


International Law National Constitution



Prof. Yaniv Roznai, July 2021

WHETHER SUPRA-NATIONAL LAW BINDS THE CONSTITUTION?

- The constitution is regarded as a local product (autochthony) – owing its validity and authority to local forces (in contrast with “imposed constitutions”).
 - The globalization of constitutional law: the migration of constitutional ideas; diffusion of constitutional institutions; constitution-making is influenced by supra-national norms, institutions and external actors.
 - The use of International Law for constitutional interpretation is contentious in itself and involves many scholarly debates.
 - There is a difference between saying that international law is mandatory and binding and using international law as a supportive argument.
 - The Monism/Dualism challenge.
 - Decrease of the “Billiards ball model” in International Relations and the Increased role international law plays within domestic constitutional discourse
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WHETHER SUPRA-NATIONAL LAW BINDS THE CONSTITUTION?

- International legal rules address matters such as values of constitutionalism and constitutional change:

African Charter on Democracy, Governance and Elections of 2007: the State Parties agreed that ‘Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government’ is deemed an ‘unconstitutional change of government’ which ‘shall draw appropriate sanctions by the Union’ (Art. 23(5)).

The Treaty on European Union states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” and allows for suspension of states who violate these values (art. 7).

- International human rights law
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THE ALLEGED SUPREMACY OF SUPRANATIONAL LAW

- The Principle of Supremacy (Josef L. Kunz).
- The Vienna Convention on the Law of Treaties 1969, article 27:
‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’
- 1932 Advisory Opinion regarding Treatment of Polish Nationals in the Danzing Territory, the Permanent Court of International Justice:
‘... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.’
- CJEU, C-11/70: *EU law takes precedence over any conflicting domestic law, including the constitution.*

THE ALLEGED SUPREMACY OF SUPRANATIONAL LAW – INTERNATIONAL COURTS OF HUMAN RIGHTS

- ECtHR: 2009 *Sejdie and Finci v. Bosnia and Herzegovina* (a constitutional provision limiting the right to be elected is a breach of the ECHR) + 2013 *Anchugov and Gladkov v. Russia* (the right to vote of prisoners)
- Article 46, ECHR: decisions of the ECtHR are binding
- Inter-American Court of Human Rights: 1999 *Castillo Petruzzi and Others v. Peru* (constitutional limitation on the right to access court is unconventional) + *Olmedo-Bustos et al v. Chile* (constitutional censorship of films is unconventional).
- African Court for People and Nations Rights: 2013 *Mtikila v. Republic of Tanzania* (prohibition on the right of independent candidate to be elected violates conventional rights).



EXTERNAL V. INTERNAL *ESPACE JURIDIQUE*

- Internal and external validity - do not always coincide.

Three examples:

1) constitutional crises in Nicaragua in 2004-2005 (President Bolaños, The Central American Court of Justice v. The Supreme Court of Nicaragua)

2) South African Constitution of 1983. Security Council Resolution 554 of 1984: ‘strongly rejects and declares as null and void the so-called “new constitution.”’

- 3) *Sejdie and Finci v. Bosnia and Herzegovina*; *Anchugov and Gladkov v. Russia* and the 2015 constitutional amendments that gave the Constitutional Court the power to declare “impossible to implement” judgements of a human rights body on the ground that its interpretation of the international treaty provisions at the basis of the judgement is inconsistent with the Constitution of the Russian Federation. (ECtHR)



THE ROLE OF NATIONAL COURTS

- André Nollkaemper: ‘national courts can act as agents of the international legal order’.
- ‘dedoublement fonclionnel’ (Scelle)
- Mixed loyalties
- International law and institutions are in decline (Brexit; South-Africa and the ICC; US and the Paris Agreement).
- Populism regards international law as a foreign, elitist and anti-democratic project that must be rejected. This includes attack on international tribunals but also affects the willingness of the national courts to apply international law.

International law in domestic courts in an era of populism

Tamar Hostovsky Brandes ✉

International Journal of Constitutional Law, Volume 17, Issue 2, April 2019, Pages 576–596, <https://doi.org/10.1093/icon/moz031>

The populist challenge to the European Court of Human Rights

Jan Petrov ✉

International Journal of Constitutional Law, Volume 18, Issue 2, July 2020, Pages 476–508, <https://doi.org/10.1093/icon/moaa027>

MISUSE OF INTERNATIONAL LAW? THE CASE OF TERM LIMITS (HONDURAS)

- The removal of President Zelaya in 2009.
- 2012 capturing the Constitutional Chamber of the Supreme Court.
- 2015 decision (Presidential term limits violate fundamental rights of freedom of expression and political rights of voters and candidates found in the Honduran Constitution and in regional and international human rights instruments.)
- Allowing the incumbent President, Juan Orlando Hernandez to stand for reelection.

Tom Ginsburg

The Machinery of International Law and Democratic Backsliding: The Problem of Term Limits

De Gruyter | Published online: August 7, 2020

DOI: <https://doi.org/10.1515/lehr-2020-2012>

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Volume 14 Issue 1

MISUSE OF INTERNATIONAL LAW? THE CASE OF TERM LIMITS (NICARAGUA)

- After winning the presidency in 2007, the incumbent president, Daniel Ortega, sought potential reelection in 2011. However, the constitution prohibited consecutive reelection, and limited presidents to serving only two terms in their lifetimes. Ortega had earlier served as president in the 1980s.
- Ortega lacked the necessary supermajority to eliminate the term limit.
- 2009: Ortega arguing before the Constitutional Chamber of the Supreme Court that the term limit, which had been added to the 1987 constitution in 1995, was an unconstitutional constitutional amendment.
- The panel held that the **amendment violated core principles** of equality, the right of voters and to be elected, and the sovereignty of the people and **void**. Ortega ran for re-election and won in 2011. With a strengthened majority in Congress, he pushed through a formal amendment removing the term limit, and then ran for (and won) re-election for yet another term in 2016.

David Landau

Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine



The Law & Ethics of
Human Rights
Volume 12 Issue 2

SUPERIORITY OF THE DOMESTIC CONSTITUTION

- Modern constitutions increasingly refer to international law and even recognize its superiority
- This superiority over domestic law is mostly restricted to ordinary and not constitutional law.
- The Lithuanian Constitutional Court (2006) held that the constitution – silent on the hierarchal position of international law within the domestic sphere – has superiority over international treaties
- US - the Constitution is supreme to international law (Geofroy v. Riggs, 133 U.S. 258 (1890)).
- Italy – ECHR is *norma interposta*.



EXCEPTIONS

- Belgium - (2004) the Supreme Court held that the ECHR has priority over the Belgian constitution
- In Netherlands - the Constitution of 1983 expressly authorizes the government to enter into treaties inconsistent with the constitution, subject to approval by two-thirds vote in both chambers of the parliament (Art. 91(3))
- Art. 2(2) of the constitution of Bosnia and Herzegovina of 1995: 'No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution [ECHR]



JUS COGENS

- *Planas v. Comelec*, Supreme Court of the Philippines (1973): the sovereign people might amend the constitution in any way it chooses, so long as the change is not inconsistent with *jus cogens* norms of international law
- Russian Supreme Court (2003): while international law is superior to ordinary laws, it is not superior to the constitution except perhaps to those generally recognized international law principles 'deviation from which is impermissible'.
- Switzerland - in 1996, both chambers of the Federal Assembly declared a *Volksinitiative* to amend the constitution to be invalid for violating the internationally-recognized peremptory principle of *non-refoulement*. In 1999: in the case of a total or partial revisions of the constitution, **mandatory provisions of international law must not be violated** (Arts. 193(4), 194(2) of the constitution)



A SKEPTIC CONCLUSION

- A prima facie supremacy of supranational law
- Difficulty in entering the internal *espace juridique*
- State practice does not demonstrate a general approval of international supremacy over the domestic constitutions.
- It is domestic constitutional law that determines the extent and the limits of the effects of international or supranational law in the domestic legal order.
- Even when the constitution grants international law a supra-constitutional status, such superiority derives not from international law as a separate legal order, but rather from the constitution itself.

