Chapter 1

THE CONSTITUTIONAL REGULATION OF THE POWER OF COURTS TO REVIEW CONSTITUTIONAL AMENDMENTS

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INTRODUCTION

Courts have increasingly become consequential actors in the politics of constitutional amendment (and at times during constitution-making). Perhaps an unprecedented judicial role was in the making of the 1996 South African Constitution, where the 1993 Interim Constitution included 36 principles against which the Constitutional Court would evaluate the draft constitution (Murray 2004; Butler 1997). The Court rejected several key provisions of the first draft in the first certification case (Certification of the Constitution of the Republic of South Africa 1996), before approving the revised version during the second certification case (Certification of the Amended Text of the Constitution of the Republic of South Africa 1996).

Judicial involvement in the procedure and substance of constitutional amendments is common.

While judicial certification of a new constitution remains exceptional, judicial involvement in the procedure and substance of constitutional amendments is common. For instance, in 2021, the Constitutional Court of Peru had to determine, in the absence of specific unamendable provisions or explicit mandate to review amendments, whether constitutional amendments passed through legislative approval and referendum are subject to judicially enforceable substantive limits. Similarly, Kenyan courts had, for the first time since the adoption of the 2010 Constitution, to determine whether there are judicially enforceable substantive limits on the amendment power.

Sometimes the judicial role is constitutionally anticipated, either through specific empowerment of courts to review amendments (e.g. the 1996 Constitution of Ukraine, article 159; and 2015 Constitution of the Central African Republic, article 95), through the inclusion of unamendable provisions (e.g. Germany) or through the inclusion of tiered constitutional amendment processes (e.g. South Africa), the latter two of which may be interpreted to impliedly empower the judiciary to substantively review amendments.

In some cases, however, the power to review constitutional amendments has been invoked by courts without specific textual foundation, often based on a theoretical distinction between the *constituent* and *constituted* powers or the *primary* and *secondary* constituent power (Gözler 2008; Roznai 2017), or fundamental alterations arguably *dismembering* the constitution's basic structure going beyond the conceptual possibilities of amendment (Albert 2019) and, in connection with these, the existence of inherent limits on the power of amendment enacted in compliance with the relevant procedural prescriptions. Such judicial assertion of the power to review constitutional amendments without a textual basis constitutes a hyper, more vigorous *Marbury v Madison* moment, the ultimate claim of judicial power (Choudhry 2017: 831).

In certain cases, courts have controversially invalidated not just constitutional amendments, but also existing/original constitutional provisions, relying on unspecified fundamental principles and/or international normative frameworks (Landau and Dixon 2020). Considering the difficulty of identifying the normative standards based on which courts can review amendments in the absence of specific principles, scholars and courts have resorted to constitutional history, as well as reference to supranational standards and 'transnational constitutionalism' (Dixon and Landau 2015).

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Some courts, however, have declined to invoke a doctrine of unconstitutional constitutional amendment, instead limiting judicial review to procedural compliance, including in some cases constitutional requirements for public education and consultation (e.g. the Tanzanian (Supreme) Court of Appeal).[1] Such judicial

1 *The Honorable Attorney General v Reverend Christopher Mtikila*, Civil Appeal No 45 of 2009, Court of Appeal of Tanzania (17 June 2010).

'underreach' is actually as likely a possibility as 'overreach', particularly in contexts of dominant political groups (Choudhry 2017: 831–32).

Scholarship on the judicial review of constitutional amendments has exploded in comparative constitutional studies (particularly led by Richard Albert and Yaniv Roznai). The primary focus of the scholarship has been on why courts shouldn't review the substance of amendments without a specific textual basis, or why courts should assume the implied power to review amendments or constitutional provisions, on what basis, and in what circumstances (especially comparing the process of constitutional amendment vis-à-vis the process of making the constitution—so-called 'approximation thesis' (Cozza 2021)).

Nevertheless, there is limited political and scholarly engagement on the role of constitutional recognition and regulation of judicial review of amendments. To be sure, political actors have in some cases adopted constitutional amendments to specifically preclude courts from reviewing amendments (e.g. India, Pakistan and Turkey) following judicial invocation of such power. There are also some works on why constitutions should empower courts to review constitutional amendments in view of similar power exercised by supranational courts and why such empowerment could counterintuitively constrain judicial power (Abebe 2019).

This chapter focuses on what, if anything, constitutions can, and should, do in relation to the substantive judicial review of constitutional amendments. Sections 1.1 and 1.2 discuss developments in Peru and Kenya, respectively, regarding judicial review of constitutional amendments. Section 1.3 argues that constitutions should expressly recognize and regulate the power of courts to review constitutional amendments, in view of the formally high level of political consensus, reflected in legislative supermajority and at times popular approval requirements, that in theory (though not always in practice) should underpin such amendments. Such an approach would simultaneously empower and constrain constitutional adjudicators. Beyond the judicial role, constitutions should also consider adopting robust amendment procedures to protect the most vulnerable and democracy-reinforcing aspects

of a constitution, notably through 'inclusive majoritarianism'—a requirement for cross-party approval of certain amendments (Abebe 2020).

This chapter focuses on the substantive review of constitutional amendments, and not judicial review for compliance with procedural requirements, which it considers is an implied and necessary judicial function to give effect to the principle of constitutional supremacy.

1.1. **PERU**

In 2019, a series of scandals implicating political leaders and judges generated popular protests that led to constitutional reforms.

In 2019, a series of scandals implicating political leaders and judges generated popular protests that led to constitutional reforms, mainly reconstituting the Peruvian National Council of the Magistracy into a new National Judicial Board.[2] Notably, the reforms provided that all judges and prosecutors would undergo mandatory performance evaluation three and a half years after their appointment, mainly to identify needs for further training. In addition, all judges and prosecutors would need 'ratification' based on a public and reasoned vote of the board after seven years of their employment before they secure a permanent position.

The 1993 Peruvian Constitution provides for two distinct amendment procedures: the approval of two-thirds of all the members in the unicameral parliament in two successive sessions, or approval with an absolute majority in parliament and in a referendum (article 206). The 2019 amendment was adopted through the second procedure.

A law firm challenged the 2019 amendment relating to the National Judicial Board as unconstitutional in November 2020. The Constitutional Court admitted the case in a decision in January 2021 after six of the seven judges ruled that the case raises valid issues as to whether the court has the mandate to review constitutional amendments adopted through referendum.[3] The seventh judge ruled that the case was inadmissible on the grounds that the court does

2 See the background in the decision of the Peruvian Constitutional Court—Pleno. Setencia 890/2021, Caso de la Junta Nacional de Justicia, Expediente 00013-2020-PI/TC, 19 October 2021.
3 Expediente N.O 00013-2020-PI/TC, Collegio de Abogados de Sullana, Auto 1 – Clarificacion, 7 February 2021.

not have the power to review constitutional amendments adopted through the proper procedure.

The court had ruled in earlier cases—extensively cited in the decisions—that constitutional amendments exclusively adopted through parliament are subject to its review and may not violate the constitutional 'identity' or 'essence' (paragraph 7 of the preliminary/admissibility ruling), which, according to the court, include, among other issues, the dignity of human beings, popular sovereignty, the democratic nature of the state, the unitary and decentralized model, and the republican form of government. The decision was founded on the idea that constitutional amendments are the creation of 'a constituted power, and consequently restricted in its actions by the legal limits contemplated in advance by the source that constitutes it' (paragraph 5 of the preliminary/admissibility ruling). The dissenting judge found that 'what seems essential to my colleagues … may not seem essential to me', and that the court was an organ of control of power, and 'the first power it must control is its own' (page 10 of the preliminary/admissibility ruling).

In its final decision, the court considered the validity of the amendments, from both formal and material/substantive perspectives.[4] The formal challenge related to allegations that the people were not properly consulted about the reforms as well as the manner of formulation of the referendum questions. The court unanimously rejected the challenges on formal grounds.

On the substance, the applicants argued that the requirements of partial evaluation and ratification for judges provided for in the amendments undermine judicial independence and impartiality. On this point, three judges found the challenge unfounded on the grounds that, while judicial independence is essential to the constitutional framework, the changes do not undermine it. Two judges upheld the challenge and declared the amendment unconstitutional. One judge, who found the case admissible in the preliminary hearing, died in the meantime, while the judge who found the case inadmissible reiterated the same position.

4 Pleno. Setencia 890/2021, Caso de la Junta Nacional de Justicia, Expediente 00013-2020-PI/TC, 19 October 2021.

Under the law establishing the court, at least five of the seven judges (before 2001, it was six of the seven judges) must uphold a challenge over the validity of laws (Tiede and Ponce 2014: 143, 159).[5] In this case, five of the seven judges found that the court has the power to review constitutional amendments, including those adopted through referendum, but only two found the amendment violated the constitutional essence. Therefore the amendment stands.

The supermajority requirement is not specified in the Constitution, but rather in the enabling organic law, which has been criticized for unduly protecting, and even for making it 'impossible' for the court to review the constitutionality of, impugned laws (Inter-American Commission on Human Rights n.d.). Specifying decision rules for constitutional courts in the Constitution may have avoided the possibility, and perception, of self-serving legislative restriction of judicial power.

1.2. **KENYA**

In Kenya, a political deal known as the 'handshake' between President Uhuru Kenyatta and prominent opposition leader Raila Odinga ended pervasive political division and instability following contested presidential elections in 2017. Odinga had refused to participate in the rerun after the Supreme Court invalidated the election, partly on the grounds that reforms needed to occur prior to the re-election, including the disbanding and reconstituting of the electoral commission. As the demand was not met, Odinga withdrew from the rerun election, unleashing a period of instability (Burke 2017).

Following months of behind-the-scenes deliberations, Kenyatta and Odinga unveiled in March 2018 the now famous handshake, which identified key problems they agreed were afflicting Kenyan society, politics and economy, and paved the way for reforms to unify and outline a common ground to move Kenya's politics (and economy) forward. Central to the handshake was the objective of taming the winner-takes-all nature of politics that has made presidential

5 Article 5, Organic Law of the Constitutional Court Law No. 28301 (2004), <https://www.tc.gob.pe/wp-content/uploads/2021/05/Ley-Organica-del-Tribunal-Constitucional.pdf>, accessed 31 May 2022.

elections do-or-die affairs. The implementation of a robust devolution regime and checks and balances to tame the imperial presidency in the 2010 Constitution have not dimmed the attractions of the presidency.

With a view to consult the people, build political buy-in and identify specific measures, Kenyatta established the Building Bridges to Unity Advisory Taskforce (BBI Taskforce). The taskforce submitted a report—aspiringly subtitled 'from a nation of blood ties to a nation of ideals'—following consultations around the country and with key stakeholders (Presidential Taskforce 2019). The government then established the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI Steering Committee) to deliberate upon, conduct further consultations with key stakeholders, including county governors, and validate and propose ways for the implementation of the report, including through constitutional reform proposals. The committee produced a report (2020) and proposed a significant set of constitutional reforms, including notably with a view to reconstitute the national executive towards a semi-presidential system of government [6]and other legislative reforms.[7]

The draft constitutional amendments were reviewed and presented to the government as the Constitutional Amendment Bill in November 2020, and a national secretariat was established to collect signatures in support of the bill to present it as a popular reform initiative, one of the processes for constitutional amendment under the 2010 Constitution.[8] The secretariat submitted the required number of signatures and the bill to the Independent Electoral and Boundaries Commission for verification and submission to the county assemblies and the two houses of parliament for approval and, as relevant, referendum.

6 The proposed constitutional reforms are available at <https://www.bbi.go.ke/constitutional-reforms>, accessed 17 May 2022.
7 The proposed legislative reforms are available at <https://www.bbi.go.ke/legislative-proposals>, accessed 17 May 2022.
8 The 2010 Kenyan Constitution provides for three distinct constitutional amendment procedures: the first exclusively involves supermajority in the two houses of parliament; the second involves supermajority in the two houses subject to majority approval in a referendum; and the third involves amendments through the popular initiative, subject to approval by a majority of the county assemblies, a majority in the two houses of parliament and, in some cases, in a referendum—see articles 255–57.

As the amendment process was unfolding, several constitutional petitions were filed in the High Court to challenge the amendment on both procedural and substantive grounds. Procedurally, the challenge mainly focused on whether the president has the power to lead amendments through popular initiative, and whether the required levels of public participation were achieved in pursuing the bill. Substantively, the petition focused on whether the Kenyan Constitution contains explicit or implied limitations on the amendment power, and whether the proposed amendments contradicted these limitations.

The High Court unanimously invalidated the proposed amendments on both procedural and substantive grounds.[9] Specifically, the court ruled that the amendments through popular initiative were initiated by the president, a power the court ruled he did not have under the Constitution. Moreover, the court held that the draft amendments were not prepared in a participatory manner as constitutionally required. Despite finding the amendment unconstitutional on procedural grounds, the court went ahead and determined whether the proposed amendments also failed on substantive grounds because they undermine the 'basic structure' of the Kenyan Constitution. Unlike other foreign courts that have held that the basic structure doctrine entails unamendability, the High Court found that the basic structure was amendable but through a four-step process involving public education, public consultation, approval by a constituent assembly and in a referendum (purportedly intended to replicate the process of enactment of the 2010 Constitution). The Court of Appeal subsequently upheld with a five–two majority the decision of the High Court.[10]

On further appeal, the Supreme Court held that the basic structure doctrine does not apply under the 2010 Kenyan Constitution.

On further appeal, the Supreme Court held that the basic structure doctrine does not apply under the 2010 Kenyan Constitution, and accordingly the four-step process outlined in the High Court was inapplicable (with one judge dissenting).[11] According to the

9 *David Ndii and Others v Attorney General and Others*, Petition No E282 of 2020, <https://www.afronomicslaw.org/sites/default/files/pdf/BBI%20Consolidated%20Judgment%20-%20Final%20Version%20-%20As%20Delivered.pdf>, accessed 24 May 2022.

10 *Attorney General and Others v David Ndii and Others*, Civil Appeal No E291, E292, E293 and E294 of 2021, <http://kenyalaw.org/caselaw/cases/view/217967>, accessed 24 May 2022.

11 *Attorney General and 2 Others v David Ndii and 79 others*, SC Petition No. 12 of 2021, 31 March 2022, <http://kenyalaw.org/caselaw/cases/view/231325>, accessed 24 May 2022.

majority, the doctrine was not necessary in view of the sufficiently robust procedural bulwarks against capricious amendments to the Constitution. The court also found with a four–three majority that the amendment bill was enacted through a participatory process, except reforms related to changes to electoral constituencies, which were added after the end of the consultative process. Nevertheless, the court found the entire amendment invalid on the grounds that the president does not have the power to initiate a popular amendment process (with a six–one majority) and the president did in fact initiate the amendment bill (with a five–two majority). As with the High Court and Court of Appeal, the Supreme Court did not clearly justify the need to decide substantive issues before determining procedural issues, especially once the amendment was found to be wanting on procedural grounds. In a similar case before the African Court on Human and Peoples' Rights involving a challenge to constitutional amendments on procedural and substantive grounds, the court found that the amendment was procedurally invalid and therefore it was not necessary to determine the substantive compatibility of the amendments with continental standards.[12]

In sum, the Supreme Court rejected the basic structure doctrine (Bhatia 2022). Nevertheless, several judges left open the possible presence of implied limits on the amendment power. Notably, the case specifically related to amendments through popular initiative, but not the two other amendment procedures provided for in the Constitution, namely amendment through supermajority in both legislative houses, and amendment through supermajority in the legislative houses and approval in a referendum. The contestation over the substantive review of constitutional amendments is far from settled, especially regarding amendments that do not require referendum.

12 *Houngue Eric Noudehouenou v Republic of Benin*, Application No. 003/2020, Judgment of 4 December 2020, paras 77–79, <https://www.african-court.org/cpmt/storage/app/uploads/public/5fc/fa5/8f0/5fcfa58f00c5c467702763.pdf>, accessed 17 May 2022.

1.3. **TOWARDS REGULATION OF THE JUDICIAL POWER TO REVIEW AMENDMENTS?**

In both Peru and Kenya, the courts considered the power to review constitutional amendments in the absence of specific constitutional provisions.

In both Peru and Kenya, the courts considered the power to review constitutional amendments in the absence of specific constitutional provisions regarding whether and through what procedures courts may do so. In view of the growing tendency of courts around the world to entertain cases involving amendments, it is arguably unwise for constitution drafters to leave the issue unregulated.

In Peru, the Constitutional Court for the first time found that it has the power to review constitutional amendments adopted through referendum. In Kenya, amendments through popular initiative may require approval in a referendum (article 257(10)). Indeed, one of the reasons for the Supreme Court's rejection of the basic structure doctrine lies in the fact that the Kenyan Constitution combines multi-staged political and deliberative processes and popular consultation and endorsement:

> … in a case where the amendment process is multi-staged; involves multiple institutions; is time-consuming; engenders inclusivity and participation by the people in deliberations over the merits of the proposed amendments; and has down-stream veto by the people in the form of a referendum, there is no need for judicially-created implied limitations to amendment power through importation of the basic structure doctrine into a constitutional system before exhausting home grown mechanisms.
> (paragraph 205)

Indeed, in comparison with Peru—where the amendment process involves either a supermajority in a unicameral parliament, or an absolute majority in parliament and approval in a referendum—the amendment process through popular initiative in Kenya is much more cumbersome, involving approval in county assemblies, a bicameral legislature and, in some cases, by the people. The divergent approaches of the highest courts in Peru and Kenya to substantive review of amendments may be partly explained by these differences in the amendment procedure. Nevertheless, even in Kenya, despite

the rejection of the doctrine in this case, the possibility for the judicial review of the substance of amendments remains.

In view of the constitutional silences, it is difficult to second-guess the intention of the constitutional drafters in Kenya and Peru on the existence of the substantive limits on the amendment power, and much less empower the judiciary to discover and enforce such limits. The judicial assertion of the power to review amendments in the absence of constitutional guidance is not unique to Peru or Kenya. Although some courts have declined to recognize either the existence of a basic structure or its judicial enforcement, other courts have claimed the power to review amendments not only on procedural but also on substantive grounds.

A more optimal approach might be to recognize the unique nature of constitutional amendments and establish specific regulations in relation to the substantive judicial review of constitutional amendments.

Considering the possibility and experience of judicial divergences on the power to review amendments, constitutional drafters may be wise to consider a cautious but proactive approach to expressly regulate the judicial power to review amendments. Such specific regulation could range from completely excluding the review of amendments on substantive grounds (as in the 2017 Constitution of Turkey where the Constitutional Court is empowered to review constitutional amendments only in relation to form or procedure—article 148) to allowing review in all cases subject to the same rules as the review of ordinary statutes (as in the 2014 Constitution of Tunisia, article 144).

A more optimal approach might be to recognize the unique nature of constitutional amendments and establish specific regulations in relation to the substantive judicial review of constitutional amendments. The judicial review of amendments may be justified partly because traditional amendment procedures that rely on legislative supermajorities and/or referendums do not always ensure genuine broad political consensus, or may simply enable elite self-dealing. Constitutional amendment processes are also high-stakes exercises with potentially far-reaching, and long-term, effects that are difficult to reverse. Furthermore, international tribunals technically have the power to review amendments, and denying domestic courts the same power is unwise (Abebe 2019). Nevertheless, such a role should not be left to the absolute discretion of judges, considering that amendments constitute a major form of democratic self-government (Albert 2019: 218). There is also the possibility of

conflict of interest as constitutional amendments may also affect the judiciary.

The proposed regulation could address what should be the basis for the review of amendments (the principles that provide the test for review); whether such review applies to all amendments or not, for examle by excluding amendments that require referendum; who may challenge amendments, or whether review would be automatic before or after the amendment's final adoption; the timing of such review (particularly whether review should be before or after submission to referendum as the case may be); and the judicial majority required before an amendment could be invalidated.

The constitutional regulation of the power of courts to engage in substantiative review of amendments would simultaneously enhance the legality and legitimacy of the judicial role, and moderate and constrain the judicial influence in the amendment process (Abebe 2019). Without such specific empowerment, the judicial invocation of the power to review amendments would be legally and politically controversial, potentially exposing courts to backlash. Moreover, the specific regulation formalizes the judicial role, as, without such regulation, courts may and have refused to review amendments (Albert 2019: 222). Furthermore, courts cannot always be assumed to strengthen democratic constitutionalism in dealing with constitutional change (Albert 2019: 221, noting that the basic structure doctrine could be susceptible to judicial 'misapplication'). Accordingly, even democracy promoters and those who support the judicial role should have interest in regulating whether, when and how courts may review constitutional amendments.

In practice, the specific regulation of the power of courts to review constitutional amendments is rare.

In practice, the specific regulation of the power of courts to review constitutional amendments is rare. Even constitutions that recognize unamendable provisions are not always clear on whether the unamendable provisions are judicially enforceable, although in practice this may be assumed. In a few cases, courts are specifically empowered to determine whether a proposed amendment would violate the unamendable provisions. For instance, in Tunisia, all proposed amendments should be submitted to the Constitutional Court to ensure compatibility with the unamendable provisions (article 144). The 1996 Ukrainian Constitution similarly requires

the submission of proposed constitutional amendments to the Constitutional Court to determine whether they are compatible with the unamendable provisions (article 159). The 2017 Constitution of Thailand allows one-tenth of members of either or both houses to sign a petition arguing that a proposed amendment violates unamendable provisions or otherwise falls under the provisions requiring a referendum (article 256(9)). In such cases, the speaker of the relevant house must within 30 days submit the petition to the Constitutional Court for determination. The 2016 Constitution of the Central African Republic (CAR) empowers the Constitutional Court to 'give its opinion' on proposals for constitutional revision (article 95). Unlike the Tunisian or Ukrainian Constitutions, the CAR Constitution is not clear on whether the review would be only against the unamendable provisions. The South African Constitution does not contain unamendable provisions. Nevertheless, in view of the adoption of a tiered amendment procedure, it empowers the Constitutional Court to review the constitutionality of constitutional amendments (Abebe 2014).

The author is not aware of a constitution that provides special rules for the judicial review of constitutional amendments. The absence of specific rules on the judicial review of amendments is remarkable in view of the prevalence of unamendable provisions, the presumed authority of courts to enforce such provisions, and the higher level of political and, at times, popular consensus that in theory should underpin constitutional amendments. While requirements for approval by a supermajority of judges exist, they are not specifically targeted at the review of constitutional amendments. For instance, in the Republic of (South) Korea, decisions of the Constitutional Court invalidating a law, banning political parties or on impeachment need the support of at least six (of the nine) judges (article 113(1)). In Peru, as noted, all decisions of the Constitutional Court require the support of five of the seven judges, although this supermajority rule is established in the act constituting the court rather than in the Constitution.

1.4. CONCLUDING REMARKS

Constitutional regulation of the judicial review of amendments could arguably be ineffective as ultimately courts may still go beyond it by invoking other implied limits or notions—as has been the case in relation to constitutional amendments excluding the substantive review of amendments in India and Pakistan. Nevertheless, even if the risk remains, the regulation will still shape the choice architecture of the judicial role and make it exceedingly difficult for courts to deviate from it. Importantly, in relation to procedural requirements, such as a qualified judicial majority to invalidate amendments, courts would have no choice but to comply with them. Accordingly, such regulation would be consequential.

The specific regulation of the judicial power to review constitutional amendments can be an important device in taming regressive amendments. Nevertheless, courts may not always stand in the way of regressive amendments, either because they lack independence or because of an entrenched judicial culture. In fact, the more powerful courts become, the more they could attract temptations to capture them. In this regard, beyond the specific issue of regulating judicial review of constitutional amendment, the usual considerations relating to constitutional safeguards for judicial independence and designing mechanisms for consensual constitutional amendment also remain of paramount relevance (Abebe 2020).

The specific regulation of the judicial power to review constitutional amendments can be an important device in taming regressive amendments.

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