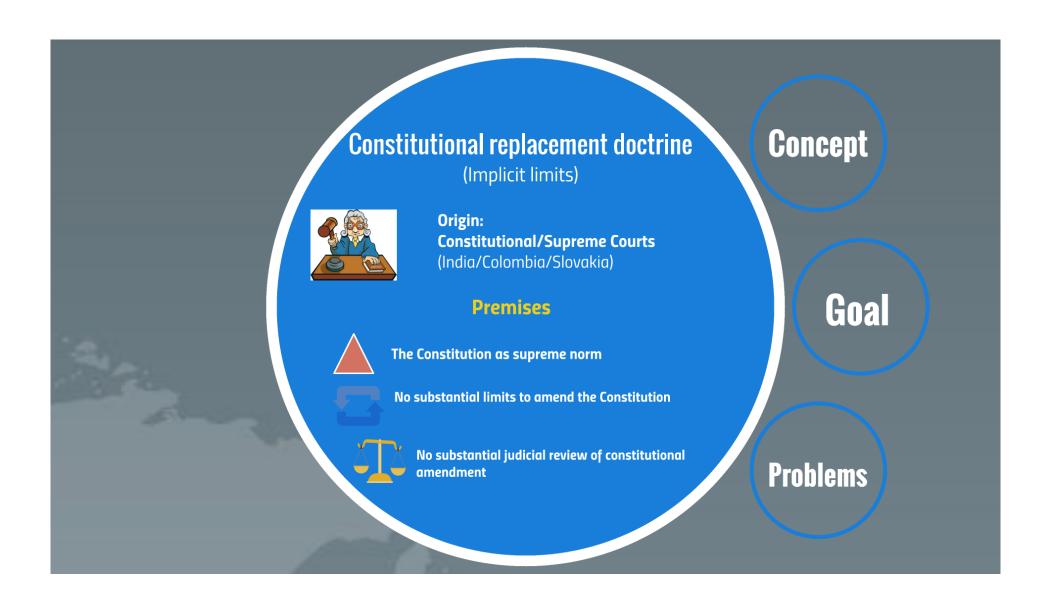


Explicit limits Constitutional rigidity **Eternity clauses** Referendum Temporary limits

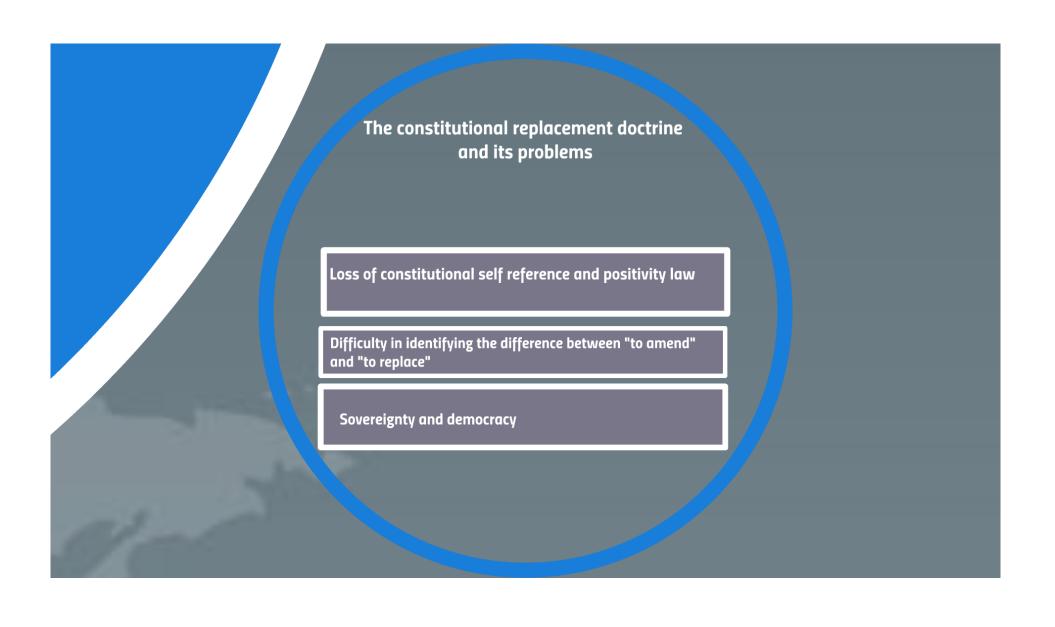
Implicit limits Fundamental decisions ABOVE the formal Constitution **Basic structure** Constitutional AMENDMENT v. Constitutional REPLACEMENT



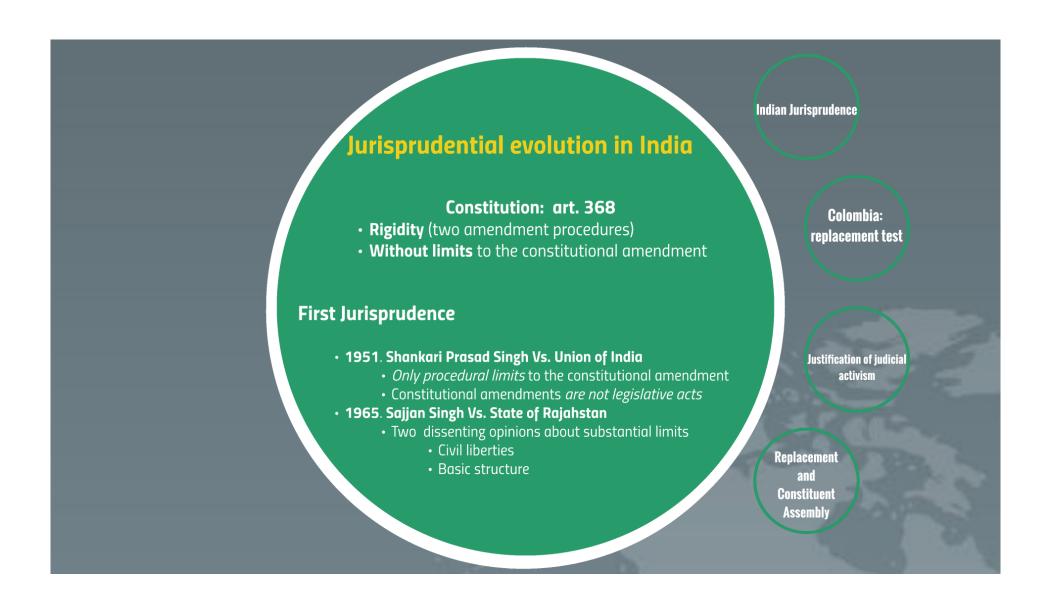


Constitutional Replacement concept • It is not a descriptive concept • Constitutional dismemberment v. Amendment (R. Albert) • It is normative concept · Constitutional fundamendment v. Amendment (Y. Roznai) • Substantial/No procedural normative concept









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 mus 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 o f Government
- Secular character of the Constitution
 Separation of powers and judicial independence
- Federal character of the Constitution



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

- \cdot 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.

elements

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.

Why are they essential elements?

Essential

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?



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

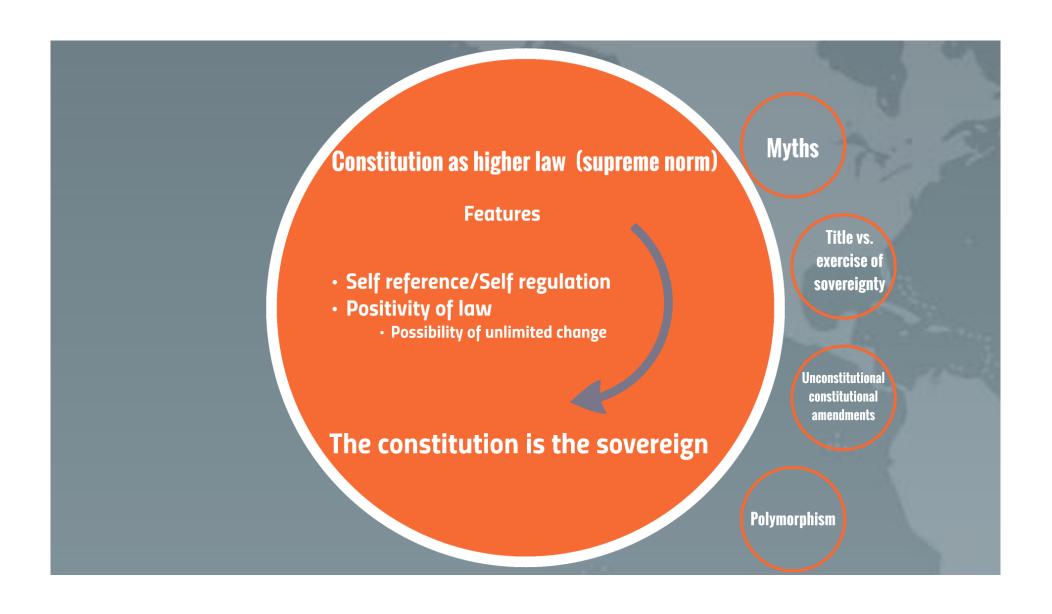
C-141/2010: only one possibility: by constituent assembly

"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





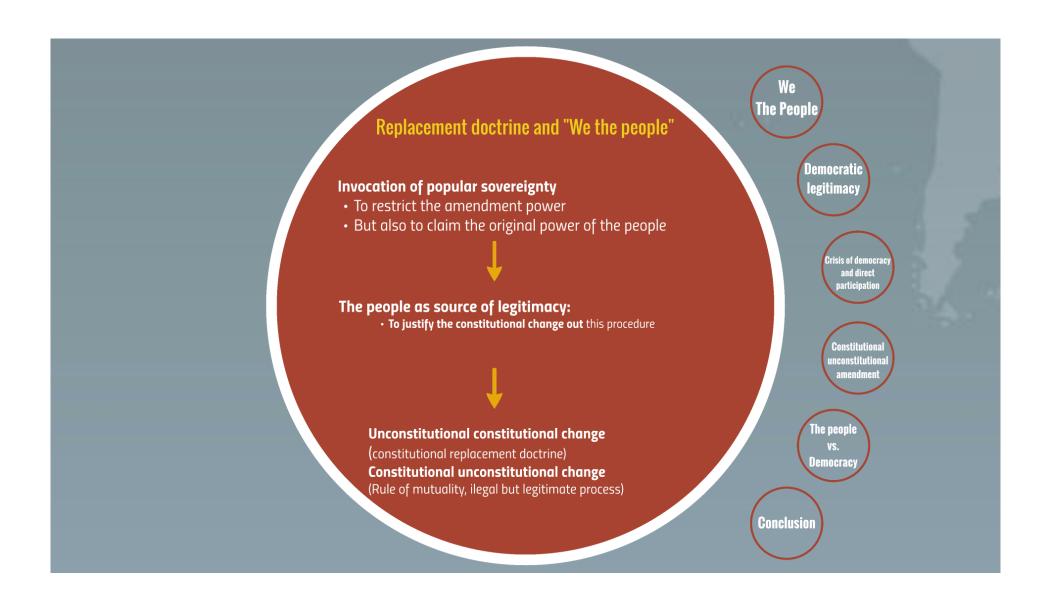


Title and exercise of the sovereignty Constitution as supreme norm: • "The popular sovereignty is domesticated" (Art. 1 Italian Constitution) "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution". • Constituent power is *absorbed* by the representation Derivative constituent power: constitutional amendment power • This power exercises the sovereignty in the forms and within the limits of the Constitution.



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





"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 <u>power</u>)
- People as complex subjet
 - 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

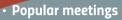
- social movements
- Social network
- social groups

Identification process:

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



Direct participation as essence of democracy?



- 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)
Iliberalism (democracy without rule of Law)

