Republic of Bulgaria, art. 158 (1991) (providing that a 'new constitution' might be adopted by a "Grand National Assembly"). Constituci6n Politica de la Repiblic de Nicaragua, arts. 191–95 (Feb. 2007).

47 See Austria Const, ch ll, art 44(3) (1920); Spain Const, pt X, arts 166–68 (1978); Switzerland Const, tit VI, ch 1, arts 192–95 (1999). California Const, art XVIII, paras 1–4 (1879). Ecuador Const. article 444 (2008).

stitution as an entirety is preserved. This means that the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself.… Constitutional amendment, therefore, is not constitutional annihilation.… A constitution resting on the constitution-making power of the people cannot be transformed into a constitution of the monarchical principle by way of a constitutional amendment'.[48]

One further argument supporting the view that there is a distinction between constitutional amendment and replacement may be found in the liberal tradition of constitution-making. The origin of this distinction is patently observable as articulated and framed in a more explicit way in the discussions surrounding the differences between constituent and amendment powers that took place in the 17th and 18th century British, French and American constitutional revolutions.[49] Replacement is often said to be 'something more dramatic than an amendment' because it 'constitutes a substantial change to the constitution, one that takes the constitution off its course in a departure from its fundamental presuppositions and organizational framework'[50]. In contrast, amendments 'are more commonly used to refer to narrow, nontransformative alterations'[51]. For this reason, unlike amendments, replacements are believed to mark a moment of break and rupture in the constitutional system to the point that they 'create a new regime'[52]. To illustrate, the members of the 1789 French Constituent Assembly reached a consensus, after heated discussions, on 'placing a method for amending the Constitution within the Constitution itself' while making it explicit that 'doing so could not bind the people in their

48 Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008) 150–151.

49 Yaniv Roznai, '"We the people", "oui, the people" and the collective body: perceptions of constituent power', in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar Publishing 2018) 295 (citations omitted).

50 Ibid.

51 Albert (n 18) 20.

52 Ibid.

capacity as the constituting power'[53]. For amending, a constitution is far cry from making a constitution from scratch.

In sum, the power to amend a constitution involves no right to destroy or repeal it, nor does it have authority to replace it. Because it is limited by the very constitution that it seeks to amend its particular provisions without prejudice to its overall identity. The power to make and replace a constitution is granted to constituent power, which is considered to be the sole authority not subject to the legal limitations that the existing constitution imposes on other authorities, such as the authority to amend a constitution.

1.3. Constituent power and legitimate political authority

Concepts are the outcome of certain political, sociological and historical developments. This means that conceptual analysis cannot save itself from the challenge of parochialism. Admittedly, conceptual analysis requires legal theorists to confine their analysis to theoretical investigation, avoid engaging in a project such as developing law, create a better world or improve democracy[54], and resist the temptation of being part of a political project[55]. However, legal theorists are human beings located somewhere in the earth, living in a particular political society with its distinct social values, traditions, and expectations about how to design a political community. As Raz insightfully noted, 'we understand the alien cultures through *our* modern Western perspective, relying on *our* notions and on *our* knowledge of history'[56], and 'it is our concept which calls the shots: other concepts are concepts of law if and only if they are related in appropriate ways to our concept'[57]. This manifests itself best in what Hart calls the internal point of view,

53 Tushnet (n 7) 322–323.
54 Raz (n 1) 86.
55 I do not mean here that this is itself something bad or good. It is a matter of choice, and I think being an activist legal scholar is as much valuable as being a legal theorist. However, those are different things.
56 Raz (n 1) 45.
57 Ibid 32.

whereby to grasp what it means to follow a rule, it is necessary to see the practice from the standpoint of participants. This brings with it a degree of parochiality even though Hart is not aware of that[58], for law does not avail itself of external observation, namely, an observation from an Archimedean point. In a nutshell, the shift to an internal point of view in analytical legal theory ironically ushers in a turn to parochiality, admitting that there are only concepts of law, not the concept of law.

The concept of constituent power is no exception to this rule[59]. As a child of modernism, it has gained importance together with the rise of modern nation states and has become a point of reference alongside others such as constitutionalism and the constitutional state[60]. One main reason why the concept of constituent power was such appealing to constitutional lawyers and political philosophers during the 18th and 19th centuries lies in its capacity to explain how a political order came into existence without resorting to a mythical external force or a God-like divine creator[61]. Thus, it parallels the functional differentiation of

58 Ibid 94.

59 Sieyes was one of the first constitutional theorist who draw a distinction between primary and secondary constituent powers in his seminal article *"Qu'est ce que le Tiers etat?* However, similar distinctions between constituent and constituted power existed before Sieyes, such as Bodin's personal and real sovereignty, Lawson's personal and real majesty, Locke's constituting power and constituted commonwealth, and Daniel Defoe's constituting and constituted power. Unlike Locke's conception, which is limited, conditional, and relational, Sieyes' view of constituent power is unconditional, making it unlimited and absolute. Similarly, Schmitt's understanding of constituent power is purely political, unconstrained by positive law. For explanations, see Roznai (n 32) 107–110. For an overview of these distinctions, see Martin, Loughlin, 'The concept of constituent power' (2014) 13 *European Journal of Political Theory* 218, 219–221; and Carlos Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 11 *International Journal of Constitutional Law* 339, 342.

60 Loughlin (n 59) 219. For detailed explanations for the historical of origin and evolution of the concept of constituent power, see Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) Part I 'A Conceptual History of Constituent Power'.

61 Constituent power 'presents itself as a modern, rational concept that does not easily fit with claims to the traditional or sacred authority of the sovereign'. Ibid.

a political system from other subsystems, including religion, economy, and science. As aptly noted by Thornhill, the concept of constituent power 'served at once to satisfy the expectations of shared autonomy and collective freedom which accompanied the rise of modern society, and clearly to abstract a single, simple, positive source of authority for the power of the modern centralized state'[62]. In this sense, constituent power liberated political authorities from the burden of resting their legitimacy to mythological or religious sources and considerations and open up the possibility for seeing democratic legitimacy as an ideal based on the view that 'those subject to power were also the factual authors of power'[63].

Liberalism and its commitment to the democratic justification of authority are abundantly clear when it is read against the backdrop of the traditional understanding of authority prevalent in the Middle Ages, where it was considered a natural and indispensable component of individuals' lives[64]. In a context where the authority of a king or state is accepted as inherent and natural, questioning why individuals should accept this authority might seem unnecessary. Therefore, Waldron characterizes liberalism as an effort to brush aside 'tradition, mystery, awe, and superstition as the basis of order' and 'to make authority answer at the tribunal of reason and convince us that it is

62 Chris Thornhill, 'Contemporary constitutionalism and the dialectic of constituent power' (2012) 1 *Global Constitutionalism* 369, 370.

63 Ibid 382.

64 For a summary of how the image of authority has changed over years in response to the social and political changes, see Maksymilian Del Mar, 'Imaginaries of Authority: Towards an Archeology of Disagreement' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016) 220. Buchanan similarly holds normative concepts like legitimate authority and constitutionalism to be 'weapons, strategic resources that have evolved in the coevolutionary struggle between hierarchy and resistance; and they first emerge and spread at least in part because of their strategic value, even when those who wield them do not think of them in strategic—that is, in purely instrumental—terms.' Allen Buchanan, 'The Perpetual Struggle: How the Coevolution of Hierarchy and Resistance Drives the Evolution of Morality and Institutions' (2021) 38 *Social Philosophy and Policy* 232, 238.

entitled to respect'[65]. He further noted that liberalism rests on 'a certain view about the justification of social arrangements'[66] to individuals who are rational enough to decide what is good for them. The need for justification of political authority to individuals stems from the liberal commitment to 'a conception of freedom and respect for the capacities and the agency of individual men and women'[67]. When a constitution is made by a constituent assembly endowed with the normative power to make a constitution, it is often considered legitimate from a liberal perspective. Simply, the concept of constituent power is better seen as a solution to the problem of legitimate political authority, that is, what makes a political authority (state) legitimate and then grants it the right to give orders and impose duties on its citizens. This is aptly noted by Loughlin when he argues:

> *'The concept (of constituent power) emerges from the secularizing and rationalizing movement of 18th century European thought known as the Enlightenment and rests on two conditions: recognition that the ultimate source of political authority derives from an entity known as 'the people' and acceptance of the idea of a constitution as something that is created'*[68].

However, what exactly does the role that constituent power plays in bestowing a political authority with the normative title of legitimacy? I think the best answer to this question may be found in Rawls' liberal principle of legitimacy (or constitutional legitimacy). For him, political power is legitimate 'when it is exercised in accordance with the constitution, the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason'[69]. In simple terms,

65 Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *The Philosophical Quarterly* 127, 134. Buchanan (n 64) 238–9.
66 Ibid.
67 Ibid.
68 Loughlin (n 59) 219.
69 John Rawls, *Political Liberalism*, (Columbia University Press 2005, expanded edition) 137.

a constitution made according to the principles of democratic constitution-making has the capacity to accord legitimacy to ordinary laws and regulations[70]. This capacity of a constitution to bestow ordinary laws and regulations with the title of legitimacy is depicted by Michelman and Ferrara as 'legitimation by constitution'[71]. Therefore, constituent power serves to justify the vast power that states enjoy and exercise over their citizens. Similarly, Waldron, who views liberalism as 'a theory about what makes political action... legitimate', asserts that no political authority may be deemed legitimate 'unless it is rooted in the consent of all those who live under it'[72]. It takes only one argumentative step to conclude that liberal tradition establishes an implicit connection between constituent power and democratic legitimacy. For this reason, it does not strike me as surprising that Rawls finds the justification for this idea of legitimation by constitution in the existing democratic political culture established in modern democratic states where individuals with diverse philosophical, religious, and moral views treat each other as free and equal citizens[73].

Two conclusions can be drawn from the foregoing discussions. First, there is a tendency in liberal tradition to view constituent power as a wholesale legitimating device for a political authority in that all laws and regulations consistent with constitutional norms are considered legitimate when a political authority is constituted in a legitimate manner. It is worth emphasizing, however, that there are also those who militate against searching for a legitimate constitutional moment to accord legitimacy to a political authority. For instance, Raz, embracing an instrumental approach to the question of constitutional legitimacy, contends that it is misconceived to rest the legitimacy of an old constitution on its constitutional moment when the founding fathers express their consent[74]. For it is all but impossible to present a

70 Ibid, 447.
71 Frank Michelman and Alessandro Ferrara, *Legitimation by Constitution: A Dialogue on Political Liberalism,* (OUP 2021) 2.
72 Waldron (n 65) 140.
73 Rawls (n 69) xxi, 411.
74 Raz (n 1) 328.

time-independent justification of constitutional authority 'that allows it to have authority stretching long into the future'.

Second, political authority derives its legitimacy from the proper use of constituent power in the sense that the power to make a constitution is to be exercised in accordance with the demands of democratic accountability. For this reason, an implicit connection between constituent power and democratic legitimacy is observable within the liberal tradition[75], a link that finds its best expression in the notion of constitutional democracy. In a way supporting the foregoing explanations, Thornhill views the concept of constituent power as a tool that allows states to rest their legitimacy on 'the idea that those subject to power were also the factual authors of power'[76]. This power to create a new constitution, granting legitimacy to a political authority, is the power of *demo*s to set rules for itself and determine the basic normative conditions under which a political authority may give orders and commands to its subjects, citizens.

Against this backdrop, it is surprising to observe this tendency to establish a link between democratic principles and constitution-making process faded into oblivion in the 20th century, probably because of the then popularity of Schmittian constituent power not bounded by any moral rules. Only recently have been an interested in the moral/normative conditions relevant to the legitimacy of any constitution-making process, particularly when there is no prior authority or legal norm authorizing and limiting the constituent power[77]. This view conveys the message that constituent power is not mere political power but

75 Waldron notes that liberalism requires that 'all aspect of social should either be made acceptable or be capable of being made acceptable to every last individual' Waldron (n 65) 128.

76 Thornhill (n 62) 382.

77 For instance, Raz notes: 'If the constitution is not an originating constitution, if it has been made by a body on which some other law (perhaps an earlier constitution) bestowed power to enact a constitution, then it may be morally legitimate if the law that authorized it is morally legitimate. However, if it is an originating constitution, then the question of its moral legitimacy cannot turn on the legitimacy of any other law. It must turn directly on moral argument. …They may have had moral authority, and it may be the reason for the authority of the constitution.' Raz (n 1) 332.

normative power whose performance is subject to certain moral limitations. Hence constitution-making process is governed by some moral principles.

2. The Normative Arguments for Limiting Amendment Power

It is highly appealing to defend an unlimited or extra-juridical conception of constituent power when one is developing an argument that amendment power is subject to legal limitations imposed by the existing constitution[78]. This classical approach allows scholars to provide a justification for the use of UCAD because it draws a thick line between legally limited amendment power and extra-juridical constituent power[79]. This is one of the main reasons why many constitutional lawyers who are interested in providing moral justification for the use of UCAD are tempted to invoke Carl Schmitt's political theory and his extra-juridical conception of constituent power[80]. Nevertheless, I believe we should resist this temptation of 'reducing the constituent power to

78 Fasel calls it 'the stain of constitutionalism', implying that the idea of a legally unlimited constituent power would 'leave an indelible blemish on constitutions that are otherwise committed to constitutionalism'. Raffael N. Fasel, 'Natural rights, constituent power, and the stain of constitutionalism' (2024) 87 *The Modern Law Review* 864.

79 For instance, Loughlin views amendment power as 'a constitutional power delegated to a certain constitutional organ', implying that it 'possesses only fiduciary power; hence, it must ipso facto be intrinsically limited by nature'. Thus, amendment power 'acts as a trustee of "the people" in their capacity as a primary constituent power because it is nothing more than 'a delegated power'. Martin Loughlin, *The Idea of Public Law* (OUP 2003) 231.

80 See, e.g., Roznai (n 32). In a later publication, he acknowledges that the power to make a constitution is subject to certain limitations even when it is considered legally unbounded. These limitations arise from natural law, international and supranational norms, the normative ideal of constitutionalism, and the very idea of constituent power.
Yaniv Roznai, 'The Boundaries of Constituent Authority' (2020) 52 *Conn. L. Rev.*, 1381.

sheer power'[81] since there is no need to militate for an extra-juridical constituent power while offering a moral justification for the UCAD. Instead, one may easily argue that if the constituent power is limited, then the amendment power is *ipso facto* limited[82].

I think that neither amendment nor constituent power is uncircumscribed. Even so, certain constraints apply only to the constituent power. For example, a constituent power could replace a constitution without undermining the main tenets of constitutionalism, such as changing the form of government from a parliamentary system to a presidential system or making important changes in the constitution, provided that it does not derogate from some fundamental human rights. In contrast, amendment power can only make changes while preserving the identity of a constitution. This is why amendment power is not only subject to the restrictions imposed on constituent power but also constrained by the constitution that grants it the power to amend. Consequently, the limitations imposed on the constituent power are narrower than those on the amendment power.

I argue that two different types of constraints apply to constituent power: a) constitutionalism constraints and b) human rights constraints. The constitutionalism constraint arises from the distinction between a state having a constitution and a state bounded by a constitution. Simply not every state having a constitution is a constitutional state. The human rights constraint is based on a similar idea—that no political authority is morally justified in violating certain human rights because these rights protect the basic conditions of membership in a political community. Taking a cue from Palombella, let me label these rights fundamental rights[83]. They are fundamental because they

81 Roznai argues that this reductionism brings forth a 'materialistic fallacy since it necessitates a certain representational form'. Roznai (n 49) 302–303.

82 It is also argued that it is counterproductive to leave limitless the constituent power because constitutional replacement just like amendments may be abused to undermine democracy. David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 *Wake Forest L. Rev*, 859.

83 For the distinction between fundamental rights and moral human rights, see Gianluigi Palombella, From Human Rights to Fundamental Rights: Consequences of a conceptual distinction (2007) 93 *Archiv für Rechts- und Sozialphilosophie* 396.

lie at the foundation of both domestic and international legal orders, to the extent that they function 'as a rule of recognition for the legality and constitutionality of any positive norms'[84] at the domestic and international level, implying that they 'cannot be overridden by the State and its public institutions'[85]. This is attested to by the fact that international agreements contradicting these fundamental rights are considered invalid[86]. In simple terms, whenever a political authority excludes a particular segment of its community from basic membership rights, namely, 'the right to have rights'[87], it 'forfeits the claim to be standing for and thus to be sovereign over'[88] those groups and cannot represent them at the international level.

The human rights constraint, although part of the constitutionalism constraint, is a more specific and positivized version, as it derives its normative significance from current human rights practices, most clearly observable at the international level, where human rights limit state sovereignty and hold political authorities accountable for their (in)actions. Both constitutionalism and human rights constraints impose certain limitations on political authorities (and subsequently on constituent power), casting doubt on their legitimacy when they disregard these normative restrictions. In addition to these two limitations,

84 Gianluigi Palombella, 'On Fundamental Rights and Common Goals: At Home and Abroad' (2022) 8 *Italian Law Journal* 635, 637.

85 Ibid 639.

86 Articles 53 and 64 of the Vienna Convention on the Law of Treaties. They are "placed outside the purview of the sovereign" autonomy. Ibid.

87 Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP 2012) 208, 216. For similar argument see; Charles R. Beitz, *The Idea of Human Rights* (OUP 2009) 148.

88 Cohen (n 87) 197. In a recent publication, Alex Green introduces two moral and necessary conditions for the state creation: i) the existence of a political community and ii) respect for the ethical value of individual political action. These two abstract principles give way to some more concrete principles conducive to provide states with reasons for actions, among which the negative self-determination principle suggests that while 'a significant portion of an extant population' is disenfranchised or subordinated, 'statehood is blocked until that situation is resolved'. Alex Green, *Statehood as a Political Community* (CUP 2024) 12–15.

amendment power is also subject to what I call the constitutional identity constraint.

This constraint is based on the idea that constitutions are historical documents through which the members of a political community express their preferences for self-governance and commit themselves to realizing the values undergirding constitutionalism in their own particular way[89]. Constitutional identity constraints result from the simple fact that there are equally valuable and incommensurable ways of concretizing the ideals of constitutionalism because it is an abstract normative ideal to be complemented by continuing social practices[90]. For instance, constitutionalism may advocate respect for individual rights, but the specific rights accorded constitutional protection and the interpretation of what it means for a moral right to be constitutionally protected can vary across different constitutional traditions and practices[91]. The existence of diverse yet equally valuable ways

89 In exploring the noninstrumental dimension of law, Raz defines a legal system as 'the authoritative voice of a political community', meaning that it can play a crucial role in constituting a political community and contributing their identity and belonging particularly when it serves 'as an object for identification'. Raz (n 1) 99–107. He also says that constitutions serve to express 'a common ideology'. Ibid, 326.

90 Raz gives democracy as an example of underdetermination of normative reasons. Ibid, 347–348. As aptly put by Mac Amhlaigh, constitutionalism is better seen 'as a series of 'family resemblances' between diverse enlightenment infused practices of legitimacy and good government' 'rather than being conceived of as a specific concrete and discrete set of practices and values or coherent set of necessary and sufficient conditions, even within this relatively limited geographical and temporal space. It is, therefore, 'compatible with, legislative and judicial supremacy, constitutional monarchies, revolutionary republics, various degrees of "writtenness", with and without canonical statements of fundamental rights, varying uses and degrees of law from clear examples of positive law, through to judicial precedents, customs, habits and conventions'. It stands to reason from these explanations that 'any attempt at conceptual formulation must *abstract*, potentially considerably, from the various discrete instances of constitutionalism practiced in particular states in order to fashion a credible and workable definition of the concept'. Cormac, MacAmhlaigh, 'Harmonizing Global Constitutionalism' (2016) 5 *Global Constitutionalism* 173, 187–188.

91 For an illuminating study exploring two different ways in which normative principles of constitutionalism are realized, see, Alond Harel and Adam Shinar, 'Two concepts of constitutional legitimacy' (2023) 12 *Global Constitutionalism* 80 (mak-

of realizing the moral principles of constitutionalism reflects a form of value pluralism. This permits political communities to create new reasons for themselves[92] by expressing their commitment to particular constitutional values. These political commitments are most clearly manifested in eternity clauses, which entrench certain values as unamendable—such as secularism in Turkey, Israel, and India or the human dignity clause in Germany. Taking a cue from Chang, we may label them 'transformative choices'[93], as they change the moral profile of a political community by introducing additional weight to certain considerations and generating new reasons in the future[94]. Simply put, the constitutional identity constraint reflects the political commitments of a community and represents the values its members are willing to promote. Let me now consider each constraint and clarify how they serve to limit constituent and amendment powers.

2.1. Constitutionalism Constraint

The literature on constitutionalism often assigns two primary functions to constitutions: they not only constitute a political authority (constitutive function) but also limit how that authority can be exercised and how it is allowed to interact with its citizens (limiting function)[95].

---

ing a distinction between representative and reason-based constitutional legitimacy).

92 In her work, Chang argues that rationality involves not only responding to abstract reasons passively but also creating reasons for yourself actively. Ruth Chang, 'Commitments, Reasons, and Will' in Russ Shafer-Landau (ed) *Oxford Studies in Metaethics, Volume 8* (OUP 2013) 107.

93 Ruth Chang, 'Transformative Choices' (2015) 92 *Res Philosophica* 237, 281.

94 She rightly draws a distinction between choice-based and event-based transformative choices, yet what interests us here is the choice-based transformative choices. Ibid, 238–243, and Chang (n 92) 76.

95 This corresponds to the views that two common traditions in Western liberal political philosophy adopts, namely, republicanism and liberalism. Republicans, primarily interested in the question of 'who', concentrates on 'the origins and aims' of political authority and associates constitutional legitimacy with the ideas such as constituent power, self-legislation, general will. In contrast, liberals whose chief concern lies in the question of 'what' are preoccupied with individual freedoms, po-

Constitutions are often said not only to 'constitute and enable it' but also to limit state power'[96].

The constitutive function is universal and cosmic because it is in the nature of any constitution that it institutes 'the (major) plan' or 'framework' within which a political authority is allowed to operate when it provides its subjects with various services and solve their diverse problems[97]. A document cannot be labelled a constitution unless it constitutes a political authority and outlines its basic framework. In other words, all political authorities, regardless of their form of government (authoritarian or democratic), are constructed by a founding document.

Instead, the limiting function places emphasis on the distinction between a state with a constitution and a constitutional state. As aptly noted by Sartori, every political authority has a constitution, but only some of them are constitutional.[98] Constitutions also serve as bulwarks, placing limits on how a political authority exercises power over individuals. To this end, they often include a catalogue of rights, which can be understood as a commitment by political authorities to protect and respect these rights[99]. This idea of limiting political authority through constitutional rights became a hallmark of 19th-century constitutionalism, best exemplified by Article 16 of the French Declaration of the Rights of Man and of the Citizen: 'Any society in which the guarantee

litical autonomy, and constitutional rights as a way to limit the exercise of political authority. MacAmhlaigh (n 90) 191–192.

96 Alex Stone Sweet, 'Constitutions and Judicial Power' in Daniele Caramani (ed) *Comparative Politics* (OUP 2008), 218, 219, 230–233. Waldron similarly notes: 'Constitutions are not just about restraining and limiting power; they are about the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their legitimate aspirations'. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 43.

97 Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review* 853, 856.

98 Ibid 856.

99 Ibid.

of rights is not assured, nor the separation of powers determined, has no Constitution'[100].

Constitutions that bring these two functions (constitutive and limiting) together are labelled by Sartori as *garantiste (proper/material) constitutions*, as they ensure that citizens' constitutional rights serve as limits on political authority[101]. Accordingly, a constitution is often said to be a document designed to 'shield certain principles of government and moral/political rights from the ordinary democratic decision-making processes'[102]. To fulfil its limiting function, a constitution is often designed as a written document, expressing a common ideology that a political community is committed to realizing, which is superior to ordinary laws and somewhat resilient to the ordinary democratic mechanism of change and whose norms are often supervised by a judicial institution[103]. Sartori contrasts *material/garantiste* constitutions with two other types of constitutions that fail to uphold the ideals of constitutionalism and realize some distinctive features: *nominal* and *façade constitutions*[104].

For Sartori, *nominal constitutions* are not constitutions in the material sense because they fail to guarantee certain constitutional rights to citizens. In his view, nominal constitutions reflect and formalize 'political power for the exclusive benefit of actual power holders'[105]

100 France: Declaration of the Right of Man and the Citizen Article 16 (26 August 1789), available at: https://www.refworld.org/docid/3ae6b52410.html [accessed 28 June 2020].

101 Sartori (n 97) 861. He notes clearly that constitution provides 'a frame of political society, *organized through and by the law,* for the purpose of restraining arbitrary power'. Ibid, 860.

102 Andrei Marmor, 'Are Constitutions Legitimate?' (2007) 20 *Canadian Journal of Law & Jurisprudence* 69, 74.

103 For Raz, there are seven distinctive features of a constitution; it is constitutive, stable, written, superior, justiciable, entrenched, and expressive of a common ideology. Raz (n 1) 325–6.

104 Sartori (n 97) 861. Raz makes a similar classification between constitution in its thin and thick senses and notes: 'In the thin sense it is tautological that every legal system includes a constitution'. Raz (n 1) 326.

105 Sartori (n 97) 861. Here, he also cites Loewenstein who labels this sort of constitutions as 'semantic constitutions'. Karl Loewenstein, *Political Power and the Governmental Process* (The University of Chicago Press 1957) 149.

without imposing constitutional limits on how authority is exercised over individuals. Thus, they can also be depicted as 'organizational constitutions', 'a system of limitless, unchecked power' because their norms fail to realize 'the telos of constitutionalism'[106].

Drawing on Lukes' definition of political power—where 'A exercises power over B when A affects B in a manner contrary to B's interests'[107] —we can argue that political authority without constitutional limitations is tantamount to mere political power. However, a central idea prevalent in the liberal political tradition is that 'authority is meant to serve its subjects, rather than the other way around'[108]. This is best expressed in Joseph Raz's service conception of authority, where legitimate political authority serves its citizens and creates the conditions for individuals to live autonomous lives[109]. Simply put, the service conception allows us to see that no genuine conflict of interest exists between a (legitimate) political authority and its citizens, as happens in the case of unchecked political power[110]. This is because political authority is presumed to act in the best interests of its citizens because it owes its existence and legitimacy to the 'well-being of its members'[111].

Façade constitutions are characterized by frequent constitutional violations, where the material limitations imposed on political authorities are often disregarded. While such constitutions outwardly profess adherence to the core principles of constitutionalism, a closer examination reveals that these normative ideals are not upheld in practice. Simply put, political authorities fail to honour their commitments to govern according to the telos of constitutionalism under the façade constitutions[112]. Since all rules, including constitutions as a set of rules, tend to deviate to some extent from their intended purposes or under-

106 Ibid.
107 Steven Lukes, *Power A Radical View* (Palgrave Macmillan 2005, 2nd ed) 42.
108 Daniel Viehoff, 'Debate: Procedure and Outcome in the Justification of Authority' (2011) 19 *Journal of Political Philosophy* 248, 251.
109 Joseph Raz, *The Morality of Freedom* (OUP 1986) 55–56.
110 Ibid 5. He admits that 'there is a room for a doctrine of reasons of state in political action'. Ibid 72.
111 Nick W. Barber, *The Principles of Constitutionalism* (OUP 2018) 6.
112 Sartori (n 97) 862.

lying justifications during application[113], it is reasonable to question whether a clear distinction can be made between *garantiste* and *façade constitutions*. This challenge arises particularly because façade constitutions, despite outwardly incorporating fundamental constitutional guarantees, fail primarily during implementation. Unsurprisingly, Sartori suggested examining how much a constitution discharges its limiting function and evaluating whether nonapplication affects the 'machinery of government in its *garantiste* aspect and the basic purposes of constitutionalism'[114]. This is because if a constitutional system fails in its basic function of limiting political authority, then it is not a constitutional state but merely a state with a constitution.

Constitutions have acquired particular historical significance beyond merely constituting political authority. From a cursory observation of 18th- and 19th-century constitutions, it can be reasonably inferred that 'what the people were asking for when they claimed a constitution' was the protection of individual freedoms from arbitrary government intervention[115]. There is no unique or singular form of *garantiste* constitution, and various ways exist to realize the normative ideal of constitutionalism. Marmor sees 'the debate about constitutionalism' as a discussion 'on institutions and procedures', primarily concerned with addressing '*who* gets to determine what those (constitutional) rights and principles are, and according to what kind of procedure'[116].

113 Schauer defines rules as 'entrenched generalizations' prescribing (although not necessarily conclusively) the decision to be made even in cases in which the resultant decision is not one that would have been reached by direct application of rule's justification'. In contrast, in an (extra) ordinary world without rules '(t)he existing generalizations operates merely as the defeasible marker of a deep reality'. They are 'transparent rather than opaque', which allow the decision-maker to 'look through that transparent generalization to something deeper' Frederick Schauer, *Playing By Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (OUP, 1991) 51. For Raz, rules 'are reasons even though they do not show the value of the actions for which they are reasons'. For this reason, they are characterized by three important features: i) opacity, ii) content-independence, and iii) normative gap. Raz (n 1) 211.

114 Sartori (n 97) 862.

115 Ibid 854.

116 Marmor (n 102) 78.

There are different ways of allocating authority within a constitutional regime between the current and future generations, as well as between different institutions, by creating a constitutionally protected domain isolated from the ordinary process of democratic decision-making. In addition, some political communities consider the constitutional protection of citizens' moral rights indispensable for the legitimacy of their constitutional system[117], whereas others hold the view that the content of constitutional rights is to be determined by the collective will of the majority[118].

These political choices are often conditioned by the previous experiences that a political community had gone through. For instance, the constitutions of the US and France are often viewed as symbols of a radical break with the past or a new beginning and a creative moment, as they mark the moment when the old political order is replaced with a new one. In contrast, the UK's constitution emphasized gradual transformation and the continuity of political authority[119]. According to Möller's classification, we can categorize the U.S. and France under 'order-founding' constitutions, whereas the UK falls under 'power-shaping (limiting)' constitutional traditions[120]. Regardless, one thing common to both constitutional traditions is that constitutions indicate 'a process of juridification, not a process of politicization', marking progress towards limiting political power through law. Constitutionalism in its

117 See, e.g., Richard Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review* 1693.

118 See, e.g., Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal,* 1346.

119 Christoph Möllers, 'Pouvoir Constituant–Constitution–Constitutionalization' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Bloomsbury Publishing 2009) 171–177.

120 Ibid 174–175. It is crucial to highlight that in the order-founding tradition, the demos and constituent power are paramount, as they offer the legitimate foundation for the newly established system. Conversely, in the power-shaping tradition, where the focus is on limiting and structuring existing power, the rule of law takes precedence over democracy.

modern form is based on the idea of "*limited collective self-governance through law*"[121].

There are two things to infer from the foregoing discussions. First, constitutionalism is an *abstract* concept open to different ways of achieving its underlying principles, often through the political choices and commitments that a particular political community makes[122]. Second, it is a *normative* concept that distinguishes between legitimate political authority and political power. Historically, this has been most clearly observed in the limiting function of constitutions. This is why constitutionalism is often contrasted with unlimited political power and equated with the notion of limited government, although sometimes this mistakenly disregards the constitutive function of constitutions[123]. A constitutional state, therefore, is committed to the normative ideal of constitutionalism, assigning a purpose (telos) to constitutions as documents designed to limit political authority and ensure respect for

121 Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance' (2011) U. of Michigan Public Law Working Paper No. 229, 5. Available at SSRN: https://ssrn.com/abstract=1758907 or http://dx.doi.org/10.2139/ssrn.1758907.

122 Rosenfeld aptly notes: 'Different constitutional identities may well account for the multi plicity of paths capable of satisfying the fundamental requirements of modem constitutionalism.' Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity' in Michel Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 12. Tripkovic similarly depicts constitutional identity as a two-dimensional concept, suggesting that while its general dimension 'relies on the notion that constitutions entail common evaluative commitments that are applicable in any constitutional system of government', its particular dimension 'relies on specific values discernible from moral judgments that have been made in local constitutional practices'. Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (OUP 2017) 14. One of the best examples supporting the argument that constitutionalism is an abstract normative ideal tolerant to cultural differences is that the idea of limited government is realized in France and American constitutional systems in quite distinct manner. While Americans achieved this principle through a horizontal and vertical division of powers, the French believe that it is 'best achieved through democratic government'. Ibid 11.

123 For a critical approach to this concentration on the limiting-function, Jeremy Waldron, 'Constitutionalism: A Skeptical View', in *Political Political Theory:Essays on Institutions* (Harvard University Press 2016) 23.

constitutional rights, which are often enshrined in a bill of rights[124]. The realization of constitutionalism's ideals calls for profound changes in the institutional structure of political authorities. This process of constitutionalization reached its full potential in the 20th century with the creation of constitutional courts responsible for protecting constitutional rights, barring its extension to international law[125]. Today, the most prevalent model of a constitutional state involves the establishment of a special court entrusted with overseeing whether legal institutions and officials respect constitutional rights when interacting with citizens. This model is known as 'the system of constitutional justice' or 'new constitutionalism'[126].

Given the foregoing, constitutionalism clearly places limits on political authorities, but the question remains whether it also serves as a bulwark against the use of constituent power. As I have suggested, constituent power can be viewed as a wholesale legitimating mechanism for political authority, provided that it is exercised in accordance with the principles of democratic legitimacy. Jackson similarly argues that 'the consent of the people is a necessary but not a sufficient condition for treating a constitution as legitimate'[127], for its legitimacy is also contingent on its being a product of a legitimate constitution-making

124 As noted by Waluchow and Kyritsis, constitutionalism denotes the view that 'government can/should be limited in its powers and that its authority depends on its observing these limitations'. He further maintains that constitutional limitations may 'come in a variety of forms' that can determine 'the *scope* of authority', sets procedural '*mechanisms*' conditioning the exercise of authority normative power, and puts substantive limits in the form of civil (or constitutional rights). Waluchow and Kyritsis (n 25).

125 Doreen Lustig and Joseph Weiler, 'Judicial Review in the Contemporary World: Retrospective and Prospective' (2018) 16 *International Journal of Constitutional Law* 315.

126 Stone Sweet (n 96) 218.

127 'If we could focus on authority more than power and perhaps substitute the phrase "legitimate constitution-making authority" – a phrase that could embrace more than a narrowly procedural conception of legitimacy, and more than a purely sociological conception – we would perhaps open the door to the dereification of "popular will" as the sole basis for legitimate constitution-making authority.' Vicki C. Jackson, '"Constituent Power" or Degrees of Legitimacy?' (2018) 12 *Vienna Journal of International Constitutional Law* 319, 324.

process. Additionally, a political authority is expected to 'instantiate the project of constitutional democracy'[128] in that the initial consent of individuals given under the conditions of democratic principles is to be 'maintained over time'[129]. Thus, a constitution is not merely a founding document; it is also a guiding document that instructs political authorities on how to improve 'the justness and goodness with which its society works'[130]. As such, 'the constitution gains legitimacy not only from consent but also from standing for good and just principles, however imperfectly realized'[131].

This temporal dimension of constitutional legitimacy is captured in Rubenferd's definition of 'constitutionalism as democracy', where 'self-government consists in a people's struggle to lay down and hold itself, over time, to its own political and legal commitments, apart from or even contrary to the popular will at any given moment'[132]. He rightly argues that it is misleading to focus solely on the present while neglecting both the past and the future when developing a theory of constitutional democracy. First, it generates a false dichotomy between individual freedom and long-term commitments in the personal domain; on the one hand, democracy is the voice of collective will, and the normative ideal of constitutionalism is a limited government[133]. In addition, it neglects how time bears on freedom and affects our choices and commitments. Moving away from this modernist desire to live in the present[134], Rubenferd suggests seeing democracy from a temporal perspective and argues that it is not about:

---

128 Cristopher F. Zürn, 'The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy' (2010) 16 *Legal Theory* 191, 216.

129 Jackson (n 127) 334.

130 Ibid.

131 Ibid 337.

132 Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2008) 183.

133 Ibid, 5.

134 'The desire to live in the present has a history. As we will see, it originates in an imperative of political liberty at the dawn of the modern age and proliferates thereafter—but only after having transmuted itself, obeying a logic we will explore, into an imperative of individual liberty—throughout modern culture. We are used to thinking of modernity as defined in part by future- oriented

> *'governance by the present will of the governed, or in governance by the a-temporal truths posited by one or another moral philosopher, but rather in a people's living out its own self-given political and legal commitments over time—apart from or even contrary to popular will at any given moment'*[135].

Seeing democracy as a collective form of self-government over time allows us to easily overcome the misleading argument that constitutionalism is conceptually at odds with democracy. Instead, constitutions are repositories of political commitments made in the past that help people 'memorialize and hold itself to its own fundamental political and legal commitments over time'[136].

Additionally, this temporal perspective enables us to see how constituent power, democratic legitimacy, and the protection of human rights are inherently connected, as widely recognized among constitutional theorists[137]. For example, Rosenfeld defines constitutionalism as an ideal for a legitimate constitutional order that imposes limitations on the exercise of political authority, including 'adherence to the rule of law and protection of fundamental rights'[138]. Kumm similarly argues that 'the idea of free and equal persons governing themselves through law' entails a commitment to "*the Trinitarian constitutionalist formula* of *human rights, democracy, and the rule of law*"[139]. He further maintains that constituent power 'can only claim legitimate authority over

---

ideals of progress, increasing technological control, and so on. However, modernity achieved its break with the past only by according the present the most profound normative and ontological privileges, and this privileging of the present eventually gave to modern man—who becomes modern man through just this progression—as little reason to think of his society's future as he has to think of its past'. Ibid 5.

135 Ibid 11.

136 Ibid.

137 Dieter Grimm, 'The achievement of constitutionalism and its prospects in a changed world' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (OUP 2010) 10.

138 Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 3.

139 Mattias Kumm, 'Constituent power, cosmopolitan constitutionalism, and postpositivist law' (2016) 14 *International Journal of Constitutional Law* 697, 710.

a domain in which there are no justice-sensitive externalities"[140]. By the same token, Colón-Ríos holds that the constituted authorities are under a negative obligation to avoid depriving future generations of the possibility of becoming the 'authors of a new constitution' and a positive obligation to preserve the conditions necessary for the use of popular sovereignty within time[141]. He further contends that certain political rights (e.g., the right to vote and freedom of expression and association) are crucial for the legitimacy of a political authority in that it is difficult to see citizens as 'authors and addressees of the law' unless they are 'fully realized'[142]. For example, he views any attempt to undermine the very conditions that make the right to self-determination practically impossible in the future as an illegitimate exercise of constituent power[143].

In summary, the constituent power, contrary to what is assumed by many constitutional scholars, is not unlimited or unbounded[144]. First and foremost, it is subject to the limitations imposed by the normative concept of constitutionalism, dealing with questions such as what legitimate authority entails and how a constitutional authority acquires legitimacy. As such, constitutionalism imposes some normative limitations on the legitimate use of constituent and constituted powers, even though a genuine disagreement is visible among constitutional

140 Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 Indiana Journal of Legal Studies' 605, 613.

141 Joel Colón-Ríos, 'Constituent power, the Rights of Nature, and Universal Jurisdiction' (2014) 60 McGill Law Journal/Revue de droit de McGill 127, 144.

142 Ibid 140.

143 Ibid 145. We are currently observing cases where parties have successfully argued for the protection of the environment, including considerations for future generations. A key example is the District Court of The Hague's ruling, which held the Dutch government liable for failing to implement adequate measures to reduce greenhouse gas emissions to the necessary levels. For an in-depth analysis of this landmark case, Marc A. Loth, Climate Change Liability After All: A Dutch Landmark Case (2016) 21 *Tilburg Law Review* 1, 5. An English translation of the case is also available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196.

144 Kumm sees constituent power not as something 'foundational and uncircumscribed', but as 'grounded in, constrained by, and guided by' his Trinitarian concept of constitutionalism. Kumm (n 139) 697.

scholars with respect to what the term legitimate constitutional authority stands for[145]. Nevertheless, they seem to converge on the view that constitutionalism requires that political authority be controlled 'even when it accurately reflects the popular will'[146].

2.2. Human Rights Constraint

Over the past 75 years, there have been substantial transformations in international law, with notable acceleration in the last three decades[147]. It is frequently argued that international law has come of age with developments over the last three decades, as international norms have

145 Mac Amhlaigh suggests viewing constitutionalism as an interpretive concept, which allows 'a disagreement about substantive values regarding what legitimate authority requires'. Cormac Mac Amhlaigh, *New Constitutional Horizons: Towards a Pluralist Constitutional Theory* (OUP 2022) 16. For the distinction between interpretive/doctrinal and criterial concepts, see Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 157–188. Dworkin sees all interpretive concepts as moral all the way down, Ibid, 166–170.

146 Murphy (n 6) 187.

147 Kumm holds that three important developments have transformed international law from an interstate cooperative scheme into a global governance scheme: i) that international law has expanded its *scope* by regulating areas consumer protection, intellectual property, public health, climate change and biodiversity, ii) that it has *eroded the tight connection between state consent and international obligations* through its new procedures of law-making (e.g. delegating law making power to international organizations or the emergence of a 'modern CIL' that softens 'the requirement of general and consistent state practice'), and iii) that it is vested with various *international courts* capable of specifying the international obligations leave states *"less flexibility in the interpretation and enforcement of international law'.* Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, 913–915. For similar explanations see, Joseph Raz, 'Why the State?' in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (CUP 2017) 152–154; and Miodrag A. Jovanović, *The Nature of International Law* (CUP 2019) 208–227. For a discussion on the extent to which this evolutionary paradigm can be used as a methodological tool in explaining the transformation of international law see, Miodrag Jovanovic, 'Grasping International Law: An Evolutionary Paradigm?' in Wojciech Załuski et al (eds) *Research Handbook on Legal Evolution* (Edward Elgar Publishing, 2024) 170.

begun to 'bind subjects who have not agreed to them'[148], sometimes regardless of whether states express their reservations and have publicly opposed them. The transformation of international law has gradually eroded the principle of absolute state sovereignty[149], weakened the tight connection between state consent and international obligations, and introduced an additional layer of legality concerning 'the overall interest in having an orderly or just international community'[150].

This transformation is aptly depicted by Cohen as the emergence of a 'new sovereignty regime' in which 'the legal prerogatives of sovereign states'[151] are reformulated in such a way that the moral right of a state to exercise authority over its citizens is made conditional on its use in accordance with human rights[152]. Recognizing that sovereign states are responsible for protecting human rights against their citizens and that the international community[153] is considered to mark a significant shift in the conception of sovereignty[154], away 'from one of impunity to one of

148 Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 174–175. It is said to leave behind the suspicion about its ontological existence, that is, whether it counts as law according to our concept of law developed mostly by reference to domestic legal orders. Thomas M. Franck, *Fairness in International Law and Institutions* (OUP 1998) 6.

149 The principle of absolute sovereignty suggests that 'a sovereign state is the final arbiter in all domestic matters, with limitations to such absolute sovereignty permissible only where the state has consented to them'. John, Tasioulas and Verdirame, Guglielmo, 'Philosophy of International Law' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition), URL = <https://plato.stanford.edu/archives/sum2022/entries/international-law/>.

150 Joseph Weiler, 'The Geology of International Law: Governance, Democracy, and Legitimacy' (2004) 64 *ZaöRV* 547, 556.

151 Cohen (n 87) 5.

152 Raz also acknowledges that it 'has always been the case that in some ways international law limited the independence of states'. Raz (n 147) 151.

153 Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513, 524–527.

154 Sovereignty is often held to encompass both internal and external components. For explanations, see Ibid 514–518. Cohen (n 87) 196–215. That is depicted by Peters as the humanization of state sovereignty because 'it has a legal value only to the extent that it respects human rights, interests, and needs.' Peters (n 153) 514.

responsibility and accountability'[155], 'from states' rights to states' obligations'[156], or from 'opaque' to 'transparent' sovereignty[157]. Similarly, Raz argues that the most distinctive feature of today's international human rights practices is 'the erosion of the previously accepted ideas about the scope of sovereignty'[158]. The link between human rights and state sovereignty leads us to admit that 'the normative principles that govern human rights practice... go hand in hand with... the normative grounds of state sovereignty, and its scope'.[159] Human rights, once held to be 'orphans' and 'unenforceable' moral rights having limited influence at the international level, have begun to serve to limit state sovereignty[160].

Against this backdrop, it can be concluded that the constraints of human rights and constitutionalism derive their normative significance from a similar value; both are concerned primarily with limiting the authority that states exercise over citizens in favour of individuals. Not surprisingly, international human rights are often viewed as functional equivalents of domestic constitutional rights, as both 'perform the same basic function of stating limits on what governments may do to people within their jurisdictions'[161]. This transformation has further implications for the concept of sovereignty. Unlike the redundant argument about the incompatibility of state sovereignty with international law[162], the new sovereignty regime envisions that states cannot lose their sovereignty when they are required to exercise their authority in

155 Cohen (n 87) 12.

156 Anne Peters, The Merits of Global Constitutionalism' (2009) 16 *Ind. J. Global Legal Studies* 397, 398.

157 Dennis Patterson, 'Cosmopolitanism and Global Legal Regimes' (2015) 67 *Rutgers UL Rev.* 7, 10.

158 Joseph Raz, 'On Waldron's Critique of Raz on Human Rights' in Adam Etinson (ed) *Human Rights: Moral or Political?* (OUP 2018) 144.

159 Ibid 143.

160 Ibid.

161 Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749, 750. Gardbaum rightly depicts the sovereignty limiting-function of human rights as constitutional function. Ibid 752.

162 John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 113.

accordance with international norms and obligations[163]. A sovereign state may create international authorities to solve various global problems and bind itself to their norms but remain sovereign, insofar as there exists 'an autonomous relationship between the government and the citizenry, and so long as its legal order is supreme domestically'[164]. Sovereignty is better imagined as a *negative concept,* requiring that a political authority (state) be able to determine its 'polity-identifying rules' by exercising its right to self-determination[165]. This is negative because international law requires that states exercise their sovereign rights consistent with the 'agreed-upon subset of inviolable human rights'[166], although their content is still a matter of dispute.

One may easily infer from the foregoing that the legitimate exercise of constituent power is subject to the limitations set by international law. Each political community is expected to respect some invaluable human rights when it exercises its right to self-determination and determines its polity-identifying rules. Challenging the voluntarist conceptions of constituent power, Kumm similarly holds that the legitimate exercise of constituent power is dependent on its use in accordance with the rules set by international law[167]. Arguing that '(n)ational and international law are mutually coconstitutive'[168], he casts doubt on the 'self-standing nature of domestic constitutional authority' created by a constituent power and claiming supreme authority over its citizens. Similarly, Raz takes sovereignty to be a legal claim recognized by international law that sets some limitations on sovereign autonomy and roughly determines the conditions under which it may be suspended

163 Raz (n 147) 158.
164 Cohen (n 87) 12.
165 Ibid 68. Joseph Raz, 'The Future of State Sovereignty' in Wojciech Sadurski (ed) *Legitimacy: The State and Beyond* (OUP 2019) 75.
166 Cohen (n 83) 15. Raz (n 143) 159–160.
167 Kumm suggests replacing the modern 'we the people' understanding of constituent power with a cosmopolitan one. Kumm, M. (140) 608.
168 Ibid 612.

on moral grounds[169]. In summary, what the constituent power entails and what its limitations are partially determined by international legal norms[170].

The new sovereignty regime makes it necessary for any political authority that respects certain fundamental human rights if it is willing to be a member of the international community. This link between 'respect for sovereignty' and 'respect for human rights'[171] has led many to reflect on the role that human rights play in today's international law and develop a new political conception of human rights[172]. Those who defend the political conception of human rights believe that human rights 'set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena'[173]. As such, human rights are said to serve as suspension tools used to rebut 'the sovereignty argument against political sanctions and military interference by outsiders in the

169 Raz (n 147) 158. Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 328–331.

170 Thornhill depicts it as an 'intrinsically juridified' concept because 'few laws can be seen clearly to originate in primary constituent acts, situated strictly outside the law'. Thornhill (n 62) 374.

171 Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, 586.

172 It does not strike me as surprising that the growing interest in the political conception of human rights goes hand in hand with the emergence of the doctrine of responsibility to protect (R2P), which suggests that each state is responsible for protecting individuals from war crimes, genocides, ethnic cleansing, and crimes against humanity. That is clearly visible in the doctrinal explanations as regards the shift in the conception of authority towards responsibility. See, Peters (n 153) 522–524.

173 Raz (n 169). Buchanan considers the respect for basic human rights norms to be a necessary condition for the legitimacy of 'any institution of governance democratic or otherwise, at the global or the domestic level'. Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 94–95. For a criticism of this interventionist reading of international human rights for its misleading description of sovereignty as something more humanistic and 'superstructural ethical notion than is plausible', see Tasioulas (n 162) 114.

affairs of a state'[174]. Even though the conditions[175] under which these political sanctions and military interference are to be triggered, and their scope and density are still controversial, as well as the content of basic human rights[176], it is clear that the right to use sovereign rights is limited and conditional on respecting some international legal norms.

Despite some uncertainty at the margins, we can still provide a preliminary list of a set of international human rights that impose normative limits on the exercise of constituent power. First, it is clear to me that each political community has a right to self-determination, barring the discussions on what constitutes a political community: it has a right to determine its 'polity-identifying rules' (e.g., rules of recognition, change, and adjudication) without any external suppressive interference[177]. Waldron calls this the territorial conception of self-determination, according to which 'the people of a country have the right to work out their own constitutional and political arrangements without interference from the outside'[178]. Here, it is crucial to underscore that the right to self-determination is intrinsically tied to the notion of equality[179] because each political community is an equal participant in the international community of states. One cannot deny recognizing 'the moral value of sovereignty of other citizens' while

174 Cohen (n 87) 12.

175 Cohen counts four cases (extermination, expulsion, ethnic cleansing, and enslavement) as the examples of serious human rights that suspend the principle of state sovereignty. Ibid 15.

176 Raz notes: 'Unlike Rawls who took rights to be human rights only if their serious violation could justify armed intervention, I take them to be rights whose violation can justify any international action against violators' Raz (n 163) 9 at footnote 14.

177 Cohen (n 87) 68. Raz (n 165) 75.

178 Jeremy Waldron, 'Two Conceptions of Self-Determination' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 397. For the ethical conception of self-determination with which Waldron takes issue, see Will Kymlicka, 'Minority Rights in Political Philosophy and International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 337. For an analytical explanation for the right to self-determination as a collective right, see Miodrag A. Jovanović, *Collective Rights: A Legal Theory* (CUP 2012).

179 Cohen (n 87) 200.

claiming at the same for oneself that its political community is entitled to being governed according to its own choices and preferences[180]. Seen in this light, the right to self-determination and democracy appear to originate from the same value, the value of living a life according to one's own preferences. However, the right to self-determination holds priority over democracy because it also encompasses the right to decide whether a political community is willing to be governed by the principles of democracy[181].

It does not strike me as surprising that the right to self-determination is also referred to as a jus cogens norm, owing to its nonderogable nature, during the travaux préparatoires of the Vienna Convention on the Law of Treaties[182]. As stated by Halberstam, *jus cogens norms* derive their legitimacy not from the simple consent of the member states but from the idea that their violation 'shocks the conscience of mankind and results in great losses to humanity'[183]. All in all, the right to self-determination as a jus cogens norm echoes the view that some rights put limits to 'state voluntarism and run counter to the consensual character of international law'[184]. This is the reason why the right to self-determination is often depicted as a natural right. As aptly put by Sieyes, 'constituent power was preceded by and subordinated to natural rights of man'[185] and is therefore limited by some natural rights such as the right to self-governance. It is worth underscoring here that

180 Barber (n 111) 40.

181 Waldron (n 178) 408. As noted by Loughlin, constitution 'as an expression of constituent power' derives its legitimate 'authority from a principle of self- determination'. Loughlin (n 59) 219.

182 Miodrag A. Jovanović and Ivana Krstić, 'Human Rights and the Constitutionalization of International Law' in Tibor Várady and Miodrag A. Jovanović (eds) *Human Rights in the 21st Century* (Eleven International Publishing 2020) 17.

183 Halberstam (n 121) 20 (citing from Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide (1951), ICJ, 28 May 1951).

184 Jovanović and Krstić (n 182) 20.

185 For Sieyes, it is necessary for the legitimacy of a political authority that it observes common security, common liberty and provides various services to society. public establishment. Michael Sonenscher, (ed.) *Sieyès: Political Writings: Including the Debate Between Sieyes and Tom Paine in 1791* (Hackett Publishing Company 2003) 153.

constituent power is also linked to the natural law tradition that plays a significant role in both French and American revolutions, as it is often 'considered as some kind of a natural right'[186]. These revolutions give prominent place to the democratic ideal of self-governance. The revolutionists appeal to the argument that there are some inalienable natural rights preceding the constituent power and thereby must be respected and could not be infringed upon by the constituent power. They say no to the *ancient regime* before saying yes to the act of constitution-making.

As underscored by Colón-Ríos, 'the attribution of rights to nature can be understood as a means of indirectly protecting the possibility of the enjoyment of human rights'[187]. These rights and freedoms are important because they are somehow necessary for future generations to exercise their right to self-determination. Thus, they derive their normative significance from the natural right of future generations to establish a new constitutional order. For this reason, Roznai asserts that no constituent power is justified in abolishing some rights and freedoms (e.g., 'freedom of expression and assembly') that play a crucial role in a 'constituent power to reappear in the future'[188]. This is why even Sieyes, one of the early proponents of extra-legal and unlimited conceptions of constituent power, contends that the nation (or political community) is bound with natural law even though it is 'prior to everything'[189] and therefore seen as the main source from which all power springs. This idea finds its best legal expression in Article 2 of UNESCO's Declaration on the Responsibilities of the Present Generations towards Future Generations, adopted on 12 November 1997:

> *'It is important to make every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as*

186 Yaniv Roznai, 'We the Limited People' NYU Global Fellows Forum (2015, March) (Vol. 10) 7. For detailed explanations, see Fasel (n 74).

187 Colón-Ríos (n 141) 147.

188 Roznai (n 186) 16.

189 Sieyès notes: 'Prior to and above the nation, there is only natural law.' Sonenscher (n 185) 136.

> *present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity'*[190].

There are also derivative rights that stem from the right to self-determination. For example, the prohibition of genocide, slavery, and apartheid are also regarded as jus cogens norms that impose international legal limitations on domestic constituent power[191]. Taking a cue from Cohen, let me call these derivative rights international 'human security rights' (IHSRs) because they prohibit what she calls the four E's (mass extermination, expulsion, ethnic cleansing, enslavement)[192]. The IHSRs comprise a set of minimum rights that protect the basic conditions of membership at the domestic level, whose violation suspends the argument from sovereignty and justifies humanitarian intervention[193]. The violation of IHSRs is simply held to fall outside the scope of the right to self-determination that states enjoy at the international level, as it determines the boundary between what is morally tolerable and what is morally impermissible[194]. In that sense, the IHSRs are 'synchronically universal, meaning that all people alive today have them'[195]. For this reason, the argument from value pluralism does not work against the

190 The declaration is available at: https://www.unesco.org/en/legal-affairs/declaration-responsibilities-present-generations-towards-future-generations.

191 Roznai (n 32) 84. Pursuant to the article 15 of the ECHR, nonderogated rights include the right to life except the cases resulting from lawful acts of war (Art. 2), prohibition of torture (Art. 3), prohibition of slavery (Art. 4/1), and the principle of *nullum poena sine lege* (Art. 7). For an illuminating discussion on whether all nonderogable rights fall under the category of *jus cogens* norms Jovanović and Krstić (n 182) 19–30.

192 Cohen (n 87) 163, 198, 199, 208.

193 Thomas M. Franck, 'Humanitarian Intervention' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 542–544.

194 Nate P. Adams, 'Legitimacy and Institutional Purpose' (2020) 23 *Critical Review of International Social and Political Philosophy* 292, 298. Raz sees sovereignty as 'counterpart of that of rightful international intervention'. Raz (n 165) 330.

195 Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds.) *Philosophical Foundations of Human Rights* (OUP 2009) 225.

IHSRs because 'no special knowledge of the circumstances of'[196] a particular political community is required to demand respect for these synchronically universal IHSRs. As such, what differentiates IHSRs from other moral human rights is that they are 'fundamental rights' of international legal order and are recognized as part of their rule of recognition through the practices of states, international organizations, and (domestic and international) courts[197].

One may find various examples of how some international human rights impose limitations on domestic political authorities and their right to enjoy the right to constitute a new constitutional order. For example, the Security Council, with its resolution of 554 in 1984, declared 'as null and void' the constitutional norm of the 1983 South African Constitution that prohibits the representation of the black people in the parliament[198]. Paying attention to the incompatibility of the relevant constitutional norm with the principles enshrined in the Charter of the United Nations, the resolution stated that 'the results of the referendum of 2 November 1983 are of no validity'[199]. Although the resolution is of a declaratory nature and has no direct effect on the validity of the South African constitution, it is indisputable that it serves to call into question the legitimacy of the South African constitution. It does not strike me as surprising that it could stand in force for only a decade. A similar example may also be found in the jurisprudence of the ECtHR. The Court in *Sejdic and Finci* held that the exclusion of Jewish or Roma people from running for presidency due to article 5 of the Bosnian Constitution, which stipulates that the presidency of Bosnia and Herzegovina consists of three members: one Bosnian, one Croat and one Serb, constitutes discrimination based on race and violates Article 14 of the ECHR[200]. Today, it is also possible to find similar con-

196 Ibid 227.
197 Palombella (n 83).
198 S. C. Res. 554, U.N. Doc S/RES/554 (17 August 1984) (https://www.refworld.org/docid/3b00f16430.html).
199 Ibid.
200 Sejdic and Finci v. Bosnia and Herzegovina, App. No. 27996/06, Eur. Ct. H.R., Judgment of Dec. 22, 2009. p. 42–50. This development of conventionality control

stitutional norms that limit the use of constituent power. For example, the 1999 Switzerland Constitution requires that the constituent power be exercised in a way that respects the 'mandatory provisions of the international law'[201].

The upshot is that international and supranational norms, mostly dressed up as human rights claims, have begun to exert significant influence on domestic political authorities and shape the way in which they exercise authority over their citizens. The condensation in these two spheres gains such traction that the classical understanding of the constitution as the separator of international law from constitutional law 'no longer seems to be as sharp as traditionally assumed'[202]. According to this classical formulation, while international law enjoys supremacy at the international level, it is up to domestic authorities to accept the supremacy of international law, as they are permitted to derogate from their international obligations. Even though the degree of authoritativeness of these international and supranational norms is still disputed, it is clear to me that they have significantly altered the way in which we think of legitimate constitutional authority. For example, it is true that the ECtHR's rulings, despite their binding nature, have no 'direct effect on continuation or validity of the national measure that was found to have breached the Convention'[203]. Even so, the Convention rights, as interpreted by the ECtHR, can penetrate domestic legal orders, allow individuals to invoke those rights before a domestic legal authority, and demand their effective implementation. Gardbaum calls it 'constitutionalism as federation' because 'the ECHR has achieved *de facto* supremacy over domestic law' owing to its capaci-

of constitutional norms is not limited to the ECHR regime and extends also other regional courts. For relevant explanations and cases, see Roznai (n 80) 1396–1397.

201 See article 193 of the constitution of Switzerland (1999).

202 Lech Garlicki and Zofia A. Garlicka, 'External review of constitutional amendments? International law as a norm of reference' (2011) 44 *Israel Law Review* 343, 357.

203 Ibid 363.

ty to 'operate() within the member states' legal systems as an invocable and supreme law'[204].

Regarding the amendment power, we can easily observe that these limitations gain more prominence and become more visible, as many constitutions give human rights treaties and norms special importance and entrench some human rights as unamendable. For example, the 1995 Bosnia and Herzegovina Constitution accepts the ECHR and its additional protocols as having direct effects on the domestic legal system and entrenches them as unamendable, a sign that the constitution considers these rights above ordinary laws and regulations[205]. Likewise, the constitution of Venezuela prohibits any constitutional referendum that abrogates the laws protecting, guaranteeing or developing human rights[206]. Drawing on these examples, we may simply argue that there is a growing trend of supra-constitutionalization of human rights norms either by granting them a special status in their constitutions or by accepting the supra-judicial enforcement of human rights violations by international courts. This trend seems to confer human rights norms such special status that they come closer to the normative status of unamendable principles of domestic constitutional systems[207]. Consequently, some constitutional amendments are said to be qualified as 'unlawful under international law', such as an amendment 'to restore capital punishment, to permit prolonged administrative detention or even torture of alleged terrorists, or to authorize summary deportations of foreigners'[208].

204 Gardbaum (n 161) 760.

205 See article II and X of the constitution of Bosnia and Herzegovina (1995).

206 See article 74 of the constitution of Venezuela (1999).

207 For instance, Kumm defines one of the features of contemporary constitutionalism as the view that the legitimacy of domestic constitutional law is partially dependent on their being accepted or justified as legitimate from the perspective of international law. This is the reason why he views the constituent power as shared between domestic and international community. Kumm (n 139) 703.

208 Garlicki and Garlicka, (n 202) 366.

2.3. Constitutional Identity Constraint

> *"On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State"*
>
> **Aristotle**[209]

The preceding two chapters highlighted the inherent limitations of constituent power, which arise either from the principles of constitutionalism or from fundamental human rights. This chapter seeks to identify the specific constraints on the power to amend the constitution, asserting that the concept of constitutional identity acts as a limiting factor on amendment power. In this regard, it suggests that constitutional identity is not only about the continuity of the constitutional text (*sameness*) but also about the constitutional character understood as the consistent expression of a particular mode of being (*selfhood*). Viewing constitutional identity as a combination of sameness and selfhood offers new insights into the nature of implicit unamendability and UCA, allowing us to explore how unamendable principles are linked to constitutional democracy.

The concept of constitutional identity has recently gained significant attention among EU lawyers, particularly following the Lisbon judgement issued by the German Federal Constitutional Court (the BVerfG)[210]. In this judgement, the Court held that 'the constituent power has not granted the representatives and bodies of the people a man-

209 Ernest Barker (ed and tr), *The politics of Aristotle* (OUP 1962) 98.

210 See, e.g., Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 *German Law Journal* 917, and Giuseppe Martinico and Oreste Pollicino, 'Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?' (2020) 39 *Yearbook of European Law* 228. For critical approaches to constitutional identity, see R. Daniel Kelemen and Laurent Pech, 'Why Autocrats love constitutional identity and pluralism: Lessons from Hungary and Poland' (September 2018) RECONNECT Working Paper No. 2, and Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (OUP 2023).

date to dispose of the identity of the constitution'[211], thus establishing its authority to review whether EU actions infringe upon the identity of the German constitution. The BVerfG's strategic invocation of constitutional identity was, in fact, an attempt to create an exception to the principle of EU law supremacy[212] and limit 'the transfer of sovereignty rights to the European level'[213]. It is possible to observe the first signs of the constitutional identity doctrine in the mid-1970s (Solange I – 1975), where the court maintained that certain sovereign powers cannot be transferred to international and supranational authorities[214]. However, the BVerfG has begun to use eternity clauses outlined in Article 79 of the German Constitution, particularly after its Solange II (1994) judgement. It was only after the Lisbon Treaty, which emphasized a 'shift in emphasis from national identity as such to *constitutional* identity'[215], that the BVerfG found an opportunity to develop the doctrine of constitutional identity. For this reason, I agree with Jovanovic that the Lisbon judgement is an attempt to delineate the boundaries 'beyond

211 BVerfGE 123, 267, at 344 (Lisbon).

212 Leonard F.M. Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht L. Rev*. 36, 48.

213 Monika Polzin, 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law' (2016) 14 *International Journal of Constitutional Law* 411, 426.

214 Ibid 427.

215 'If we compare the succinct formulation of Article 6(3) EU in the Maastricht version ('The Union shall respect the national identities of its Member States') with the very wordy formulation in the Lisbon version ('(...) shall respect their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (...)') it is quite clear that the political and constitutional aspect is much enhanced in the Lisbon version.' Besselink (n 208) 44. Faraguna similarly notes that 'the interpretation of the notion of ́national identity ´ has gradually shifted towards a legal approach, moving away from a historical or sociological one'. Pietro Faraguna, A Living Constitutional Identity: The Contribution of Non-Judicial Actors' (2015) Jean Monnet Working Paper Series 10/15, New York School of Law 7.

which Germany's identity as the state under the given constitutional order can be compromised within a supranational political entity'[216].

Notably, there is a difference between constitutional identity (Lisbon) and *ultra vires review* (Solange cases) in terms of how the BVerfG provides legal justification to its judgement[217]. According to Tuori, the legal justification of ultra vires review is primarily grounded in Article 23 (1) of the Basic Law (Grundgesetz, GG), as it authorizes the German Federation to transfer sovereign powers to the European Union through legislation. In contrast, there seem to be two different legal bases for constitutional identity review, as the Court also makes reference to Article 79(2), the 'eternity clause' (Ewigkeitsklausel) of the GG, in addition to Article 23(1)[218]. The role that Article 79(2) plays in the justification of these rulings is particularly important because it declares certain constitutional principles unamendable, including the human dignity clause enshrined in Article 1 and the constitutional principles outlined in Article 20. Reading *ultra vires* doctrine through the lens of eternity clauses allows the Court to establish a new doctrine, namely, constitutional identity. This is best expressed in the Public Sector Purchase Programme (PSPP) case, where the BVerfG developed a broader interpretation of the principle of democracy enshrined in Article 20[219] by noting that 'being capable of exercising its overall budgetary responsibility' is a necessary condition for democratic legitimacy[220]. The court further clarified that '(t)he democratic legitimation by the

216 Miodrag A. Jovanović, 'Sovereignty–Out, Constitutional Identity–In: The 'Core Areas' Controversy in the European Union' (April 28, 2015) 19–20. Available at: https://ssrn.com/abstract=2599925.

217 For the argument that what BVerfG and the ECJ understands from the notion of constitutional identity is different, particularly in terms of whether it allows for balancing with other interests and principles enshrined in the EU's founding documents. While the ECJ believes that it allows for balancing, the BVerfG views constitutional identity as a categorical rule that denies balancing. Kaarlo Tuori, 'From Pluralism to Perspectivism' in Gareth Davies and Matej Avbelj (eds) Research Handbook on Legal Pluralism and EU Law (Edward Elgar Publishing 2018) 46.

218 Ibid 45.

219 BVerfG, 2 BvR 859/15, 05 May 2020, para. 115 (PSPP judgment).

220 Ibid.

people … forms part of the Basic Law's constitutional identity protected in article 79(3) GG; it is therefore beyond the reach of European integration'[221].

Despite the scholarly discussions on the doctrine of constitutional identity, which focus mostly on whether it plays into the hands of illiberal and populist leaders[222], it is difficult to say that there is much philosophical interest in the concept of constitutional identity. As such, despite the rising scholarly interest in constitutional identity, the following questions are still yet to be addressed: What is the meaning of constitutional identity? and how does it differ from national identity? First, let me provide several explanations of what I understand from the constitution before delving into the details of the concept of constitutional identity. For me, a constitution amounts to a legal system, understood as a set of legal norms connected to each other and ordered hierarchically. A legal system avails itself of conceptual and normative analysis from two different perspectives: i) temporal and ii) sociopolitical.

Approaching a legal system from a temporal perspective allows us to observe its dynamic, fluid, and evolutionary nature by raising questions such as how a legal system comes into existence, how it differs from other normative orders, and how it preserves its autonomy while at the same time adjusting itself to its social, economic, and political environment[223]. For instance, Raz's distinction between momentary and nonmomentary legal systems presents a telling example of analysing a legal (or constitutional) system from a temporal perspective[224]. A momentary perspective enables us to detect the norms belonging to a legal system at a particular moment as if it were not subject to the limits of temporality and present a snapshot of a legal system as a system

221 Ibid.

222 Kelemen and Pech (n 210).

223 For two seminal philosophical studies on these questions, see Joseph Raz, *The Concept of a Legal System* (OUP 1999 2nd ed) and John Finnis, 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 408.

224 Raz (n 223) 34–35.

of interlocking norms. In contrast, when a legal system is approached from a nonmomentary perspective, it is possible to view it as a set of norms evolving over time. This nonmomentary perspective allows us to address questions such as whether amendment power entails the power to change any constitutional norm regardless of the role that it plays in a constitutional system.

Here, Raz's distinction between the formal and material unity of a legal system may offer some help. Formal unity coincides with the set of norms belonging to a legal system at a certain time and place. It is therefore concerned with presenting a complete but momentary picture of a legal system. Instead, material unity seeks to explain how a legal system maintains its existence over time and how these momentous legal systems remain part and parcel of a political system. This raises the question of what are the norms and principles that give a legal system its distinctive identity. Thus, material unity is not so much interested in momentarily valid norms as it is in "the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend it its distinctive character"[225]. The material unity problematizes what is taken for granted by the formal unity as to the meaning of politically crucial events, say constitutional revolution, *coup d'etat*, or a declaration of independence: They create a point of rupture in the legal domain by putting an end to one legal system as well as giving birth to another. In searching for the identity of legal systems, it is, therefore, a mistake to confine the analysis to formal unity with no regard to material unity because the question of when the identity of constitution is altered does not avail itself of a purely legal analysis and forces us to delve deeper into a sociopolitical context. Instead, the identity of a legal system is better focused on the constitutional norms that acquire a distinctive status (e.g., unamendable principles) in the system, as they are the norms that carry the 'spirit' and 'character' of a political system[226]. The importance of seeing a legal system as part of a political system is quite clear in Raz's following statement:

225 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 79.
226 Ibid. 79.

> *'Legal systems are not "autarkic" social organizations. They are an aspect or a dimension of some political system…Both its existence and identity are bound up with the existence and identity of the political system of which it is part'*[227].

Simply put, law aims at guiding human behaviour in a top-down manner but can do so only if it reflects the particularistic features of society it purports to govern[228]. As such, law is a mirror reflecting cultural differences as well as an artificial tool that crosscuts those particularities. For this reason, a legal system is better conceived of not as a 'self-sufficient free-floating normative entity' but as part of a sociopolitical system, that is, as 'a legal system of something, and part of the key to its identity lies in the character of that something, and in the relation of the legal system to it'[229]. There is no escape from that because 'determining the identity of a distinct legal system is bound up with the question of the identity and character of the political entity or unit of societal governance which that legal system is a legal system of'[230]. As such, the concept of a legal system is not something detached from the society in which it is embedded; in contrast, it is always in a dialectic and somewhat conflicting relationship with the concept of national identity[231]. One may easily deny the possibility of writing a constitution from scratch without paying much attention to the social norms and values respected and upheld by a particular political com-

227 Raz (n 223) 210–211. He also writes that 'the continuity of a legal system is tied to the continuity of the political system the former is affected by the fate of the nonlegal norms that happen to form part of the political system concerned'. Raz (n 1) 100.

228 'Legal systems whose decisions do not resonate with widely held conceptions of justice may not be able over the long run to perform their basic functions'. Vicki C. Jackson, 'Constitutional Law in an Age of Proportionality' (2014) 124 *The Yale Law Journal* 3094, 3147. Finnis similarly argues that 'the continuity and identity of a legal system is a function of the continuity and identity of the society in whose ordered existence in time the legal system participates'. Finnis (n 223) 428.

229 Julie Dickson, 'Towards a Theory of European Union Legal System' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (CUP 2012) 38.

230 Ibid 51.

231 Ibid 34.

munity. However, the relationship between constitutional and national identities is not only conflictual but also constructive. This is quite clear in Raz's following explanations:

> '*Legal systems can become the focus of attitudes of identification and attachment (as well as of alienation and disaffection), and the concept of a legal system is used to demarcate that which is the object of those attitudes and to differentiate it from other instances of legal phenomena in the world*'[232].

A sociopolitical approach to a legal system enables us to see how constitutional identity is connected to national identity. It underscores the importance of examining constitutions not only 'as a mere instrument for the circulation of political power or self-reference to the legal system' but also 'as an object of culture and tradition'[233]. Here, the distinction that Loughlin makes between constitution as a text and as a political way of being proves highly useful[234]. A constitution, when seen as a political way of being, reflects some static and unchanging norms less than their sociopolitical, cultural, and historical dimensions do. It draws on the tradition of historicism, whose main roots in law can be discovered in Savigny's and Maine's historical jurisprudences[235]. In contrast, when it is treated as a text, it represents the universalistic-rationalistic way of thinking whose origins return to Descartes' rationalism. While its rationalist dimension, underscoring the universal aspirations of constitutionalism, stresses the limiting function of constitutions, its social and historical dimension emphasizes that constitution

232 Ibid 32.

233 Jiří Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Routledge 2007) 22.

234 Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183, 185. For a similar distinction between constitution 'as (a static) establishment' and 'as a (dynamic) constitutive project for a political society', see Neil Walker, *Intimations of Global Law* (CUP 2015) 100.

235 Roger B. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press 1992) 37–51. One problem besetting historical jurisprudence is how to identify intentional legal development and change made by legal institutions.

is something made by a political community, a historical, cultural, and temporal being. It is clear that all constitutions rest on a 'symbiotic'[236] relationship between these static (rationalistic) and dynamic (historicist) perspectives and therefore should find a balance between these textual/static and sociopolitical/dynamic sides[237].

Seen from a historical perspective, it is arguable that constitutional identity is closely associated with the rise of modern nation states and constitutions as well as with the normative ideal of constitutionalism. Just as constituent power is imbued with the myth of creation ex nihilo, so too constitutional identity represents a moment of rupture marking the formation of a new identity. However, constitutional identity, as underscored by Rosenfeld, stands in an ambiguous relationship with national identity because the former 'is constructed in part against' the latter and 'in part consistent with it'[238]. In his view, there is a collective aspiration and commitment to form a singular and distinct 'We the People' among individuals who are committed to living together within a pluralistic society. In modern constitutional democracies, the collective self is characterized by a constant 'mode of questionability', where 'the collective must incessantly relate to its possibilities, determining time and again what interests are its own and who is a member of the political community'[239]. The authority of the people, as Kay suggested, is akin to 'a daily plebiscite'[240] that must remain open to renegotiation and reconstruction. In this view, democracy is not merely 'political action by the people' but also a 'form of political organization' governed

236 Walker (n 234) 101.

237 As noted by Walker, 'the sense of *a* constitution as a canonical document or set of documents containing a discrete body of positive law … has long existed alongside the sense of *the* constitution as referring to the deep and interlayered structure of established power within the polity'. Neil Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3 *Transnational Legal Theory* 61, 70.

238 Rosenfeld (n 138) 12.

239 Ibid.

240 Richard S. Kay, 'Constituent Authority' (2011) 59 *The American Journal of Comparative Law*, 715, 756–757.

by constitutional principles, basic human rights, and the established rules of the constitution[241].

Accordingly, the emergence of constitutional identity hinges on the dynamic coexistence of the constitutional subjects as both 'plural' and 'singular'[242]. Any attempt to rigidly define or narrow this questioning aspect of 'We the People' or constitutional identity fails to accurately represent its true nature. As Corrias points out, populist governments do frequently 'reduce constitutional identity to a specific form of sameness' '(w)ith their often extremely simplistic picture of what constitutes the identity of a people'[243]. By prioritizing self-governance over constitutionalism and the rule of law, they attempt to address the question of national identity in a unilateral and unequal manner, which not only contradicts preexisting commitments but also undermines the equal right of all individuals to self-governance. Thus, the *demos* who have the authority to make a new constitution from scratch are considered not ethical/realistic but something mythical/transcendent[244]. Under the realistic approach, the power of demos to make a constitution is limited to the current living generation, and the constituent power is tantamount to what these real people say[245]. Landau calls it "the immanent conception" of constituent power, contrasting it with the transcendent conception of constituent power, "vested not in the living people, but rather in the imaginary collective or corporate body of

241 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 23.

242 Ibid. p. 22–23.

243 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 *European Constitutional Law Review* 6, 22. Both Corrias and Rosenfeld argue that constitution includes sameness as well as selfhood, see Ibid, 22–24, and Rosenfeld (n 134) 27.

244 Roznai (n 49) 305–309.

245 The distinction between real and perpetual constituent people was first made by Marcel Gauchet, Ibid 306. See, Michel Troper, 'The Logic of Justification of Judicial Review' (2003) 1 *International Journal of Constitutional Law* 99, 119–20 (citing Marcel Gauchet, *Révolution des pouvoirs. La souveraineté, le peuple et la représentation 1789–1799,* at 45–47 (1995)).

society"[246]. In contrast, the transcendent/mythical approach takes the *demos* to be something extending from the past to the future. This temporal perspective allows us to see constituent power as a continuous 'project of self-government'[247] stretched over time covering different generations descending from a common origin.

Constitutional identity exists in a dynamic and concurrent tension not only with national identity but also with pre-constitutional and extraconstitutional identities. For Rosenfeld, it 'revolves around the antinomies between fact and norm, and between real and ideal' reflecting the tension between 'constitutional norms, and sociopolitical and historical facts', or 'the conflict between an actual existing constitution and the normative requirements of constitutionalism'[248]. To maintain its identity, a constitution employs three mutually supporting tools: a) negation, b) metaphor, and c) metonymy. In brief, negation indicates a moment of saying no to the previous order during the constitutive moment and is therefore associated with notions such as 'rejection, repudiation, repression, exclusion, and renunciation'[249]. For example, during the French Revolution, the people first rejected and "demanded emancipation from feudal hierarchical constraints, abolition of the privileges of nobility and clergy in favour of equality for all"[250]. Only then could the nation, as the constituent power, establish a new constitutional order. Importantly, constitution-making often involves a moment of repudiation and rejection of the previous political order in the pursuit of justice.

In contrast, metaphor and metonymy are the constructive tools used to fill the void left by negation. While metaphor seeks to reveal similarities and establish connections in the pursuit of imagined communities, metonymy 'promotes relations of contiguity within a con-

246 Roznai (n 49) 306.
247 Rubenfeld (n 132). He also talks about 'the idea of a generation-spanning people acting as a political subject'. Ibid 12.
248 Rosenfeld (n 138) 42.
249 Ibid 45.
250 Ibid 17.

text'[251]. Metonymy, in particular, helps make visible what is otherwise hidden behind the veil of similarities, facilitating the incorporation of 'differences through contextualization to avert subordination of some to others within the same constitutional regime'[252]. Briefly, both metaphor and metonomy highlight the connection between constitutional and national identities and underscore that constitutional identity, despite efforts to break from the past, inevitably reconstructs, deconstructs, and selectively incorporates elements of pre-constitutional and national identities[253]. For this reason, the legitimacy of any reconstruction depends on its consistency with the constitutional identity of the previous sociopolitical order as well as with the ideals of constitutionalism—the limited government, the rule of law, and the protection of fundamental rights.

In this context, Paul Ricoeur's concept of identity offers a valuable framework for explaining how constitutional identity inherently embodies both sameness and difference simultaneously. According to Ricoeur, identity can be divided into two distinct types: a) idem identity (sameness) and b) ipse identity (selfhood). While *sameness* is often associated with notions such as '*permanence in time*', 'a non-changing core of the personality' and 'immutability', *selfhood* refers to the changing, fluid and contingent nature of identity[254]. Identity is simply something constructed through choices made over time. For Ricoeur, *selfhood* 'consists of a kind of self-maintaining (*maintien de soi-même*) despite all the empirical changes that affect one's 'character', a 'constancy' that does not rest on the persistence of an identity'[255]. Selfhood, unlike sameness, is not concerned with maintaining the same outwards appearance over time; rather, it involves a 'mode of being' or

251 Ibid 53.
252 Ibid 56.
253 Ibid 41–45.
254 Paul Ricoeur, *Oneself as Another* (University of Chicago Press 1992, trans. Kathleen Blamey) 2.
255 Claude Romano, 'Identity and Selfhood: Paul Ricœur's Contribution and Its Continuations' in Scott Davidson and Marc-Antonie Vallée *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon* (Springer 2016) 46.

character[256]. Just as the essence of a promise lies in the ongoing effort to honour a previous commitment, selfhood is 'the way of being in which I am committed to keeping my commitments toward others, in which I vouch for them despite my own transformations, and purport to be trustworthy and reliable, in an act of attestation'[257]. In the context of constitutional identity, I argue that identity embodies both sameness (idem identity) in preserving core principles and selfhood (ipse identity), as suggested by Rosenfeld, who defines constitutional identity as 'a dynamic interaction between projections of sameness and images of selfhood' or between textual continuity and interpretive flexibility[258].

Consequently, it is not possible to describe a constitution by merely looking at the text or the founding moment since '(c)onstitutional identity can take many forms and evolve over time, because it is often immersed in an ongoing process marked by substantial change'[259]. If I were to be asked 'what makes of that constitution'[260], I would most likely point to the eternity clauses[261]. Because they serve as foundational principles that are so integral, they distinguish one constitution from others with similar wording. For example, secularism in the Indian and Turkish constitutions or human dignity in the German constitution are foundational elements that provide these documents with unique characteristics. As Finn notes, eternity clauses act as 'definitional markers', setting boundaries for what constitutes the core of the constitution[262]. Any amendment that fundamentally contradicts these unamendable principles would not merely alter the constitution but transform it so drastically that it could no longer be considered the same document, effectively resulting in what could be termed 'transmogrification'[263].

256 Ricoeur (n 254) 309.
257 Ibid 49.
258 Rosenfeld (n 138) 27.
259 Rosenfeld (122)10.
260 Marti (n 44) 20.
261 Ibid. 24.
262 John E. Finn, 'Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity' (1999) 10 *Constitutional Political Economy* 355, 357.
263 Ibid 359.

In an ontological sense, such a transformation might be seen as a form of betrayal, as it would undermine the foundational commitments upon which the constitution rests[264]. This is why even in the absence of explicit unamendable principles that preserve the sameness of the constitution, there are implicit unamendable principles that flow from the commitments we have already made to each other.

However, what are these identity markers that cannot be altered without impairing the constitution's personality? It is possible to distinguish between substantive and formal identity markers. Substantive identity markers are those principles embedded in the constitution from its inception, such as secularism in Turkey, the republican form of government in France, or the human dignity clause in Germany. Formal identity markers, on the other hand, derive from the idea that a constitution is not merely a collection of articles but also a coherent systemic unity with an underlying structure or backbone. These substantive markers are often explicitly stated in eternity clauses if such clauses exist[265]. In the absence of such clauses, courts or scholars may interpret or infer implicit unamendable principles, which can be seen as formal identity markers that uphold the constitution's internal coherence.

Implicit limitations or formal identity markers may also arise from an inherent hierarchical relationship among constitutional norms, even if this hierarchy is not explicitly stated. For example, Richard Albert, who takes a rather critical stance to the idea of unamendable constitutional provisions, admits that it is possible to consider the First Amendment as unamendable because it lays the foundation for all other democratic rights and freedoms[266]. Accordingly, he acknowledges that the

264 Lindahl (n 241) 9–24.

265 For a detailed study on eternity clauses, see Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021).

266 "The paradox of the United States Constitution, then, is that in order for it to cohere internally as a charter that is freely amendable as a reflection of the prevailing views of political actors and the public, whatever those views may be, we must interpret the Constitution as implicitly making the First Amendment's democratic rights formally unamendable". Albert (n 18) 29–30.

power 'to repeal the First Amendment and replace it with its opposite fundamentally contradicts the (existing) constitutional tradition'[267] so much so that only constituent power could carry out the amendments on that scale or importance. A similar line of reasoning was employed by the Indian Supreme Court in the landmark case of *Kesavananda Bharati v. State of Kerala*, where the court ruled that "(t)he word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations"[268]. Similarly, in *the Indira Nehru Gandhi v. Raj Narain* case, the Indian Supreme Court struck down an amendment that sought to prevent judicial review of certain electoral matters (the election of the President, Vice-President, Parliament Speaker, and Prime Minister), arguing that it "violated three essential features of the constitutional system—namely, fair democratic elections, equality, and separation of powers"[269]. In another significant case, *Minerva Mills Ltd. v. Union of India,* the court invalidated an amendment that attempted to grant unlimited legislative power to amend the constitution, emphasizing that 'a limited power cannot by the exercise of that power convert the limited power into an unlimited one'[270].

While human rights and constitutionalism impose constraints on the constituent power, constitutional identity primarily influences the power to amend the constitution. This implies that human rights and constitutionalism inherently limit the scope of constitutional amendments. Albert's argument that the First Amendment in the United States is to be treated as an unamendable principle enshrined in the spirit of the constitution presents a telling example of how constitutional identity may impose limitations on amendment power[271].

267 Rawls (n 69) 239.
268 Kesavananda Bharati v. State of Kerala, 1973 .C 1461, at 1860.
269 Roznai (n 45) 45. Indira Nehru Gandhi v. Raj Narain, 1975 SC 2299.
270 Minerva Mills Ltd. v. Union of India, 1980 SC 1789, at 1798.
271 Albert (n 14) 29–30.

PART II:
The Interpretive Legitimacy of the Unconstitutional Constitutional Amendment Doctrine

3. Three Suggestions for the Legitimate Use of UCAD

3.1. UCAD as a Solution to Abusive Constitutionalism

The foregoing section has introduced three different moral reasons why the courts are justified in reviewing the constitutionality of constitutional amendments. Instead, this section seeks to provide a positive response to the interpretive legitimacy question. In doing so, it first clarifies why the courts are better suited than other legal institutions for implementing the UCAD. It then compares three different suggestions as to how to apply the UCAD without prejudice to the capacity of a political community to update its constitution. This comparison paves the way for the main argument of the monograph, that is, the courts should strike a balance between two competing (formal) principles in deciding on the constitutionality of constitutional amendments, i.e., constitutional continuity and constitutional innovation.

One of the greatest problems, if not the most daunting, afflicting constitutional democracies is the rise of populism and its detrimental impact on underlying normative principles. Landau, labelling this trend abusive constitutionalism, argues that populist and authoritarian leaders use seemingly legitimate constitutional mechanisms to strengthen their political power and make the system 'significantly less democratic than it was before'[272]. Populist leaders aim to consolidate

272 David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189, 195. In this context, the conception of democracy that one espouses has further

their political power and tilt the political landscape in favour of it by gradually weakening institutional mechanisms and constitutional safeguards. They conceal their true motivations when they employ various constitutional tools to erode the very limitations that the constitution imposes on them. The fact that abusive regimes combine different mechanisms and exploit the interaction effects between them makes it harder to detect the monstrous 'Frankenstate' they seek to create[273].

The success of populist governments in their effort to manipulate constitutional architecture is partially associated with the failure of the current constitutional safeguards against the strategic use of seemingly legitimate constitutional mechanisms. These include militant democracy, designing tiered constitutional amendment rules, and UCAD[274]. For instance, militant democracy proves ineffective against abusive constitutionalism because it seeks to protect democracy from apparent threats posed by the totalitarian or authoritarian governments of the 1930s and 1940s. In the same vein, a tiered constitutional amendment rule fails to hold rein in populist leaders, as it often assures unamendable status to expressive elements of constitutions (e.g., human dignity, secularism, fundamental rights) without much regard for the threats posed by populist leaders to structural provisions (e.g., independence of the judiciary)[275]. Constitutional tiering strategy, as Landau depicts,

---

implications for offering an answer to the question of how to fight against abusive constitutionalism. Landau employs a minimalist definition of democracy whereby 'a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of electoral democracy' Rosalind Dixon and David Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds) *Assessing Constitutional Performance* (CUP 2016) 281.

273 Ibid.

274 Rosalind Dixon and David Landau, 'Transnational Constitutionalism and A Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606.

275 Landau (n 272) 229. Landau suggests that a temporal limitation clause could be added to constitutional amendments, requiring multiple votes on amendments with an intervening election between them. Ibid 228.While compulsory referendum clauses may seem effective in preventing would-be authoritarians, they are unlikely to be as successful as sequential approval. Would-be authoritarians often exploit majoritarian surges to amend the constitution. This is formulated by

'appears blind to the problem of abusive constitutionalism and plays instead an expressive or identity-related purpose'[276], even though it is said to function as a 'speed bump or deterrent against destabilizing or anti-democratic forms of constitutional change'[277].

Moreover, finding a constitutional system that is perfectly designed to keep democratic mechanisms intact and functioning smoothly is rare, as it is nearly impossible for the founding fathers to anticipate every potential threat to the constitutional system[278]. As Hayek noted, our knowledge is always limited, and this limitation is something we must accept[279]. Any attempt to comprehensively design society as though 'all relevant facts are known to one mind' risks falling into what Hayek calls 'synoptic delusion'[280]. For this reason, any ex ante mechanism to address abusive constitutionalism suffers from similar synoptic delusion. Consequently, neither militant democracy nor tiered constitutional design can effectively curb populist governments because constitutional designers cannot foresee all potential threats to the constitutional structure in advance. Seen in this light, we may view UCAD as 'necessary evil/negative virtue'[281] to compensate for our irremediable lack of knowledge.

For Dixon and Landau, the UCAD is the most effective constitutional safeguard in the fight against abusive constitutionalism. First, it takes a retrospective approach, addressing the deficiencies of ex ante designed constitutional amendment rules. This allows the courts to

---

Dixon and Landau as follows: 'The more concentrated political power is, the more fragile a tiering strategy is likely to be to subsequent shifts in the power of an already dominant political party or faction, whereas the more dispersed power is, the less likely it is that heightened supermajority requirements will be easily circumvented'. Dixon and Landau (n 274) 614.

276 Landau (n 272) 229.

277 Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86 *Geo. Wash. L. Rev*. 438, 444.

278 Rosalind Dixon and David Landau, 'Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review*, 859, 874–875.

279 Frederick A. Hayek, *Law, Legislation and Liberty: Rules and Order (Vol. 1.)* (The University of Chicago Press 1978) 12–15.

280 Ibid 15.

281 Raz (n 225) 195–202.

embrace a holistic perspective, see the collective impact of particular constitutional modifications, and detect the 'devil' hiding behind 'the interactions'[282]. The fact that courts are better placed than other legal institutions lies in the position they occupy in a legal system. They stand at the centre of a legal system because they are the final institutions responsible for 'the *authoritative* determination of normative situations in accordance with preexisting norms'[283]. A legal system can be seen as 'a system of interrelated reasons'[284] or 'a structure of authority'[285], composed of various legal rules, rulings, and doctrines, all of which are internally and hierarchically connected to each other through 'justificatory chains'[286], and 'yielding conclusions as to what rights, duties, liabilities, and so on exist by law (all legal things considered)'[287]. Within this chain of justification, the courts assume the role of final authority in the sense that 'the law is identified through the eyes of the courts'[288]. This is aptly worded by Raz as follows:

'The finality of judicial decisions is an essential feature of the law and of the judicial process. It expresses itself in doctrines like *res judicata*, and double jeopardy... Its role is not to allow for diversity and individuality within a relatively stable framework, but to secure uniformity if not of opinion at least in action'[289].

This enables them to address the challenge of abusive constitutionalism because they can embrace a holistic perspective due to their capacity to make a law and apply it retroactively to a past case. This means that judicial institutions have the advantage of flexibility[290] in

282 Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559, 561.
283 Raz (n 225) 109.
284 Raz (n 1) 8.
285 Raz (n 12) 259–260.
286 Ibid.
287 Raz (n 1) 8.
288 Raz (n 225) 71. He further notes: 'Legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions'. Ibid 44.
289 Raz (n 1) 320.
290 The UCAD's biggest advantage is its flexibility, Dixon and Landau (n 279) 874.

their fight against abusive regimes because they can change the law through their innovative interpretations, which will be binding on all citizens and other legal institutions in forthcoming cases and incidents[291].

Additionally, there is also a moral case for the use of UCAD by judicial institutions, which results from the conclusion that the authority to amend a constitution is subject to three different limitations. Accordingly, we may see judicial review of constitutional amendments as a natural extension or addendum to eternity clauses, as this is the most common way of controlling if amendment power is exercised in accordance with the existing constitution and its underlying principles. As Barak astutely noted, judicial review 'provides teeth to the eternity clause'[292] and ensures that they remain unamendable and not subject to the whim of political incumbents. In the same vein, Tushnet sees the possibility of judicial review of constitutional amendments as a mechanism of political checks on the amendment process, serving as a 'sword of Damocles that … cautions political actors'[293].

While indispensable[294] in addressing abusive constitutionalism, the UCAD is a powerful tool that can be used for both good and ill individuals. Therefore, it is necessary to establish clear guidelines for its proper use to protect constitutional democracy and avoid undermining it[295].

---

291 Raz (n 1) 320.

292 Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, 333.

293 Tushnet (n 7) 332.

294 Dixon and Landau (n 274) 606.

295 For a perfect example of how to misuse the UCA doctrine, Serkan Yolcu and Yaniv Roznai, 'An unconstitutional constitutional amendment—the Turkish perspective: a comment on the Turkish constitutional court's headscarf decision' (2012) 10 *International Journal of Constitutional Law* 175. This decision has further resulted in a political backlash in the form of a popular constitutional amendment, Gürkan Çapar, 'A Guideline for the Courts Under Pressure: Pluralist Judicial Review' in Stefan Mayr and Andreas Orator (eds) *Populism, Popular Sovereignty, and Public Reason* (Peter Lang Publishing 2021) 105. For a similar exemplary case from Honnduras, see David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.

The ex post nature of the UCA doctrine is its fundamental advantage, but it also undermines legal predictability, which is why its use must be limited[296]. Another common argument against the judicial review of constitutional amendments is that it allows courts to overturn the actions of democratically elected legislatures, leading to another version of the famous 'countermajoritarian difficulty'[297]. The fact that any legislature can override a court's ruling through a subsequent constitutional amendment provides a 'safety valve'[298] that relieves tension in the political system. Without this safety valve, judicial rulings run the risk of provoking political backlash, potentially leading to a constitutional crisis or even court packing[299]. This is the second point of criticism often voiced against the use of UCAD.

Seen in this light, the normative conditions under which the courts exercise this authority to review constitutional amendments in a legitimate way without undercutting the authority to amend a constitution should be explored. Constitutional identity should 'be resistant to change but not necessarily pose an insuperable obstacle to it'[300]. Even though it is difficult to offer one right answer, a balance is to be struck between constitutional continuity/stability and innovation whenever

296 For the principles of the rule of law, see, Raz (n 225) 210–229.

297 Today, countermajoritarian difficulty is fervently defended by political constitutionalists, see, e.g., Waldron (n 119). For a critique of political constitutionalism from the perspective of constitutional theory, Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP 2016) 95.

298 Dixon and Landau (n 277) 462–464. The rigidity and flexibility of the constitution is of utmost importance for the proper functioning of this safety valve. The more flexible the constitution is, the more it will be easier to keep updated the constitutional text and to override judicial decisions. In contrast, the more rigid the constitution is, the more stable it will in terms of drawing a line between constitutional and ordinary politics. Ibid 450–473.

299 For an article arguing that the Turkish Constitutional Court's use of UCAD provided a permissive environment for court-packing, see, Ozan O. Varol, 'The Origins and Limits of Originalism: A Comparative Study' (2011) *Vand. J. Transnat'l L.*, 44, 1239.

300 Gary J. Jacobsohn, 'Constitutional Identity' (2006) 68 *The Review of Politics* 361, 387.

the courts review the constitutionality of constitutional amendments. Even so, we may reduce the scope of uncertainty and eliminate some ways of balancing exercises as illegitimate. For example, radical interpretations that inflict serious harm on the continuity (and identity) of legal systems tilt the balance between innovation and interpretation towards the former. A radical interpretation of existing norms or discontinuity of a legal system following a radical rupture not only harms the constitutional identity but also places extra pressure on the tension between the national and constitutional identities. As a result, Raz argues that any change in a constitutional system should be made slowly without creating a radical rupture in time simply because it is in the nature of law that it should be relatively stable over time[301]. In response, he suggests that the courts adopt what he calls 'innovative legal interpretation'[302], a balancing exercise between the constitutional baggage of the past and the ongoing demands of the present and future. This leads a constitution to conserve its identity no matter how many constitutional amendments it has been subject to:

> *'It is still the (same) constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century-house lives in a house built two hundred years ago. His house had been repaired, added, and changed many times since. However, it is still the same house and so is the constitution'*[303].

The question of how courts should find a balance between constitutional continuity and innovation is normative. One of its most visible examples may be found in the discussions surrounding the legitimacy of the UCAD, where many constitutional lawyers seek to offer a response to what I call the interpretive legitimacy question: How should the courts exercise the judicial review of constitutional amendments in

301 This results from the necessity of individuals to have access to the knowledge of law not only for their short-term decisions but also for their long-term planning. Raz (n 225) 214.

302 Innovative legal reasoning brings together the reasons for 'fidelity to an original constitution' and 'innovation'. Raz (n 1) 361.

303 Ibid 370.

a legitimate and morally acceptable manner? In what follows, I make three different suggestions by constitutional lawyers concerning the legitimate exercise of UCAD and then argue that the courts should strike a balance in each case between two different principles, i.e., constitutional continuity and innovation.

3.2. Treating Amendment Power as a Spectrum to Link Unamendability to the Amendment Procedure

Drawing on Schmitt's distinction between constituent and constituted powers, as well as between the constitution and constitutional laws, Roznai introduces what he calls three-track democracy, consisting of legislative power, amendment power, and constituent power[304]. Like Schmitt's notion that amendment power is inherently limited by constituent power, Roznai argues that amendment power cannot alter the constitutional identity or its core principles, no matter whether they are framed, including 'core nucleus principles', 'basic principles', 'identity', 'genetic code', 'immutable provisions' or 'eternity clauses'[305]. According to Roznai, the authority to change the identity of a constitution falls within the realm of constituent power. However, there is an important question to be addressed even when the foregoing explanations are accepted: How can we distinguish between constituent and amendment powers?

304 'Schmitt (also) distinguished between the constituent power and the amendment power. The first is the power to establish a new Constitution, whereas the second is the power to amend the text of constitutional laws currently in force, which, like every constitutional authority, is limited. Schmitt's doctrine is built upon a distinction between the Verfassung, or 'the Constitution', which is the fundamental political decisions of the constituent power, and ordinary Verfassungsgesetz, or 'constitutional laws', which are constitutional norms or provisions but which lack any true fundamental character'. Roznai (n 32) 116. For the influence of Schmittian ideas on Venezuela and Colombia, see Joel Colón-Ríos, 'Carl Schmitt and constituent power in Latin American courts: the cases of Venezuela and Colombia' (2011) 18 *Constellations* 3, 365.

305 Roznai (n 32) 221,126, 149, 203.

The answer to this question has further implications for the interpretive legitimacy question. Therefore, let me briefly explain how Roznai addresses this problem. For Roznai, amendment power—whether eternity clauses exist—is always constrained by constituent power because 'it uses a legal competence *delegated* to it by the primary constituent power'[306]. In other words, amendment power is not unconditionally transferred but entrusted, making it contingent on the proper use of that power as part of a principal-agent relationship. Given that any constitutional amendment potentially affects unamendable principles, the extent to which the former interferes with the latter must be evaluated. The courts should bring eternity clauses to bear on reviewing the constitutionality of constitutional amendments and interpret any amendment as consistent with unamendable principles whenever possible (verfassungskonforme Auslegung). Only when the principle of consistent interpretation with unamendable principles is a practical impossibility can the court annul the amendment[307]. The first problem to surmount is to provide an explanation for how to balance unamendable principles with proposed amendments.

In response, Roznai connects unamendability (and its judicial review) to constitutional amendment procedures, introducing the idea of a 'spectrum of constitutional amendment powers'[308]. Seeing amendment power as a continuum oscillating between constituent and constituted powers allows Roznai to distinguish between two types of amendment power, i.e., popular and governmental amendment powers. In his view, the more an amendment power includes 'the people' through a referendum or constituent assembly, the more it borders on constituent power or what Roznai calls the popular amendment power[309]. In con-

306 Ibid 118 (emphasis belongs to the author).
307 Ibid 225.
308 Ibid 158–159. In this context, he also cites Lior Barschak's following formula: 'the fuller the sovereign presence, the more relaxed the constitutional structure and the formal procedure that governs the referendum'. Lior Barshack, 'Constituent Power as Body: Outline of a Constitutional Theology' (2006) 56 *The University of Toronto Law Journal* 185, 212–213.
309 Ibid 162–164.

trast, the more an amendment power excludes 'the people' from the process, the more it resembles ordinary constituted power or what he calls governmental amendment power. The spectrum of amendment power helps not only dissolve the traditional opposition between constitutional amendment and replacement but also offers a response to the interpretive normative question. Here, Roznai suggests that the more the constitutional amendment procedure (i.e., including popular participation) resembles popular amendment power, the looser the judicial scrutiny will be and vice versa. In summary, he suggests applying different standards of judicial scrutiny to constitutional amendments depending on how participatory or popular they are.

Depending on the participatory quality of the constitutional amendment, Roznai introduces three different standards of judicial review that the courts may adopt when they review the constitutionality of constitutional amendments: i) minimal effect standards, ii) disproportionate violation standards, and iii) fundamental abandonment standards. When dealing with the highest level of amendment power (popular amendment power) and the lowest judicial scrutiny, the court will only strike down an amendment if it disproportionately undermines constitutional identity[310]. This is what Roznai calls the 'fundamental abandonment standard'; amendments remain legitimate as long as they do not destroy the constitution's genetic code. At the secondary level, where there exists a disproportionate violation standard, a constitutional amendment should be struck down only when it disproportionately infringes on unamendable principles. When a constitutional amendment is more like an ordinary use of governmental power due to the absence of popular participation, the courts are justified in applying the minimal effect standard. This standard suggests that whenever a constitutional amendment contradicts unamendable principles, this leads to an automatic nullification of the proposed amendment no matter how minimal its effect is on unamendable principles. Here, unamendable

310 Ibid 219–221.

principles are viewed as unamendable rules[311], as they trigger an automatic process of nullification whenever they are violated.

In addition to his spectrum of amendment power, Roznai proposes a tiered-amendment rule, or 'constitutional escalator', which suggests that 'the more fundamental the principles of the constitutional order, the more they should be protected from hasty changes through heightened amendment requirements'[312]. This rule serves two purposes: it jealously protects the 'genetic code' of the constitution from rash changes while also making it easier to amend ordinary provisions than would be possible under a uniform amendment rule[313]. The tiered-amendment rule assumes that 'the more deliberative, multi-institutional, and prolonged the processes of amendments are, the less the likelihood of abuse of the amendment power'[314]. In this way, Roznai links democratic legitimacy with the amendment process, proposing that the more democratic the process is, the lower the amendment threshold should be. He goes a step further, suggesting that as the amendment threshold increases, the intensity of judicial review should decrease, and vice versa[315]. In short, he establishes a reverse correlation between the degree of judicial review and the amendment threshold, tying amendment procedures to judicial scrutiny[316].

311 For the distinction between rules and principles, see Chapter IV in this monograph.

312 Ibid 168. For tiered constitutional design, see Dixon and Landau (n 277), and Richard Albert, Amending Constitutional Amendment Rules (2015) 13 *International Journal of Constitutional Law* 655. The main examples of the tiered constitutional design may be seen in the constitutions of Nicaragua, Philippines, Austria, Canada and South Africa.

313 Roznai (n 32) 168.

314 Ibid.

315 Ibid 175.

316 The same suggestion is also made by Barshack who argues that 'the binding force of constitutional procedure varies in every constitutional moment in proportion to the intensity of sovereign presence ... When the communal body asserts itself in the amendment of a constitution as intensely as it was involved in its original adoption, it is hardly bound by constitutional procedure at all and hardly subject to judicial review over the constitutionality of the amendment'. He further maintains that 'the more exuberant the sovereign presence, the less bound is the

In summary, Roznai establishes a positive correlation between amendment procedures, the legitimacy of amendment power, and the degree of judicial scrutiny. His approach is evident in concepts such as the 'spectrum of amendment power', 'constitutional escalator', and 'spectrum of judicial review', which reflect a relative and conditional approach to unconstitutional constitutional amendments. His formula can be summarized as follows: the more amendment power resembles (primary) constituent power, the less it is bound by eternity clauses, and the lower the degree of judicial scrutiny. This approach allows Roznai to avoid a categorical approach to the interpretive legitimacy question and seems to cohere well with the politically salient nature of the UCAD. This is most clear in his presumption that there is no need to draw a strict line between constitutional amendment and replacement, particularly at a time when populist leaders often attempt to replace a constitution under the guise of a constitutional amendment. For example, De Gaulle circumvented high amendment thresholds through a referendum, whereas Mugabe in Zimbabwe bypassed popular participation, proposing 17 constitutional amendments in his first 25 years without any referendum[317]. In both cases, the distinction between amendment and replacement blurred, undermining the constitutional limitation imposed on amendment power.[318] This highlights the need to view the relationship between amendment and replacement as a continuum, particularly in the context of abusive constitutionalism. This nuanced approach helps refute the mistaken argument that the UCAD cannot be applied to constitutional replacement or constituent power.

---

collective body by ... the nonamendability of certain constitutional principles'. Barshack (n 308) 201–202.

317 Constitutionnet (n.d) *Constitutional History of Zimbabwe* http://constitutionnet.org/country/zimbabwe-country-constitutional-profile.

318 Dixon and Landau (n 278) 864–868; In this article Dixon and Landau contend that due to the indifference between constitutional amendment and replacement, the courts carry out a review on constituent power's compatibility with specific substantive constraints such as 'international constitutional minimum core', from which the Constitutional Court of South Africa benefited diligently in the transition period.

3.3. Using Transnational Constitutionalism as a Second Check

A very similar suggestion is made by Dixon and Landau, who argue that transnational constitutional norms reduce the unpredictability of the UCAD. Let us leave aside many problems likely to arise concerning how to determine the content of these norms that fall under the category of transnational constitutional norms and focus on their line of argumentation. For them, the UCAD, despite its many advantages, risks undermining the principles of the rule of law and is therefore subject to certain limitations. In addition, here, transnational constitutional norms may help differentiate real threats to democracy from others.

Dixon and Landau identify three different approaches that courts have developed in their use of the UCA doctrine: (a) a narrow approach, (b) a potential adverse impact approach, and (c) a limited doctrine approach incorporating transnational constitutionalism. They differ in their degree of sensitivity, specifically how sensitive courts should be to the infringement of unamendable principles by a constitutional amendment. The narrow approach, which protects only a 'small, core set of institutions or principles'[319], underprotects the basic structure of the constitution, making it vulnerable to evasion by populist governments[320]. Additionally, this approach ignores the cumulative effects of incremental amendments, failing to prevent the creation of a 'Frankenstate'[321]. The potential adverse impact approach, on the other hand, risks being overbreadth, as it gives courts too much latitude to strike down amendments that may not pose a significant threat to constitutional identity[322]. This tension between overprotection and underprotection reflects the classical dilemma between rules and stan-

319 Dixon and Landau (n 274) 623.
320 Ibid 624–626.
321 See Scheppele (n 282).
322 Dixon and Landau (n 274) 624–626.

dards: overly rigid rules may prevent justice in specific cases, whereas excessive discretion threatens the rule of law[323].

To overcome the shortcomings of these first two approaches, Dixon and Landau propose the use of transnational constitutional norms as a second check to be applied only after the UCA doctrine has been invoked. This approach balances the weaknesses of both the narrow and potential adverse impact approaches[324]. On the one hand, it is broad enough to address the threat of abusive constitutionalism because 'it does not attempt to identify a narrow set of institutions or values ex ante"[325]. On the other hand, it is weak because 'it strikes down only constitutional changes that it is confident will have a substantial adverse impact'[326]. This method has been successfully applied by courts such as the Indian Supreme Court and the Colombian Constitutional Court. In Colombia's first and second re-election cases, the court used a case-by-case approach to contextualize presidential term limits, ultimately finding the proposed amendment in the second case unconstitutional. In line with Dixon and Landau's proposals, the Colombian court first decided whether to apply the UCAD and then referred to transnational principles as a second check to ensure its decision[327]. According to Dixon and Landau, transnational norms serve as a safeguard against the misuse of the UCAD, but they are not a panacea. Instead, they represent a positive step toward a limited and carefully calibrated use of the UCAD.

This suggestion of benefiting from transnational constitutionalism can be viewed as an attempt to construct and draw from shared under-

323 Ibid**.** In making a distinction between rules and standards, they make reference to Sullivan, Kathleen Sullivan, 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards' (1993) 106 *Harvard Law Review* 22.

324 'The key question a judge should ask is the following: based on the actual impact of this amendment and what has come before it or is occurring in parallel in a particular country, does this particular amendment clearly pose a substantial threat to democracy or to democratic constitutionalism?' Dixon and Landau (n 274) 628.

325 Ibid.

326 Ibid.

327 Ibid 629.

lying principles widely accepted as part of today's international law. The first thing to note here is that the use of transnational constitutional norms by a domestic court in its review of constitutional amendments is dependent on developing a theory about how to determine these constitutional norms that gain transnational or international significance and recognition. It is clear to me that there is a great deal of comparative work here, as the court is called on to investigate, compare, and decide on the identity of transnational constitutional norms. Moreover, domestic courts differ in their attitudes towards international law, which makes it difficult for some to anchor their judgement in transnational constitutional norms[328]. For instance, the U.S. Supreme Court has taken a quite conservative stance towards international norms, often seeing them as alien norms originated and legitimated by a political process not controlled by American citizens[329]. In contrast, the German courts show no hesitation in benefiting from and citing international norms in their judgments, as long as they are relevant to the case. This permissive approach to international law has brought about an unwritten constitutional principle, also known as 'Völkerrechtsfreundlichkeit des Grundgesetzes', meaning that 'every national German norm including the constitution itself has to be interpreted in accordance with international law'[330].

Concerns aside, we can argue that the use of transnational norms can help national courts strengthen their legitimacy when they issue a judgement on the constitutionality of constitutional amendments. The court may use these transnational norms to support its line of reasoning and argumentation. Doing so would not only provide legitimacy to national courts but also aid in the construction of an 'ius commune' or global constitutional principles. In an increasingly fragmented and

328 For a comparative study, see Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

329 For an interesting study, see Frederick Schauer, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1391.

330 Hans-Peter Folz, 'Germany' in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 241.

globalized society where law is becoming more pluralized by the day[331], creating such common principles could serve as a defence against the threat of abusive constitutionalism.

Furthermore, the idea of transnational constitutionalism as a second check could benefit both legal scholarship and doctrine. As Van Hoecke and Ost argued more than 20 years ago, legal doctrine is in crisis due to increasing specialization, acceleration, pluralization of legal systems, and overemphasis on quantitative data at the expense of qualitative knowledge[332]. To overcome this crisis, they suggest that we must a) construct and use general legal principles, b) create diverse control mechanisms, c) employ balancing and weighing in legal reasoning, and d) accept paradoxical concepts such as 'partial sovereignty'[333]. Unsurprisingly, the UCAD serves as a telling example of how legal doctrine can provide a solution to the challenges and problems posed by globalization, digitalization, and populism to our constitutional democracies. As argued above, it considers sovereignty as a negative concept whose content is mostly determined by today's international legal norms. As shown in this section, the threat of abusive constitutionalism can be addressed only with a context-sensitive and holistic approach for which judicial institutions are particularly suited. They are well versed in interpreting legal rules and finding a balance between competing interests and principles.

In conclusion, both Roznai and Dixon and Landau emphasize that while the UCAD is necessary and indispensable, it must be applied in a way that protects democracy rather than undermines it. They all seek ways to utilize the UCAD without prejudicing democratic values. Notably, Roznai's emphasis on balancing unamendable principles with proposed amendments is of particular importance for the purposes of

331 For the link between modernism and fragmentation of society, and how it has been undergone a process of transformation through globalization, see Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).

332 Mark Van Hoecke and François Ost, 'Legal doctrine in crisis: towards a European legal science' (1998) 18 *Legal Studies* 197.

333 Ibid.

this project. In his analysis of the disproportionate violation standard, he states:

> *'There is no 'technical' obstacle to using the principle of proportionality in the review of amendments, since the nature of proportionality allows for balancing between conflicting principles. In the case of unamendability, the balance would be between the core of the protected unamendable principle on the one hand and the pursued interest and the means taken by the constitutional amendment for its achievement on the other hand'*[334].

I must admit that this is a significant step towards resolving the conflicts of competence between the judiciary and legislature or between amendment and constituent powers. However, Roznai, while addressing the balance between unamendable principles and proposed amendments, overlooks the authority responsible for issuing them. In other words, while courts can balance competing fundamental rights, it is also possible to strike a balance between proposed amendments and unamendable principles. The issue here, however, is not substantive principles such as fundamental rights but rather formal principles regarding who has the competence to decide on those substantive principles. For this reason, I think we need to approach Roznai's suggestion from the perspective of legal theory and provide a clear explanation for the nature of these principles and how they can be balanced with each other.

3.4. Constitutional Dismemberment as an Alternative to UCAD

Unlike previous scholars, Richard Albert took a rather critical approach to the UCAD. Richard Albert takes issue with what he calls the 'conventional understanding', according to which the power of constitutional amendment is limited by constituent power, and judicial review of constitutional amendments is considered part of the judiciary's ordi-

334 Ibid 220.

nary competences[335]. From this perspective, the court can strike down an amendment that contradicts unamendable principles. Albert views the improper use of the UCAD, mostly due to inadequately designed amendment rules, as a serious problem because most amendment rules do not differentiate between creating a new constitution and making ordinary amendments. Thus, this standard design of constitutional change fails to constitutionalize the constituent power.

To address this design flaw, Albert coined the term 'constitutional dismemberment' to define the sort of constitutional amendments whose purpose is 'to unmake the constitution' without disrupting legal continuity[336]. In his view, not all constitutional amendments are of equal importance and are thereby constitutional in the substantive sense. As Lincoln stated in his first inaugural address, '(w)henever (people) should grow weary of the existing government, they can exercise their CONSTITUTIONAL right of amending it, or their REVOLUTIONARY right to *dismember* or overthrow it'[337]. Similarly, Albert refers to this second type of revolutionary amendment as *constitutional dismemberment*, as these amendments dismantle core or fundamental features of the constitution to the point that it can no longer retain its identity[338]. Some amendments alter the structure of the constitution so significantly that they 'do not amend at all'; rather, '(t)hey seek to *transform* the constitution, to *replace* it with a new one,

335 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 *The Yale Law Journal* 1.

336 Ibid 4.

337 Abraham Lincoln's First Inaugural Address, cited from Jacobsohn (n 300) 367 (emphasis belongs to me).

338 Albert (n 335) 1. However, for Roznai, such amendments not only deconstruct the constitution's core features but also reconstruct its identity. Therefore, he proposes 'the term "*fundamendment*" to describe constitutional amendments that *fundamentally* change the constitution'. Additionally, Roznai argues that the term *fundamendment* is narrower than concepts like constitutional revolution or transformation, which are used to describe moments of extralegal constitutional change. Yaniv Roznai, 'Constitutional Amendment and "Fundamentment": A Response to Professor Richard Albert, (2018, February 26) Yale Journal of International Law Forum. Available at: https://www.yjil.yale.edu/constitutional-amendment-and-fundamendment-a-response-to-professor-richard-albert/.

and to *revolutionize* the constitutional order'[339]. For example, he suggests treating 'the Civil War Amendments to the U.S. Constitution' as constitutional dismemberments, for they have introduced such radical changes in 'the existing constitution's structure, identity or rights'[340].

This enables him to overcome the failure of the conventional approach in discriminating constitutional replacement from amendment, resulting in instability and uncertainty and ultimately leading to 'judicial manipulation of the rules of constitutional change'[341]. To resolve the uncertainty caused by constituent power, Albert suggests the need to redesign the constitutional system rather than relying on conventional ex-post judicial review. He proposes a two-track system for constitutional change: one track for corrective and elaborative amendments and another for constitutional dismemberment, which would require a higher threshold than the first track would require[342]. This allows for the integration of the constituent power into the legal framework of a constitution and obviates the need for an extra-legal and unlimited constituent power in the Schmittian sense. In addition,

339 Ibid.

340 Albert (n 335) 4. These changes 'tore down the major pillars of America's original sin: The Three-Fifths Clause, the Fugitive Slave Clause, the Migration or Importation Clause, and the Proportionate Tax Clause'. Ibid. As an example of structural change, he gives the example of failing constitutional amendment proposal in Italy in December 2016 and in Ireland in 2013, which would have changed almost one third of the constitutional provisions had they entered into force. As a rights-based change, he gives the 2016 Public Spending Cap Amendment to the Brazilian Constitution, as it is expected to have serious negative impact on the future generations. Last, he suggests construing the establishment of the Caribbean Court of Justice as a replacement of the Judicial Committee of the Privy Council. Ibid 41–49.

341 Ibid 29. 'One of the key pillars of constitutional dismemberment is *the principle of variable difficulty* in constitutional change. The basic point of variable difficulty is a prescription for constitutional design: political actors should be directed by the rules of constitutional change to satisfy different thresholds for amendment than for dismemberment'. Ibid 4.

342 'Constitutional amendments come in two types: they can either be corrective or elaborative. Properly defined, a constitutional amendment is a correction made to better achieve the purpose of the existing constitution. … Instead of repairing an error in the constitution, however, an elaboration advances the meaning of the constitution as it is presently understood'. Ibid 3.

subsequently, it obviates the need to recourse to the UCAD because there would no longer be a constituent power outside the constitution to be infringed upon. In the absence of a constitutional dismemberment rule, he proposes a default rule of mutuality, which holds that 'removing something fundamental from a constitution should be permissible using only the same procedure that was used to put it in or something more onerous'[343]. This rule of mutuality resembles Bruce Ackerman's two-track democracy and constitutional moments[344]. In addition, constitutional dismemberment may be thought of as a version of the constitutional moment that is integrated into the constitution; that is, it becomes positivized.

In regard to determining whether a constitutional change rises to the level of dismemberment, Albert emphasizes that the reference point should not be an idealized founding moment but rather 'the understanding of the relevant actors and the people at the time the change is made'[345]. Here, he aligns himself with political constitutionalism, advocating for the priority of democracy over constitutionalism whenever possible. He maintains that courts should play a more 'defensive, collaborative, and constructive'[346] role, contrary to the model under the UCAD, where courts can annul an amendment even in disregard of the constitution's text. For example, Albert suggests that if courts face uncertainty about whether to strike down an amendment, they should refrain from doing so and instead ask Parliament to vote on the issue again[347]. This intertemporal voting procedure, he believes, enhances deliberation and makes it harder for courts to intervene in the political process. Moreover, in this system, courts may rule on the unconstitutionality of an amendment only when this decision is

343 He also writes that 'the people exercise their constituent power when they speak in the same way they did when they wrote the constitution' Ibid 6.

344 Here the distinction is made between ordinary/normal and constitutional politics or moments, Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99 *The Yale Law Journal* 453.

345 Albert (n 335) 49.

346 Ibid 67.

347 Ibid 69–70.

reached by a supermajority. However, this ruling would not be legally binding on political actors but would instead carry political weight for the legislature or executive[348]. Overall, Albert's model, which assigns a highly deferential role to courts, may undermine their ability to rule on constitutional amendments, potentially leading to the demise of the UCAD.

Despite his eloquent discussions on the proper use of the UCAD, I think that Albert's model is designed to defuse its use while seeking to prevent its misuse. As such, I have several disagreements with his line of reasoning. First, Albert's argument is based on the assumption that constitutions are often made as democratically as possible. For example, all four constitutions of Turkey were drafted under extraordinary circumstances, such as following coups in 1961 and 1982 or during or after a war of independence in 1921 and 1924. This phenomenon is not unique to fragile democracies. Constitutions drafted after World War II, such as those in Germany and Italy, also reflect this pattern.

Second, Albert criticizes the new wave of scholarship that supports the use of the UCAD for being ideologically oriented and pursuing particular political agendas. Instead, he views constitutions as empty vessels[349] available for any moral or ideological aspirations, free from imposed values. He argues that imposing Western liberal democratic values on other constitutional systems amounts to 'intrusion into a nation's sphere of sovereignty and the self-determination of its peoples'[350]. By distancing himself from value-laden conceptions of the constitution, Albert aims to prevent the potential misuse of the UCAD, which he believes could allow the judiciary to have the final say on matters that should be democratically decided. For Albert, the justification for constitutional dismemberment lies in 'the support of a substantial democratic majority of the relevant people'[351]. However, he shies away from discussing whether it is possible to depict a constitution as an empty

348 Ibid 72.
349 Ibid 63.
350 Ibid 64.
351 Ibid 66.

vessel to be filled with any political ideology while at the same time remaining committed to the normative concept of constitutionalism. Simply, I expect him to tell a little bit more about how constitutions as a set of founding rules are linked to the ideal of constitutionalism.

Third, Albert is committed to pursuing a purely descriptive methodology rather than a normative one. However, it is dubious whether he fully adheres to his promise. For instance, Albert argues that traditional constitutional design, which fails to distinguish between constitutional amendment, dismemberment, and replacement, paves the way for inconsistent applications of the UCAD. He cites two contradictory rulings by the Turkish Constitutional Court (TCC) — the 2008 headscarf and the 2016 parliamentary immunity cases — as evidence of this inconsistency[352]. According to Albert, if the constitution had included a dismemberment rule, the TCC would have applied the UCAD consistently. However, the inconsistency in the TCC's rulings is not due to arbitrary judicial power or misuse of the UCAD but rather to the court's capture by political incumbents following the 2010 constitutional amendments[353]. These amendments significantly altered the court's composition, increasing the number of justices from 11–17 and introducing a mandatory 12-year term, thus giving incumbents more influence over the court's makeup[354]. Empirical studies by Varol et al. in 2017 revealed a conservative ideological shift in the TCC after the 2010 amendments, with the full implications of this shift becoming more apparent over time[355]. While Albert points to the absence of a dis-

352 Ibid 26–29.

353 For a detailed analysis of the political and legal background of the 2010 Turkish constitutional amendment, together with an explanation for why Albert was mistaken in his arguments about the Turkish constitutional saga, Gürkan Çapar, 'How (not) to Compare?: Not Being Inside, Nor Outside' (2022) 7 *Global Jurist* 375.

354 For the proposed constitutional amendment, see Levent Gönenç, '2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey' (2010 September) TEPAV Evaluation Note.

355 'When the size of the TCC increased from eleven to seventeen in 2010, the AKP government was unable to immediately fill the six new seats. Rather, four judges that were serving as substitutes on the eleven-member Court became permanent members'. Ozan O. Varol, Lucia Della Pellegrina, and Nuno Garoupa, 'An Empiri-

memberment rule as the cause of the inconsistency, the real issue was not the defects in the constitutional amendment rule but the court's capture.

Fourth, Albert's argument is based on the assumption that, since constituent power is extra-legal and amendment power is derived from it, amendment power is inherently limited. The concept of constitutional dismemberment helps Albert fill the legal gap between constituent and amendment powers, making the use of UCAD questionable from the perspective of legitimacy. However, as discussed in the first section, there are other justifications for the UCAD, one of which is Schmitt's argument, which Albert accepts without question. In contrast, I believe that the strongest argument for the UCAD arises from the concept of constitutional identity. Recall that constitutional identity can be formal or material, and unlike material identity, formal identity is grounded in the idea that the constitution is a consistent and coherent structure. Moreover, there are external constraints, such as human rights and constitutionalism, which also limit the amendment power and are closely linked to the notion of constitutional identity. From this, it can be inferred that defending the UCAD does not require an extra-juridical constituent power as a looming threat to amendment power. Similarly, constitutionalizing the constituent power through a mechanism what Albert calls the constitutional dismemberment rule does not suffice to deny the legitimate use of the UCAD for other reasons. Simply put, there are different values and reasons at stake when the UCAD is employed by the courts.

Finally, Albert's proposal to strengthen the amendment rule, despite his scepticism towards the UCAD, is crucial. His 'rule of mutuality' mirrors Roznai's gradual approach to amendment power as a spectrum. For this reason, it could even serve as a basis for defending the judicial review of constitutional amendments. Designing a more flexible and rational amendment rule is necessary in the wake of the recent populist and antidemocratic trend prevalent in all countries, including

cal Analysis of Judicial Transformation in Turkey' (2017) 65 *The American Journal of Comparative Law* 187, 214.

those Western democracies with exemplary records of democratic governance. Notably, all three approaches acknowledge the importance and benefits of a tiered constitutional design. It is clear that this shared understanding is a response to the rise of abusive constitutionalism. The next section explores how to reach a compromise between conflicting competences, specifically how to balance formal principles in line with the spectrum of amendment power.

4. Amendment Power and Its Judicial Review as Formal Principles

This section, drawing on Dworkin and Alexy, explores the concept of formal principles. In simple terms, formal principles[356] are responsible for determining the authority entrusted with setting rules, laying down judgments, and issuing orders. As such, formal principles require deference to authority, although the extent of that deference can vary, particularly when substantive principles exist to be balanced. The best example of substantive principles is constitutional rights, which call for optimization to the greatest extent possible when they are in partial conflict with each other. In contrast, formal principles demand not optimization of substantive principles (or constitutional rights) but deferring to the judgment of an authority. One may trace the origins of this distinction between formal and substantive principles in Dworkin's distinction between rules and principles. In his view, rules 'apply in an all-or-nothing fashion'[357], whereas a principle 'states a reason that

356 They are also called procedural principles, as they 'establish how and by whom the substantial content is to be established'. Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 136. In a similar vein, Schauer draws a distinction between jurisdictional and substantive rules, arguing that while the former 'grant(s) to some agent or institution the power to make decisions with respect to some category of events', the latter acts as a restraint filling in these jurisdictional rules. Schauer (n 109) 171–172. Sieckmann similarly notes that 'the authority of law must be justified through balancing, which in turn establishes formal principles that grant authoritative powers'. Jan-R Sieckmann, *The Logic of Autonomy: Law, Morality and Autonomous Reasoning* (Bloomsbury Publishing 2012) 167.

357 Ronald M. Dworkin, 'The model of rules' (1967) 35 *The University of Chicago Law Review 14*, 24.

argues in one direction without necessitating a specific decision'[358]. After making a distinction between rules and principles on the basis of how they operate logically, Dworkin classifies principles into two different categories, i.e., substantive and conservative. Substantive principles help judges go beyond the constraints of rules, whereas conservative principles protect existing precedents and legislation. For example, the principle that "no man should profit from his own wrong" is a substantive principle, whereas the doctrine of precedent is a conservative one, which "incline(s) towards status quo"[359]. In summary, the reasons undergirding the substantive and formal principles are different: While the former concerns first-order ordinary reasons, the latter concerns second-order reasons calling for deference to an authority.

4.1. Rules and Principles

In my view, it is highly likely that Dworkin's distinction between rules and principles has a dramatic influence on Robert Alexy, laying the foundations of his 'principles theory'. It is even arguable that Alexy helped spread Dworkin's ideas towards Continental Europe in a more positivized and less moralistic way, as he depicts legal principles as something 'distilled from the constitution by interpretation'[360]. In this sense, Dworkin's extra-legal moral principles, which judges are meant to invoke in hard cases, are transformed into constitutional rights enshrined in the positive constitution. Here, Alexy benefits a great deal from precedents of the German Federal Constitutional Court in highlighting the inherent connection between substantive principles and proportionality analysis[361]. If principles do require optimization to the greatest extent possible, then we need a logical tool or mechanism to

358 Ibid 26.
359 Ibid 37.
360 Jan Henrik Klement, 'Common Law Thinking in German Jurisprudence – on Alexy's Principles Theory' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 191.
361 Martin Borowski, 'Discourse, Principles, and the Problem of Law and Morality: Robert Alexy's Three Main Works' (2011) 2 *Jurisprudence* 575, 580.

find an equilibrium or balance whenever they partially conflict with each other. This is why Alexy sees proportionality analysis as a direct logical consequence of the definition of principles as optimization requirements. Let me elaborate on this point by explaining how Alexy explains the distinction between principles and rules.

In his view, it is misleading to view principles as merely more general or abstract versions of rules. Instead, a norm-theoretical distinction exists between rules and principles because they operate as different kinds of norms that follow distinct logical forms[362]. The fact that a norm plays a different role and function in judicial reasoning depending on whether it is initially classified as a rule or a principle leads Poscher to depict this distinction as ontological[363]. When a court is faced with a rule, it is expected to take it as a command or order, indicating 'conclusive and 'incompatible ought-judgements'[364] that 'require something (to be done) definitively'[365]. Instead, when it is encountered with a principle, it should take it as an 'optimization requirement'[366] that gives ordinary reasons to (not) do something without demanding a specific conclusion. Rules have a bipolar nature, meaning that they are 'always either fulfilled or not[367]'. This is because they operate in the dimension of validity, and there is *no tertium datur* when two rules come into conflict with each other: one should be deemed valid and the other invalid[368]. In contrast, principles are polar because they deny the logic of validity and operate in a scalar dimension of weight. When

362 The distinction 'is not simply a matter of degree but is qualitative'. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 47.

363 Ralf Poscher, 'The Principles Theory: How Many Theories and What is their Merit?' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 220.

364 Alexy (n 362) 49.

365 Robert Alexy, 'Constitutional Rights, Democracy, and Representation' (2014) 3 *Richerche giuridiche*, 197, 198.

366 'principles are norms which require that something to be realized to the greatest extent possible given the legal and factual possibilities' Alexy (n 362) 49.

367 Ibid 48. 'If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain *fixed points* in the field of factually and legally possible'. Ibid.

368 Another option is to create an exception rule. Alexy (n 362) 49.

two principles *compete with* each other, there is no need to consider one as invalid and irrelevant to the judgement. The exact weight of a principle can be established only when it competes with another principle, meaning that principles call for 'a conditional relation of precedence'[369] among themselves. Principles, therefore, acquire 'different weights in different cases'[370], depending on which principles they are competing against. For this reason, balancing (or proportionality analysis in the strict sense) is the method used to resolve conflicts (or competitions) between principles: 'The greater the detriment to one principle, the greater the importance of satisfying the other'[371].

Proportionality analysis, as is well known, consists of three subtests: suitability, necessity, and proportionality in the strict sense[372]. The gist of proportionality analysis is that any measure taken by public authorities should go no further than what is strictly necessary to achieve the intended aims. The first prong, the principle of suitability, serves to disqualify means that are inappropriate for achieving the desired ends. The second prong, the principle of necessity, eliminates the means that are over-restrictive and impose unnecessary burdens on individual rights and freedoms. It finds its best expression in the following motto: 'Do not use a cannon to kill a crow'. While the suitability test assesses whether the means are effective in achieving the goal, the necessity test compares alternative means to ensure that no less restrictive options exist to achieve the same goal. Furthermore, these two subprinciples concern factual optimization by avoiding unnecessary costs, thus aligning with efficiency and causality, similar to Pareto optimality. As such, they can be viewed as rationality tests[373]. In contrast, the principle of

369 Ibid 50.

370 Ibid 50.

371 Ibid 102. For its refined version, see Robert Alexy, Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 573.

372 Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 52.

373 Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill 2015) 201–202.

proportionality in the strict sense—the balancing step—requires striking a balance between competing principles. This step goes beyond choosing among alternatives; it aims to synthesize and account for both principles at stake. In that respect, it is more about reasonableness than mere rationality[374].

For proportionality analysis to function effectively, principles rather than rules are needed for the simple reason that rules, being norms that 'require something definitively'[375], are unfit for the balancing step. Alexy, who is primarily interested in offering an analytical explanation for rights-based adjudication, suggested treating constitutional rights as substantive principles that demand optimization. This seems to be the best possible way of explaining why constitutional rights are to be balanced against each other. This link between proportionality analysis and substantive principles can be considered Alexy's 'genuine contribution to'[376] the distinction between rules and principles, as well as to proportionality analysis. Alexy's proportionality analysis, along with his later-developed weight formula[377], operates as follows:

$$Wij = \frac{Ii \,.\, Wi \,.\, Ri}{Ij \,.\, Wj \,.\, Rj}$$

In this formula, **W** represents the abstract weight of each principle, **I** represents the intensity of interference with each principle, and **R** represents the epistemic reliability of the assumption. 'Wij' is the outcome of the balancing, or the concrete weight of the competing principles. Moreover, the balancing formula consists of two steps: a) external

374 Ibid 201–208.

375 Alexy (n 365) 198.

376 Poscher (n 363) 220. This is a significant contribution when particularly seen against the backdrop of the problem of developing a general theory on constitutional interpretation. In a way attesting to the success of Alexy's principles theory, Raz notes: 'The writings on constitutional theory fill libraries. They are often presented as, and almost invariably are, writings on the constitutional practice of one country or another. Few writings on constitutional inter- pretation successfully address problems in full generality; that is, few offer useful lessons regarding the nature of constitutional interpretation as such'. Raz (n 1) 323.

377 Alexy (n 362) 408–410, 418–419.

justification and b) internal justification[378]. The weight formula corresponds to the internal justification step, where arithmetic calculation is performed on the basis of the values assigned to the variables in the formula. The values of these variables are determined during the external justification step, which relies on arguments and evidence. Unlike internal justification, external justification depends on 'arguments external to the balancing itself'[379]. Thus, the rationality of the balancing process hinges on how sound and rational the external justification process is, in which values are assigned to the three variables in the weight formula. In other words, if the weight formula does not clarify how 'the concrete weights to be inserted into the formula are identified, measured, and compared', it risks being 'left hanging in mid-air'[380].

However, Alexy argues that law, as a form of legal argumentation, is a special case of practical discourse. In his view, law necessarily claims correctness, meaning that when evaluating the soundness of arguments in the external justification step, judges must appeal to morality and rationality for guidance[381]. As such, he embeds his principles theory and the weight formula in discourse theory, thereby constraining them within a framework of rational discourse. This connection provides a firmer foundation for the external justification step, which is the most vulnerable part of the balancing process. Drawing on BVerfG case law, Habermas's discourse theory, and Dworkin's distinction between rules and principles, Alexy develops his principles theory to explain the role of proportionality analysis in adjudicating constitutional rights. The popularity of proportionality analysis and Alexy's principles theory lies not only in his analytical clarity but also in his being 'the right theoretical idea in the right place at the right time'[382].

---

378 See, e.g., Jerzy Wroblewski, 'Legal Decision and Its Justification' (1971) 14 *Logique et analyse*, 409.

379 Matthias Klatt, 'Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts' (2015) 4 *Global Constitutionalism* 214.

380 Matthias Jestaedt, 'The Doctrine of Balancing – its Strengths and Weakness' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 164–165.

381 Klatt and Meister (n 356) 4–6.

382 Jestaedt (n 380) 157.

4.2. The Problem of Formal Principles

Alexy appears to follow Dworkin's approach by defining formal principles as conservative, citing 'one should not depart from established practice without good reason'[383] as an example. For Alexy, formal principles are conceived of as authoritative principles, requiring the balancing authority to defer to other authoritative institutions[384]. For example, a formal principle of respect to legislative authority requires that adjudicative institutions should show deference to the legislative decision when finding a balance between competing substantive principles. Consequently, tension arises between formal and substantive principles, rooted in the fact that although principles are optimization requirements and constitutional rights are considered principles, legislatures retain discretion in cases of uncertainty. This discretion leads to the under-optimization of substantive principles, which conflicts with the way principles are intended to function. Alexy addresses this tension by arguing that formal principles require 'the authority of duly issued and socially efficacious norms to be optimized', meaning that 'the formal principle of democratically legitimized legislative decision-making competence' should also be optimized[385]. Simply put, if formal principles are distinct from substantive principles, this distinction helps preserve the integrity of principles theory by allowing Alexy to maintain his commitment to the view that all principles are optimization requirements, even though they differ in kind.

However, it is worth underscoring that the integration of formal principles into Alexy's principles theory was a latecomer, becoming particularly relevant during the 2000s as a result of the increasing discussions on the use of proportionality analysis in balancing socioe-

383 Alexy (n 362) 58.

384 'The more weight that is given to formal principles within a legal system, the stronger is the prima facie character of its rules. It is only when such principles are completely deprived of any weight than the rules would no longer apply as rules' Ibid 58.

385 Alexy (n 362) 416.

conomic rights[386]. It is also bound up with the expansion of the rights catalogue that is used by the courts all across the world and with the more deferential rulings of the last instance courts with the rise of the subsidiarity principle[387]. Between 2002 and 2003, Alexy sought to clarify the role that formal principles play in his principles theory in four key articles[388] and revised his theory by introducing a second (epistemic) law of balancing[389] and making a distinction between epistemic and structural discretions. Even though there are numerous problems with how to square them with each other on the one hand and with the weight formula on the other hand, it is safe to say that these are all authority-related tools. For instance, structural discretion refers to situations in which 'the law itself leaves open the choice

386 Peng-Hsiang Wang, 'Formal Principles as Second-Order Reasons' in Martin Borowski, Stanley L. Paulson und Jan-Reinard Sieckmann (eds) *Rechtsphilosophie und Grundrechtstheorie: Robert Alexys System* (Mohr Siebeck 2017) 429. For socioeconomic rights see, Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 691; and Klatt and Meister (n 352) 85–108.

387 For the ECtHR's jurisprudence, see Patricia Popelier and Catherine Van Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 *Leiden Journal of International Law* 5; and Leonie M. Hujbers, 'The European Court of Human Rights' Procedural Approach in the age of subsidiarity' (2017) 6 *Cambridge International Law Journal* 177. For the EU, see Darren Harvey, 'Towards a Process-Oriented Proportionality Review in the European Union' (2017) 23 *European Public Law* 93. For a more holistic approach comparing the EU and ECHR regime, Başak Çalı, 'Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016) 144.

388 Alexy (n 362) 388–425; Robert Alexy et al. (eds) *Verfassungsrecht und einfaches Recht-Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. Primär-und Sekundärrechtsschutz im Öffentlichen Recht: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Würzburg vom 3. bis 6. Oktober 2001* (De Gruyter 2002); Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433; Robert Alexy, 'The Weight Formula' in Bartosz Brożek, Jerzy Stelmach and Wojciech Zbigniew Załuski *Frontiers of the Economic Analysis of Law* (Jagiellonian University Press 2007) 9.

389 'The more heavily interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'. Alexy (n 362) 418.

between different, but equally legal possibilities'[390], whereas epistemic discretion stems from our limited knowledge both about empirical facts and normative questions[391]. For example, the 'evaluation of facts, the hearing of witnesses, the hearing of evidence' can be considered epistemic discretion granted to lower-order courts. By giving a place to these authority-related concepts, principles theory has situated itself between the model of absolute discretion (purely procedural model), in which the courts are not constrained with any rule, and the model of one right answer (purely substantive) once defended by Dworkin[392]. On this basis, Klatt called their approach the 'procedural-substantive model'[393].

The relationship between formal and substantive principles is the key to assessing the degree of deference shown to authority in the course of balancing. Accordingly, the following two questions become highly essential: i) how to integrate formal principles into the weight formula and ii) how to balance formal principles with substantive principles. In his 2014 article, 'Formal Principles: Some Replies to Critics', Alexy seeks to clarify how formal principles interact with substantive principles and talks about two different models, i.e., the combination and separation models. They differ in how they foresee the relationship between formal and substantive principles. The combination model requires that formal principles be combined with substantive principles before they affect the outcome of a legal decision. In contrast, the separation model permits formal principles to be balanced directly with substantive principles[394]. It is plausible to place both Dworkin's conservative principles and Alexy's conceptualization of formal principles (prior to the postscript) under the combination model, as in both cases, formal principles influence balancing only when paired

390 Matthias Klatt, 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506, 516.
391 Ibid 517.
392 Ibid 516.
393 Ibid.
394 Robert Alexy, 'Formal Principles: Some replies to critics' (2014) 12 *International Journal of Constitutional Law* 511.

with a substantive principle. In other words, formal principles serve to increase the weight of the substantive principles they support. The separation model, on the other hand, can be exemplified by the Radbruch formula, where the substantive principle of legal certainty and the formal principle of justice directly compete.

However, Alexy explicitly warned that balancing formal and substantive principles is a mistake, as it may lead to unwarranted interference with fundamental rights, for example, solely in favour of authority[395]. He also rejects the combination model for the same reason, noting that while the negative impact of authority is reduced in the separation model, it still distorts the balancing formula and results in insufficient optimization of substantive principles. by giving undue weights to formal principles. Indeed, it is not possible to escape from the under-optimization of substantive principles; nevertheless, what Alexy struggles to do is to diminish the negative impact of formal principles on the optimization of substantive principles to such an extent that it would be regarded as tolerable, defensible and justifiable. To address this, Alexy proposed a third approach—the epistemic model—which seeks to minimize the influence of formal principles in the weight formula as much as possible without disregarding them entirely.

Under the epistemic model, second order (meta-level) balancing exists to find a balance between 'constitutional rights as epistemic optimization requirements' and 'the formal principle of the democratically legitimated legislature'[396], which operates alongside the first-order balancing carried out via the weight formula. The purpose of this second-order balancing is to determine whether the epistemic variable, **R**, should be incorporated into the first-order weight formula. In simple terms, the inclusion of variable **R** in the weight formula depends on the outcome of this meta-level balancing. If there is no uncertainty, then there is no need to defer to legislative authority. As such, the epistemic model transfers the degree of epistemic uncertainty to second-order

395 Alexy (n 362) 417–418; Alexy (n 394) 518.
396 Alexy (n 394) 521.

balancing, where it functions as a substantive principle in contrast to the formal principle of democratically legitimated legislatures[397].

It seems that Alexy introduces this second-order balancing to reduce the potential overemphasis of variable **R** in the weight formula. Recall that the weight formula comprises three variables: **I** (intensity of interference), **W** (abstract weight of the principle), and **R** (reliability of empirical and normative assumptions). Given that **R** consists of two components—normative and empirical epistemic reliability—it could have disproportionately influenced the weight formula without second-order balancing. Therefore, Alexy utilizes second-order balancing to decide whether there exists a sufficient degree of uncertainty to defer to the legislative authority.

In developing this epistemic model, Alexy recourses the idea that constitutional rights call for epistemic optimization. However, this does not establish a clear connection between formal principles and epistemic uncertainty, as Wang points out: 'taking account of epistemic uncertainty in balancing is one thing; why deference should be shown to an authority' is another[398]. In this epistemic model, the formal principle of legislative supremacy is indirectly reflected in the variable **R**, making it a specific case of the separation model (substantive-formal balancing)[399]. For this reason, it remains to be seen whether Alexy's epistemic model fares better than its alternatives do[400]. In addition to Alexy's epistemic model, two other suggestions should be considered. The first argues that since formal and substantive principles are fundamentally different, they must be separated and balanced within differ-

397 Ibid 521.

398 Wang (n 386) 435.

399 Alexy (n 394) 521.

400 We can now see that formal principles and the balancing between material principles are two separate things. Alexy's model mixes and combines these aspects. … This is clear from the justification of the second law of balancing. This argument lacks clarity in so far as the second law of balancing does not in any way have regard to the formal principle. The second law of balancing does not lead to a balancing between the competency of the legislature and a material principle. Rather, it prescribes a balancing between epistemic uncertainties and the corresponding material principle.' Klatt and Meister (n 356) 140.

ent domains. Klatt and Meister's 'two-level model'[401] and Sieckmann's 'model of competing conceptions of law' are examples of this formal-formal balancing approach[402]. On the other hand, Borowski's proposal falls under the category of the combination model[403].

Klatt and Meister, who argue that formal and substantive principles are to be separated completely and balanced within different domains (two-level model), propose distinguishing between the level at which substantive principles are balanced (balancing level) and the level at which formal principles are balanced (review level)[404]. Their main purpose is to explain how the discretion granted to legislative authorities is connected with judicial review, as they consider them the 'two sides of the same coin'[405]. In the balancing level, substantive principles are weighted via a weight formula without regard to formal principles. However, epistemic uncertainties play a role in finding a balance between two substantive principles through the variable R in the weight formula[406]. In contrast, the review level seeks to determine how strictly the court is allowed to review legislative acts or rulings from lower courts. This second level determines the degree of judicial review or the degree of deference to be shown to the reviewed authority.

According to Klatt and Meister, 'the minimum amount of review in any relation of judicial review'[407] that the court should conduct is an evaluation of how the internal justification has been established by lower courts or legislatures. They call this 'procedural review', as it is solely concerned with examining 'if the controlled authority has done the balancing correctly'[408]. Thus, any review authority is warranted to check whether epistemic and normative premises lead to the conclusion

401 See, Klatt and Meister (n 356) 100.
402 See, Jan-Reinard Sieckmann, *Recht als normatives System* (Nomos 2009) 200–204.
403 See, Martin Borowski, 'The Structure of Formal Principles: Robert Alexy's "Law of Combination"' (2010) 119 *Archiv für Rechts-und Sozialphilosophie*, 19.
404 Klatt and Meister (n 356) 136–148.
405 Ibid 136.
406 Ibid 142–143.
407 Ibid 143.
408 Ibid.

replaced by the lower-order authorities. For Klatt and Meister, the ability to perform procedural review is the essence of what we understand from judicial review[409]. Because it focuses primarily on assessing the internal justification step and detecting the structural errors made in the balancing process, procedural review grants lower authorities the highest degree of discretion possible[410]. They remain 'free to determine the underlying premises'[411] and assign different values to the variables of the weight formula when confronted with a different case. External justification, however, involves a much more complicated process, as it must also question the reliability of the underlying assumptions regarding the balancing formula. The fundamental issue at this second level is 'to what extent the controlling authority can overrule the decisions of the controlled authority'[412]. Therefore, in the case of stricter scrutiny, the reviewing authority could also challenge the external justification presented by the lower-order authorities.

Neither supreme courts nor constitutional courts hold a monopoly on balancing fundamental rights. Balancing is so pervasive that it is difficult to find any authority that is not expected to weigh competing rights. Borowski, by highlighting the heterarchical and cooperative aspects of balancing, argues that it is essential to distinguish between the 'decision to be reviewed' and the 'review decision'[413]. For example, consider a situation in which a prison administrative body must decide whether a prisoner has the right to keep more than 15 books in their cell[414]. In this case, the administrative body inevitably balances the right to receive information or education against the need for prison securi-

409 They consider 'errors in internal justification, namely, in the structure of balancing' 'so fundamental as to be included in any review of any type. If the reviewing body lacks this competence, one cannot speak of proper judicial review'. Ibid 143.

410 Ibid 143.

411 Ibid 143.

412 Ibid 144.

413 Martin Borowski, 'Limited Review in Balancing Fundamental Rights' (Unpublished manuscript) 13–14. Available at: https://icjp.pt/sites/default/files/cursos/documentacao/borowski_-_limited_review_.pdf.

414 See Turkish Constitutional Court's decision on following a constitutional complaint, AYM Özkan Kart, B. No: 2013/1821, 5/11/2014,

ty. Furthermore, administrative courts may then rule on whether the administrative body violated the prisoner's fundamental rights. Finally, a higher court may issue a judgment on the basis of the law rather than the merits of the case. In other words, there exists a 'chain of balancing decisions'[415] wherein courts and administrative bodies work collectively and cooperatively to strike a proper balance between competing rights.

From this temporal and sequential dimension of balancing, it follows that 'the review of whether a preceding decision is unlawful leaves structural discretion to the "decision to be reviewed" and the body that made that decision'[416]. This, in turn, leads to limited judicial review, as each authority is bound by the balancing decisions of the lower authority, whether it is a legislative act or an appellate court ruling. According to Borowski, the notion of limited review refers to the 'limitation of the review competence of the reviewing body'[417]. In summary, the reviewing authority is inherently constrained by the rulings or decisions of the preceding authorities. Those legal institutions that stand as the final courts in this chain of judicial review, such as constitutional or international courts such as the ECtHR or the ECJ, may enjoy wider discretion in their decisions[418]. However, it is misleading to assume that their discretion is unlimited. For instance, they need to rely on the judgments of the lower courts with respect to the evaluation of factual evidence unless there are significant reasons not to do so.

It would not be incorrect to argue that Alexy's weight formula is designed mainly from the perspective of a court of last instance. Borowski, to incorporate the limitations faced by such courts, suggested that a variable of formal principles (Pf) should be added to the weight formula[419], suggesting that the decision of the reviewed authority is to be respected unless epistemic uncertainty exists with respect to how

415 Borowski (n 413) 13–14.
416 Ibid 13.
417 Ibid 15.
418 For a classification of discretion into two different forms (weak and strong), see Dworkin (n 357) 32–33.
419 Borowski (n 413) 27. This formal principle will also be comprised of abstract weight of deference and the intensity of interference.

to balance competing substantive principles[420]. We may summarize his formula as follows: 'The greater the epistemic uncertainty, the more weight is accorded to the formal principle 'Pf,' and, in turn, the more limited the review of the balancing of substantive principles'[421]. Wang has recently taken a very similar position, arguing that formal principles are better viewed 'as a special kind of second-order reason: it is both a reason to act on the decision of some authority and a reason not to act on one's own judgment of what the objective balance of reasons requires'[422]. The point on which they differ from Razian exclusionary reasons is that they are reasons not to 'preempt balancing of first-order *pro tanto* reasons' but to 'disregard one's subjective assessment of the balance of reasons'[423]. Seen in this light, formal principles operate as conditional or "epistemically bounded reasons" in that the deferring authority's reliance upon the decision of the deferred authority will be conditional upon the degree of uncertainty at stake[424]. The result of the question of when and to what extent the deferring authority is to show deference will be determined only with case-specific second-order balancing[425].

4.3. How can Formal Principles be balanced?

Separating formal principles from substantive principles, as suggested by Klatt and Meister, may enable us to distinguish between judicial

420 Ibid 15.

421 Ibid 28. The new weight formula will be as such; $Wij = \frac{Wi.\,Ii.\,Ri + Pf}{Wj.\,Ij.\,Rj}$. The Pf may be either in the nominator or denominator in accordance with the decision to be reviewed.

422 Wang (n 386) 442. Indeed, Alexy already specifies in A Theory of Constitutional Rights that 'Raz takes the view that norms are reasons for actions. In contrast, the position taken here is that rules are reasons for norms. The gap between the two views is actually smaller than might seem, since if rules and principles are reasons for norms, they are indirectly reasons for actions.' Alexy (n 362) 59.

423 Wang (n 386) 443.

424 Ibid 447.

425 Ibid 448, Wang calls this 'variable epistemic threshold' upon which the deferring authority will continue to show deference to the other authorities.

deference and the balancing of substantive rights. This, in turn, provides a solid foundation for a more intelligible process in balancing formal principles. Regarding Borowski's limited review, it may be argued that it does not fundamentally alter Alexy's epistemic model, as the underlying logic in both models treats formal principles as secondary to substantive principles. In their frameworks, formal principles are contingent upon either second-degree balancing (Alexy) or the degree of uncertainty (Borowski and Wang). However, at the end of the day, formal principles impact the balancing formula only when they are combined with substantive principles. Thus, their models are merely different versions of the combination model.

Against this backdrop, I contend that the combination model should be discarded, as it is overly complex and has various shortcomings. Instead, I propose balancing formal principles directly with other formal principles. In this light, I argue that it is preferable to adopt the two-level model, as it is the clearest among the proposed alternatives. Its clarity lies in its sharp distinction between formal and substantive principles, even though they may influence one another. Moreover, it is plausible to focus solely on the review level in this model to determine the appropriate degree of review. This model allows for a balance between two formal principles, such as democratic legitimacy and judicial competence.

One of the best examples supporting the foregoing argument is that a two-level model is widely used by international courts when they resolve how much deference they need to show to the judgements of domestic authorities[426]. For example, the ECtHR has recently introduced a crucial factor to be considered when deciding whether to grant domestic authorities a margin of appreciation (MoA) or not—namely, 'the quality of decision-making, both at the legislative stage and before the courts'[427]. This variable allows the ECtHR to show deference to

426 See, e.g., Gabriel Encinas, 'The Idea of "Interlegal Balancing" in Multilevel Settings' in Maja Sahadžić et al. *Accommodating Diversity in Multilevel Constitutional Orders: Legal Mechanisms of Divergence and Convergence* (Routledge 2023) 21.

427 Robert Spano, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 498. The relevant

domestic authorities when they 'act in good faith'[428] in that they strike a fair balance between conflicting rights and apply the proportionality analysis as it is done by the court itself. This new approach to judicial decision-making at the interface is termed by Spano 'process-based review'[429], as it aims to encourage national authorities to fulfil their obligations in securing convention rights through a reward mechanism. For this reason, this procedural turn is, for Spano, also normatively desirable because it regards successful domestication of the Convention as a factor in deciding whether to extend the domestic MoA. For this reason, it is viewed as a 'democracy enhancing approach'[430], indicating that the discretion that domestic authorities enjoy derives its normative value from the way in which they treat their citizens. The Court views the correct application of proportionality analysis as an indication that domestic authorities are progressing towards becoming established democracies where human rights are both respected and well protected. Simply put, domestic authorities have discretion only if it is demonstrated and justified

The institution of judicial review is caught between Scylla and Charybdis: it either risks undermining the principle of democratic governance by having the final say on human rights or leaves the protection of human rights at the mercy of parliamentary majorities[431]. As such, the legitimacy of judicial review of human rights focuses on finding a proper balance between these competing interests undergirding two different formal principles. In response, Klatt proposed a flexible model of judicial review by referring to the issue as a 'conflict

cases include Animal Defenders v. The United Kingdom, Parrillo v. Italy, S.A.S. v. France, Dakir v. Belgium.

428 Başak Çalı, 'Coping With Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 *Wisconsin International Law Journal* 237, 242.

429 Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473, 480 480–494.

430 Spano (n 427) 497–499. Spano (n 429) 488–492.

431 Matthias Klatt, 'Positive rights: Who decides? Judicial review in balance' (2015) 13 *International Journal of Constitutional Law* 354, 357.

of competences': the competence of democratic governance and the competence of judicial review[432]. According to Klatt, 'the correct intensity of judicial review will always be sensitive to the circumstances'[433], as these competences are formal principles whose balance calls for a case-specific balancing exercise[434]. This is clear in Klatt's following remarks:

> *'Both the legislature's competence to decide and the court's competence to conduct constitutional review must, prima facie, be realized to the greatest extent possible. However, they pull in different directions. Only a balancing procedure can determine the definite degree of realization of both formal principles'*[435].

For Klatt, conflicts between institutions with respect to competences must be resolved through balance. This requires what he calls 'institutional practical concordance', whereby when institutional competences conflict, neither should be completely subordinated to the other[436]. Simply put, the competence of judicial review 'is not an either-or matter but one of degree'[437]. One of the best examples of this normative idea of institutional practical concordance may be found in what he calls the 'Bermuda Triangle'[438] of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and national constitutional courts. Solange jurisprudence, where the principles of

---

432 Ibid 363.

433 Ibid 366.

434 As Klatt states, 'only a balancing procedure can establish the definite degree of realization of both formal principles'. Klatt (n 379) 212.

435 Ibid.

436 Here, Klatt draws from Hesse's notion of 'practical concordance', which holds that 'when fundamental rights compete as they frequently do, neither of those rights has to give way completely. Rather they must be correlated in such a way that both gain reality'. Klatt transfers this idea from the substantive level of fundamental rights to the institutional level of legal authority and competence. Matthias Klatt, 'Judicial review and institutional balance. Comments on Dimitrios Kyritsis' (2019) 38 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 21, 24–25.

437 Ibid 26.

438 Klatt (n 379) 198.

proportionality and subsidiarity play crucial roles in mediating the conflicts of competence between the EU and member states, serves as a telling example of institutional practical concordance. In Solange I, the BVerfG denied the principle of supremacy of EU law, affirming that it would continue to carry out fundamental rights review so long as the EU legal order fills its gap in fundamental rights protection[439]. Nevertheless, 12 years later, in 1986, the Court ceased to carry out its fundamental rights review, finding the level of protection ensured by the EU legal order substantially equivalent to that of Germany. It further admitted that it would abstain from such a control activity, 'as long as the European Communities ensure effective protection of fundamental rights'[440].

Klatt underscores that the conflict of competences has a multi-faceted nature, including legal, logical, formal, actual, and concrete dimensions[441]. However, a comprehensive analysis of these dimensions falls beyond the scope of this study. Therefore, the focus here will be on his proposal to strictly distinguish between formal and material principles[442]. While substantive principles concern fundamental rights, formal principles include the rule of law, separation of powers, legal certainty, and protection of fundamental rights[443]. Given that discussions on the nature and scope of formal principles are still fledgling,

439 As long as [Solange] the integration process [in the European Communities] has not progressed thus far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings [involving conflicts of Community secondary law and fundamental rights under the German Basic Law] … is admissible and necessary.' See BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974), available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588.

440 BVerfGE 73, 339 2 BvR 197/83 Solange II decision, 22 October 1986, available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572.

441 Klatt (n 379) 200–201.

442 Ibid 203.

443 Ibid.

this monograph focuses on, for the sake of clarity and simplicity, competences such as legislative power, amendment power, and the judiciary's control over the amendment power as examples of formal principles.

Ultimately, in the process of balancing formal principles, each principle 'pulls in different directions'[444] with the goal of realizing its potential to the greatest extent possible under concrete circumstances. In his analysis of the Solange I and II cases, Klatt demonstrated how to balance formal principles. The key issue is determining the concrete weight of each principle through external justification. To facilitate this, Klatt proposed five external justification criteria: (a) democratic legitimacy, (b) the quality of the decision, (c) the quality and effectiveness of the legal system as a whole, (d) the significance of the material principles, and (e) the principle of subsidiarity[445]. For external justification, values are assigned to the variables in the weight formula via a triadic scale (severe, moderate, or light)[446]. Once external justification is completed, the internal justification phase begins. The internal justification unfolds in three stages. In the first stage, the degree of nonsatisfaction of the first principle is determined. In the second stage, the importance (degree) of satisfying the second principle is evaluated. In the third stage, it is determined whether it is justifiable to satisfy the second principle at the expense of the first[447].

The logic of internal justification is deductive, whereas the logic of external justification is inductive. For this reason, in external justification, unlike internal justification, the strength of the arguments depends on choices made from ethical, moral, and political perspectives. Simply, as reflected in the weight formula, internal justification is based on conclusions drawn from external justification. In addition, I think this is one of the most important aspect of balancing formula, that is, it helps draw a clear distinction between the internal and external

444 Ibid 212.
445 Ibid 214–216.
446 Ibid 213.
447 Ibid.

justification steps. This distinction allows us to separate which aspects of the decision are based on external assumptions (external justification) from those that are derived from the formal balancing process (internal justification). While the decision maker's value assignment might initially seem subjective, the underlying arguments must support the assigned values.

4.4. Transfer of Klatt's Five External Justification Criteria to the UCA Context

Judicial review of constitutional amendments is better seen not as something qualitatively[448] different from the judicial review of ordinary laws and regulations. This is because both involve similar competing principles: the legislature's competence in making policy choices and the judiciary's competence in overseeing the legislature. While the former stems from the principles of democracy and democratic legitimacy, the latter is grounded in the principle of constitutional supremacy. Transferring the notion of conflicts of competence to the context of unconditional constitutional amendments (UCAs) replaces the conflict between national and supranational legal orders with the conflict between amendment and constituent powers. While Klatt's case involves a conflict between two courts and two different legal orders[449], in the case of UCAs, the conflict lies between amendment and constituent powers.

If the distinction between the judicial review of constitutional amendments and legislative acts is indeed a matter of degree, then

448 Alexy and Bernal defends the nonidentity(separability) thesis. 'There can be no identity between constitutional review of constitutional amendments and constitutional review of ordinary laws. This can be called the *nonidentity thesis* (I owe this remark on the nonidentity thesis to *Robert Alexy.*)'. Bernal (n 60) 356. For a criticism of the sharp distinction between constitutional amendment and replacement, see Dixon and Landau (n 278). Raz similarly notes: 'Constitutional politics may not be the same as parliamentary politics, but they are not altogether separate either.' Raz (n 1) 327.

449 Klatt (n 431). 357.

the scope of judicial review could also extend to constitutional amendments. Since both involve similar underlying principles—the check on legislative and amendment powers in favour of constituent power—it is appropriate to transpose Klatt's external justification criteria to the UCA context. Klatt outlines five external justification criteria[450], but owing to the unique importance of the principle of subsidiarity in the EU context and its irrelevance in the UCA context, it will be replaced by the 'political capital criterion'. This is because constitutional courts, in their decisions, often grapple with policy choices regardless of their significance. Moreover, in the context of UCAs, the relationship between political and legal domains gets further blurred and complicated, as is already shown when discussing the concept of constitutional identity. Constitutional amendments typically concern highly debated topics and inevitably encompass important sociopolitical questions concerning the past and future of a political community. Accordingly, the five external justification criteria that determine the concrete value of each formal principle in our balancing analysis are (a) democratic legitimacy, (b) the quality of the decision, (c) the effective functioning of the legal system as a whole (rule of law criteria), (d) the content of the amendment, and (e) the political capital of the courts.

Given the democratic legitimacy criterion, it is worth underscoring that constitution-making is a collaborative and collective activity. Thus, this criterion suggests that 'the more democratic the process is in terms of 'the degree of deliberation, time, participation and public support', the less will be the degree of judicial scrutiny'[451]. As Roznai incisively observes, 'we the people' is distinct from 'oui the people'[452], contrasting

450 Klatt determines 5 very similar external justification criteria while he is analysing positive rights: i) 'the quality of primary decision', ii) 'the epistemic reliability of premises used', iii) the democratic legitimacy, iv) the material principles at stake, and v) 'the specific function fulfilled by the relevant competences'. Klatt (n 427). 354–382.

451 See Jackson (n 127) 338–339. For the argument that the weaker the democratic legitimacy of an institution, say the ECB or Bundestag, the more it will be under stricter judicial review, see BVerfG, 2 BvR 859/15, 05 May 2020, para. 115 (PSPP judgment).

452 Roznai (n 49) 295–316.

a genuine exercise of constituent power with mere acquiescence to a leader's will, as exemplified by Napoleon Bonaparte, who presents himself as 'the constituent power'[453]. Democratic legitimacy demands more than a simple yes/no referendum[454] so much that its 'exercise should incorporate actual, well-deliberated and thoughtful, free choice by society's members' in an 'inclusive, participatory, time-consuming, and deliberative' way[455]. As such, a decision taken behind the closed doors and then ratified with a referendum does not suffice to endow it with the title of democratic legitimacy.

Today, we are witnessing *a turn from legal interpretation to public reason-oriented justification*'[456] not only in the judiciary but also across legal systems. This shift enhances the overall quality of parliamentary decisions because it strengthens the idea that no decision-making authority should be left unchecked regardless of its legitimacy from the perspective of democracy. Historically, a key question has been whether parliamentary decisions are legitimate solely because they reflect the will of the Parliament or if the quality of the parliamentary decision-making process also matters. What we are witnessing today is a procedural turn in judicial review, as evidenced by the rulings of the ECtHR, ECJ, and BVerfG, where courts are increasingly focused on the quality of the parliamentary process as indicative of the quality of the outcome rather than merely the outcome itself[457]. For instance, once regarded as

453 Hannah Arendt, *On Revolution* (Penguin Books 1963)163, cited from Roznai (n 49) 298.

454 Roznai (n 49) 312.

455 Ibid 313.

456 Mattias Kumm, 'The idea of Socratic contestation and the right to justification: the point of rights-based proportionality review' (2010) 4 *Law & Ethics of Human Rights* 142.

457 For the ECtHR, see Janneke Gerards and Eva Brems (Eds.) *Procedural Review in European Fundamental Rights Cases* (CUP 2017); for the CJEU see Patricia Popelier, 'Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach' (2019) 15 *European Constitutional Law Review* 272; and for the BVerfG as an example of domestic courts see Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016).

a sacred domain immune to scrutiny by the courts, the parliamentary process has begun to be viewed as important factual evidence illustrating the participatory and deliberative quality of decision-making[458]. Various terms have emerged to describe this trend, including semi-procedural review[459], procedural review[460], evidence-based law-making[461], and legisprudence[462]. They all converge on the fundamental idea that the legitimacy of a legislative act relies on the quality of the decision-making process as well as the outcome itself. Accordingly, it is crucial to recognize our second criterion—the quality of decision—which posits that 'the more qualified and elaborated the outcome of a constitutional amendment is, the less the degree of judicial scrutiny'[463] will be, reflecting this procedural shift as part of a broader culture of justification and rational law-making.

The third criterion for external justification is the rule of law (RoL), which posits that 'the more qualified and elaborated the outcome of a constitutional amendment is, the less the degree of judicial scrutiny'[464]. This criterion is grounded in the assumption that as principles of the rule of law[465]—such as predictability, generality, and nonretroactivity—

458 See, e.g. Suzei Navot 'Judicial Review of Legislative Process' (2006) 39 *Israel Law Review* 182.

459 Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

460 Gerards and Brems (n 457).

461 Rob Van Gestel and Jurgen de Poorter, 'Putting Evidence-Based Law-Making to the Test: Judicial Review of Legislative Rationality' (2016) 4 *The Theory and Practice of Legislation* 155.

462 Luc J. Witgens, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in Luc J. Witgens and A. Daniel Oliver-Lalana (eds) The Rationality and Justification of Legislation: Essays in Legisprudence (Springer 2013) 1.

463 When applied to the relationship between a lower and higher order courts, this formula requires assessing the quality of judicial reasoning. For an edited volume on this issue, see Mátyás Bencze and Gar Yein Ng (Eds) *How to Measure the Quality of Judicial Reasoning* (Vol. 69) (Springer 2018).

464 This directly follows from the second criterion, that is, the quality of amendment process.

465 These include generality, promulgation, prospectivity, coherence, clarity, practibility, constancy, coherence in the implementation. Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 33–91. To this list Raz adds following principles mostly associated with the functioning of courts: the independence of the judiciary must be guaranteed; natural justice must be observed; courts must

are upheld, the judiciary has less reason to intervene in the political decision-making process. This assumption results from the idea that the RoL serves to create a stable and predictable sociopolitical environment in which individuals can live an autonomous life by making both short- and long-term plans. Taking a cue from Gardner, I suggest thinking of the RoL as 'a modal ideal' whose purpose is to ensure that political authorities work functionally well and operate 'in good shape'[466]. For this reason, it is better viewed as 'subsidiarity' to the primary services that a political authority is supposed to deliver, as well as to the 'various purposes of the various rules that are upheld, regulated by external morality'[467]. It is, therefore, 'an intermediate destination'[468], primarily concerned with the mode of governance between authority and subject, i.e., the way in which political authority treats its subjects and delivers them various services, including authoritative guidance. The fact that the RoL ensures stability and predictability because it provides guidance to authorities with respect to how to govern their societies is well captured by Raz:

> 'The RoL consists of principles that constrain the way government actions change and apply the law – to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well.'[469]

One thing that follows from the definition of the RoL as a modal ideal subject to external morality is that there are many values to be realized, and interests protected by law and the RoL are only one political value, such as living a life according to one's own preferences, living a life with liberty and happiness, and living a prosperous life without being wor-

---

have the reviewing power over some principles; courts should be accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law. Raz (n 221) 217–219.

466 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 211.

467 Ibid.

468 Ibid.

469 Joseph Raz, 'The Law's Own Virtue' (2018) 39 *Oxford Journal of Legal Studies* 1, 12–13.

ried about poverty[470]. Additionally, this criterion assumes that political authorities respecting the principles of the RoL are likely to be more resistant to populist capture than those authoritarian regimes where these principles are apparently neglected[471]. It is worth remembering, however, that this modal quality of the RoL also risks failing to detect the potential backsliding experienced in a political system with this criterion only[472]. However, we have other criteria in our weighting formula to mitigate this shortcoming.

The fourth criterion for external justification is 'the content of the amendment', expressed by the following formula: 'the more the amendment is related to the constitutional structure and mechanisms of checks and balances, the greater the degree of judicial scrutiny'**.** This formula suggests that some provisions hold more constitutional significance than others do, as indicated by concepts such as constitutional identity, the constitutional escalator, and the tiered-amendment rule. In addition, I believe that the best way to determine these constitutional provisions that are more significant than others is to look at the constitutional history and tradition of a particular political system through the normative principles of constitutionalism. As such, this criterion is subject to some degree of social and historical contingencies. For instance, while Turkish and Indian political communities assign more importance to secularism, French views republicanism as an indispensable value enshrined in their constitutional system. Additionally, greater emphasis may be placed on the independence of the judiciary, as it is not only one of the first frequently targeted institutions by

470 As aptly put by Gardner: 'Legalists overstate the importance of the rule of law (or of everyone's 'playing by the rules', as their deceptively chummy expression has it) as compared with other moral and political ideals. For some, indeed, the rule of law is the be-all-and-end- all of sound government, the one and only valid political ideal'. Gardner (n 466) 197.

471 For an example from Turkish context see, Çapar (n 353).

472 'And, what may be good and fair in one democratic setting may be unfair and authoritarian in another. One could indeed put together quite an authoritarian system by choosing some particular mix of regulations from various liberal democratic states.' Andrew Arato, 'The constitutional reform proposal of the Turkish government: The return of majority imposition' (2010) 17 *Constellations* 345, 347.

populist governments but also a necessary condition for living under a political regime observing the principles of the RoL.

The fifth criterion is 'the political capital' accumulated by the court. According to this criterion, the accumulated legitimacy of the court increases the possibility that the court is warranted to exercise a judicial review of constitutional amendments[473]. As Whittington observes, 'the independence of the judiciary cannot be assumed', as it must be understood as 'interdependent' on the cooperation of elected officials[474]. Given that courts function as political actors[475], it follows that 'if they get too far out of line, they may well end up in serious trouble'[476]. Conversely, these constraints imply a mutual and interdependent relationship between courts and political actors; that is, courts are not only limited by political actors but also rely on them to enforce their rulings. Against this backdrop, I draw on Raz's argument that there is a 'principle of political morality'[477] whereby public officials and institutions should be accountable to individuals for their actions and decisions. From here, it springs that when courts are faced with incommensurable options and reasons, they 'should develop or adopt distancing devices—devices they can rely on to settle such issues in a way that is independent of the personal tastes of the judges or other officials involved'[478]. One very useful distancing device available to judges is that they can rely on the well-known historical argument that they make their decisions solely according to legal considerations and nothing more. Relying on legal doctrine when faced with incommensurable choices, Raz says, is justified unless it 'prevents a court from adopting

473 For an article exploring how judicial institutions accumulate political capital over time, Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wis. L. Rev.* 683.

474 Keith E. Whittington, 'Legislative sanctions and the strategic environment of judicial review' (2003) *International Journal of Constitutional Law* 446.

475 For constitutional courts as political actors, see Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002).

476 Bary Friedman, 'The importance of being positive: the nature and function of judicial review' (2003) 72 U. *Cin. L. Rev.* 1257, 1278.

477 Raz (n 1) 369.

478 Ibid.

an innovative interpretation that could improve the constitution'[479]. Be that as it may, it is prudent for the courts to support their arguments with the legal doctrine, as much as possible, particularly when they are deciding on politically salient issues such as the constitutionality of a constitutional amendment.

479 Ibid.

5. Colombian Re-Election Saga as an Example of Balancing Formal Principles

> *'On this occasion, the Court had to define, regardless of the consequences and risks implied in the decision, whether Colombia is a democracy exclusively founded on the principle of the majority or a constitutional democracy in which the majority—no matter who leads it—must comply with the limits and restrictions established in the Constitution.'*
>
> **Justice Jaime Cordoba Trivino**[480]

Having taken stock of the external justification criteria, the internal balancing phase determines whether the court should strike down the constitutional amendment or uphold its constitutionality. To shed light on how this balancing process unfolds, this essay draws upon the two re-election cases of the Colombian Constitutional Court. Just as Klatt analysed the Solange 1 and Solange 2 decisions to explain how formal principles are balanced, it similarly scrutinizes the first and second re-election cases of the Colombian Constitutional Court to highlight how the courts, perhaps unconsciously, applied the balancing formula. In doing so, it aims not only to provide a descriptive analysis but also to make a normative claim about how courts should implement the balancing formula on UCAs.

480 Dissenting Judge in Colombia Constitutional Court's C1040/05 (First Re-Election Case) decision.

5.1. The First and Second Re-Election Cases

The Colombian Constitutional Court ranks among the most successful courts globally, alongside the Indian and South African Supreme Courts. The court's success lies not only in its proper use of UCAD but also in its progressive rulings on social rights and terror-related cases[481], all of which have significantly impacted the country's political landscape in the last two decades. In one of its most renowned decisions, the second re-election case, the court invoked the UCAD to strike down the constitutional amendment that would have allowed incumbent president Álvaro Uribe to be elected for a third time. The significance of this decision is underscored by the fact that, while the court upheld a similar constitutional amendment in the First Re-Election Case of 2005, it declined to do so in 2010 in a nearly identical case. Despite the apparent inconsistency at first glance, a closer investigation reveals continuity between the two rulings.

Pursuant to Article 241[482] of the Colombian Constitution, the judicial review of constitutional amendments does not fall within the constitutional court's competence. Furthermore, the Constitution does not contain any eternity clauses that could aid in the advancement of the UCAD. Despite these limitations, the Colombian Constitutional Court, in its C-551/03 decision, stated the following:

> '*… even though the 1991 Constitution does not establish any express petrified or unmodifiable clause, this does not mean that the power of reform lacks limits. The power of reform, a constituted power, has material limits, because the power to reform the Constitution does not*

481 For the Colombian Constitutional Court's progressive and activist rulings in areas related to socioeconomic rights, Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health' (2010) 52 *Latin American Politics and Society* 67.

482 See Articles 374–378 and 379 of the Colombian Constitution.

include the possibility of derogating it, subverting it, or substituting it in its entirety."[483]

This was the first time that the court distinguished between constitutional amendment and replacement. In this case, without annulling the amendment in its entirety, the court struck down two provisions: a) the preliminary questions asked to voters in a manipulative manner and b) the block vote requirement. Having partially and deferentially implemented the UCA doctrine in 2003, the court in the First Re-Election Case of 2005 faced an amendment to Article 197, which prohibited the re-election of the president. The amendment, approved by Congress, was challenged by citizens on the grounds that it contradicted the article itself. In its C-1040/05 decision, the Colombian Constitutional Court, by a seven-to-two majority, ruled that the amendment was constitutional. For the court, although constitutional amendments and replacements are distinct concepts, Congress retains the authority to alter the Constitution in accordance with 'society's evolution and citizens' expectations'[484]. Nevertheless, the court explicitly stated that the responsibility to demonstrate the difference between an amendment and a replacement rests with the court if the amendment is to be annulled as unconstitutional[485]. By shifting the burden of proof, the court indicated that annulling a constitutional amendment requires a higher level of justification than annulling a legislative act. Furthermore, in this case, the court held the following:

"… allowing presidential re-election for a single additional term … is not an amendment that substitutes the 1991 Constitution with a wholly different text. The essential elements that define our democratic and social state of law, founded on human dignity, were not replaced by amendments. The people will freely decide who to elect as president, institutions with powers of control and review will continue

483 Decision C-551 of 2003 (Colombia Constitutional Court), cited from Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) 355.

484 Decision C-1040 of 2005, cited from Espinoza and Landau (n 483) 343.

485 Ibid. 345.

> *to have full authority, the system of checks and balances will still operate, the independence of constitutional bodies is safeguarded, and the executive is not granted new powers…"*[486]

Strikingly, the court held the view that the re-election of the incumbent president would neither weaken checks and balances nor compromise the independence of the judiciary, deeming it insufficient to qualify as a constitutional replacement. Additionally, the court, drawing upon examples from other Latin American countries, argued that the re-election of an incumbent is neither an uncommon nor a unique phenomenon, even in fully developed democratic states. Although the prohibition of re-election holds special significance in Colombian constitutionalism—being the result of specific societal and historical experiences—the court argued that this clause is not beyond renegotiation or reform, provided that due consideration is given[487]. In conclusion, after thoroughly addressing the objections raised by opponents of the amendment, particularly regarding the separation of powers and fundamental rights, including the right to be elected, the court determined that the proposed amendment was not unconstitutional[488].

Following Uribe's second re-election in 2006, he served as president until 2010. As Uribe's second term neared its end, his supporters at Congress proposed an amendment to allow him to serve a third term. The issue once again came before the court, which, in its well-known decision, was ruled by a 5–4 majority that the proposed amendment was unconstitutional. The court reasoned that a third term, amounting to 12 consecutive years in office, posed a significant threat to the separation of powers and the rule of law[489] to the extent that 'the 1991 Constitution would not be recognizable once a second presidential re-election had been authorized.'[490] Moreover, the court underscored that

486 Ibid.
487 Ibid 346.
488 However, it is worth stressing that the court struck down a provision whose purpose is to give the highest administrative court the authority to enact statutory law under certain conditions during the electoral process. Ibid 349.
489 Ibid 355–358.
490 Ibid 358.

the constitution makes no meaningful distinction between a legislative amendment and a popular amendment approved by referendum—neither equates to constituent power, implying that both are constrained by the Constitution[491]. After scrutinizing the proposed amendment for its constitutionality, the court concluded that a third term would have such a detrimental effect on the existing constitutional structure that only a constituent assembly, under Article 376 of the Constitution, would have the authority to enact it[492].

In these cases, the court struggled to address two distinct issues and find a balance between two different competences. On the one hand, it sought to evaluate the negative impact of a third presidential term on the separation of powers, particularly concerning the legislative branch. On the other hand, it wrestled with balancing the right to run for presidential office with the need to preserve institutional checks and balances. Some courts in Latin America have framed the conflict over presidential re-election as a clash between constitutional rights and the separation of powers[493]. Unfortunately, this can lead to the misuse of constitutional rights to bypass constitutional limits. This tension is also evident in the two re-election cases of the Colombian Constitutional Court. In the first case, the court placed considerable emphasis on the right to be elected, whereas in the second re-election case, it underscored the importance of institutional balance and the potential negative impact a third term could have on it.

491 Ibid 352; For the Court, only a constitutional assembly, which is convened by the people may be the constituent power. Even under this situation, the constituent power cannot act unlimitedly, and it is limited by 'the imperative norms of international law and of international human rights treaties, to give two examples.' Ibid 353.

492 Article 376: 'By means of a law approved by the members of both chambers, Congress may stipulate that the people decide by popular vote if a Constituent Assembly should be called with the jurisdiction, term, and members determined by that same law.'

493 For Honduras case Landau, Dixon, and Roznai (n 295).

5.2. The Implementation of Formal Principles in the Re-Election Cases: Balancing Unconstitutional Constitutional Amendments

Allow me to proceed with demonstrating how the Colombia Constitutional Court's two re-election cases present us with a telling example of how to use formal principles in balancing UCAs. Recall that balancing involves two competing formal principles: the legislature's ability to amend the constitution and the judiciary's ability to review constitutional amendments. Importantly, the external justification criteria (the content of the amendment, democratic legitimacy, the rule of law, the quality of the decision, and political capital) collectively determine the specific weight assigned to each principle. Furthermore, it is crucial to note that the balancing of formal principles occurs at the 'review level' in Klatt and Schmitt's two-level model. The analysis will therefore focus on a relational comparison of the two decisions. Not only is it nearly impossible to apply an objective criterion in this context, but it is also necessary to draw a contextual comparison between the cases.

The Content of the Amendment (C): First, although both re-election cases involved the extension of the presidential term limit, the court, in each ruling, assigned different weights to the degree of interference with unamendable principles. In the second re-election case, the court concluded that the proposed amendment would have a serious adverse impact on checks and balances—unamendable principles—and thus assessed the degree of interference with the constitution's basic structure as severe. However, in the first re-election case, despite acknowledging the negative effects of the amendment on the basic structure, the court noted that other countries allow a second presidential term. Therefore, in the first case, the degree of interference was assessed as moderate or light. Additionally, while the court considered the negative effects of an eight-year presidency, it found that they were insufficient to seriously undermine the constitution's basic structure. In contrast, in the second case, the court explicitly focused on the impact that a 12-year presidency

could have on the constitutional structure, noting that such a long tenure could allow the president to reshape independent authorities and the judiciary according to his ideological preferences. Consequently, the court concluded that the proposed amendment would seriously interfere with unamendable principles[494].

The Democratic Legitimacy (D): Regarding the democratic legitimacy criterion, there is little reference to the amendment procedure, making it difficult to assess the democratic qualities of the amendment process in terms of participation, deliberation, timing, and public support. However, in the second re-election case, the court clearly emphasized that the approval of a constitutional amendment by referendum does not grant it greater legitimacy than an amendment passed by parliament. Both are expressions of constituted power and are, therefore, limited by the Constitution. Consequently, the court assigned equal weight to the degree of democratic legitimacy in both decisions.

Importantly, however, as Roznai suggested, the more an amendment process excludes people from the process, the more it resembles governmental power[495]. Conversely, the more it includes the people in the process of amending the Constitution, the more it aligns with popular (amendment) power[496]. All things considered, it is still arguable that a constitutional amendment ratified by the people in a referendum carries greater legitimacy, and annulling such an amendment may pose

494 'The lengthening of the presidential term to twelve years implies the rupture of the equilibrium between the president invested with relevant powers by the presidential system, with reinforced nomination powers and whose term would coincide with those of the officials in the distinct control organisms and courts which he designated ..., and the role played by those organisms of control in assuring checks and balances on presidential power. In addition, a president who is part of a political majority with congressional majorities, will control not only the executive and legislature but also organs of the judicial branch and autonomous and independent organs like the Bank of the Republic and the National Television Commission, precisely by virtue of those previously described nomination powers.' Decision C-551 of 2003, cited from Espinosa and Landau (n 483) 355.

495 Roznai (n 49) 163.

496 Ibid. For the sake of simplicity, allow me to treat the popular amendment power as constituent power.

significant challenges in terms of democratic legitimacy. This is why 'courts have frequently denied jurisdiction over amendments passed through popular vote, showing self-restraint'[497]. To overcome this difficulty, constitutional review of amendments is said to occur 'after the approval by the legislature but before the entry into force of an amendment'[498]. This *a priori* review would allow courts to avoid facing amendments ratified by the people, ultimately helping them maintain democratic legitimacy in the public's eyes. Additionally, this type of review would help courts conserve their limited political capital.

The rule of law (R): As mentioned earlier, the weaker a country's rule of law mechanism is, the greater the level of judicial scrutiny that is needed. Thus, it seems reasonable to assert that in fragile democracies, courts tend to have more freedom than do those in well-established democracies. Additionally, it can be argued that the longer a president remains in office, the less effective the rule of law mechanisms will likely become. On the basis of these two assumptions, it can be inferred that the second re-election case was poised to make the Colombian political system more vulnerable to rule of law backsliding because of President Uribe's eight consecutive years in office. Therefore, while the court assessed the degree of interference with the constitutional structure as light in the first re-election case, it evaluated it as severe or moderate in the second case when applying the rule of law criterion.

The quality of decision (Q): In terms of decision quality, neither ruling provides clear indications of the overall quality of judicial reasoning. However, in the historical context, there appears to be no significant backsliding in terms of judicial independence. Therefore, it is reasonable to conclude that the quality of judicial reasoning in both cases is comparable.

Political Capital (P): In terms of political capital, the Court's decision to uphold the constitutional amendment in the first re-election case allowed it to accumulate legitimacy for future rulings, enhancing

497 Sabrina Ragone, 'The Limits of Amendment Powers' (2018) 12 *ICL Journal* 345, 352.

498 Ibid 355.

its standing in the eyes of other political actors. Additionally, the political context in which the Court operates contributed to the legitimacy of the exercise of UCAD in the second re-election case. When President Uribe took office in 2002, he waged a strong campaign against organized criminal groups such as the FARC (Revolutionary Armed Forces of Colombia) and drug-trafficking organizations. As a result, the 'substantial decline in the rate of murder and kidnapping across the country' dramatically boosted Uribe popularity[499].

However, between 2005 and 2010, Uribe supporters coalesced into a political party, which helped mature the country's political culture to the extent that party affiliation surged from 26% in 2004 to nearly 66% in 2010[500]. This shift meant that, by the time of the second re-election case, 'the choice was not simply between Uribe and the prior chaos'[501], as there were other alternative political coalitions. By 2009, the popularity of President Uribe had also declined, mostly because of the 2008 global economic crisis and the ensuing decrease in the country's annual GDP (gross domestic product). As Landau noted, despite Uribe's popularity and his supermajority coalition in Congress, that coalition was composed of various movements and individuals rather than a single, strong party[502]. This fragmentation not only prevented political backlash against the Court but also allowed the loose coalition supporting Uribe to begin unravelling. For all these reasons, it seems, in hindsight, that the second-re-election case was an opportune moment for the court to invoke the UCAD in 2010 because its political capital was at the peak and the political climate was permissive to such a ruling.

Comparing the Colombian case with other countries where the UCA doctrine has been employed, such as Ecuador and Venezuela, it becomes clear that Colombia's political context was more favourable. For once, In Ecuador and Venezuela, the courts 'have faced presidents

499 Dixon and Issacharoff (n 473) 717.
500 Ibid 718.
501 Ibid 718.
502 David Landau, 'Substitute and Complement Theories of Judicial Review' (2016) 92 *Indiana Law Journal* 1283, 1317.

commanding much more cohesive movements and with much weaker oppositions'[503]. Colombia's success story stems not only from the sophisticated application of the UCA doctrine by the Court but also 'because the court had initially avoided a confrontation with Uribe, and instead had delayed intervention until it would have maximum effect and might generate more public support'[504]. In sum, the Court, by deferring to the amendment power in the first case, accumulated the political capital necessary to act decisively when the time came in the second case.

These five external justification criteria help determine the concrete weight of each formal principle, i.e., the legislature's amendment competence and the judiciary's control competence. In our balancing formula, the five external justification criteria, like a hydraulic system[505], pull in opposite directions, with the final outcome determining whether the court should uphold or strike down an amendment. In the first re-election case, the court, after considering the five criteria—C (Content), D (Democratic Legitimacy), R (Rule of Law), Q (Quality of Decision), and P (Political Capital)—give more weight to the legislature's amendment competence than to the judiciary's control competence. It could also be said that, given the legal and factual circumstances, the principle of amendment power took precedence over judicial review. This conditional relationship can be explained via Alexy's 'law of competing principles', according to which

503 David Landau, 'Political Support and Structural Constitutional Law' (2015) 67 *Alabama Law Review* 1069, 1118.

504 Aziz Huq, 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review* 21.

505 Jackson makes a normative argument about the legitimacy of UCAD, noting that the legitimacy of an amendment should not solely depend on democratic consent but also on its justness and fairness. She highlights a 'hydraulic' or complementary relationship between the justness of an amendment and the democratic consent on which it is based. Simply put, the more legitimate an amendment is from a democratic perspective, the more it may diverge from justness, and vice versa. Jackson (n 127) 338–339.9.

> *"If principle Pi takes precedence over principle Pj in circumstances C: (PiPPj)C, and if Pi gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C → Q"*[506].

It stands to reason from this formula that under conditions C1, D1, R1, Q1, and P1, the rule dictates that the court should defer to the legislature and refrain from striking down the constitutional amendment. Similarly, under conditions C2, D2, R2, Q2, and P2, the rule requires the court to declare the constitutional amendment unconstitutional[507]. Consequently, in each specific situation where the relevant conditions are met, the corresponding rule will apply.

Notably, the 'law of competing principles' serves to establish a concrete rule capable of giving its subjects conclusive reasons for action on the basis of the result of the balance struck between two principles through the weight formula[508]. It is stated before that there is a norm-theoretical distinction between rules and principles. However, this does not mean that there is no relationship between rules and principles. Rules are derived from principles, and whenever two principles compete with each other in a concrete case, a new rule comes into existence.

506 Alexy (n 362) 47.

507 For an analysis of a similar case where the Court struck down another constitutional amendment on the basis that it constitutes an unnecessary infringement with unamendable principles that form the identity of Colombian constitutional system (e.g. respecting human dignity and being a social welfare state), see Manuel Iturralde Sánchez and Daniel Bonilla Maldonado, *Lifetime Imprisonment and the Identity of the Constitution: The Colombian Constitutional Court, Human Dignity, and the Substitution of the Constitution, VerfBlog*, 2022/2/01, DOI: 10.17176/20220202–001420–0.

508 'The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence'. Ibid 54.

6. Conclusion

This monograph has made several contributions to the literature on constitutional interpretation, with a particular focus on how to properly use and justify the UCAD. In doing so, it first made the case that the amendment power is subject to three different limitations: i) constitutionalism constraints, ii) human rights constraints, and iii) constitutional identity constraints. Upon showing that there are normative reasons for a constitutional court to strike down a constitutional amendment, it addresses the question of how the courts can exercise the UCAD in a legitimate and morally acceptable way. This means that it is exercised without prejudice to the authority to amend a constitution.

While scholars propose various solutions to the potential misuse of the UCA doctrine, they share a common ground that deserves highlighting. Identifying this commonality helps reveal the broader issues we face. The first shared feature is the emphasis on conditional, context-based solutions rather than categorical, one-size-fits-all approaches. Roznai's amendment spectrum and constitutional escalator, Dixon and Landau's recommendation for tiered-constitutional design and transnational constitutional norms as a secondary check, and Albert's rule of mutuality all clearly demonstrate this conditionality.

These suggestions do not strike me as surprising, given that we are often said to live in an 'age of justification' characterized by the view that 'every exercise of power is expected to be justified'.[509] This trend is evident in the evolving and more active role of judicial institutions at

509 Of course, not all countries accompany this trend See, Michael Ignatieff (Ed.) *American Exceptionalism and Human Rights* (Princeton University Press 2009), and Jackson (n 228).

both the domestic and international levels, with increasing support for the use of different interpretive methods such as proportionality analysis and balancing. This prompts constitutional lawyers and theorists to develop new theories to explain the nuanced role that judicial institutions play in constitutional democracy. For example, Klatt advocated for a 'flexible model of judicial review'[510], whereas Rivers proposed the concept of 'variable intensity of review'[511]. Although the idea of a flexible judicial role is not entirely new—many previous studies have emphasized the political nature of constitutional courts from a political science perspective, such as Ginsburg's insurance thesis—the difference in the current trend lies in its normative dimension. As argued by Klatt, what differentiates the flexible model from the traditional models that envision a 'certain standard of review and deference generally' is that it allows for not making 'in the abstract, once and for all', the decision on how much to defer to other legal institutions (in our case, the amendment power) and instead determining 'the correct intensity of control in each particular case, depending on the factual and normative circumstances'[512]. It is plausible to observe a general trend away from categorical towards flexible solutions to problems such as how much deferral to other legal institutions and how much discretion the courts enjoy in determining the scope of deference[513]. A flexible approach to judicial review also calls for a more contextual perspective, as exemplified by the Colombian Constitutional Court. As Roznai and Brandes argue, what makes 'a second term … a valid constitutional

510 Klatt n (431).

511 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *The Cambridge Law Journal* 174.

512 Klatt n (431) 363.

513 For a suggestion on how to solve conflict of competences between the CJEU and the BVerfG, Matthias Goldmann, 'Constitutional pluralism as mutually assured discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 23 *Maastricht journal of European and Comparative Law* 119. For a similar response to the question of what the courts can do in addressing populism, Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 *North Carolina Law Review* 1; and Çapar (n 295).

amendment, but a third term … an unconstitutional replacement' is the aggregated vision gained through judicial review by virtue of which the courts 'review a specific amendment together with the surrounding legal environment with which it would interact'[514].

It is no coincidence that the rise of proportionality, balancing, and a culture of justification has coincided with a trend towards increasing institutional pluralism, primarily caused by the emergence of international and supranational organizations exercising authority of different intensity and quality over states[515]. As underscored by many, this institutional legal pluralism brings with it various problems for domestic legal orders, making it harder for them to preserve their normative coherence under the increasing relevance and pressure of international and supranational norms[516]. This is in addition to the potential negative impacts that international law as such may have on domestic democracies. For instance, international law destabilizes domestic democracies and creates fertile ground for the flourishing of populism because it is primarily formed by a neoliberal ideology that assigns more importance to market freedoms over the rights of individuals, workers, animals, and nature[517].

One consequence of this institutional pluralism is that it calls on domestic courts to decide on many issues, often considered to lie be-

514 Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic erosion, populist constitutionalism, and the unconstitutional constitutional amendments doctrine' (2020) 14 *Law & Ethics of Human Rights* 19, 38.

515 Berman calls it global legal pluralism, depict it as an attempt to apply the plurality lens to 'the hybrid legal spaces created by a different set of overlapping jurisdictional assertions (state v. state; state v. international body; state v. nonstate entity) in the global arena', which once applied to the 'clashes within one geographical area, where formal bureaucracies encountered indigenous ethnic, tribal, institutional or religious norms'. Paul Schiff Berman, 'The Evolution of Global Legal Pluralism' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016) 154.

516 For an edited volume that partially explores the impact of global legal pluralism on domestic legal adjudicative practices, see Jan Klabbers and Gianluigi Palombella (Eds) *The Challenge of Interlegality* (CUP 2019).

517 Gürkan Çapar, 'The Paradox of Global Constitutionalism: Between Sectoral Integration and Legitimacy' (2023) Global Constitutionalism (First View), DOI: https://doi.org/10.1017/S2045381723000072.

yond their purview and imagination for various historical and political reasons such as the principle of legislative supremacy. They play a much more crucial role than have historically been in creating norms that govern domestic and international affairs. For this reason, a trend toward an ex-post judiciary-centred decision-making process is quite visible at both the domestic and international levels. This does not mean, however, that it has gained more importance than the formal aspects of law, which favour abstract, general, and predictable ex ante rule-making. It means instead that judicial institutions are inclined to resolve disputes more through mechanisms such as balancing and proportionality analysis than through subsumption and interpretation of authoritative texts and documents. Notably, balancing is 'neither ad hoc nor definitional' because it 'seeks to combine flexibility with legal certainty; a case-by-case assessment of conflicting norms with the production of rules that can guide future assessments'[518]. For example, the law of competing principles, which establishes a connection between rules and principles, is instrumental in overcoming the old-age tension between formal and substantive justice, i.e., the application of the same rules to the same cases on the one hand, and the administration of justice in the concrete case on the other[519].

Beyond its 'elective affinity' with the culture of justification in the era of institutional pluralism, balancing can also be valuable in combating abusive constitutionalism, as it is as fluid and adaptable as the phenomenon it seeks to address. As Scheppele noted, governance checklists alone are inadequate in confronting the challenges posed by abusive constitutionalism. However, the holistic methodology of balancing, which does not exclude any arguments ex ante, seems fit for the task of combating abusive constitutionalism. In response to

518 Giorgio Bongiovanni and Chiara Valentini, 'Balancing, Proportionality and Constitutional Rights' in Giorgio Bongiovanni et al. *Handbook of Legal Reasoning and Argumentation* (Springer 2018) 604.

519 For an explanation about formal qualities of law and anti-formalist and justice-related tendencies as its attendant consequences, see Max Weber, *Economy and society: An outline of interpretive sociology* (Univ of California Press 1978) 880–889.

the challenges of the third wave of democracy, implementing Alexy's formal principles, particularly in Klatt's evolved version, will be especially useful. First and foremost, balancing helps distinguish between the formal and substantive elements of legal argumentation. This differentiation allows for a clearer separation between the evaluative and nonevaluative components of legal reasoning. In the evaluative aspect, preferences about which values to prioritize will inevitably lead to defending certain ends over others in the nonevaluative part.

7. References

1) Monographies and edited volumes

Alexy R, *A Theory of Constitutional Rights* (OUP 2010)

– et al. (eds) *Verfassungsrecht und einfaches Recht-Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. Primär-und Sekundärrechtsschutz im Öffentlichen Recht: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Würzburg vom 3. bis 6. Oktober 2001* (De Gruyter 2002)

Barber NW, *The Principles of Constitutionalism* (OUP 2018).

Beitz CR, *The Idea of Human Rights* (OUP 2009).

Bencze M and Ng GY (Eds) *How to Measure the Quality of Judicial Reasoning* (Vol. 69) (Springer 2018).

Bickel AM, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986).

Cohen JL, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP 2012).

Cotterrell RB, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press 1992.

Dworkin R, *Justice for Hedgehogs* (Harvard University Press 2011).

Espinosa MJC and Landau D, *Colombian Constitutional Law: Leading Cases* (OUP 2017).

Franck TM, *Fairness in International Law and Institutions* (OUP 1998).

Fuller LL, *The Morality of Law* (Yale University Press 1969).

Gardner J, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).

Gerards J and Brems E (Eds.) *Procedural Review in European Fundamental Rights Cases* (CUP 2017).

Green A, *Statehood as a Political Community* (CUP 2024).

Harbo TI, *The Function of Proportionality Analysis in European Law* (Brill 2015).

Hayek FA, *Law, Legislation and Liberty: Rules and Order (Vol 1.)* (The University of Chicago Press 1978).

Ignatieff M. (Ed.) *American Exceptionalism and Human Rights* (Princeton University Press 2009).

Jovanović MA *Collective Rights: A Legal Theory* (CUP 2012).

– (ed), *Constitutional Review and Democracy* (Eleven International Publishing, 2015)

– *The Nature of International Law* (CUP 2019)

Klabbers J and Palombella G (Eds) *The Challenge of Interlegality* (CUP 2019).

Klatt M and Meister M, *The Constitutional Structure of Proportionality* (OUP 2012)

Loewenstein K, *Political Power and the Governmental Process* (The University of Chicago Press 1957).

Loughlin M, *The Idea of Public Law* (OUP 2003)

– and Walker N (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007)

Lukes S, *Power A Radical View* (Palgrave Macmillan 2005, 2nd ed).

Krishnaswamy S, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2010).

Mac Amhlaigh C, *New Constitutional Horizons: Towards a Pluralist Constitutional Theory* (OUP 2022).

Meßerschmidt K and Oliver-Lalana AD (eds) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016)

Michelman F and Ferrara A, *Legitimation by Constitution: A Dialogue on Political Liberalism,* (OUP 2021).

Přibáň J, *Legal Symbolism: On Law, Time and European Identity* (Routledge 2007)

Ragone S, 'The Limits of Amendment Powers' (2018) 12 *ICL Journal* 345,

Rawls J, Political *Liberalism*, (Columbia University Press 2005, expanded edition)

Raz J, *The Authority of Law: Essays on Law and Morality* (OUP 1979)

– *The Morality of Freedom* (OUP 1986)

– *The Concept of a Legal System* (OUP 1999 2nd ed)

– *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP, 2009).

Ricoeur P, *Oneself as Another* (University of Chicago Press 1992, trans. Kathleen Blamey).

Rosenfeld M, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010)

Roznai Y, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017).

Rubenfeld J, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2008).

Schauer F, *Playing By Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (OUP, 1991)

Scheppele KM, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559

Schmitt C, *Constitutional Theory* (Duke University Press, 2008).

Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Sieckmann JR, *The Logic of Autonomy: Law, Morality and Autonomous Reasoning* (Bloomsbury Publishing 2012).

Suteu S, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021).

Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (OUP 2023).

Sonenscher M, (ed.) *Sieyès: Political Writings: Including the Debate between Sieyes and Tom Paine in 1791* (Hackett Publishing Company 2003).

Tripkovic B, The Metaethics of Constitutional Adjudication (OUP 2017).

Waldron J, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016).

Walker N, *Intimations of Global Law* (CUP 2015).

Weber M, *Economy and society: An outline of interpretive sociology* (Univ of California Press 1978).

2) Articles and Contributions in the Edited Volumes

Ackerman B, 'Constitutional Politics/Constitutional Law' (1989) 99 *The Yale Law Journal* 453.

Adams NP, 'Legitimacy and Institutional Purpose' (2020) 23 *Critical Review of International Social and Political Philosophy* 292.

Albert R, 'Counterconstitutionalism (2008) 31 *Dalhousie LJ* 1, 47–48.

– 'Nonconstitutional Amendments' (2009) 22 *Can. JL & Jurisprudence* 1.

– 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 663.

– 'The Unamendable Core of the United States Constitution' in András Koltay (ed) *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015)

– Amending Constitutional Amendment Rules (2015) 13 *International Journal of Constitutional Law* 655.

– 'Constitutional Amendment and Dismemberment' (2018) 43 *The Yale Law Journal* 1.

Alexy R, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433.

– 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572.

– 'The Weight Formula' in Bartosz Brożek, Jerzy Stelmach and Wojciech Zbigniew Załuski *Frontiers of the Economic Analysis of Law* (Jagiellonian University Press 2007).

– 'Constitutional Rights, Democracy, and Representation' (2014) 3 *Richerche giuridiche*, 197.

– Constitutional Rights and Proportionality' (2014) 22 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 52.

– 'Formal Principles: Some replies to critics' (2014) 12 *International Journal of Constitutional Law* 511.

Arato A, 'The constitutional reform proposal of the Turkish government: The return of majority imposition' (2010) 17 *Constellations* 345.

Ball T, '"The earth belongs to the living": Thomas Jefferson and the problem of intergenerational relations' (2000) 9 *Environmental Politics* 61.

Bar-Siman-Tov I, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

Barak A, 'Unconstitutional Constitutional Amendments' (2011) 44 Israel Law Review 321.

Barshack L, 'Constituent Power as Body: Outline of a Constitutional Theology' (2006) 56 *The University of Toronto Law Journal* 185.

Berman PS, 'The Evolution of Global Legal Pluralism' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016).

Bernal C, 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 11 *International Journal of Constitutional Law* 339.

Besselink LFM, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht L. Rev*. 36.

Besson S, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010).

Borowski M, 'The Structure of Formal Principles: Robert Alexy's "Law of Combination"' (2010) 119 *Archiv für Rechts-und Sozialphilosophie*, 19.

– 'Discourse, Principles, and the Problem of Law and Morality: Robert Alexy's Three Main Works' (2011) 2 *Jurisprudence* 575.

Boyd JP (ed), *The Papers of Thomas Jefferson, Volume 15: March 1789 to November 1789 (Vol. 53)* (Princeton University Press 2018)

Buchanan A, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010)

– 'The Perpetual Struggle: How the Coevolution of Hierarchy and Resistance Drives the Evolution of Morality and Institutions' (2021) 38 *Social Philosophy and Policy* 232.

Claes M and Reestman JH, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 *German Law Journal* 917.

Chang R, 'Commitments, Reasons, and Will' in Russ Shafer-Landau (ed) *Oxford Studies in Metaethics, Volume 8* (OUP 2013).

– 'Transformative Choices' (2015) 92 *Res Philosophica* 237.

Colón-Ríos J, 'Carl Schmitt and constituent power in Latin American courts: the cases of Venezuela and Colombia' (2011) 18 Constellations 365.

– 'Constituent power, the Rights of Nature, and Universal Jurisdiction' (2014) 60 McGill Law Journal/Revue de droit de McGill 127.

Corrias L, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 *European Constitutional Law Review* 6.

Çalı B, 'Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016).

– 'Coping With Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 *Wisconsin International Law Journal* 237.

Çapar G, 'A Guideline for the Courts Under Pressure: Pluralist Judicial Review' in Stefan Mayr and Andreas Orator (eds) *Populism, Popular Sovereignty, and Public Reason* (Peter Lang Publishing 2021).

– 'How (not) to Compare? : Not Being Inside, Nor Outside' (2022) 7 *Global Jurist* 375.

– 'The Paradox of Global Constitutionalism: Between Sectoral Integration and Legitimacy' (2023) Global Constitutionalism (First View), DOI: https://doi.org/10.1017/S2045381723000072

Del Mar M, 'Imaginaries of Authority: Towards an Archeology of Disagreement' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016)

Deva S, 'Constitutional Politics over (un)constitutional amendments' in Rehan Abeyratne and Ngoc Son Bui (eds) *The Law and Politics of Unconstitutional Amendments in Asia* (Routledge 2021).

Dickson J, 'Towards a Theory of European Union Legal System' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (CUP 2012)

Dixon R and Landau D 'Transnational Constitutionalism and A Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606.

– Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review*, 859,

– 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds) *Assessing Constitutional Performance* (CUP 2016)

– 'Tiered Constitutional Design' (2018) 86 *Geo. Wash. L. Rev*. 438.

Dixon R and Issacharoff S, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wis. L. Rev.* 683.

Dixon R. and Stone A, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP 2016).

Dworkin, RM 'The model of rules' (1967) 35 *The University of Chicago Law Review* 14.

Encinas G, 'The Idea of "Interlegal Balancing" in Multilevel Settings' in Maja Sahadžić et al. *Accommodating Diversity in Multilevel Constitutional Orders: Legal Mechanisms of Divergence and Convergence* (Routledge 2023).

Fallon R, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review* 1693.

Fasel RN, 'Natural rights, constituent power, and the stain of constitutionalism' (2024) 87 *The Modern Law Review* 864.

Finn JE, 'Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity' (1999) 10 *Constitutional Political Economy* 355.

Finnis J, 'Revolutions and Continuity of Law' in Philosophy of Law: Collected Essays Volume IV (OUP 2011)

Folz HP, 'Germany' in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

Franck TM, 'Humanitarian Intervention' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010).

Friedman B, 'The importance of being positive: the nature and function of judicial review' (2003) 72 U. *Cin. L. Rev.* 1257.

Gardbaum S, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749.

Garlicki L and Garlicka ZA, 'External review of constitutional amendments? International law as a norm of reference' (2011) 44 *Israel Law Review* 343.

Goldmann M, 'Constitutional pluralism as mutually assured discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 23 *Maastricht journal of European and Comparative Law* 119.

Green L, 'The Nature of Limited Government' in John Keown and Robert P. George (eds) *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 202.

Grimm D, 'The achievement of constitutionalism and its prospects in a changed world' in Petraner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (OUP 2010)

Harel A and Shinar A, 'Two concepts of constitutional legitimacy' (2023) 12 *Global Constitutionalism* 80.

Harvey D, 'Towards a Process-Oriented Proportionality Review in the European Union' (2017) 23 *European Public Law* 93.

Hujbers LM, 'The European Court of Human Rights' Procedural Approach in the age of subsidiarity' (2017) 6 *Cambridge International Law Journal* 177.

Huq A, 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review*

Jacobsohn GJ, 'Constitutional Identity' (2006) 68 *The Review of Politics* 361.

Issacharoff S, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 *North Carolina Law Review* 1.

Jackson VC 'Constitutional Law in an Age of Proportionality' (2014) 124 *The Yale Law Journal* 3094.

– '"Constituent Power" or Degrees of Legitimacy?' (2018) 12 *Vienna Journal of International Constitutional Law* 319.

Jestaedt M, 'The Doctrine of Balancing – its Strengths and Weakness' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012).

Jovanović, MA, 'Grasping International Law: An Evolutionary Paradigm?' in Wojciech Załuski et al (eds) *Research Handbook on Legal Evolution* (Edward Elgar Publishing, 2024) 170

– 'Sovereignty–Out, Constitutional Identity–In: The 'Core Areas' Controversy in the European Union' (April 28, 2015) 19–20. Available at: https://ssrn.com/abstract=2599925.

– and Krstić I, 'Human Rights and the Constitutionalization of International Law' in Tibor Várady and Miodrag A. Jovanović (eds) *Human Rights in the 21st Century* (Eleven International Publishing 2020).

Kay RS, 'Constituent Authority' (2011) 59 *The American Journal of Comparative Law*, 715.

Klatt M, 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506.

– 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 691.

– 'Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts' (2015) 4 *Global Constitutionalism* 214.

– 'Positive rights: Who decides? Judicial review in balance' (2015) 13 *International Journal of Constitutional Law* 354

– 'Judicial review and institutional balance. Comments on Dimitrios Kyritsis' (2019) 38 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 21.

Klement JH, 'Common Law Thinking in German Jurisprudence – on Alexy's Principles Theory' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012).

Kymlicka W, 'Minority Rights in Political Philosophy and International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010).

Kumm M, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

– 'The idea of Socratic contestation and the right to justification: the point of rights-based proportionality review' (2010) 4 *Law & Ethics of Human Rights* 142.

– 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 Indiana Journal of Legal Studies' 605.

– 'Constituent power, cosmopolitan constitutionalism, and postpositivist law' (2016) 14 *International Journal of Constitutional Law* 697.

Lindahl H, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007).

Landau D, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.

– and Dixon R, 'Constraining Constitutional Change' (2015) 50 *Wake Forest L. Rev*, 859.

– 'Political Support and Structural Constitutional Law' (2015) 67 *Alabama Law Review* 1069,

– 'Substitute and Complement Theories of Judicial Review' (2016) 92 *Indiana Law Journal* 1283,

– Dixon R, and Roznai Y, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.

Loth MA, Climate Change Liability After All: A Dutch Landmark Case (2016) 21 *Tilburg Law Review* 1.

Loughlin M, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183.

– 'The concept of constituent power' (2014) 13 *European Journal of Political Theory* 218.

Lustig D and Weiler J, 'Judicial Review in the Contemporary World: Retrospective and Prospective' (2018) 16 *International Journal of Constitutional Law* 315.

MacAmhlaigh C, 'Harmonizing Global Constitutionalism' (2016) 5 *Global Constitutionalism* 173.

Marmor A, 'Are Constitutions Legitimate?' (2007) 20 *Canadian Journal of Law & Jurisprudence* 69.

Martí JL, 'Two different ideas of constitutional identity: Identity of the constitution v. identity of the people' in Alejandro S. Arnáiz and Carina Alcoberro (eds), *National Constitutional Identity and European Integration* (Cambridge: Intersentia 2013).

Martinico G and Pollicino O, 'Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?' (2020) 39 *Yearbook of European Law* 228.

Möllers C, 'Pouvoir Constituant–Constitution–Constitutionalization' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Bloomsbury Publishing 2009).

Muñiz-Fraticelli VM, 'The Problem of a Perpetual Constitution' in Alex Gosseries and Lukas H. Meyer (eds) *Intergenerational Justice* (OUP 2009).

Murphy WM, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995).

Navot S, 'Judicial Review of Legislative Process' (2006) 39 *Israel Law Review* 182.

Nunes RM, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health' (2010) 52 *Latin American Politics and Society* 67.

Paine T, 'The Rights of Man' in Philip S. Foner (ed) *The Life and Major Writings of Thomas Paine* (Citadel Press 1961).

Palombella G, From Human Rights to Fundamental Rights: Consequences of a conceptual distinction (2007) 93 *Archiv für Rechts- und Sozialphilosophie* 396.

– 'On Fundamental Rights and Common Goals: At Home and Abroad' (2022) 8 *Italian Law Journal* 635,

Patterson D, 'Cosmopolitanism and Global Legal Regimes' (2015) 67 *Rutgers UL Rev.* 7.

Peters A, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579.

– 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513.

– The Merits of Global Constitutionalism' (2009) 16 *Ind. J. Global Legal Studies* 397.

Polzin M, 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law' (2016) 14 *International Journal of Constitutional Law* 411.

Popelier P, 'Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach' (2019) 15 *European Constitutional Law Review* 272.

– and Van Heyning C, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 *Leiden Journal of International Law* 5.

Poscher R, 'The Principles Theory: How Many Theories and What is their Merit?' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012)

Raz J, 'Human Rights in the Emerging World Order' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds.) *Philosophical Foundations of Human Rights* (OUP 2009)

– 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010)

– 'Why the State?' in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (CUP 2017).

– 'On Waldron's Critique of Raz on Human Rights' in Adam Etinson (ed) *Human Rights: Moral or Political?* (OUP 2018)

– 'The Law's Own Virtue' (2018) 39 *Oxford Journal of Legal Studies* 1,

– 'The Future of State Sovereignty' in Wojciech Sadurski (ed) *Legitimacy: The State and Beyond* (OUP 2019).

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 *The Cambridge Law Journal* 174.

Romano C, 'Identity and Selfhood: Paul Ricœur's Contribution and Its Continuations' in Scott Davidson and Marc-Antonie Vallée *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon* (Springer 2016).

Rosenfeld M, 'Modern Constitutionalism as Interplay between Identity and Diversity' in Michel Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994)

Roznai Y, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 *The American Journal of Comparative Law* 3, 657.

– '"We the people", "oui, the people" and the collective body: perceptions of constituent power' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar Publishing 2018).

– 'The Boundaries of Constituent Authority' (2020) 52 *Conn. L. Rev.*, 1381.

– and Brandes TH, 'Democratic erosion, populist constitutionalism, and the unconstitutional constitutional amendments doctrine' (2020) 14 *Law & Ethics of Human Rights* 19,

Sartori G, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review* 853.

Schauer F, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1391.

Spano R, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

– 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473.

Stone A 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' (2018) 12 *ICL Journal* 357.

Stone Sweet A, 'Constitutions and Judicial Power' in Daniele Caramani (ed) *Comparative Politics* (OUP 2008).

Sullivan K, 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards' (1993) 106 *Harvard Law Review* 22.

Tasioulas J, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010).

Teubner G, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).

Thornhill C, 'Contemporary constitutionalism and the dialectic of constituent power' (2012) 1 *Global Constitutionalism* 369.

Troper M, 'The Logic of Justification of Judicial Review' (2003) *1 International Journal of Constitutional Law* 99.

Tuori K, 'From Pluralism to Perspectivism' in Gareth Davies and Matej Avbelj (eds) Research Handbook on Legal Pluralism and EU Law (Edward Elgar Publishing 2018).

Tushnet M, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar Publishing 2019).

Van Hoecke M and Ost F, 'Legal doctrine in crisis: towards a European legal science' (1998) 18 *Legal Studies* 197.

Van Gestel R and de Poorter J, 'Putting Evidence-Based Law-Making to the Test: Judicial Review of Legislative Rationality' (2016) 4 *The Theory and Practice of Legislation* 155.

Varol OO, 'The Origins and Limits of Originalism: A Comparative Study' (2011) *Vand. J. Transnat'l L.,* 44, 1239.

– Pellegrina LD, and Garoupa N, 'An Empirical Analysis of Judicial Transformation in Turkey' (2017) 65 The American Journal of Comparative Law 187.

Viehoff D, 'Debate: Procedure and Outcome in the Justification of Authority' (2011) 19 *Journal of Political Philosophy* 248.

Yolcu S and Roznai Y, 'An unconstitutional constitutional amendment—the Turkish perspective: a comment on the Turkish constitutional court's headscarf decision' (2012) 10 *International Journal of Constitutional Law* 175.

Waldron J, 'Theoretical Foundations of Liberalism' (1987) 37 *The Philosophical Quarterly* 127.

– 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal,* 1346.

– 'Two Conceptions of Self-Determination' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010).

– 'Constitutionalism: A Skeptical View', in *Political Political Theory:Essays on Institutions* (Harvard University Press 2016)

Walker N, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3 *Transnational Legal Theory* 61.

Wang PS, 'Formal Principles as Second-Order Reasons' in Martin Borowski, Stanley L. Paulson und Jan-Reinard Sieckmann (eds) *Rechtsphilosophie und Grundrechtstheorie: Robert Alexys System* (Mohr Siebeck 2017)

Weiler J, 'The Geology of International Law: Governance, Democracy, and Legitimacy' (2004) 64 *ZaöRV* 547.

Whittington KE, 'Legislative sanctions and the strategic environment of judicial review' (2003) *International Journal of Constitutional Law* 446.

Witgens LJ, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in Luc J. Witgens and A. Daniel Oliver-Lalana (eds) The Rationality and Justification of Legislation: Essays in Legisprudence (Springer 2013).

Wroblewski J, 'Legal Decision and Its Justification' (1971) 14 *Logique et analyse*, 409.

Zürn CF, 'The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy' (2010) 16 *Legal Theory* 191

3) Online Sources

Borowski M, 'Limited Review in Balancing Fundamental Rights' (Unpublished manuscript). Available at: https://icjp.pt/sites/default/files/cursos/documentacao/borowski_-_limited_review_.pdf

Constitutionnet (n.d) *Constitutional History of Zimbabwe* http://constitutionnet.org/country/zimbabwe-country-constitutional-profile

Faraguna P, A Living Constitutional Identity: The Contribution of Non-Judicial Actors' (2015) Jean Monnet Working Paper Series 10/15, New York School of Law 7. Available at: https://jeanmonnetprogram.org/wp-content/uploads/JMWP-10-Faraguna.pdf

France: Declaration of the Right of Man and the Citizen Article 28, 26 August 1789, available at: https://www.refworld.org/docid/3ae6b52410.html [accessed 28 June 2020].

Gönenç L, '2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey' (2010 September) TEPAV Evaluation Note. Available at: https://www.tepav.org.tr/upload/files/1284468699-0.2010_Proposed_Constitutional_Amendments_to_the_1982_Constitution_of_Turkey.pdf

Halberstam D, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance' (2011) U. of Michigan Public Law Working Paper No. 229 5. Available at SSRN: https://ssrn.com/abstract=1758907 or http://dx.doi.org/10.2139/ssrn.1758907.

Kelemen D and Pech L, 'Why Autocrats love constitutional identity and pluralism: Lessons from Hungary and Poland' (September 2018) RECONNECT Working Paper No.2. Available at: http://icedd.luiss.it/files/2019/02/Why-autocrats-love-constitutional.pdf

Letter from Thomas Jefferson to James Madison. 'The Earth Belongs to the Living' (Paris, Sept. 6, 1789).

Roznai Y, 'We the Limited People' NYU Global Fellows Forum (2015, March) (Vol. 10)

– 'Constitutional Amendment and "Fundamentment": A Response to Professor Richard Albert, (2018, February 26) Yale Journal of International Law Forum. Available at: https://www.yjil.yale.edu/constitutional-amendment-and-fundamendment-a-response-to-professor-richard-albert/

Iturralde Sánchez M and Bonilla Maldonado D, *Lifetime Imprisonment and the Identity of the Constitution: The Colombian Constitutional Court, Human Dignity, and the Substitution of the Constitution, VerfBlog,* 2022/2/01, DOI: 10.17176/20220202–001420–0.

Tasioulas J and Guglielmo V, 'Philosophy of International Law' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition), URL = <https://plato.stanford.edu/archives/sum2022/entries/international-law/>.

Waluchow W and Kyritsis D, 'Constitutionalism' in Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Summer 2023 Edition), URL = <https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>.

4) Cases

Sejdic and Finci v. Bosnia and Herzegovina, App. No. 27996/06, Eur. Ct. H.R., Judgment of Dec. 22, 2009

Animal Defenders v. The United Kingdom, App. No. 48876/08, Eur. Ct. H.R., Judgment of Apr. 22, 2013

Parrillo v. Italy, App. No. 46470/11, Eur. Ct. H.R., Judgment of Aug. 27, 2015

S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R., Judgment of July 1, 2014

Dakir v. Belgium, App. No. 4619/12, Eur. Ct. H.R., Judgment of July 11, 2017

BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 -, paras. 1–421

BVerfG, Judgment of the Second Senate of 29 May 1974 – 2 BvL 52/71 Solange I-decision.

BVerfG, Judgment of the Second Senate of 22 October 1986- 2 BvR 197/83 Solange II decision.

BVerfG, Judgment of the Second Senate of 05 May 2020- 2 BvR 859/15 -, paras. 1–237.

The Kesavananda Bharati v. State of Kerala, 1973 .C 1461 (Supreme Court of India)

Indira Nehru Gandhi v. Raj Narain, 1975 SC 2299. (Supreme Court of India)

Minerva Mills Ltd. v. Union of India, 1980 SC 1789. (Supreme Court of India)

AYM Özkan Kart, B. No: 2013/1821, 5/11/2014 (Turkish Constitutional Court's decision on following a constitutional complaint)

Colombia Constitutional Court's decisions:

– Decision C-551 of 2003

– Decision C-1040 of 2005 (First Re-Election case)

– Decision C-141 of 2010 (Second Re-Election case)

Acknowledgements

I came to the Goethe University in October 2019 as an awardee of the Jean Monnet Scholarship, a prestiguous scholarship funded by the EU as part of Turkey's accession to the Union. For sure, it was my ambition to pursue an academic career in legal theory, yet I had limited research-related skills to make this dream come true. I had not even written a research paper or essay in English. I am grateful to the faculty members of the LLM in Legal Theory Program whose valuable input and stimulating discussions prepared me for academic life. Special thanks to Prof. Jürgen Busch, Prof. Klaus Günther, Prof. Petra Bard, Prof. Hubert Rottleuthner, Prof. Joachim Rückert, Prof. Matthias Goldmann, and Prof. Günther Teubner. I learned a great deal from them about how to approach current legal problems from different perspectives and gained indepth methodological knowledge necessary to pursue multidisciplinary research. I would like to express my gratitude to Prof. Lorenz Schulz who puts great effort and expertise to keep this LLM program effective and operational for organizing this special issue series dedicated to the awardee of the best masters thesis written under the program.

I would like to devote a special paragraph to my supervisor. Prof. Miodrag Jovanović has had a profound impact on my academic life, and I still keep in touch with him and hope to continue doing so as long as time allows. He is not only an excellent scholar with a sharp analytical mind but also a very supportive supervisor who always offer his support and guidance to his students. No need to say that his insightful feedback, patience, and expertise were essential in shaping the ideas that form the backbone of this thesis. For instance, he made me realize that there is a prior need to focus on the normative justification of the

unconstitutional constitutional amendment doctrine before engaging in a discussion on how to apply it to a concrete case. His comments led me introduce three different normative constraints that limit the exercise of constituent power: international human rights, constitutionalism, and constitutional identity constraints. When I was asked to prepare the thesis for this publication project four years after graduation, I realized how far I had come in this process.It goes without saying that this would not have been possible without his continuous support and mentorship.

I am incredibly grateful to my lifelong academic interlocutor, Walter Abalo, whose challenging questions and critical mind helped me refine my ideas and made this journey both intellectually enriching and personally fulfilling.

To my family and especially to my mother, I owe an immense debt of gratitude for their unwavering support and understanding. Their belief in me and constant motivation were a source of strength throughout the ups and downs of this process. I could not have completed this without their love and encouragement.

Lastly, I would like to acknowledge the support of Jean Monnet Scholarship without which I would not have been an academic life.

Thank you.

Gürkan **Çapar**

14.10.2024