

## CHAPTER - II

### A Survey of the Amending Process in the Constitutions of the major political systems of the World.

#### I

Constitutional rules and principles, however pragmatic they may be, cannot be divorced 'from the increasing evolution of

Significance of Constitutional dynamics society.'<sup>(1)</sup> When established rules and principles fail to maintain 'relevance to reality,' they are to be modified, redefined or totally discarded.<sup>(2)</sup>

This brings us to the issue of Constitution-making and diffusion of powers. Where 'temperate'<sup>(3)</sup> diffusion of powers prevails as a 'positive value', both the constitutional rules and the political

Constitution-making and diffusion of powers. practices will preserve their diffusion and will help prevent the emergence of a privileged ruling elite.<sup>(4)</sup> Great Britain offers an example where 'the

entire story of constitutional development is marked by the expansion of the diffusion of power.<sup>(5)</sup> Although it is a fact that the framers of the U. S. Constitution were, to some extent, influenced by the British concept of diffusion of powers, 'the birth of the United States

Constitution was preceded by a painstaking search for a system which would permit the interaction of many parties and interests'.<sup>(6)</sup> The

Constitution of India tries to uphold the principle of 'temperate' diffusion of powers. The leaders were aware of the fact that a vast country like India with many different racial, cultural, linguistic and religious groups, needed a basic document spelling out the rules of

the new State in elaborate detail. (7) Thus, it has been observed that the story of the framing of the Indian Constitution is "by far the most massive and ambitious enterprise in the World-wide history of Constitution-making. (8)

It is worthwhile mentioning here that there are at least three peaceful processes by which constitutional rules may be changed.

**Processes of Constitutional change**

These are formal amendment procedures, customs and judicial decisions. It has been observed that facility in changing constitutional rules 'does not necessarily indicate that the amending process will be used with excessive frequency; nor does the rigidity of the amendment provisions rules out frequent and even violent changes.' (9)

There is a great variety of formal amendment procedures prescribed by the constitutions that operate in different political

**Variety of amending procedures**

systems. It is generally accepted that the people or more particularly the electorate, should be associated, directly or indirectly with the amending process of the Constitution. In other words, people should have a voice with regard to the question of changing or altering the constitution. This idea of popular participation appears to be closely related to the concept of 'popular sovereignty.' For it is the people who make, enact and give to themselves the constitution.

Naturally, the question of popular consent with respect to constitutional amendment comes in. It is in consonance with this idea that the Constitutions of the Republic of Ireland, of Denmark, of the Commonwealth of Australia and of Switzerland and the Constitutions of each

of the American States prescribe the method of seeking popular consent in relation to constitutional amendment. In some constitutions, legislatures have been given the power of amending the Constitution, but it may be required to delay its final action until a general election is held. The Constitution of Belgium offers such an example. In this Constitution, initiative for an amendment generally comes from the Legislature. But in some countries, for example in Switzerland, it is thought proper that an opportunity should be given to the people to take initiative themselves and put forward proposals for constitutional amendment.

Before a discussion is made on the comparative assessment of the different amending processes prescribed in different leading constitutions of the world, a few words should be said about the primary forces which cause constitutional changes. It is admitted on all hands that "a political system is a dynamic set of relationships among public institutions, the bureaucracy, private centres of power

Primary forces behind constitutional change. and the electorate which exists to meet the demands and solve the problems of society." (10)

In actual practice, these demands and problems "are presented in the form of particular interests of social and economic groups," and the solutions emerging out of such a political system "take the form of public policy." (11) An industrially advanced society frequently undergoes changes - rapid and revolutionary -- "the political system must be able to adjust sufficiently to meet the new patterns and demands created by social change." (12) If it fails to do so, "it will not long survive the revolutionary pressures which will be generated." (13)

Every Constitution, during the time of its framing and adoption, must incorporate the dominant socio-economic beliefs and interests with a view to making a compromise between conflicting view points of the framers of the Constitution. It may be worthwhile here to mention the observation of Dr. Charles A. Beard in 1913 who held the view that the American Constitution was mainly the result of economic demands. (14) He observed that the members who met at the Philadelphia Convention which drafted the Constitution "were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system ...". (15) The Constitution that was drafted and adopted "was essentially an economic document based upon the concept that fundamental private rights of property are inferior to government and morally beyond the reach of popular majorities." (16)

That economic considerations cause constitutional changes can best be illustrated from the American Constitution. When in 1787 the American Constitution was framed, the Congress was given the power to "regulate commerce" among several states. In the beginning, the Congress had nothing to do with the 'Commerce Clause' because most of the States were agricultural in character. But, with the advancement of industrialisation, inter-State Commerce became an important aspect of administration which ultimately gave the Congress the opportunity to exercise tremendous influence over the States through the mechanism of regulating Commerce and trade-relations of different States. This increase in the power of the Congress has brought about

corresponding changes in the balance of power between the Union and the States of the American federation. But this did not call for any constitutional change through the formal amending procedure provided for in the American Constitution.

In a similar way, under Section 91 of the British North America Acts, 1867-1960, the legislative authority of the Parliament in Canada extends to the following matters: the amendment of the Constitution of Canada subject to certain exceptions; the public debt and property; the regulation of trade and commerce; unemployment etc. In addition, under Section 95, the Parliament of Canada may make laws in relation to agriculture and immigration concurrently with Provincial Legislatures, although in the event of conflict, federal legislation is paramount. By the British North America Act, 1951, it was declared that Parliament may make laws in relation to old age pensions in Canada, but that no such law should affect the operation of any Provincial Laws in relation to old age pensions.

Apart from these basic forces, political parties in different countries take active part in changing the Constitution. But it is interesting to note that very few Constitutions of the world make explicit reference to the existence of political parties. The Constitutions of the Communist countries are exceptions in this regard. But the impact of political parties on constitutional changes are not same everywhere and under all political systems. In the United States, political parties have not only strengthened the executive, but also the Congress "in its battles with the executive and results in virtual  
(17)  
paralysis of American Government at certain times." In France,

under the Third and Fourth Republics, "the multi-party system weakened the cabinet." (18) Although the Constitution vested considerable powers on the executive, it failed to exercise these powers with resolution "because it could not count upon continuous or effective party-support" (19) It may be noted that in some other countries of Continental Europe, a multi-party system does not produce such great instability of government. It is a characteristic feature of the Government of Holland, Belgium and the Scandinavian countries that the parties are "readier to form a coalition government with greater security to tenure than that enjoyed by most French governments." (20) In a two party system, "it is common to find a cabinet in a stronger position relatively than in countries with a multi-party system." (21) Since the nature and functioning of political parties depend to a great extent upon the existing political system, "it is necessary to analyse the structure of parties to discover how much real cohesion and unity there is behind the facade." (22)

Apart from these tangible extra-constitutional factor, there is 'another factor, which, though not explicit, is of no lesser importance, i. e., the attitude of the people towards the Constitution. The Constitution, as an embodiment of ideals and objectives, can and should never be interpreted as an end itself. It is widely agreed that the Constitution is a means to an end --- a vehicle through which ideals can be translated into practice. It has been observed that "if a Constitution is regarded with veneration, if what it embodies is thought to be 'prima-facie' right and good, then there exists a force to preserve the Constitution against light-hearted attempts to change it. Though the formal process of amendment is there, it will be seldom and

hesitatingly invoked. The Constitution of the United States occupies such position in the eyes of the citizens." (23)

It is in this background that a discussion on the various mechanisms of amendment prescribed in leading world constitutions can be made. In order to appreciate their actual scope of operation, it is necessary to look back to those historical circumstances which were primarily responsible for bringing about the constitutional set up of the countries concerned.

## II

The Constitution of the United States "has turned out to be perhaps the most successful example in history of a legal

Amending Procedure  
in the U. S.

instrument that has served both as a safeguard of individual freedom and as a ligament of

national unity." (24)

The Constitution that emerged from the

Philadelphia Convention was a model of draftsmanship, of linguistic elegance, of brevity and of apparent clarity. Its provisions were built around several fundamental principles enshrined in the Declaration of Independence and upon these principles the American governmental system has since operated. So enduring and inspiring are these principles that the Constitution has, for nearly two centuries, withstood the onslaughts of time and has served the country in times of war and peace, in calm and crisis, without fundamental change.

With regard to the question of adopting the amending provision in the American Constitution, it may be recalled here that the draft amending process was finalised by the Committee of Detail

which was constituted during the later part of the Constitution framing process. (25) But it should be mentioned here that in the draft of the Virginia Plan, under clause 15, an amending procedure had earlier been provided. It read as follows:

"Resolved that amendments which shall be offered to the Confederation by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider and decide there on." (26)

The debate relating to the amending clause was taken up almost at the fag end of the session. (27) The provision in the draft "reported by the Committee of Detail -- that on the application of the legislatures of two-thirds of the States, Congress should call a convention for that purpose had been unanimously adopted by the Convention." (28) (29)

But one of the draftsmen wanted the move to be reconsidered because "he thought two-thirds of the States could thus commit the whole union to the dangerous innovation." (30) This move was generally welcomed by those "who desired an easier method of amendment, to render it possible for Congress to inaugurate amendments whether two-thirds of both houses should think it necessary." (31) It appears

that Mr. Gerry wished to require "the consent of all the States to adopt an amendment," (32) which failed to win support from Wilson who proposed to require the approach of only two-thirds. This interesting to note that the latter motion was defeated by a majority of one which prompted Wilson to bring forward a suggestion for a three-fourths requirement for the purpose. (34) (35) Another member wanted to put a

restriction on this clause with the purpose of making it compulsory that no amendment might be passed before 1808 "affecting importation of slaves or the restriction on direct taxes".<sup>(36)</sup> Although it was agreed on that day but on the fifteenth of that month it was provided that "when two-thirds amendments, they should be proposed by a general convention called by Congress." The rights of the States were sought to be upheld and protected by another member<sup>(38)</sup> who wanted to provide that "no amendment, at any time, should affect the internal police of any State without its consent and deprive its equal suffrage in the Senate."<sup>(39)</sup> Although the move was defeated, considering the resentments expressed by the representatives of the States at the Convention,<sup>(40)</sup> a motion was subsequently brought forward by another member, providing that no State should be deprived of an equal vote in the Senate. This was "agreed to without debate, no one opposing it, or on the question, saying no."<sup>(41)</sup>

It is worthwhile to mention that the Committee of Detail of Aug. 6., 1787, prepared a draft report of the Constitution. It contained in its Article XIX an amending procedure which stated: "On the application of the Legislatures of two-thirds, of the States in the Union for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."<sup>(42)</sup>

As has already been said, a specific time-limit, i. e. 1808, was sought to be imposed on the power of amendment by some of the Members, representing the Southern part of the territory, an elaborate provision was included in the Report, presented to the Committee on Style. It read as follows:

"The Legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by conventions in three-fourths thereof as one or the other mode of ratification may be proposed by the Legislature of the United States: Provided that no amendments which may be made prior to the year 1808 shall in any manner affect the 4th and 5th Sections or article the 7th.

Thus the process which started with the Virginia Plan came to an end with the final adoption of the amending provision in the Constitution of the United States. It is an example of compromise between two opposite views expressed by the 'Federalists' and the 'anti-Federalists' at the Convention. But a careful analysis of the American political process reveals the fact that formal amendments, though not unimportant, occupy a considerably less distinctive place than judicial decisions, statutes, executive actions and customs in developing the Constitution. But the framers of the Constitution prudently realised that future context of things and experience would need a change in the Constitution and accordingly, they provided for the process of formal amendment in Article V of the Constitution.

In the opinion of many observers, "the Constitution of the United States contains one of the most complex procedures for amendment."<sup>(44)</sup>

The process by which the Constitution can be

amended is divided into two parts: proposing an amendment and ratifying an amendment. There are two ways in which an amendment may be proposed:

- (a) by a two-thirds vote of both Houses of Congress: or
- (b) by a national Constitutional Convention called by Congress when petitioned to do so by the Legislatures of two-thirds of the States.

Again, it may be ratified by -----

- (a) the Legislatures of three-fourths of the States, or
- (b) special Convention in three-fourths of the States.

It has been observed that "although two methods of initiating amendments and two methods of ratifying them are provided all thus far adopted have been proposed in the same way: by joint resolution of the two branches of Congress." (45) It is interesting to note that the President has no role to play in the amending process. Amendments, not being legislative acts "are not officially submitted to him at all." (46)

But there have been attempts to bring forward amendment proposals by the alternative method of national convention. In many times, "the Legislatures of considerably more than two-thirds of States have called upon Congress to convoke a convention for the purpose." (47) One such move was launched in December, 1962, "to get the states to memorialize Congress to call a Convention for consideration of three amendments aimed at reducing the power of the Supreme Court and strengthening the power of the States." (48) One of those amendments sought to amend the amending process itself and to authorize two-thirds of the State Legislatures to initiate amendments without Congressional approval. (49) It may be recalled that a number of applications aiming

at convoking a Convention for a general reconstruction of the Constitution had been sent earlier by States. (50) Numerous instances of this kind can be cited from the period of nullification controversy of 1832 and from the period of Civil War of 1859-60. (51) It has sometimes been opined "that every request for a Convention made at any time by a State is to be regarded as pending indefinitely, and that whenever two-thirds of the States are found to have made such a request, Congress ought forthwith to call a Convention." (52)

Whether a particular amendment shall be acted upon by State Legislatures or by Conventions will be determined by the Congress. Prior to the Twenty-first Amendment of 1933, the legislative method was generally used. (53) Conventions are considered better because these are composed of for a particular purpose, i.e. to consider an amendment proposal.

It is interesting to note that if a proposal fails to get the requisite majority, it is never officially announced as rejected; it is considered to be remaining before the States indefinitely. (54) Because of the terms laid down therein, four out of the last six amendments "were to become operative only if ratified within seven years. (55) How long an amendment shall be considered pending is to be determined by the Congress. The Supreme Court considers this to be a political question. (56) In this connection, it may be mentioned that a Child Labour amendment which was submitted in 1924 is regarded by many as still "alive". (57) Congress has declared that a State, once having ratified an amendment, "can not reverse its action." (58) Finally, it has been decided that ratification must be made by the State Legislatures or Conventions and "not by the people acting directly." (59) It may be recalled here that in 1918 the State

of Ohio amended her Constitution to provide that voters should be given an opportunity through referendum to consider an amendment proposal. But the U.S. Supreme Court declared the procedure (60) invalid.

The total number of amendments actually endorsed by the two Houses is only 29 and the number ratified by the States only 24. It has been rightly observed that "it would hardly be erroneous, to say that the Constitution really has been amended only 14 times, because the first the amendments were, to all intentions and purposes, part of the original plan promised to many state ratifying (61) bodies."

It has been stated that "the successful use of the amending process has been episodic." (62) The first amendments were passed soon after the Constitution became operative in order to enumerate the Bill of Rights of the citizens. The Eleventh Amendment was passed in 1798 to provide that thereafter "a State could not be sued by a citizen of another state or nation in the national (63) courts." The Twelfth Amendment was necessary to change the (64) method of voting for President and the Vice-President .

In the Civil War period, the Republican Party tried to protect the rights of the Negroes by three amendments "aimed at prohibiting slavery, preventing discriminatory State-actions against the freedmen, and at forbidding the denial of the vote to them (65) because of their colour or previous condition of servitude." Again, during the period of Woodrow Wilson, four other amendments were added. Of these, the Sixteenth Amendment relating to income-tax, is considered to be most important. It was aimed at "reversing a

Supreme Court decision of 1894 which had held such taxation to be direct and therefore, subject to the apportioning requirement of the Constitution." (66) Two other amendments were passed in order to make provisions for electing the Senators directly by the people and removing discriminatory barriers against woman suffrage. (67) The last amendment which was passed during this period aimed at stopping the manufacture and sale of alcoholic beverages. (68) Again during the long tenure of President Roosevelt, the Constitution underwent a change in 1951, to limit presidential tenure to two terms. (69) In recent times, two amendments have been passed, viz., the Twenty-third Amendment in 1961 and the Twenty-fourth in 1964. The Twenty-third Amendment has granted the residents of Washington, D.C., the right to vote in the Presidential elections and the Twenty-fourth was "aimed at tax-paying qualifications for voting in national elections" and was "primarily intended to get rid of the poll-tax requirements of five southern States." (70)

A number of proposed new changes in the Constitution has been brought about and the Congress has been urged to adopt amendment resolution: (1) granting equal rights to women; (2) changing the method of counting the electoral vote in Presidential elections; (3) providing for Presidential disability and succession; (4) forbidding national intervention in State-schemes of legislative appointment; (5) limiting the amount of income that may be taken by taxation; (6) changing the treaty-making procedure by making it easier to ratify-treaties, by increasing Congressional control of executive agreements and by limiting the subjects on which treaties might be negotiated; and (7) creating a court of the Union

made up of 50 States Chief Justices to hear appeals from certain decisions of the Supreme Court of the United States. (71)

With regard to the amending process, Madison held the view that it guards "equally against the extreme facility which would render the Constitution too mutable and that extreme difficulty which might perpetuate discovered faults." (72) But Chief Justice Marshall characterised the amending process as "unwieldly and cumbrous." (73) On the other hand, there are persons who believe that the amending process can be criticised on the ground that it is too easy. The speedy ratification of the Eighteenth Amendment led many to believe that "in point of fact the amending process was easier than it ought to be." (74) Further it has been alleged that the system is not sufficiently democratic because there is no provision for direct popular initiation of amendments. (75)

Apart from the fact that the entire amending process is controlled by the Congress, it has been held that any 13 States can defeat an amendment and "13 could be listed which together would have hardly one twentieth of the total population." (76)

An analysis of the amendments done so far will point to the fact that "most of them have been unnecessary." (77) Cf all the amendments, only "seven or eight ... are truly significant!" (78) It may be observed that Ninth, Tenth, Eighteenth and Twenty-first Amendments are "superfluous" (79) and their objectives could be achieved "in another way" (80) without taking resort to the formal amending procedure.

III

According to Paul Gerin Lajoie, Canada does not possess any constitutional document called the "Constitution" or "the Constitution Act." (81) But this does not seem to be a correct

Amending procedure  
in Canada

appreciation of the nature of the Canadian Constitution. The British North America Act is the written part of the Constitution and constitutes its original and basic written document. It is the instrument that created the Dominion of Canada by uniting the four original Provinces and binds together in perpetual common ties the ten Provinces which to-day, make the federation of Canada. Since the British North America Act was designed to bring unity into the diversity of the new nation, it contains the scheme of distribution of powers between the Dominion and the Provinces and the organisation of governments at both the levels.

The British North America Act is accordingly, the pivot on which hinges the Constitutional framework of Canada. It is written and fundamental though the document is not comprehensive. At many points, it is silent on vital matters such as the exercise of executive power and its relation to the legislature, and at others, when it goes into details, they are given such way that they become ambiguous if not sometimes misleading. The explanation of this peculiarity is essentially due to the contents of the Preamble which states that it was the desire of the original provinces to be united with a Constitution similar in principle to that of the United Kingdom, and accordingly, many of the usages and conventions of government that have been developed in Britain over centuries

are followed in Canada. The Cabinet system of responsible government as developed in Britain obtains in Canada, although no mention thereof is made in the British North America Act.

From this analysis, E.A. Driedger, Deputy Minister of Justice and Deputy Attorney General of Canada concludes that "in Canada there is no document that purports to set out the complete laws pertaining as in the case of the United Kingdom consists in part of the written material and in part, in conventions or customs." (82) He categorizes the Constitution of Canada 'in its broadest sense' to include:

- a) Statutes of the United Kingdom, e.g., British North America Acts Statute of Westminster, 1931, Parliament of Canada Act, 1875.
- b) Statutes of Canada, e.g., Senate and the House of Commons Act, Canada Elections Act, Representation Act, North West Territories Act etc.
- c) Statutes of Provinces, e.g., Acts relating to the Executive Council, the Legislature, Representation and Election.
- d) Other Documents, e.g., Instructions to Governors and Letters Patent. (83)
- e) Conventions.

It has been asserted that the development of the Constitution in Canada was possible by five chief methods. These are:

- (1) Formal amendment of the British North America Act.
- (2) Legal amendment authorized by the British North America Act.
- (3) Acts of Parliament and orders-in-Council
- (4) Conventions. (84)
- (5) Judiciary.

But the British North America Act, unlike the Commonwealth of Australia Constitution Act contains no amending clause whatever. The reason for this omission from the Act is not clear "although it may be supposed that a British Statute appeared to be normal instrument through which another British Statute might be changed."<sup>(85)</sup>

Because of the absence of this formal amending procedure "no one knows exactly how many times it has been amended."<sup>(86)</sup> It has been observed that "the people of Canada have so far (1962) been unable to decide what method of amendment they would like to have inserted in the Act, and no action can be taken until they somehow contrive to make up their minds."<sup>(87)</sup> It may be pointed out here that "ordinary British Statutes may also be part of the Canadian Constitution and yet be formally quite unrelated to the British North America Act."<sup>(88)</sup> Since 1867, as many as seventy-five British Statutes<sup>(89)</sup> have been passed which are applicable to Canada directly or indirectly. Again, since 1931, an amendment passed by the British Parliament has become very easy. It has been declared that "no act of the British Parliament extends to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that the Dominion has requested and consented to, the enactment thereof."<sup>(90)</sup> Of all the British Statutes, the Acts of 1871, 1875, 1886, 1889, 1895, 1907, 1915, 1916, 1930, 1940, 1943, 1946, 1949 (Nos. 1 and 2), 1951 and 1960 are most important.<sup>(91)</sup> But it is to be mentioned here that all the amendments do not carry equal value and significance in the context of Canadian political system. Dawson has classified all these amendments into three categories.<sup>(92)</sup>

- (a) Amendments passed to clarify the powers granted by the British North America Act. (Nos. 1, 2 and 5).
- (b) Amendments of only temporary duration (Nos. 8 and 11)
- (c) Amendments which have made substantial changes in the Act (Nos. 1, 2, 3, 4, 6, 7, 9, 10, 12, 13, 14, 15, 16 and 17).

One remarkable feature of the amendments done that no amendment was made to change the sections dealing with financial grants to the provinces. <sup>(94)</sup> Since 1869, "the financial provisions have proved in practice to have been the most flexible of all the clauses of the British North America Act." <sup>(95)</sup>

The British North America Act 1867, gave to the Canadian Provinces the power to amend their constitutions, except as regards the office of the Lieutenant Governor, <sup>(96)</sup> but the same power was not conferred on the federal Parliament. Amendment to the federal Constitution thus could be made only by the British Parliament and this was done on address to the Sovereign from both Houses of the Canadian Parliament. In 1949, the British North America Act was passed in accordance with a request made by the Canadian Senate and the House of Commons, so as largely to remove this disability. Section 91 now empowers the Parliament of Canada to legislate with respect to Constitutional matters and amend the Constitution of Canada, except as regards the legislative authority of the Provinces, the rights and privileges of the Provincial Legislatures and Governments, schools, the use of the English and French languages and the duration of the House of Commons.

Under this authority, one amendment was passed in 1962. In this Act, the Dominion government proposed to fix the age of seventy-five for the retirement of the Senators <sup>(97)</sup> "but the amendment was

not proceeded with because of the dissolution of Parliament." (98)

At present, therefore, the Constitutional laws for Canada may be made by the Parliament of Canada, by the Provincial Legislatures or by the Parliament of the United Kingdom. There has, however, been an earnest effort in Canada to find out a suitable method of amending the Constitution of Canada in Canada and thereby to remove the stigma that it is the only country among the independent nations of the world that does not possess the complete legal power to amend its own Constitution. This issue has been discussed in various conferences. In December, 1961, the Conference of the Attorneys - General worked out a draft amending formula which was transmitted to the Provincial Governments for their consideration. (99) But no firm decision has been taken with regard to this vital issue.

#### IV

But the amending procedures contained in the Constitutions of Switzerland and Australia display the same characteristics. In both the Constitutions, devices like referendum, initiative and recall-have been incorporated in the Constitutions.

Constitutional  
revision in  
Switzerland.

The new Constitution of Switzerland which came into operation on May 29, 1874, gave to the federal government centralized control over military matters and the initiative in unifying certain matters of commercial law. From 1874 to 1962, as many as 126 plebiscites took place in Switzerland on constitutional matters. (100) Of these, sixty four were referenda on Constitutional amendments submitted to the people by the general legislature. (101) It is to be noted that out of these 64 referenda, 49 were accepted. (102) Out of the remaining

plebiscites, 49 were proposals for amendment of the Constitution which were presented on the initiative of fifty thousand voters. (103) But only seven out of these forty-nine were accepted by the people. (104) Again, in thirteen cases, the general legislature offered proposals as substitutes for those initiatives taken by the people. (105) In actual practice, only <sup>five</sup> proposals were accepted. (106) The procedure for constitutional amendment is definitely rigid and difficult but the attitudes of the people towards Constitutional amendment are flexible. (107) The people of Switzerland have always been "ready to use an amending process which, from its careful safeguards, might have proved a conservative and obstructive force, to adapt their Constitution to what they conceived to be the needs of their time." (108)

There have been two proposals since 1874 for total revision - in 1880 when partial revision by petition of fifty-thousand was not recognized, and a project of Swiss Nazis, right-wing Catholics, and other in 1935. Both were rejected. A really piquant situation would arise if the decision for total revision were at any time accepted. It is difficult to see how under the stress of modern conditions the Assembly could neglect its own normal business for the long period necessary to work out the text of a new Constitution. It has, accordingly, been suggested that a separate Constituent Assembly be elected, if the total revision was ever decided upon.

There have been numerous partial revisions. But comparatively few of these have altered the Constitutive parts of the Constitution; the vast majority have extended the competence of the Central Government, particularly in restriction of the freedom of trade and industry. Other amendments impose upon the citizens the

exacting standards of morality in matters of drink, gambling etc. Amendments to constitutive parts the Constitution include Popular Constitutional Initiative, 1891, Administrative Jurisdiction and Delegation to Departments, 1914, Proportional Representation, 1918, Treaty Referendum 1921, altering the number of inhabitants per National Councillor 1931 and 1950, raising the term of the office of National Councillor and hence of Federal Councillor and Chancellor to four years 1931, rules declaring 'arretés' urgent amending Art. 89 in 1939 and 1949. Among the amendments which extend Federal Competence may be particularly noted the Federal Civil and Penal Code Articles of 1898 and the Economic Articles of 1947.

The constitutional development in Switzerland has been made possible only through the formal amending process. There is no growth through judicial decisions and precedents because of the absence of the system of judicial review. The Federal Tribunal cannot declare 'ultra-vires' a law of the Federal Assembly. An initiative proposal to invest the Federal Tribunal with power to review legislation was rejected in a referendum in 1939. Hans Huber who himself was a Judge of the Federal Tribunal, remarked that the Swiss people "saw in the judicial examination of Constitutional law an infringement of democratic principles."<sup>(109)</sup>

Another fact to be noted in this connection is that it is "easier for the Swiss people to amend their fundamental law than their ordinary statute against the will of a hostile Parliament"<sup>(110)</sup> This is due to the fact that the Swiss people have no power of initiative in the matter of ordinary legislation. They can, on a

petition of 30,000 citizens, demand a referendum on any federal law or decree, but they can never directly provoke the adoption, repeal or amendment of a law by the Federal authorities. The proposals for constitutional amendments in Switzerland have, therefore, been made by the people as frequently as by the Federal Council and the Federal Assembly.

V

The present Constitution of Australia is to be found in the Commonwealth of Australia Act, 1900. It came into force on January, 1901. It is provided in the Constitution of Australia under Art 128 that a rigid and difficult procedure will have to be followed when effecting an amendment to the Constitution.

Any law proposing an amendment will have to be passed by an absolute majority in both Houses and must be submitted to the electors of the House of Representatives in each state to vote upon it. If any such law is passed by one House and rejected by the other, and is passed again by the same House after the passage of three months or in the next session, the Governor-General may submit it, either with or without amendment by the House which objects to it, to a referendum. If it is accepted by a majority of voters in a majority of States and by a majority of all the voters voting, it becomes a law. But if the proposed amendment is vitally concerned with the interests of a State, it will have to be approved of by a majority of electors voting in that particular State.

Amending procedure  
in Australia

The system of constitutional amendment which is substantially the same as the Swiss, "was borrowed from Switzerland." (112) On twelve separate occasions from 1901 to 1963, constitutional amendments were submitted to the people. (113) The following are the years when they were submitted - 1906, 1910, 1911, 1913, 1919, 1926, 1928, 1937, 1944, 1946, 1948 and 1951. (114) But only four out of these twelve proposals were passed by the requisite majority. (115) The first one, passed in 1906 altered the date of the elections to the Senate; (116) the second adopted in 1910 authorised the Commonwealth to take over state debts irrespective of the date of such a contract; (117) the third amendment was passed to validate the Financial Agreement of 1927 (118) and the fourth amendment of 1946 established the power of the Commonwealth to legislate upon certain categories of social service. (119)

But it is to be noted that the successive proposals which were made since 1911 with a view to increasing the powers of the Commonwealth had been rejected. (120) In 1911, the proposals relating to empowering the Commonwealth to deal with trade and commerce without restrictions, was rejected by a majority of all the electors voting and by a majority of the electors voting in all the States except Western Australia. (121) In 1913, another set of similar proposals met with the same fate. (122) Again in 1926, all attempts to increase the Commonwealth's power with regard to the settlement of industrial disputes were rejected by the majorities of all the electors. (123) In 1937, proposals to increase the power of the Commonwealth in regard to marketing and aviation experienced the same fate. (124) Again, in 1944, all proposals aimed at giving the Commonwealth powers in all important economic and social affairs were accepted partially

but not fully. <sup>(125)</sup> In, 1951, another proposal which were made to empower the Commonwealth to deal with communism was rejected by a majority of all the electors and by majorities in each of the three States. <sup>(126)</sup>

From the foregoing discussion it is clear that, with the exception of the proposals of 1910, 1928 and 1946, each of the proposals to extend the power of the Commonwealth has been rejected. <sup>(127)</sup> Of course, the Commonwealth has gained enormous powers in other fields of administration not by amendments, but by constitutional practice. It has been observed that "the majority of the Australian electorate, in so far as it has expressed its views upon the matter in referendum has been, in general, opposed to the encroachment of the Commonwealth upon the sphere reserved by the constitution to the States." <sup>(128)</sup>

## VI

Of all the countries of Europe that have written Constitution, France is perhaps the only country which has seen many ups and downs in the sphere of constitutional development. It may be recalled that before the French Revolution, France had an autocratic government. After the execution of Louis XVI in 1793, monarchy was abolished and France became a Republic. In Amending procedure in France. 1799, Napoleon usurped power. In 1804, he declared himself Emperor and he continued to occupy that office till 1814 when he was overthrown. The Bourbons were restored till they were ousted in 1830. Louis Phillips ruled from 1830 to 1848. A

republican Government was set up in France in 1848 but the same was superseded in 1852 when Louis Napoleon declared himself Emperor III. He was overthrown in 1870 after his defeat in the Franco-Prussian war. After his overthrow, the third Republic was proclaimed in 1870.

It took five years for the people of France to frame their Constitution which came into force in 1875. The National Assembly "had full power to amend the Constitution as it might decide except that, by a law of 1884, the abolition of the Republic could not be the subject of a proposal for revision." (129) In actual practice, during its existence of long sixty years, the National Assembly under the Third Republic "made very few changes in the Constitution." (130) On 10th, July 1940, the Chamber of Deputies and the Senate met jointly at the National Assembly at Vichy and adopted the following resolution:

"The National Assembly grants all power to the Government of the Republic under the authority and signature of Marshall Petain with a view to promulgation, through one or more acts, a new Constitution for the French State." (131)

On July 11, 1940, Marshall Petain assumed the functions of the Head of the French State and suspended the Constitutional provisions relating to the election of the French President and assumed the power of appointing and removing Ministers and Secretaries of State. They were made responsible to him and not to the Legislature. The provisions relating to the meetings of the Chamber of Deputies were repealed. A kind of dictatorship was set up in France. However, during the Vichy Regime, a resistance

movement was started in France. General de Gaulle started the Liberation Movement. In September, 1941, a Free French National Committee was set up and it was given the power to act for Free France. On August 25, 1944, the German forces in France surrendered and General de Gaulle became the head of the Provisional Government. On August 17, 1945, the French Government issued an ordinance outlining the electoral law under which the Constituent Assembly was to be elected. The Constituent Assembly met on November, 6, 1945 and passed by 309 votes to 249, the Bill which defined a new Constitution for France. This draft Constitution was rejected by the people of France in May, 1946. A new Constituent Assembly was elected in June, 1946 and a new Constitution was prepared. The new Constitution, having been ratified on October 13, 1946, was promulgated on October 27, 1946. (132)

The Constitution of the Fourth Republic remained in force from 1946 to 1958. The procedure for constitutional amendment covered six Articles (Arts 90-95). (133) According to these clauses, a resolution proposing an amendment was passed by absolute majority in the National Assembly, or Lower House; the proposal must be in specific terms and could originate only with the members of the lower branch. Next for advisory purposes, the resolution was sent to the Council of the Republic, or Upper Chamber; and after three months (sooner if the Council had acted promptly and favourably), a second reading took place in the Assembly. Finally, if this stage was successfully passed, a bill incorporating the amendment would be placed like an ordinary law; and if there was either a two-thirds affirmative vote in the Assembly on second reading or a three-fifths

vote in both Houses on final passage, the amendment was considered adopted and ready to be proclaimed by the President of the Republic. If, however, neither of these conditions had been met, the final fate of the proposal was determined by a popular referendum which, of course, introduced a feature quite unknown to the old system. The Bill was to be promulgated as a Constitutional law within eight days after its adoption. (134)

An analysis of the procedure reveals the fact that it was a more difficult procedure than the one provided in the Constitution of the Third Republic. It will be observed that, in the final analysis, all that was really necessary for any affirmative action was a two-thirds vote in the National Assembly; the upper branch had a chance to ease the process a bit by giving the proposal of a three-fourths vote, but what it did, or whether it did anything at all, did not matter so long as two-thirds could be mustered in the Assembly, whose will prevailed except only as it might be frustrated by a referendum it held. But there were at least three express limitations on the amending power, namely, (1) no revision could be undertaken at any time when any part of France remained under foreign occupation; (2) as under the 1884 amendment to the Constitution of the Third Republic, no proposal changing the republican form of government could be undertaken and (3) no amendment threatening the existence of the Council of the Republic might be adopted without either concurrence of that body itself or resort to a referendum.

But the Fourth Republic in France was faced with a very serious crisis in May, 1958. The revolts in Algeria and Corsica saw the complete breakdown of the Constitutional system in

the country. With the suppression of the revolts, a draft Constitution was prepared and submitted for the referendum of the people. On Sept. 28, 1958, the Constitution of the Fifth Republic was adopted and on October 7, 1958, it came into force. It is regarded as a personal victory for the General because he was able to mobilise the French voters in support of "a plebiscital, authoritarian, presidential system, with Parliament an appendage, and the Cabinet a merely executory body of the will of the President." (135)

Thus, the Fifth Republic has established a stronger executive led by the President and a debilitated Parliament which the President "can dissolve at will and whose opportunities for striking back have been whittled down far below the most supine level of British Parliament, let alone the American Congress." (136) Thus, the French system represents, to quote Prof. Wheare, "a curious hybrid of Parliamentary and presidential executives." (137) But "during its early years, the Fifth Republic hesitated at the cross-roads." (138)

The Government under the Fifth Republic has "the right to reject all amendments" and it can "demand a single vote on its own text with only those amendments that it accepts." (139) This procedure is known as "vote bloqué". (140) It has been observed that this system was "necessary . . . . if the new system of government were to function effectively." (141)

Art. 89 of the Constitution of the Fifth Republic provides for the procedure of constitutional amendment. The article states that the initiative for amending the Constitution shall lie with the President of the Republic on the proposal of the Prime Minister and the members of the Parliament. The Government or

Parliamentary Bill for amendment, must be passed by the two Assemblies in identical terms. The amendment shall become effective only after approval by a referendum. The proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress. In that case, the proposed amendment shall be deemed to be approved only if it is accepted by a three-fifths majority of the votes cast. The Republican form of Government in France shall not be the subject of amendment. (142)

During the first term of General de Gaulle, at least three referendums were held. (143) The first referendum, held on January, 8, 1961, related to the question of allowing self-determination in Algeria. (144) The second one of April, 1962 was concerned with the question of approval of the Evian agreements with the FLN and full powers to the President to bring them into force. (145) A special session was convened "to approve the Bill which was passed without any vote because the Government made it matter of confidence and no censure motion was proposed." (146) Again in the October referendum on direct election of the President "de Gaulle chose not to use article 89" (147) which deals with the amending procedure. Such a move was again made in 1969 by de Gaulle. (148)

## VII

Constitution-making in West Germany "started with an agreement reached by six Western countries (U.S., U.K., France, Belgium, Netherlands, Luxembourg) in London on June, 1948." (149) The Bonn Constitution is thus called "the result of compromise between the Allies and the German parties." (150)

The amending procedure has been elaborately dealt with in Art. 9 of the Constitution. (151) Under the Bonn Constitution, amendments can be passed "by concurring two-thirds majorities in both houses." (152) For this, it has become Amending procedure in West Germany. important for the Chancellor "to control not only a simple but a qualified majority in the Bundesrat as well as in the Bundestag." (153)

Any amendment directed to change the federal structure as such has been made unconstitutional and illegal. (154) Not only that, the basic principle of the participation of the Laender in the legislative process and the principles laid down in Articles 1 and 20, can not be altered. (155) But such "unalterable guarantees" failed to preserve their character "when exposed to serious political pressure, inviting either their revolutionary overthrow or freezing desirable constitutional evolution." (157) In normal times, these may be regarded as "a warning sign beyond which the legislator may not drive." (158) Amendments to the constitution are permissible "only if the text of the Constitution is explicitly and simultaneously amended." (159) This provision has been incorporated "to terminate once and for all the nefarious practice of silent ( or clandestine) amendments merely by qualified majorities of the legislature that had been the usage under the Empire and Weimar and contributed much to depriving the Constitution of its sanctity." (160) As a package on March 19, 1956, as many as fifteen amendments became effective. (161) Most of them were passed to empower West Germany "to create a national military establishment and to exercise the security function which had previously been reserved to the

Constituent states".<sup>(162)</sup> In 1960, the Ministry of Interior presented a draft amendatory law "authorizing the Federal Government to deal with states of emergency."<sup>(163)</sup> Thus, it has been correctly observed that "the historical circumstances surrounding the Basic Law of the Federal Republic of Germany are reflected in its provision for amendment."<sup>(164)</sup>

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