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

1. The Idea of Amending a constitution

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

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

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

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

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

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

3 Ibid 354.

4 Ibid.

5 Ibid 357.

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

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

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

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

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

9 Ibid 340.

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

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

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

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

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

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

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

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

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

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

19 Raz (n 1) 341.

20 Ibid 342–343.

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

22 Ibid 350.

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

24 Ibid 350.

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

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

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

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

27 Ibid 327.

28 Albert (n 18) 17.

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

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

1.1. Conceptual and Normative Questions

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

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

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

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

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

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

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

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

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

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

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

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

36 Albert (n 18) 13.

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

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

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

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

1.2. Constitutional Amendment and Replacement

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

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

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

42 Ibid 66.

43 Murphy (n 6) 177.

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

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

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

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

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

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

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

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

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

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

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

50 Ibid.

51 Albert (n 18) 20.

52 Ibid.

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

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

1.3. Constituent power and legitimate political authority

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

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

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

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

58 Ibid 94.

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

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

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

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

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

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

63 Ibid 382.

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

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

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

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

65 Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *The Philosophical Quarterly* 127, 134. Buchanan (n 64) 238–9.

66 Ibid.

67 Ibid.

68 Loughlin (n 59) 219.

69 John Rawls, *Political Liberalism*, (Columbia University Press 2005, expanded edition) 137.

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

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

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

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

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

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

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

76 Thornhill (n 62) 382.

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

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

2. The Normative Arguments for Limiting Amendment Power

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

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

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

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

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

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

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

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

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

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

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

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

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

85 Ibid 639.

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

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

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

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

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

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

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

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

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

2.1. Constitutionalism Constraint

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

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

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

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

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

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

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

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

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

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

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

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

98 Ibid 856.

99 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

114 Sartori (n 97) 862.

115 Ibid 854.

116 Marmor (n 102) 78.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126 Stone Sweet (n 96) 218.

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

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

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

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

129 Jackson (n 127) 334.

130 Ibid.

131 Ibid 337.

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

133 Ibid, 5.

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

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

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

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

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

135 Ibid 11.

136 Ibid.

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

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

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

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

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

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

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

142 Ibid 140.

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

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

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

2.2. Human Rights Constraint

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

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

146 Murphy (n 6) 187.

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

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

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

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

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

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

151 Cohen (n 87) 5.

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

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

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

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

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

155 Cohen (n 87) 12.

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

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

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

159 Ibid 143.

160 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

174 Cohen (n 87) 12.

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

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

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

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

179 Cohen (n 87) 200.

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

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

180 Barber (n 111) 40.

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

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

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

184 Jovanović and Krstić (n 182) 20.

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

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

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

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

186 Yaniv Roznai, 'We the Limited People' NYU Global Fellows Forum (2015, March) (Vol. 10) 7. For detailed explanations, see Fasel (n 74).
187 Colón-Ríos (n 141) 147.
188 Roznai (n 186) 16.
189 Sieyès notes: 'Prior to and above the nation, there is only natural law.' Sonenscher (n 185) 136.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

203 Ibid 363.

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

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

204 Gardbaum (n 161) 760.

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

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

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

208 Garlicki and Garlicka, (n 202) 366.

2.3. Constitutional Identity Constraint

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

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

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

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

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

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

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

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

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

214 Ibid 427.

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

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

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

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

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

218 Ibid 45.

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

220 Ibid.

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

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

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

221 Ibid.

222 Kelemen and Pech (n 210).

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

224 Raz (n 223) 34–35.

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

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

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

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

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

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

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

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

230 Ibid 51.

231 Ibid 34.

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

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

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

232 Ibid 32.

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

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

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

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

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

236 Walker (n 234) 101.

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

238 Rosenfeld (n 138) 12.

239 Ibid.

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

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

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

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

242 Ibid. p. 22–23.

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

244 Roznai (n 49) 305–309.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

264 Lindahl (n 241) 9–24.

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

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

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

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

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