



INTERNATIONAL CONFERENCE ON CONSTITUTIONAL AMENDMENT AND DEFENSE OF DEMOCRACY

## Constitutional amendment vs constitutional replacement

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# Political worry



How to guarantee the democratic constitution

Constitutional  
Sudoku

Legal  
responses

## CONSTITUTIONAL SUDOKU



Constituent power → basic decisions into the Constitution



- The Constitution as supreme norm
- It rules its own change: Constitutional amendment power



- How protect basic decisions?
- How prevent their change?

Legal response to the constitutional concern

Constitutional EXPLICIT LIMITS to the Constitutional amendment power

Constitutional IMPLICIT LIMITS (by judicial and doctrinal interpretations)

Explicit limits

Implicit limits

# Explicit limits

- 1 Constitutional rigidity
- 2 Eternity clauses
- 3 Referendum
- 4 Temporary limits

# Implicit limits

- 1 Fundamental decisions ABOVE the formal Constitution
- 2 Basic structure
- 3 Constitutional AMENDMENT v. Constitutional REPLACEMENT





# Constitutional replacement doctrine (Implicit limits)



**Origin:**  
**Constitutional/Supreme Courts**  
(India/Colombia/Slovakia)

## Premises



The Constitution as supreme norm



No substantial limits to amend the Constitution



No substantial judicial review of constitutional amendment

Concept

Goal

Problems

## Constitutional Replacement concept

- **It is not a descriptive concept**
  - Constitutional dismemberment v. Amendment (R. Albert)
- **It is normative concept**
  - Constitutional fundamentment v. Amendment (Y. Roznai)
- **Substantial/No procedural normative concept**

## Goal of the doctrine



To guarantee the constitution as a *political rule*/no as *legal norm*



To put (implicit) limits to the constitutional amendment power



To justify the judicial review about content of constitutional amendments

## The constitutional replacement doctrine and its problems

Loss of constitutional self reference and positivity law

Difficulty in identifying the difference between "to amend"  
and "to replace"

Sovereignty and democracy



## Jurisprudential evolution in India

### Constitution: art. 368

- **Rigidity** (two amendment procedures)
- **Without limits** to the constitutional amendment

### First Jurisprudence

- **1951. Shankari Prasad Singh Vs. Union of India**
  - *Only procedural limits* to the constitutional amendment
  - Constitutional amendments *are not legislative acts*
- **1965. Sajjan Singh Vs. State of Rajasthan**
  - Two dissenting opinions about substantial limits
    - Civil liberties
    - Basic structure

Indian Jurisprudence

Colombia:  
replacement test

Justification of judicial  
activism

Replacement  
and  
Constituent  
Assembly

## Jurisprudential Change

### 1967. Golaknath Vs. Punjab

- Constitutional amendments *are legislative acts*
- Competence of Supreme Court to review all legislative acts
- *Substantial limit* to constitutional amendment: *the civil rights*

### 1973. Kesavanand Bharati Vs. State of Kerala

- Constitutional amendments *are not legislative acts*, but
- Constitutional amendments must respect ***the basic structure***
- *Amend is not replace*

### 1975. Indira Nehru Gandhi v. Raj Narai

- *Basic structure doctrine*
- Difference between Constituent power and Constitutional amendment power

### 1980. Minerva Mills Vs. India

- The judicial review of constitutional amendment is into the basic structure
- Unconstitutional to suppress the judicial review

Basic structure



## Basic structure

2000. State of Bihar Vs. Bal Mukund Sah:

**Basic features:**

- Supremacy of the Constitution
- Republican and democratic form of Government
- Secular character of the Constitution
- Separation of powers and judicial independence
- Federal character of the Constitution

## Constitution of Colombia 1991

### Amendment constitutional provisions:

- No substantial limits
- 3 constitutional amendment procedures
  - Congress
  - Congress + popular referendum
  - Constituent Assembly

### Judicial review of constitutional amendments

- Only about infringement of procedure

Jurisprudence

Replacement  
test

## Jurisprudence of the Constitutional Court of Colombia

### C-551-2003

- Constitutional amendment power  $\neq$  Constituent power
- Amendment  $\neq$  Replacement
- Judicial review of constitutional amendments:
  - only about competence, not about substantial review
- Respect for principles and values underlying the constitution

### C-1200-2003

- This doctrine cannot be used to label a eternity clause
- An amendment is a partial *constitutional replacement* if it is of great "transcendence and magnitude" for the system
- Not every infringement of a fundamental constitutional principle is a partial constitutional replacement

## Constitutional replacement test

### C-970/2004

- **Amendment** → Replacement if it replaces an "identity element" of the constitution.

### C-1040/2005

- **Seven tiered test** to preserve the essential elements:
  - *What is the essential element involved and why it is essential*
  - *No use that essential element as a constitutional eternity clause*
  - *Proving that the amendment is incompatible with the essential elements of the constitution.*

Essential  
elements

Why are they  
essential  
elements?

## Essential elements

- **Popular sovereignty** C-971/2004
- **Separation of powers** C-971/2004
- **Constitutional supremacy** C-1040/2005
- **Democracy and pluralism** C-1040/2005

### **Substantial concept of the Constitution**

Art. 16 of the French Declaration of the Rights of Man and of the Citizen.

- There is Constitution only
  - If the rights are guaranteed and
  - If the separation of powers is defined

## Why are they "essential elements"?

### **C-1040/2005:**

- **Separation of powers**

- Replacement, if Council of State is authorized to enact a regulation granting equality of rights during the elections?

### **C-588/2009:**

- **Principle of equality and the principle of merit**

- Replacement, if certain category of temporary employees of the Public Administration was included in the administrative career?

### **C-141/2010:**

- **Principle of checks and balances**

- Replacement if an amendment grants the possibility of a presidential reelection to a third term?

## Justification of Judicial activism of Constitutional Court

- The *competence* of constitutional amendment power is *to amend*, not *to replace*
- A Constitutional replacement is an *overreaching competence*
- The Constitutional Court must determine the difference between "*Amendment*" and "*replacement*"

Criticism

## Criticism

- **Difficulty in identifying:**
  - What is the basic structure?
  - When constitutional amendment >>> C. replacement
    - Rule of law?
    - Civil liberties?
    - Territorial organization of power?
- **Problematic role of Supreme/Constitutional Court**
  - Substantial review
  - Judicial activism breaks the separation of power:
  - Supreme Court, hidden sovereign



## Total constitutional replacement

### C-141/2010: only one possibility: by constituent assembly

"By means of a law approved by the members of both chambers, Congress may stipulate that the people decide by popular vote if a Constituent Assembly should be called with the jurisdiction, term, and members determined by that same law." (art. 376 C.C.)

#### Inconsistent argument:

- The basic decisions, were established by constituent Power
- Constituent Assembly is not constituent power
  - It only acts by a previous decision of Congress
  - It only acts "with the jurisdiction, term, and members determined by Congress law".
- It presupposes limits to the "replacement power" of the Assembly
- Impossible TOTAL replacement power of Constituent Assembly
- Appeal to the Constituent Assembly only to limit constitutional amendment power



## Constitution as higher law (supreme norm)

### Features

- Self reference/Self regulation
- Positivity of law
  - Possibility of unlimited change

The constitution is the sovereign

Myths

Title vs.  
exercise of  
sovereignty

Unconstitutional  
constitutional  
amendments

Polymorphism

## Political & Constitutional Myths

### Original constituent power

- as a legal power, and not a factual power
- as a power that after the constitution passed

### Sovereignty of the people

- **Political function (+):** to legitimize constituted powers
- **Legal function (-):** To claim that no constituted power is sovereign
  - (-) Constituted powers
  - (-) Instituted constituent power (derivative constituent power)

## Title and exercise of the sovereignty

### Constitution as supreme norm:

- "The popular sovereignty is domesticated"

(Art. 1 Italian Constitution) "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution".

- Constituent power is *absorbed* by the representation



### Derivative constituent power: constitutional amendment power

- This power exercises the *sovereignty in the forms and within the limits of the Constitution.*

## The Constitution as supreme norm

### Unconstitutional constitutional amendments?



- *Constitutional*, regarding formal legal procedure
- *Unconstitutional*, regarding implicit principles in the constitution

### There are not unconstitutional constitutional amendments



- The constitutional amendments are constitutional or not

## Unconstitutional constitutional amendments

### Normativist perspective: non-equivalent constitutional polymorphism

- **Conflict of procedures or legal forms**
- **No conflict:**
  - Between procedures of constitutional amendment and implicit limits
  - Between decisions of constitutional amendment power and will of the sovereign people





## Replacement doctrine and "We the people"

### Invocation of popular sovereignty

- To restrict the amendment power
- But also to claim the original power of the people



### The people as source of legitimacy:

- To justify the constitutional change out this procedure



### Unconstitutional constitutional change

(constitutional replacement doctrine)

### Constitutional unconstitutional change

(Rule of mutuality, illegal but legitimate process)

We  
The People

Democratic  
legitimacy

Crisis of democracy  
and direct  
participation

Constitutional  
unconstitutional  
amendment

The people  
vs.  
Democracy

Conclusion

# "We the People"

Who are "The People"?  
Who are "We"

- **"THE PEOPLE"** are an *abstract entity*. Political Subject of legal imputation
- **"WE"** are "citizens"
- **"We The People"** is a political and legal **synecdoche**

## "Citizens" are not "the people"

- When they participate *directly* in public affairs, they are not the sovereign people
- When they act *through their representatives*, They represent
  - the people (legally)
  - Citizens (Politically)

People >>> Sovereignty

Citizens (directly/by representatives) >>> Democracy

# Democratic legitimacy

Direct participation and participation through representatives:  
Ways complementary to legitimize democracy

- **Regarding People** (myth of popular sovereignty) primacy of the **direct** participation
- **Regarding citizens:** primacy **indirect** participation
  - **The pluralism**, better through representatives than referendum
  - **The social complexity**, better organized through complex procedures and institutions (representation, constitutional amendment power)
- **People as complex subject**

The legal procedure generates legitimacy  
In the social complexity: legal procedures are the identity of system

## **Crisis of constitutional democracy**

### **Causes**

- Crisis of representation
- Hard rigidity of amendment procedures
- Crisis of basic structure of constitution

### **Political leadership of the plural society**

- social movements
- Social networks
- social groups

### **Identification process:**

- Society = People
- Social power= direct exercise of the popular sovereignty



**Direct participation as essence of democracy?**

- Popular meetings
- Civic demonstrations
- Opinion polls
- Informal or illegal voting ways



- Popular deliberation about constitutional changes
- Deliberative plebiscite
- Referendum not provided for in the constitution



### Unconstitutional amendment ways



*The formal illegality is irrelevant in the face of the (unconstitutional) popular decision*



### Constitutional unconstitutional amendment

**If the society can act contra legem**



- **Society, as if were the People, is the sovereign**
- **The Constitution is not supreme norm**
- **Constitutional replacement doctrine:**
  - Positive function: it links C. replacement with **constituent power**
  - No longer guarantee of the basic structure
- **Constitutional unconstitutional amendment by popular acclamation**



**The triumph of populism**  
**The people vs. liberal democracy** (Yascha Mounk)  
**Il liberalism** (democracy without rule of Law)



**Very important:**

**To claim the Constitution as supreme norm**

**To guarantee the constitutional democracy through a balance**

- **between constitutional rigidity and positivity law,**
- **between direct and indirect political participation**

**To prevent the judicial activism**

**Thanks**





