

# Global Constitutional Norms and The Limits of Amendment Power: Rethinking Judicial Strategies in Comparative Perspective

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## Abstract:

*The intersection of transnational constitutional norms and national amendment procedures presents a pressing challenge in constitutional democracies. While democratic amendment powers are embedded within the framework of constitutional governance, they are increasingly co-opted for purposes antithetical to constitutionalism. This article explores the tension between constitutional change and democratic erosion through the lens of the doctrine of unconstitutional constitutional amendments. Drawing on comparative jurisprudence, particularly from India and Colombia, the article proposes a restrained, context-sensitive judicial approach grounded in transnational constitutional values. This framework avoids the extremes of judicial overreach and democratic abdication, offering a calibrated model that preserves constitutional identity while respecting democratic legitimacy.*

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## 1. INTRODUCTION

Constitutions are not static documents; they are designed to evolve with the socio-political and economic landscapes of the nations they govern. Through amendment procedures embedded in constitutional texts, societies are empowered to respond to emerging challenges, democratize institutions, and deepen commitments to justice and liberty. However, in recent decades, this very mechanism of constitutional adaptability has been misused in several jurisdictions to entrench power and erode democratic accountability.

Authoritarian-leaning governments have increasingly weaponized formal amendment procedures to erode judicial independence, diminish checks and balances, stifle political dissent, and manipulate electoral processes—all under the veil of legality. In doing so, they have managed to give democratic legitimacy to authoritarian objectives, thereby undermining the very principles of constitutional democracy.

To counter this trend, the doctrine of unconstitutional constitutional amendments has emerged as a powerful but contentious judicial safeguard. This doctrine allows constitutional courts to invalidate amendments that, despite adhering to procedural requirements, infringe upon the fundamental, unalterable principles of the constitutional order—principles often referred to as the constitution's 'basic structure' or 'core identity.'

While this doctrine is seen as an essential guardrail against democratic erosion, it also presents a complex constitutional paradox: How can unelected judges override formally valid constitutional amendments enacted by elected legislatures without themselves undermining democratic legitimacy?

This article contends that a middle path is both necessary and achievable—one that combines judicial restraint with normative clarity. Anchored in transnational constitutionalism, the paper advocates for a doctrine that is responsive to comparative experiences and international constitutional norms. By examining the jurisprudential developments in India and Colombia—two jurisdictions where the doctrine has evolved significantly—the paper proposes a nuanced model of adjudication that respects both constitutional identity and democratic sovereignty.

## 2. CONCEPTUAL FOUNDATIONS

### 2.1 The Paradox of Constitutional Change

Modern constitutional democracies function through a delicate balance between stability and adaptability. On one hand, constitutions must be resilient, anchoring foundational values and institutional frameworks against the whims of transient political majorities. On the other hand, they must retain the capacity for reform to address evolving social, political, and economic conditions.

This duality manifests in the coexistence of **amendable** and **unamendable** provisions within many constitutional systems. This structural paradox gives rise to a critical jurisprudential question: *Is it possible for a constitutional amendment to be procedurally valid yet substantively illegitimate?* The doctrine of unconstitutional constitutional amendments answers this in the affirmative. It asserts that certain constitutional changes—though enacted in compliance with formal amendment procedures—may violate the fundamental identity of the constitution and are therefore judicially reviewable and invalid.

The rationale behind this doctrine rests on the premise that a constitution is not merely a legal code but a normative framework representing the social contract. Certain values, such as democratic governance, fundamental rights, and the separation of powers, are not subject to revision by ordinary majorities because they constitute the core ethos of the constitutional order. As such, when amendment powers are used to undermine these foundational values—particularly under the guise of legality—they lose their democratic legitimacy, even if formally valid.

Examples of such misuse abound, particularly in transitional or fragile democracies where authoritarian leaders manipulate constitutional mechanisms to entrench their rule. In these contexts, the doctrine serves not merely as a legal limitation but as a normative check against the degeneration of constitutionalism into authoritarianism cloaked in legal form. Hence, the paradox lies not in the existence of amendment power itself, but in its potential to undermine the very constitution it purports to serve.

## 2.2 Democratic Legitimacy vs. Constitutional Identity

The legitimacy of constitutional amendment processes is conventionally rooted in democratic ideals. These procedures are often seen as expressions of popular sovereignty, reflecting the collective will of the people as articulated through their representatives or through direct referenda. From this perspective, any validly enacted constitutional amendment ought to be considered legitimate, as it embodies the choices of a democratic polity. However, this view becomes complicated when democratic procedures are used to subvert the substantive principles that constitute the *identity* of a constitutional democracy. Core principles—such as human dignity, rule of law, separation of powers, free elections, and judicial independence—transcend mere procedural validation. They form what many scholars and courts refer to as the "basic structure" or "constitutional identity" of the state. The central tension lies in reconciling two competing notions of legitimacy: **procedural legitimacy**, which emphasizes compliance with formal amendment rules, and **substantive legitimacy**, which demands consistency with constitutional values that safeguard democratic governance and human rights. The doctrine of unconstitutional constitutional amendments is an attempt to reconcile this tension by asserting that constitutional identity places intrinsic limitations on the power of amendment, even in democratically sanctioned processes.

Critics argue that allowing judges to review and potentially invalidate constitutional amendments poses a risk of judicial overreach, whereby unelected bodies override the democratic will. However, proponents contend that without such safeguards, democracy can be hollowed out from within—wherein majoritarianism erodes pluralism, accountability, and rights protections.

Thus, the doctrine challenges the assumption that democratic legitimacy and constitutionalism are always aligned. Instead, it acknowledges that democracy, in the absence of constitutional constraints, can be manipulated to perpetuate authoritarianism. The judiciary's role, therefore, is not to obstruct democratic change but to ensure that such change remains faithful to the essential structure and principles of the constitutional order.

## 3. THEORETICAL JUSTIFICATIONS FOR THE DOCTRINE

### 3.1 The Theory of Abusive Constitutionalism

In recent constitutional scholarship, particularly in the works of Rosalind Dixon and David Landau, the concept of **abusive constitutionalism** has gained prominence as a theoretical foundation for the doctrine of unconstitutional constitutional amendments. This theory reveals how political elites, while maintaining a façade of legality and democratic form, can undermine the very spirit of constitutional democracy by weaponizing amendment powers.

Abusive constitutionalism refers to the strategic use of formally lawful constitutional amendments to achieve undemocratic ends. Rather than engaging in overt constitutional breakdown or military coups, modern authoritarian regimes often adopt subtler mechanisms. These include abolishing presidential term limits to facilitate indefinite rule, weakening independent judicial bodies, restricting press freedoms under national

security laws, and embedding ruling party control within key institutions. Such alterations, although technically lawful and procedurally compliant, can fundamentally distort the balance of democratic governance.

In these contexts, judicial review of constitutional amendments functions as a necessary **counter-abuse mechanism**. It allows courts to intervene when amendments threaten to systematically dismantle the institutional architecture of democracy. The judiciary's role, therefore, is not to oppose constitutional change per se but to **safeguard the minimum democratic conditions** required for a functioning constitutional order.

This theory provides a compelling normative justification for the doctrine. It recognizes that **the erosion of democracy in the 21st century often occurs incrementally**, through legalistic manipulations that hollow out checks and balances from within. By invoking the doctrine of unconstitutional constitutional amendments in response to such abuses, courts can disrupt this trajectory and fortify constitutional resilience.

Furthermore, abusive constitutionalism highlights that threats to democracy today are less likely to emerge from revolutionary ruptures and more from **gradual distortions cloaked in procedural legitimacy**. This insight justifies the need for a judicial doctrine that looks beyond the surface of legality to evaluate the *substantive democratic implications* of constitutional amendments.

### 3.2 The Principle of Constitutional Core

A complementary theoretical justification for the doctrine arises from the concept of a **constitutional core**—a set of foundational principles that form the identity of a constitutional order and are considered inviolable, regardless of procedural compliance. This idea draws from both constitutional theory and comparative jurisprudence, where courts have recognized that certain values are so essential to the functioning of a democracy that they cannot be amended or abrogated, even by constitutional means.

The constitutional core typically includes elements such as the rule of law, the separation of powers, judicial independence, free and fair elections, protection of fundamental rights, and respect for human dignity. These principles are not arbitrary; they are the normative foundation upon which the legitimacy of the entire constitutional framework rests. Altering them through amendment, even with supermajority support, risks transforming the constitution into a radically different document—one that no longer reflects the original social contract.

In this framework, the judiciary is seen not merely as an interpreter of law but as a **guardian of constitutional identity**. Courts applying the doctrine act to prevent amendments that would cross the threshold between legitimate reform and unconstitutional substitution. The legitimacy of this judicial function stems from the understanding that **constitutional continuity is not guaranteed solely by procedure**, but by fidelity to these underlying values.

This notion has been especially influential in jurisdictions such as India and Colombia. In India, the **Basic Structure Doctrine** developed by the Supreme Court embodies this very principle, asserting that Parliament's amendment power does not extend to altering the fundamental structure of the Constitution. Similarly, Colombia's Constitutional Court has used the idea of a "**constitutional replacement**" to strike down amendments that, though formally correct, effectively substitute the existing constitutional order with a new one. Thus, the doctrine of unconstitutional constitutional amendments, as rooted in the principle of the constitutional core, emphasizes that not all legal changes are normatively permissible. Where an amendment compromises the essence of constitutional democracy, it ceases to be legitimate—regardless of its procedural validity. In this sense, the doctrine represents not a limitation on democracy, but a **protection of its foundational conditions**.

## 4. COMPARATIVE JURISPRUDENCE

### 4.1 India: The Basic Structure Doctrine

India presents one of the most elaborate and influential examples of the judicially constructed doctrine of unconstitutional constitutional amendments through its **Basic Structure Doctrine**. The evolution of this doctrine originates from the landmark judgment in *Kesavananda Bharati v. State of Kerala (1973)*, where a thirteen-judge bench of the Supreme Court deliberated on the limits of the Parliament's power to amend the Constitution under Article 368.

In this seminal ruling, the majority held that while Parliament has wide authority to amend the Constitution, it does not possess unfettered power to alter its "basic structure." The Court refrained from providing an exhaustive list of what constitutes this basic structure, but identified several essential features, such as the supremacy of the

Constitution, the rule of law, the principle of separation of powers, judicial review, and the preservation of a republican and democratic form of government.

Over the years, the basic structure doctrine has become an entrenched part of Indian constitutional law, invoked to safeguard foundational principles from legislative excesses. For instance, in **Indira Nehru Gandhi v. Raj Narain (1975)**, the Supreme Court invalidated provisions of the 39th Constitutional Amendment Act that sought to exempt the election of the Prime Minister from judicial scrutiny. The Court ruled that the amendment violated the principle of free and fair elections—a component of the basic structure.

Similarly, in **Minerva Mills Ltd. v. Union of India (1980)**, the Court struck down portions of the 42nd Amendment that attempted to immunize certain laws from judicial review and curtail the judiciary's role in enforcing fundamental rights. The Court reaffirmed that limited amending power is an integral part of constitutional governance, and any attempt to obliterate checks and balances was inherently unconstitutional.

In **I.R. Coelho v. State of Tamil Nadu (2007)**, the doctrine was extended to scrutinize laws placed under the Ninth Schedule of the Constitution. The Court held that even laws inserted into the Constitution through amendments were not immune if they damaged or destroyed the basic structure, particularly in relation to fundamental rights.

Despite its utility in checking authoritarian tendencies and preserving constitutional integrity, the basic structure doctrine is not without controversy. Critics contend that it empowers the judiciary to invalidate democratically enacted constitutional amendments based on abstract and evolving notions of "basic features." This, they argue, creates a risk of judicial supremacy and unpredictability in constitutional adjudication.

Nonetheless, in the Indian context—marked by frequent attempts to undermine institutional independence and centralize political power—the doctrine has acted as a critical **constitutional safety valve**. It provides a normative framework within which the Court can assess whether constitutional changes remain within the permissible bounds of democratic governance.

#### 4.2 Colombia: Substantive Limits to Amendments

Colombia offers another important illustration of judicial engagement with unconstitutional constitutional amendments, particularly through the principle of **"constitutional substitution."** Unlike India's expansive and somewhat open-ended "basic structure" concept, the Colombian approach is more **structurally focused and procedurally grounded**, reflecting the unique history and democratic aspirations embedded in its 1991 Constitution.

In the pivotal case of **Decision C-141/2010**, the Colombian Constitutional Court invalidated a constitutional amendment that would have allowed President **Álvaro Uribe** to run for a third consecutive term. The proposed amendment had followed procedural formalities, including legislative passage and public referendum approval. However, the Court held that the amendment violated Colombia's constitutional identity by threatening the principle of rotation in office and undermining the system of checks and balances.

The Court distinguished between ordinary amendments—which adjust or refine existing constitutional norms—and **substitutions**, which overhaul essential structures or principles of the Constitution. According to the Court, the proposed amendment amounted to a substitution because it significantly altered the nature of executive power and reduced the effectiveness of democratic alternation in leadership.

Importantly, the Colombian Court justified its intervention by referencing both domestic constitutional commitments and international democratic norms. It emphasized that democratic regimes depend not merely on elections but on **institutional mechanisms** that prevent the concentration of power and ensure governmental accountability.

Colombia's constitutional jurisprudence has also struck down other amendments and laws that were deemed to disrupt the **delicate balance of powers** or interfere with the protection of fundamental rights. This includes decisions that prevented civil service reforms designed to centralize bureaucratic control and others that restricted judicial independence.

However, the Colombian model has been careful not to exercise this power indiscriminately. The Court has developed a **structured test** to assess whether an amendment constitutes a substitution. This test includes examining the magnitude of the change, its effect on institutional design, and its potential to disturb the equilibrium of democratic governance. The emphasis is on **context-sensitive reasoning**, not abstract theorizing. The Colombian experience demonstrates that it is possible for courts to adopt a **moderated judicial role**—one that respects democratic processes while still acting decisively when core constitutional principles are endangered.

It also illustrates the value of framing constitutional review in terms of **structural transformation**, rather than just legal procedure.

## 5. RISKS AND CRITICISMS

### 5.1 Democratic Backlash and Legitimacy Crisis

One of the foremost concerns associated with judicial enforcement of the doctrine of unconstitutional constitutional amendments is the potential for democratic backlash. When courts nullify constitutional amendments passed through legitimate political procedures—often with substantial legislative and public support—they risk being perceived as undemocratic institutions operating above the elected branches of government. Critics argue that such interventions reflect judicial elitism or technocratic overreach, casting courts as self-appointed guardians of constitutional morality.

This perception, particularly in politically polarized environments, can erode the legitimacy of the judiciary. Courts must therefore tread carefully, basing their decisions not only on abstract constitutional ideals but also on widely accepted legal and political norms. Comparative constitutional practices offer valuable precedents that can reinforce judicial legitimacy by demonstrating that similar doctrines have been upheld by other constitutional democracies. Anchoring decisions in both national traditions and transnational values can mitigate accusations of judicial supremacy.

### 5.2 The Danger of Doctrinal Overreach

Another critical risk lies in the expansion of judicial power under the guise of constitutional protection. An overly broad or unchecked application of the doctrine can result in courts becoming the ultimate arbiters of political morality, with the authority to invalidate any constitutional change they subjectively deem harmful. This development could undermine democratic self-governance and distort the balance of power among the branches of government.

To prevent such doctrinal overreach, courts must adopt clearly articulated standards and constraints. The development of objective benchmarks—such as essential features of democratic governance, fundamental rights, and institutional separation of powers—can serve as guardrails. Furthermore, the doctrine should be employed with restraint, recognizing the exceptional nature of its invocation.

## 6. TRANSNATIONAL CONSTITUTIONALISM: A FRAMEWORK FOR JUDICIAL RESTRAINT

### 6.1 Comparative Constitutional Dialogue

Transnational constitutionalism provides a conceptual framework wherein domestic courts engage with foreign jurisprudence and international democratic norms. This dialogic process enhances the legitimacy and consistency of judicial reasoning by drawing upon a broader body of constitutional experiences. When reviewing constitutional amendments, courts can consult decisions from other jurisdictions that have confronted similar dilemmas, enriching their interpretive lens while fostering global constitutional convergence.

For instance, Indian courts referencing Colombian jurisprudence, or South African decisions citing European constitutional courts, exemplify how comparative analysis can strengthen arguments and reinforce normative claims. Such engagement does not amount to blind transplantation but rather involves contextual adaptation of shared principles, tailored to national circumstances.

### 6.2 Objective Benchmarks for Judicial Review

Transnational norms function as heuristic tools, enabling courts to assess whether a proposed amendment aligns with core values underpinning constitutional democracies. These include the conduct of free and fair elections, protection of minority rights, judicial independence, press freedom, and robust checks and balances.

Using such benchmarks ensures that judicial review is not arbitrary but grounded in widely recognized principles. Courts can thereby distinguish between legitimate constitutional evolution and amendments that erode the essential infrastructure of democracy.

### 6.3 Judicial Minimalism and Contextual Analysis

The philosophy of judicial minimalism complements transnational constitutionalism by advocating restrained and incremental adjudication. Rather than issuing sweeping declarations, courts should focus narrowly on specific constitutional threats, intervening only when the integrity of the democratic system faces serious jeopardy.

Contextual analysis is also crucial. Courts must consider the political, historical, and institutional background of each case. This ensures that judgments are not only legally sound but also sensitive to democratic processes and societal complexities.

## **7. OPERATIONALIZING A LIMITED DOCTRINE**

### **7.1 The Broad-But-Weak Model**

Rosalind Dixon and David Landau have proposed a "broad-but-weak" approach to the doctrine. Under this model, courts maintain the authority to scrutinize a wide array of constitutional amendments but invalidate them only in cases of extreme democratic endangerment. This balances vigilance with restraint, ensuring that courts do not overstep their democratic mandate while still guarding against egregious constitutional harm.

The doctrine thus serves as a constitutional safeguard of last resort, activated in situations where core democratic structures—such as electoral integrity, judicial independence, or opposition rights—are under existential threat.

### **7.2 Cumulative Impact Assessment**

An important feature of a limited doctrine is the assessment of cumulative effects. While individual amendments may appear benign, their collective impact can distort constitutional equilibrium. Courts must be equipped to analyze whether a series of amendments, taken together, signal a shift towards authoritarianism or systemic erosion of constitutional values.

This approach reflects a more realistic understanding of how democratic backsliding often occurs—not through sudden coups but through incremental legal changes.

### **7.3 Transparent Reasoning and Public Engagement**

For judicial decisions under this doctrine to command respect and compliance, transparency is essential. Courts must provide well-reasoned judgments that clearly explain the constitutional basis of their rulings and the criteria used to assess validity. Judicial reasoning should be accessible to the public and avoid excessive reliance on abstract principles.

Moreover, engaging with civil society, academia, and other stakeholders through mechanisms like *amicus curiae* submissions can democratize the adjudication process. This broader deliberative engagement enhances legitimacy and fosters constitutional consensus.

## **8. THE DOCTRINE AND CONSTITUTIONAL REPLACEMENT**

### **8.1 Beyond Amendments: Constitutional Substitutions**

The logic of the doctrine may extend beyond mere amendments to cases of wholesale constitutional replacement. In instances where a new constitution is adopted under the appearance of legality but in an environment lacking public participation, transparency, or deliberative legitimacy, courts may be called upon to assess its constitutional validity.

Such replacements, often engineered to entrench authoritarian rule, undermine the principle of constituent power as rooted in democratic will. Judicial review in such contexts focuses not on content but on the authenticity of the constitution-making process.

### **8.2 Caution Against Expanding Judicial Role**

Nevertheless, courts must exercise caution when evaluating constitutional replacements. Overreach in such cases could result in judicial encroachment into the realm of political sovereignty. Courts should confine their review to ensuring procedural integrity, transparency, and inclusiveness, rather than evaluating the substantive outcomes of constitution-making.

The doctrine must not become a pretext for judicial paternalism. Instead, it should safeguard the democratic essence of constitutional processes, without undermining the people's right to determine their constitutional future.

## **9. CONCLUSION**

The doctrine of unconstitutional constitutional amendments occupies a precarious space at the intersection of judicial power and democratic legitimacy. When applied judiciously, it offers a critical defense mechanism against the misuse of constitutional amendment powers by authoritarian actors.

By anchoring this doctrine in the principles of transnational constitutionalism, courts can navigate the tension between protecting core democratic values and respecting popular sovereignty. The emphasis on comparative

jurisprudence, minimalism, and contextual analysis allows courts to function as constitutional guardians without becoming undemocratic overseers.

As global constitutional democracies face renewed threats from populist and authoritarian regimes, a calibrated and principled doctrine of unconstitutional constitutional amendment stands as an essential tool. It reminds us that constitutional change, to be legitimate, must uphold not only procedural form but also the substantive spirit of democracy.

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