Lex Scientia Law Review
Vol. 8 Issue 1 (2024) 261–298
DOI: https://doi.org/10.15294/lslr.v8i1.1901
Online since: September 22, 2024

https://journal.unnes.ac.id/journals/lslr/index

Judicial Review of Constitutional Amendments: Comparison Between India, Germany, Colombia, and the Relevancy with Indonesia

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Abstract

The purpose of this study is to explore the urgency for a judicial review of the constitutionality of Indonesia's constitutional amendments. In addition, it explores, using Germany, Colombia, and India as comparative materials, the practice of judicial review regarding the constitutionality of constitutional amendments. The main writing approach used in this article, which examined the constitutional texts of Germany, Indonesia, Colombia, India, and Germany, was a comparative one. Similar provisions that are unchangeable explicitly or implicitly may be found in the constitutions of Colombia, Germany, India, and Indonesia. However, there are fundamental differences in efforts to protect, maintain and preserve these unchangeable provisions (as the fundamental structure and identity of the Constitution) in reviewing the

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constitutionality of constitutional amendments. This mechanism is practiced in India, Germany and Colombia but not in Indonesia. However, if studied carefully, 3 aspects show the urgency of implementing this mechanism in Indonesia: 1) historical aspects (the existence of past events regarding constitutional changes or transitions that are normatively unconstitutional; 2) philosophical and juridical aspects (the existence of Pancasila as state ideology as well as constitutional identity and the existence of Article 37 paragraph (5) which clearly states that the Form of the Republic of Indonesia cannot be changed); and 3) sociological aspects (the issue of constitutional amendments which seems to be patterned at the end of each president's term of office to extend the period of the president's term of office to three terms). These three aspects are the primary consideration and basis for implementing a mechanism for reviewing the constitutionality of constitutional amendments so that the fundamental structure and identity of the Indonesian Constitution are not damaged or eliminated by parliament through constitutional amendment activities.

KEYWORDS: Judicial Review, Constitutional Amendment, Basic Structure, Constitutional Identity

Introduction

Global reality indicates that authoritarian leaders use legal instruments to smooth out anti-democratic and authoritarian actions.[1] David Landau even explicitly mentioned that the legal instrument used was through a constitutional amendment.[2] In Colombia, when President Alvaro Uribe wanted to become

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1 Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2017): 88–168, https://doi.org/10.2139/ssrn.2901776; Compare this with Ozan Varol who said that the authoritarian leadership style in modern times is undermining democracy by constitutional means. See also Ozan Varol, "Stealth Authoritarianism," *Iowa Law Review* 100, no. 4 (2015): 1673–1742, https://ilr.law.uiowa.edu/print/volume-100-issue-4/stealth-authoritarianism; See Also, Novendri M. Nggilu et al., "Constitutional Crisis: Intensifying Disobedience to the Decisions of the Indonesian Constitutional Court," *Revista Chilena de Derecho* 50, no. 2 (2023): 115–32, https://doi.org/10.7764/R.502.5.

2 David Landau said that constitutional amendments were one of the methods used by anti-democratic groups to undermine the democratic order (democratic backsliding). See more David Landau, "Abusive Constitutionalism," *University of California Davis Law Review* 47, no. 1 (2013): 189–260, https://lawreview.law.ucdavis.edu/archives/47/1/abusive-constitutionalism.

president for a third term, he used the instrument of constitutional amendment.[3] Similar to Colombia, the case in Venezuela reveals how President Hugo Chavez employed the instrument of constitutional amendments to strengthen his power.[4] Another critical event as a reflection was in Hungary when Viktor Orban also used the constitutional amendments and derivative acts to subjugate the judiciary by amputating judicial independence.[5]

These historical events in various countries highlight the crucial need for monitoring and regulating constitutional amendment activities to ensure they are conducted responsibly and non-haphazardly. A common method employed to control constitutional amendments activities is through mechanism of reviewing the constitutionality of constitutional amendments by the judiciary, a practice widely adopted across many countries. The events in India of reviewing constitutional amendments, as reflected in the case of Kesavananda Bharati vs. the State of Kerala, also marks the existence of the doctrine of the basic structure of the constitution, which is used as a measure in reviewing, which has now migrated to other countries, such as Bangladesh for the case of Anwar Hossain Chowdhury vs. Bangladesh.[6] Kenya, for the case of Njoya vs Attorney General,[7] Türkiye, for the case of removing provisions prohibiting

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[3] Mario Alberto Cajas-Sarria, "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016," *The Theory and Practice of Legislation* 5, no. 3 (2017): 245–75, https://doi.org/10.1080/20508840.2017.1407397.

[4] Crisis Group, "Imagining a Resolution of Venezuela's Crisis," 2020.

[5] The subjugation and amputation of judicial independence in both Hungary and Poland uses the form of Court Packing, amputation of authority, and even the possibility of dismissing judges without reason. See more Peter Curos, "Attack or Reform: Systemic Interventions in the Judiciary in Hungary, Poland, and Slovakia," *Oñati Socio-Legal Series* 12 (2023), https://doi.org/10.35295/osls.iisl/0000-0000-0000-1393; Robert Sata and Ireneusz Pawel Karolewski, "Caesarean Politics in Hungary and Poland," in *The (Not So) Surprising Longevity of Identity Politics* (London: Routledge, 2022), 60–79, https://doi.org/10.4324/9781003271840-4.

[6] Kawser Ahmed, "Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine," *Israel Law Review* 56, no. 2 (2023): 263–87, https://doi.org/10.1017/S0021223721000297.

[7] Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," *American Journal of Comparative Law* 61, no. 3 (2013): 657–719, https://doi.org/10.5131/AJCL.2012.0027.

the use of the hijab in universities,[8] Germany, for the case of land reform,[9] Bellize, for the case of Bowen vs Attorney General of 2008,[10] and also Malaysia, for the case of Indira Gandhi Mutho vs. Director of the Department of Islamic Religion Perak and Others.[11]

Practically reviewing the constitutionality of constitutional amendments, the review indicators are not only related to the fundamental structure doctrine as it exists in India, but also to the doctrine of constitutional replacement as emerged and developed by the Constitutional Court in Colombia.[12] The doctrine of the fundamental structure of the constitution asserts that there are essential principles or aspects within the constitution that must be protected and preserved, and thus cannot be altered. Conversely, the doctrine of constitutional replacement highlights that the power of parliament to make amendments is restricted to certain aspects and prohibits changes that would eliminate or alter the constitution's core identity.[13] These two doctrines also sparked Yaniv Roznai to conduct research on unconstitutional constitutional amendments and found that the constitutions of various countries contain

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8 Y. Roznai and S. Yolcu, "An Unconstitutional Constitutional Amendment--The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision," *International Journal of Constitutional Law* 10, no. 1 (2012): 175–207, https://doi.org/10.1093/icon/mos007; Michael Hein, "Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe," *International Journal of Constitutional Law* 18, no. 1 (May 21, 2020): 78–110, https://doi.org/10.1093/icon/moaa002.

9 Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa: Ekin Press, 2008), https://www.anayasa.gen.tr/jrca-text.htm.

10 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017).

11 Yvonne Tew and Hoong Phun Lee, "The Law and Politics of Unconstitutional Constitutional Amendments in Malaysia," in *The Law and Politics of Unconstitutional Constitutional Amendments in Asia*, ed. Ngoc Son Rehan Abeyratne (New York: Rouletdge, 2021), 94.

12 C. Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine," *International Journal of Constitutional Law* 11, no. 2 (2013): 339–57, https://doi.org/10.1093/icon/mot007.

13 Vicente F. Benítez-R., "Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-Amending Case Law in Colombia," *Revista de Investigações Constitucionais* 9, no. 2 (2022): 269, https://doi.org/10.5380/rinc.v9i2.86742.

provisions that cannot be changed either explicitly or implicitly.[14] In the context of explicit restrictions, Yaniv Roznai groups countries into 5 forms, such us:

1. *Form of state and system of government.* In this context, several countries protect the form of the state and its system of government so that it cannot be changed, such as Indonesia,[15] Thailand,[16] and Germany.[17]
2. *Political structure.* In this context, several countries protect the bicameral system, regional autonomy, separation of powers, independence of the judiciary, for example Bahrain,[18] Kazakhstan,[19] and Portugal.[20]
3. *State ideology is also often referred to as constitutional identity.* This form of state strictly prohibits amendments to state ideology; for example, Ecuador protects 'Roman Catholic Apostolic',[21] and Turkey protects state ideology, which is secular and socialist.[22] Apart from that, according to the author's perspective, if it is related to the Indonesian context, Pancasila, as a state ideology, also falls into this qualification.[23]
4. *Fundamental rights.* Some countries firmly state that the fundamental rights of citizens cannot be changed and must be protected and preserved. These fundamental rights relate to human dignity, equality, freedom, press

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[14] Yaniv Roznai, "Towards a Theory of Constitutional Unamendability: On the Nature and Scope of The Constituional Amendment Powers," *Jus Politicum* 18 (2017).

[15] Luthfi Widagdo Eddyono, "The Unamendable Articles of the 1945 Constitution," *Constitutional Review* 2, no. 2 (2017): 252, https://doi.org/10.31078/consrev225.

[16] Yaniv Roznai, "Constitutional Amendability and Unamendability in South-East Asia," *Journal of Comparative Law* 14, no. 1 (2019): 188–204.

[17] Monika Polzin, "The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting," *Indian Law Review* 5, no. 1 (2021): 45–61, https://doi.org/10.1080/24730580.2020.1866882.

[18] Richard Albert, "The Three Varieties of Unamendability," in *Constitutional Amendments* (New York: Oxford University Press, 2019), 139–72, https://doi.org/10.1093/oso/9780190640484.003.0005.

[19] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (New York: Oxford University Press, 2021).

[20] Lech Garlicki and Yaniv Roznai, "Introduction: Constitutional Unamendability in Europe," *European Journal of Law Reform* 21, no. 3 (2019): 217–25, https://doi.org/10.5553/EJLR/138723702019021003001.

[21] Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea'," *The American Journal of Comparative Law* 61, no. 3 (2013): 657–719.

[22] Roznai and Yolcu, "An Unconstitutional Constitutional Amendment--The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision."

[23] Ali Abdurahman, Novendri Momahad Nggilu, Indra Perwira, "Constitutionality Review of Indonesian Constitutional Amendments: History And Future," *Russian Law Journal* 11, no. 2 (2023), https://doi.org/10.52783/rlj.v11i2.517.

freedom, workers' rights, and trade unions. Some examples of countries that explicitly protect fundamental rights from constitutional amendments are Germany, Mexico, and Portugal.[24]

5. *State integrity, which includes national unity, territorial integrity, sovereignty, and independence.* Some countries that have made this aspect unchangeable, such as Azerbaijan, Cameroon, and Ivory Coast.[25]

In the Indonesian context, it must be acknowledged that the current design of judicial review system lacks the needs to recognize the existence of a mechanism for reviewing the constitutionality of constitutional amendments. Presently, the judicial review system in Indonesia only includes two types of review mechanisms: one for reviewing laws against basic laws, which falls under the authority of the Constitutional Court,[26] and Reviewing mechanisms for amendments to statutory regulations under laws against laws, which falls under authority of the Supreme Court.[27] Therefore, this article will explore the relevance of testing the constitutionality of constitutional amendments by considering comparative aspects in three countries, namely India, Germany, and Colombia, which will focus on the design of the constitutions in these countries regarding essential values, actors, and their authority in implementing testing, as well as photographing the reviewing practice.

However, a deeper study reveals the relevance and basis of arguments from juridical, historical, and philosophical perspectives, underscoring the importance of implementing a mechanism to test the constitutionality of constitutional amendments in Indonesia. This measure is crucial for maintaining and preserving the constitution's essential values. Therefore, this article will explore the relevance of such a testing mechanism by examining comparative aspects in three countries: India, Germany, and Colombia. The focus will be on the design of their constitutions regarding essential values, the actors and their authority in conducting reviews, and the practical implementation of these reviews.

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[24] Yaniv Roznai, "Unconstitutional Constitutional Amandments: A Study of The Nature and Limits of Constitutional Amandment." (The London School of Economics and Political Science (LSE), 2014).

[25] Roznai.

[26] *See more at Article 24C paragraph (1),* "The 1945 Constitution of the Republic of Indonesia" (2002).

[27] *See more at Article 24A paragraph (1),* The 1945 Constitution of the Republic of Indonesia. *See also* Tri Sulistyowati, Ali Ridho, and M. Imam Nasef. "Constitutional Compliance Solution to Law Testing Rulings in the Constitutional Court." *Jambura Law Review* 3, no. SI (2021): 117-134; Ahmad Wijaya, and Nasran Nasran. "Comparison of Judicial Review: A Critical Approach to the Model in Several Countries." *Jurnal Legalitas* 14, no. 2 (2021): 85-106.

This article employs a statutory approach, focusing on reviewing aspects of the Indonesian Constitution, particularly those related to its basic structure and identity, and the current design of review system in place. Additionally, a comparative approach is utilized, not only due to its rapid development but also because it offers a broader perspective and the opportunity to study various constitutional experiences in other countries. This comparative analysis can help formulate improvements and strengthen the Indonesian constitutional system, especially regarding the review of the constitutionality of constitutional amendments.

In making comparisons, it is essential to examine the text of the constitution is a mandatory method, particularly to understand the constitutional design concerning the basic structure or identity contained in the constitution, the actors involved, and the authority for reviewing the constitutionality of amendments. This examination also includes the practices in India, Germany, and Colombia. All collected legal materials are analyzed and presented in a prescriptive manner.

The Mechanism of Constitutional Review of Constitutional Amendments: Lesson Learnt from Several Countries

A. India

1. The unamendable provisions and constitutional design of constitutional justice

The Indian Constitution is also known as the thickest constitution in the world as it contains 395 articles, however in this constitution there is not any explicit provisions regarding unamendable provisions. However, no matter how explicit these provisions are, as stated by the Supreme Court of India, which dealt with various cases regarding the review of constitutional amendments, in the Indian constitution, there is a fundamental constitutional structure.[28] In that context, even though parliament is given the authority to carry out

[28] This decision of the Supreme Court of India marks the existence of a doctrine of the basic structure of the constitution, which colors the debate and scholarly discourse in the field of the constitution. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers.*

amendment activities, it has limitations in making these amendments. Thus, parliament cannot make changes to the basic structure of the constitution.[29]

The Indian Constitution gives authority to exercise judicial authority to the Supreme Court, one whose jurisdiction is related to the validity and constitutionality of central laws. Based on this provision, the Supreme Court reviews the constitutionality of central laws,[30] including the Constitution. Suppose it is related to the constitutional design of changes to the Indian Constitution. In that case, it is stated in Article 368 that parliament can amend it by adding, changing, or repealing any provision in the Constitution by established procedures.[31] However, a closer examination of the Indian Constitution reveals some provisions that implicitly restrict the object of amendment power. Article 13 of the Indian Constitution declares void any provisions that deviate from fundamental rights. Furthermore, paragraph 2 emphasizes that the state is prohibited from enacting regulations that eliminate or limit the fundamental rights of citizens.[32]

This article also served as the foundation for the Supreme Court's consideration in the case of Golaknath vs. the State of Punjab. Here, the Supreme Court interpreted the term "regulations" in Article 13, paragraph 2, to encompass an amended constitution. This implies that if a constitutional amendment leads to the elimination or restriction of fundamental rights, the court has the authority to nullify the constitutional amendment.[33]

2. The practice of reviewing constitutional amendments

Reviewing constitutional amendments in India began in 1951 when many citizens felt that agrarian reform violated their property rights. Rejection of this regulation resulted in several cases being tried by the Supreme Court, including the case of Shankari Prasad Deo vs. Union of India,[34] Golakhnath vs. State of Punjab,[35] the case of Kesavananda Bharati vs. State of Kerala. Still, the cases that

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[29] "The Constitution of India" (n.d.).

[30] Central Laws Also cover the Constitution of India. See Article 131A the Constitution Of India.

[31] *See more* Article 368 paragraph 1 *The Constitution of India*.

[32] *See more* Article 12 Paragraph 1 *The Constitution of India*.

[33] Siddharth Sijoria, "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India," (Central European University, 2018).

[34] A. R. Blackshield, "Fundamental Rights and the Institutional Viability of the Indian Supreme Court," *Journal of the Indian Law Institute* 8, no. 2 (1996): 139–217.

[35] Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments," *UC Law Journal* 70, no. 3 (2019): 639,

will be described in this section will focus on cases that mark the basic structure of the Constitution, as follows:

a) *Golakhnath vs. State of Punjab*

This case originated from the ownership of 500 hectares of agricultural land by two brothers, Hendry and William Golakhnath. However, under the latest provisions on agrarian reform, the maximum land ownership was restricted to 30 hectares, with the government taking over the remaining part. Discontented, the Golakhnath family took the matter before the Supreme Court, contending that the agrarian reform violated their fundamental rights as guaranteed in the constitution. They petitioned the Supreme Court to invalidate the 17th Amendment to agricultural reform. Additionally, they challenged the inclusion of Article 31B in the 9th Schedule of the Indian Constitution, which exempted agrarian reform from judicial review.[36]

In the petition, Nambyar, the petitioner's lawyer, introduced the concept of "basic structure" in his introduction to the trial. This concept, initially conveyed by German professor Dietrich Conrad, an expert in South Asian law, posits that there are implicit limits on the power of amendment. According to Conrad, amendments cannot be allowed to destroy the permanent character or "basic structure" of the Constitution.[37] Responding to Golakhnath's petition, the respondent stated that agrarian reform is within the power of parliament, and in the Indian Constitution, there are no provisions that reflect superiority over other constitutional provisions.

After the trial of the case, the Supreme Court finally decided with a majority vote (6 to 5 judges) stating that the agrarian reform had violated fundamental rights. The Court believes that fundamental rights are an essential and vital aspect of the Constitution, and without these fundamental rights, the Constitution would be like a "body without a soul".[38]

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https://repository.uclawsf.edu/hastings_law_journal/vol70/iss3/1; Rosalind Dixon, "Transnational Constitutionalism and Unconstitutional Constitutional Amendments," *University of Chicago Public Law & Legal Theory Working Paper*, 2011, https://doi.org/10.2139/ssrn.1840963.

[36] *See more* Supreme Court of India Judgments "I.C. Golak Nath And Ors. vs State Of Punjab And Anr. on 27 February, 1967," February 20, 2024, https://indiankanoon.org/doc/21266288/.

[37] Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*.

[38] *See more* Supreme Court of India Judgments "I.C. Golak Nath And Ors. vs State Of Punjab And Anr. on 27 February, 1967"; Siddharth Sijoria, "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India,"; and Tarik Olcay Richard Albert, Malkhaz Nakashidze, "The Formalist Resistance to Unconstitutional Constitutional Amendments," *UC Law Journal* 70, no. 3 (2019): 639; Emmett

b) Kesavananda Bharati Sripadagalvaru vs State of Kerala

Kesavananda Bharati, Chair of the Pope Edneer Mutt, believes that the 24th, 25th and 29th constitutional amendments violate the provisions of Article 13 Paragraph 2 of the Indian Constitution, which states that the state may not make laws (including constitutional amendments) that eliminate and limit fundamental rights. Kesavanda Bharati postulates that parliament in exercising amendment powers does not mean destroying the essential characteristics of the constitution, which are reflected in several parts of the constitution, including fundamental rights, state sovereignty, republican form of government, secularism, judicial independence, and separation of powers.[39]

The petitioner's argument received a response from the State of Kerala as the respondent in the case. The respondents contended that Parliament, a part of the basic structure of the Indian legal system, is vested with the authority and power to make amendments. They argued that this amendment power is unlimited, especially when exercised to fulfill obligations aimed at achieving socio-economic goals.[40] Respondents also argued that the basic structural principles mentioned created ambiguity that would be difficult to understand and could not be used as a guide for parliament in making constitutional amendments.

After deliberating for 66 days, the Supreme Court issued a decision based on a majority vote[41] (6 out of 11 judges), affirming that Parliament could amend any provision in the Indian Constitution to fulfill the socio-economic obligations outlined in the Preamble to the Indian Constitution. However, these amendments should not alter the constitutional structure. S.M. Sikri, the Chief Justice, emphasized that the constitution is a document imbued with a noble vision. By giving unlimited power to parliament in changing the constitution, it will endanger the noble vision, which is also the basic structure

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Macfarlane, "The Unconstitutionality of Unconstitutional Constitutional Amendments," *Manitoba Law Journal* 45 (2022): 198–218, http://files/204/Macfarlane - 2022 - The Unconstitutionality of Unconstitutional Consti.pdf.

[39] *See more* Supreme Court of India Judgments "Kesavananda Bharati Sripadagalvaru vs. State of Kerala, AIR 1973 SC 1461" (n.d.); Siddharth Sijoria, "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India,"; Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*.

[40] Kesavananda Bharati Sripadagalvaru vs. State of Kerala, AIR 1973 SC 1461; Siddharth Sijoria, "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India,"; Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*.

[41] Siddharth Sijoria, "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India,"; See also online published of Supreme Court of India, Supreme Court of India, "Writ Petition (Civil) 135 of 1970" (n.d.), https://main.sci.gov.in/jonew/judis/29981.pdf.

of the constitution, as the majority government will use this unlimited power to enforce totalitarianism, enslaving the people in the name of democracy. [42]

Besides the court's decision, this case further strengthened the doctrine of the basic structure of the constitution as developed by the Supreme Court of India. It also became a subject of extensive research and discussion among constitutionalists, not only in India but also globally, including notable experts like Richard Albert, Yaniv Roznai, and Rosalind Dixon.[43]

c) Ashok Kumar Jain vs. Union of India, Election Commission of India

The previously described case marked the emergence of the doctrine of the basic structure of the constitution by the Supreme Court of India and demonstrated the existence of a mechanism for reviewing the constitutionality of constitutional amendments. The case of Ashok Kumar Jain vs. The Union of India and the Election Commission of India exemplifies the practice of reviewing the constitutionality of contemporary constitutional amendments in India. In this case, Ashok Kumar Jain filed a petition challenging the validity of the 104th constitutional amendment, which extended the time limits on the "representation of registered Castes and Anglo-Indian communities in the State Legislative Council and the People's Council". [44]

The petitioner argued that the 1949 Indian Constitution, through Article 334, had emphasized specific representation for the registered Castes and the Anglo-Indian community in legislative institutions, providing a time limit that would expire 70 years after the Constitution came into force in 1949[45] Interestingly, when the 104th Amendment constitution took place in 2019, this provision was extended by parliament. The petitioner asked the Supreme Court to assess the validity of extending the time limits for the representation of registered Castes and Anglo-Indian communities or tribes in legislative bodies.

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[42] *See more* Supreme Court of India Judgments *Kesavananda Bharati Sripadagalvaru vs. State of Kerala, AIR 1973 SC 1461*; Sijoria.

[43] R Dixon and D Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment," *International Journal of Constitutional Law* 13, no. 3 (February 20, 2015): 606–38, https://doi.org/10.1093/icon/mov039.

[44] "Challenge to Extended Reservations in the Lok Sabha and State Legislative Assemblies - Supreme Court Observer," January 20, 2024, https://www.scobserver.in/cases/challenge-to-extended-reservations-in-the-lok-sabha-and-state-legislative-assemblies/; PTI, "Pleas Challenging Constitutional Validity of Extending Reservation to SC/ST in Lok Sabha, State Assemblies to Be Heard on November 21," *Deccan Herald*, November 20, 2023, https://www.deccanherald.com/india/pleas-challenging-constitutional-validity-of-extending-reservation-to-scst-in-lok-sabha-state-assemblies-to-be-heard-on-november-21-2693546.

[45] See more at Article 334 of *The Constitution of India*.

During the trial process, Senior Advocate CA. Sundaram, who represented the petitioner, highlighted the main issue in this case: whether the provisions of Article 334 violate the basic structure of the constitution or not.[46]

This case is still ongoing in the Supreme Court of India, demonstrating that the practice of reviewing the constitutionality of amendments to the Indian constitution continues to roll out as an active constitutional mechanism. Citizens continue to use this process to challenge or review the constitutionality of constitutional amendments which are products of parliament. The key issue is whether these constitutional amendments violate the basic structure of the Constitution, which has become the jurisprudence of the Supreme Court of India.

B. Germany

1. *The unamendable provisions and constitutional design of constitutional justice*

In the German Constitution, besides the Federal Constitutional Court, there are also Constitutional Courts in 16 states that have the constitutional judicial authority.[47] The constitutional basis of the Constitutional Court in Germany is regulated in Article 93, which states that the authority of the Constitutional Court includes: Reviewing the constitutionality of federal laws and regulations; resolving authority disputes between state institutions; and assessing the actions of state institutions and making court decisions in individual cases, also known as the term constitutional complaint.[48]

If we look deeply at the provisions in the articles of the German constitution, we will not find any confirmation regarding the authority of the German Federal Constitutional Court to review the constitutionality of its constitution, however, in the various cases it has handled, the Constitutional Court has the competence to review constitutional amendments. According to Gozler, the German Federal Constitutional Court implicitly defines that the

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[46] "Lok Sabha: SC to Hear on Nov 21 Pleas Challenging Validity of Extending Reservation of Seats for SCs/STs in LS, Assemblies, ET LegalWorld," January 30, 2024, https://legal.economictimes.indiatimes.com/news/litigation/sc-to-hear-on-nov-21-pleas-challenging-validity-of-extending-reservation-of-seats-for-scs/sts-in-ls-assemblies/103817713, [accessed 31 January 2024].

[47] Tanto Lailam, "Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional," *Jurnal HAM* 13, no. 1 (2022): 65, https://doi.org/10.30641/ham.2022.13.65-80.

[48] Article 93 "Basic Law for the Federal Republic of Germany" (2023), https://www.gesetze-im-internet.de/englisch_gg/. [accessed 30 November 2023].

constitution is also part of federal legal regulations, therefore the Constitutional Court has the authority to review it. [49]

In the review process of constitutional amendments in Germany, the Constitutional Court refers to unamendable provisions as a measure to assess whether amendments to the constitution are constitutional or unconstitutional. The unamendable provisions contained in the German constitution are as follows:

a) The principle of respecting and protecting human dignity. Article 1, paragraph 1 states that "human dignity is inviolable"[50]. Respect and protection of human dignity bind the German people[51] and the legislative, executive, and judicial institutions.[52] This provision reflects that human rights are fundamental principles of the German Constitution protected from constitutional amendment activities.
b) The form of the German state is a federal, democratic, and social state with popular sovereignty. Article 20a states that the Federal Republic of Germany is democratic and social,[53] whose power comes from the people and is exercised through general elections, as well as through the legislative, executive, and judicial bodies.[54] This provision is a non-amendable provision, which is expressly stated in paragraph 4, that all German citizens have the right to reject anyone who attempts to abolish the constitutional order.[55]

2. *The practice of reviewing constitutional amendments*

There are several cases of reviewing constitutional amendments at the German Constitutional Court, such as:

a) Klass Case

The practice of reviewing constitutional amendments in Germany first took place in 1970 in the Klass case; Article 10 of the German Constitution stated that the privacy of correspondence, postal, and telecommunications is

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[49] *Kemal Gözler, Judicial Review of Constitutional Amendments.*

[50] Article 1 Paragraph 1 *Basic Law for the Federal Republic of Germany.*

[51] Article 1 paragraph 2 *Basic Law for the Federal Republic of Germany.*

[52] Article 1 paragraph 3 *Basic Law for the Federal Republic of Germany.*

[53] Article 20A paragraph 1 *Basic Law for the Federal Republic of Germany* Other provisions which confirm the form of a federal state which cannot be amended are also contained in Article 79 paragraph 3 of the Basic Law.

[54] Article 20a paragraph 2 *Basic Law for the Federal Republic of Germany.*

[55] Article 20a paragraph 4 *Basic Law for the Federal Republic of Germany.*

something that cannot be contested,[56] even if the right to privacy was restricted, it can only be under the law. Suppose the restrictions serve to protect the basic order of democracy or Federal or Land security. In that case, the law may stipulate that the affected persons may not be notified of the restrictions, and a review of the rules may be submitted to parliament through a designated body.[57]

Those who question this right consider that this provision allows violations of communications privacy based on protecting national security reasons and that the review of communications privacy is carried out by parliament through an appointed body. Those who opposed this provision consider it contrary to Article 79, paragraph 3 of the Constitution concerning the basic principles of human dignity. In this case, although there were differences of opinion among the constitutional judges, the majority of judges on the Federal Constitutional Court decided to reject the application for this case. The court argued that the review of Article 10 paragraph 2 of the German Constitution (especially regarding the protection of communications privacy and the prohibition on review return for this action) does not violate the basic principles of the German Constitution, as the authority of parliament through an appointed body is a form of control (supervision procedure), and not "judicial review" which is closely related to legal review through the judiciary. The court also assesses this is a sufficient form of assurance for law enforcement.[58]

The German federal constitutional court also argued that Article 79 paragraph 3 contains unamendable provisions and must be interpreted narrowly as it is an exception to the general rule of which parliament is not allowed to change the basic principles of the constitution through amendments.[59] In contrast to the majority of constitutional judges, the dissenting judge stated that the provisions of Article 10 paragraph 2 clearly violated the principle of human dignity. Article 79 paragraph 3 should be interpreted broadly as a provision that parliament cannot amend. Suppose there is a provision in the constitution that reflects action against basic principles such as human dignity. In such circumstances, the amendment is unconstitutional, especially as the legal mechanism of Article 10 paragraph 2 can only be implemented by a body

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[56] Article 10 paragraph 1 *Basic Law for the Federal Republic of Germany.*

[57] Article 10 paragraph 2 *Basic Law for the Federal Republic of Germany.*

[58] *Kemal Gözler, Judicial Review of Constitutional Amendments.*

[59] "Bundesverfassungsgericht - Suche Nach Entscheidungen," https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language_=en, [accessed 21 February 2024].

authorized by parliament. This violates the principle of separation of powers, which requires legal action through the judiciary.[60]

b) "Land Reform I and II" Case

This case began with Article 143 paragraph 3, which had the consequence that property confiscated in the Soviet occupation zone from 1945 to 1949 was not allowed to be returned to its original owner. [61] The provisions arising from the 36th constitutional amendment process (unification amendment) were petitioned to the German Federal Constitutional Court by fourteen owners of the confiscated property because the provisions of Article 143 paragraph (3) were contrary to the provisions of Article 79 paragraph (3).

After approving the petition for this case, the German Federal Constitutional Court first conducted a review from the procedural aspect, whether the amendment was in accordance with Article 79 paragraph 1, stating that:

> "…in the case of international agreements regarding the settlement of disputes, preparation for the settlement of disputes or the gradual elimination of the occupation regime or designed to increase the defense of the Federal Republic, this is sufficient to clarify that the provisions in this Constitution do not prevent the conclusion and entry into force of the agreement..."

The German Federal Constitutional Court declared that Article 143 paragraph 3 did not violate or conflict with Article 93. Furthermore, the Constitutional Court ruled that Germany could not protect land expropriation which took place between 1945 and 1949 since it occurred during the Soviet occupation and so did not fall under German federal jurisdiction.[62] The Court also stated that the provisions of Article 93 paragraph 3 were not interpreted to protect the rights of citizens from foreign actions, in this case, during the Soviet subjugation period.[63] Five years later, a petition challenging the existence of

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[60] Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?," *Constellations* 19, no. 2 (2012): 182–203, https://doi.org/10.1111/j.1467-8675.2012.00688.x.

[61] Article 143 paragraph 3 *Basic Law for the Federal Republic of Germany*.

[62] "The German Federal Constitutional Court Decision," BVerfGE 94, 12 (1990) (BvR 1452/90, 1459/90 and 2031/94) § (n.d.).

[63] Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*; Abdurrachman Satrio, "The Existence of the Unamendable Provision of the Unitary State of the Republic of Indonesia: The Role of the Constitutional Court," *Comparative*

Article 143 paragraph 3 was again submitted to the Constitutional Court. If the first case was filed in 1991, in 1996, the same issue was petitioned to the Constitutional Court, where once again the Court maintained its previous decision.[64]

c) Asylum Cases

In 1993, there was an amendment to Article 16A of the constitution, which stated that the right of asylum may not be requested by anyone belonging to the category of member states of the European Community or other third countries.[65] This provision is considered to contradict human dignity as it is an inviolable provision as stated in Article 79 paragraph 3. In its decision on this case, the Constitutional Court declared that the provisions of Article 16a, which states the denial of the right to asylum, do not violate or conflict with the provisions of Article 79 paragraph 3.[66]

d) Acoustic Surveillance of Homes

The constitutional amendment conducted in 1998 resulted in the formulation of Article 13 paragraph 3[67] which allows for acoustic monitoring of homes for prosecution or to explore facts about the occurrence of serious crimes. This provision is considered by some parties to have violated the principle of human dignity as regulated in Article 1, which is an inviolable clause. This is the basis for a lawsuit to the Constitutional Court in 2004.[68] According to Jutta Stender-Vorwachsy, the provisions of Article 13 paragraph 3 allow for the possibility of acoustic monitoring of housing for reasons of prosecution under certain circumstances in which such monitoring actions is permissible in cases of serious and organized crimes. The defendant occupies or carries out activities in the residential area in question, and there is no prospect of uncovering the facts about organized crime through exploration or other

Constitutional Law and Administrative Law Journal 3 (2016): 18, https://heinonline.org/HOL/Page?handle=hein.journals/cvecllw3&id=268&div=&collection=.

[64] Elene Janelidze, "Judicial Review of Constitutional Amendments in Georgia, France and Germany-The Quest for Eternity" (Central European University, 2016), http://files/235/janelidze_elene.pdf.

[65] Article 16A *Basic Law for the Federal Republic of Germany.*

[66] *Kemal Gözler, Judicial Review of Constitutional Amendments.*

[67] Article 13 paragraph 3 *Basic Law for the Federal Republic of Germany.*

[68] *Kemal Gözler, Judicial Review of Constitutional Amendments.*

means.[69] After examining this case, the Constitutional Court decided that the provisions of Article 13 paragraph (3) did not conflict with the principle of human dignity. When the defendant resides or operates in the targeted area, and there is no other viable way to uncover facts about the organized crime through investigation or other methods.

Apart from these cases being decided by the Constitutional Court, they do not conflict with the principles of human dignity or the basic structure of the constitution, but in fact, the activity of reviewing the constitutionality of constitutional amendments by the German Federal Constitutional Court has become part of the constitutional mechanism that German citizens can use to seek constitutional justice.

C. Colombia

1. The unamendable provisions and constitutional design of constitutional justice

The design of the Colombian Constitution does not provide for unamendable provisions like the German Constitution, which explicitly contains unamendable provisions. Even though there are no explicit, unamendable provisions in the Colombian Constitution, Richart Albert believes that the absence of these explicit provisions does not mean that there is an absence of basic structures, principles, or values in the Constitution that must be protected and preserved.[70] Yaniv Roznai[71] called this provision an unamendable implicit provision, which in many constitution reviewing practices, was developed by the constitutional justice institution. Interestingly, even though it does not explicitly contain unamended provisions, the Colombian Constitution provides a review mechanism for constitutional amendments.

The design of constitutional justice in Colombia is carried out by a Constitutional Court, one of which powers is to review the constitutionality of constitutional amendments, although it is limited to procedural review. Article 241 of the Colombian Constitution expressly states that the Constitutional

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[69] Jutta Stender-Vorwachs, "The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space," *German Law Journal* 5, no. 11 (2004): 1337–48, https://doi.org/10.1017/S2071832200013262.

[70] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions / Richard Albert* (Oxford, United Kingdom ; New York: Oxford University Press, 2019).

[71] Roznai, 'Unconstitutional Constitutional Amendments'.

Court has the authority to decide on petitions for the unconstitutionality of constitutional amendments procedurally.[72]

2. *The practice of reviewing constitutional amendments*

In the practice of reviewing constitutional amendments, the Colombian Constitutional Court has a different perspective from reviewing practices in various countries which refer to the doctrine of the basic structure of the constitution. The Colombian Constitutional Court actually formulated a new doctrine regarding "Constitutional Replacement" which was first marked in the Colombian Constitutional Court Decision C-531/2003, and continued to develop in various subsequent decisions. Various examples of cases or decisions of the Colombian constitutional court are as follows:

a) Constitutional Court Decision NumberC-531/2003

Constitutional Court Decision C-531/2003 regarding the case of reviewing the call for a referendum by Congress[73] is a sign of the doctrine of constitutional replacement by the Colombian Constitutional Court. The call for a referendum[74] released by the Congress contains 19 questions in the following aspects: 1) Loss of political rights; 2) Roll Vote; 3) Substitutions; 4) powers of public corporations of popular elections in the direction and control of public finance; 5) progressive administrative services; 6) Reduction of Congress; 7) loss of investment; 8) limitations of pensions and salaries charged to public resources; 9) suppression of departmental, district and municipal controller's; 10) Deletion of Personality; 11) Aid with public money; 12) new resources for education and basic sanitation; 13) resources for education and

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[72] Article 241 “Colombia 1991 (Rev. 2015) Constitution - Constitute,” https://www.constituteproject.org/constitution/Colombia_2015, [accessed 21 February 2024].

[73] *See* Article 241 paragraph 2 of the Colombian Constitution which states that the court has the authority to ‘decide, before any expression of public opinion, on the constitutionality of the call for a referendum or a constituent assembly to amend the constitution, solely because of procedural errors in its formation.’ ‘Colombia 1991 (Rev. 2015) Constitution - Constitute’.

[74] The mechanism for Constitutional Reform in Colombia (call for a referendum) is regulated by law. The act regarding the call for a referendum contains provisions that will be reformed in the form of questions (agree-disagree) about the norms that will be changed. ‘Colombia 1991 (Rev. 2015) Constitution - Constitute’ <https://www.constituteproject.org/constitution/Colombia_2015> [accessed 21 February 2024].

basic sanitation; 14) healthy public finances; 15) political parties; 16) against drug trafficking and drug addiction; 17) periods of territorial authorities; 18) validity; 19) full approval of this referendum.[75]

For the parties that will submit the petition of the call for a referendum must consider the fundamental aspects of the constitution. Even though the constitution does not contain explicit norms regarding unamendable clauses, there are main aspects that protect and ensure basic rights and people's participation that cannot be sacrificed by constitutional amendments. In other words, constitutional amendments must remain tied to the basic values of the constitution so that they cannot be changed and sacrificed by amendments made by Congress. Even if these fundamental values are to be the object of reviewing, they must be truly ensured that these values are based on the desires of the Colombian people (the original constituent power holders), whereas the congress is only an actor of which function is to implement amendments which only hold derivative constituent rights.[76] Furthermore, according to Fabio, who intervened in this case, the call for a referendum includes norms that harm citizens' rights, particularly those of workers and pensioners. Additionally, from a procedural standpoint, several points in the call for a referendum consist of norms that were agreed upon solely by one party of the chamber in Colombian parliament.[77]

Other intervening parties clarified that the Constitutional Court's jurisdiction, as based on constitutional provisions, is restricted solely to reviewing procedural aspects, whereas the substance of this petition pertains to something related to material aspects.[78] The Constitutional Court's decision provides crucial results which include the following:

1) State and justify the doctrine of constitutional replacement. The constitutional court stated that the authority to amend the constitution also includes the authority to make changes to any article in the text of the

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75 Act 796 of 2003 Congress of the Republic of Colombia, By Which a Referendum is Called and a Constitutional Reform Project is Submitted for Considerat by the People "Ley 796 de 2003 Congreso de La República de Colombia," https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=7144, [accessed 21 February 2024].

76 "C-551/2003C-551-03 Corte Constitucional de Colombia" (2003), https://www.corteconstitucional.gov.co/relatoria/2003/C-551-03.htm#_ftnref100, [accessed 21 February 2024].

77 *C-551/2003C-551-03 Corte Constitucional de Colombia.*

78 C-551/2003C-551-03 Corte Constitucional de Colombia; Luis Alejandro Silva and Fernando Contreras, "La doctrina de la sustitución de la Constitución en Colombia," *Estudios constitucionales* 18, no. 1 (2020): 395–434, https://doi.org/10.4067/S0718-52002020000100395.

constitution, but this does not mean reducing or replacing the constitutional characteristics of the constitution.[79]

2) Even though the constitutional court's authority for reviewing is only limited to procedural aspects, to assess whether the amendments made are truly changes or replacements, the court must analyze whether the material norms that are the call for reform constitute changes or replacements to the constitution.[80]
3) Even though it puts aside principles which, if changed, would have an impact on replacing the constitution, the Court, in its decision, touched on what is called the "constitutional block" or norms relating to human rights, which are one of the basic characteristics of the constitution.[81]
4) The Constitutional Court also declared in its decision the unconstitutionality of the constitutional amendments carried out by Congress.[82]

b) Constitutional Court Decision Number C-1200/2003

Constitutional Court Decision Number C-1200/2003 relates to a case filed by Antonio Jose Cancino Moreo and David Teleki Ayala and supported by 17 other residents. Antonio Jose Cancino Moreo petitioned for the Law on Constitutional Reform which amends the provisions of the Colombian

[79] Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine."

[80] Tania Ramírez, "Viability of Judicial Review of (Un)Constitutional Amendments in Mexico: Lessons From Colombia" (Cetral European University, 2021), http://files/252/ramirez_tania.pdf.

[81] Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine."

[82] Gonzalo Andres Ramirez-Cleves, "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy," in *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism*, ed. Thomas Bustamante and Bernardo Gonçalves Fernandes, Law and Philosophy Library (Cham: Springer International Publishing, 2016), 213–29, https://doi.org/10.1007/978-3-319-28371-5_10.

Constitution in Article 116,[83] Article 250,[84] Article 251.[85] As a derivative consequence of the constitutional amendment, the Transitional Provisions of Article 4 of this Law mandate Congress to prepare and issue related laws until June 20, 2004. Suppose Congress does not issue the relevant laws by that time limit. In that case, the President of the Republic of Colombia can be given extraordinary powers within two months to issue legal norms necessary for the new system.[86] The plaintiffs believe that the granting of extraordinary powers violates the essential principle in the constitution, namely limitation of power.

In this decision, the Constitutional Court once again referred to its considerations regarding constitutional replacement, as previously outlined. While serving as a basis for the Court to assess the existence of a procedural review, it also mandates a comparison or verification of the amended norms to determine whether they have an impact on the basic principles of the constitution, potentially transforming the status of the reform into a constitutional replacement endeavor. Luis Alejandro Silva highlighted that in decision C-1200/2003, the Constitutional Court reaffirmed the interpretation of "reform" as stated in Article 347 of the Colombian Constitution. The term "reform" implies that if the impact of the action aims to preserve the constitution's identity, then it qualifies as reform. Conversely, if the action diverges from maintaining the constitution's identity, it constitutes not a reform but rather a replacement of the constitution.[87]

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[83] Article 116 of the amended Colombian Constitution states that the Constitutional Court, the Judiciary Council and the Supreme Court carry out judicial functions, and individuals who can have the function of implementing justice in the capacity of conciliator, arbitrator and can issue legal or justice decisions based on law.

[84] Article 250 of the amended Colombian Constitution includes changes to the authority and functions of the attorney general's office in investigations, arrests, searches, confiscations, wiretapping, as well as other functions determined by sectoral laws.

[85] Article 251 of the amended Colombian Constitution includes special functions of the attorney general's office which include recruiting employees, designing, and proposing state policies regarding criminal matters, and being able to grant transitional powers to public bodies that can carry out judicial police functions that are under the responsibility of the attorney general's office.

[86] *See more* Legislative Act 3 of 2002 Congress of the Republic of Colombia, "Acto Legislativo 3 de 2002 Congreso de La República - Gestor Normativo - Función Pública," February 21, 2024, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6679.

[87] Silva and Contreras, "La doctrina de la sustitución de la Constitución en Colombia"; See also Sabrina Ragone who states that Constitutional Court Decision C-1200/2003 reflects the strengthening of the doctrine of constitutional replacement which was first outlined in Decision C-551/2003. Sabrina Ragone, "The 'Basic Structure' of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication," *Revista de Estudos*

Despite the decision of the Colombian Constitutional Court, which rejected the lawsuit, this decision was again used as a legal instrument by the Constitutional Court to continue developing the doctrine of constitutional replacement[88] in the practice of reviewing the constitutionality of constitutional amendments.

c) Constitutional Court Decision Number C-970/2004

Colombian Constitutional Court Decision C-970/2004, which adjudicated a case or lawsuit case similar to that in Case C-1200/2003, the focus was on the Transitional Provisions of Article 4 of the National Constitutional Reform Law. Juan Dario Contreras Bautista, acting as the plaintiff, argued that the transitional provisions, which confer extraordinary powers to the President of the Republic, affect the fundamental principles of the Colombian Constitution. In his lawsuit, Juan Dario Contreras Bautista elaborated on the detailed fundamental principles impacted by the transitional provisions in the National Constitutional Reform Law,[89] including deviations from democratic principles and the separation of powers.[90]

In the decision of the Colombian Constitutional Court, Ramirez Cleves considers that the Constitutional Court not only adheres to the argument of the doctrine of constitutional replacement but also continues to develop this doctrine further. The Constitutional Court introduced an element of "substitutive methodology," which includes three key aspects. Firstly, the Court only outlines the general elements found in contemporary constitutions. Secondly, the Court must examine the law (pertaining to the call for a referendum or constitutional reform) to assess "the impact of the law in relation

Constitucionais, Hermenêutica e Teoria Do Direito 11, no. 3 (February 21, 2020): 327–40, https://doi.org/10.4013/rechtd.2019.113.02.

[88] *See more* at Carlos Bernal who considers that Decision C-1200/2003 of the Constitutional Court strengthens the argument regarding the doctrine of constitutional placement (as stated in Decision C-551/2003) as well as identifying the existence of 3 definitions of this doctrine, first, this doctrine cannot be used to mention the immortality clause. Second, an amendment which is a replacement as a constitution if the amendment has great transcendence for the system. Third, the plaintiff has the burden of proving that the amendment constitutes a replacement. Look Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine."

[89] *See more* at Legislative Act 03 of 2002, National Constitution is Reformed. 'Acto Legislativo 3 de 2002 Congreso de La República - Gestor Normativo - Función Pública' <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6679> [accessed 21 February 2024].

[90] "Colombian Constitutional Court Decision Number C-970/2004".

to the essential elements of the Colombian Constitution". Lastly, the Court must verify "if the reform replaces the essential elements that serve as the genetic code of the Colombian Constitution".[91]

The decision of the Constitutional Court stated that the transitional provisions in this case did not affect the main principles of the constitution significantly. This was primarily because the extraordinary powers bestowed upon the President of the Republic of Colombia was temporary in nature, lasting only for a designated period of two months. Furthermore, these powers were deemed as subsidiary, meaning they could only be exercised by the president if Congress failed to exercise the power to form laws related to the new system.[92]

d) Constitutional Court Decision Number C-1040/2005

Constitutional Court Decision C-1040/2005 on testing the constitutionality of constitutional amendments related to the presidential election for a second term. This case was submitted to the Colombian Constitutional Court due to a law reforming the constitution, Article 179 paragraph 8[93] which expressly states that the presidential term of office is limited to one term. The Congress of the Republic of Colombia issued the latest provisions allowing Alvaro Uribe, who was then President of the Republic of Colombia, to have the opportunity and opportunity to run for office and return to office for a second term.[94]

Blanca Linday Enciso, the plaintiff in this case, argued that the change to the constitution allowing the president to serve a second term constituted a replacement of the constitution, as it undermined the structure and fundamental principles contained in the Colombian Constitution. The plaintiff's argument prompted numerous other intervention parties[95] to request

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[91] Ramirez-Cleves, "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy."

[92] *Colombian Constitutional Court Decision Number C-970/2004.*

[93] 'Colombia 1991 (Rev. 2015) Constitution - Constitute'.

[94] 'See more Acto Legislativo 3 de 2002 Congreso de La República - Gestor Normativo - Función Pública' <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6679> [accessed 21 February 2024].

[95] Juan Bautista Rivas Ramos, Carlos Lozano, Yubely Munoz and Anderson Rojas were the parties who proposed intervention for this case. Their intervention also strengthened the argument and stated that the provisions regarding the possibility of a two-term term of office were deviated from being equal for other presidential candidates. See Colombian Constitutional Court Decision number, [accessed 21 February 2024]

the Constitutional Court to declare the provisions under review as unconstitutional, thereby preventing their implementation.[96]

Even though the decision of the Colombian Constitutional Court considers this provision to be constitutional,[97] however, this decision could lead the Court to develop a doctrine regarding constitutional replacement. The Court underscored that the aspect of reviewing constitutional amendments or replacements is based on seven levels of review, which are as follows: 1) Identifying the main constitutional factors at stake; 2) Explaining how these essential factors underpin several constitutional laws. 3) Explaining why the factor is significant. 4) Providing evidence that the factor content is fundamental. 5) Presenting that identifying constitutional clauses is perpetual. 6) Proving that the essential factor is replaced by a new factor; and 7) Explaining why the new factor is incompatible with other essential constitutional factors.[98]

e) Constitutional Court Decision Number C-141/2010

Colombian Constitutional Court decision number C-141/2010 on the case of Call for Constitutional Reform[99] allows the president to serve a third term through constitutional reform. In this case, the petitioners referred to eight previous decisions of the Constitutional Court, highlighting limitations on aspects of constitutional reform. These restrictions measured whether the reform changed the constitutional identity factor or not. Suppose the identity factor experiences the impact of amendment activities by parliament. In that case, these activities are not amendments but replacements. Consequently, the Court had the authority to declare such amendments unconstitutional.

The party who petitioned for a referendum argued that the constitutional reform constituted not an amendment but a replacement. The existence of

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[96] 'C-1040-05 Corte Constitucional de Colombia'.

[97] Cajas-Sarria, "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016."

[98] Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine"; Silva and Contreras, "La doctrina de la sustitución de la Constitución en Colombia"; Ramirez-Cleves, "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy"; and Santiago García-Jaramillo Linares Cantillo, Alejandro, Camilo Valdivieso-León, *Constitutionalism: Old Dilemmas, New Insights*, 1st ed. (Oxford University Press, 2021), https://academic.oup.com/book/40000.

[99] Law 1354 of 2009 of the Colombian Congress, Holding a Constitutional Referendum and a Constitutional Reform Project given to the People for Consideration. "Ley 1354 de 2009 - Gestor Normativo - Función Pública" (2024), https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=37303.

provisions regarding limitations on the presidential term of office represents a normative form for ensuring continuity and balance of power. Changing these norms to allow for three presidential terms, or 12 years in total, could disrupt this balance of power value.[100] Apart from the changes in restrictions that would potentially infringe upon the principle of equality, the constitutional reform initiative brought before the Constitutional Court is also perceived as a political and pragmatic project primarily serving the interests of the incumbent President Alvaro Uribe.

balances, and the separation of powers but also violations

In contrast to the previous decision regarding the review of constitutional reform, which changed the provisions on the periodization of the presidential term of office from one term to two terms, which was declared constitutional by the Court, this review determined that the amendment to the constitutional reform clause which allows the president to serve for a third term is unconstitutional. The Court not only found violations or deviations from essential principles in the constitution such as democracy, equality, checks and balances system, and separation of powers,[101] but also numerous violations in the formulation and execution of the referendum call.[102]

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[100] "Constitutional Court Decision Number," C-141/2010C-141-10 Corte Constitucional de Colombia, https://www.corteconstitucional.gov.co/relatoria/2010/C-141-10.htm, [accessed 22 February 2024].

[101] Ramirez-Cleves, "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy"; Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine"; Linares Cantillo, Alejandro, Camilo Valdivieso-León, *Constitutionalism: Old Dilemmas, New Insights*.

[102] Violations found in the process of forming and implementing the constitutional reform law were: 1] abuse of power committed by some members of congress; 2) the process of initiating the formation of a law calling for a referendum by citizens does not meet the established requirements; 3) the referendum project is controlled as an instrument to win the interests of certain parties, in this case President Alvaro Uribe who wants to serve for a third term. See more at *Constitutional Court Decision Numbe C-141/2010C-141-10r*.

Unamendable Clauses and The Urgency of Implementing the Mechanism of Constitutional Review of Constitutional Amendments in Indonesia

A. The unamendable provisions in the constitution of Indonesia

It is a universal truth that every constitution in the world embodies ideological values that are embraced and upheld by their nation. Indonesia is no exception, which believes in Pancasila as a philosophical value that will provide direction for Indonesia in living as a nation and state. As an ideology, Pancasila embodies the character of constitutional identity, reflecting an identity that reflects the collective values that unite the nation as a psychological and sociological phenomenon.[103] Pancasila, as stated in the preamble of the 1945 Constitution of the Republic of Indonesia, incorporates five key concepts, as follows: 1) The Principle of Divinity, which means belief in the existence of One Almighty God, 2) The Principle of Humanity which contains the meaning of recognition of the principle of humanity which is A just and civilized humanity, 3) The Principle of Nationality which contains the meaning of a strong collective spirit and will to become one nation with unity in diversity, 4) The Principle of Democracy which contains the meaning of the existence of a collective will for independence while simultaneously ensuring the freedom of each individual in deliberations and representation, and 5) The Principles of Social Justice which contain the meaning of an agreement regarding the ideals of becoming a just-prosperous society with social justice for all Indonesian people.[104]

Pancasila in the Preamble to the Constitution was a consideration for the parliament, the People's Consultative Assembly (MPRI), in the process of amending the 1999-2002 constitution and agreed that the Preamble was not the object of amendment[105] to the Indonesian Constitution. Pancasila is an implicitly unamendable aspect of the Indonesian Constitution, mirroring similar provisions found in other nations like India and Colombia, in several countries that adhere to aspects of basic constitutional principles that implicitly

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[103] Bijana Kostadinov, "Constitutional Identity," *Iustinianus Primus Law Review* 3, no. 1 (2012).

[104] Jimly Asshiddiqie, *Pancasila : Identitas Konstitusi Berbangsa Dan Bernegara* (Jakarta: Raja Grafindo Persada, 2020).

[105] Luthfi Widagdo Eddyono, "Quo Vadis Pancasila Sebagai Norma Konstitusi Yang Tidak Dapat Diubah," *Jurnal Konstitusi* 16, no. 3 (2019): 585.

cannot be changed, such as India and Colombia. If we carefully examine the norms in the Indonesian Constitution, there are also explicit amendable provisions, as found in Article 37 paragraph 5, which states that the form of the Unitary State of the Republic of Indonesia cannot be changed. The existence of restrictions on constitutional amendments both implicitly and explicitly in the Indonesian Constitution indicates that the Constitution's basic structure and identity must be preserved so that this aspect can be protected from constitutional amendments that could damage the basic structure and identity of the Indonesian Constitution.

Upon closer examination of the norms enshrined in the Indonesian Constitution, explicit provisions also exist, such as those outlined in Article 37 paragraph 5, affirming that the Unitary State of the Republic of Indonesia's form remains immutable. These dual layers of constraints on constitutional amendments, both implicit and explicit, underscore the imperative to safeguard the Constitution's foundational structure and identity. This ensures protection against amendments that might undermine the Constitution's core principles and identity.

B. Constitutional Design of the Norm Review System in Indonesia, and the Urgency of Reviewing the Constitutionality of Constitutional Amendments

Two state institutions have the authority to implement judicial power in Indonesia, namely the Constitutional Court and the Supreme Court,[106] which are the same as the constitutional design of judicial institutions in Germany and Colombia. However, in the context of reviewing the constitutionality of constitutional amendments, the design of the Indonesian constitution does not recognize this reviewing system. This authority is what differentiates it from the Colombian Constitutional Court, which has the authority to review constitutional amendments even though it is limited in procedural aspects,[107] or the German Constitutional Court, which, although it does not explicitly have the authority to review constitutional amendments, the German Constitutional

[106] Usman Rasyid et al., "Reformulation of the Authority of Judicial Commission: Safeguarding the Future of Indonesian Judicial Power," *Jambura Law Review* 5, no. 2 (2023): 386–413, https://doi.org/10.33756/jlr.v5i2.24239.

[107] Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine."

Court has the authority to review federal laws. One of them is the reviewing authority for the German Constitution.[108]

The Constitutional Court, in exercising its constitutional duties, has contributed to the development and practice of reviewing the constitutionality of constitutional amendments in many countries. During the Seventieth Congress of the Conference of European Constitutional Courts, Arief Hidayat, who served as the Chairman of the Indonesian Constitutional Court from 2015 to 2017, raised the possibility of implementing the practice of reviewing constitutional amendments in Indonesia.[109] However, should the Indonesian Constitutional Court be granted the authority to review constitutional amendments, the question arises whether it will indeed carry out such practice. Despite the absence of a constitutional amendment review system in Indonesia, if the essence of such review pertains to safeguarding the identity of the Indonesian constitution, which is rooted in Pancasila, the Constitutional Court has already made Pancasila a touchstone in its practice of reviewing the constitutionality of laws. This underscores its efforts to uphold Pancasila's values as the constitution's identity.

There are several Constitutional Court decisions that used Pancasila as a touchstone. Yance Arizona even in his research, in 2003-2012 there were 14 Constitutional Court decisions that used Pancasila as a benchmark or touchstone,[110] such as, Decision No. 012/PUU-I/2003, Decision no. 31/PUU-V/2007, Decision no. 47-81/PHPU.A/VII/2009, Decision no. 10-17-23/PUU-VII/2009, Decision no. 115/PUU-VII/2009, Decision no. 140/PUU-VII/2009, Decision no. 55/PUU-VIII/2010, Decision no. 19/PUU-IX/2011, Decision no. 27/PUU-IX/2011, Decision no. 58/PUU-IX/2011, Decision no. 37/PUU-IX/2011, Decision no. 35/PUU-X/2012, Decision no. 84/PUU-X/2012, Decision no. 100/PUU-X/2012. The use of Pancasila as a touchstone for reviewing laws against the constitution actually indicates that the Indonesian Constitutional Court has not only positioned itself as the guardian

[108] Satrio, "The Existence of the Unamendable Provision of the Unitary State of the Republic of Indonesia: The Role of the Constitutional Court."

[109] Arief Hidayat, "Arief Hidayat's Speech at the Seventeeth Congress of the Conference of European Constitutional Courts| Constitutional Principles in Sate Administration and Government," n.d., https://www.mkri.id/public/content/berita/file/translation for pak Ketua.pdf.

[110] A study conducted by Ahmad Basarah states that the characteristics of the Indonesian Constitutional Court's decisions are that there are Constitutional Court decisions that explicitly and implicitly use Pancasila as the touchstone. See Ahmad Basarah, "Eksistensi Pancasila Sebagai Tolak Ukur Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Di Mahkamah Konstitusi: Kajian Perspektif Filsafat Hukum Dan Ketatanegaraan," (Universitas Diponegoro, 2016).

of the constitution,[111] but has also established itself as the guardian of ideology,[112] or as the guardian of the constitutional identity.

Even though Indonesia presently lacks a system for reviewing the constitutionality of constitutional amendments, there is an urgency indicating that Indonesia needs this mechanism. If it was previously specified that some provisions could not be amended, either implicitly (Pancasila is mentioned in the Preamble) or expressly in Article 37 paragraph (5), there were historical implications for the need for this mechanism. Historical records indicate events in 1959, where a Presidential Decree was issued on July 5, 1959, which essentially ordered the transition of the constitution from the 1950 Provisional Constitution (UUDS) to the 1945 Constitution (Proclamation Constitution), where the constitutional transition was carried out and Issued by the President at that time presented an unconstitutional action, Hatta even called it a form of coup from a legitimate institution,[113] because if it was linked to Article 134 of the 1950 Provisional Constitution, it clearly stated the authority to change and enact laws. The constitution is the authority of the Constituent Assembly.[114]

Other occurrences in 1963, Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia (Tap MPRS) Number III/MPR/1963 of 1963 on the Appointment of the Great Leader of the Indonesian Revolution, Bung Karno, as President of the Republic of Indonesia for Life. [115] This TAP MPRS has denied the spirit of the constitutional

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[111] Fakhris Lutfianto Hapsoro and Ismail Ismail, "Interpretasi Konstitusi Dalam Pengujian Konstitusionalitas Untuk Mewujudkan The Living Constitution," *Jambura Law Review* 2, no. 2 (2020): 139–60, https://doi.org/10.33756/jlr.v2i2.5644.

[112] Arief Hidayat, "Peningkatan Pemahaman Hak Konstitusional Warga Negara Bagi Asosiasi Dosen Pancasila Dan Kewarganegaraan (ADPK) & Asosiasi Profesi Pendidikan Pancasila Dan Kewarganegaraan Indonesia (AP3KnI)"," 2017, http://files/282/materi_92_Makalah Negara Hukum Berwatak Pancasila_Hakim Konstitusi Prof. Arief Hidayat.pdf.

[113] Moh. Mahfud M D, *Konstitusi Dan Hukum Dalam Kontroversi Isu* (Jakarta: Rajawali Pers, 2009); Bagir Manan, *Memahami Konstitusi: Makna Dan Aktualisasi*, Cetakan ke (Jakarta: RajaGrafindo Persada, 2014).

[114] "Law Number 7 of 1950 Concerning Amendments to the Temporary Constitution of the Republic of Indonesia to Become the Provisional Constitution of the Republic of Indonesia" (2024), http://peraturan.bpk.go.id/Details/38102/uu-no-7-tahun-1950, [accessed 22 February 2024].

[115] The considerations for Soekarno's appointment as President for Life were: 1) The Indonesian Revolution was not finished; 2) Soekarno was appointed MPRS Mandatory with full powers; 3) Soekarno as the leader of the revolution had succeeded in achieving victories like those enjoyed at that time; 4) Bung Karno's personality is seen as the embodiment of the combination of revolutionary leader and state leader, and is the unifier of all revolutionary people's forces. See the Section Considering the Decree of the

formulation, especially regarding limiting presidential power as an important principle in the Indonesian constitution.[116] In 1983 and 1985, the Government and Parliament issued Decree of the People's Consultative Assembly (TAP MPR) Number IV/MPR/1983 on Referendum and Law Number 5 of 1985 on Referendum. Ali Safaat stated that the presence of the MPR TAP and this Law was the culmination of the sacralization of the constitution and made it far from possible to be amended.[117] These two laws are a form of constitutional change that deviates from the provisions of Article 37 of the 1945 Constitution.[118]

Another aspect is also related to sociological conditions, which can be viewed from the potential to make constitutional changes that are actually only in the interest of exercising power. The issue of constitutional amendments that would target the provisions on the periodization of the presidential term of office always emerged at the end of the periodization of the second term of office, both during the terms of office of Soesilo Bambang Yudhoyono and Joko Widodo. This issue arose with the aim of extending the presidential term of office, which is currently limited to 2 terms. This potential pragmatic constitutional amendment must be anticipated through judicial mechanisms. Learning from events in Colombia, when Alvaro Uribe was elected president for the 2002-2006 term, then wanted to return to serve as president for a second term, Uribe made amendments to the constitutional provisions which regulate the periodization of terms of office that cannot be re-elected for another period. This political manoeuvre then succeeded in leading Uribe to lead the country as president for the 2006-2010 term.[119] At the end of his second term of office, Uribe wanted to extend his leadership for three terms, but this wish was cut short when the Constitutional Court decided that the constitutional amendment which prolonged the president's term of office was unconstitutional.[120]

Temporary People's Consultative Assembly Number III/MPR/1963 of 1963 concerning the Appointment of the Great Leader of the Indonesian Revolution, Bung Karno, as President of the Republic of Indonesia for Life.

[116] Riri Nazriyah, "Status Hukum Ketetapan Majelis Permusyawaratan Rakyat/Sementara Setelah Perubahan Undang-Undang Dasar 1945," *Jurnal Hukum* 28, no. 12 (2005).

[117] Muchamad Ali Safa'at., *Sejarah Konstitusi Indonesia* (Malang: Universitas Brawijaya, 2015).

[118] "People's Consultative Assembly Decree No. IV/MPR/1983 Concerning Referendum." (n.d.), http://files/294/85uu005.pdf.

[119] Cajas-Sarria, "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016."

[120] Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine."

These historical, juridical and philosophical, and sociological bases indicate the urgency of the mechanism for reviewing constitutional amendments to maintain and preserve the basic structure and identity of the constitution. In the future, the Indonesian Constitutional Court needs to have a reviewing mechanism of constitutional amendment so that this court is not only have the role as the guardian of the constitution, but also the guardian of constitutional identity.

Conclusion

Indonesia, India, Germany, and Colombia have similarities in terms of unamendable provisions in their constitutions, either implicitly or explicitly. However, what is fundamentally different is the practice in each country in maintaining and preserving such unamendable provisions that constitute the basic structure and identity of the constitution. In Colombia, the constitution expressly grants the authority to review constitutional amendments (although limited to procedural aspects). In contrast, in India and Germany, even though they do not expressly grant this authority, the Constitutional Court's judicial review practice expands the interpretation of its authority, which underlies the Constitutional Court's practice of reviewing constitutional amendments: Germany and the Supreme Court of India. Meanwhile, in Indonesia, there is no such mechanism for reviewing the constitutional amendments. However, in the practice of reviewing the constitutionality of laws, Pancasila, as the identity of the Indonesian constitution, has been used as a touchstone.

References

"Acto Legislativo 3 de 2002 Congreso de La República - Gestor Normativo - Función Pública," February 21, 2024. https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6679.

Ahmed, Kawser. "Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine." *Israel Law Review* 56, no. 2 (2023): 263–87. https://doi.org/10.1017/S0021223721000297.

Albert, Richard. "The Three Varieties of Unamendability." In *Constitutional Amendments*, 139–72. (New York: Oxford University Press, 2019). https://doi.org/10.1093/oso/9780190640484.003.0005.

Albert, Richard C N - K3168 .A43 2019. *Constitutional Amendments: Making, Breaking, and Changing Constitutions / Richard Albert*. (Oxford, United

Kingdom ; New York: Oxford University Press, 2019).

Albert, Richard, Malkhaz Nakashidze, and Tarik Olcay. "The Formalist Resistance to Unconstitutional Constitutional Amendments." *UC Law Journal* 70, no. 3 (2019): 639. https://repository.uclawsf.edu/hastings_law_journal/vol70/iss3/1.

Asshiddiqie, Jimly. *Pancasila : Identitas Konstitusi Berbangsa dan Bernegara*. (Jakarta: Raja Grafindo Persada, 2020).

Basarah, Ahmad. "Eksistensi Pancasila Sebagai Tolak Ukur Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 di Mahkamah Konstitusi: Kajian Perspektif Filsafat Hukum dan Ketatanegaraan." *Thesis*. (Semarang: Universitas Diponegoro, 2016).

Basic Law for the Federal Republic of Germany (2023). https://www.gesetze-im-internet.de/englisch_gg/.

Blackshield, A. R. "Fundamental Rights and the Institutional Viability of the Indian Supreme Court." *Journal of the Indian Law Institute* 8, no. 2 (1996): 139–217.

Benítez-R., Vicente F. "Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-Amending Case Law in Colombia." *Revista de Investigações Constitucionais* 9, no. 2 (2022): 269. https://doi.org/10.5380/rinc.v9i2.86742.

Bernal, C. "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine." *International Journal of Constitutional Law* 11, no. 2 (2013): 339–57. https://doi.org/10.1093/icon/mot007.

"Bundesverfassungsgericht - Suche Nach Entscheidungen," February 21, 2024. https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language_=en.

C-551/2003C-551-03 Corte Constitucional de Colombia (2024). https://www.corteconstitucional.gov.co/relatoria/2003/C-551-03.htm#_ftnref100.

Cajas-Sarria, Mario Alberto. "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016." *The Theory and Practice of Legislation* 5, no. 3 (2017): 245–75. https://doi.org/10.1080/20508840.2017.1407397.

"Challenge to Extended Reservations in the Lok Sabha and State Legislative Assemblies - Supreme Court Observer," January 20, 2024. https://www.scobserver.in/cases/challenge-to-extended-reservations-in-the-lok-sabha-and-state-legislative-assemblies/.

"Colombia 1991 (Rev. 2015) Constitution - Constitute," February 21, 2024. https://www.constituteproject.org/constitution/Colombia_2015.

Colombian Constitutional Court Decision number C-970/2004 (n.d.).

Constitutional Court Decision Number, C-141/2010C-141-10 Corte Constitucional de Colombia § (2024). https://www.corteconstitucional.gov.co/relatoria/2010/C-141-10.htm.

Curos, Peter. "Attack or Reform: Systemic Interventions in the Judiciary in Hungary, Poland, and Slovakia." *Oñati Socio-Legal Series* 12 (2023). https://doi.org/10.35295/osls.iisl/0000-0000-0000-1393.

Dixon, R, and D Landau. "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment." *International Journal of Constitutional Law* 13, no. 3 (2015): 606–38. https://doi.org/10.1093/icon/mov039.

Dixon, Rosalind. "Transnational Constitutionalism and Unconstitutional Constitutional Amendments." *University of Chicago Public Law & Legal Theory Working Paper*, 2011. https://doi.org/10.2139/ssrn.1840963.

Eddyono, Luthfi Widagdo. "Quo Vadis Pancasila Sebagai Norma Konstitusi Yang Tidak Dapat Diubah." *Jurnal Konstitusi* 16, no. 3 (2019): 585. https://doi.org/10.31078/jk1637.

Eddyono, Luthfi Widagdo. "The Unamendable Articles of the 1945 Constitution." *Constitutional Review* 2, no. 2 (2017): 252. https://doi.org/10.31078/consrev225.

Garlicki, Lech, and Yaniv Roznai. "Introduction: Constitutional Unamendability in Europe." *European Journal of Law Reform* 21, no. 3 (2019): 217–25. https://doi.org/10.5553/EJLR/138723702019021003001.

Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: Ekin Press, 2008. https://www.anayasa.gen.tr/jrca-text.htm.

Group, Crisis. "Imagining a Resolution of Venezuela's Crisis," 2020.

Halmai, Gábor. "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?" *Constellations* 19, no. 2 (2012): 182–203. https://doi.org/10.1111/j.1467-8675.2012.00688.x.

Hapsoro, Fakhris Lutfianto, and Ismail Ismail. "Interpretasi Konstitusi Dalam Pengujian Konstitusionalitas Untuk Mewujudkan The Living Constitution." *Jambura Law Review* 2, no. 2 (2020): 139–60. https://doi.org/10.33756/jlr.v2i2.5644.

Hein, Michael. "Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe." *International Journal of Constitutional Law* 18, no. 1 (2020): 78–110.

https://doi.org/10.1093/icon/moaa002.

Hidayat, Arief. "Constitutional Principles in Sate Administration and Government" *Speech at the Seventeeth Congress of the Conference of European Constitutional Courts*. Available online at https://www.mkri.id/public/content/berita/file/translation%20for%20pak%20Ketua.pdf

Hidayat, Arief. "Negara Hukum Berwatak Pancasila", *Paper* presented for Peningkatan Pemahaman Hak Konstitusional Warga Negara Bagi Asosiasi Dosen Pancasila dan Kewarganegaraan (ADPK) & Asosiasi Profesi Pendidikan Pancasila dan Kewarganegaraan Indonesia (AP3KnI), Bogor, August 21, 2019. Available online at https://pusdik.mkri.id/materi/materi_92_Makalah%20Negara%20Hukum%20Berwatak%20Pancasila_Hakim%20Konstitusi%20Prof.%20Arief%20Hidayat.pdf

Huq, Aziz Z., and Tom Ginsburg. "How to Lose a Constitutional Democracy." *UCLA Law Review* 65 (2017): 88–168. https://doi.org/10.2139/ssrn.2901776.

"I.C. Golak Nath And Ors. vs State Of Punjab And Anr. on 27 February, 1967," February 20, 2024. https://indiankanoon.org/doc/21266288/.

India, Supreme Court of. Writ Petition (civil) 135 of 1970 (n.d.). https://main.sci.gov.in/jonew/judis/29981.pdf.

Janelidze, Elene. "Judicial Review of Constitutional Amendments in Georgia, France and Germany-The Quest for Eternity." Central European University, 2016. http://files/235/janelidze_elene.pdf.

Kesavananda Bharati Sripadagalvaru vs. State of Kerala, AIR 1973 SC 1461 (n.d.).

Kostadinov, Bijana. "Constitutional Identity." *Iustinianus Primus Law Review* 3, no. 1 (2012).

Lailam, Tanto. "Peran Mahkamah Konstitusi Federal Jerman dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional." *Jurnal HAM* 13, no. 1 (2022): 65. https://doi.org/10.30641/ham.2022.13.65-80.

Landau, David. "Abusive Constitutionalism." *University of California Davis Law Review* 47, no. 1 (2013): 189–260. https://lawreview.law.ucdavis.edu/archives/47/1/abusive-constitutionalism.

Law Number 7 of 1950 concerning Amendments to the Temporary Constitution of the Republic of Indonesia to Become the Provisional Constitution of the Republic of Indonesia (2024). http://peraturan.bpk.go.id/Details/38102/uu-no-7-tahun-1950.

Lee, Yvonne Tew and Hoong Phun. "The Law and Politics of Unconstitutional Constitutional Amendments in Malaysia." In *The Law and Politics of Unconstitutional Constitutional Amendments in Asia*, edited by Ngoc Son Rehan Abeyratne, 94. (New York: Rouletdge, 2021).

Ley 1354 de 2009 - Gestor Normativo - Función Pública (2024). https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=37303.

"Ley 796 de 2003 Congreso de La República de Colombia," February 21, 2024. https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=7144.

Linares Cantillo, Alejandro, Camilo Valdivieso-León, and Santiago García-Jaramillo. *Constitutionalism: Old Dilemmas, New Insights*. 1st ed. (Oxford University Press, 2021).

"Lok Sabha: SC to Hear on Nov 21 Pleas Challenging Validity of Extending Reservation of Seats for SCs/STs in LS, Assemblies, ET LegalWorld," January 30, 2024. https://legal.economictimes.indiatimes.com/news/litigation/sc-to-hear-on-nov-21-pleas-challenging-validity-of-extending-reservation-of-seats-for-scs/sts-in-ls-assemblies/103817713.

Mahfud MD, Moh. *Konstitusi dan Hukum dalam Kontroversi Isu*. (Jakarta: Rajawali Pers, 2009).

M. Nggilu, Novendri, Dian Ekawaty Ismail, Tri Sulistyowati, and Mohamad Rivaldi Moha. "Constitutional Crisis: Intensifying Disobedience to the Decisions of the Indonesian Constitutional Court." *Revista Chilena de Derecho* 50, no. 2 (2023): 115–32. https://doi.org/10.7764/R.502.5.

Macfarlane, Emmett. "The Unconstitutionality of Unconstitutional Constitutional Amendments." *Manitoba Law Journal* 45 (2022): 198–218. http://files/204/Macfarlane - 2022 - The Unconstitutionality of Unconstitutional Consti.pdf.

Manan, Bagir. *Memahami Konstitusi: Makna dan Aktualisasi*. (Jakarta: RajaGrafindo Persada, 2014).

Nazriyah, Riri. "Status Hukum Ketetapan Majelis Permusyawaratan Rakyat/Sementara Setelah Perubahan Undang-Undang Dasar 1945." *Jurnal Hukum* 28, no. 12 (2005).

Nggilu, Novendri Momahad, Indra Perwira, Ali Abdurahman. "Constitutionality Review of Indonesian Constitutional Amendments: History and Future." *Russian Law Journal* 11, no. 2 (2023). https://doi.org/10.52783/rlj.v11i2.517.

People's Consultative Assembly Decree No. IV/MPR/1983 concerning Referendum. (n.d.). http://files/294/85uu005.pdf.

Polzin, Monika. "The Basic-Structure Doctrine and Its German and French

Origins: A Tale of Migration, Integration, Invention and Forgetting." *Indian Law Review* 5, no. 1 (2021): 45–61. https://doi.org/10.1080/24730580.2020.1866882.

PTI. "Pleas Challenging Constitutional Validity of Extending Reservation to SC/ST in Lok Sabha, State Assemblies to Be Heard on November 21." *Deccan Herald*, November 20, 2023. https://www.deccanherald.com/india/pleas-challenging-constitutional-validity-of-extending-reservation-to-scst-in-lok-sabha-state-assemblies-to-be-heard-on-november-21-2693546.

Ragone, Sabrina. "The 'Basic Structure' of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication." *Revista de Estudos Constitucionais, Hermenêutica e Teoria Do Direito* 11, no. 3 (2020): 327–40. https://doi.org/10.4013/rechtd.2019.113.02.

Ramirez-Cleves, Gonzalo Andres. "The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy." In *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism*, edited by Thomas Bustamante and Bernardo Gonçalves Fernandes, 213–29. (Law and Philosophy Library, Cham: Springer International Publishing, 2016). https://doi.org/10.1007/978-3-319-28371-5_10.

Ramírez, Tania. "Viability of Judicial Review of (Un)Constitutional Amendments in Mexico: Lessons From Colombia." Cetral European University, 2021. http://files/252/ramirez_tania.pdf.

Rasyid, Usman, Novendri Mohamad Nggilu, Fence Wantu, Julisa Aprilia Kaluku, and Ahmad Ahmad. "Reformulation of the Authority of Judicial Commission: Safeguarding the Future of Indonesian Judicial Power." *Jambura Law Review* 5, no. 2 (2023): 386–413. https://doi.org/10.33756/jlr.v5i2.24239.

Richard Albert, Malkhaz Nakashidze, and Tarik Olcay. "The Formalist Resistance to Unconstitutional Constitutional Amendments." *UC Law Journal* 70, no. 3 (2019): 639.

Roznai, Y., and S. Yolcu. "An Unconstitutional Constitutional Amendment--The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision." *International Journal of Constitutional Law* 10, no. 1 (2012): 175–207. https://doi.org/10.1093/icon/mos007.

Roznai, Yaniv. "Constitutional Amendability and Unamendability in South-East Asia." *Journal of Comparative Law* 14, no. 1 (2019): 188–204.

Roznai, Yaniv. "Towards a Theory of Constitutional Unamendability: On the Nature and Scope of The Constituional Amendment Powers." *Jus*

Politicum 18 (2017).

Roznai, Yaniv. "Unconstitutional Constitutional Amandments: A Study of The Nature and Limits of Constitutional Amandment." *The London School of Economics and Political Science* (LSE), 2014.

Roznai, Yaniv. "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea." *American Journal of Comparative Law* 61, no. 3 (2013): 657–719. https://doi.org/10.5131/AJCL.2012.0027.

Roznai, Yaniv. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford: Oxford University Press, 2017.

Safa'at., Muchamad Ali. *Sejarah Konstitusi Indonesia*. (Malang: Universitas Brawijaya, 2015).

Sata, Robert, and Ireneusz Pawel Karolewski. "Caesarean Politics in Hungary and Poland." In *The (Not So) Surprising Longevity of Identity Politics*, 60–79. (London: Routledge, 2022). https://doi.org/10.4324/9781003271840-4.

Satrio, Abdurrachman. "The Existence of the Unamendable Provision of the Unitary State of the Republic of Indonesia: The Role of the Constitutional Court." *Comparative Constitutional Law and Administrative Law Journal* 3 (2016): 18.

Sijoria, Siddharth. "Unconstitutional Constitutional Amendment: Limiting Amendment Power in India." *Thesis*. (Vienna: Central European University, 2018).

Silva, Luis Alejandro, and Fernando Contreras. "La doctrina de la sustitución de la Constitución en Colombia." *Estudios constitucionales* 18, no. 1 (2020): 395–434. https://doi.org/10.4067/S0718-52002020000100395.

Silvia Suteu. *Eternity Clauses in Democratic Constitutionalism*. (New York: Oxford University Press, 2021).

Stender-Vorwachs, Jutta. "The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space." *German Law Journal* 5, no. 11 (2004): 1337–48. https://doi.org/10.1017/S2071832200013262.

Sulistyowati, Tri, Ali Ridho, and M. Imam Nasef. "Constitutional Compliance Solution to Law Testing Rulings in the Constitutional Court." *Jambura Law Review* 3, no. SI (2021): 117-134.

The 1945 Constitution of the Republic of Indonesia (2002).

The Constitution of India (n.d.).

The German federal constitutional court Decision, BVerfGE 94, 12 (1990) (BvR 1452/90, 1459/90 and 2031/94) § (n.d.).

Varol, Ozan. "Stealth Authoritarianism." *Iowa Law Review* 100, no. 4 (2015):

1673–1742. https://ilr.law.uiowa.edu/print/volume-100-issue-4/stealth-authoritarianism.

Wijaya, Ahmad, and Nasran Nasran. "Comparison of Judicial Review: A Critical Approach to the Model in Several Countries." *Jurnal Legalitas* 14, no. 2 (2021): 85-106.

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Acknowledgment

The authors express their profound appreciation to Universitas Negeri Gorontalo for facilitating the successful completion of this research endeavor. Additionally, the authors extend sincere gratitude to the anonymous reviewers and editors whose constructive feedback has greatly enhanced the quality and scholarly value of this manuscript, rendering it a noteworthy contribution worthy of reading and citation.

Funding Information

None

Conflicting Interest Statement

The authors state that there is no conflict of interest in the publication of this article.

History of Article

Submitted : February 26, 2024
Revised : May 20, 2024; July 21, 2024
Accepted : September 7, 2024
Published : September 22, 2024