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

Explicit limits

Constitutional EXPLICIT LIMITS to the Constitutional amendment power

Implicit limits

Constitutional IMPLICIT LIMITS (by judicial and doctrinal interpretations)
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 fundamendment v. Amendment (Y. Roznoi)

- 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
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

- 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
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 of the Constitutional Court of Colombia

C-551-2003
- Constitutional amendment power ≠ Constituent power
- Amendment ≠ 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

- **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"
• **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
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"

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

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

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Unconstitutional amendment ways

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

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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)
Illebralism (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