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# The Scope And Ambit Of Amendment Of The Constitution: A Comparative Study Of The Constitutions Of India, Usa And Switzerland

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*The amending procedure in various Constitutions differ from country to country. This study deals with what extent and range of amendment can be permitted in case of the constitutions of USA, India and Switzerland. All these three Constitutions provide special provision for amendment to the Constitution and are all therefore, rigid in this sense. The extent of relative rigidity varies. In India, within a span of 70 years, there have been more than 100 amendments to the Constitution. In Switzerland, Constitution of 1999 has been changed by popular initiative ten times while US Constitution has undergone only 27 amendments till now in 200 years. Though all the Constitutions are rigid in normal parlance, but the number of amendments show clearly that degree of rigidity varies.* ***The paper seeks to compare the extent of rigidity of all the three constitutions and find out how far these different procedures of amendment help in reflecting the aspirations of the 'people' of the country.***

*"In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution."*

***— Thomas Jefferson***

## INTRODUCTION

The Constitution of any country is intended to preserve practical and substantial rights of its citizens. It is the basic or fundamental law of the land which controls the whole system of the country. Because of this peculiar nature of it, it is but obvious and rather necessary that with the changes in the conditions of life of the Nation and sometimes, from changed objectives of the present government, the fundamental law that is, the constitutional law of country should revise and modify itself according to the prescribed formula.

If the Constitution be a legal instrument, it should be capable of being changed by the process by which statutes may be amended. But because it is the ***'fundamental law'***, it cannot be changed by the ordinary procedure for amending ordinary laws. As regards ordinary statutes, the words 'amend' and 'repeal' are used to indicate different functions, with different effects. Thus, amendment means destruction of a part, followed, may be but not necessarily, by the creation of a substitute.[1] Unless it is to forfeit the character of the fundamental law, it should be amendable only by a *special procedure,* which is usually laid down in the Constitution.[2] Another consequence following from the assumption that

1 *Sibnath v. Porter*, AIR 1943 Cal 377 (384) (SB).

2 Justice GB Patnaik, Yashobant Das, *et. al.* (eds.), *Dr. Durga Das Basu Comparative Constitutional Law* 308 (LexisNexis, Delhi, 2014/3rd edn.).



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Vol-22-Issue-14-December-2019

Constitution is a 'higher law' is that the special procedure for its own amendment is prescribed in the Constitutions of the Nations itself.

When legislature functions for passing an amendment, it is not acting as a law-making function but it functions as in the process of constitutional enactment. Constitutional changes cannot be achieved formal legal means.[3] The amending power, which is known as *Constituent power* may be exercised only by that body and in that manner as is specified by the Constitution.[4] Constituent power, understood as the power to establish the constitutional order of a nation, is the procreative principle of modern constitutional arrangements. [5] Sieyès distinguished between constituent power (pouvoirconstituant) and constituted power (pouvoirconstitué): 'in each of its parts a constitution is not the work of a constituted power but a constituent power'.[6] The latter is the extraordinary power to form a constitution – ***the immediate expression of the Nation and thus its representative.****It is independent of any constitutional forms and restrictions*. The former is the power created by the constitution, an ordinary, limited power, which functions according to the forms and mode that the nation grants it in positive law.[7]

Amendments to the constitution are a safety valve for the constitution and if it is not provided it will cause to the blasting up of the entire structure. PS Deshmukh said in the Constituent Assembly of India ``If we do not provide the necessary outlet or safety-valves for the air or storm to pass through, it is likely that the whole ship may be blown up.''[8] Amendments to constitution make it possible to cope up with developments of the people and country and hence, provisions for amendments in respective Constitutions of the countries here become a matter for discussion. The rights of the people should be protected along with fulfillment of needs of the changing society. Here we are examining the provisions for amendments and its practical applications. *India, USA and Switzerland are democratic republics which enshrine within their Constitutions the procedure for its amendment.*

The common feature of these three Constitutions is that they all prescribe a special procedure for amending the Constitution and what becomes the trigger point of the present study is that these three Constitutions provide for an entirely different procedures from each other and hence, a comparative study of three different kinds of procedures impacting the society or the Nation and how and to what extent the society's needs are catered to with respect to these three entirely different procedures. ***After all, the main aim of amending provisions is to serve the changing needs of the society.***

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3 *See* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective, in* COMPARATIVE CONSTITUTIONAL LAW 96, 98 (Tom Ginsburg & Rosalind Dixon eds., 2011).

4 Id. at 309.

5 Martin Loughlin, *The Idea of Public Law* 100 (Oxford University Press, London, 2004).

6 Michael Sonaescher (ed.), *Sieyès: Political Writings* 136 (Hackett Publishing Company, Inc. 2014).

7 Id. At 134-137.

8 Constituent Assemble Debates of India (Proceedings): Volume IX- 17th September, 1949 available at http://cadindia.clpr.org.in/.


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Vol-22-Issue-14-December-2019

Constitutions obsolesce rapidly, and must be updated over time to reflect changes in the polity's circumstances and citizens' values.[9] The courts in different countries on various occasions considered the matter of Parliament's power to make amendment of the respective Constitutions. In India and U.S.A the matter became a subject for deep discussions on many occasions. Article 368 of the Indian Constitution empowers the Indian Parliament to make amendments to its Constitution. Article V of the American Constitution[10] of the American Constitution provides for the amendment of Constitution of U.S.A. and Revision procedures for Swiss Constitution are provided for in its Article 120 to Article 123 (Partial and Total).

It is important to note that in India, total 123 Constitutional Amendment Bills have been introduced and 101 out of them have been passed. In US, total number of 27 Constitutional Amendments have been passed while many scholars have argued that constitutional changes frequently occur through other means (the most common one being judicial interpretation)[11]. Some have claimed, for example, that certain judicial interpretations of the U.S. Constitution are better viewed as amendments.[12] The latest Swiss Constitution came into force on 1 January 2000.[13]

In Switzerland where semi-direct democracy prevails, after the successful total revision of 1848 Constitution in 1878, three unsuccessful total revision attempts have been made in 1880, 1935 and 1975 and attempt made in 1988-89 was finally approved and was a success through a referendum and new Constitution came into operation on 1st January, 2000. The feature that makes the amendment procedure of Swiss Constitution distinct is that no amendment, total or partial, can be made in the constitution without the approval of majority of people as well as of the Cantons. The Constitution of 1999 has been changed by popular initiative ten times in the period of 2002 to 2014.[14]

The frequency of amendments in these three Constitutions is reflective of the rigidity of the amendment procedure and therefore is of great relevance. *It is often said that Constitutional amendments are sometimes made to fulfill the ulterior motives of the political class and are referred to as 'unconstitutional constitutional amendments'*. So, it becomes important to establish a connection between the amendment procedure, frequency of amendments and ***whether the procedure facilitates the fulfillment of aspirations of its people or the ulterior motives of political class.***

**INDIA**

9 Adrian Vermeule, "Constitutional Amendment and Constitutional Common Law" (University of Chicago Public Law & Legal Theory Working Paper No. 73, 2004).

10 Constitution of U.S.A, 1787.

11 See e.g. in Sanford Levinson, OUR UNDEMOCRATIC CONSTITUTION (2006) cited in Joel Colón-Ríos, "Introduction: The forms and limits of constitutional amendments" (*International Journal of Constitutional Law*, Volume 13, Issue 3, 1 July 2015, 567–574 ) available at https://academic.oup.com/icon/article/13/3/567/2450811.

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

13 available at https://www.parlament.ch/en/%C3%BCber-das-parlament/how-does-the-swiss-parliament-work/Rules-governing-parliamentary-procedures/federal-constitution.

14 Ibid.

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ISSN:0971-1260
Vol-22-Issue-14-December-2019

**Amendment procedure for amending the Constitution of India is provided for under Article 368.** Article 368 provides for the amendment of Indian Constitution in three categories:-

- Amendment by simple majority,
- Amendment by special majority and Our Undemocratic Constitution
- By special majority and ratification by States.

The provision since its very first use has been surrounded by controversies and has been interpreted numerous times by the Supreme Court owing to various instances of its misuse by the Legislature as well as Executive.***The history of the interpretation of Article 13 and 368 will give us an insight how their literal interpretation helped political class to use it for its ulterior motives without considering the aspirations of the people.***Also looking into how the courts interpretation fluctuated a few times *before the doctrine of basic structure doctrine* which has changed the entire discourse of making a Constitutional Amendment in the country and ***thus, giving direction to fulfillment of the aspirations of "we, the people" in real sense acting as savior of Indian democracy that was at that time on the verge of running to dogs.***

Indian Constitution came into force in the year 1950 and since then more than hundred amendment Acts have been passed. The Indian Supreme Court can use its power of judicial review to strike down or approve the Constitutional Amendments. The first amendment was made in the year 1951 which was challenged in the Supreme Court in Sri Sankari Prasad's case *on the ground that it violates Article 19(f) of Part III of the Indian Constitution,* which is guaranteed as fundamental right to the citizens of India. The Supreme Court decided upholding the validity of the amendment *with observation that the Parliament can amend any Article of the Constitution including fundamental rights (Sri Sankari Prasad Singh Deo v. Union of India)*[15].

After independence, many states in India for introducing agrarian revolution made several enactments which faced serious challenges in the courts. In order to assist the States, the first amendment added to the Constitution- Article 31A and 31B in 1951. ***The newly added provision Article 31B provided protection to the enactments included in the 9th schedule of the Constitution from the challenges of the Courts(barring judicial review absolutely).*** In 1955, Article 31A was again amended by fourth Constitutional amendment.

Despite such provision existing, some of the statutes for agricultural reforms were successfully challenged in the Courts. In order to save the validity of those Acts, the Parliament again amended Article 31A by seventeenth amendment[16] in 1964 and ***44 statutes were included in the 9th schedule of the Constitution for its protection from challenging in courts.***

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15 AIR 1951 SC 455.

16 *In Article 31A of the Constitution, — of Article 31A.*
*(i) in clause (1), after the existing proviso, the following proviso shall be inserted, namely: — "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the*

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Vol-22-Issue-14-December-2019

But this very action of the Parliament was challenged in the Supreme Court in *Sajjan Singh v. State of Rajasthan*[17]. In this case, it was argued by the petitioners that fundamental rights contained in Part III of the Constitution cannot be amended if the amendment abridges or takes away the rights guaranteed under Article 19(f) or say, any right under Part III of the Constitution. The petitioner further contended that the amendment in question also affected the right under Article 226, right to approach the High Court, a remedial measure. The Supreme Court did not change its earlier position and held that the impugned amendment does not purport any change in the provision of Article 226 and it only purported to reduce the sphere of operation and did not take away the power of High Court. The Supreme Court followed its own decision in Sankari Prasad case[18] and held that Parliament had power to amend all the provisions of the Constitution under Article 368 including fundamental rights or Part III.

Again, different States enacted several new legislations and amendments were made in the existing legislations in order to make the law more conveniently enforceable for the agrarian reforms that were ignited in the country without interference by Judiciary. This invoked plethora of litigations full of challenges to the constitutionality of the laws and the amendments which were made to protect the State Laws. The Punjab Security of Land tenures Act, 1953, and Mysore Land Reforms Act, 1962 were challenged. These Acts were included in the 9th Schedule to exempt them from judicial review of any kind. The Parliament made seventeenth amendment to include these State laws as well in the 9th schedule and hence this amendment was also challenged in 1967 in *I.C.Golaknath v. State of Punjab.*[19] The issue in this case was ***whether the Parliament had power under Article 368 to amend the Constitution including fundamental rights guaranteed in part III of the Constitution. Whether Article 13(2) could exercise any bar against the power under Article 368.***

*Article 13 (1)* says that ``All Laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void. ***Art. 13(2) states that the State shall not make any Law which takes away or abridges the rights conferred in this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.***

The Supreme considered provision of this Article while dealing with the impugned amendment. In Part XX which contains only one chapter and only one article under the heading, "***AMENDMENT OF THE CONSTITUTION"*** and in the marginal notes says ***"Procedure for Amendment".*** It was contented in the case that Article 368 prescribes only the procedure and no power to amend the *Constitution rests in Article 368 and an amendment to the Constitution is a legislative act and is violative of clause 2 of Article 13 and hence the laws are to be struck down.* **The Supreme Court held**

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*ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."*

17 AIR 1965 SC 845.

18 1965 SCR (1) 933.

19 1967 SCR (2) 762.



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Vol-22-Issue-14-December-2019

**that the Parliament had no power under article 368 to amend the Constitution and the power of legislation is with articles 245 and 248 and with entry 18, schedule VII.**

*It further ruled that an amendment to the Constitution also comes within the definition in ``Law" in Article 13(2).* The majority overruled the decision in Sajjan Singh's case. The overruling was prospective and therefore, first and fourth amendments to the Constitution were held to be valid because of its long acquiescence and the court declined to consider the validity of the amendment after a considerable lapse of time in good sense and for the sake of sound policy. It reached the conclusion that the amendments to the laws are valid because of the existence article 31A(1) but it struck down S. 3 of the Amendment act which includes 44 Acts into the 9th Schedule and adopted prospective overruling for the first time in its history. The Supreme Court held that Parliament has no power to make any amendment to the Constitution in the future, curtailing fundamental rights as it is transcendental in nature and highly necessary for the personal development of citizens and the word ``law" covered Art. 13(2) is also applicable to Article 368 that is, amendment procedure.

The tussle between Parliament and judiciary did not stop here. To surpass the ruling of the Supreme Court in the I.C.Golaknath, the Parliament enacted 24th Amendment to the Constitution (classic example of the misuse of the Constituent power or to fulfill ulterior motives).

An amendment was also brought to the marginal note, instead of `procedure for amendment", it is now changed to 'power and procedure'. Clause 4, was added to Article 13, making it explicit that ***the term ``law" in Article 13 does not include any constitutional amendment.***

Further, Twenty-fifth amendment added Article 31C to the Constitution to protect State laws purported to be made to give effect to directive principles enshrined in the Constitution. It says as ``Notwithstanding anything contained in Article 13, no law giving effect to the policy of the States towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or it takes away or abridges any right conferred by article 14 or 19,and no law containing a declaration that it is for giving effect to such policy shall be called into question in any court on the ground that it does not give effect to such policy". Twenty-ninth amendment also brought some statutes in the ninth schedule.

And here comes the climax of the whole drama when The Kerala Land Reforms Act 1963 as amended by Kerala Land Reforms (amendment) Act 1969 was challenged along with the Constitutional amendments by His Holiness Sri KesavanandaBharathi in the Supreme Court. In this case, the extent of power conferred on the Parliament to make amendment under Article 368 was also examined by the Supreme Court.

Foregoing view taken in Golaknath's case was then overruled by 1973- Full Bench decision in KeshvanandaBharti. ***It was held by majority of the full Bench that Article 13(2) referred to an ordinary law made by Parliament or State legislature and not to an Act amending the Constitution contrasting Golaknath on this point.***

This final phase of interpretation of Article 368 and Article 13(2) brought Fundamental Rights under the sway of the Constituent Power under Art. 368. Even though the entire Bench sacrificed Fundamental Rights before the altar of the amending powers overruling Golaknath, but it however

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ISSN:0971-1260
Vol-22-Issue-14-December-2019

introduced a novel and structureless (which took shape in subsequent case laws) idea, by way of judicial interpretation, by inventing or say, discovering the doctrine of 'basic features' of the Constitution as constituting IMPLIED LIMITATIONS upon amending power conferred under Art. 368.[20]

*The famous doctrine of basic feature is undoubtedly symbolic of implied limitations on the amending powers of the Parliament which the Parliament refused to consider at its nascent stage, but gradually adopted it after years of tussle between it and Judiciary.*

Later, in the year 1975 the Parliament made the 39th amendment which was in the wake of the setting aside the election of the then Prime Minister, Indira Gandhi, to Parliament by Allahabad High Court. **The amendment was brought to nullify the judgment of Allahabad High Courtwhich again highlights howthe powerful majority in Parliament has time and again tried to misuse the power of Amendment to fulfill its own ulterior motives**. A new article, 329A was introduced in the Constitution by 39th amendment. The amended clause prohibited challenging the election of any person to the House of People who holds the office of the Prime Minister at the time of election or is appointed as the Prime Minister after such election; and to the election of a person to the House of People who holds the office of the Speaker or is appointed as the Speaker after such election. Their election as per the amendment could only be challenged before authority appointed by Parliament only and thus, barring the judicial review and hampering the whole system of checks and balances as the very other clause of amendment stated that no such decision of the authority be called in question in any court.

Also, the petition pending before any court immediately before commencement of the amendment had to stand abated and this very clause was more than enough to neutralize the Allahabad High Court judgment and mandated the Supreme Court to decide even the pending cases accordingly with amended provision including that of Indira Gandhi's election. But the Supreme Court did not bow down to the powerful clauses of 39th Amendment and ruled that clause 4 of the 39th amendment act is *void on the ground that it destroys the basic features of the Constitution*[21] *and the whole Nation still starts shivering even with the thought of what happened next- The declaration of Emergency which was again a misuse of Constitutional power by a powerful government though not exactly of the Amendment power, but triggered by it.*

The practice of nullifying judicial pronouncements after plethora of cases deciding against it is still not over in entirety. Recently, the Supreme Court in Medical Council of India v. State of Kerala[22] had to emphasize that *ajudicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act.* This judgment was pursuant to the Kerala Government's blatant attempt to nullify the judgment of the High court and the Supreme Court.

Separation of Legislative, Judicial and Executive powers is recognized in the Constitution and the amendment is an intrusion into the judicial power and hence violated the basic principles of the Constitution and upheld the decision in *KesavanandaBharati's case*. During the period of emergency,

20*KesavanandaBharati v. State of Kerala*, AIR 1962 SC 933.

21*Indira Nehru Gandhi v. Raj Narain*, AIR 1975 *SC* 2299.

22Writ Petition (C) No.178 of 2018.

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Vol-22-Issue-14-December-2019

the 42nd amendment was made to the Constitution by adding two clauses to Article 368 as 368(4) and (5) according to which no amendment made under Article 368 could be called in question in any court on any ground and thus, provided unlimited constituent power to the Parliament to make amendment by way of addition, variation or repeal the provisions of the Constitution. By this amendment Parliament claimed unlimited and unquestionable power to amend the constitution under Article 368. It seems that Basic structure case was not enough to stop the Parliament to make unscrupulous use of the power of Amendment and it took some time for the Parliament of a newly constituted democracy to understand that checks and balances is the base of its Constitution and doing away with it meant nothing less than doing away with the Constitution itself without the permission of "*We, the people*".

42nd amendment was challenged before the Supreme Court in 1980 in *Minerva Mills v. Union of India*[23] and the Supreme Court ruled that the 42nd Amendment was void as it violates the basic principles of the Constitution as held in the *KesavanandaBharti's case*. The Court held that even though no express limitation is provided in the Article 368 for amending the provisions of the Constitution, the Supreme Court invoked implied limitations for amendment. Hence the Indian Constitution can be amended, subject to the principles of basic features of Indian Constitution, drawn by the Supreme Court. The Supreme Court held that Parliament, Judiciary and Executive are the creatures of the Constitution and none of it can override the Constitution.

Thus, it can easily be seen that without the help of judiciary, the amending powers of Parliament could easily and were in fact actively being misused and things did not tend to improve much even after the locus classicus of KeshvanandaBharti. The Courts had to be consistent in declaring repeatedly in the forthcoming cases by enumerating one by one what would be included in the basic features of the Constitution. For instance, in *WamanRao's case*[24], CJ Chandrachud observed-

"…the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original: you cannot by an amendment transform the original into the opposite of what it is. For that purpose, comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of Constitutional law. What were the basic postulates to the Indian Constitution when it was enacted? And does the…Amendment do violence to these postulates?"

From this statement by then CJI, it would not be wrong to interpret and even conclude that the Constitution is nothing, ***but result of the aspirations of people of India who struggled for years to achieve the independence of framing the higher law for themselves and there are certain basic tenets of the document which if altered would be violent to the aspirations of the people.***

The above mentioned amendments did not cater to the aspirations of the people at all, but simply served the ulterior motives of political class until judicial interpretation came to the rescue of Indian democracy. We can now conveniently say observing the above scenario that the amendment to the Constitution specifically in India, if goes unchecked can prove detrimental.

23AIR 1980 SC 1789.

24 AIR 1981 SC 271 (para 18).


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Vol-22-Issue-14-December-2019

However, it is still not the end of arguments and interpretations. If we consider the amendments to achieve agrarian reforms in India, there is no doubt to the fact that the agrarian reforms were much needed at that time and were in consonance with the aspirations of majority of the people in long run. So, we can say that may be the ways adopted to achieve the reforms seemed prima facie unscrupulous at that time, but these reforms had a significant role to play in reforming the Indian society. This is what we can call is part and parcel of a Constitutional Democracy. Whatever bad or good happens, it'll keep revealing its results positively as well as negatively in long run for the democracy and from Indian experience, it seems the results have been quite positive with a reformed society and a well structures basic structure doctrine to which the Parliament has made peace with by now.

**U.S.A.**

Someone who attempted to understand Constitutional change in the United States by reading the written Constitution's provision on amending the Constitution would be misled.[25] The formal amendment process is only one (and also, considered to be least important one) given under Article V. Article V of the U.S. Constitution provides for the amendment of the Constitution. It says, "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-third 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 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 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."

The Article V is very rigid for making any amendments. Amendment is possible only in two ways :-

1) A proposal for Amendment is made by the Congress with a two- third majority of both houses, when ratified by three- fourths of the State Legislatures of several States, it become an amendment.
2) On the application of two-third legislatures of several States a convention is called for proposing amendments which when ratified by three- fourth of the Legislatures of several States become amended provision of the Constitution.

The Congress is at liberty to adopt whichever mode of ratification. However, there is no time limit set in the Constitution for ratification. Several amendments, by their own terms, specified that they had to be ratified within seven years, as they were.[26] In Coleman v. Miller[27], the Supreme Court found that constitutional challenges to ratifications generally present political questions when

25 Mark Tushnet, *Constitutional Systems of the World: Volume II, The Constitution of United States of America (A contextual analysis)*237 (Hart Publishing, Oxford and Portland, Oregon, 2009).

26 See Amendment XVIII (alcohol prohibition), XX (altering the dates for the Presidential inauguration), XXI (repeal of prohibition) and XXII (setting a limit of two terms for the President).

27307 U.S. 433 (1939).

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Vol-22-Issue-14-December-2019

it rejected a challenge to the Child Labour Amendment (it ultimately failed because it did not gain enough ratifications). *It seems from this example particularly, that the position in United States is no different than India when it comes to examining the relation between amendments and motives of the political class and whether in making an amendment, the actual aspirations of the people are kept in mind or not.*

A related point is that the question 'Are here unconstitutional constitutional amendment?' as discussed above in Indian context. However, this question has till now never arisen in United States and is unlikely to arise.

In USA, Constitutional interpretation accounts for a much larger portion of Constitutional change. However, we would go through the journey of 27 formal amendments that have been made till now. There are two express limitations prescribed under Article V for amending the Constitution which makes it difficult to amend US Constitution every now and then unlike India where there are no express limitations on amending the higher law, but eventually placed by judicial interpretation. *This reflects on how the limitations placed on the constituent power and procedure for amendment affect the frequency of amendments (In India, more than 100[28] in just 70 years whereas in US, only 27 in 200 years[29]).*

*Here, the Supreme Court instead changes the Constitution itself with changing times through Constitutional interpretation as is argued by many eminent scholars whereas Indian Supreme Court entrusted itself to place limitation on amending power as well as to judicially review the formal amendments made by Indian parliament.*

Coming back to formal amendments, we can classify them roughly into four classes. The first ten amendments, popularly known as Bill of rights are rather completion of the Constitution than the amendments. Senate approval and ratification by the States were quite quick as soon as the Bill of Rights Amendments were introduced, and it finally became effective in 1791.

Another group comprises of three amendments which were specifically made to overturn the Supreme Court decisions which we discussed in Indian context as well, but there will be many variations of such amendments in USA. The Supreme Court in *Chisholm v. Georgia*[30] held that the Constitution allowed States to be sued in federal court for failing to pay their debts and eleventh amendment[31] was added after this case to rule out suits against the States. Further, the sixteenth amendment[32] overturned a

28 See https://www.india.gov.in/my-government/constitution-india/amendments.

29 See https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf.

30 2 US. 419 (1793).

31 The Eleventh Amendment's text prohibits the federal courts from hearing certain lawsuits against states. The Amendment has also been interpreted to mean that state courts do not have to hear certain suits against the state, if those suits are based on federal law. The text reads as:

*"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."*

32 It allows Congress to levy an income tax without apportioning it among the states on the basis of population.

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Vol-22-Issue-14-December-2019

Supreme Court decision[33] holding that the Constitution's ban on 'direct' taxes not apportioned among the States by population prohibited congress from enacting a national income tax. Lastly, twenty-sixth Amendment[34] responded to a Supreme Court decision in*Oregon v. Mitchell*[35]holding that, though Congress had the power to lower the minimum age for voting in national elections to eighteen, it had no such power with respect to state elections. This created an administrative nightmare and Congress and the States immediately responded with a Constitutional Amendment.[36]

If we try to observe the intent behind these three sets of amendments, it is obvious that these were barely the result of natural discourse. Well, the same had happened in India to overturn the effect of KeshvanandaBharti and decision of Allahabad High Court in Indira Ganhi's election case[37]. ***This shows that intent behind amending the Constitution is not always simply to amend it and there can be 'overtly hidden motives' as well.***

However, if we compare the scenario in both the countries, the intent behind 24th and 39th Amendments was purely politically motivated. It was to curb judicial review on the matters that formed the base of the Constitution- the aspiration behind the Constitution and its sole intent. ***However, in US, the intent was not always politically motivated, but to correct the administrative problems created by the SC judgment (26th amendment specifically).*** The Judgment that the amendments sought to curb in India were related to putting implied limitations on Parliament's power to amend. While in India amendments sought to undermine the doctrine of checks and balances, on the other hand, the amendments (specifically, 26th) in US are an example of proper checks and balances performed with the power of Constitution by Senate on judiciary. ***This totally different fulfillment of motives can be owed to the strictness or rigidity of procedure in both countries where US has a rigid process with express limitations and India's not so rigid process in which any amendment can easily be made by a strong government enjoying majority in houses. This thus establishes how the rigidity in process of amendment can change the whole course of Nation building.***

Another set of amendments is also basically technical improvements[38] in the Constitution as a means of government like 12th amendment was a response to the defect in the Presidential selection process that came to light in 1800 elections.

In whole, all the American Constitutional Amendments can fairly be described as mix of technicalities and shifts toward greater democracy. Three amendments adopted during reconstruction eliminated slavery[39], provided all citizens but most notably the newly freed population with a panoply of fundamental rights, and guaranteed that the right to vote would not be denied based on race.[40] 17th

33 See *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429 (1895).

34 The Twenty-sixth Amendment to the United States Constitution prohibits the states and the federal government from using age as a reason for denying the right to vote to citizens of the United States who are at least eighteen years old.

35 400 U.S. 112 (1970).

36 *Supra* note at 25.

37 Refer to 24th and 39th (Constitution of India) Amendment Acts.

38 See 20th Amendment to US Constitution.

39 13th, 14th and 15th Amendments to US Constitution.

40 *Supra* note at 25.

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Vol-22-Issue-14-December-2019

Amendment of 1913 provided for direct election of senators rather than indirect. The 19th guaranteed suffrage to women.

When we talk about Constitutional Amendments in United State of America, it becomes more than important to discuss the ***reconstruction amendments.*** The US Constitution had said enough about getting the States into a Union, but was silent on what if any of them wanted to cede away. The *Civil War*, famously known as "The War Between the States," was fought between the United States of America and the Confederate States of America which was a collection of eleven southern states which wanted to leave (in fact, left) the Union in 1860 and 1861 and made attempts to form their own country in order to protect the institution of slavery and to oppose the USA's move of abolishing it.[41]The war between the Northern and Southern States (Confederate State-which wanted to cede away from United States) continued for over 4 years when finally in 1865, the US defeated the Confederate States *and thus, the amendments abolishing slavery finally came into existence.* ***This can be a classic example of amending the Constitution keeping in mind the aspirations of the people who are being governed by it.***

However, it is more than difficult to understand the course of US Constitution while going through only its formal amendments, but for our purpose here, we seek to study the relation between the rigidity of the amendment procedure and the purpose of amendments.

The little inferences above are with respect to the individual amendments trying to observe to what extent those individually helped a democracy and addressed people's concerns. However, if we examine the rigid procedure as a whole, it would not be wrong to say that the amendment rule crafted in 1787 renders the US Constitution 'most inflexible' ever written.[42]But at the same time, Article V-induced rigidity played an important, if unacknowledged, role in promoting the Constitution's survival at a key moment in American history—the early decades of the Republic. Article V-induced rigidity during the early Republic enabled the development of National institutions necessary to anchor the new nation.[43] The rigidity which kept the Nation stable in its early years, the same lack of rigidity in Indian Constitution was on the verge of stumbling the Nation unless the judiciary had stepped in. *This is an important comparison to be taken into consideration.*

**SWITZERLAND**

While till now, we have discussed about two representative democracies, now is the need to discuss the course of Constitutional Amendments in Switzerland- *a rare example of direct democracy.* Swiss Constitution uses both the words 'amendment' and 'revision' as regards different kinds of change and different provisions laid down for a total revision or repeal of the Constitution and the amendment of particular provisions. The most prominent feature of the Swiss Constitution is that it provides for two different provisions for a *partial amendment* and a *total revision* of the Constitution of Switzerland.

41availaible at https://www.battlefields.org/learn/articles/10-facts-what-everyone-should-know-about-civil-war.

42Aziz Huq, "The Function of Article V" (University of Chicago Public Law & Legal Theory Working Paper No. 470, 2014).

43 Ibid.

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Vol-22-Issue-14-December-2019

While Articles 119-120 prescribe the procedure for a 'total revision', Article 121 speaks of a 'partial revision or amendment'.

In the Swiss Constitution, a total or partial revision of the constitution can be made if both the Houses of the federal Assembly approve of the amendment and the same is also approved by majority of the Swiss Canton and the majority of the citizens of Switzerland. However, if one house of the Federal Assembly approved of the amendment, and the other does not, the question whether there should be a revision or not is *referred to the people for their approval*. In such case, the amendment is not submitted to the cantons for their approval. If a majority of the citizens of the Switzerland express themselves in favour of revision, fresh elections have to be held to the Federal Assembly, and the proposed amendment is then put before the newly elected houses of the Federal Assembly and if it is approved by them, the same is submitted to a referendum of the cantons and the people. If the amendment is approved by a majority of the cantons and a majority of the people, the amendment is considered to have been approved and becomes a part of the constitution.

C.F.Strong says, "…the Swiss admits of both the legislative and popular methods of amendment, but makes in every case the final sanction of the people an indispensable condition for the adoption of a proposed amendment and its incorporation into the constitution"[44]. Thus, final decision for any amendment in Switzerland is in the hands of people of Switzerland. Finer has rightly called people of Switzerland the third house of Federal Assembly.[45]

Referendums strengthen popular sovereignty by giving people a say and allowing voters to mandate change. Where there are effective public education campaigns referendums can create high levels of support for significant changes to the way people are governed. They create a public space for political discourse about important issues so that once the referendum is concluded there is often a degree of consensus about the outcome.[46] ***Thus, it can be pleasantly stated that referendums are direct reflections of the aspirations of people.*** However, there are many ifs and buts. The referendums have their own weaknesses as well. These most often lead to simplification of the issues that are very complicated and nuanced. Before conducting any referendum, ***it is more than important to confirm that population very clearly understands the result of its vote and for that, the fact whether the population is literate or educated enough to understand the issue is also important.*** Therefore, in countries such as India and USA where population is huge, it does not really seem feasible to conduct referendums.

**CONCLUSION**

Before this whole discussion of amendment procedure of Constitution of these three countries, we knew the one common thing between these Constitutions is ***that the documents have stood the test of time and politics quite fairly.*** As we know that Constitution is not a static document, but an organic

44 CF Strong, *Modern Political Constitutions: An introduction to the comparative study of their history and existing forms* (Sidgwick and Jackson; 8th revised and enlarged edition, 1972).

45 Herman Finer, *The Theory and Practice of Modern Government*, 561 (Greenwood Press, 1949).

46 available at https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/10011302.htm.

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Vol-22-Issue-14-December-2019

one. After the whole discussion of amendment procedures in USA, India and Switzerland, we can conclude that the amendment procedure adopted by each Constitution has ***done fairly well for the respective countries.*** Referendums have proved well for Switzerland owing to small population which would not be possible for a country like India where population is huge and the extent of participation of population in governance is minimal owing to one of the biggest factors that is, literacy rate, education level, etc. The factor of huge population in US also makes it difficult to conduct referendums for an important issue like amendment to the Constitution. Also, USA consists of 52 states which again would make the process cumbersome.

US Constitution despite being too rigid has managed to survive for more than 200 years and has undoubtedly anchored the Nation to path of development by keeping the Nation intact in initial years even when there were dangers of States ceding away.

Indian Constitution's flexible amendment procedure too has managed well to survive. This may be because of the judicial independence provided for by the Constitution which has helped it to survive and come out with flying colors that today Indian Constitution is quoted as an example of a good constitution to the world in spite, of it being the lengthiest one. We here believe that the length became its strength by giving the Courts independence to interpret the Constitution as per the need of the hour as well as intention of framers.

***We come to the conclusion that the amendment procedures discussed above have proved to be in consonance with the needs of the society and aspirations of the people in long run, but at the same time, have often fallen prey to the intentional craftiness of the political class which the Nations seem to resolve by one or the other way and that is how the three democracies have been prevailing and flourishing since the making of their Constitutions.***


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