

# THE CONSTITUTION OF UNITED STATES OF AMERICA AND ITS PATH TO DEMOCRACY THROUGH ITS AMENDMENTS

PhD. student Etleva PAPLEKAJ<sup>1</sup>

## **Abstract**

*The United States of America defined the national purpose in the first two words of its Constitution. The United States of America is the state where the rulers have gained the authority to speak, to act on behalf of 'We the People'. 'We the People' was the philosophy of the 'founding fathers' of the Constitution of the United States of America. 'We the People' was the theory, the attitude that would serve as a guiding principle of governance. For the 'Founding Fathers', the two-word phrase 'We the People' was a creed, a doctrine, an ideology in action and not in words. The history of the Constitution of the United States of America taught us that 'We the People' which was converted to myth deserve this conversion. Through this research, keeping in mind the content and the historical background of the U.S Constitution we will elaborate and answer the below questions. How is it possible for the Constitution that began with 'We the People' it did not list the fundamental rights and freedoms but also denied the fundamental rights and freedoms of the individuals (people)? How are explained the slavery, the denial of citizenship, the restrictions of the right to vote for different groups of American society of that time? Was there any purpose for the deprivation of the fundamental rights and freedoms of the individual in the Constitution of the United States of America? Did the Constitution of the United States of America at the drafting time recognize the right of women to vote? Through this article we will try to shed light on this seemingly contradicts between the myth of the Constitution of United States of America and the 'denied' or 'unforeseen' fundamental rights and the role of the amendments of U.S. Constitution in this process.*

**Keywords:** Constitution, historic development, review of constitution, amendment methods, amending subjects.

**JEL Classification:** K10, K38

## **1. Methodology**

In this paper, I have used the below mentioned methods to elaborate this study:

**Historical method:** the path of birth and uninterrupted development of the concept and phenomenon of constitutional review cannot be understood without the historical method. Through this method will be presented facts, events, phenomena that belong to the past, and the present, but that their study will be a key factor to understand the present with its positive and negative sides and to draw lessons for the future.

**Sociological and legal method:** in addressing this topic, I have relied on sociological methods. At the same time, in my research work I have been based on the legal method, respectively on the normative legal method, the comparative legal method, the analytical legal method, the method of legal logic.

**Analytical method:** the analytical method will provide the study of details, the detailed analysis of issues related to the review of the constitution but not to stop here but also to analyse, elaborate these details in detail.

## **2. Introduction**

Kmiec, Presser, Marcin, in their book „*History, Philosophy, and the Structure of the American Constitution*” as the title itself puts it, introduce three aspects of the United States Constitution 1) *History*; 2) *Philosophy* and 3) *Its structure*. In the historical aspect of the Constitution of the United States of America from the above book it is clearly understood that: the 'founding fathers' of the United States Constitution enriched American law by studying the Greek, *Plato, Aristotle*, Roman thinkers, *Cicero*, thinkers, ancient and modernists who have tried to understand the way in which religious belief contributes to civilized society<sup>2</sup>.

---

<sup>1</sup> Etleva Papelekaj – Faculty of Law, University of Prishtina, Kosovo, papelekaj@gmail.com .

<sup>2</sup> Kmiec, Douglas W., Presser, Stephen B., Eastman, John C., Marcin, Raymond B., *The History, Philosophy and Structure of the American Constitution*, third edition, LexisNexis, 2009, p. 1.

The American Declaration of Independence and the American Constitution were designed with monarchical abuses in mind and, in particular, to refute Stuart's theory (held by Jacob I, Charles I, Charles II and James II) that the King rules through Divine Law and as the Ruler of God on earth, no subject could control it<sup>3</sup>.

At the Constitution of United States of America (*herinafter CUSA*), in the name of 'We the People', it is introduced the philosophy, the structure of the state. The power of this two-word phrase was and sounds so magnificent today that almost all the constitutions of the world's states have incorporated it into their texts. But as we know in other constitutions, in the name of 'We the People', are violated the fundamental rights and freedoms of the individual, in the name of 'We the People' dictatorships or democracies are established, after the solemn words 'We the People' derive the legitimate or illegitimate governing authority of the authorities. While in the various constitutions of the world the two-word phrase 'We the People' is converted in a clichè, the United States of America has something to teach and rebuke about the clichè of this two-word.

'We the People' was the philosophy of the 'Founding Fathers' of Constitution of the United States of America. 'We the People' was the theory, the attitude that would serve as a guiding principle of governance. For the 'Founding Fathers' the two-word 'We the People' was a creed, a doctrine, an ideology in action and not in words.

The United States of America was the state where it defined national purpose in the first two words of its Constitution. The state that lived the expression 'We the people'. The United States of America is the state that did not abuse the authority given in the first two words of its Constitution. The United States of America is the state where the rulers have gained the authority to speak, to act on behalf of 'We the People'. But at the time of the drafting of CUSA this is just the one side of the coin. On the upcoming section we will see that the other side of the coin gives us a picture of a selective rights and freedoms of "We the People".

### 3. History of the Constitution of the United States of America

The history of the CUSA taught us that WE THE PEOPLE converted to myth deserve this conversion. Why?

The history of 'We the People' in the US, too, is blood-stained, it is linked to selective histories of the protection of individual rights and freedoms. ***At the time of the adoption of the CUSA, its first two-word tagline of 'We the People' meant only white US men. Yes, there were rights that were not recognized in this constitution, there were other rights that were denied in this constitution, rights that were acquired only through war. Myth is not easily created. For the transition from the words 'We the people' to the myth of 'WE THE PEOPLE' there were wars, it had bloodshed.***

Through the constitutional instrument, through the amendment process, provided in Article V of CUSA, constitutional rights denied or that were absent in the CUSA, over the years they were envisaged and regulated by putting in place the freedoms and rights denied or violated.

Transition can stagnate the development of a state, it can destroy it actually. US development dynamics, the dynamics of the CUSA amendments, and the actions or omissions in response to these dynamics are the ideal model of how stability is maintained in the country, how constitutional order is secured.

Despite these, the CUSA was a unique model that other states followed, an original testament not copied, but being adapted to the vision that the drafters had for their country. 'Founding Fathers' intentionally (and probably unintentionally)<sup>4</sup> abandoned European models and created a new system of governance with American conditions in mind<sup>5</sup>. Despite its short length, the US Constitution contains many important innovations, such as presidentialism, federalism, the separation of powers,

---

<sup>3</sup> Ibid, p. 1.

<sup>4</sup> Rosenn, Keith S., *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, University of Miami, School of Law Institutional Repository, 1990, f. 12, supra note n. 49, p. 12.

<sup>5</sup> Ibid, p. 12.

and the complex scheme of checks and balances<sup>6</sup>. It can be said of the United States, as it was said of ancient Athens: "Our constitution does not copy the laws of neighboring states, but we are more a model for others other than imitators."<sup>7</sup>

The Constitution consists of just 7 Articles. Article 1 contains 10 Sections, Article 2 contains 4 Sections, Article 3 contains 3 Sections, Article 4 contains 4 Sections, Article 5; 6; 7 contain 1 Section each<sup>8</sup>.

The first three articles of the United States Constitution are in support of the doctrine of separation of powers, with the federal government divided into three branches: legislative, composed of the bicameral Congress; the executive, composed of the President; and the judiciary, composed of the Supreme Court and other federal courts. Articles Four, Five and Six regulate the concepts of federalism, describing the rights and responsibilities of state and state governments in relation to the federal government, admissions of new states, changes in borders, extradition, freedom of movement, constitutional amendments, the legal hierarchy and the supremacy of the constitution. Article Seven regulates the manner of ratification, that is, it specifies the number of States required for the entry into force of the CUSA, the procedure subsequently used by the thirteen States to ratify it.

The drafters of the CUSA did not start from nothing. Taking into consideration the legal bases of the British state, its pros and cons, as well as developments in the country, they drafted their centuries-old constitution. They (drafters of the constitution) were not working from nothing, and they were not creating institutions out of nothing, from theory standing on air. They were essentially writing the functional principles of the constitution derived from the British constitutional tradition after making corrections from abuses here and there<sup>9</sup>. They replaced the monarchical authority for the republic; they created federalism, to replace the unifying authority of the imperial crown, and then added the judicial review they had promised to impose when they were oppressed by what James Wilson previously called a "non-constitutional" parliamentary decree<sup>10</sup>. And the story does not end there: they converted British parliamentary supremacy into the division of powers and the principle of control and balance<sup>11</sup>.

***If the drafting strategists of the CUSA placed the Constitution on the pedestal, the state-building strategists with their amendments kept the CUSA on the pedestal.***

Demographic changes, the dynamics of demographic development in a country have their impacts on the economic, social and political life of a state.

The US Constitution came into force in 1789, where according to the US Census Bureau its population was one year later was 3,929,214<sup>12</sup> inhabitants (year 1790 in 13 shtete). In year 1860 according to the U.S. Census Bureau its population was 31,443,321<sup>13</sup> inhabitants (for 33 states). In year 2018 the population of USA is 326,465,568<sup>14</sup>.

In USA was and it is in force a Constitution:

- With VII articles for a population of **3,929,214 inhabitants** in year 1790 (**13 States**);
- With VII articles and 12 Amendments for a population of **31,443,321 inhabitants** in year 1860, (**33 States**);
- With VII articles and 27 Amendments for a population of **326,465,568 inhabitants**, in year 2018 (**50 States**).

The Bible says: '*When there are many words, transgression is unavoidable*<sup>15</sup>'. Various

<sup>6</sup> Ibid, p. 12.

<sup>7</sup> Ibid, supra note n. 50.

<sup>8</sup> See: [https://www.constituteproject.org/constitution/United\\_States\\_of\\_America\\_1992.pdf?lang=en](https://www.constituteproject.org/constitution/United_States_of_America_1992.pdf?lang=en), visited on April 17 2018.

<sup>9</sup> Wheeler, Harvey, The Foundations of Constitutionalism, Loyola Marymount University and Loyola Law School Digital Commons at Loyola Marymount University and Loyola Law School, 1975, p. 573.

<sup>10</sup> Ibid, p. 573.

<sup>11</sup> Ibid, p. 573.

<sup>12</sup> See: [https://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1860\\_fast\\_facts.html](https://www.census.gov/history/www/through_the_decades/fast_facts/1860_fast_facts.html), visited on April 10 2018.

<sup>13</sup> Ibid.

<sup>14</sup> See: <http://www.worldometers.info/world-population/us-population/>, visited on May 14 2018, at 19:04 o'clock. (Given that the number changed every second depending on the births it was considered reasonable to set the date and time of obtaining the information).

<sup>15</sup> Bible, Proverbs 10:19, p. 683.

historians and scholars have supported the idea that most of the drafters of the CUSA were protestants, people who believed in the Word of God. The drafters of the CUSA, while writing briefly, managed to avoid irreparable errors, while leaving the clarity to future generations to reflect the clarity of constitutional provisions through amendments (*formal and informal*).

The CUSA is one of the most rigid constitutions. There are authors who comment that this rigidity is a 'coincidence', that the 'founding fathers' did not intend such a difficult process of amending the constitution. The procedure of amending the constitution has given the American Constitution the form of a pretty rigid norm, but that the coincidence has ensured its survival for over 220 years by allowing mainly substantial changes when circumstances dictate them<sup>16</sup>.

I think the opposite is true! Drafters of the CUSA taking into account the inflexibility of the text of Article 13 of the Articles of Confederation<sup>17</sup>, that in fact made it impossible its amendment, they drafted a constitution that would stand the test of time, but also that would make it possible to amend it according to certain procedures.

The 'founding fathers' had a clear purpose in relation to Article 5 of the CUSA, for amendments of the constitution. ***The drafters of the CUSA intended to draft an article that did not preclude amendment, such as that of the Articles of Confederation, but an article that made the amend difficult.*** The impossibility of amending the Articles of Confederation, among other things, brought about the necessity of a new constitutional text.

Another element found in Article 5 of the CUSA is *pro-tempore* (*temporary*) restrictions on constitutional amendments.

Until 1808 no Amendment may be undertaken that may in any way affect Clauses 1 and 4 in Section 9 of Article 1. (*where Clause 1 relates to Congress restrictions on adopting laws prohibiting slavery until 1808 and clause 4 concerning restrictions on taxation other than in proportion to the number of countries in the population*).

#### **4. The procedure for amending the CUSA and the legitimate subjects for amending the constitution**

The genesis history of the Constitutional Review Institute, the path of its development, the events and phenomena of the genesis and development of the review of constitution reveal the beginning of the change of governance. Tom Ginsburg, Mila Versteeg, in their article 'Why States Adopt a Constitutional Review', inter alia write 'The constitutional review did not exist, it was in existence in 1781, but has steadily gained popularity over 230 years future, so 83% of the world's constitutions now foresee it'.

Machiavelli, in his book *'The Prince'*, writes, among other things: "*It is necessary for him (the prince) to have a spirit capable of changing rapidly, on the basis of the blowing winds and the changes of fortune and, as we have said above, possibly to not depart from good, but, when needed, he must know how to return to evil*". The winds of the immutability-un-amendability of the constitution, the winds of the untouchability of the constitution were changing direction and together with them changed direction even the authorities. Historically, these rulers, using the legitimacy of the Institute for constitutional review, as Machiavelli instructed them, at times 'returned to evil and at other times tried not to depart from good'. History has shown that the constitutional review foreseen and regulated by the constitution would have some positive consequences somewhere and elsewhere negative consequences.

The 'pioneering' action of envisaging a new tool, that of reviewing the constitution during the process of constitution-making has become standard in most of the world constitutions.

The process of amending the CUSA, over the years, has been accomplished through two basic

---

<sup>16</sup> Grau, Luis, *An American Constitutional History Course for Non-American Students*, The Figuerola Institute Programme: Legal History, Universidad Carlos III De Madrid 2012, p. 124.

<sup>17</sup> Article 13 of Articles of Confederation among others specified that 'the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterward confirmed by the legislatures of every state'.

ways:

- i. Formal Amendment (*as explicitly set forth in Article 5 of the CUSA*) and
- ii. The informal process of amendment (*through legal interpretation, tradition and political practice*).

The constitution can be amended either by formal amendments or by a number of informal processes. Formal amendments change the language of the Constitution in accordance with the procedures described in Article V. The Constitution may be amended informally in a variety of ways, such as through judicial interpretation or through customary practice or political practice<sup>18</sup>.

#### 4.1. Formal amendment of the Constitution of the United States of America

CUSA does not explicitly mention the term review. In its content we find the terms amend and amendments. According to Article 5<sup>19</sup> of the CUSA there are four methods through which passes the process of amending the Constitution:

- Two methods for Proposing Constitutional Amendments and
- Two other methods for the Ratification of Constitutional Amendments.

The two methods for proposing of the amendments at CUSA are initiated with:

1. The Congress proposal for constitutional amendments (*its two Chambers, the House of Representatives and the Senate*) 2/3 of these two Chambers whenever deemed necessary or;
2. The request of the 2/3 Legislatures of different states. *It is the Congress that convenes a Convention to propose Amendments.*

The two methods for ratifying of the amendments of CUSA are:

1. Ratification by the Legislature of States of the 3/4 of these States or;
  2. Ratification by the Conventions held in 3/4 of the States,
- where actually any method of ratification may be proposed by Congress.

Any formal amendment proposal under Article V must overcome these procedural barriers in order to be incorporated into the constitutional text. The simplicity and clarity of the clause of Article V enables us to identify when the Constitution is formally amended: when two-thirds and three-quarters of the majority cooperate to approve and ratify a proposal for amendment, that proposal becomes “valid for all purposes and intentions, as part of this Constitution”<sup>20</sup>.

According to Article 5 of the CUSA we can see that Congress has a dual role in the amendment process, in addition to the right to propose amendments.

According to the content of this Article we conclude that:

*Concerning the process of proposing Constitutional Amendments:*

- 1) Congress is the one entitled to invoke the State Conventions, after the request of the State Legislature;

*Concerning the process of ratification of the Constitutional Amendments:*

- 2) Congress has the right to determine which method of ratification will be implemented to amend the relevant article or articles.

The right of Congress to determine how to ratify constitutional amendments (State Legislatures or State Conventions) can be read and interpreted in several ways:

1. Centralization of decision-making within the federal bodies on matters of federal importance, as is the amendment of the CUSA;

---

<sup>18</sup> Tiller, Mark, Wood, Laura Matysek, *Government in America. People, Politics, and Policy*, Thirteenth Edition, to accompany Comprehensive and Texas editions, ©2008 Pearson Education, p. 17.

<sup>19</sup> Article V of Constitution of the United States of America it does expressly specifies: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

<sup>20</sup> Albert Richard, Panel VI: *What Are We to do About Dysfunction? Constitutional Disuse or Desuetude: the Case of Article V*, 1997, p. 1035.

2. The flexibility guaranteed to the Congress, leaving it to his will the determination of the manner of ratification of certain amendments, brings about the protection of the CUSA and its rigidity;
3. The use of the appropriate mechanism by Congress, which, depending on the proposed amendment, specifies the manner of ratification 'may' guarantee the Congress (the political force that has the 'numbers' in Congress at the time of the proposed amendment) the vote in favor or against that 'intended' ;
4. The combination of the Flexibility of Congress to decide how to ratify the amendments and the rigidity of the CUSA have provided the longevity of this constitution;
5. The institutional genius of Congress in the ability, in the constitutional right vested to it, it is shown in proper political, economic, and social decision-making. Congress as a political body has defended and will defend certain political interests but has not violated and managed to maintain the proper social and economic equilibrium by always knowing which way of ratification to 'exploit' for the common good. The typical case is that of ratification by the State Convention of Amendment 21 of the CUSA.

Undoubtedly, formal amendments have made the Constitution more egalitarian and democratic. Some amendments have been proposed but not ratified. The most popular of these in recent years is the Equal Rights Amendment, or ERA<sup>21</sup>.

The constitutional history of a state also includes the stages or phases of the dynamics of its amends depending on the factors that dictate this change.

The U.S. constitutional history is a testimony to the American people and the role it has played in the CUSA amendments. It was the American people who won the constitutional rights by war, it was the American people who demonstrated that the CUSA was not just a constitution of speech but of deeds also.

The CUSA, through the years has twenty-seven (27) amendments. The first ten (10) amendments, known as the Bill of Rights, on the one hand provide protection of the rights and freedoms of the individuals and on the other hand imposes restrictions on the powers of the government. Most of the later seventeen amendments expand individual protection of civil rights. Other amendments relate to federal authorities or change government processes and procedures. The amendments of the CUSA, unlike most of those made in many constitutions around the world, are attached to the end of the constitutional document and have not been incorporated into the CUSA. The CUSA has been amended 16 times in 230 years, from which 27 formal amendments have been adopted.

After reading the Amendments of Constitution of the United States of America<sup>22</sup>, *a number of questions naturally come to mind. How is it possible for the Constitution that began with 'We the People' not only not to list the fundamental rights and freedoms but also to deny the fundamental rights and freedoms of the individual (people)? How are explained slavery, denial of citizenship, the right to vote, the restriction of the right to vote for different groups of American society of that time? Was there any purpose to the deprivation of the fundamental rights and freedoms of the individual in the Constitution of the United States of America? Did the Constitution of the United States of America recognize the right of women to vote?*

And in answering these questions we should keep in mind:

- i. Time factor - the historical period when it was designed and
- ii. Current content of CUSA.

The time factor, the historical period during which the Constitution of the United States of America was designed, influenced the text, its content, the structuring of powers, the subjects of the law to which this Constitution belonged in 1789.

After being introduced to the states (the constitution), the earliest ratifications of the Constitution were quickly and positively achieved. Two months after submission, Delaware,

<sup>21</sup> Tiller, Mark, Wood, Laura Matysek, *op. cit.* (2008), p. 17.

<sup>22</sup> See: [https://www.constituteproject.org/constitution/United\\_States\\_of\\_America\\_1992.pdf?lang=en](https://www.constituteproject.org/constitution/United_States_of_America_1992.pdf?lang=en), visited on April 15 2018.

Pennsylvania, and New Jersey had ratified the Constitution either unanimously or by a required majority. Soon after, however, some states objected to its text, largely because it did not have a Bill of Rights<sup>23</sup>. There were some drafters of the CUSA who opposed to a Bill of Rights. At No. 84 Hamilton rejects the need for a Bill of Rights, arguing that the constitutional text had sufficient personal guarantees<sup>24</sup>.

Another claim was that the Preamble of the Constitution - "We, the People [...] adopt and enact this Constitution for the United States of America" - was a better recognition of civil rights than all aphorism books, because these belong to a treaty of ethics rather than the constitution of a government whose purpose was to regulate the political interests of the nation. Alexander Hamilton went so far as to consider claims of rights not only unnecessary but also dangerous<sup>25</sup>.

The listing of the rights and duties of the executive, legislative and judicial powers was not accompanied by a listing of the rights and freedoms of the individual. James Madison during the drafting process of the CUSA stated, inter alia: 'an incomplete count is not safe'. The logic that a listing of rights would recognize certain fundamental rights and freedoms and would exclude others, that it would be impossible to achieve an 'exhaustive' listing of fundamental rights and freedoms was not considered grounds for the lack of them. For this, it was adopted in 1791 the first ten Amendments to the CUSA, where Amendment IX meant that this listing of individual rights and freedoms was not only not 'exhaustive', but 'this listing was not to be construed to deny or reject other rights belonging to the people'.

The inauguration of the first session of the United States Congress took place on March 4, 1789<sup>26</sup>. One of the first actions of Congress was to adopt the text of the twelve amendments to be proposed to the states<sup>27</sup>. On September 25, copies of these proposals were sent to several states for ratification by state legislatures<sup>28</sup>. On November 20, New Jersey was the first state to ratify eleven of the 12 amendments<sup>29</sup>. Over the next two years, the states ratified some of the proposed amendments, and on December 15, 1791, ratification by Virginia authorized ten amendments to become part of the Constitution<sup>30</sup>. These are popularly known as the Bill of Rights<sup>31</sup>. Just two years after the adoption of the CUSA, there were added the first 10 Amendments, otherwise known as the Bill of Rights.

#### **4.2. The informal process of amendment of the Constitution of the United States of America**

The longevity of the CUSA is not accidental, it is well-calculated with a rare genius by the drafters of this constitution. The CUSA it is characterized by a resilience and rigidity with an almost perfect balance. For example, Article 1, Section 8 states: '*Congress may legislate as it deems necessary and proper to carry out its specific duties*'. It is this flexibility or resilience that has also legitimized the informal amendments to the CUSA by the legislative initiative of Congress.

In the US, formal processes of constitutional amendment are not the only way the constitutional amendments can occur<sup>32</sup>. Constitutional amendments can also occur informally, for example, through the executive, legislative or judicial interpretation<sup>33</sup>.

Concerning informal amendments, Bruce Ackerman with his questions and answers in the book "We the People, Transformation" gives us a complete overview of legal thought and the 'justification' of the reason for going beyond the text of Article V of the CUSA.

---

<sup>23</sup> Grau, Luis, *op. cit.* (2012), p.102.

<sup>24</sup> *Ibid.*, p. 103.

<sup>25</sup> *Ibid.*, p. 126.

<sup>26</sup> *Ibid.*, p. 128.

<sup>27</sup> *Ibid.*, p. 128.

<sup>28</sup> *Ibid.*, p. 128.

<sup>29</sup> *Ibid.*, p. 128.

<sup>30</sup> *Ibid.*, p. 128.

<sup>31</sup> *Ibid.*, p. 128.

<sup>32</sup> Dixon, Rosalind, Landau, David, „Tiered Constitutional Design”, *The George Washington Law Review*, Vol. 86:438, 2018, supra note n. 58, p. 451.

<sup>33</sup> *Ibid.*, p. 451.

Ackerman asks, should modern Americans read Article 5 as describing the only mechanisms they can use for proper constitutional review at the dawn of the twenty-first century<sup>34</sup>?

And Ackerman responds, 'the text does not provide an answer'<sup>35</sup>. None of its 143 words expressly state that "this Constitution can only be amended by the following procedures and in no other way"<sup>36</sup>. It is up to us, not the text, to decide whether to convert a sufficient condition into an indispensable one and to give the Establishment procedure a monopoly on future development<sup>37</sup>.

Given the importance of this decision, we should not make this arbitrarily<sup>38</sup>. Much of a lawyer's ability involves judicious resolution of indeterminacy<sup>39</sup>. We will use a full range of interpretive disciplines - from drafters' intent to modern Supreme Court decisions<sup>40</sup>.

The drafters came up with an innovative procedure that proved extremely effective<sup>41</sup>. This procedure was effective, as it enabled amendments that were necessary but not possible through the formal method.

Through judicial decisions it is the judiciary that has made the most informal changes. But the courts are not the only ones who can use the informal method of constitutional amendments<sup>42</sup>. Other branches of government, as well as citizens, can also engage in these processes<sup>43</sup>. For example, Bruce Ackerman has argued that throughout American history there have been a series of "constitutional moments" in which both lawmakers and citizens have engaged in a process of informal constitutional change: the New Deal, the Civil Rights Acts, and of course, post-1989 changes to the constitutional order, such as the North American Free Trade Agreement<sup>44</sup>.

#### **4.3. Subjects of informal amendment to the Constitution of the United States of America**

While formal changes have brought about a change in the 'words' of the text of the CUSA, informal changes have brought about a change in the meaning of the 'words' of the text of CUSA, based on judicial interpretations or the practice of operating the certain bodies of state power.

Historically, the process of informal amendment of the CUSA has been implemented by:

- i. Legislative Power (*Congress*);
- ii. Executive Power (*President*);
- iii. Judicial Power (*Supreme Court*);
- iv. Political parties (*which are not even mentioned in the CUSA*)
- v. As well as the tradition and customs.

##### ***i. The role of the legislative power in the process of informal amendment of the CUSA***

The US judicial system, the procedure the federal courts had to follow, their composition was not regulated in the CUSA. In Article 3, Session 1 of the CUSA, '*The Judicial Power of the United States shall be vested in the Supreme Court, and the lower Courts as Congress may establish and decide*'. By constitution, the Congress is legitimized as the constitutional entity for the informal amendment of the CUSA regarding the federal court system.

Based on the content of this Article, Congress played its role in establishing and installment of the federal court system. The action Congress took on the basis of the implementation of the CUSA was the adoption of the Judicial Act of 1789. This Act provided for procedures that federal courts

---

<sup>34</sup> Ackerman, Bruce, *We the People, Transformations*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 1998, p. 15.

<sup>35</sup> Ibid, p. 15.

<sup>36</sup> Ibid, p. 15.

<sup>37</sup> Ibid, p. 15.

<sup>38</sup> Ibid, p. 15-16.

<sup>39</sup> Ibid, p. 16.

<sup>40</sup> Ibid, p. 16

<sup>41</sup> Grau, Luis, *op. cit.*, 2012, p.124.

<sup>42</sup> Dixon, Rosalind, Landau, David, *op. cit.*, 2018, supra note n. 58, p. 452.

<sup>43</sup> Ibid, p. 452.

<sup>44</sup> Ibid, supra note n. 64, p. 452



should follow, setting the number of Supreme Court judges to 6<sup>45</sup>, establishes the creation of district courts<sup>46</sup> and city courts<sup>47</sup>. The act created the Attorney General's office<sup>48</sup>.

Provisions of this Act, although relevant to the U.S. judicial system, were not provided for in the CUSA. Such an action is a clear picture of the process of informal amendment by the Congress.

### *ii. The role of the executive power in the process of informal amendment of the CUSA*

Article 2 of the CUSA regulates the activity of executive power, where the executive power had been vested in the US President (*Section 1, Paragraph I*). According to this Article, the executive consists of the President, Vice President, unspecified Head of Department (*Article 2, Section 1, Paragraph I; Section 2, Paragraph II*). The Heads of Departments form what is today known as the President's Cabinet, a designation or structure not found in the Constitution.

According to Article 1 of the CUSA, Section 8, 'Congress Has the Power to Declare War'. Article 2 of Section 2 states that '*The President shall be Commander-in-Chief*'. Historically, the General Commanders, Presidents have sent troops to war without the declaring of war by the Congress. According to this practice, there is an expansion of the power of the President by changing the meaning of the words of the Constitution but not the text. *Historically even though no war has been formally declared by Congress, the Commander-in-Chief has sent troops into the war.*

The Conclusion of Executive Agreements between states is another way that the President, the Office of the President, has played a part in the process of informal amendment of CUSA. According to Article 2, Section 2, of the CUSA '*The President has the Power to make Treaties provided that 2/3 of the senators present agree*'. The Office of the President, over the years, for various reasons, that are not subject to this thesis, has managed to bypass the Senate's consent by changing the term from Treaty to Agreement. I mention here the Executive Agreements with Portugal and Bahrain. At the end of 1971, the United States entered into two executive agreements, with Portugal and Bahrain<sup>49</sup>. Both agreements involved the use of military facilities and neither was subject to Senate ratification<sup>50</sup>.

Bypassing the Senate, changing the wording, even though the agreements may have the same function as the Treaties is a practice set by the President, setting a precedent that is nothing more than an informal amendment to the CUSA.

### *iii. The role of the judicial power in the process of informal amendment of the CUSA*

The 28<sup>th</sup> US President of US, Woodrow Wilson, said for the Supreme Court that it is a "constitutional convention in continuous session". President Wilson's statement reflects the enormous and lasting impact the Supreme Court has had on the process of informal amendment.

The judiciary and its role have been important in interpreting the CUSA. Article 3 of the CUSA with its three Sections defines to whom the judicial power belongs, the entirety of matters under judicial power, but does not specifically mention judicial review.

The 'famous' case *Marbury vs. Madison* marks the first time Supreme Court Judge John Marshall has determined the role of the Supreme Court in relation to the CUSA. In his *Marbury Opinion on Madison*, 5 U.S.C. (1Cr.) 137 (1803), Judge Marshall inter alia states: '*It is clear that the jurisdiction and duty of the judicial department is to say what the law is ... a law which is in contradiction to the constitution is invalid and that the courts, like other departments, are bound by this instrument*'<sup>51</sup>. Judge Marshall's opinion clearly states the Supreme Court's power for judicial

<sup>45</sup> See: 'The Judiciary Act of 1789 September 24, 1789', Section 1.

<sup>46</sup> See: 'The Judiciary Act of 1789 September 24, 1789', Section 4 and 5.

<sup>47</sup> See: 'The Judiciary Act of 1789 September 24, 1789', Section 2 and 3.

<sup>48</sup> See: 'The Judiciary Act of 1789 September 24, 1789', Section 35.

<sup>49</sup> Tomain, Joseph P., *Executive Agreements and the Bypassing of Congress*, University of Cincinnati College of Law Scholarship and Publications, Faculty Articles and Other Publications, Faculty Scholarships, 1-1-1979.

<sup>50</sup> Ibid.

<sup>51</sup> Fisher, Louis, Harriger Katy J., *American Constitutional Law*, Tenth Edition, Carolina Academic Press, 2013.

review to judge whether the executive or legislative acts are constitutional or not.

#### *iv. Political parties and customs*

**Political parties and customs** or traditions have had their impact on the process of informal amendments to the CUSA.

**Political parties** are not mentioned in the Constitution, but their influence has been not minor in modeling the government. It is the political parties that nominate the candidate for President in the National Conventions even though such a practice is not provided for in the Constitution.

**The custom** as an unwritten rule or norm of conduct has not only had its effect on the informal amendment of the Constitution, but these rules of conduct have influenced the adoption of formal amendments to the CUSA.

- Cases where the Vice President took the place of the deceased President were returned to tradition until the adoption of Amendment 25;
- The unwritten 'no third term' tradition or rule is another example that was applied until the time of President Franklin Roosevelt (who was elected 4 times as US President). This case also led to the adoption of Amendment 22 which limited the number of mandates to 2.

The formal and informal amendments of the CUSA highlight the characteristics that the so-called 'living constitution' has:

- Not eternal;
- Not versatile;
- Not perfect;
- Not mandatory for future generations;
- Amendable;
- Rigid in formal amendments;
- Flexible in informal amendments.

### **5. Features of amending of the Constitution of United States of America**

The features of constitutional amendments are closely linked to the constitutional features of constitutionalism itself. According to Barnett, constitutionalism includes the restriction of power (limited government), the separation of powers (checks and balances), and responsible and accountable government<sup>52</sup>. Henkin<sup>53</sup> identifies popular sovereignty, rule of law, limitation of powers, separation of powers (checks and balances), civilian control of the military, law-governed police and judicial control, independent judiciary, respect for individual rights and the right to self-determination as essentials characteristics of constitutionalism<sup>54</sup>.

We will thus focus on the following basic elements<sup>55</sup>:

1. People's sovereignty
2. Separation of Powers (checks and balances)
3. Responsible and accountable government
4. Rule of law
5. An independent judiciary
6. Respect for individual rights
7. Respect for self-determination
8. Civilian Control of Army
9. Police governed by law and judicial control<sup>56</sup>

The distinctive feature of the CUSA is that these elements of constitutionalism are embodied

<sup>52</sup> Bazezew, Maru, „Constitutionalism”, *Mizan Law Review*, Vol. 3 No. 2, September 2009, supra note. 2, p. 358.

<sup>53</sup> Ibid, supra note 3, p. 358.

<sup>54</sup> Ibid, p. 358-359.

<sup>55</sup> Ibid, p. 359.

<sup>56</sup> Ibid, p. 359.

in the text of the U.S. Constitution. At the same time, these elements of functional constitutionalism are also elements of the CUSA amendment. According to the relevant amendment, in accordance with the method used for amendment these elements are part of the US amendment process. As we have seen above, through formal or informal amendments, one or more elements of constitutionalism can be clearly seen even during the process of CUSA amendments.

Another feature of the constitution amendment is closely related to the democratic feature of this constitution and to the reforms that are made possible during the constitutional amendment process. The process of amending the democratic constitution should allow for reforms that advance broad interests to be adopted without undermining its practical value as a permanent routine for advancing majority interests and protecting minorities<sup>57</sup>. Advancing the interests of the majority on the one hand and protecting minorities on the other requires some kind of flexibility. This requirement for some kind of flexibility, in practice has been made possible through informal amendment of the CUSA.

Rasch and Congleton in their book *'Drafting Democratic Constitutions and Public Policy'* apart of addressing the dynamic problems that address democratic constitutions (where the CUSA is regarded as such), they also address phenomena such as flexibility and stability and the role they play in the process of amending the Constitution.

Democratic constitutions address dynamic problems related to the stability and flexibility of the constitutional regime itself<sup>58</sup>. Modesty on the part of constitutional drafters requires that they recognize that even their best efforts may need to be adapted to take into account new circumstances, new ideas or new information<sup>59</sup>.

From the foregoing examples brought about when addressing these issues of the CUSA and its amendment process (formal or informal) we can conclude that in the US a balance has been found between stability in the country and the rigidity of the CUSA. An important role in this balance has been the flexibility of Article 5 of the CUSA which has made possible the application of the informal amendment.

Carlos Closa is of the same opinion as above. In his book he states “moreover, rigid/flexible amending procedures also influence other mechanisms of constitutional change, first of all, change through judicial interpretation<sup>60</sup>: If methods of securing formal amendments are difficult (as in the US), there may be pressures to adapt the constitution through judicial interpretation (Elkins et al., 2008)<sup>61</sup>”.

When exercising the power of judicial review, the Supreme Court is not entirely dependent on the text of the Constitution, including its amendments<sup>62</sup>. It relies on political theories, policies and other things like these as the basis for decision. The importance of judicial review actually exceeds that of the constitutional text<sup>63</sup>. The decision of the Supreme Court not only binds the parties to that case under review and all lower courts, but also affects society at large<sup>64</sup>.

Another important feature of the amendment of CUSA concerns the fact that the constitutional amendment procedure is a source of stability.

Processes of amending can contribute to the stability and sustainability of a constitutional regime, which itself can have significant effects on well-being, insofar as prosperity and trust are fostered by sustainable public policy<sup>65</sup>.

---

<sup>57</sup> Rasch, Bjørn Erik and Congleton, Roger, *Constitutional Amendment Procedures, from the Book: "Democratic Constitutional Design and Public Policy: Analysis and Evidence"*. Cambridge, MA: The MIT Press, 2006, p. 539.

<sup>58</sup> Ibid, p. 539.

<sup>59</sup> Ibid, p. 539.

<sup>60</sup> Closa, Carlos, *Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States*, 2012, p. 286.

<sup>61</sup> Ibid, p. 286.

<sup>62</sup> Zengyuan, Pu, *A Comparative Perspective on the United States and Chinese Constitutions*, William & Mary Law Review, Volume 30, Issue 4, Article 4, 1989, p. 873.

<sup>63</sup> Ibid, p. 873.

<sup>64</sup> Ibid, p. 873.

<sup>65</sup> Ibid, p. 537.

## 6. Conclusions

Constitutional system, rule of law and the existence of the rule of law, democracy or its consolidation, the stability in the USA, to a large extent were and are influenced by the initiation of the amendment of constitution, by the way it is conducted the constitutional review process. In United States of America, the amendment of the constitution was one of the vital instruments for the existence of the rule of law and the dominion of law, an instrument that has been a cause of the stability in the country. The application of this instrument had multi-dimensional effects, positive and stabilizing effects and where the launch or the initiation of this instrument was a legitimate, democratic process, a process that has been tried to be replicated throughout the world. The amendment of the CUSA tested the 'fidelitas, veritas, integritas' towards the constitution of a country and of all subjects involved in this process and the result of the test was a long path towards democracy a hundred of year success in the constitutional order.

## Bibliography

1. Ackerman, Bruce, *We the People, Transformations*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 1998.
2. Bazezew, Maru, „Constitutionalism”, *Mizan Law Review*, Vol. 3 No. 2, September 2009.
3. Closa, Carlos, *Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States*, 2012.
4. Dixon, Rosalind, Landau, David, „Tiered Constitutional Design”, *The George Washington Law Review*, Vol. 86:438, 2018.
5. Fisher, Louis, Harriger Katy J., *American Constitutional Law*, Tenth Edition, Carolina Academic Press, 2013.
6. Grau, Luis, *An American Constitutional History Course for Non-American Students*, The Figuerola Institute Programme: Legal History, Universidad Carlos III de Madrid 2012.
7. Kmiec, Douglas W., Presser, Stephen B., Eastman, John C., Marcin, Raymond B., *The History, Philosophy and Structure of The American Constitution*, third edition, LexisNexis, 2009.
8. Machiavelli, Niccolo, *Princi Poiltika dhe Kodi Moral / The Prince, Politics and Moral Code*, Translated from the original Arian Lleshi, 2003.
9. Rasch, Bjørn Erik and Congleton, Roger, *Constitutional Amendment Procedures, from the Book: “Democratic Constitutional Design and Public Policy: Analysis and Evidence”*, Cambridge, MA: The MIT Press, 2006.
10. Rosenn, Keith S., *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, University of Miami, School of Law Institutional Repository, 1990.
11. Tiller, Mark, Wood, Laura Matysek, *Government in America. People, Politics, and Policy*, thirteenth edition, to accompany Comprehensive and Texas editions, Pearson Education, 2008.
12. Tomain, Joseph P., *Executive Agreements and the Bypassing of Congress*, University of Cincinnati College of Law Scholarship and Publications, Faculty Articles and Other Publications, Faculty Scholarships, 1-1-1979.
13. Wheeler, Harvey, *The Foundations of Constitutionalism*, Loyola Marymount University and Loyola Law School Digital Commons at Loyola Marymount University and Loyola Law School, 1975.
14. Zengyuan, Pu, „A Comparative Perspective on the United States and Chinese Constitutions”, *William & Mary Law Review*, Volume 30, Issue 4, Article 4, 1989.