

# THE THEORY AND PRACTICE OF 'SUPRA-CONSTITUTIONAL' LIMITS ON CONSTITUTIONAL AMENDMENTS

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**Abstract** This article examines whether there are any limitations on constitutional amendment powers that are external to the constitutional system and above it—'supra-constitutional' limits. It considers the theory and practice of the relationship between natural law, international law or other supranational law, and domestic constitutional law in a comparative prism. After considering the alleged supremacy of supranational law over constitutional amendments, the author explores the problem of the relationship between the different legal orders in the external/internal juridical spheres, and the important potential and actual role of national courts in 'domesticating' supranational law and enforcing its supremacy. It is claimed that despite the growing influence of supranational law, state practice demonstrates that constitutional law is still generally superior to international law, and even when the normative hierarchical superiority of supranational law is recognized within the domestic legal order, this supremacy derives not from supranational law as a separate legal order, but rather from the constitution itself. Therefore, it is claimed that existing practice regarding arguments of 'supra-constitutional' limitations are better described by explicit or implicit limitations within the constitution itself, through which supranational standards can be infused to serve as valid limitations on constitutional amendment powers.

**Keywords:** constitutional amendments, European law, hierarchy of norms, international law, judicial review, limits on amendment powers, natural law, supra-constitutional, supranational law, unconstitutional constitutional amendments.

## I. INTRODUCTION

Can there be limits on constitutional amendment powers? Can a constitutional amendment be deemed 'unconstitutional'? These vexing issues have attracted

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increased attention in recent years.<sup>1</sup> This article examines whether there are any limitations on the amendment powers that are external to the constitutional system and above it—‘supra-constitutional limits’. By the term supra-constitutional limits, I refer to principles or rules that might be placed ‘above’ the domestic constitutional order,<sup>2</sup> such as natural or supranational (international or regional) law. This investigation is imperative in light of recent arguments according to which in our globalized world, international law (especially international human rights law) and regional law (especially in Europe) may have a central role in the judicial assessment of constitutional amendments. The article thus considers the theory and practice of the relationship between natural law, international law or other supranational law, and the domestic constitutional law in a comparative prism.

Most existing literature on the issue of ‘unconstitutional constitutional amendments’ engages with explicit limitations on the amendment powers in the form of ‘unamendable provisions’ or implicit limitations, such as the Indian ‘basic structure doctrine’ according to which ‘the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity’.<sup>3</sup> Whereas the global trend is indeed going towards accepting the idea of a limited (explicitly or implicitly) amendment powers,<sup>4</sup> these types of limits originate from within the constitutional order. As demonstrated in this article, the distinction between explicit, implicit, and supra-constitutional limits is not always clear, and some overlapping may exist between the three. For example, supra-constitutional limitations may be explicit. This is the case with the Constitution of

<sup>1</sup> See eg RG Wright, ‘Could a Constitutional Amendment Be Unconstitutional?’ (1990) 22 Loyola University of Chicago LJ 741; R O’Connell, ‘Guardians of the Constitution: Unconstitutional Constitutional Norms’ (1999) 4 JCL 74; VA Da Silva, ‘A Fossilised Constitution?’ (2004) 17(4) Ratio Juris 454; J Mazzone, ‘Unamendments’ (2005) 90 Iowa L Rev 1747; GJ Jacobsohn, ‘An Unconstitutional Constitution? A Comparative Perspective’ (2006) 4(3) IntlJConstL 460; VJ Samar, ‘Can a Constitutional Amendment Be Unconstitutional?’ (2008) 33 OklaCityULRev 667; R Albert, ‘Nonconstitutional Amendments’ (2009) 22(1) CanJL&Jur 5; S Weintal, ‘The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory’ (2011) 44 IsLR 449; A Barak, ‘Unconstitutional Constitutional Amendments’ (2011) 44 IsLR 321; O Pfersmann, ‘Unconstitutional Constitutional Amendments: A Normativist Approach’ (2012) 67 ZÖR 81; Y Roznai and S Yolcu, ‘An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision’ (2012) 10(1) IntlJConstL 175; G Halmai, ‘Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?’ (2012) 19(2) Constellations 182.

<sup>2</sup> BA Garner, *A Dictionary of Modern Legal Usage* (2nd edn, OUP 2001) 858.

<sup>3</sup> *Kesavanda Bharati v State of Kerala*, AIR 1973 SC 1461, 1510, 1603, 1624–25. For a comprehensive analysis of the doctrine see S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2009).

<sup>4</sup> See Y Roznai, ‘Unconstitutional Constitutional Amendment: The Migration and Success of a Constitutional Idea’ (2013) 61(3) AmJComL (forthcoming); Y Roznai, ‘The Migration of the Indian Basic Structure Doctrine’, in M Lokendra (ed), *Judicial Activism in India: A Festschrift in Honour of Justice VR Krishna Iyer* (Universal Law Publishing Co 2012) 240–62.

Switzerland of 1999, according to which when there is a partial or even total revision of the constitution, ‘The mandatory provisions of international law must not be violated’ (Articles 193(4), 194(2)).<sup>5</sup> Similarly, Article 2(2) of the Constitution of Bosnia and Herzegovina of 1995 specifically provides that those standards set in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>6</sup> shall have priority over all other law, including constitutional amendments.<sup>7</sup> Likewise, some ‘supra-constitutional’ principles can be regarded as setting implicit limitations to the constitutional amendment powers when those principles are considered basic principles of the constitutional order. For instance, it has been argued that the Indian basic structure doctrine of implied limitations on the amendment power is linked to the concepts of natural law and natural rights.<sup>8</sup> However, these explicit and implied limitations originate from within the constitutional order itself. This article does not focus on such limitations, rather it examines those limitations to the constitutional amendment powers that derive either from a meta-legal acknowledgment (natural law) or a legal system external to the domestic legal order (international or regional law).

The term ‘supra-constitutional’ is often attributed to those principles that are considered unamendable. Serge Arne, for instance, defines supra-constitutionality as the explicit or implicit superiority of certain rules or principles to the content of the constitution.<sup>9</sup> Louis Favoreu distinguishes between ‘internal supra-constitutionality’—those constitutional principles with which the amendment power must comply—and ‘external supra-constitutionality’—those international or supranational standards with which the constitutional standard must comply.<sup>10</sup> I refer to supra-constitutionality to describe only the latter. The former constitutional principles might seem, at first, to carry supra-constitutional status, but this is inaccurate. They are not above the constitution; they are solely above the constitutional amendment power. They are unamendable, but they cannot limit the *original constituent power* of the people.<sup>11</sup> In that respect, supra-constitutional limits are unique.

<sup>5</sup> G Biaggini, ‘Switzerland’ in D Oliver and C Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 316–17.

<sup>6</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5 <<http://www.unhcr.org/refworld/docid/3ae6b3b04.html>>.

<sup>7</sup> See art X(2): ‘No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.’ See N Mol, ‘Implications of the Special Status Accorded in the General Framework Agreement for Peace to the European Convention on Human Rights’ in G Gisvold (ed), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (Martinus Nijhoff Publishers 1998) 30–1.

<sup>8</sup> N Samanta and S Basu, ‘Test of Basic Structure: An Analysis’ (2008) NUJSLRev 499, 516.

<sup>9</sup> S Arné, ‘Existe-t-il des normes supra-constitutionnelles?’ (1993) 2 *Revue du Droit Public* 460, 461.

<sup>10</sup> L Favoreu, ‘Souveraineté et supraconstitutionnalité’ (1993) 67 *Pouvoirs* 71, 74–6.

<sup>11</sup> Y Roznai, ‘Explicit Limits on Constitutional Amendments’ (The American Society For Comparative Law Annual Works-in-Progress Workshop, Princeton University, February 2012).

Simply put, if one were to accept supra-constitutional limitations, they would limit not only the amendment power (often termed the *derived constituent power*), but also the *original constituent power*.<sup>12</sup> If supra-constitutional limits may bar constitution-making power, it is all the more relevant to explore any supra-constitutional limitations that may exist on the constitutional amending power.

This article progresses as follows: Section II explores the idea of natural law limitations on constitutional amendments in theory and in practice, as applied and debated in various jurisdictions, most notably in German and Irish jurisprudence. It is argued that natural law theories are unfitted to serve as limitations on the constitutional amendment powers and that even when courts and academics attempt to use natural law arguments as enforceable limits on constitutional amendments, these limits should not be regarded as ‘supra-constitutional’ as they derive from the constitution itself. Section III explores the question of whether international law or regional law imposes limitations on the national constitutional amendment powers, from a theoretical and comparative perspective. While *prima facie* it seems that legal limitations are now imposed on the domestic constitutional amendment powers by supranational laws that might be enforced by supranational actors, it is argued that such limitation is mostly relevant in the external juridical space (ie between states) but not in the internal juridical space where state practice, at large, demonstrates a superiority of domestic constitutional law over other conflicting laws. Moreover, it is claimed that even when the superiority of supranational law is acknowledged within the domestic legal order, this superiority stems from the constitution itself and not from any external and separate legal order, therefore pointing to the continuing importance of the domestic constitutional law and the dependence of supranational law in the constitution for any claims of ‘supra-constitutionality’.

## II. NATURAL LAW

### *A. General*

This analysis begins with an examination of possible natural law constraints on the power to amend constitutions. A medieval understanding of natural law as a certain ‘divine will of god’ surely accepts the notion of unamendability since one of its characteristics is immutability.<sup>13</sup> As Thomas Aquinas wrote with

<sup>12</sup> D Maus, ‘The Influence of Contemporary International Law on the Exercise of Constituent Power’ in A Jyranki (ed), *National Constitutions in the Era of Integration* (Kluwer 1999) 50. On the distinction between the original and derived constituent power see C Klein, *Théorie et pratique du pouvoir constituant* (constituant coll Les voies du droit Paris Presses universitaires de France 1996) 187; K Gözler, *Pouvoir constituant* (Ekin Press 1999) 10–28; A Le Pillouer, ‘Pouvoir constituant originaire et pouvoir constituant dérivé: à propos de l’émergence d’une distinction conceptuelle’ (2005–06) 25–26 *Revue d’histoire des facultés de droit et de la science juridique* 123.

<sup>13</sup> M Schwartzberg, *Democracy and Legal Change* (CUP 2009) 16–19.

regard to the revision of laws: 'Human law is derived from the natural law ... But the law remains immutable. Therefore, human law ought to remain immutable', and later, 'natural law has this immutability from the immutability and perfection of the divine reason that establishes human nature. But human reason is mutable and imperfect.'<sup>14</sup> However, the focus here is on modern ideas of natural law.<sup>15</sup> At the basis of natural law theory rests the relationship between law and morals. Natural law is not primarily concerned with the *structure or form* of law, but rather with its *content*. According to natural law theorists, law is a means to achieve certain absolute moral values, which can be discovered by reason.<sup>16</sup> This leads many natural law lawyers to argue in favour of a certain type of 'dependence thesis', according to which a legal norm with a moral defect is necessarily invalid or flawed.<sup>17</sup> From natural law derives the theory of natural rights.<sup>18</sup> The idea of the individual as bearing certain 'natural' and 'inherent' rights was central to early modern political philosophy. Indeed, 'a good many of what we call Natural Rights today are derived from political theories as to the nature and function of the state'.<sup>19</sup>

How is natural law related to the question of possible limitations on constitutional amendments? Importantly, as regards the issue of limitations to *constituent power*, natural law 'is based on the premise that there is a higher law which is unamendable and thus is above the whims of the sovereign'.<sup>20</sup> This seems compatible with how early political writers conceived natural law. Even in Jean Bodin's theory of sovereignty, the power of the 'sovereign prince' was not unlimited, but was restricted by natural law.<sup>21</sup> If natural law is

<sup>14</sup> Aquinas, *Treatise on Law* (Hackett 2000) 63–4.

<sup>15</sup> For the transformation of medieval natural law to modern natural law see M Loughlin, *Foundations of Public Law* (OUP 2010) 73–83. See also HA Rommen, 'The Natural Law in The Renaissance Period' (1948–49) 24 *Notre Dame L* 460; R Tuck, 'The "Modern" Theory of Natural Law' in A Pagden (ed), *The Languages of Political Theory in Early-Modern Europe* (CUP 1987) 99; J Finnis, 'Natural Law: The Classical Tradition' and BH Bix, 'Natural Law: The Modern Tradition' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 1, 61.

<sup>16</sup> AP d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (5th printing, Transaction Publishers 2004) 79.

<sup>17</sup> For the 'dependence thesis' and some of its ambiguities see J Crowe, 'Natural Law beyond Finnis' (2011) 2(2) *Jurisprudence* 293, 305–7.

<sup>18</sup> See d'Entrèves (n 16) 51–64; J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 198–226; F Oakley, *Natural Law, Laws of Nature, Natural Rights* (Continuum International Publishing Group 2005) 87–109. For historical accounts see R Tuck, *Natural Rights Theories: Their Origin and Development* (CUP 1981); B Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Wm B Eerdmans Publishing 1997). But see LL Winreb, 'Natural Law and Rights' in RP George (ed), *Natural Law Theory: Contemporary Essays* (OUP 1994) 278: 'The philosophy of natural law has on the whole not been much concerned with the matter of rights.'

<sup>19</sup> AC Outler, *Natural Law and Natural Rights* (Southern Methodist University Press 1955) 71. See also M Loughlin, *The Idea of Public Law* (OUP 2004) 114–17.

<sup>20</sup> Samanta and Basu (n 8) 503.

<sup>21</sup> J Bodin and JH Franklin (ed), *Bodin: On Sovereignty* (CUP 2004) 10: 'for if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign, since every earthly prince is subject to the laws of God and of nature and to various human laws that

supreme, then it cannot be violated, not even by constitutional laws. Indeed, many great eighteenth- and nineteenth-century European thinkers such as Pufendorf, Vattel, Burlamaqui and Rutherford believed that governmental power was limited by natural law and could not contradict it.<sup>22</sup> Even in Abbé Sieyès, one can infer that *constituent power* is in some ways conditioned by natural law: ‘The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. *Prior to the nation and above the nation, there is only natural law*’ (emphasis added).<sup>23</sup>

The argument on ‘higher law’ also recurs in more contemporary literature regarding possible limitations on constitution-making and amending. As regards invoking ‘natural law’, many scholars hold the view that certain rights have a supra-constitutional status in that they cannot be altered even by constitutional means, such as constitutional amendments.<sup>24</sup> Illustrations of such arguments can be found in the United States and France. In the United States, it has frequently been suggested that some rights are ‘natural’ and therefore inalienable, even by means of a constitutional amendment. For example, EV Abbot claimed that the Eighteenth Amendment (which established the prohibition of alcoholic beverages) might violate the natural right to pursue happiness,<sup>25</sup> and more recently, Jeff Rosen has argued that constitutional amendments may only be used to secure rather than restrain individual’s natural rights.<sup>26</sup> Roscoe Pound explained this approach in 1959: ‘there are rights in every free government beyond the reach of the state, apparently beyond the reach even of a constitution, so that there might be a constitutionally adopted but unconstitutional constitutional amendment’.<sup>27</sup> Similarly, Charles Rice took the position that in limited and extreme cases, a court may refer to natural law:

although it is the highest enacted law of the nation, the Constitution is itself a form of human law and is therefore subject to the higher standard of the natural law. That standard is supra-constitutional. It sets limits to what the legal system, however it is structured, can do even through constitutional provisions.<sup>28</sup>

are common to all peoples’ [*Six Livres de law Republique* (1576), Book I, Ch 8]. See S Beaulac, ‘The Social Power of Bodin’s “Sovereignty” and International Law’ (2003) 4 *MelbJIntL* 1, 13–15.

<sup>22</sup> JJ Burlamaqui, *The Principles of Natural and Politic Law* (2nd edn, J Nourse 1763) 157; T Rutherford, *Institutes of Natural Law* (2nd edn, W & J Neal 1832) 373; E de Vattel, *The Law of Nations* (7th edn, T & JW Johnson 1849) 20; S Pufendorf, *On the Law of Nature and Nations* (Clarendon Press 1934) 1133.

<sup>23</sup> EJ Sieyès, ‘What is the Third Estate?’ [1789] in EJ Sieyès, *Political Writings* (Hackett Publishing Co 2003) 136.

<sup>24</sup> See in A Stone Sweet, ‘The Politics of Constitutional Review in France and Europe’ (2007) 5 *IntLJConstL* 69, 84, at n 40.

<sup>25</sup> EV Abbot, ‘Inalienable Rights and the Eighteenth Amendment’ (1920) 20 *ColumLRev* 183.

<sup>26</sup> J Rosen, ‘Was the Flag Burning Amendment Unconstitutional?’ (1991) 100 *YaleLJ* 1073.

<sup>27</sup> R Pound, *Jurisprudence* (6th printing, The Lawbook Exchange Ltd 2008) 498–9, n 92.

<sup>28</sup> CE Rice, *Fifty Questions on the Natural Law: What It Is and Why We Need It* (Ignatius Press 1999) 115.

In France, the question of the existence of any supra-constitutional limits on the amendment power has received rather wide attention.<sup>29</sup> Authors such as Maurice Hauriou and Léon Duguit defend the view that the Declaration of the Rights of Man and the Citizen of 1789 has a supra-constitutional status, as it simply recognizes and proclaims pre-existing rights. They argue that the Declaration of Rights imposes limits on the state that rank higher than constitutional legislation and *a fortiori* ordinary legislation.<sup>30</sup> More recently, Stéphane Rials has claimed that certain principles—the nation as holder of the supreme power, separation of powers and fundamental rights—are supra-constitutional in that they are superior to the constituent will.<sup>31</sup> However, ideas of natural law limits to constitutional amendments have received the widest attention in Germany and Ireland.

### *B. Germany*

Drawing on the writings of Maurice Hauriou,<sup>32</sup> it was the German Scholar Carl Schmitt who argued, during the Weimar period that certain basic freedoms ‘have, as an outstanding French theorist of public law, Maurice Hauriou has explained, a “superlégalité constitutionnelle”, which is raised not only above the usual simple laws, but also over the written constitutional laws ...’.<sup>33</sup> This notion was revived after World War II. German jurisprudence in the post-Nazi regime era was characterized by the rejection of pure positivism and the endorsement of natural law ideas,<sup>34</sup> raising the possibility that even the constitutional amendment power is limited by certain supra-constitutional

<sup>29</sup> See, for example, G Vedel, ‘Souveraineté et supra-constitutionnalité’ (1993) 67 *Pouvoirs* 76; K Gözler, *Le pouvoir de révision constitutionnelle* (Thèse pour le doctorat en droit, Université Montesquieu – Bordeaux IV, Faculté de droit, des sciences sociales et politiques 1995) 287–350; Favoreu (n 10); Arné (n 9).

<sup>30</sup> M Hauriou, *Précis de Droit Constitutionnel* (Sirey 1923) 245; L Duguit, *Traité de droit constitutionnel* (3rd edn, Ancienne librairie Fontemoing 1930) 603–7. Both cited in A Laquière, ‘Etat de Droit and National Sovereignty in France’ in P Costa and D Zolo (eds), *The Rule of Law History, Theory and Criticism* (Springer 2007) 267.

<sup>31</sup> S Rials, ‘Supraconstitutionnalité et Systématique du Droit’ (1986) 31 *Archives de philosophie du droit* 57, 64.

<sup>32</sup> G Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (Verso 2000) 162. Schmitt claimed that Hauriou’s work on institutions was the ‘first systematic attempt of a restoration of concrete-order thinking since the dominance of juristic positivism’. Cited in D Bates, ‘Political Theology and the Nazi State: Carl Schmitt’s Concept of the Institution’ (2006) 3(3) *Modern Intellectual History* 415, 424.

<sup>33</sup> C Schmitt, *Legality and Legitimacy* (Duke University Press 2004) 58–60. For Schmitt’s theory of limits to constitutional amendments see C Schmitt, *Constitutional Theory* (Duke University Press 2008) 150–3.

<sup>34</sup> See generally E Bodenheimer, ‘Significant Developments in German Legal Philosophy since 1945’ (1954) 3 *AmJCompL* 379; T Cole, ‘The West German Federal Constitutional Court: An Evaluation after Six Years’ (1958) 20(2) *Journal of Politics* 278, 302–4; H Rommen, ‘Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany’ (1959) 4 *NatLF* 1; Rommen (n 15).



principles.<sup>35</sup> Of particular interest is Gustav Radbruch, the leading legal philosopher, who argued after World War II, and in contrast to his earlier writings, that certain ‘minimum standards of justice’ exist as a criterion for ‘right law.’<sup>36</sup> In 1945, Radbruch wrote that, ‘There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason.’<sup>37</sup> A year later, Radbruch further elaborated:

The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’ (‘unrichtiges Recht’), must yield to justice. . . . Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.<sup>38</sup>

This notion was accepted in German Courts at that time. In 1950, the Bavarian Constitutional Court famously declared:

There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms . . . can be void because they conflict with them.<sup>39</sup>

The Federal Constitutional Court later cited and reaffirmed this paragraph in the 1951 *Southwest* case involving equal rights of men and women.<sup>40</sup> Two years later, in the *Article 117* case, the Federal Constitutional Court acknowledged the possibility of invalid constitutional norms in the extreme

<sup>35</sup> See G Dietze, ‘Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany’ (1956) 42 VaLRev 1; MJ Herdegen, ‘Unjust Laws, Human Rights, and the German Constitution: Germany’s Recent Confrontation with the Past’ (1995) 32 ColumJTransnatL 591; Rommen ‘Natural Law’ *ibid* 17–19.

<sup>36</sup> See Cole (n 34) 302; Bodenheimer (n 34) 382. See generally SL Paulson, ‘On the Background and Significance of Gustav Radbruch’s Post-War Papers’ (2006) 26(1) OJLS 17.

<sup>37</sup> G Radbruch, ‘Five Minutes of Legal Philosophy (1945)’ (2006) 26(1) OJLS 13, 14 [BL Paulson and SL Paulson trans, originally published as G Radbruch, ‘Fünf Minuten Rechtsphilosophie’ (12 September 1945) Rhein-Neckar-Zeitung (Heidelberg)].

<sup>38</sup> G Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26(1) OJLS 1, 7 [BL Paulson and SL Paulson trans, originally published as G Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) 1 Süddeutsche Juristen-Zeitung 105–8].

<sup>39</sup> Decision from April 4, 1950, 2 Verwaltungs-Rechtsrechnung No 65, quoted in Dietze (n 35) 15–16 and in O Bachof, *Verfassungswidrige Verfassungsnormen?* (JCB Mohr 1951) 15. Interestingly, based upon this para, Judge Sussman of the Israeli Supreme Court recognized the existence of supra-constitutional norms stemming from natural law which are supreme to any law. See *Yeredor v Chairman, Central Election Committee for the Sixth Knesset*, 19(2) PD 365, 390 [1965] (Isr); S Guberman, ‘Israel’s Supra-Constitution’ (1967) 2 IsLR 455, 458.

<sup>40</sup> 1 BverfGE 14, 32 (1951); see K Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008) 84–6.



case where positive constitutional laws severely transcend the limits of justice.<sup>41</sup> However, these statements were mere *obiter dictum*. The idea that supra-constitutional limits on the amendment power exist was best summarized and developed by Otto Bachof in his book *Unconstitutional Constitutional Norms?* published in 1951.<sup>42</sup> According to Bachof, natural law, which exists ‘above’ positive law, is an objective order. It is different from a personal conscience as the basis for validity or source of judicial decisions. Within the borderlines of this ‘higher law’, the legislator, and especially the constitution-maker, has leeway to establish an autonomous system of values. Bachof writes that not only should the reminders of the not-so-distant past warn us of limiting the constitution’s legitimacy solely to its positivist characteristics, but also that the basic law itself forbids it through Articles 1, 3, 20, and 79(3) of the German Basic Law. The inclusion of a ‘higher law’ within the constitution has only a declarative significance, not a constitutive one. It does not create a law; rather, it solely recognizes its existence. Therefore, a constitution is valid only with regard to those sections within the integrative and positivist legal order that do not exceed the predetermined borders of ‘higher law’. In other words, the ‘higher law’, which is characterized as ‘natural law’, becomes a part of the constitution.<sup>43</sup> A constitutional amendment that violates ‘higher law’, as recognized by the constitution, would contradict both ‘natural law’ and the constitution, and would be invalid. Bachof further contends that in such a case, it should be in the power of the courts to declare constitutional amendments as unconstitutional and thus void.<sup>44</sup> Bachof’s book, while not very familiar to English readers, was translated into Portuguese<sup>45</sup> and was quite influential in Portuguese-speaking countries.<sup>46</sup> Nevertheless, the ‘natural law’ arguments raised by scholars such as Bachof and Radbruch, and by the German courts, were rarely referred to in later years, as the Federal Constitutional Court declined to refer to supra-positive principles, concentrating on explicit limits to the amendment power as stipulated in Article 79(3). To

<sup>41</sup> 3 BverfGE 225, 234 (1953), see Dietze (n 35) 17–19; Cole (n 34) 303; Gözler *ibid* 86–7; DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1989) 55.

<sup>42</sup> Bachof (n 39). I thank Marjorie Kaufman for translating Bachof’s book from German to Hebrew. <sup>43</sup> *ibid* 29–32. <sup>44</sup> *ibid* 47–57.

<sup>45</sup> O Bachof, *Normas Constitucionais Inconstitucionais?* Trad. e nota prévia de José Manuel M. Cardoso da Costa. (Coimbra 1977) (Republished in 1994).

<sup>46</sup> On Bachof’s influence see the following experience in post-dictatorship Portugal. In 1975, the Council of the Revolution issued a Constitutional Law (8/75) which declared the dictatorship political police (abolished after the Revolution) to be a terrorist organization. On this basis, former prime ministers and home ministers were incriminated. Law 8/75 had a constitutional status which allegedly prevented any claim of unconstitutionality. However, in one case, a military court (which had an authority to adjudicate crimes based upon this law) invoked Bachof’s theory to find that the law, due to its retroactive nature, contradicted supra-constitutional norms. This argument was nevertheless rejected by the Supreme Military Court. See Opinion no. 9/79 from the Constitutional Commission (Pareceres da Comissão Constitucional, vol. 8, 3ff). This is taken from MG Teles, ‘Ex Post Justice, Legal Retrospection, and Claim to Bindingness’, in A Silva et al. (eds) *Liber Amicorum de José de Sousa Brito* (Almedina 2009) 430–1.

date, no constitutional amendment has ever been invalidated for conflicting with that Article.<sup>47</sup>

### *C. Ireland*

The idea that natural law may set limits to the constitutional amendment power received considerable attention in Ireland.<sup>48</sup> The relationship between natural rights and constitutional amendments was first debated under the Irish Free State (Constitution) Act of 1922.<sup>49</sup> The Seventeenth Amendment added Article 2A (Emergency Powers) into the Constitution. This amendment conferred vast powers, such as detention without trial on the Executive whenever it believed its execution was required.<sup>50</sup> In *State (Ryan) v Lennon* involving a habeas corpus application, these emergency measures were contested. The plaintiff argued that the amendment itself was unconstitutional. The two majority judges of the Supreme Court (Justice FitzGibbon and Justice Murnaghan) rejected this claim. The majority held that as no explicit limitations exist on the amending power (with the exception not to violate the Anglo-Irish Treaty), the amendment was therefore formally valid and there can be no substantive judicial review of amendments. It is not for judges, the majority held, to decide whether constitutional provisions are valid or not and whether a hierarchy of constitutional norms exist.<sup>51</sup> Importantly, Chief Justice Hugh Kennedy, one of the constitution-drafters delivered a dissenting opinion according to which the court can substantially review constitutional amendments. The Seventeenth Amendment, Kennedy CJ states, is ‘no mere amendment . . . but effects a radical alteration of the basic scheme and principles of the Constitution’.<sup>52</sup> Kennedy CJ regarded the ‘spectacular assertion of natural law values’<sup>53</sup> as possible limitations to the amendment power:

The Constituent Assembly declared in the forefront of the Constitution Act . . . that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that ‘all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland’. It follows that every act . . . in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that if any legislation of the Oireachtas

<sup>47</sup> Gözler (n 40) 61.

<sup>48</sup> For a recent summary of the idea of ‘unconstitutional constitutional amendments’ in Ireland see A Kavanagh, ‘Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic’, in G de Baere and E Cloots (eds), *Federalism and EU Law* (Hart Publishing 2012) 45.

<sup>49</sup> On the origins of the Irish Constitution see VTH Delany, ‘The Constitution of Ireland: Its Origins and Development’ (1957) 12(1) *UTorontoLJ* 1; P Taylor, ‘The Creation and Amendment of Constitutional Norms in Ireland’ in M Andenas (ed), *The Creation and Amendment of Constitutional Norms* (BIICL 2000) 206.

<sup>50</sup> See OH Phillips, ‘Ryan’s Case’ (1936) 52 *LQR* 241.

<sup>51</sup> 28 [1935] *IR* 170, 236. See also Phillips *ibid*; O Clarke, ‘The State (Ryan) v Lennon: A Victory for Man over God?’ (2007) 15 *ISLR* 136.

<sup>52</sup> 28 [1935] *IR* 170, 200–2.

<sup>53</sup> *ibid* 218–19.

(including any purported amendment to the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.<sup>54</sup>

The reference to God as the source of all authority, according to Kennedy CJ, is an implicit acknowledgement of natural law, and therefore any positive law—including a constitutional amendment—that violates natural law is unconstitutional.<sup>55</sup> The majority of the Supreme Court did not accept this minority view.

The issue rose again under the Constitution of 1937.<sup>56</sup> The 1937 Constitution came into force after the people approved the draft Constitution in a national plebiscite which was held on 1 July 1937. The 1937 Constitution has a clear Christian character. It was drafted with the participation of the Roman Catholic clergy; enacted in the name of the Most Holy Trinity; acknowledges ‘Almighty God’; and refers to man as a rational being with natural rights antecedent to positive law.<sup>57</sup> Therefore, the claim that there exists a higher law—natural law—superior to positive law is occasionally argued within Ireland’s constitutional debate.<sup>58</sup> In 1992, two constitutional amendments guaranteeing the rights to obtain information about abortion services abroad and to receive such services, were adopted through a referendum. In response to these amendments, High Court Justice O’Hanlon, not wearing his judicial hat, argued that the constitutional amendment power is limited by basic natural rights, such as the right to life of the unborn. The Constitution’s recognition of a superior and antecedent norm to positive law and the Constitution’s references to ‘inalienability’ and ‘antecedent to positive law’ can be taken as ‘important indicators of the legal philosophy on which the Constitution is based and they must govern our understanding of Irish law’. Since the two amendments contradicted the natural right of the unborn to life, they should be invalidated.<sup>59</sup> In reply, Desmond Clarke claimed that such an argument could not be accepted for

[it] justifies members of the court using their own philosophical or religious convictions to rule that an amendment to the Constitution is unconstitutional—even when it is explicitly enacted by the people in accordance with Article 46.1 following widespread public debate—on the grounds that it is inconsistent with provisions of an unwritten Law which was implicitly enacted into the

<sup>54</sup> *ibid* 204–5; See A O’Sullivan and PCW Chan, ‘Judicial Review in Ireland and the Relationship between The Irish Constitution and Natural Law’ (2006) 15 *NottinghamLJ* 18, 33.

<sup>55</sup> 28 [1935] *IR* 170, 205, 236.

<sup>56</sup> See Kavanagh (n 48).

<sup>57</sup> See V Grogan, ‘The Constitution and the Natural Law’ (1954) 8 *Christus Rex* 201; D Costello, ‘The Natural Law and the Irish Constitution’ (1956) 45(18) *Studies: An Irish Q Rev* 403.

<sup>58</sup> O’Sullivan and Chan (n 54) 19–22. See also R Cannon, ‘Matters of Irish Constitutional Debate: Originalism, Democracy and Natural Law’ (1995) 5 *ISLR* 22; VB Lewis, ‘Natural Law in Irish Constitutional Jurisprudence’ (1997) 2 *Catholic Social Science Review* 171.

<sup>59</sup> R O’Hanlon, ‘Natural Rights and the Irish Constitution’ (1993) 11 *Irish Law Times* 8.

Constitution by those who voted, by a relatively small majority, for the original text in 1937.<sup>60</sup>

Another reply came from Ruth Cannon who objected the invocation of natural law doctrine on textual grounds and urged the courts to treat cautiously any arguments calling ‘to look beyond the text itself at some extra-constitutional theory’ especially when such a theory might conflict with another explicit constitutional theory or make it redundant:

Courts should be wary of holding the Constitution to endorse specific pre-existing theories of rights in the absence of express endorsement. It may be taken that where a Constitution has gone to the trouble to lay down a comprehensive system of human rights protection, there is a strong argument against it having at the same time endorsed an extra-constitutional system which would either negate the Constitutional system or render it superfluous ... The Irish Constitution should not be read as a document wholeheartedly endorsing natural law theory in the absence of any provision therein relating to the notion of an unconstitutional constitutional amendment.<sup>61</sup>

Later, when the Supreme Court faced a challenge to the amendments in *re Article 26 and the Information (Termination of Pregnancies) Bill, 1995*, it rejected the claim that natural law was superior and antecedent to the Constitution. The Supreme Court held that the people, not God, are the creator of the Constitution and the supreme authority. Hence, constitutional amendments made by the people become the fundamental and supreme law of the land.<sup>62</sup> The Supreme Court’s reasoning was not accepted without criticism. GF Whyte criticized the Court for not making clear how it arrived at the understanding of the Constitution in an exclusively positive sense.<sup>63</sup> Others, such as Oran Doyle and William Duncan have pointed to the contradiction that lies at the core of the debate. Duncan writes:

The difficulty here is that the theory that the natural law stands above the Constitution is being justified by the terms of a human instrument, the Constitution, which is itself subject to the natural law. The Constitution cannot be both subject to the natural law and the legal justification for that subjection. One or other, the natural law or the Constitution, must finally have priority over the other as the ultimate source of legal validity in any potential area of conflict. If indeed the natural law stands above the Constitution, it is necessary to find authority for this proposition outside the Constitution, perhaps within the natural law itself.<sup>64</sup>

<sup>60</sup> DM Clarke, ‘The Constitution and Natural Law: A Reply to Mr Justice O’Hanlon’ (1993) 11 *Irish Law Times* 177, 179.

<sup>61</sup> Cannon (n 58) 28–9.

<sup>62</sup> [1995] IESC 9; 1 IR 1, 38; see O’Connell (n 1) 61–6; O’Sullivan and Chan (n 54) 32.

<sup>63</sup> GF Whyte, ‘Natural Law and the Constitution’ (1996) 14 *Irish Law Times* 8, 10.

<sup>64</sup> W Duncan, ‘Can Natural Law Be Used in Constitutional Interpretation?’ (1995) 45 *Doctrine and Life* 125, 127.

Similarly, pointing to the ‘paradox at the core of the legal validity problem’, Doyle observes that in order to legally enforce natural rights, they need to be recognized by positive law, which ‘diminishes their antecedent status’. This paradox is exacerbated when ‘an agent of positive law (the judge) determines what is superior to positive law’ and especially when ‘some judges at least relied on natural law as a source of implied rights’. The ‘deeper paradox’, according to Doyle, is that the claim of natural law as an external source to the Constitution is derived from ‘within the constitutional order itself’ and dependent on the positive Constitution.<sup>65</sup>

Summarizing the existing legal situation in Ireland with regard to the constitutional amendment power and natural law, O’Sullivan and Chan write:

as Ireland is a sovereign democratic state the people are thus ‘paramount’, and the power of amending the constitution is an unfettered power of, and inheres in, the people under article 46. This power is unconstrained by any requirement to amend the constitution in accordance with natural law, which is indeterminable. . . . The non-superiority of natural law is therefore compatible with the unfettered right and capacity of the people to amend the constitution.<sup>66</sup>

The Court repeated the superior right of the people to amend the Constitution in various other decisions.<sup>67</sup> This led one constitutional scholar to conclude that in Ireland, there is an ‘unlimited power to amend the constitution’.<sup>68</sup>

#### *D. Evaluation*

A theory that recognizes natural law as a form of a superior ‘higher law’ must lead to the conclusion that the amendment powers are limited. As Lech Garlicki and Zofia A Garlicka recently wrote with regard to limitations on constitutional amendments, ‘[b]y definition, natural law constitutes an external and superior norm of reference that autonomously exists above all written laws

<sup>65</sup> O Doyle, ‘Legal Validity: Reflections on the Irish Constitution’ (2003) 25 *DublinUniLJ* 56, 65–7.

<sup>66</sup> O’Sullivan and Chan (n 54) 19–22. See also Kavanagh (n 48): ‘For the time being, the matter seems closed as a matter of legal doctrine: the Irish Supreme Court will not stand in the way of an amendment to the Constitution supported by the people in a referendum.’

<sup>67</sup> *Riordan v An Taoiseach*, [1999] IESC 1, 4: ‘There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional’; *Hanafin v Minister of the Environment*, [1996] 2 *ILRM* 61, 183: ‘No organ of the State, including this Court, is competent to review or nullify a decision of the people’; and *ibid* 183: ‘The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with. The decision is theirs and theirs alone.’ All cited in Jacobsohn (n 1) 469.

<sup>68</sup> Halmai (n 1) 182. I would perhaps constrict that observation to claim that in Ireland, the amendment power is not limited by natural law. This, however, might not necessarily mean that it may not be limited by other limits, such as explicit limits (eg the Anglo-Irish Treaty) or implicit limits (for instance, if a constitutional amendment attempts to change the very basic structure of the constitution).

(including constitutions and constitutional amendments)'.<sup>69</sup> However, both authors doubt the suitability of natural law ideas to function as limitations to constitutional amendments. Natural law, they assert, lacks several important factors required in order to function as a norm of reference for judicial review, such as systematic nature, precision, procedural accessibility, and effectiveness.<sup>70</sup>

Indeed, natural law theories are inappropriate to serve as limitations on constitutional amendments. Even if one accepts the presupposition that binding, objective moral principles exist in every society (even a 'minimal content' of natural law<sup>71</sup>), there is no basis to regard them as the yardstick for determining the legal validity of an amendment.<sup>72</sup> Such a view would unnecessarily blur the distinction between what the law *is* and what it *ought* to be, and would be incompatible with the nature and value of the law as a social institution providing a certain measure of predictability.<sup>73</sup> Moreover, the definition of 'moral' is highly problematic and vague.<sup>74</sup> Subjecting the legal validity of constitutional norms to moral thresholds would undermine certainty in law and detract from its authoritative nature, since such subjection would necessitate the *a priori* resolution of contentious moral questions.<sup>75</sup> As Joseph Kunz, Hans Kelsen's international-law disciple, claims, natural law 'is not a system of legal norms, but a system of highest ethical principles'. In that respect, 'natural law' can be used for a jurisprudential study of the foundations of law, to critically evaluate—from an ethical perspective—the law in force, and to normatively propose how law should develop, again, from an ethical point of view. But 'natural law' cannot be used to declare something to be law or not.<sup>76</sup> This applies to constitutional amendments as well, and indeed, both in Germany and in Ireland, courts have eventually rejected claims of natural law limitations on the amendment powers, focusing, whenever these exist, on explicit limitations.

<sup>69</sup> L Garlicki and ZA Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44 *IsLR* 343, 355. <sup>70</sup> *ibid* 356.

<sup>71</sup> HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 193–200.

<sup>72</sup> In this article I do not reach such high level of abstraction as to engage with the complex issue of whether natural law exists or not.

<sup>73</sup> For the 'is-ought' problem with regard to natural law see HP Kainz, *Natural Law: A Reevaluation* (Open Court Publishing 2004) 69–75; S Stille, *Natural Law Theory and the 'Is' – 'Ought' Problem: A Critique of Four Solutions* (A Dissertation Submitted to the Faculty of the Graduate School, Marquette University, in Partial Fulfilment of the Requirements for The Degree of Doctor of Philosophy 2010) <[http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1059&context=dissertations\\_mu](http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1059&context=dissertations_mu)>.

<sup>74</sup> E van den Haag, 'Not Above the Law' (1991) 43(18) *National Review* 25, 27 (claiming that various questions such as slavery, gender equality and capital punishment received opposing and supporting arguments based on natural law grounds).

<sup>75</sup> A Parush, 'Judicial Activism, Natural Law and Legal Positivism: Judge Barak and "The Omnipotent Knesset" Doctrine' (1993) 17 *Iyunei Mishpat* (Tel-AvivUniLRev) 717, 729–30 (Hebrew).

<sup>76</sup> JL Kunz, 'Editorial Comment: Natural-Law Thinking in the Modern Science of International Law' (1961) 55 *AJIL* 951, 957.

Moreover, when analysing the existing arguments on natural law limitations on the amendment powers, one can clearly infer from the examples provided by Germany and Ireland that alleged limitations eventually derive from the constitution itself. Both in Germany and in Ireland, where possible ‘natural law’ limitations were seriously debated in court, it was, to use the words of Ivo Duchacek, the ‘supraconstitutional invocations’<sup>77</sup>—ie, the constitutional referral to natural law or to ‘unamendable’ principles—that stood as the basic rationale for arguing in favour of limited amendment powers. Admittedly, such arguments are flawed in their circularity. The common argument usually progresses as follows: natural law prevails over positive law (including constitutional amendments) due to the positive—implicit or explicit—recognition of natural law in the constitution. With regard to the Irish Constitution, Ralph Gaebler raises the question of ‘whether a constitution . . . can incorporate a source of law whose authority is completely external to the constitution?’<sup>78</sup> To which Walter Murphy replies that ‘by identifying the constitution’s goal and values as those of the external authority, the constitutional document accepts (internalizes) that authority’.<sup>79</sup> This of course raises debate on the constitution as a ‘constituting’ versus ‘recognizing’ device. What if the positive constitution did not include such recognition? Would that mean that natural law is not superior to positive law? If natural law is indeed the authority from which positive law derives its authority, this does not require any positive recognition. If the argument rests on the constitution’s explicit or implicit recognition of the priority of natural law, then the constitutional limitation derives from the constitution itself—as part of the implicit or explicit limits—rather than natural theories external to the constitution.

Instead of ‘natural law’, supra-constitutional limits might appear today in the form of international law. This is not to deny that international law is made by states; it is only to point, first, to the contribution of natural law to the development of international law,<sup>80</sup> and second—and more importantly, to this argument—to the idea of a universal or regional ‘higher law’, perhaps even higher than a state’s constitution. The nexus between ideas of natural law and international law is well known,<sup>81</sup> especially with regard to international human rights law. The Preamble of the Universal Declaration of Human Rights of 1948 opens with the ‘recognition of the inherent dignity and of the equal and

<sup>77</sup> ID Duchacek, *Power Maps: Comparative Politics of Constitutions* (Clio Press 1973) 18.

<sup>78</sup> RF Gaebler, ‘Is There a Natural Right to Privacy?’ (1992) 37 *AmJJuris* 319, 332, Also See Outler n 19.

<sup>79</sup> WF Murphy, ‘Staggering toward the New Jerusalem of Constitutional Theory: A Response to Ralph F Gaebler’ (1992) 37 *AmJJuris* 337, 353, n 50.

<sup>80</sup> L Henkin, *International Law: Politics and Values* (Martinus Nijhoff 1995) 27, 168.

<sup>81</sup> See eg JS Reeves, ‘The Influence of the Law of Nature upon International Law in the United States’ (1909) 3 *AJIL* 547; ED Dickinson, ‘Changing Concepts and the Doctrine of Incorporation’ (1932) 26 *AJIL* 239; BF Brown, ‘The Natural Law as the Moral Basis of International Justice’ (1955–56) 8 *LoyLRev* 59; J Lobel, ‘The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law’ (1985) 71 *VaLRev* 1071, 1078–84; Kunz (n 76).



inalienable rights of all members of the human family'.<sup>82</sup> This Declaration 'has demonstrated most clearly the tendency ... to work out a system of international law conforming as closely as possible to natural law', by recognizing certain human rights as beyond the power of human (and as such any state) authority to deny or annul.<sup>83</sup> Joseph Kunz explains the revival of natural law ideas:

Then there were the terrible experiences before, in and after the Second World War, the unheard-of cruelties toward men by totalitarian regimes, the abuse of law for purposes of injustice, torture and extermination, total war, the appearance of nuclear weapons, the bitter struggle in a world torn by an ideological abyss. Such periods of profound crisis foster a flight into natural law as ideas and values on which man can rely, as a barrier against the misuse of law. These events of our time are part of the explanation why Gustav Radbruch, at the end of his life, returned from relativism to natural law, why natural-law concepts appear in modern European Constitutions and in the decisions of the highest courts of Western Germany, as well as in documents of the 'new' international law.<sup>84</sup>

This 'revival' in the form of international law brings us to the analysis of the modern conception of positive international law (and other kinds of supra-national law) as a possible limitation on the constitutional amendment powers.

### III. INTERNATIONAL LAW

#### *A. General*

In recent years, international law, alongside foreign law, has played an increased role within domestic constitutional discourse around the globe.<sup>85</sup> A transnational or global 'judicial dialogue' recently emerged,<sup>86</sup> one that is also relevant to limitations on constitutional amendments. As one constitutional judge of the German Constitutional Court writes, international and

<sup>82</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217A (III) <[www.unhcr.org/refworld/docid/3ae6b3712c.html](http://www.unhcr.org/refworld/docid/3ae6b3712c.html)>.

<sup>83</sup> CP Romulo, 'Natural Law and International Law' (1949) 35 VaLRev 1052, 1053; CP Romulo, 'Natural Law and International Law' (1950) 3 NatLInstProc 117, 121.

<sup>84</sup> Kunz (n 76) 954. The revival of international law arrived much earlier than World War II. See CG Haines, *Revival of Natural Law Concepts* (Harvard University Press 1930).

<sup>85</sup> See R Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 HarvLRev 2570; VC Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 HarvLRev 109.

<sup>86</sup> See AM Slaughter, 'A Typology of Transjudicial Communication (1994) 29 URichLRev 99; CL Heuereux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 TulsaLJ 15; AM Slaughter, 'Judicial Globalization' (2000) 40 VaIntlL 1103; C Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?' (2003) 38 TexIntlLJ 505; MA Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 GeoLJ 487; MA Waters, 'Normativity in the New Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts' (2007) 32 YaleIntlL 478; MA Waters, 'The Future of Transnational Judicial Dialogue' (2010) 104 AmSocIntlLProc 465.

comparative law can be useful from the standpoint of the constitutional judge when addressing judicial review of constitutional amendments:

When the constitution limits the amending power by enshrining general principles like democracy, federalism, the rule of law, or the principle of human dignity, the standard cannot be taken from the constitutional system itself . . . A survey of the realizations of the relevant constitutional principles and an analysis whether the constitutional amendment remains within this framework appears to be the best solution. Here . . . the argument that the intended change is known in other constitutionalist democracies is a genuine legal argument.<sup>87</sup>

The use of international law in constitutional interpretation and adjudication is itself highly controversial, and has given rise to some heated judicial<sup>88</sup> and academic discussions.<sup>89</sup> Nevertheless, there is a difference between binding and persuasive uses of international law.<sup>90</sup> International law can be relevant as a legal argument when adjudicating the substance of a constitutional amendment, even without carrying any binding force. Are the constitutional amendment powers limited, in any way, by international law? If so, this would carry crucial implications for any notions of ‘sovereignty’ and the ‘hierarchy of norms’.<sup>91</sup>

Traditionally, the debate regarding the relationship between domestic and international law concerned two main approaches: monism and dualism.<sup>92</sup>

<sup>87</sup> BO Bryde, ‘The Constitutional Judge and the International Constitutionalism Dialogue’ (2006) 80 *TuLLRev* 203, 219.

<sup>88</sup> See for instance in the United States, *Atkins v Virginia*, 536 U.S. 304 (2002), *Lawrence v Texas*, 539 U.S. 558 (2003), *Roper v Simmons*, 543 U.S. 551 (2005) and in Australia *Al-Kateb v Godwin* [2004] HCA 37; (2004) 208 ALR 124.

<sup>89</sup> See eg M Wells, ‘International Norms in Constitutional Law’ (2004) 32 *GaJIntl&CompL* 429; DM Amann, ‘“Raise the Flag and Let It Talk”: On the Use of External Norms in Constitutional Decision Making’ (2004) 2 *IntlJConstL* 597; D Hovell and G Williams, ‘A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa’ (2005) 29(1) *MULR* 95; M Kirby, ‘International Law – The Impact on National Constitutions’ (2005) 99 *Am SocyIntlProc* 1; MA Weisburd, ‘Using International Law to Interpret National Constitutions – Conceptual Problems: Reflections on Justice Kirby’s Advocacy of International Law in Domestic Constitutional Jurisprudence’ (2006) 21 *AmUIntlRev* 365; VJ Samar, ‘Justifying the Use of International Human Rights Principles in American Constitutional Law’ (2005) 37 *ColumHumRtsLRev* 1; WH Pryor Jr, ‘Foreign and International Law Sources in Domestic Constitutional Interpretation’ (2006) 30(1) *HarvJL&PubPoly* 173; GL Neuman, ‘International Law as a Resource in Constitutional Interpretation’ (2006) 30(1) *HarvJL&PubPoly* 177; RD Glensy, ‘The Use of International Law in U.S. Constitutional Adjudication’ (2011) 25 *EmoryIntlLRev* 198.

<sup>90</sup> See K Knop, ‘Here and There: International law in domestic courts’ (2000) 32 *NYUJIL&Pol* 501 (proposes [at 525–35] to regard international law not as binding rather ‘through the lens of comparative law’).

<sup>91</sup> M Troper, ‘Judicial Review and International Law’ (2003) 4 *SanDiegoIntlLJ* 39; see also L Henkin, ‘Human Rights and State “Sovereignty”’ (1995) 25 *GaJIntl&CompL* 31; L Henkin, ‘That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera’ (1999) 68 *FordhamLR* 1.

<sup>92</sup> See JG Starke, ‘Monism and Dualism in the Theory of International Law’ (1936) *BYIL* 66; EM Borchard, ‘The Relation between International Law and Municipal Law’ (1940) 27(2) *ValRev* 137; C Bradley, ‘Breard, Our Dualist Constitution, and the Internationalist Conception’

Monism regards both international and domestic laws as forming one fused legal order. Domestic law automatically implements international law, as it is immediately and directly applicable within the domestic legal system. Moreover, monism regards domestic law as deriving its binding force from international law, and—in its extreme form—monism regards the former as inferior to the latter. In contrast, dualism views the two as distinct legal orders. International law has to be implemented through domestic measures in order to be applicable in domestic law. For dualists, international law, even if supreme in the international legal system, cannot claim supremacy within the domestic legal order, where, if the two systems conflicted, domestic law would prevail.

These terms are slightly confusing specially as regards the incorporation of international law wherein a dualist state could have a monist approach to the superiority of international law within the domestic legal system once international law has been incorporated within it. On the other hand a domestic legal system could (to some extent, or entirely) be monist wherein certain international treaties or customary rules are automatically incorporated into domestic law, without the need for domestic implementation, while still having a dualist approach to the relationship between international and domestic law, ie, in that the status of international law within the domestic sphere is determined by the domestic law.<sup>93</sup> Moreover, there might be different approaches towards different sources of international law, such as differences between customary law and treaty law. In that respect, states' incorporation of international law has not necessarily followed a strict or coherent monist or dualist approach.<sup>94</sup> Therefore, while this article contends that general state practice regarding the relationship between constitutional and international law is dualist in nature, ie, determined, eventually, by the domestic constitutional order, it does not broadly refer or adhere to these approaches.

It has been increasingly argued of late that the constitutional amendment powers are substantially limited by international law. Jorge Tapia Valdés, for instance, suggests that the globalization of fundamental rights and *jus cogens* norms set new limits on the amendment powers.<sup>95</sup> In international law, *jus cogens* are those 'peremptory rules' of international law which are non-derogable. They do not permit of any exceptions (whether through treaties, persistent objection, or the creation of special customary rules) and render void

(1999) 51 *StanLRev* 529, 530; MN Shaw, *International Law* (6th edn, CUP 2008) 131–3; I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 31–4; G Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing 2012) 120–2.

<sup>93</sup> D Sloss, 'Non-Self-Executing Treaties: Exposing a Constitutional Fallacy' (2002) 36(1) *UCDavisLRev* 1, 9.

<sup>94</sup> Y Zilbershats, 'The Role of International Law in Israeli Constitutional Law' (1997) 4 *Mishpat U'Mimshal* 47, 56 (Hebrew).

<sup>95</sup> JT Valdés, 'Poder constituyente irregular: los límites metajurídicos del poder constituyente originario' (2008) 6(2) *Estudios Constitucionales* 121.

other conflicting non-peremptory rules.<sup>96</sup> Such rules include, for instance, the prohibitions on aggressive use of force, genocide, slavery, torture, and apartheid.<sup>97</sup> *Jus cogens* norms override all other sources of law, both international and national.<sup>98</sup> Stephen Schnably points out that certain emerging international and supranational legal rules address matters such as constitutional amendments.<sup>99</sup> For instance, in the African Charter on Democracy, Governance and Elections of 2007<sup>100</sup> the State Parties agreed that ‘Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government’ is deemed an ‘unconstitutional change of government’ which ‘shall draw appropriate sanctions by the Union’ (Article 23(5)). The Statute of the Council of Europe demands that all member states accept ‘the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’.<sup>101</sup> Larry Backer summarizes this idea of ‘supranational’, ‘global’, or ‘transnational’ constitutionalism:

Supra-national constitutionalism posited limits on national constitution—making grounded in an evolving set of foundational universal norms derived from the understandings of basic right and wrong developed by consensus among the community of nations . . . it was clear that no state could unilaterally opt out of the system, whatever its own views of the relationship between its internal constitutional system and that of the global legal order.<sup>102</sup>

International human rights law demands special attention. Contrary to traditional international law, which was concerned with regulating the relations between states, international law is now increasingly interested in areas that were regulated solely by national constitutions, most notably fundamental rights. International human rights law now protects civil, political, social, economic, and cultural rights through various human rights instruments. To put it in different terms, in many states, fundamental rights carry a dual protection: first, via the state’s constitution, and second, through human rights

<sup>96</sup> See art 53 of The Vienna Convention on the Law of Treaties 1969, UN, Treaty Series, Vol 1155, 331 (VCLT); M Byers, ‘Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules’ (1997) 66 *NordicJIntlL* 211, 223; K Hossain, ‘The Concept of Jus Cogens and the Obligation under The U.N. Charter’ (2005) 3 *SantaClaraJIntlL* 72, 74–82.

<sup>97</sup> Byers *ibid* 219.

<sup>98</sup> D Shelton, ‘Introduction’, in D Shelton (ed), *International Law and Domestic Legal System: Incorporations, Transformation, and Persuasion* (OUP 2011) 7.

<sup>99</sup> SJ Schnably, ‘Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal’ (2008) 62 *UMiamiLRev* 417, 422.

<sup>100</sup> African Union, African Charter on Democracy, Elections and Governance, 30 January 2007 <[www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf](http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf)>.

<sup>101</sup> Art 3 of the *Statute of The Council of Europe* 1949, 87 UNTS 103, ETS 1 <<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>>.

<sup>102</sup> LC Backer, ‘God(s) over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century’ (2007–08) 27 *MississippiCollLRev* 11, 16–17. On the emergence of ‘global constitutionalism’ see eg P Zumbansen, ‘Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order’ (2012) 1(1) *Global Constitutionalism* 16.

treaties to which the state is bound.<sup>103</sup> In fact, the constitutional protection of rights (such as Bills of Rights) is one way through which states seek to implement their international human rights' obligations.<sup>104</sup> One can certainly argue that even if a constitutional amendment removes or abridges a certain constitutional right, international human rights law still serves as a limit to such a constitutional change. Vincent Samar, for instance, argues that limitations on constitutional amendment must include human rights, which are universally recognized.<sup>105</sup> In a similar vein, Matthias Herdegen opines that those 'standards of human rights flowing from peremptory international law (*jus cogens*)', should act as 'an objective criterion for the self-limitation of the State's domestic powers', as such a focal point for limitations on the constitutional amendment powers 'ensures and enhances rationality in the constitutional balance between the legislature and the courts'.<sup>106</sup>

Indeed, as the International Criminal Tribunal for the former Yugoslavia (ICTY) notes, the violation of the *jus cogens* prohibition against torture has direct effects. The act authorizing torture (even if a constitutional act) would be delegitimized<sup>107</sup> and would not obtain international legal recognition. Further, potential victims can initiate proceedings before a competent international body. Alleged perpetrators of torture might be held criminally accountable in an international tribunal or even in a domestic court of a foreign state that claims universal jurisdiction over violations of the prohibition against torture.<sup>108</sup> It therefore seems, as Garlicki and Garlicka write, that in the area of human rights, international law is clear and precise, has effective judicial review mechanisms through supranational human rights bodies, and is even accessible (procedurally) by often allowing individual petitions, to act as supra-constitutional reference for adjudicating constitutional amendments.<sup>109</sup>

<sup>103</sup> See GL Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) *StanLRev* 1863; Garlicki and Garlicka (n 69) 358. For a comparison between international and constitutional rights see S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19(4) *EJIL* 749, 750–3, 764–8.

<sup>104</sup> P Hyndman, 'Constitutions, Constitutionalism and the Effective Implementation of the International Standards of Human Rights' (2000) 21 *AusYBIL* 95, 106; C Heyns and F Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23(3) *HumRtsQ* 483, 500. But see DS Law and M Versteeg, 'The Declining Influence of The United States Constitution (2012) 87 *NYULRev* 762, 850 (empirical analysis 'uncovers no clear evidence that transnational human rights instruments are shaping global or even regional trends in constitution writing') contra Z Elkins, T Ginsburg and B Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54(1) *HarvIntLLJ* 61, 64–5 (empirical evidence exhibits that 'international instruments have a powerful coordinating effect on the contents of national constitutions').

<sup>105</sup> Samar (n 1) 691–3.

<sup>106</sup> Herdegen (n 35) 605.

<sup>107</sup> One may wonder about the ICTY's choice of words, as a distinction exists between illegality and illegitimacy. See generally AE Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in P Alston and E Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 206–8.

<sup>108</sup> *Prosecutor v Furundzija*, Case No IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 155–157 (dictum) <[www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf](http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf)>.

<sup>109</sup> Garlicki and Garlicka (n 69) 359–63.

### B. The Alleged Supremacy of Supranational Law

At first glance, the question of what is the legal status of a norm that breaches international law obligations seems simply irrelevant from an international law perspective. For international law, a state has to comply with its international obligations regardless of any conflicting domestic laws—be it primary legislation, secondary legislation or even a constitutional norm.<sup>110</sup> Certainly, if one follows Hans Kelsen’s theory that international law is the basic norm from which the ultimate source of validity of national law derives, international law is considered supreme compared to national law.<sup>111</sup> This is the extreme monist position, as explained by Kunz: ‘The primacy of the Law of Nations means that . . . the pyramid of the law does not end with the basic norm of the juridical order of a given single state, but that at the top of the pyramid of law stands the international juridical order.’<sup>112</sup> Indeed, according to the principle of supremacy—‘one of the great principles of international law’<sup>113</sup>—national law is subordinated to international law; the latter takes precedence over the former.<sup>114</sup> Thus, if international law is superior to domestic law, it is also superior to domestic constitutional laws.

This theoretical presupposition finds support in various international legal documents. Take, for example, international treaty law. At the heart of international law lies the Vienna Convention on the Law of Treaties 1969 (VCLT),<sup>115</sup> which regulates inter-states treaties. According to Article 27 of the VCLT: ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.<sup>116</sup> Taking into account the principle of *pacta sunt servanda*, the reference to ‘internal law’ must include the constitution. This interpretation is supported by the VCLT’s *travaux préparatoires*.<sup>117</sup>

<sup>110</sup> See Schnably (n 99) 422.

<sup>111</sup> H Kelsen, *Principles of International Law* (3rd printing, Lawbook Exchange, Ltd 2003) 408–18. See also MP Socarras, ‘International Law and the Constitution’ (2010) 4(2) FedCtsLRev 185, 54 (the US Supreme Court ‘has long enforced the law of nations as the source and limit of the sovereign powers that the Constitution allocates to the federal government’).

<sup>112</sup> JL Kunz, ‘The “Vienna School” and International Law’ (1934) 11 NYULQRev 370, 402.

<sup>113</sup> G Fitzmaurice, ‘the General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 Recueil Des Cours 85.

<sup>114</sup> MB Akehurst and P Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn, Routledge 1997) 63.

<sup>115</sup> See VCLT (n 96).  
<sup>116</sup> See also art 27(2–3) to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 and art 3 of the Draft on the Responsibility of States for Internationally Wrongful Acts. More specifically with regard to domestic constitutional law see United Nations Declaration of the Rights and Duties of States, Annex to UNGA Res No 375 (IV), UNGA Off Rec 4th Sess, Resolutions, (1949) 67, art 13: ‘Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty’; Restatement (Third) of the Foreign Relations Law of the United States, s. 155 cmt b (1987): ‘A State cannot adduce its constitution or its laws as a defense for failure to carry out its international obligations.’

<sup>117</sup> A de Hoogh, ‘The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission’ (4 January 2010) EJIL: Talk! <[www.ejiltalk.org/](http://www.ejiltalk.org/)

Moreover, international judicial practice may support this claim. In 1875, in the case of the *Montijo*, an international arbitrator stated that ‘a treaty is superior to the Constitution, which latter must give way’.<sup>118</sup> In its 1932 Advisory Opinion regarding *Treatment of Polish Nationals in the Danzig Territory*, the Permanent Court of International Justice stated that according to generally accepted principles: ‘a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force’.<sup>119</sup>

The idea of the supremacy of supranational law covers not only international but also regional law.<sup>120</sup> This is most notable with regard to European Union law.<sup>121</sup> As the Court of Justice of the European Communities (ECJ) established, EU law is considered to take priority over the domestic law of the member states, and in case of inconsistency between the two, EU law prevails.<sup>122</sup> In a case that concerned a conflict between the German Basic Law and EU law, the ECJ stated that EU law must take precedence over any conflicting domestic law regardless of the normative status of that law:

The law, stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law ... Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as

[the-relationship-between-national-law-and-international-law-in-the-report-of-the-georgia-fact-finding-mission/>](#).

<sup>118</sup> *Case of the ‘Montijo’*: Agreement between the United States and Colombia of 17.08.1874, award of 26.7.1875, cited in A Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 ICL 170, 183–4.

<sup>119</sup> Avis Consultatif du 4 février 1932, Série A/B No 44, 24. See MO Hudson, ‘International Engagements and Their Interpretation by the Permanent Court of International Justice’ in AM Kidd and M Radin (eds), *Legal Essays: In Tribute to Orrin Kip McMurray* (University of California Press 1935) 190.

<sup>120</sup> The question of the relationship between international and regional law (especially EU law) seems even more complicated. See A Posch, ‘The Kadi Case: Rethinking The Relationship between EU Law and International Law?’ (2009) 15 ColumJEurL 1; J d’Aspremont and F Dopagne, ‘Two Constitutionalism in Europe: Pursuing and Articulation of the European and International Legal Orders’ (2009) 69 HeidelbergJintL (ZaöRV) 939; P De Sena and MC Vitucci, ‘The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values’ (2009) 20(1) EJIL 193; A Nollkaemper, ‘The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci’ (2009) 20(3) EJIL L 862; G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51(1) HarvIntLJ 1.

<sup>121</sup> On the national treatment of EU and ECHR law see H Keller and A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008); G Martinico and O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010); G Martinico, ‘Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 23(2) EJIL 401.

<sup>122</sup> See MF Rigaux, *La théorie des limites matérielles à l’exercice de la fonction constituante* (Maison Ferdinand Larquier 1985) 182–3, 289–91; S Boelaert, ‘European Union Courts’ in C Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff 2012) 432.



formulated by the Constitution of that State or the principles of a national constitutional structure.<sup>123</sup>

Similarly, the European Court of Human Rights (ECtHR) established in several cases its authority to review even constitutional provisions—not merely ordinary legislation—and to assess their compatibility with the European Convention on Human Rights (ECHR).<sup>124</sup> In a recent case, the ECtHR criticized Article 70(5) of the Hungarian Constitution for indiscriminately depriving the right to vote from persons placed under total or partial guardianship.<sup>125</sup> In *Sejdić and Finci v Bosnia and Herzegovina*, the ECtHR held that a constitutional provision limiting the right to be elected in parliamentary and presidential elections to people belonging to Bosniaks, Croats, and Serbs (the ‘constituent peoples’ of Bosnia and Herzegovina) is discriminatory, and the disqualification of Jewish and Roma origin candidates constitutes a breach of the ECHR.<sup>126</sup> Therefore, as Dieter Grimm notes, the EU law may even ‘include an obligation to change the national constitution’ of member states.<sup>127</sup>

Article 46 of the ECHR clearly states that the decisions of the ECtHR are binding and member states ‘undertake to abide by the final judgment of the court in any case to which they are parties’. Therefore, a supranational court, such as the ECtHR, can decide that a constitutional amendment breaches the ECHR and such a decision is binding upon the state under supranational law. This is perhaps why Jed Rubenfeld remarks that:

[W]hat makes the new European constitutionalism cohere—what gives European constitutional courts their claim to legitimacy—is the ideology of universal or ‘international human rights’, which we owe their validity to no particular nation’s constitution, and which possess therefore a supranational and almost supra-constitutional character, making them close to unamendable.<sup>128</sup>

<sup>123</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125, 1134, para 3 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970CJ0011:EN:PDF>>.

<sup>124</sup> See *Rekvenyi v Hungary*, App No 25390/94, ECtHR Judgment of 20 May 1999 and *Victor-Emmanuel de Savoie v Italy*, App No 53360/99, ECtHR Judgment of 24 April 2003, in which the ECtHR examined the compatibility of constitutional provisions with the ECHR but did not establish a breach. Cited in Garlicki and Garlicka (n 69) 362–3, n 42.

<sup>125</sup> *Alajos Kiss v Hungary*, App No 38832/06, ECtHR Judgment of 20 May 2010.

<sup>126</sup> *Sejdić and Finci v Bosnia and Herzegovina*, App No 27996/06, ECtHR Judgment of 22 December 2009. See M Milanović, ‘Sejdić and Finci v Bosnia and Herzegovina (ECtHR), Introductory Note’ (2010) 49(2) *International Legal Materials* 281; S Bardutzky, ‘The Strasbourg Court on the Dayton Constitution: Judgment in the Case of Sejdić and Finci v Bosnia and Herzegovina, 22 December 2009 (October 19, 2010)’ (2010) 6(2) *Eur Const L Rev* 309; C Tran, ‘Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision in Sejdić and Finci v Bosnia and Herzegovina’ (2011) 18(2) *Human Rights Brief* 3.

<sup>127</sup> D Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 15.

<sup>128</sup> J Rubenfeld, ‘Unilateralism and Constitutionalism’ (2004) 79 *NYUL Rev* 1971, 1973.

The analysis above shows that, *prima facie*, supranational law may pose limitations to constitutional amendments. Legal limitations are now imposed on the constitutional amendment powers by international and regional laws and might be enforced by international and regional, rather than domestic, state actors. Nevertheless, as will be demonstrated in the next section, this alleged limitation encounters difficulties with regard to the internal *espace juridique*.

### *C. The Problem of External v Internal Espace Juridique*

It can be argued that the principle of the superiority of supranational law over domestic constitutional law only means that for the purpose of a state's responsibility, a constitutional provision (including constitutional amendments) cannot be a ground for excusing such responsibility. It does not necessarily follow from Article 27 of the VCLT that an obligation exists to prioritize treaties over domestic laws within national juridical systems; rather, only to restate that international law has priority over domestic law in the international sphere—the external *espace juridique*.<sup>129</sup> This is what Myres McDougal terms 'external v internal arenas'.<sup>130</sup> André Nollkaemper elaborates on this idea:

In principle, the claim to supremacy of international law is confined to the international level. It is at that level that states cannot invoke domestic law to justify the non-performance with an international obligation and it is at that level that international courts, by virtue of their establishment under international law, have to give precedence to international law over domestic law. This has no necessary legal consequences domestically . . . What is wrong in the international law sphere may be right in the national sphere, and what is unlawful in the national legal order may be perfectly legal in the international domain. While international courts can pronounce that legal restitution is due, they do not themselves effectuate such restitution. . . . The general understanding is that international law cannot itself realize supremacy at the domestic level.<sup>131</sup>

Kemal Gözler takes a similar approach in his rejection of the idea of the superiority of international law over national constitutional law. Gözler claims that even if a judge finds a conflict between an international standard and an internal constitutional standard, the state can be found responsible and the constitutional standard unenforceable. Nevertheless, such unenforceability only applies in the international sphere. In other words, if a supranational court, for example the ECtHR, declares a domestic constitutional provision incompatible with the ECHR, under Article 50 of the ECHR it may grant the

<sup>129</sup> XF Torrijo, 'International Law and Domestic Law: Definitely an Odd Couple' (2008) 77 *Rev Jur UPR* 483, 489–90.

<sup>130</sup> MS McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective' (1959) 4 *SouthDakotaLRev* 25.

<sup>131</sup> A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 199–200.

injured party just reparations. Nevertheless, under Article 53, it is up to the state to amend the domestic law that was declared incompatible with the ECHR. One has to distinguish between internal and external validity, since they do not always coincide.<sup>132</sup> As Garlicki and Garlicka acknowledge:

ECtHR's judgments do not have any direct effect on the continuation or validity of the national measure that was found to have breached the Convention. The ECtHR has neither the power to quash an individual decision nor the power to annul provisions of national legislation. Therefore, even if the Strasbourg Court has decided on the 'unconventionality' of a national legislative provision, the latter does not become null and void but continues until it is abolished by the national parliament.<sup>133</sup>

Consequently, any inconsistency between binding international law and a constitutional provision might give rise to state responsibility, but the provision would still be valid under domestic national law.<sup>134</sup>

True, the role that an international tribunal can play—where such tribunals exist—is significant. Nowadays, many national courts need to consider the prospect of their judgments being considered in international or regional courts, scrutinized with respect to international human rights, or even nullified if they deviate from certain international law standards. This is one of the possible influences of international law on national law. As Brun-Otto Bryde writes, the highest judicial authorities of countries are 'no longer the highest authority' in that respect.<sup>135</sup> This echoes Lord Rodger's famous dictum in *Secretary of State for the Home Department v AF (No 3)*: '*Argentoratum locutum: iudicium finitum*—Strasbourg has spoken, the case is closed'.<sup>136</sup> Nevertheless, as we shall see, the role of international tribunals is limited with regard to the domestic validity of laws, especially constitutional ones that contradict international law.

Take, for example, the constitutional crisis that occurred in Nicaragua in 2004–05. In general,<sup>137</sup> the Constitution of Nicaragua of 1987 allows for a 'total' and 'partial' reform in its amendment process. A partial reform demands a 60 per cent majority in the National Assembly and an approval in two successive sessions, while a total reform requires a two-thirds approval in the Assembly and a final approval by a special elected Constituent Assembly (Articles 192–4). In November 2004, the Assembly granted a first approval to a set of constitutional amendments that limited the president's power, deeming them to be a partial reform. The president, Enrique Bolaños, argued that these amendments undermined the balance of powers and therefore comprised a total reform. In December 2004, he filed petitions with the Nicaraguan Supreme

<sup>132</sup> K Gözler, 'La Question de la Supériorité des Normes de Droit international sur la Constitution' (1996) 46 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 200.

<sup>133</sup> Garlicki and Garlicka (n 69) 363.

<sup>134</sup> Rigaux (n 122) 301–6.

<sup>135</sup> Bryde (n 87) 210.

<sup>136</sup> [2009] UKHL2, para 98.

<sup>137</sup> For a detailed review see Schnably (n 99) 461–73.

Court and the Central American Court of Justice (CCJ). The CCJ accepted jurisdiction over the petition in January 2005 and called upon the National Assembly to suspend the amendment process until a final decision had been made. That same month, the Supreme Court of Nicaragua held that it—and not the CCJ—had jurisdiction over the dispute. Meanwhile, the National Assembly ignored the CCJ’s interim order and approved the amendments. In March 2005, the CCJ ruled that the amendments would undermine the executive’s independence. Since these amendments attempted to transform Nicaragua from a presidential system to a parliamentary one, such a transformation could be effected solely through the process of a ‘total reform’. The CCJ concluded that the amendments were therefore unconstitutional and invalid. However, that same day, the Supreme Court of Nicaragua delivered its ruling on the case, holding that the CCJ’s decision was invalid. Nicaragua was left with ‘two constitutions’: valid nationally and invalid internationally.<sup>138</sup> Eventually, the president and the Assembly reached an agreement to reconsider the amendments by the next elections and to suspend their application until after that time. Indeed, after the elections, the new government suspended the implementation of the new amendments indefinitely.<sup>139</sup> Two important lessons can be learned from the Nicaragua crisis: first, a supranational tribunal can (and did) declare constitutional amendments to be unconstitutional; second, and perhaps more importantly, this declaration of unconstitutionality need not affect the validity of the amendments within the domestic sphere.

Another example is Security Council (SC) Resolution 554 of 1984, regarding the new Constitution of South Africa of 1983 that entrenched apartheid.<sup>140</sup> In that resolution, the SC declared that it ‘strongly rejects and declares as null and void the so-called “new constitution”’, due to its contradiction of the principles of the UN Charter, mainly racial equality.<sup>141</sup> Ulrich Preuss considers this resolution an example of the changing roles of national constitutions: ‘No longer can we regard them as purely domestic instruments of government of a nation-bound population which exercises its right to national self-determination without concern of its regional or global surroundings.’<sup>142</sup> Whereas South Africa had to ‘accept and carry out’ this decision of the SC in accordance with Article 25 of the UN Charter,<sup>143</sup> South Africa condemned this resolution as ‘a gross interference in domestic

<sup>138</sup> *ibid* 470.

<sup>139</sup> *ibid* 473.

<sup>140</sup> GT Butcher, ‘Legal Consequences for States of the Illegality of Apartheid’ (1986) 8 *HumRtsQ* 404, 433; X Jisheng, ‘Evolution of South Africa’s Racist Constitutions and the 1983 Constitution’ (1987) 16(1) *A Journal of Opinion* 18.

<sup>141</sup> SC Res 554, UN Doc S/RES/554 (17 August 1984) <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/487/84/IMG/NR048784.pdf?OpenElement>>.

<sup>142</sup> UK Preuss, ‘Perspectives in Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’ (2006) 51 *NYLSchLRev* 467, 492.

<sup>143</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, [www.un.org/en/documents/charter/](http://www.un.org/en/documents/charter/), art 25: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

affairs'.<sup>144</sup> Thus, one can claim that while South Africa took a rather extreme dualist approach, the SC asserted that international law itself—in a 'self-contained regime of mandatory domestic implementation'—applies domestically regardless of any constitutional provisions to the contrary.<sup>145</sup> It is important to note, however, that although the Constitution was declared 'null and void,' it remained in force for ten years, until it was replaced by the Interim Constitution in 1994.

Lastly, it is necessary to revisit the *Sejdie and Finci v Bosnia and Herzegovina* case, in which the ECtHR declared a constitutional provision discriminating against minority groups in elections as violating the ECHR. Following that judgment, Bosnian authorities began proceedings to implement the decision. However, implementation is still the role of domestic institutions and so far no constitutional amendments regarding the discrimination against minority groups in elections have been made.<sup>146</sup>

These three cases are not exhaustive. They certainly do not aim to deny the importance of international or regional legal systems.<sup>147</sup> Nonetheless, they help to exemplify a critical argument: all three demonstrate the awkward situation in which an action is illegal under supranational law but remains valid under domestic law. Therefore, it would perhaps be more accurate to use Brenda Hale's statement: '*Argentorum locutum: iudicium non finitum*': The word of a supranational tribunal is not the last one.<sup>148</sup>

#### *D. The Role of National Courts*

The above analysis, even if correct at its core, is partial in its scope. It ignores the important potential and actual roles of national courts in enforcing international law.<sup>149</sup> Recently, André Nollkaemper explored how 'across the

<sup>144</sup> DJ Devine, 'International Law Tensions Arising from the South African Situation 1976–1986' (1987) *Acta Juridica* 165, 194.

<sup>145</sup> For such interpretation of the decision see RP Schaffer, 'The Inter-Relationship between Public International Law and the Law of South Africa: An Overview' (1983) 32 *ICLQ* 277; A Zimmermann, 'Is It Really All about Commitment and Diffusion? A Comment on Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *UIILLRev* 253, 257–8.

<sup>146</sup> See M Milanović, 'Sejdic and Finci v Bosnia and Herzegovina' (2010) 104(4) *AJIL* 636, 640; B Brljavac, 'Institutional Discrimination against the Minority Groups in Bosnia and Herzegovina: Barrier to the EU Membership' (2012) 7(2) *Research and Practice in Social Sciences* 1, 9.

<sup>147</sup> See famously L Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 47: 'It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.' See also HH Koh, 'Why Do Nations Obey International Law?' (1997) 106 *YaleLJ* 2599.

<sup>148</sup> B Hale, 'Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12(1) *HRLRev* 65, 77.

<sup>149</sup> F Francioni, 'International Law as a Common Language for National Courts' (2001) 36 *TexIntLJ* 587; Nollkaemper (n 131). For an important debate on the role of domestic courts in the development and enforcement of international law see A Roberts, 'Comparative International Law? The Role of National Courts in International Law' (2011) 60(1) *ICLQ* 57.

world, national courts have been given or have assumed the power to review acts of the executive or legislative branches of their state against international law',<sup>150</sup> arguing that 'national courts can act as agents of the international legal order, in the service of the international rule of law'.<sup>151</sup> In case of a violation of international law, national courts can ensure, for example, that proper reparations are given or that a decision of an international tribunal is implemented.<sup>152</sup> If international or supranational law are to be enforced judicially by domestic courts, then the compliance of state organs with these laws is expected to increase.<sup>153</sup>

While admitting that 'international courts cannot pronounce on anything other than the (lack of) formal validity of a domestic legal act from the perspective of international law, and cannot pronounce on their actual effectiveness in the national sphere', Nollkaemper argues that:

[National courts] can 'domesticate' the supremacy of international law, and significantly strengthen efficacy and the effectiveness of international law. It leads to a monist model where in the hierarchy of norms, international law features at the summit, and may generally enable courts to review the exercise of public power, even if this is lawful under the law of the forum state.<sup>154</sup>

In the same vein, Dieter Grimm argues, with regard to Germany and EU law, that:

Because of the primacy of EU law, the domestic constitution, and its agent, the constitutional court loses its exclusive power to determine the validity of domestic law. . . . Every judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law.<sup>155</sup>

This can apply, at least in theory, to a review of constitutional amendments and even to their nullification by national courts where there is a contradiction between supreme international or supranational law and constitutional law.<sup>156</sup> Of course, such an exercise of power by courts depends on the power, independence and legitimacy of the judiciary within that national system.<sup>157</sup>

<sup>150</sup> Nollkaemper (n 131) 7.

<sup>151</sup> *ibid* 8.

<sup>152</sup> *ibid* 200.

<sup>153</sup> M Kumm, 'The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 *VaJIntL* 19, 22–3.

<sup>154</sup> Nollkaemper (n 131) 166–77.  
<sup>155</sup> D Grimm, 'The Basic Law at 60: Identity and Change' (2010) 11(1) *GermanLJ* 33, 45. But see the German Constitutional Court Cases BVerfGE 37, 327 (Solange I), BVerfGE 73, 339 (Solange II) and VerfGE 89, 255 (Maastricht) (the Constitution Court's authority to adjudicate individual complaints is restored if EU gives lack of attention to fundamental rights).

<sup>156</sup> Compare DR Deener, 'Treaties, Constitutions and Judicial Review' (1964) 4 *VaJIntL* 7 (examining 'the extent to which powers of judicial review contribute to or shape the decisions of municipal courts in cases of conflict between a treaty and a constitution').

<sup>157</sup> The use of international law by domestic courts is likely to intensify institutional tensions between the judiciary and governmental branches. See MF Mohallem, 'Book Review: National Courts and the International Rule of Law, by André Nollkaemper' (2012) 32(3) *LS* 516, 522.

Thus, it seems that the solution for the ineffectiveness of international law lies within national courts. This resembles Georges Scelle's doctrine of '*dédoublement fonctionnel*' ('role splitting'), according to which whenever a national court faces a conflict between national and international law, it acts in the capacity of international judicial body, an agent of international law, alongside its domestic role.<sup>158</sup> But, when national courts are asked to enforce international law *vis-à-vis* a contradictory constitutional amendment, they face what Yuval Shany terms 'mixed loyalties'.<sup>159</sup> On the one hand, as a constituted organ, the judiciary must abide by the national constitution, the 'supreme law of the land.' On the other hand, since all organs of a state may not engage in conduct that constitutes a breach of an international obligation, national courts are bound to give effect to such an obligation as a matter of international law.<sup>160</sup> 'Surely', Shany notes, 'the fact that international law—a system of law which binds the polity—requires a certain outcome, ought to be considered a relevant factor by the courts of the same polity'.<sup>161</sup> This puts the domestic judge in a highly uncomfortable position: either she must act contrary to international law or contrary to the constitution.<sup>162</sup> Pierre-Marie Dupuy remarks that Scelle's '*dédoublement fonctionnel*' theory enables state organs to 'kill two birds with one stone'. While still acting within the framework of their competence as it is defined in the national legal order, they also play a part in the application of international law.<sup>163</sup> Whereas this remark is accurate with regard to a court that adjudicates on acts of other branches or ordinary acts, it encounters difficulties when one has to apply the '*dédoublement fonctionnel*' theory to adjudication of constitutional amendments. In such a case, the judge might no longer act under her 'framework of competence as defined in the national legal order', but rather against the constitution, from which her

<sup>158</sup> G Scelle, *Precis du droit des gens, Principes et systématique* (Vol I, Librairie du Recueil Sirey 1932) 43, 54–56. On Scelle's theory see in general H Thierry, 'The Thought of Georges Scelle' (1990) 1 EJIL 193; A Casses, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 2 EJIL 210, 212–13.

<sup>159</sup> Y Shany, 'Dédoublement fonctionnel and the Mixed Loyalties of National and International Judges' in F Fontanelli, G Martinico and P Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law Publishing 2010) 29.

<sup>160</sup> cf *LaGrand* (Germany v United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, 9, para 28, and International Court of Justice, *LaGrand Case* (Germany v United States of America), Judgment of 27 June 2001, ICJ Reports 2001, 466 paras 111–115.

<sup>161</sup> Y Shany, 'How Supreme is The Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Text by Domestic Courts' (2006) 31(2) *BrookJIntlL* 341, 399.

<sup>162</sup> Add to this the claim that national courts hesitate to apply international or regional law if they cannot be assured that other national court will act similarly. See E Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 175; JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26 *CompPolStud* 510, 521–2.

<sup>163</sup> PM Dupuy, 'Unity in the Application of International law at the Global Level and the Responsibility of Judges at the National Level: Reviewing Georges Scelle's "Role Splitting" Theory', in LB De Chazournes and M Kohen (eds), *International Law and the Quest for Its Implementation* (Brill 2010) 421.



competence stems.<sup>164</sup> Equally problematic is the postulation that ‘if national constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law’.<sup>165</sup> When the court invalidates a law passed by the legislature, it does so because that law is deemed unconstitutional. In its actions, the court guards the constitution. Then again that comparison seems inappropriate when it comes to judicial review of constitutional amendments. Arguably, by invalidating a constitutional amendment, properly enacted according to constitutional procedures, the court no longer guards the constitution but acts contrary to its provisions.

### *E. The Eventual Superiority of Domestic Constitutional Law*

Certainly, a decision by a supranational tribunal that a constitutional provision is incompatible with international law grants the domestic court a powerful tool, for rationalization as well as legitimation, when adjudicating constitutional amendments that breach binding supranational law.<sup>166</sup> Moreover, such a decision (of a supranational tribunal) has a value ‘in the very process of exposing community practice and norms to self-reflection and justification as part of a shared reflexive practice of developing normative standards based on broadly held values’.<sup>167</sup> However, as Andreas Paulus remarks, ‘When domestic courts apply international law or implement international decisions, they do so because domestic law requires it, not because they are organs of the international community . . . When domestic courts apply international law, they use authority derived from their domestic law, in particular their constitution.’<sup>168</sup> Even with regard to EU law—the supremacy of which is widely recognized by the member states—national constitutional courts ‘regard supremacy as a concept rooted in the national constitutions, rather than deriving from the autonomous nature of the Community legal order’.<sup>169</sup> Paulus is correct in stating that ‘it is domestic constitutional law that determines

<sup>164</sup> See JF Ingham, ‘Unconstitutional Amendments’ (1928–29) 33 *DickLRev* 161, 165–6: ‘If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment . . . it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess.’

<sup>166</sup> Garlicki and Garlicka (n 69) 364.

<sup>167</sup> G de Búrca and O Gerstenberg, ‘The Denationalization of Constitutional Law’ (2006) 47(1) *HarvIntLJ* 243, 258.

<sup>168</sup> A Paulus, ‘National Courts and the International Rule of Law: Remarks on the Book by André Nollkaemper’ (2012) 4 *JrslmRevLegalStud* 9.

<sup>169</sup> A Albi, ‘Supremacy of EC Law in the new Member States: Bringing Parliament into the Equation of Co-operative Constitutionalism’ (2007) 3 *EurConstLRev* 25. See also R Kwiecień, ‘The Primacy of European Union Law over National Law under the Constitutional Treaty’ (2005) 6(11) *GermanLJ* 1479, 1487–8: ‘Unlike the ECJ, the national courts comparatively seldom justified primacy by the autonomy of the Community legal order . . . The national courts thus reject the hierarchy of legal acts, within which the acts of national law, including the Constitutions, are subject to the supremacy of Community law.’

the extent and the limits of the effects of international or supranational law in the domestic legal order'.<sup>170</sup> Despite the growing influence of supranational law, the 'supranational rule of law' ultimately depends on the domestic constitutional order.<sup>171</sup> Even Hans Kelsen, a notable monist, observes that:

The question as to whether in case of a conflict between national and international law the one or the other prevails can be decided only on the basis of the national law concerned; the answer cannot be deduced from the relation which is assumed to exist between international and national law.<sup>172</sup>

True, modern constitutions, especially following World War II<sup>173</sup>, increasingly refer to international law.<sup>174</sup> Some even grant international law binding force within the domestic sphere and acknowledge the normative hierarchical superiority of international law, especially of human rights treaties (international or supranational), over domestic law.<sup>175</sup> This 'constitutionalization of international law' (or 'internationalization of constitutions'<sup>176</sup>), ie, the incorporation of international law (treaty or customary) within the constitution, may act as an important mechanism for states to pre-commit themselves to

<sup>170</sup> Paulus (n 168) 16. cf *Görgülü* Case 2 BvR 1481/04 (14 October 2004) BVerfGE 111, 307 at para 34 <[www.bundesverfassungsgericht.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html)>: 'The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can only be determined from the viewpoint of domestic law only by domestic law itself.'

<sup>171</sup> Nollkaemper himself recognizes that in order for international claims to be adjudicated in domestic courts 'international law has to be valid in national law'. Nollkaemper (n 131) 68–74.

<sup>172</sup> Kelsen (n 111) 420.

<sup>173</sup> See DR Deener, 'Comment: International Law Provisions in Post-World War II Constitutions' (1951) 36 *CornellLRev* 505, 522–8; RR Wilson, 'International Law in New National Constitutions' (1964) 58 *AJIL* 432. For an earlier account see C Pergler 'Constitutional Recognition of International Law' (1944) 30(2) *VaLRev* 30(2) 318.

<sup>174</sup> See E Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *AJIL* 427; T Ginsburg, S Chernykh and Z Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *UIILRev* 201, 207–10; WC Chang and JR Yeh, 'Internationalization of Constitutional Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1168.

<sup>175</sup> A Cassese, 'Modern Constitutions and International Law' (1985-III) 192 *Recueil des Cours* 331; VS Vereshchetin, 'New Constitutions and the Old Problem of the Relationship Between International Law and National Law' (1996) 7 *EJIL* 1, 4–8; T Buergenthal, 'Modern Constitutions and Human Rights Treaties' (1998) 36 *ColumJTransnatlL* 211; OA Hathaway, 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) 117 *YaleLJ* 1236, 1362–72; Peters (n 118) 171; Nollkaemper (n 131) 151.

<sup>176</sup> See H Schwartz, 'The Internationalization of Constitutional Law' (2003) 10(2) *Hum Rts Brief* 10. Note that by these terms I do not refer to the 'structural changes of the international legal systems' or to 'the transfer of constitutional functions from the national to the international level'. On such understanding see T Cottier and M Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck UNYB* 261, 269–75. On constitutionalism beyond the state see also JP Trachtman and JL Dunoff (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009); CEJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011); Dobner and Loughlin (n 127).

certain international obligations, by placing them at a constitutional level beyond the control of ordinary politics.<sup>177</sup> However, this superiority over domestic law is mostly restricted to ordinary, and not constitutional, law.<sup>178</sup> Even in modern constitutions, Judge Vladlen Vereshchetin remarks, there is ‘a clear tendency toward “*de jure* recognition” of the primacy of international law . . . but not above the constitution itself’.<sup>179</sup> Indeed, as Anne Peters recently demonstrated, whereas international courts and tribunals assert the supremacy of international law over domestic law, including constitutional law, most of the domestic actors reject such an assertion and do not award superiority to international or regional law over the national constitution. On the contrary, states commonly grant the constitution superiority over international law, even when international law is given superiority over ordinary legislation.<sup>180</sup> For example, in 2006 the Lithuanian Constitutional Court held that EU law is superior to ‘national legal acts (regardless of what their legal power is), *save the Constitution itself*’ (emphasis added).<sup>181</sup> In Italy, the Constitutional Court has recognized, in several decisions, that the ECHR is a ‘*norma interposta*’ (‘interposed law’); it has a supra-legislative status, ie, superior to ordinary legislation, yet infra-constitutional, ie, inferior to the Constitution.<sup>182</sup> Within the United States, where according to the Supremacy Clause of the Constitution, treaties generally prevail over inconsistent state laws,<sup>183</sup> there is a wide consensus—not without criticism—that the Constitution is supreme to international law.<sup>184</sup>

<sup>177</sup> See T Ginsburg, ‘Locking in Democracy: Constitutions, Commitment and International Law’ (2006) 38 NYUJIntL 707; Ginsburg, Chernykh and Elkins (n 174).

<sup>178</sup> Henkin (n 80) 72–4; Peters (n 118) 172; Neuman (n 103) 1891.

<sup>179</sup> Vereshchetin (n 175) 13.

<sup>180</sup> See Peters (n 118) 187–93; A Peters, ‘The Globalization of State Constitutions’ in J Nijman, and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 259–66.

<sup>181</sup> Constitutional Court of Lithuania, Case No 17/02-24/02-06/03–22/04 on the limitation of the rights of ownership in areas of particular value and in forest land, ruling of 14 March 2006, para 9.4 <[www.lrkt.lt/dokumentai/2006/r060314.htm](http://www.lrkt.lt/dokumentai/2006/r060314.htm)>.

<sup>182</sup> Corte costituzionale Judgment Nos 348/2007; 349/2007; 311/2009; 317/2009 <[http://www.cortecostituzionale.it/ActionPagina\\_328.do](http://www.cortecostituzionale.it/ActionPagina_328.do)>. See F Biondi Dal Monte, F Fontanelli, ‘Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System’ (2008) 9 GermanLJ 889; S Mirate, ‘The Role of the ECHR in the Italian Administrative Case Law: An Analysis after the Two Judgments of the Constitutional Court No. 348 and No. 349 of 2007’ (2009) 1 ItalianJPubL 260; G Gentili, ‘A Comparison of European Systems of Direct Access to Constitutional Judges: Exploring Advantages for the Italian Constitutional Court’ (2012) 4(1) ItalianJPubL 159, 205–6.

<sup>183</sup> US Const art VI, cl 2; D Sloss, ‘The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties’ (1999) 24 YaleJIntL 129, 131.

<sup>184</sup> See *Geofroy v Riggs*, 133 US 258, 267 (1890) (dictum): ‘It would not be contended that (the treaty power) extends so far as to authorize what the Constitution forbids.’ See also CM Vazquez, ‘Treaties as Law of The Land: The Supremacy Clause and The Judicial Enforcement of Treaties’ (2008) 122 HarvLRev 599, 611. But see Socarras (n 111) 190 (the roots of American law acknowledged the supraconstitutional status of international law) and RZ Levin and P Chen, ‘Rethinking the Constitution–Treaty Relationship’ (2012) 10(1) IntJConsL 242, 243 (the relationship between the Constitution and treaties is better characterized by ‘mutual adjustment’).

One can identify a few exceptions to this denial of international or supranational superiority over domestic constitutional law. In some states, the relationship between domestic constitutional law and international law is still ambiguous. Take for instance the Constitutions of Romania of 1991 (Articles 11, 20), Slovakia of 1992 (Article 11), and the Czech Republic of 1992 (Article 10), which grant supranational human rights treaties priority over domestic 'law', but where it remains unclear whether this 'law' includes the constitution.<sup>185</sup> In Austria, EU law is superior to all domestic law, including the Constitution, inasmuch as it does not conflict with the 'basic principles of domestic constitutional law'.<sup>186</sup> Conflicts between the Constitution and the ECHR are quite uniquely governed by the principle of *lex posterior derogat legi priori*.<sup>187</sup> In Argentina, the Constitution grants international treaties on human rights a constitutional hierarchy.<sup>188</sup> A clearer provision exists in Article 2(2) of the Constitution of Bosnia and Herzegovina of 1995, which specifically provides that those standards set in the ECHR shall have priority over all other law, including constitutional amendments.<sup>189</sup> Article 91(3) of the Constitution of the Netherlands of 1983 gives priority to international treaties over domestic statutes, which most scholars consider to include the constitution.<sup>190</sup> In Belgium, the Constitutional Court remarked, quite remarkably,<sup>191</sup> that the ECHR has priority over the Belgian constitution: '*que la Convention de sauvegarde des droits de l'homme et des libertes fondamentales prime la Constitution.*'<sup>192</sup>

<sup>185</sup> On the relationship between EU law, ECHR law and national law in the Czech Republic, Slovakia and Romania see M Bobek, D Kosai, 'Report on the Czech Republic and Slovakia' in Martinico and Pollicino (n 121) 117; I Raducu, 'Report on Romania', in Martinico and Pollicino (n 121) 369.

<sup>186</sup> P Cede, 'Report on Austria and Germany' in Martinico and Pollicino (n 121) 61.

<sup>187</sup> H Keller, A Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Keller and Stone Sweet (n 121) 684.

<sup>188</sup> Constitución de la Nación Argentina (1994), art 75, para 22. See HF Fierrot and SL Ayllón, 'The Impact of Globalization on the Reform of the State and the Law in Latin America' (1997) 19 *HousJIntL* 785, 799. On the relationship between domestic constitutional law and international human rights law in Latin America see generally MEG Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (Inter-American Institute of Human Rights 2011).

<sup>189</sup> The Constitution of Bosnia and Herzegovina, art 2(2) (n 7).

<sup>190</sup> Peters (n 118) 184. The Constitution expressly authorizes the government to enter into treaties inconsistent with the Constitution, subject to approval by two-thirds vote in both chambers of the parliament. Grondwet [Gw.] [Constitution] art 91(3) (Neth). See EA Alkema, 'Constitutional Law' in J Chorus, PH Gerver and E Hondius (eds), *Introduction to Dutch Law* (4th edn, Kluwer Law International 2006) 327–30; E Mak, 'Report on the Netherlands and Luxembourg' in Martinico and Pollicino (n 121) 301.

<sup>191</sup> See E Brems, 'Belgium: The Vlaams Block Political Party Convicted Indirectly of Racism' (2006) 4 *IntJConstL* 702, 710 ('the priority of international treaties over the Belgian Constitution is not a matter of complete consensus among Belgian constitutional lawyers, and the Court of Cassation has never before so explicitly taken a position in this debate'); P Popelier, 'Report on Belgium' in Martinico and Pollicino (n 121) 90 ('the Constitutional Court has never openly expressed the primacy of the constitution over international law').

<sup>192</sup> Belgian Cour de cassation, Dutch Section, 2nd Chamber, Vlaamse Concentratie, Decision of 9 November 2004, para 14.1, cited in Peters (n 118) 184 and Peters (n 180) 260.

In some states, the superiority of *jus cogens* over domestic law, including the constitution, has been recognized. For example, in *Planas v Comelec*, a case before the Supreme Court of the Philippines in 1973, the Court stated that the sovereign people might amend the Constitution in any way it chooses, so long as the change is not inconsistent with *jus cogens* norms of international law.<sup>193</sup> In Russia, international treaty law is superior (with certain exceptions) to ordinary laws but not to the Constitution.<sup>194</sup> In a decision of 2003, the Russian Supreme Court held that those ‘generally recognized principles and norms of international law’ have direct effect within the national jurisdiction, and stated that ‘deviation from which is impermissible’.<sup>195</sup>

The strongest example comes from Switzerland where 100,000 people eligible to vote have the right to propose revisions to the Constitution. This is referred to as a People’s Initiative (*Volksinitiative*). In response to such an initiative, the Federal Council can issue a recommendation, based upon which the Federal Assembly (*Bundesversammlung*) reviews the initiative for its compliance with several elements as established in the Constitution. The double majority of voters and cantons must approve a *Volksinitiative*. In 1996, both chambers of the Federal Assembly declared a *Volksinitiative* to amend the Constitution to be invalid for violating the internationally recognized peremptory prohibition of *refoulement*.<sup>196</sup> According to this prohibition, states must refrain from deporting or extraditing persons to a country where they would face torture or inhumane or degrading treatment. This prohibition imposes on states the positive obligation to examine whether the deportation or extradition of an individual would have such an effect. According to the *Volksinitiative*, asylum seekers who enter the state unlawfully would be deported immediately and without the option of appeal. In its report to the *Volksinitiative*, the Federal Council noted the peremptory (or *jus cogens*) character of the *non-refoulement* principle. It further stated that the

<sup>193</sup> 49 SCRA 105, 126 (1973), cited in JG Bernas, *Constitutional Structure and Powers of Government: Notes and Cases: Part I* (Rex Bookstore 2005) 1224. On the events leading to this case see SBJ Tan, ‘The Philippines after the Lifting of Martial Law: A Lingering Authoritarianism’ (1980) 55 *PhilippineLJ* 418, 419; H Roque, ‘The Philippines: Quezon’s Wish Granted’ in C Hill, J Menzel (eds), *Constitutionalism in Southeast Asia: Vol. 2 Reports on National Constitutions* (Konrad-Adenauer-Stiftung 2008) 217–19.

<sup>194</sup> The Constitution of the Russian Federation, 1993, Part 6, art 125. See generally Y Tikhomirov, ‘Russia’ in Shelton (n 98) 518, 523–4; SY Marochkin ‘International Law in the Courts of the Russian Federation: Practice of Application’ (2007) 6(2) *ChineseJIL* 329.

<sup>195</sup> Supreme Court of Russian Federation (plenum), decision No 5 of 10 October 2003, ‘on application of the universally recognized principles and norms of the international law and the international treaties of the Russian Federation by courts of general jurisdiction’, para 1. An English translation is available at A Burkov, *The Impact of the European Convention on Human Rights on Russia Law* (ibidem-Verlag 2007) 124–34.

<sup>196</sup> Bundesbeschluss über die Volksinitiative ‘für eine vernünftige Asylpolitik und gegen die illegale Einwanderung.’ 14 March 1996, BBl 1996 I 1355, cited and elaborated in E de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law’ (2004) 15(1) *EJIL* 97, 101–5. See also Zimmermann (n 145) 258. On the peremptory status of the *non-refoulement* principle see J Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (2001) 13(4) *IJRL* 533.

immediate deportation of illegal immigrants, as proposed in the initiative, would not allow an examination of whether the deported persons would face torture or inhumane or degrading treatment. Therefore, illegal immigrants who had fled their countries due to persecution might face similar treatment if returned. The proposed constitutional amendment thus violated the peremptory principle of *non-refoulement*. Interestingly, the Federal Council stated that respecting the fundamental norms of international law is inherent to the *Rechtstaat* principle of ‘rule by law’,<sup>197</sup> and violation of said norms would undermine the *Rechtstaat* and cause the state and the influenced individuals an irreversible damage. It therefore proposed that the Federal Assembly invalidate the *Volksinitiative*,<sup>198</sup> which it did on 14 March 1996; consequently, the *Volksinitiative* did not form the subject of a referendum.<sup>199</sup>

In 1999, Switzerland granted explicit constitutional recognition to the proposition that *jus cogens* norms of international law were a limitation to constitutional amendments. According to the 1999 Constitution, in the case of a total revision of the Constitution, ‘mandatory provisions of international law must not be violated’ (Article 193(4)) and ‘partial revision must respect the principle of cohesion of subject matter and must not violate mandatory provisions of international law’ (Article 194(2)).<sup>200</sup> According to the Federal Assembly and Federal Council, ‘mandatory provisions’ of international law include the prohibitions on torture, genocide, slavery and *refoulement*, the core guarantees of international humanitarian law, and the non-derogable guarantees of the ECHR and the 1966 International Covenant on Civil and Political Rights.<sup>201</sup> What about other rules of international law? In a report of 2010 regarding the relationship between international and domestic law, the Federal Council states that when a new constitutional norm, which was enacted by a *Volksinitiative*, clearly aims to violate international law, the constitutional provisions should prevail over the older international law. The approval by the people and cantons should then be interpreted as a mandate to withdraw from the relevant international instrument.<sup>202</sup>

<sup>197</sup> On the Swiss *Rechtstaat* principle see T Fleiner, A Misic and N Töpperwien, *Swiss Constitutional Law* (Kluwer Law International 2005) 28–30.

<sup>198</sup> Botschaft über die Volksinitiativen ‘für eine vernünftige Asylpolitik und gegen die illegale Einwanderung’. In BBI 1994 III 1489, 1495–1500, cited in de Wet (n 196).

<sup>199</sup> This opinion of the Swiss Federal Council was somewhat contrary to a prior decision of 1953, in which it held that no external limitations exist upon the constitutional process that can be deemed superior to the people’s will (BBI 1954 I 72). In its later opinion, the Federal Council distinguished between treaty obligations, which state parties can legally terminate and were at issue in the 1953 initiative, and *jus cogens* norms, which were at issue in the 1994 initiative. See de Wet (n 196) 102–3.

<sup>200</sup> See Biaggini (n 5) 316–17; O Diggelmann, ‘Switzerland and the European Convention on Human Rights: Particularities in a Nutshell’ (2007) Jura 171, 173.

<sup>201</sup> See D Moeckli, ‘Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human rights’ (2011) 11(4) HRLRev 774, 781.

<sup>202</sup> Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht, 5 March 2010, Bundesblatt 2010, 2263 at 2310, 2323, 2328–2331, cited in Moeckli *ibid* 785.

At first glance, these examples demonstrate that in some jurisdictions, international law may be normatively positioned even above the constitution itself. However, one must be cautious when evaluating such alleged supremacy of international law within the domestic constitutional order. As Gerald L Neuman remarks:

Even if a constitutional provision accords supremacy to international law, that provision itself will be subject to amendment, if necessary by resort to the constitution-giving power of the people. Similarly, in their consensual aspect, constitutional provisions recognizing the inviolability of international human rights represent voluntary national value choices.<sup>203</sup>

The first section of this observation demands clarification. An ordinary constitutional provision granting international law supremacy can indeed be subject to future amendments. However, if such a constitutional provision would be drafted as an ‘unamendable’ provision, it would bind the amendment powers.<sup>204</sup> Hence, an explicit limitation that amendments should not violate certain rules of international law would also apply to the constitutional amendment powers. Of course, a similar unamendable provision would not limit or bind the *original constituent power*. Therefore, Neuman is correct that through the ‘constitution-giving power of the people’, any constitutional provision granting superiority to international law may be changed. Moreover, the final section of this observation is also important as it emphasizes, in a somewhat Oppenheimian way,<sup>205</sup> that even when the constitution grants international law a supra-constitutional status, ie, superiority over constitutional provisions, and thereby possible limits upon the constitutional amendment powers, such limitation derives not from international law as a separate legal order but, rather, from the constitution itself.

#### IV. CONCLUSION

Constitutionalists have long sought a high law to refer to when assessing legal norms, for instance, primary legislation when assessing secondary legislation,

<sup>203</sup> Neuman (n 103) 1875–6.

<sup>204</sup> On ‘unamendable provisions’ as valid and binding see Roznai (n 11). See also H Kelsen, ‘Derogation’ in RA Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Bobbs-Merrill 1962) 343–4; H Kelsen, *General Theory of Norms* (Clarendon Press 1991) 109–10; H Kelsen *General Theory of Law and State* (The Lawbook Exchange 2007) 259; Gözler (n 40) 52; Roznai and Yolcu (n 1) 190–5.

<sup>205</sup> L Oppenheim, ‘Introduction’, in CM Picciotto, *Relational Law to the Law of England and the United States* (McBride, Nast & Co 1915) 10 : ‘Neither can International Law per se create or invalidate Municipal Law, nor can Municipal Law per se create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law ... Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become ipso facto rules of Municipal Law.’



or constitutional legislation when assessing primary legislation. But what if the norm to be assessed is a constitutional one? When it comes to constitutional amendments, these 'higher norms' can be basic constitutional principles—explicit or implicit. These are often termed 'internal supra-constitutional' principles. Arguments of a higher norm can also be made in reference to external supra-constitutional principles, designed as a set of natural law or international law standards that bind national constitutional standards. As has been argued in this article, natural law theory seems inadequate to function as a limitation to constitutional amendments. Nevertheless, there is a growing tendency to argue for supra-constitutional limitations on amendments in the form of international or regional law.

Supra-constitutional limits are manifestations of the phenomena of globalization, multilateralism, and transnationalism which exert a growing influence on domestic law and domestic legal institutions. As we have seen, in many cases this influence goes beyond merely supplementing or complementing domestic law. Today, supranational law seems to serve as an autonomous limitation to constitutional amendments. States are bound by certain supranational rules. When those rules are breached—even by constitutional legislation—they can be enforced in supranational bodies and tribunals. From this perspective, supra-constitutional limits on the constitutional amendment powers do exist. This appears to overcome the traditional dualism between international law and domestic law by identifying certain supremacy of supranational law over the national legal order.

This alleged supremacy finds its limit when it comes to a state's constitution. It seems that these supra-constitutional limits are themselves limited and deficient. They find their boundaries when they attempt to enter the internal *espace juridique* and overcome the highest hierarchical norm. As Garlicki and Garlicka recently wrote, the main problem with international law is its enforceability, mainly due to a conflict between two perspectives:

From the perspective of international law, each and every domestic regulation, including regulations of constitutional rank, must respect the priority of binding international norms. The same position is adopted by the supranational law ... Constitutional law adopts an entirely opposite approach. The national constitution is regarded as the supreme law of the land and any 'unconstitutional' international (supranational) regulation therefore cannot be applied by the domestic authorities. In several European countries, constitutional courts have explicit jurisdiction to decide on the conformity of international undertakings with the national constitution. As a result, any regulation that may be qualified as an 'unconventional' constitutional norm from the perspective of international law ... would be qualified as an unconstitutional international norm from the perspective of constitutional law.<sup>206</sup>

<sup>206</sup> Garlicki and Garlicka (n 69) 364.

The inconsistency between these two approaches is, to borrow from Anne Peters, ‘a fact with which academics will have to learn to live’.<sup>207</sup> So how, then, can supranational limitations, such as international human rights law and *jus cogens* principles, be enforced within a domestic legal system? In the case of a constitutional amendment that breaches international or regional law, domestic courts can—at least in theory—have recourse to supranational avenues in order to annul the conflicting constitutional provision.<sup>208</sup> This is especially the case for a powerful court that enjoys great legitimacy. But this still seems unlikely to occur—the rare exception rather than the rule—since when facing ‘mixed loyalties,’ the national judge will usually choose the national constitutional law over international law.<sup>209</sup> Even if it is clear, from an international law perspective, that international law prevails over national law; state practice does not demonstrate general approval of international supremacy over the domestic constitutions.<sup>210</sup> In fact, in most countries, international law (contrary to EU and ECHR law) is still relatively neglected or dismissed in constitutional litigation.<sup>211</sup> Moreover, any judicial reference to supra-constitutional norms in order to invalidate constitutional amendments would likely earn harsh criticism.<sup>212</sup>

Today, any alleged primacy of supranational law is still qualified. Ultimately, it would be subject to the highest hierarchical normative national norm—the constitution.<sup>213</sup> Furthermore, in the internal *espace juridique* (contrary to the external one) any arguments that supranational law prevails over domestic constitutional law are commonly based on the constitution itself, which may grant to certain international or regional law a normative status

<sup>207</sup> A Peters, ‘The Bananas Decision (2000) of the German Federal Constitutional Court: Towards Reconciliation with the European Court of Justice as Regards Fundamental Rights Protection in Europe’, in (2000) 43 GerYBIL 276, 282.

<sup>208</sup> Compare JP McCormick, ‘Book Review: Judging the Judges, Judging Ourselves’ (1999) 25 NYUREVL&SocChange 109, 118: ‘As legal fora increasingly lose direct state-related implementation power as a result of globalization and regionalization, judges will need to consider methods that pursue civil and social justice when actual implementation is likely to be imperfect or ineffectual.’

<sup>209</sup> Recall David Dyzenhaus’s criticism of the South African judiciary who, according to him, should have confronted the government and resisted apartheid. While those judges saw themselves bound by domestic law, they could have invoked common law rights and freedoms to protect members of the society. D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 14–15.

<sup>210</sup> A Peters and U Preuss, ‘International Relations and International Law’ in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2012) 36–9; Nollkaemper (n 131) 199–200; Peters (n 118).

<sup>211</sup> See for example with regard to East Asia: KG Lee, ‘From Monadic Sovereignty to Civitas Maxima: A Critical Perspective on the (Lack of) Interfaces between International Human Rights Law and National Constitutions in East Asia’ (2010) 5(1) NationalTaiwanUniLRev 155.

<sup>212</sup> See M Rosenfeld, ‘Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts’ (2004) 2 IntlJConstL 633, 655; R Bork, *The Tempting of America* (Free Press 1990) 66 (arguing that recognizing supra-constitutional norms invites judicial activism).

<sup>213</sup> Vereshchetin (n 175) 14.

higher than domestic law.<sup>214</sup> However, that constitution may be amended or replaced by a new constitution, so as to loosen or even exclude such superiority. More important is the acknowledgment that this superiority is based not on any supra-constitutional theory, but rather on limitations within the constitutional order itself. This is well demonstrated in the clearest example of an international limitation within a domestic legal system: the Swiss case regarding the deportation of asylum seekers. Even in Switzerland, where the Federal Council recognized *jus cogens* as an implicit limitation on constitutional amendments, the reasoning was based upon the national constitutional order. It was derived from the principle of *Rechtstaat*, which constitutes a basic principle of the domestic legal order, rather than from an autonomous external legal order. As Erika de Wet writes, ‘the (Swiss notion of) *Rechtstaat* itself contains certain peremptory and unalterable norms, including the prohibition of *refoulement* and that this national origin of the most elementary norms of international law would suffice for applying the concept of *jus cogens* to national legislation’.<sup>215</sup>

This is not to deny the importance of supranational law. Ultimately, these principles that may act as valid limitations on the constitutional amendment powers (such as *jus cogens* and international human rights) form part of international and regional laws. Nevertheless, they require some domestic anchoring. Therefore, a better approach—taking cue from Anne-Marie Slaughter and William Burke-White’s slogan ‘the future of international law is domestic’<sup>216</sup>—is to use explicit and implicit limitations as means to enforce international law. This might seem, in theory, like taking a step backwards rather than a step forwards. Already 90 years ago, Quincy Wright concluded his enquiry into ‘what, if any, limitations international law places upon the capacity of a state to make and alter its constitution’<sup>217</sup> by stating that:

While conflicts remain, national authorities are bound by the constitution and since international law relies in first instance upon enforcement by national authorities, it will suffer, but in the long run, as Pillet justly remarks, international law must be respected ‘on the penalty of exposing the state to a responsibility which may paralyze its sovereignty and put obstacles to the reign of its national law’.<sup>218</sup>

<sup>214</sup> But see Martinico (n 121) 424: ‘today, the issue of the ECHR’s primacy and direct effect does not depend just on what is written in the constitutions, it is something that seems to go beyond the full control of national constitutions’.

<sup>215</sup> de Wet (n 196) 103.

<sup>216</sup> AM Slaughter and WB White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’ (2006) 47(2) *HarvIntLJ* 327, 350 (for them, this slogan ‘refers not simply to domestic law but to domestic politics. More precisely, the future of international law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors in domestic politics’).

<sup>217</sup> Q Wright, ‘International Law in Its Relation to Constitutional Law’ (1923) 17 *AJIL* 234, 239.

<sup>218</sup> *ibid* 244.

However, one must remember that national constitutions remain essential in any process of global or European constitutionalization.<sup>219</sup> As Ximena Fuentes Torrijo recently remarked:

if international law does not provide tools for preventing States from enacting norms incompatible with treaties, then, the solution should be sought within domestic law ... rules contained in international treaties had to be placed somewhere beyond the reach of domestic law. How can this be accomplished? By placing international treaties at a higher level internally. This pre-eminence may sometimes correspond to a constitutional hierarchy. In other cases, a supra-constitutional hierarchy is recognised, while an intermediate solution would be to grant the supralegal but infraconstitutional hierarchy.<sup>220</sup>

Therefore, not only does 'the emergence of an international public power ... not render the constitution obsolete or ineffective,'<sup>221</sup> but also the constitution remains essential for supra-constitutional law. This dependency on domestic 'sovereignty' to enforce norms that attempt to transcend sovereignty is the 'paradox of cosmopolitanism'.<sup>222</sup>

Once having acknowledged the limited nature of the amendment powers (contrary perhaps to the *original constituent power*), resorting to supra-constitutional theories in order to limit the constitutional amendments may be superfluous.<sup>223</sup> Limitations within the constitution itself may be used in order to render supranational standards valid limitations on the amendment powers. For instance, an explicit unamendable provision may refer to international laws such as *jus cogens* principles or international human rights law. Similarly, *jus cogens* principles may form part of the (universal) basic principles of the domestic constitutional order.<sup>224</sup> Such explicit and implicit limitations are binding upon the constitutional amendment powers. Contrary to this approach, De Wet contends that 'one could claim that such an explicit intra-state

<sup>219</sup> Compare M Claes, 'The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15' (2007) 3 CYELP 1, 37.

<sup>220</sup> Torrijo (n 129) 491.

<sup>221</sup> Grimm (n 127) 16.

<sup>222</sup> G Simpson, *Law, War & Crime* (Polity Press 2007) 46.

<sup>223</sup> This may not be the case when one argues that the original constituent power is limited. Here, resorting to supra-constitutional theories might be unavoidable. See CV Keshavamurthy, *Amending Power Under The Indian Constitution: Basic Structure Limitations* (Deep & Deep Publications 1982) 87, n 29: 'Taken to logical limits it can even be argued that the human values protected by the International Covenants operate as limitations even on the ultimate Sovereignty in any community which would prefer to remain as a member of the community of civilized nations.' See also TM Franck and AK Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in LE Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace Press 2010) 3.

<sup>224</sup> cf The German Constitutional Court *Lisbon* Case, BVerfG, 2 BvE 2/08, 30 June 2009, para 218 <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)>: 'Through what is known as the eternity guarantee, the Basic Law ... makes clear ... that the Constitution of the Germans, in accordance with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which cannot be amended by positive law.'

commitment to peremptory norms of international law could have counter-productive effects, as it would imply that the legislature would not be bound to customary law that does not constitute *jus cogens*, but could follow it at its own discretion'.<sup>225</sup> In light of other popular initiatives to amend the Constitution in Switzerland, this evaluation seems correct.<sup>226</sup> Of course, a relatively wider explicit limitation provision that includes more than just *jus cogens*, such as important human rights treaties, may solve, or at least, assuage this problem. Besides, from an international law perspective, is it not better to have an unamendable provision which would protect core principles than not having any protection whatsoever?

This article has examined the notion of supra-constitutional limits on the constitutional amendment powers. It has both summarized current debates on their use and explained what is in fact meant when talking about supra-constitutional limits. It has demonstrated that existing practice dispels a genuine notion of supra-constitutionality, which requires for its application, or is dependent upon, limitations on the amendment powers within national constitutions. Matthias Herdegen claims that 'defining the constitution's core by reference to the law of nations and its peremptory protection of human rights will strengthen the normative force of international law in the community of States'.<sup>227</sup> Indeed, not only do explicit and implicit limits on the amendment powers describe the existing national practice regarding arguments relating to the superiority of supranational law over domestic constitutional law but, by focusing on explicit and implicit limits, rather than on external legal orders, international and supranational laws may be strengthened and pose enforceable limitations on the constitutional amendment powers. 'The government undoubtedly has a variety of legitimate means at its disposal to modify its international legal obligations or to deprive them of domestic applicability', William Carter reminds us, and 'Ignoring the Constitution is not one of them.'<sup>228</sup>

<sup>225</sup> de Wet (n 196) 104.

<sup>226</sup> For example, with regard to the initiative to ban the construction of minarets, the Federal authorities did not find any violation of peremptory norms, claiming that the freedom to exercise one's religion and the prohibition on discrimination do not form part of *jus cogens*. Similarly, with regard to the initiative requiring the automatic expulsion of foreign nationals convicted of certain criminal offences specified by law, it was argued that it could be implemented in a way that respects the prohibition on refoulement. Botschaft zur Volksinitiative 'Gegen den Bau von Minaretten' Bundesblatt 2008, 7603, 7609–12; Botschaft zur Volksinitiative 'für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)', Bundesblatt 2009, 5097, 5106–13, cited in Moeckli (n 201) 781–82.

<sup>227</sup> Herdegen (n 35) 605.

<sup>228</sup> WM Carter, 'Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation' (2010) 69 *MdLRev* 344, 389.