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Limits on the Amending Power: A Comparative Study of India's Basic Structure Doctrine, Germany's Eternity Clause and Colombia's Substitution Doctrine

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ABSTRACT

Formal amendment procedures are designed to allow a constitution to change, but they have been repeatedly used to dismantle checks and balances, capture judiciaries and extend executive tenure. This paper examines three responses to that problem: Germany's express eternity clause in Article 79(3) of the Basic Law, India's judicially developed Basic Structure Doctrine, and Colombia's Substitution Doctrine. It also traces the journey of these models to Bangladesh and Malaysia. The study finds that the three doctrines are founded on the same premise: a power derived from a constitution cannot be used to destroy or supersede the original constituent power from which it is derived. They vary in the source of the limit, the identification of the protected core and the institutional risks they pose. Germany gives textual certainty, but the clause still needs to be interpreted. India provides flexibility at the cost of an open-ended list and the prospect of judicial supremacy, as the NJAC verdict demonstrates. Colombia provides a structured test, but its fundamental notion of an "essential element" is vague. The paper takes seriously the counter-majoritarian objection that unelected courts invalidate amendments. It concludes that such limits are defensible only where courts employ them sparingly to protect the democratic order itself. It proposes a "Democratic Minimum Test", under which a court can strike down an amendment only if it poses a clear threat to the open political processes necessary to challenge and change the law at a later time. The paper concludes with some practical proposals for judicial restraint.

Keywords: *Basic Structure Doctrine, Eternity Clause, Substitution Doctrine, Unconstitutional Constitutional Amendments, Abusive Constitutionalism, Counter-Majoritarian Difficulty*

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I. Introduction

> "[A]mendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. . . . [I]t is retained though in the amended form."[1]

Global constitutionalism contains a contradiction. The seminal observation of Justice H.R. Khanna in the landmark *Kesavananda Bharati* case of the Indian Supreme Court illustrates it: if a constitution provides for its own amendment, does that power of amendment include the power to erase the entire document? Modern democracies often require a special procedure or a supermajority of some kind for amendments, on the assumption that demanding rules will insulate the constitutional structure from capricious change. In practice, formal compliance has often proved inadequate to protect democratic institutions. Governments in different countries have used the formal processes of constitutional amendment to undermine checks and balances systematically, take control of independent judiciaries and extend presidential terms of office, a phenomenon contemporary scholars now call "abusive constitutionalism".[2] This is what Dixon and Landau call a basic contradiction in many countries between democratic values and the rules for constitutional change.

Three systems give three different answers to the question. Article 79(3) of the German Basic Law of 1949 entrenches certain principles in its text. The clause is an attempt to prevent authoritarian rule from ever returning, in contrast to the Weimar Constitution, which simply required a two-thirds majority (Article 76).[3] Article 368 of the Indian Constitution contains no such list. In *Kesavananda Bharati v. State of Kerala*, the Indian Supreme Court held, by a majority of seven judges to six, that Parliament could not alter the "basic structure" of the Constitution.[4] The 1991 Constitution of Colombia has no unamendable provisions, and the Constitutional Court can review amendments only for procedural defects under Articles 241

[1] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 1426 (India) (Khanna, J.).
[2] David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 Int'l J. Const. L. 606, 615 (2015), https://doi.org/10.1093/icon/mov039.
[3] Grundgesetz [GG] [Basic Law] art. 79(3) (Ger.); Monika Polzin, *The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting*, 5 Indian L. Rev. 45, 46–47 (2021), https://doi.org/10.1080/24730580.2020.1866882.
[4] *Kesavananda Bharati*, (1973) 4 SCC 225 (India); Polzin, *supra* note 3, at 56–57.

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and 379. Since Judgment C-551 of 2003, however, the Court has held that the amending power cannot be used to replace the Constitution.[5]

This paper is a comparative study of these three major frameworks, and it also considers the migration of these ideas to Bangladesh in South Asia and to Malaysia in Southeast Asia. Its central finding is that the three doctrines rest on a single underlying assumption: that a secondary body created by a constitution (*pouvoir constitué*) cannot use its derived authority to replace or extinguish the original constituent power (*pouvoir constituant*) from which it sprang.[6] These systems nevertheless differ significantly in the sources of their constraints, the manner in which they define their protected core, and the institutional hazards they entail. After a critical assessment of these models in relation to judicial review and majoritarian supremacy, the paper argues that limitations on the amending power are permissible only if they aim at protecting the basic democratic structure and are applied with strict judicial self-restraint.[7] The study is doctrinal and comparative, and it puts three questions: where the limits come from and why they are justified, how courts decide what is protected, and whether judicial enforcement can be reconciled with democratic values.

II. Concept and Nature of the Power of Amendment

A. Amendment and its limits

A constitution has to be durable, but it also has to be able to change with the times. Bernal notes that a political system can solve problems only if it lasts for a long time, but that a long and detailed constitution could hardly survive without some flexibility.[8] Amendment rules seek a balance between the two. Colombia requires only two consecutive votes in Congress, while Weimar Germany required, and Malaysia requires, two-thirds majorities.[9] Limits on amendability may be contained in the text itself (as in Article 79(3) of the German Basic Law) or found by judges (as in India and Colombia).[10]

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[5] Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 Int'l J. Const. L. 339, 339–40 (2013), https://doi.org/10.1093/icon/mot007.

[6] Emmanuel Joseph Sieyès, Qu'est-ce que le Tiers-État? 53 (2002) (1789) (page reference as cited in Polzin, *supra* note 3); Carl Schmitt, Constitutional Theory 125–35, 150 (Jeffrey Seitzer trans., 2008) (page references as cited in Bernal, *supra* note 5).

[7] Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions (2019); Dixon & Landau, *supra* note 2, at 606; Bernal, *supra* note 5, at 356–57.

[8] Bernal, *supra* note 5, at 354, 356.

[9] Dixon & Landau, *supra* note 2, at 616; Polzin, *supra* note 3, at 46–47; Malay. Const. art. 159(3).

[10] Siddharth Sijoria, Unconstitutional Constitutional Amendment: Limiting Amendment Power in India, Colombia and Benin 4 (2018) (unpublished LL.M. short thesis, Central European University).

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The difficulty lies in deciding where modification ends and replacement begins. As Conrad wrote, "[e]ven partial alterations are beyond the scope of amendment if their repercussions on the organic context of the whole are so deep and far reaching that the fundamental identity of the constitution is no longer apparent."[11] Every amendment changes the constitution in some way or another, so the line is difficult to draw.[12]

B. Three ideas behind the limits

Three ideas come up again and again in this paper, so it helps to explain them now.

The first is the difference between the power that makes a constitution and the powers that a constitution creates. The French thinker Sieyès made this point during the French Revolution.[13] Later writers said that the body that amends a constitution holds only a "derivative" power, because it exists only because the constitution gives it that task.[14] The argument, then, is that a body that derives its power from the constitution cannot use that power to replace the constitution.

The second idea comes from two dissenting writers. Carl Schmitt, writing in Germany in 1928, argued that the amending power could change ordinary constitutional laws but must maintain the constitution's identity and continuity. He nonetheless saw the will of the people as unlimited and did not want courts to control it.[15] For Maurice Hauriou in France, the law binds even the body that makes a constitution, and some principles are so basic that they stand above the written text.[16] Both were opposed by Hans Kelsen and most German lawyers of the time, who said there was no limit unless the constitution wrote it down.[17] This remains the most forceful objection to limits found by judges.

The third idea is constitutional identity, developed by Jacobsohn.[18] It refers to the core values and structure that make a constitution what it is. India's rule that an amendment must leave the Constitution recognizable, and Colombia's test of whether an "essential element" has been replaced, both use this idea.[19] An older American argument adds that the power to "amend" does not include the power to "destroy".[20]

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[11] Polzin, *supra* note 3, at 56 (quoting Dietrich Conrad, *Limitations of Amendment Procedures and the Constituent Power*, INDIAN Y.B. INT'L AFF. 375, 420 (1970)).
[12] Bernal, *supra* note 5, at 342.
[13] Polzin, *supra* note 3, at 48.
[14] Bernal, *supra* note 5, at 342.
[15] Polzin, *supra* note 3, at 47–48.
[16] *Id.* at 51–53.
[17] *Id.* at 49.
[18] GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010).
[19] Polzin, *supra* note 3, at 58; Bernal, *supra* note 5, at 343–44.
[20] William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919).

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III. Germany: the eternity clause

A. Historical background and the Weimar legacy

The German model of explicit textual unamendability is the direct result of the tragic historical failure of the Weimar Constitution of 1919. Under the Weimar model, Article 76 allowed the Constitution to be amended by legislation, requiring only a two-thirds majority of the members present in the Reichstag.[21] Legal positivists of the time, such as Anschütz and Thoma, argued that this procedural device permitted complete transformation: any principle could be legally rewritten if the required majority was obtained. One reason for this view was that Weimar lacked a special constituent body, so that the Reichstag was both the lawmaker and the amending authority.[22]

This strict procedural method allowed the Nazi regime to dismantle the state systematically and legally. Through the Enabling Act of 1933, a temporary majority coalition manipulated the existing rules of the Weimar Constitution to destroy its democratic core completely.[23] Schmitt's was a minority view. He argued that identity and continuity constrain the amending power, but he opposed listing the unamendable parts in advance.[24]

The framers of the 1949 Basic Law (*Grundgesetz*) were convinced that another democratic self-liquidation could not be permitted and consciously rejected absolute procedural positivism; they recognised that a strong democracy must be able to deploy its legal arsenal against internal subversion, the so-called militant democracy (*streitbare Demokratie*).[25]

B. Article 79(3)

This protective framework is institutionalised in Article 79(3) of the Basic Law, the so-called "Eternity Clause" (*Ewigkeitsklausel*). The text explicitly forbids any amendment affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the principles laid down in Articles 1 and 20.[26] Article 1 guarantees the inviolability of human dignity as the supreme constitutional value, and Article 20 enshrines the basic pillars of the state: its republican, democratic, social and federal character, together with the separation of

[21] Verfassung des Deutschen Reichs [Weimar Constitution], Aug. 11, 1919, art. 76 (Ger.); Polzin, *supra* note 3, at 46–47.
[22] Polzin, *supra* note 3, at 49–50.
[23] Gesetz zur Behebung der Not von Volk und Reich [Law to Remedy the Distress of the People and the Reich] (Enabling Act), Mar. 24, 1933, Reichsgesetzblatt [RGBl.] I at 141 (Ger.).
[24] Polzin, *supra* note 3, at 48.
[25] Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 Am. Pol. Sci. Rev. 417 (1937).
[26] Grundgesetz [GG] [Basic Law] art. 79(3) (Ger.).

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powers and the rule of law.[27] Bernal notes that Colombia has no such clause.[28] Comparing the German and Indian systems, Bhatia notes that the protected principles are named in the German text, whereas the Indian court finds them by studying the "structure of the Constitution" as a whole.[29]

C. Active judicial enforcement, the Lisbon judgment and constitutional identity

It is a widespread misconception in comparative law that Article 79(3) is a merely passive or symbolic provision because the Federal Constitutional Court (*Bundesverfassungsgericht*) has never annulled a federal amendment in its entirety. The Court has consistently applied the Eternity Clause as a timeless judicial standard for measuring and restraining legislative overreach. In its decisions on telecommunications privacy (the G10 Law case) and on restrictions of asylum under Article 16a, the Court undertook a robust substantive review of the amendments.[30]

This active approach was consolidated in the historic Lisbon Treaty judgment (2009), in which the Federal Constitutional Court linked the identity protected by Article 79(3) to democracy. An encroachment on that identity is an encroachment on the constituent power of the people, which has not authorised any constitutional body to dispose of it, and the Court monitors this.[31]

The Court found that the Eternity Clause sets a hard limit to transnational integration and that "the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution."[32] With this ruling, the Court made clear that any international treaty or domestic change that weakens Germany's democratic sovereignty breaches the unamendable core, confirming that Article 79(3) is an active mechanism for protecting the identity of the state.

Polzin says this draws in part on Schmitt's distinction between "constituent" and "constituted" power. Some writers argue that only the constituted powers are bound by Article 79(3) and that the people retain their authority over the clause itself. Unlike Schmitt, however, the Court treats the constituent power as bound by law and as possibly limited by principles of natural law.[33]

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[27] GRUNDGESETZ [GG] [BASIC LAW] arts. 1, 20 (Ger.).
[28] Bernal, *supra* note 5, at 340.
[29] Gautam Bhatia, *The Basic Structure Doctrine: Notes from Germany*, INDIAN CONST. L. & PHIL. (Sept. 24, 2013), https://indconlawphil.wordpress.com/2013/09/24/the-basic-structure-doctrine-notes-from-germany/.
[30] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVerfGE 1 (1970) (Ger.) (Klass case; G10 Law); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 94 BVerfGE 49 (1996) (Ger.) (Asylum case).
[31] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 123 BVerfGE 267, 343–44 (2009) (Ger.) (*Lisbon Treaty Judgment*); Polzin, *supra* note 3, at 50.
[32] *Lisbon Treaty Judgment*, 123 BVerfGE at 344.
[33] Polzin, *supra* note 3, at 50–51.

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D. Observations and a contrast with France

The German model is a good example of both the strength and the limit of a written clause. The text gives the court a solid basis and answers the complaint that judges invent limits. But scholars are divided on whether Article 79(3) really codifies Schmitt's theory, and Polzin lists authors who say it does not.[34] The clause also has to be interpreted, for someone has to decide what the protected principles require. The difference between a written and a judge-made limit is therefore smaller than it looks at first sight.

France offers an opposite approach. Under Article 89 of the French Constitution, the republican form of government can never be the subject of an amendment. Vedel argued, however, that the derived constituent power is of the same nature as the original one, and that the ban is therefore itself open to revision. The French Constitutional Council and most French writers treat the amending and the constituent powers as identical and regard the clause as having moral value only.[35] The contrast suggests that a written clause does not settle the matter by itself. What matters is what the legal system does with the power behind it.

IV. India: the basic structure doctrine

A. The road to *Kesavananda*

The Basic Structure Doctrine in India did not rest on an explicit text but grew out of a long and high-stakes struggle between the Supreme Court and Parliament over property rights and social engineering laws. The struggle began soon after independence, when Parliament sought to implement land reforms through the First Amendment of 1951, which inserted Article 31B and the Ninth Schedule to protect land redistribution laws from judicial review on the ground of fundamental rights; according to Sijoria, the Schedule later came to cover over 250 laws.[36]

In *Shankari Prasad*, a unanimous Supreme Court held that an amendment is not "law" for the purposes of Article 13, so that fundamental rights could be amended. The Court ruled that the power to amend under Article 368 was absolute and distinct from ordinary law-making.[37] The majority in *Sajjan Singh* followed this view, but Hidayatullah and Mudholkar JJ., in separate opinions, questioned whether the fundamental rights of citizens could be completely obliterated by a dominant political faction.[38]

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[34] *Id.* at 50.
[35] *Id.* at 53–54.
[36] Sijoria, *supra* note 10, at 4–5.
[37] *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 (India); India Const. arts. 13, 368; Sijoria, *supra* note 10, at 5.
[38] *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 (India); Sijoria, *supra* note 10, at 6.

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This growing discomfort culminated in the historic *Golak Nath* ruling. By a narrow 6:5 majority, the Court overturned its earlier position and held that Parliament had no power to amend fundamental rights, in effect freezing that part of the text and triggering a major institutional crisis.[39] The petitioners there relied on Conrad's lecture at Banaras Hindu University, which said that the German eternity clause merely spelled out what was already implicit in rigid constitutions.[40]

B. The decision in *Kesavananda Bharati*

After *Golak Nath*, a Congress government with a large majority passed the Twenty-fourth Amendment (1971) to restore Parliament's power, and the challenge to it came before a bench of thirteen judges.[41] In *Kesavananda Bharati*, the Court held by a majority of seven to six that Parliament could amend any part of the text, including fundamental rights, but laid down a profound structural limitation: the amending power under Article 368 could not be used to alter, damage or destroy the "basic structure" of the Constitution.[42] Polzin observes that the judgment "is more a compilation of different judicial opinions than one unified judgement", and that the judges used different, sometimes contradictory, arguments.[43]

The Court emphasised that the Basic Structure Doctrine is not conjured out of the air but is derived from the internal geometry, architecture and Preamble of the text itself.[44]

There are four lines of reasoning. First, the word "amendment" postulates that "the old Constitution survives without loss of its identity". Khanna J. said that the retention of the old Constitution means the retention of its basic structure.[45] Second, Sikri C.J. found the limits in the scheme of the Constitution, its Preamble and its foundation in the "dignity and freedom of the individual"; Polzin finds this close to Hauriou.[46] Third, Shelat and Grover JJ. said that a specially convened constituent assembly may revise or repeal the Constitution, but that the amending body under Article 368 does not have the same powers.[47] Fourth, some judges were concerned that unlimited power would enable a party with a two-thirds majority to make itself permanent.[48]

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[39] *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (India); Sijoria, *supra* note 10, at 6.
[40] Sijoria, *supra* note 10, at 7; Polzin, *supra* note 3, at 54.
[41] Dixon & Landau, *supra* note 2, at 618.
[42] *Kesavananda Bharati*, (1973) 4 SCC 225 (India); Polzin, *supra* note 3, at 56–57.
[43] Polzin, *supra* note 3, at 57.
[44] *Id.* at 58.
[45] *Id.* at 57–58.
[46] *Id.* at 58.
[47] *Id.* at 58–59.
[48] *Id.* at 59.

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The judgment referred to Conrad's writing several times. Khanna J. accepted his view that the amending power is limited, but Chandrachud J. rejected it.[49] Polzin's main point is that only the general idea of a limited amending power, and the argument that amendment does not mean destruction, reached India; Schmitt's idea of an unlimited constituent power did not.[50] The Court has not provided a complete list of basic features, but it has referred to democracy, republicanism, secularism and judicial review. Bhatia explains what follows. Even a supermajority is constrained. The basic structure lies in abstract principles found across many articles, not in one provision. The original Constitution cannot be challenged on this ground. And the doctrine presupposes that the Constitution has a unity of principle, if only as a legal fiction.[51]

C. Later development

The decision did not immediately end the abuse. Indira Gandhi's government superseded three judges of the majority in appointing the Chief Justice.[52] In *Indira Nehru Gandhi v. Raj Narain*, the Court invoked the doctrine to strike down clause (4) of Article 329A, which had been inserted by the Thirty-ninth Amendment and sought to place the Prime Minister's election beyond all judicial scrutiny.[53] But the Court refused to extend the doctrine to protect habeas corpus in *A.D.M. Jabalpur* during the Emergency.[54] Dixon and Landau suggest that the doctrine may still have cut the period of abuse short, because it warned that later governments could not use amendments to shield electoral wrongdoing, and free elections followed in 1977.[55]

In *Minerva Mills*, the Court held that the Forty-second Amendment had tried to put Parliament's amending power beyond judicial review, and declared the limited nature of that power to be itself part of the "basic structure".[56] In *Waman Rao* and *I.R. Coelho*, the Court held that laws inserted into the Ninth Schedule after 24 April 1973, the date of *Kesavananda*, are open to challenge on the ground that they violate the "basic structure": even laws placed in the Ninth Schedule must satisfy basic structure scrutiny if they affect the core values of fundamental rights.[57] The doctrine has also been used outside amendments, for example in *S.R. Bommai*,

[49] *Id.* at 45, 57.
[50] *Id.* at 59.
[51] Bhatia, *supra* note 29.
[52] Dixon & Landau, *supra* note 2, at 618–19.
[53] *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 (India); Dixon & Landau, *supra* note 2, at 619.
[54] *A.D.M. Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521 (India); Dixon & Landau, *supra* note 2, at 619.
[55] Dixon & Landau, *supra* note 2, at 619–20.
[56] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India); Dixon & Landau, *supra* note 2, at 620.
[57] *Waman Rao v. Union of India*, (1981) 2 SCC 362 (India); *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1 (India).

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where the Court, considering the use of Article 356, found secularism to be part of the "basic structure".[58]

D. The NJAC case

The Ninety-ninth Amendment replaced the collegium system of judicial appointments, set up by judges in 1993, with a National Judicial Appointments Commission. The Commission comprised the Chief Justice of India, two other senior judges, the Union Law Minister and two eminent persons, and any two members could veto an appointment. The reform was meant to increase transparency and accountability.[59] The Supreme Court of India struck it down, holding that it threatened judicial independence, a part of the basic structure. It read the President's duty to consult senior judges under Article 124(2) as a duty to follow their advice.[60]

Suteu states that the case moved from the uncontested protection of judicial independence to its equation with judicial supremacy in appointments, and that it is difficult to avoid the conclusion that the Court was guarding the *status quo* for institutional reasons.[61] Abeyratne sees it differently, placing the system in India's specific history.[62] The case shows the doctrine's central risk: the court that defines the "basic structure" also decides when its own powers are part of it.

V. Colombia: the substitution doctrine

A. Conceptual genesis: amendment versus replacement

A third model was created by the Colombian Constitutional Court (*Corte Constitucional*): the Doctrine of Substitution of the Constitution (*Doctrina de la Sustitución de la Constitución*). In contrast to the defined textual parameters of Germany and the open structural principles of India, the Colombian doctrine rests on a close linguistic analysis of the text. Article 374 of the Constitution of 1991 establishes the procedures for its own "reform". The Court read the term "*reforma*" as a narrowly circumscribed authorisation to amend, improve or modify parts of the text, and as excluding any power to replace the document with a completely different charter.[63]

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[58] *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (India).

[59] *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (1993) 4 SCC 441 (India); Silvia Suteu, *Eternity Clauses as Tools for Exclusionary Constitutional Projects*, *in* The Law and Politics of Unconstitutional Constitutional Amendments in Asia (Rehan Abeyratne & Ngoc Son Bui eds., 2021) (accepted manuscript at 10, https://discovery.ucl.ac.uk/id/eprint/10134525/; page references in this paper are to the manuscript).

[60] *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1 (India); Suteu, *supra* note 59, at 10–11.

[61] Suteu, *supra* note 59, at 11.

[62] Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 Geo. Wash. Int'l L. Rev. 569, 570 (2017).

[63] Constitución Política de Colombia [C.P.] art. 374 (Colom.); Gonzalo A. Ramírez Cleves, *Limits and Methodological Criteria for the Substitution of the Constitution Doctrine in Colombia*, 63 Revista Derecho del Estado 33, 36 (2025), https://doi.org/10.18601/01229893.n63.02.

Following the reasoning of the reporting judge, Justice Eduardo Montealegre Lynett, the Court held in the landmark Decision C-551 of 2003 that an alteration that replaces a fundamental element of the constitution with a completely different structure is an invalid substitution, not a valid change. The amending body simply lacks the competence to make such a structural substitution.[64]

B. The Constitution's text

The Constitution of Colombia does not have any unamendable clause. The Constitutional Court reviews amendments only for procedural defects (Arts. 241 and 379). An amendment must pass in two consecutive ordinary sessions of Congress, by a simple majority in the first and an absolute majority in the second (Art. 375).[65] This bar is low, and that matters for the justification of the doctrine. Article 376 allows the people to vote on whether to convene a Constituent Assembly, and the Court has said that this is the only legitimate way to replace the Constitution entirely.[66]

C. Judgment C-551 of 2003

The Court first pronounced the doctrine in Judgment C-551 of 2003, in reviewing a law that called a referendum on constitutional reform and did not itself amend the Constitution.[67] According to Ramírez Cleves, the Court said that "[a]lthough the 1991 Constitution does not expressly establish any unamendable or unchangeable clause, this does not mean that the amending power has no limits." A constituted authority cannot repeal, subvert or wholly substitute the constitution from which it derives its power.[68] The Court said that the test does not compare an amendment with a single article; the question is whether one structural principle has been replaced by another. It gave the example that the social and democratic State under the rule of law could not be replaced by a dictatorship or a monarchy.[69] The argument rested on the difference between original and derived constituent power.[70]

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[64] Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-551/03 (2003) (Colom.); Bernal, *supra* note 5, at 341.
[65] CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 241, 375, 379 (Colom.); Bernal, *supra* note 5, at 340, 351; Dixon & Landau, *supra* note 2, at 616.
[66] Bernal, *supra* note 5, at 346.
[67] Sentencia C-551/03 (Colom.); Bernal, *supra* note 5, at 341.
[68] Ramírez Cleves, *supra* note 63, at 36.
[69] *Id.* at 36–37.
[70] Bernal, *supra* note 5, at 341–42.

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D. The three-tier methodological test

To anchor this principle in objective legal review and to answer accusations of judicial arbitrariness, the Court built a rigid three-step methodological framework in Decision C-970 of 2004 and Decision C-1040 of 2005:[71]

1. The Court must specifically identify a basic structural feature that gives the 1991 Constitution its distinct identity (for example, the separation of powers or an independent judiciary).
2. The Court considers the actual legal effects of the constitutional amendment in question.
3. The Court asks whether the amendment merely changes an element, or replaces it with a conflicting structure that distorts the essence of the constitution.

In C-1200 of 2003 the Court held that the doctrine cannot make a clause perpetual, that substitution may be complete or partial, and that the burden of proof lies on the person challenging the amendment. Partial substitution means a major and significant change, such as the establishment of a monarchy.[72]

In C-1040 of 2005, the Court developed this into a seven-step evaluation centred on an essential element of the Constitution. The procedure is to identify the element, to show that it underlies several provisions, to explain why it is essential, to show that it cannot be reduced to one provision, to make clear that calling it essential does not make a clause unamendable, to establish that it has been replaced, and to show that the new element is opposed to the old one.[73] In the same ruling, the Court upheld the immediate re-election of the President but struck down a provision empowering the Council of State to set electoral rules, because it violated the separation of powers.[74] In C-588 of 2009 it held that the principles of equality and merit were replaced by moving provisional employees into permanent posts without a competitive examination.[75]

[71] Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-970/04 (2004) (Colom.); Bernal, *supra* note 5, at 343–44.
[72] Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-1200/03 (2003) (Colom.); Bernal, *supra* note 5, at 343.
[73] Bernal, *supra* note 5, at 344.
[74] Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-1040/05 (2005) (Colom.); Ramírez Cleves, *supra* note 63, at 37–38.
[75] Ramírez Cleves, *supra* note 63, at 38.

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E. Blocking executive overreach: the Uribe precedent

The defining test of the Substitution Doctrine came in a major political crisis over executive power. In 2004, a constitutional amendment allowed a sitting president to run for a second consecutive term; the Court upheld it in 2005, and it allowed President Álvaro Uribe to remain in power.[76] In 2009, Uribe's supporters secured the passage of a law calling a popular referendum on a further amendment that would have allowed him to run for a third consecutive term.[77]

In Decision C-141 of 2010, the Constitutional Court struck down the referendum law. The Court ruled that allowing a third presidential term would replace the principles of democracy, the separation of powers, checks and balances, equality and the alternation of power.[78] The decision showed how the Substitution Doctrine could serve as a formidable barrier to competitive authoritarianism, stopping a popular leader from using majoritarian procedures to entrench his power permanently. Ramírez Cleves counts ten occasions on which the Court has used the doctrine to strike down amendments in whole or in part.[79]

F. Assessment

Bernal criticises the Court's main argument as illogical: a derivative power can follow all the procedures and still replace the Constitution.[80] He also finds the seven-step test too intuitive, as it gives no clear rule for what is "essential", and argues that the requirement that an element underpin several provisions is neither necessary nor sufficient.[81]

His own defence of the doctrine rests on context. In a hyper-presidential system, where the president is far more powerful than a feeble Congress, a doctrine that protects deliberative democracy is warranted. He offers two rules. An amendment replaces the constitution if it deletes the charter of rights, the rule of law or the separation of powers, or if it alters the constitution so that it can no longer be called a deliberative democracy. And review should be more rigorous when an amendment is the product of a poor democratic process.[82]

Not all uses of the doctrine are easy to justify. Dixon and Landau point out that it has been invoked in areas such as the civil service, where the Court may be protecting its own earlier

[76] Sentencia C-1040/05 (Colom.); Dixon & Landau, *supra* note 2, at 616–17.
[77] Dixon & Landau, *supra* note 2, at 617.
[78] Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-141/10 (2010) (Colom.); Ramírez Cleves, *supra* note 63, at 38.
[79] Ramírez Cleves, *supra* note 63, at 37.
[80] Bernal, *supra* note 5, at 343.
[81] *Id.* at 344–45.
[82] *Id.* at 352–57.

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decisions.[83] In 2016 the Court invalidated amendments establishing a Judicial Governance Council and a Commission of Aforados (C-285 and C-373). Suteu draws a parallel with the Indian NJAC case and observes that the political reaction was quick.[84]

VI. Comparative analysis

A. The three models compared

Aspect	Germany	India	Colombia
Source of limit	Written text: Basic Law, art. 79(3)	Found by judges in art. 368 and the "structure of the Constitution"	Found by judges in the difference between amendment and replacement
Leading authority	Lisbon Treaty judgment, BVerfGE 123, 267 (2009)	Kesavananda Bharati (1973), decided 7:6	Judgment C-551 of 2003; test refined in C-970/2004 and C-1040/2005
Protected core	Dignity, rights, democracy, rule of law, federal structure (arts. 1 and 20)	Unlisted; includes democracy, secularism, republicanism, judicial review	Essential elements, e.g. "separation of powers", "checks and balances", "equality", merit
Textual restriction on court's review	Not applicable	None express	Arts. 241 and 379 limit review to procedure
Notable strikedowns	Doctrine mainly shaped through identity review (Lisbon)	39th Amendment cl. (4) of art. 329A; parts of 42nd Amendment; NJAC amendment	Third presidential term (C-141/2010); Council of State clause (C-1040/2005); judicial governance reforms (2016)
Main criticism	Interpretive uncertainty; rigidity	Open-ended list; judicial supremacy	Undefined "essential element"; wide discretion

Table 1: Judicial and Textual Approaches to Limits on Amendment

The table sums up the discussion above. It shows that the three models differ in where the limit comes from, but are close in what they do.

B. Regional migration in South Asia: the case of Bangladesh

The intellectual blueprint of the Indian model has been exported to neighbouring South Asian jurisdictions. The Supreme Court of Bangladesh adopted this approach in the landmark case of *Anwar Hossain Chowdhury v. Bangladesh* (1989). In a challenge to the Eighth Amendment, which sought to decentralise the High Court Division into regional benches, the Court relied on the basic structure doctrine. It held that the unity of the Court and the integrated nature of the Supreme Court of Bangladesh were unamendable core features and that the amendment was

[83] Dixon & Landau, *supra* note 2, at 615, 620–21.
[84] Suteu, *supra* note 59, at 11–12.

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therefore invalid.[85] Afzal J. dissented, holding that Article 142 conferred a full power of amendment.[86]

But the political history of Bangladesh reveals a deep structural irony regarding these constraints. In 2011, a dominant legislative majority enacted the Fifteenth Amendment Act, adding Article 7B to the Constitution. Here it was not a court using the doctrine to limit Parliament: Parliament itself took up the basic structure idea, declaring a large portion of the constitutional text, including provisions on nationalism and state ideology, permanently unamendable.[87] This is an illustration of abusive constitutionalism: a legislature that takes hold of the idea of unamendability can use it to entrench a particular political ideology permanently and to block democratic dissent.

According to Suteu, Yap and Abeyratne argue that the Bangladeshi and Pakistani cases concerning judicial appointments are more amenable to arguments based on the basic structure doctrine than the Indian case.[88]

C. The Malaysian experience: *Dhinesh Tanaphll*

Implicit limitations have also crossed over to Southeast Asia, particularly into Malaysia's constitutional structure. For decades Malaysian courts took a strict literalist approach, deferring heavily to parliamentary majorities.[89] The basic structure doctrine was, however, firmly revived by the Federal Court of Malaysia in the landmark decision in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah* (2022), which marked a major structural shift.[90]

In that decision the Federal Court applied the basic structure doctrine to strike down a statutory provision that sought to oust completely the courts' power of judicial review under preventive detention law. The Court held that the power of judicial review is an inherent part of the judicial power vested under Article 121(1) and forms part of the basic structure of the Federal Constitution. In holding that Parliament has no competence to destroy this core part of the basic structure, *Dhinesh Tanaphll* shows that even in traditionally literalist legal cultures, implicit structural limits are increasingly valued as a means of protecting the rule of law from legislative overreach.[91]

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[85] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, 41 DLR (AD) 165 (Bangl.).
[86] *Anwar Hossain Chowdhury*, 1989 BLD (Spl) 1 (Bangl.) (Afzal, J., dissenting).
[87] BANGL. CONST. arts. 7A, 7B (as inserted by the Constitution (Fifteenth Amendment) Act, 2011), *invalidated by Badiul Alam Majumdar v. Gov't of Bangladesh*, 20 SCOB [2025] HCD 97 (Bangl. H.C.D. Dec. 17, 2024).
[88] Suteu, *supra* note 59, at 11.
[89] *Loh Kooi Choon v. Gov't of Malaysia*, [1977] 2 MLJ 187 (Malay.).
[90] *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah*, [2022] 3 MLJ 356 (Malay.).
[91] *Dhinesh Tanaphll*, [2022] 3 MLJ 356.

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Caution is needed, however. Malaysian courts have stopped short of striking down a constitutional amendment, and Article 159(3) of the Federal Constitution requires only a two-thirds majority in each House of Parliament.[92]

D. Similarities and differences

The models share some similarities. All see the amending body as constrained by its constitutional origin and unable to supersede the constitution. All allow a court the final word. All find the protected core mainly in democracy, human dignity or rights, the separation of powers and the rule of law. And in India and Colombia, the clearest successes are cases in which leaders sought to entrench their own position or to escape review.[93] Suteu describes the common function as that of a lock on the door, shielding the core from rapid change.[94]

The differences lie in the source and discipline of the limit. Germany lists the protected principles. India uses an open and unlisted basic structure. Colombia asks whether an essential element has been replaced. Germany gives more certainty, although its text still needs interpretation. India gives the most flexibility and the most risk, as the NJAC case shows. Colombia's test looks more structured but, as Bernal says, it relies on the unclear idea of an "essential element". The practical record also differs. Colombia's Court has used the doctrine to strike down amendments ten times, while Malaysian courts have not struck down a single amendment.[95]

VII. Critical evaluation

A. The counter-majoritarian dilemma and "judicial overreach"

The primary criticism of the Basic Structure and Substitution doctrines alike rests on the classical counter-majoritarian difficulty. Drawing on Jeremy Waldron's case against judicial review, critics argue that when unelected judges strike down formal amendments passed by elected representatives on the basis of unwritten principles, they directly undermine democratic legitimacy.[96]

In systems where there are no explicit textual boundaries, as in India and Colombia, judge-made limits risk turning the judiciary into a supreme third chamber of parliament, entrenching particular political preferences and arresting the natural development of the law. Bernal states

[92] Suteu, *supra* note 59, at 12; MALAY. CONST. art. 159(3).
[93] Dixon & Landau, *supra* note 2, at 615.
[94] Suteu, *supra* note 59, at 5.
[95] Ramírez Cleves, *supra* note 63, at 37; Suteu, *supra* note 59, at 12.
[96] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006).

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the objection clearly: if the people made the constitution, then it is the people, and not the court, who should decide what is essential in it.[97]

He relies on Waldron's contention that it is difficult to defend judicial review when democratic institutions and respect for rights are functioning well.[98] He also considers Schauer's contention that law protects enduring societal values against transient wants. This does not help, he says, because people can change their permanent values, and amendments are signs of such changes.[99]

Bernal gives two examples. First, over five million citizens endorsed the initiative behind the proposed third-term amendment in Colombia, whereas the Constituent Assembly that drafted the 1991 Constitution was elected by 3,710,557 citizens; it is hard to see why the decision of the smaller number should bind the larger. Second, if a constitution had instituted a caste system, an amendment establishing equality would replace one of its essential elements, yet it would be unreasonable for a court to strike that amendment down.[100]

The answer is that the principle protects democracy itself. Sijoria says it has a constitutional basis and has been used to prevent the creation of perpetual incumbency.[101] The answer, Bernal says, depends on context. In a hyper-presidential system, a president can easily obtain majorities in a weak Congress, and his hypothetical amendment giving the president authority over the judiciary, the central bank and the media shows the need for such a doctrine.[102]

This answer works well for amendments concerning term limits, elections and judicial review. It works less well for amendments concerning economic and social policy, which is where the Indian doctrine began.[103]

B. Misuse of unamendability

Suteu points out that unamendability can itself be abused. In Thailand, for example, Section 255 of the 2017 Constitution entrenches the democratic regime of government "with the King as Head of State". The Constitutional Court invalidated amendments to the 2007 Constitution, including one to reintroduce a directly elected senate; in her view, this blocked a change that would have made the constitution more democratic.[104] In Nepal, sovereignty and territorial

[97] Bernal, *supra* note 5, at 346–47.
[98] Waldron, *supra* note 96, at 1360; Bernal, *supra* note 5, at 352.
[99] Bernal, *supra* note 5, at 348.
[100] *See* Bernal, *supra* note 5 (discussing the Colombian third-term initiative and a hypothetical constitution that institutes a caste system).
[101] Sijoria, *supra* note 10, at i.
[102] Bernal, *supra* note 5, at 350–51.
[103] Dixon & Landau, *supra* note 2, at 618.
[104] Suteu, *supra* note 59, at 4.

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integrity are protected by Article 274, which is itself protected, and Suteu reads it together with exclusionary rules on citizenship and federalism.[105] Unamendability, she argues, seems most useful in divided and fragile countries, but these are also the countries in which it is most easily abused.[106] The Indian and Colombian cases on judicial appointments highlight another kind of misuse: courts protecting their own institution.[107]

C. Overuse and the doctrine's origins

Dixon and Landau also warn that courts in India and Colombia have sometimes overestimated the threat posed by an amendment, and that an overused doctrine can prevent normal and legitimate amendments.[108] They also note that courts cannot solve the problem alone, as leaders might respond by replacing the entire constitution or by using emergency powers. They describe the doctrine as a speed bump, not a final cure.[109] Polzin warns about where the idea originated. The positive dimension of implied limits protects the democratic core, while the negative dimension, inspired by Schmitt's notion of an unbounded constituent power, may be used to overcome any legal order.[110] India's experience shows that positive outcomes can be achieved when the doctrine is founded on the rule of law.

D. Proposing a solution: the "Democratic Minimum Test"

This paper proposes an original conceptual framework, the Democratic Minimum Test, to resolve this fundamental tension and to draw a clear boundary for judicial intervention.[111] Under the proposed standard, a court should never strike down a constitutional amendment on the basis of personal prejudices or flexible political philosophies. Judicial intervention should be limited to one objective standard:

A court may strike down a constitutional amendment only if the change clearly threatens the open political processes necessary to challenge and amend the law at a later time.

Where an amendment addresses ordinary policy questions, such as changes to economic structures, property rights or regulatory standards, the judiciary must defer to the legislative branch. But an amendment that systematically undermines the core features of the democratic framework, such as ending free and fair elections, incapacitating an independent judiciary,

[105] *Id.* at 7–9.
[106] *Id.* at 1.
[107] *Id.* at 11–12.
[108] Dixon & Landau, *supra* note 2, at 606, 615.
[109] *Id.* at 615.
[110] Polzin, *supra* note 3, at 60.
[111] The "Democratic Minimum Test" is the authors' own proposal, developed from the arguments discussed in the sources that follow. Bernal, *supra* note 5, at 356–57; Dixon & Landau, *supra* note 2, at 606.

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curtailing political speech or dismantling the constitution's own amendment procedure, fails the Democratic Minimum Test and may be struck down. In striking it down, the court protects the democratic system: it stops a temporary majority from becoming permanent. In such extraordinary circumstances, judicial intervention is fully justified.

VIII. FINDINGS, CONCLUSION AND SUGGESTIONS

A. Findings

The paper posed three questions, and the answers are as follows. First, the limits imposed in Germany, India and Colombia rest on a common idea: the amending authority is a secondary power that can change the constitution but cannot replace it. Second, courts identify the protected substance in different ways: Germany follows a written list, India an open basic framework and Colombia an assessment of essential elements. Third, the democratic objection can never be fully satisfied, but it can be eased if the doctrine is limited to threats to the democratic core, as in cases of term-limit evasion and electoral manipulation.

Hence the origin of the limit matters less than its application. The German text still requires interpretation, while the lines drawn by judges in India and Colombia are more defensible when courts apply a consistent and rational standard. The weakest applications of the doctrine are those that protect the judiciary's own status or policy decisions (as in the NJAC case), and those that risk entrenching exclusion (as in Thailand and Nepal).

B. Suggestions

1. Use the doctrine as a last resort. Conrad himself called implied limits "a doctrine of last resort".[112] Courts should strike down an amendment only if the threat to the democratic core is manifest.
2. Give clear reasons. The Colombian seven-step test is a good discipline, but it needs a clearer standard of what counts as an "essential element". Courts should explain why an element is part of the core and why the amendment replaces it.[113]
3. Look at transnational norms. As Dixon and Landau explain, international and comparative norms may constrain both the principles that courts treat as fundamental and the changes that courts treat as threats.[114]

[112] Polzin, *supra* note 3, at 56.
[113] Bernal, *supra* note 5, at 344; Ramírez Cleves, *supra* note 63, at 33.
[114] Dixon & Landau, *supra* note 2, at 606.

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4. Match the strictness of review to the quality of the process. Following Bernal, review should be more rigorous when an amendment emerges from a weak democratic process, and less rigorous when it emerges from a wide public debate.[115]
5. Show special restraint when the court's own powers are involved. When an amendment relates to judicial appointments or judicial review, the court is judging its own case, and the reason for restraint is stronger.[116]
6. Look at the context. Before praising an eternity clause or a basic structure doctrine, one should look at the politics behind such a rule. Such rules can protect exclusion, not democracy.[117]

C. Conclusion

> "The constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution."[118]

In holding that no organ of the state has sovereign authority over the identity of the constitution, the German Federal Constitutional Court in the Lisbon Treaty judgment (2009) captured the baseline truth common to all modern regimes of limited amendment. Whether a constitutional system protects its boundaries through the explicit textual barriers of Germany's Eternity Clause, the open-ended parameters of India's Basic Structure Doctrine, or the identity-focused test of Colombia's Substitution Doctrine, the core principle is the same: a derived power may not legally override or extinguish its creator. The comparative analysis undertaken in this paper suggests that while these doctrines are vital to prevent majoritarian subversion and executive overreach, their survival depends entirely on strict judicial restraint. To ensure long-term institutional legitimacy and respond to the counter-majoritarian critique, courts must reject subjective expansion and avoid locking in temporary policy preferences. By applying structured thresholds such as the proposed Democratic Minimum Test, courts can ensure that their extraordinary power to invalidate amendments is reserved exclusively for the defence of the democratic order itself. When applied with restraint and tethered to objective structural principles, limits on the amending power do not subvert democracy; rather, they are its ultimate institutional safeguard, ensuring that the constitutional identity of a free nation survives across generations.

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[115] Bernal, *supra* note 5, at 357.
[116] Suteu, *supra* note 59, at 11–13.
[117] *Id.* at 13.
[118] *Lisbon Treaty Judgment*, 123 BVerfGE at 344.

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