CHAPTER - V

COMPARATIVE STUDY OF AMENDING – PROCESS IN
DIFFERENT FEDERAL CONSTITUTIONS

Having discussed broad features of federal constitution, position of Amending Process in Federal Constitution and maintenance of Fundamental Rights in Federal constitution, it would be in the fitness of things to take up the special features and incidents of amending process of different federal constitutions from the point of view comparision.

The constitution of United State of America, Switzerland, Australia, Canada, West Germany, South Africa, Yugoslavia, U.S.S.R., India, Malaysia and Nigeria etc. would be called as federal constitution, because they have written rigid constitutions for they are intended to be supreme over the Legislatures - General and Regional - which they create or recognise and they can not be altered by these legislatures acting through the ordinary process of legislation.

The simplest way to grasp the distinction between flexible and rigid constitutions is to consider
how rigid constitution have, most commonly, come into
eexistence. In most cases they have been born of the
deliberations of a special body called constituent
Assembly. The business of such a body is not to enact
ordinary legislation but to devise an instrument of
government within the limits of which the ordinary
legislature shall function. The constituent Assembly,
knowing that it will disperse and leave the actual
business of legislation to another body, attempts to
bring into the constitution that if promulgates as many
guides to future action as possible. If it wishes as it
generally does to take out of the hands of the ordinary
legislature the power to alter the constitution by its
own act, and since it can not possibly foresee all
eventualities, it must arrange for some method of
amendment.

All Federal constitutions like, U.S.A.,
Australia, Switzerland, Canada, South Africa, West
Germany, U.S.S.R., Yugoslavia, India, Malaysia and Nigeria
have been drafted by the constitutional Assembly and they
clearly lay down specific method of amendment under the
provisions of their constitutions.
If their constitution have prescribed specific method of amendment, they may be called rigid federal constitution. In support of this contention, C.F. Strong rightly observed:

"The constitution which can be altered or amended without any special machinery is a flexible constitution. The Constitution which require special procedure for its alteration or amendment is a rigid constitution."

James Bryce expressed the same view in the following words:

"Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers had discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend or usage may modify, the

express provisions of the apparently immovable and inflexible instrument.  

Similarly K.C. Wheare observed:

"... Whether such excessive rigidity and conservation, if it exists, is an inevitable consequence of a federal system."

A Federal constitution is called rigid or controlled constitution, because it requires special procedure for its alteration or amendment. Rigid constitution is one which enjoys an authority superior to that of the other laws of the state and can be changed only by a method different from that whereby those other laws are enacted or repealed. It can be changed only by a special procedure which is usually laid down in the constitution.

COMMON FACTORS OF THE AMENDING PROCESS IN FEDERAL CONSTITUTIONS:

Despite minor variation in the amending process of various constitutions, there are certain common

factors which are invariably present in all the Federal constitutions. They may be briefly summerised as follows:

In all the federal constitutions, there is a written constitution, which is known as a Supreme Law or Basic law or Fundamental law of the country, which has a fixed prescribed method for the amendment.

Generally, such amending process of federal constitution is differ from the ordinary legislative process.

The next common factor is that amending process which is given in the hands of legislative body, though it may be federal legislative body or State legislative body or mixed form of the both bodies.

In amending process, generally, there are two stages for the amendment first is initiating of a proposal for the amendment and second is ratification of that proposal.

Lastly, given amending process is strictly followed by the amending body in the Federal constitution, if it is not followed strictly then it may be declared void.
An analysis of the relevant provisions of the various federal constitutions such as U.S.A., Australia, Switzerland, Canada, South Africa, West Germany, U.S.S.R. Yugoslavia, India, Malaysia and Nigeria indicate that aforesaid factors are invariably present in them.

**VARIETY OF AMENDING PROCESS IN FEDERAL CONSTITUTIONS:**

Though all Federal constitutions have some common elements in them, yet they are not same in form and manner. There are various methods of amending process in federal constitutions which may be classified in the following categories:

I. Amendment by amending body.
II. Power of initiation.
III. Power of Ratification.
IV. Amendment by special majority.
V. Amendment by Simple majority.
VI. Participation of Federal units.
VII. Participation of People.
VIII. Participation of Executive Head.

I. Amendment by Amending Body:

Constitution is a will of the people, which is drafted by the representatives of the people, and it is
generally known as a constituent body or constituent Assembly. The main function of the body is to establish a constitution, on the other hand there is another body which is known as a 'Amending Body', the function of this body is to amend the constitution in pursuance of given constitution-amending process.

On the above basis some writers differ to these powers, namely, constituent power and amending power. Carl J. Friedrich distinguished to these powers in the following way:

"The constituent Power, is the power which seek to establish a constitution ...... from this constituent power must be distinguished the amending power which changes an existing constitution in form provided by the constitution itself."4

Thus, it may be said after the drafting of the constitution, amending power is vested in the hands of amending body not in constituent body or constituent Assembly. Before the Indian Supreme Court, in Golak Nath case5 question. arose that parliament can amend the fundamental rights which is given in Part-III of the Constitution? Then Supreme Court, in its majority opinion held that parliament cannot abridge or take away the fundamental rights. If it wants to do so then, it has to call constituent assembly. The whole matter in the words

of Justice Hidayatullah:

"Just as the French or the Japanese etc., cannot change the articles of their constitution which are made free from the power of amendment and must call a convention or a constituent Body, so also we in India cannot abridge or take away the Fundamental rights ....... a fresh constituent Assembly must be invoked.

Supreme Court in Kesavananda case overruled to Golak Nath case and held that Parliament has power to amend each and every provision of the constitution and there is no necessity to call constituent Assembly. Mathew J. said there is no necessity for convoking a constituent Assembly because:

"I think it might be open to the amending body to amend article 368 itself"

Similarly, Chandrachud J. observed:

"In the controlled constitution like ours ordinary powers of legislatures do not include the power to amend the constitution because the body which enacts and amends the constitution functions in its capacity as the constituent Assembly. the Parliament

6. Ibid at P. 1705 (Para 163) Hidayatulla J.
8. Ibid at P. 1927
performing its functions under Article 368 discharges these functions not as a parliament but in a constituent capacity."

Thus, there is difference between constituent assembly and Amending Body. The Power of Amendment has been given in the hands of Parliament under Article 368 than there is no necessity to call constituent Assembly; so majority of Kesavananda Bharti case\(^7\) overruled the Golak Nath case.\(^5\)

In the Federal constitution Amending powers are generally given in the hands of legislative body, though it may be Federal Legislative Body or Regional Legislative Body or in both. In some Federal constitutions with the federal and Regional Legislative bodies the voice of people is also associated.

In the following federal constitutions power of amendments are exclusively vested in the hands of Federal or Central Legislative body:

In the constitution of U.S.S.R. the power of amending the constitution is exclusively vested in the Supreme Sovit of U.S.S.R. and the Union Republic or their legislatures have no share in Amending Process.\(^10\)

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9. Ibid Justice Chandrachud at P. 2038
10. See constitution of U.S.S.R. Art 174
In the constitution of West Germany Amending power is given in the hands of Central legislature.11

In the constitution of Malaysia the power of Amending the constitution is vested in the hands of Federal legislature.12

Constitution of South Africa also provides that "Parliament may by law repeal or alter any of the provisions of this Act......"13

In India, excepting to certain provisions14 of the constitution, Central Parliament can amend each and every provision of the constitution and there is no necessity of State Legislature's consent.14

In the Canada Act 1982, under section 44 Federal legislature has a exclusive power of amendment likewise under Section 45 state legislatures also have a exclusively power of amendment. Excepting to above both

11. See Constitution of West Germany Art. 79.
provisions Amending Powers have been given in the hands of Federal Legislature with the association of State Legislature.\textsuperscript{15} Amend\textsuperscript{\textdagger} may be taken place after the joint effort of Federal and State Legislatures.

Thus in the constitution of U.S.S.R., West Germany, South Africa, Malaysia, and India, amending powers are given in the hands of Federal legislative or Central Legislative body exclusively and there is no voice of State Legislative Body or voice of people directly.

On the other hand, in the following federal constitutions, Amending Powers have been given in the hands of Federal Legislative with the Association of State Legislative Bodies. Both federal as well as Regional Governments have their voice in the amending process:

In the U.S.A., the Amending Process provided in the constitution requires a joint endeavour by the Federal and the associating units.

\textsuperscript{15} See Canada Act 1982 - Section 38, 41, 42 & 43.
Under Article V of U.S.A. Constitution there are two methods of amendments; first method is amendment through congress and second method is amendment through the convention.

Under the first method, amendment of the constitution may be proposed by the congress and proposed amendment must be subsequently be ratified by the State Legislatures.

Under the second method, the state Legislatures may request congress for summoning a constitutional convention. Congress shall thereupon do so, having no option to refuse and the convention when called shall draft and submitted amendments. Then convention may be called in the several states and it may be ratified by them.

In U.S.A. there is provision of the convention, but there is no method for composing to this body. On this point James Bryce said:
"Though there is method of convention for amendment but no provision is made as to the election and composition of the convention, matter which would therefore offens to be left to the discretion of congress." 16

Though convention method of amendment has been given in the constitution of U.S.A., but on all the occasions on which the amending power has been exercised first method of amendment has been employed and no drafting conventions of the whole union or ratifying conventions in the several states have ever been summoned.

Convention method of U.S.A. was not adopted by other countries, because this method not get success in its own country and it is a very long and slow process of amendment. In convention both legislative bodies federal as well as states take place and form a new amending body which takes too much time. The same thing may be done without forming a separate body, through the ratification of state Legislature as is done in First method so it is avoided by all the other countries. So Frederic A. Ogg and P. Orman Ray rightly called it as a "An unused device". 17

In the original constitutional Act of Canada there was no amending process, it could not be amended otherwise than by the British Parliament. But by the enactment of Canada Act 1982, the British Parliament has now adjured all its authority over Canada and has made elaborate provisions for amending the constitution of Canada.

Excepting to certain matters, amending power is given in the hands of Federal and Provincial legislative bodies, unanimous consent of the legislatures of the Federation and the Provinces is required for making amendments to the matter specified in section 41 and in relation to Section 38 ordinary consent is required by the both legislative bodies.

Constitution of Nigeria 1979 also lays down a special procedure for amending the constitution and Amending powers have been given in the hands of federal Legislative body with the association of state. No amendment can be made unless offered by the States.

18. See Canada Act 1982 Section 38 and 41.
18.a. See Canada Act 1982 Section 44 and 45.
19. see Constitution of Nigeria 1979, Section 9.
In the Indian constitution, under the article 368(2), for the amendment of certain provisions state legislatures are associated with the Central Legislative body. No amendment take place without the assent of State Legislature.

Thus, constitution of U.S.A. Canada, India and Nigeria are the best Example of a joint endeavour of centre and associating units.

On the other hand in the constitution of Australia, Nigeria and Switzerland with the federal Legislative and state Legislative People are directly associated in amending process, in form of Referendum.

Australia and Switzerland are the best example of those constitutions in which people are directly implicated in amending process of the constitution. In such process a amending bill is at first passed by Central Legislature, then it is approved by the State Legislatures, after the it is submitted for the approval of the people.

Thus, it may be submitted that in the Federal Constitution, Amending Power is vested in the hands of Legislature, with the Federal Legislative body, state and legislative bodies, people are directly associated with.
Now question is that when legislative body performing the work of constitutional amendment at that time is it a constituent body or ordinary legislative body? And result of its function is called ordinarily law or constitutional law?

When the legislative and constituent powers are vested in different bodies then there is no dispute, but even when they vested in the same body of men, the distinction between legislative and constituent power or the distinction between ordinary and constitutional law making power become a matter of dispute.

On this point Writer like C.F. Strong said:

"..... Whenever such matters (Matter for the amendments) are in future to be considered, even though that assembly be nothing more than the ordinary legislature, acting under certain restrictions" 20

Subba Rao C.J. in Golak Nath case relied on McCawley Vs. the King and the Bribery Commissioners Vs. Pedric Ranasinghe and in his majority opinion held:

"It will be seen from the said judgments that an amendment of the constitution is made only by legislative process with ordinary majority or with special majority, as the case may be. Therefore, amendments either under Art. 368 or under other Articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises an amendment of the constitution can be no thing but law" 21

This erroneous assumption has cost it: force owing to be reversal of the Golak Nath case 5 in majority opinion of Kesavananda Bhart case 7. Justice Ray in clear term said:

"The distinction between constituent and legislative power is brought out by the feature in a rigid constitution that the amendment is by a different procedure than that by which ordinary laws may be altered. The amending power is, therefore, said to be a re-creation of the constituent assembly every time parliament amends the constitution in accordance with Article 368." 22

To critised to Golak Nath case Mathew J. observed:

"That apart the power to amend a rigid constitution, no being an ordinary legislative power but a constituent one, it would be strange that the constitution makers put it sub-silence in the rejudisary legislative entry."

See also the Hidayatullah J. Para 148, 157 and 158
Justice Dwivedi:

"In a controlled constitution the procedure for making laws for amending the constitution are distinct and discrete."

Thus, after the Kesavananda Bharti case there is no dispute about the Power of Parliament in reference to amending process and it is clearly laid down by Supreme Court that parliament, is a different body from the ordinary legislative body in relation to amending process.

In American constitution difference between amending process and ordinary legislative process has been properly maintain. American supreme court in Hollings worth Vs. Virginia clearly said:

"The Negative of president applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the constitution."

Similarly in U.S. Vs. Sprague supreme Court observed:


25) 1798, 3 Dall 378
"The price between the two modes of ratification is left to congress by Art. V and there is no exception or limitation to this permission.... In amending the constitution the General assembly act in the character and capacity of convention expressing the supreme will of the people and unlimited in its power save by the constitution." 26

At last, in the words of D.D. Basu it may be said:

"Usually, the legislative and constituent powers are vested in or exercised by different bodies. But even when they are vested in the same body of man, the distinction between legislative and constituent power or the distinction between ordinary and constitutional law making is not same." 27

Thus, it may be submitted that, in Federal Constitution amending powers are generally given in the hands of legislative body, though it may be Federal legislative body or Regional Legislative body or in both and in some Federal constitutions with the Federal and Regional Legislative body the voice of people is directly associated with it, but it is not a ordinary legislative body.

II. Power of Initiation:

There is no doubt that amending power is vested in the legislative Body who performs this power as a constituent power. But now the question is that who is competent to initiate the proposal of amendment before the amending body, can it be initiated by the sovereign people or by their representative?

The constitutions of the U.S.A. and India, in the preamble, expressly declare that the constitution has been ordained or enacted by the people. Whether such constitution has actually been referred to the people before its adoption or it has been drawn up by representatives of the people sitting in a constituent assembly or otherwise. The legal effect of the declaration is that the originic instrument has been enacted and established by the people, that the source of authority of the constitution is the people and that because the authority of the people must be superior to that of any authority created by the constitution itself, the constitution must have in authority superior to laws exacted by the legislature. The initial constituent power in such cases, must be said to belong to the people because it is they who have made constitution as it is.
The question is that whether this constituent power of the people is provided in the constitution itself, how it should be amended in future. When the framers of modern constitution lay down in the constitution itself the manner in which the constitution may be amended in future. Therefore, it would be absurd to suppose that the people at large should still retain their initial constituent power even though the constitution has placed the constituent power of amendment in the hands of specified authority. So C.F. Strong said:

"The amending body is a replica or recreation of the constitution making body itself."^{28}

In the Federal constitution, there are various methods of initiating the amending bills. In some countries, only federal legislative has this power, then in some countries it is vested in the hands of legislative bodies with the federal legislative body, on the other hand in some constitutions it is given directly in the hands of sovereign people.

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Two methods of initiating bill of amendments have been given in the constitution of U.S.A. In the first method, the congress can propose the amendment of the constitution by 2/3rds majority of both the Houses but this possible only when both the houses respectively propose the amendment by 2/3rds of their majority.

In the second method, 2/3rds of the legislative bodies of states can also propose the amendment of the constitution, but state legislature can not propose the amendment directly, states have only right to call upon congress to convolve a convention for the purpose. It is depend on the choice of congress to call convention or not.

But James Bryce expressed the opinion on this point:

"Congress shall there upon do so, having No opinion to refuse and convention when called shall draft and submitted amendments" 29(a)

A provision has been made for the calling of special convention of states for proposal and ratification of the amendments. So far this provisions

29 See Article v constitution of U.S.A.
has been used only once at the time of 21st Amendment of the constitution.

In the Switzerland, apart from the Federal Assembly, a proposal for amendment may be made by the people themselves, which is unknown in the U.S.A. People have no direct participation in the matter of initiation of the amending bill in the U.S.A. as it has been given in the constitution of Switzerland.

In the Switzerland, both the Houses of Federal Assembly can initiate proposals for revision of the constitution. The Citizen of Switzerland can also take the initiative in amending their constitution. The number of signatures required for initiative for total amendment of the constitution is a least 50,000\(^{29(b)}\)

In the Australian constitution, only federal Parliament can take the initiative. Though citizens and states take part in ratification but they have no power to initiate the amending bill.\(^{29(c)}\)

\(^{29(b)}\) See Article 120 and 121 constitution of Switzerland.

\(^{29(c)}\) See Section 128 constitution of Australia.
Under the part v of Canada Act 1982, Amending process for the Canadian Constitution is given. A amending proposal may be initiated by any of the participating legislative chambers. Section 46(1) of the Canada act 1982, make it explicit that the procedure for amendment under section 38, 41,42, and 43 may be initiated either by the Senate or the House of commons or by the legislative assembly of a Province.

The power of a provincial legislative assembly to initiate constitutions amendments by resolution seems for more likely to be effective than the power given to an American State legislative by Article V of United states, to apply for calling of a convention, even though the constitutional language seems to impose a duty upon congress to comply with such a request from the legislatures of two thirds of the States. Of course the Canadian federal houses can ignore provincial resolutions it will be interesting to see whether the federal government will obliged to provide particularly time to debate resolutions coming from provincial assembly.

In the Canada Act 1982, all amending procedure may be initiated by any of the participating legislative Chambers. The 'Unilateral' procedures - assuming bicameralism or multicameralism - will of course be subject to the normal rule that bills may be introduced
in any of the two - or more co-ordinate legislative bodies. for the other procedures of the para V of the constitution Act 1982, section 46(1) makes, it explicit that the procedure for amendment section 38,41,42, and 43 may be initiated either by the senate or the house of commons or by the legislative assembly of a province.

In the Indian constitution, under Article 368 there is only one way by which an amendment proposal could be initiated that is 'the introduction of a Bill in either House of Parliament,' legislative body of States have no right to initiate a amending bill, and people also have no direct voice as citizen of Switzerland have. the parliament has only power to initiate a amending bill.

Thus, it may be submitted that Switzerland is a best example of direct voice of people, in which initiative power, in matter of partial or total revision is vests with the people. In other Federal constitution the power of initiating the amending bill is only vested in the hands of federal legislative only. Though in Australia people is associated with the amending process by the permission of referendum but people have no power to initiate a amending bill
III. **Power of ratification**:

In the federal constitution, there are varities of procedure for the ratification of the amending bills. In some constitutions powers of ratification are vested exclusively in the hands of federal legislative bodies. In some constitutions federal as well as state legislatives bodies, collectively have power of ratification. But in some constitutions people are also directly associated with it.

In U.S.A. there are two methods of ratification of the amending bill. Ratifications of the proposal for the amendment of the constitution can be either by 3/4 of the legislature of the states or 3/4ths majority of the numbers of special convention called for the purpose.

Congress has right to decide whether the proposal for the amendment of the constitution should be ratified by first method or second method.

In Australia, at first the proposed amendment is passed by the absolute majority of the each House of the parliament than a majority of the electors in four of six States have to approve the amendment, their apart a majority of electors in the whole six states combined must also approve the amendment. Thus it would appear
that Australian constitution is very rigid in the matter of ratification of the amendment.

On the above reason Colin Howard observed:

"However liberal S.128 may appear to be by comparison with even more circumscribed power of amendment, in practice it has proved a formidable obstacle to surmount" 30

However, Honourable Justice Madden disagreed with above view and observed:

"It is a very liberal and.....Very easy method of amending the constitution"31

In the Switzerland 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 citizen 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

31. Justice Madden, Wollaston’s case, 1902 CLR P.168
Switzerland express themselves in favour of revision, fresh election have to be held to the Federal Assembly, 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.

Thus, Switzerland established a representative institution in such a fashion in which a direct participation of the people is accepted which is a distinctive characteristic of Swiss democracy. So Finer rightly called to people as a third House of the federal Assembly" 32

Similarly C.F.Strong concluded the matter :-

"Thus the constitution of 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" 33

32. Finer : The theory and practice of modern Government P. 561
Under Section 44 of the Canada Act, 1982, Federal parliament is exclusively competent to make amendment and there is no necessity of ratification of province legislature. Corresponding under section 44, the legislature of province is also competent to make amendment of that province.

Excepting to above provisions under the General procedure of amendment and unanimous consent procedure of amendment consent of federal and state legislatures are necessary. After the ratification of both the bodies a amending bill becomes a law of the constitution.

Thus, in the Canadian constitution federal and state legislatures are associated in the amending process but there is no direct participation of people as we see in constitution of Switzerland and Australia. Though at the drafting stage on Oct. 2, 1982, proposal for association of the people in the amending process was added but it was finally withdrawn subsequently at the final stage.

34. See Section 44,45, Canada Act, 1982.
35. Ibid section 38,41,42, and 43.
In the Indian Constitution, parliament has exclusively power to amend each and every provision of the constitution excepting to the certain provisions given in Article 368(2), in which consent of states is necessary.

Constitution of Malaysia 1963, subject to certain provisions\(^{36}\), amending powers are vested in the hands of federal legislative body.

In the constitution of Nigeria 1979, in the Matter of amendment section 9 itself and provisions relating to the creation of states or alteration of boundaries,\(^{37}\) consent of State legislatures are necessary with the federal legislative body.

Rest of the federal constitution like constitution of West Germany, Constitution of South Africa and Constitution of U.S.S.R. etc., Amending powers are exclusively vested in the hands of Federal legislative bodies and there is no necessary of ratification by the Federating states. For the Constitutional

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36. Constitution of Malaysia 1963-Art 161 E and other provisional given in Art 159(1)(3) and (4)
37. Constitution of Nigeria Art 8, and Art. 9 itself
amendment in these federal constitution Federal legislative bodies are competent to amend the constitution and there is no necessity of ratification by the federating units.

IV. Amendment by special majority:

A federal constitution is called controlled and rigid constitution; because it has a higher law which limits the powers of federal and Regional governments and it provides a process for changing its provisions called amendment. The nature of Federal constitution is that it prescribes amending process itself in the documents. So K.C. Wheare rightly observed:

"A Rigid constitution, is one which enjoys an authority superior to that of the other laws of the state and can be changed only by a method different from that whereby those other laws are exacted or repealed." 38

In the federal constitution a special amending process is prescribed which imposes restrictions upon the amending body of the constitution. On this point C.F. Strong said:

"The sole Criterion of rigid constitution is whether the constituent assembly which drew up the constitution left any special directional as to how it was to be changed. If in the constitution there are no such directions, or if the directions explicitly leave the legislature a free hand, then the constitution is flexible. If there are restrictions. No matter how slight, then the constitution is rigid."

Thus, it may be said, for the federal constitution it is necessary that there must be some direction or special procedure for the amendment which must be given in the constitution itself. It is not necessary it must be too rigid it may be slightly rigid but there must be some fixed and prescribed amending process.

In all the Federal constitutions, there are fixed and prescribed amending process, though they are not same in nature and process even though they have some prescribed fixed process of amendment.

In the constitution of U.S.A. there are two methods of framing and proposing amendments.  

39. Strong C.F: Modern political constitutions (1966) P. 146

40. See Article V constitution of U.S.A.
A) Congress may itself, by a two-thirds vote in each House, prepare and propose amendments. Or

B) The legislatures of two-thirds of the States may require Congress to summon a constitutional convention, Congress shall thereupon do so, having no option to refuse and the convention when called shall draft and submit amendments. No provision is made as to the election and composition of the convention, matters which would therefore appear to be left to the discretion of Congress.

There are also two methods of enacting amendments framed and proposed in either of the foregoing ways. If left to Congress to prescribe one or other methods as Congress may think fit.

Again there are two methods for ratifying the proposed amendment bill:

A) The legislatures of three-fourths of the States may ratifying any amendments submitted to them.

B) Conventions may be called in the several states and three-fourths of these conventions may ratify.
Thus, in U.S.A. amending proposal could be initiated either by the congress, whenever two-thirds of the numbers of both Houses so desire of by convention called by congress as the application of the legislatures of two-thirds of the states. In either case the proposal has to be ratified either by the legislatures of three-fourths of the states or by three-fourths of the members of the convention assembled for the propose.

No doubt that amending process of U.S.A. is too easy, but on the other side it is too slow and difficult, because there is no clear provision about composition of convention and there is no fixed time limit for a ratification and it also has no voice of people directly. Moreover with it minorities can overcome on majority of other states.

Switzerland has a rigid constitution although it is not so rigid as the American constitution. there are two sets of provisions for the 'total Revision' and 'Partial Revision yet in both condition partial and total revisions, procedure is the same.

41. See Partial Revision Art. 119 and 120 and total revision Art. 121,122 and 123, constitution of Switzerland.
The methods of revision are precisely stated that:

A) If both Houses agree, by the ordinary process of legislation, upon an amendment, then it must be submitted to be people and approved not only by a majority of citizens voting but also by a majority of cantons.

B) If, 50,000 citizens decide that a certain amendment should be, then they may either, send it up as a specific amendment in which case the federal authority must submit it to the people for approval in the manner just stated or demand that the natural Assembly prepare and amendment embodying the principle which they lay before it, in which case the Assembly must first submit to popular vote the question whether such an amendment should be prepared and if the answer is in the affirmative, then the assembly prepares the amendment and submits, it again for final approval by the people.

Thus, in Switzerland, a total revision and partial revision of constitution can be made if both the House of Federal Assembly approve the amendment and the same is also approved, by a majority of Swiss cantons.
and a majority of the Citizen of Switzerland. The people of Switzerland not only associated in amending process in the form of referendum but they have right to initiate the amending proposal.

The amending process of Switzerland is more difficult to U.S.A. because with the both legislative bodies' majority, approval of a people is also added in the amending process. Though it is more rigid process but still there have been more amendments taken place in the comparison to U.S.A. So K.C. Wheare rightly said:

"If the Swiss Constitution is rigid. The Swiss people are flexible" 42

In the Australian constitution 43, at first amending proposal is passed by absolute majority of each house of Parliament. Then within Two to six months, after its passage by parliament, the proposed law is required to be submitted in each state to the electors qualified to vote for the election of members of the House of representatives and vote taken in the manner prescribed by the parliament. If then, the proposed law is approved by a majority of the electors voting in a majority of the

42. Wheare K.C : Federal Government 1963, P. 223
States as also by a majority of all the electors voting it is presented to the Governor General for the queen's assent.

Briefly speaking, Australian constitution is substantially the same as the switzerland but it is not same as it appears. The amending process of Australia is a combination of U.S.A. and Swiss constitutions. to associate state legislatures with the federal legislative if follows the pattern of U.S.A. constitution. In the other hand in adopting the people's voice directly in amending process it follows the pattern of Swiss constitution. but it is differ to Swiss amending process insense that, it has no initiative power to the people directly as may be seen in the constitution of Switzerland although it has voice to ratify amending bill.

The original constitution of Canada 1867, Known as a British North American Act, did not contain any provision for its amendment so that it could not be amended otherwise than by the British Parliament.

43. See Section 128, Constitution of Australia.
But, by enacting the Canada Act 1982, the British Parliament has now objured all its authority over Canada and has made elaborate provisions for amending the constitution of Canada.\textsuperscript{44}

In Canada, Federal Parliament is exclusively competent to make amendments in the matter which relate to executive government or the House of the Canadian Parliament. Corresponding the legislature of each province is also competent to make laws amending the constitution of that province.\textsuperscript{45}

Excepting to both above stated amending process, there are also three process of amendment first is General procedures second is special amending process and third is unnions consent process.

The General procedure of amendment applies in particular to the provisions mentioned in section 42. In it proclamation is issued by the Government General forth amendment when so authorised by resolution of both Houses of Canadian Parliament by simple majority and resolutions of the legislative assemblies of atleast two-thirds of the provinces having atleast fifty percent of the

\textsuperscript{44} Canada Act 1882
\textsuperscript{45} Ibid See section, 44 and 45
\textsuperscript{46} Ibid See Section 38
population of all the provinces.

Special procedure of amendment\textsuperscript{47} is applies in particular to the provisions, such as alteration of their boundaries inter se, then a proclamation is issued by the Government General for the amendment, when so authorised by resolutions of both houses of legislative assembly of each of the provinces to which the amendment is applicable.

Unanimous consent of the legislatures of the federation and the provinces are required for making amendments to the matters specified in section 41, which are of concern to both the federation and the provinces, such as the offices of the queen, the Governor-General and the Provincial lieutenant-governor, the Supreme Court of Canada. The proclamation is issued by the Governor-General, when authorised by resolution of all the provincial legislatures and both houses of the Canadian parliament.

After departure from the British North American Act 1867 and by enacting the Canada Act 1982, a new

\textsuperscript{47} Ibid. See Section 43
domestic amending process is prescribed, which is very complicated. But writers like Walter Dellinger and Stephen A. Scott, in their Articles express the view that new amending provision of Canada is not complicated. It appears to do so but in reality there is nothing like that only seeing the various amending process it is wrong to say that is a very complicated. The basic structure of the amending process may be divided in the following four categories:

1) A few parts of the constitution can be amended only with unanimous consent of the Canadian parliament and the legislative assembly of every province.

2) Parliament acting alone can alter certain provisions of the constitution which are related to federal Governments.

3) The legislative assembly of a province may also alter its own provincial constitution.

4) The amendment of any provision that applies to one or more but not all provinces may be made upon the Agreement to which the amendment applies.


Each of the provisions noted above deal with special situation. The basic amendment provision applicable, to most amendment will be a version of 'The Vancouver Formula under this basic provision, an amendment may be made upon the concurrence of Senate and house of commons and the legislative assemblies of two-thirds of the provinces that have in the aggregate, at least fifty percent of the population of all the provinces. Where an amendment derogates from the rights of a province, it must be passed by the House and Senate and in the requisite number of legislative assemblies, by a majority of the members rather than by a mere majority of those present and voting. Both the unilateral Federal and provincial amending procedure section 44 and 45 purport in them to confer exclusive powers.

Walter Dellinger, compared to amending process of Canada Act, 1982, with the Article V of American Constitution and in the conclusion observed:

"An Evaluation of the Canadian Amendment procedures should perhaps begin by noting that it detailed provisions answer several perplexing questions that Article V of the American Constitution has left to speculation and more recently, controversy..... Part V of the Canadian constitution Act 1982 has the virtue of answers these questions:50

Ibid F.N. 48 at P. 136
In the Canada Act 1982 the basic theme of Federal Constitution is adopted and with the Federal legislative Body the voice of Regional Governments are associated, but for avoiding the permanent road block of amending process, the provision of referendum which is given in the constitution of Australia and Switzerland is not adopted in the constitution of Canada.

The Constitution of Malaysia 1963, prescribes the amending procedure for the constitution, barring certain matters, a bill for making an amendment to the constitution has to be passed in each house of Parliament by not less than Two-thirds of the total number of members on second and third readings. Certain matters can not be amended by the parliament. Similarly, certain provisions can not be passed without the consent of the conference of rulers or Governor of the States.

Subject to the Exceptions stated above, the provisions of the Constitution can be amended by the Federal legislatures, but by a special majority, not less than two-third of the total number of members of each House of the legislature which majority must exist for at

51. See Article 159, Constitution of Malaysia 1963
52. See Article 74,76, and Scheduled II,III,VI and VIII.
53. See Articles 10(4), 38,64(a), 70, 71(1), 72(a), 152, 153, 159 and provisions of part - III
the second and third readings of the bills for amendment.

In the constitution of Nigeria 1979, a bill for amending the constitution may be passed by federal legislature by special majority of two third majority of the each house, thereof, followed by a resolution of the legislatures of not less then two third of the States.

An Act for the amendment of section 9 itself or the provisions relating to the certain of states or alteration of their foundaries as specified in section 7 would require not less than Four-fifth of the total membership of each house of the federal legislature following a résolution in the legislatures of not les then two third of the states.

Thus, No amendment can be made in Nigeria unless it is passed by two-third majority of federal legislature and two-third majority of States. In special case it is required that, it must be passed by four-fifth of federal legislature and two-third majority of the States.

A special procedure for the amendment of the Indian constitution is given in the Article 368 of the Constitution. Under Article 368 (1), an amendment of
Indian constitution may be initiated only by the introduction of a bill for the purpose in either house of Parliament and when the bill is passed in each House by Majority of the total membership of that house and by majority of Not less than two-thirds of the members of that House present and voting, it shall be presented to the president who shall give his assent to the bill and thereupon the constitution shall stand amended in accordance with the term of bill. For the amendment of these provisions no ratification by the States is necessary.

But in relation to certain provisions\(^{54}\) consent of State Legislatures are necessary under Article 368(2). They may be amended by a majority of total membership of each House of Parliament and by a majority of not less than two-thirds of the members of each house present and voting and with the concurrence of the half of the Stated.

Thus, according to article 368, it is required that an amendment bill should be passed in each House, by majority of the total membership of that House as well as

\(^{54}\) See Articles 54,55,93,163,241, or Chapter IV of Part- V Ch.V of Part VI or Ch.I of Part - V or list in the VII Schedule or article 80 and scheduled IV and Article 368 itself.
by a majority of not less than two-thirds of members of
that House present and voting. This requirement of a double
majority for constitution amendment bill distinguishes
such a bill from an ordinary bill. This special double
majority is to be had not only in any one House of
Parliament but in both houses of Parliament. In certain
matters, ratification of one half of the state
legislatures also require, with the total membership of
both houses and two-third majority of the both houses
under article 368.

In U.S.A. There is no requirement of double
majority as finds in Indian constitution. There is only
requirement of two-third majority of each House.
According to U.S.A. supreme court, 55 two-thirds majority
of each Houses means two thirds members present assuming
the presence of a quorum and not a vote of two-thirds of
the entire membership.

Thus, it may be submitted that for the federal
constitution there must be special procedure for the
amendment of the constitution and which must be given in
the constitution itself

V) Amendment by Simple Majority:

There are some federal constitutions, though they are federal in nature but they are not so rigid in comparison to other Federal constitution. In such simple procedure of amendment, legislature is allowed to amend the constitution in the ordinary course of the legislation. The simplest restriction is that which requires a fixed quorum of members for the consideration of proposed amendment as special majority for their passage prescribes a mode of seating of the house.

Constitution of U.S.S.R., South Africa, West Germany, and Certain provision, of India constitution may be amended by the simple procedure and there is no necessity of special majority of the Federal constitution though they are also come within the family of federal constitution.

Author like prof. Neumann does not include to constitution of U.S.S.R in the Family of federal constitution. He excludes to U.S.S.R from the federation on the two grounds, first that the decision of power

under the Soviet Constitution is only theoretical being overshadowed by the domination of the same political party and second there is no rigid amending process.

But on the other hand author like D.D. Basu does not agree with the above view and includes to constitution of U.S.S.R in the family of federal constitution and he called U.S.S.R as a 'simplest amongst the federal constitution'.

Article 174 of U.S.S.R. provides that constitution of U.S.S.R. may be amended only by decision of the Supreme Society of the U.S.S.R. adopted by a majority of not less than two thirds of the votes in each of its chambers.

Thus, in the constitution of U.S.S.R, the power of amending the constitution is exclusively vested in the supreme Soviet of U.S.S.R and the republics (State legislatures) have no share in the amending process.

Constitution of South Africa, also comes within the category of simple amending process of Federal constitution. It only requires a majority of two houses.

In joint session and amending bill has to be pass by the two-third majority of the total numbers of the both Houses.\(^{59}\)

In the constitution of West Germany an amendment might be carried without a referendum by ordinary legislative methods under certain restrictions as to majority in the chambers. It required the approval of two-thirds of the members of the Bundertag and two-thirds of the votes of the Bundesrat.\(^{60}\)

So K.C. Wheare observed:

"West Germany of 1919, though federal, is comparatively flexible, in as much as it can be amended by the Federal legislature, without either ratification by the State or referendum of the people".\(^{61}\)

Indian constitution has a special procedure for amendment under Article 368. Besides it has also a simple procedure for amendment.\(^{62}\)

The simple procedure of amendment needs only a majority of members present and voting, such as required

59. See Article 152, Constitution of South Africa.
60. See Article 79, Constitution of West Germany.
62. Article – 2 Sch. I and IV, 11, 73(2), 75(6), 97, 106, 124(1), 125(2), 133(3), 137, 148(3), 172(2), 221(2), 343(2), 348(1), 239(a), Para 7 of Sh. V. Para 21 of Sch.VI and Sch. II.
for the passing of an ordinary law and there is no necessity to follow the procedure which is given under Article 368.

It is significant to note that in certain provisions expression are used like such:

"No such law as aforesaid shall be deemed to be an amendment of this constitution for the purpose of Article 368."  

This phraselogy clearly indicates that such law would, in absence of a contrary provision be laws regarding amendment of the constitution for the purpose of Article 368 but the above articles and paragraphs specifically provide that "they shall not be deemed to be so."  

Seeing to these phraselogy generally it is held that such amendments are not amendments of Article 368. Justice Bachawat expressed the view:

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63. Article 4(2), 5, 6, 163(2), 239(A), (2), Para 7(2) of the V Schedule and para 21(2) of the VI Schedule, Indian Constitution.
"Power of amendment has been given under the Article 368... No other article confer the powers of amending the constitution... None of Articles given the power of amending the constitution.

Dr. Paras Diwan does not agree with the view that under simple procedure there is no power to amend the Constitution and says:

"An amending procedure is laid down in some articles themselves and if that amending procedure which is to pass an amendment simple majority either by parliament or the state legislature is followed the constitution stands amended. There is a temptation to call the former (under article 368) alone as 'Amendments of the constitution and to deny this description to latter (under simple procedure). But it is submitted since in both, the constitution stands amended, both are constitutional amendments."

Expressing his view in this regard H.M. Seervai inter alia observed:

"Under the Simple procedure of Amendment each one of the provision has a sub-clause(2) which provides that the law so passed 'shall not be deemed to be an amendment of this constitution for the purpose of Article 368' the word 'deem' does not mean that though the constitution is

64. Golak Nath Vs. State of Punjab AIR 1967 SC 1643 at P. 1719
65. Dr. Paras Diwan : amending powers and constitutional amendments (1990) P.117 and 118
amended in fact, it is to be considered not to have been amended. The word 'Deemed' has been used because it was intended to exclude the special machinery provided for the amendment of the constitution in article 368 as is clear from the word' for the purposes of article 368".66

Seeing the effect of the provision P.S. Chaudhari67 in his Article observed:

"The Real test should be whether the amendment bring about a change in the basic law. If it is does it must be regarded as constitutional law' if it does not it is ordinary law".67

The same view expressed by Sukhcharan K. Bhatia68

"Thus, the real test to distinguish an ordinary law from a constituent law should be based on the fact that amendment brings a formal change in the text of the constitution and not, on the difference in procedure or the body who brings the change i.e. constituent Assembly or legislature" 68

Now Question is that, amendment in the constitution by a simple procedure comes within the purview of the Federal rigid constitution or not? answer of this question is given by C.F. Strong69 in the right manner:

66. Seervai, H.M.: Constitutional law of India, P.1092
67. Chaudhari P.S.: Golak Nath Case - Critical affrisal Published Journal section AIR 1963; 90 at P. 94
"it does not follow that because a constitution... a constitution is documentary it is therefore rigid. It has special procedure it is therefore rigid. The sole criterion of the rigid constitution is whether the constituent Assembly which drew of the constitution left any specific direction as to how it was to be change. If in the constitution there are no such directions or if the directions explicity leave the legislature a free hand, then the constitution is flexible. If there are restrictions, No matter how slight then the constitution is rigid" 69.

On the above approach D.D.Basu called to constitution of U.S.S.R as "Simplest among the Federal Constitution". 70

VI Participation of Federal Units:

The existence of federal government is totally depend on the co-relation of federal and Regional Units of federation, without it no body can think about federal Government so for maintaining to this element in the Federal constitution rigid amending process is adopted. Therefore K.C. Wheare rightly observed:

"It is essential in Federal Government that if there be a power of amending the constitution that power so far at least as concerns those provisions of the constitution which those regulate the status and powers of the general and regional governments, should not be confined exclusively either to the general government or to be regional governments.

Apart from this, it does not matter logically where the power is placed, but there can be no doubt that practically it is wise to associate both the general government and the regional either their governments or their people, in the process." 71

On the above principle participation of Union and states together is insisted upon for amendment, in most of the Federal constitution.

Article V of the American constitution enjoys that amendments, proposed by the federal legislature must be ratified by legislatures or conventions of three-fourth of the states.

The Swiss constitution provides 72 for participation of that states in amending the federal constitution in a way more complicated than the American constitution. an amendment ultimately requires the consent

72. See Article 118 to 123, Constitution of Switzerland.
of the people of the majority of states, apart from the majority of all the people voting, even though it may have been approved by the federal legislature.

The process of Amendment of the Australian constitution is a combination of the American and Swiss precedents. After an amendment bill is passed by absolute majority of each house of the federal parliament it is submitted to a referendum of the electors of the House of Representatives, voting in the state. The bill will be deemed to be passed, when it is passed by the majority of the total number of electors voting at the referendum, majority of the electors voting in each state and majority of states voting in favour of the bill.

In the certain matters as diminishing the proportional representation of any state in either House of Parliament, diminishing the minimum number of representatives of a state in the House, of representatives and altering the limits of a state, require an additional condition for amending any provision relating to these matters, namely but the amendment must be approved by the Majority of the electors voting in that particular state which is asserted. 73

73. See Section 128, constitution of Australia.
Canada Act 1982, also provides provisions in which participation of states is accepted. Except the section 44 and 45, in which exclusive power of amendment have been given in the hands of federal government or in the hands of state government separately, in all other amending process states are associated within the federal legislative body and consent of states are necessary.\textsuperscript{74}

Though in the constitution of Malaysia power of amendment has been given in hands of federal legislature but in relation to specified provision,\textsuperscript{75} consent of conference ruler is necessary. Similarly No amendment of the provisions relating to Eastern states of Sabah and Sarawak\textsuperscript{76} can be made without the consent of Governor of the state Concern.

The constitution of Nigeria 1979, also lays down a special procedure for amending the constitution to safeguard to position of the State. A bill for amending the constitution may be passed by the federal legislature by a special majority of two-third members of each House, followed by a resolution of the legislatures of not less

\textsuperscript{74} See Section 38,41,42 and 43 Canada Act, 1982.

\textsuperscript{75} See Article 159(2) of constitution of Malaysia 1963

\textsuperscript{76} Ibid Article 161 e.
than two-thirds of the states. That no amendment can be made unless approved by a majority of States 77.

The provisions relating to creation of State or alteration of their boundaries 78 would require a majority of four-fifth of the total membership of each House of the federal Legislature, followed by a resolution in the legislatures of not less than two-thirds of the states.

For creation of a new State, which the above provision amending bill must be approved by a referendum of two-thirds majority of the people of the area concerned following by the referendum of a majority of the people of all the states and this legislatures. 79

In the Constitution of India, the power of amendment is vested exclusively in the hands of union parliament. Excepting to some matters 80, the states have nothing to do with the amendment of the constitution. In some matter given in article 368(2), consent of one-half of the states is necessary with the total membership of the House of Parliament and two-thirds majority of the members present and voting in each house.

77. Section 9, Constitution of Nigeria 1979.
78. Ibid Section 8.
79. Ibid- Section 9(3).
80. Articles 368(2) Constitution of India.
In the constitution of U.S.S.R, West Germany and South Africa there is no voice of the federaling units and constitution of these countries may be altered by the federal legislative exclusively.

VII Participation of People:

It must be stated that Referendum is not a novel device in the history of constitutionalism in the world. It has been adopted and is working under various constitutions for ordinary legislation as well as constitutional amendment but in the Federal constitution system of Referendum was firstly employed in the constitution of Switzerland.

In the constitution of Switzerland people are directly associated in Governance of the country. C.F. Strong, on this point, observed:

"The plebiscite, the referendum, the popular initiative and recall, are four direct democratic checks and they are connected in the sense that they are designed to give to voting mass of the people a direct contest of their political destiny by granting them the power to approve or reject measures for their well being to institute, legislation, and to remove unsatisfactory representatives" 81

81. - Strong, C.F. Modern Political constitution P. 257.
The constitution of Switzerland, introduces not only the referendum but the popular initiative whereby the people themselves may propose amendments.

In Switzerland, proposal of amendment may be initiated by the General Legislature, or in some circumstances by one House of the General Legislature or by 50,000 citizens. But however amendments have been initiated, none can become effective until approved at a referendum by a majority of all the electors voting and by a majority of electors voting in a majority of the cantons. 82

In Australia, this association of the people with the General legislature in the process of amending the constitution was borrowed from Switzerland.

In Australia, the constitution may be amended by a process which if the two houses of the parliament of the commonwealth or in certain circumstances, one House propose the amendment by an absolute majority, it must then be submitted to a referendum of the people. If in

82. See Articles 120, 121, 122 and 123 Switzerland.
this referendum a majority of all the electors voting approve the proposed law and if in a majority of the States, majority of the electors voting also approve the proposed law, then it can be submitted for the royal assent.

Further, it is provided that no amendment diminishing the proportionate representation of any state in either house of the parliament or the minimum number of representatives of a state in the house of the representatives or increasing, diminishing or otherwise altering the limits of the state or in any manner affecting the provisions of the constitution in relation thereto, shall become law unless the majority of the electors voting in that state approve the proposed law. 84

In the constitution of Nigeria 1979 the provision about referendum, has been given for the certain matters. for the creation of a new states, a bill must be passed not less than four-fifth of the total membership of each house of the federal legislature, followed by a resolution in the legislature, of not less than two third of the states. Then it must be approved by

84. Ibid section 128.
a referendum of two-third majority of the people of the area concerned, followed by a referendum of a majority of the people of all the states and of their legislatures. 85

In the constitution of U.S.S.R., U.S.A., Canada, South Africa, Malaysia, West Germany and India there are no provision about the referendum. In the old Germany constitution there was provision about it but in the West Germany there is no wording about it. 86

In the Canada Act, 1982 a proposal for referendum was introduced in 1980. but it could not get final approval and it could not take place in the constitution Stephen A. Scott observed:

Participation of the electorate directly through referendum so prominent in the proposal of Oct., 2, 1980 and it ultimate revision of April 24, 1985 has inconsequence of Nov. 5, 1981 agreement, disappeared completely. 87

Similarly, in India a proposal for referendum was introduced in the 44th Amendment bill. Although, the referendum clause of 44th Amendment bill has been passed by Lok Sabha, but it could not get recognition in the

85. Section 9(2) and 9(3) of the constitution of Nigeria 1979.
in the Rajya Sabha. 88

Where there is no provision of referendum, it is said that Sovereignty of the people, is maintained through the representatives of the people, they represent the voice of the people in the House. So there is no necessity of direct voice of the people in the amending process.

VIII Participation of the executive head:

In the several federal constitutions, the head of executive has been associated with the amending process. On the other hand in some constitutions the executive head has no role to play in the amending process.

In the Federal constitutions like U.S.A, Switzerland, West Germany and Malaysia etc., there is no necessity of taking assent of executive head on the amendment bill. They have no role in the amending process and if they have any voice then it is a mere formality.

In context of the constitution of U.S.A. James Bryce Said:

88. See proposed bill of 44th Amendment bill 1977.
In the constitution of U.S.A., the consent of the president is not required to a constitutional Amendment.\textsuperscript{89}

The same view was expressed by Supreme Court of U.S.A.\textsuperscript{90}

"The Negative of president applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments the constitution".

Similarly the federal constitutions of Switzerland, West Germany and Malaysia, there is no necessity of consent of Executive head.

However, in the Federal constitutions like U.S.S.R, Australia, Canada and India consent of Executive Head is necessary.

In the constitution of Australia when amendment bill is passed by the each house of the parliament, by the majority of the States, by the majority of electors, then it shall be presented to the governor General for the Queen's assent.\textsuperscript{91}

\textsuperscript{89} Bryce James: American Common-wealth Vol. I.P.366
\textsuperscript{90} Hollling Sworth Vs.State of Vermont 3 Dall 378
\textsuperscript{91} See Section 128 of the constitution of Australia
Assent of Governor General is only formality and he has no choice in the matter of amending process - So P.D. Phillips rightly said:

"In amending process, Governor General is simply spackman of the people, symbol of the Queen and has no choice in it....."92

Similarly, in the constitution of U.S.S.R assent of executive head is required. All laws passed by the Supreme soviet are published in the Languages of the Union Republics under the signatures of the presidium. This power of presidium is similar to the power of assenting the bill by a king or a president.

See the same thing in the words of Topornin:

"All laws passed by the Supreme Soviet though it may be constitutional or ordinary laws, must be published in language of the Union Republics over the signature of the presidium"93

Likewise, in the constitution of Canada, assent of Executive head is necessary. The Sovereign or her representative is necessary participant in all the amending procedures of part V. The unilateral procedure contemplate acts of parliament of Canada and provincial legislatures. In each such instance Royal Assent, given


93. Topornin: The new constitution of USSR 1977,P.152
personally by the Sovereign or through her representative, is legal indisspeable. The other amending procedures of Part-V, Section 38(1), 41 and 43 all require a proclamation issued by the Governor-General under the great seal of Canada.

In the Canadian constitutional system at the Federal level at any rate both Supreme Executive power and co-ordinate legislative power are vested directly in the person of the sovereign and are exercisable by her representative only delegation. It thus appears a symmetric even unseemly for part V to confer upon the subordinate directly rather than initially upon the principal the ultimate law making power: The power of enactment of constitutional amendments after the necessary consents have been secured. 93A.

In the Indian constitution the Executive Head is also associated with the amending process of the constitution Article 368(2) Says: [Definite Amendment]

"An amendment of this constitution may be initiated only by introduction of a bill for the purpose in either house of Parliament and when the bill is passed in each House by majority of the total membership of that house and by a majority of not less than

two-thirds of the members of that house present and voting it shall be presented to the president who shall give his assent to the bill and their upon the constitution shall stand amended in accordance with the terms of the bill...."

Justice Wanchoo on behalf of himself and Bhargava and Mitter JJ Observed:

"Article 368 provides that a bill for the amendment of the constitution shall be presented to the president for his assent. Further provides that upon such assent by the president, the constitution shall stand amended. That in our opinion postulates that, if assent is not given, the constitution can not be amended whether a president will ever withhold his assent in our form of government is a different matter altogether. But as we read article 368 we can not hold that president is bound to assent can not withhold his assent when a bill for amendment of the constitution is presented to him.... We are of opinion that the president can refuse to give his assent when a bill for amendment of the constitution is presented amendment of the constitution, in presented to him the result being that bill altogether falls for any thing further to be done about the bill in Article 368 as there is Article 111....."

This position has been, however, been radically changed after the 24th Amendment Act, 1971, Under this amendment words " who shall give his assent to the Bill"

Justice Khanna expressed his opinion on the 24th Amendment:

"24th Amendment has been made so as to make it obligatory for the president to give his assent to the amendment bill after it has been passed in accordance with the Article."  

Justice Mathew observed:

after 24th amendment .......

It is declaratory in character except as regard the compulsory nature of the assent of the president to a bill for amendment.  

The same opinion has been expressed by other Judges in Kesavananda Bharti case.

D.D. Basu, presents the whole matter in the following way:

"A contrary position in the matter of the assent of the president was, of course, provided in the original tex of Article 368 of the Indian constitution...... This position has, however, been radically altered by the constitution (24th Amendment) Act 1971 by which though the requirement of presenting the bill to the president has been retained, it has been reduced to a sure formality, for it has been made obligatory for the president to

95. Kasavananda Bharti Vs. State of Kerala 1973 SC Para 1521
96. Ibid Para 1798
give his consent, to bill for amending the constitution, by reason of the express words newly inserted in Article 368(2) 'Who shall give his assent to the bill....' Hence the Indian President can not refuse to give his assent to a bill for amendment of the constitutions, which has been presented to him without violating the constitution...."

CONCLUSION:

On the basis of the aforesaid discussion it may be submitted that federal Constitution has its rigid amending process which is differ from the flexible constitution. It has special procedure for the amendment which is differ from the ordinary legislative procedure.

In Federal Amending Process, voice of both the units, th-ough it may be Federal or Regional Units, are properly maintain by that no one can disturb the federal set of the constitution without the consent of each other.

In the Federal constitution there are varities of amending : process but the basic or essential object of all the Federal Amending process is to protect the co-existence of the Federal and State Governments and without the consent of each other no one can disturb the

the basic structure of Federal, Constitution. Federal Government and federal constitution is the consequence of the agreement or common consent and it should not be disturbed without the unanimous opinion of the federating units. For that reason this rigid amending process is adopted.

In comparative study we see that constitution of U.S.A. Australia, Switzerland, Canada are more complicated and too rigid, in comparatively constitution of U.S.S.R, West Germany, South Africa, Malaysia, Nigeria and India, when the constitution of west Germany, U.S.S.R. Malaysia Nigeria and South Africa and Australia have single amending process, then constitutions of U.S.A. Canada, Switzerland and India have more then one amending process.

The constitution of U.S.A. has a special nature of amending process which is, unknown to other constitution, known as convention. This form of amendment has been adopted in Switzerland in a different manner, with the association of the people, when in U.S.A., only states and federal units perform the same function.

In the constitution of U.S.A., West Germany, U.S.S.R., Australia, Malaysia, South Africa, and Nigeria people have no direct initiative power of amending bill
when Switzerland has a direct power to initiate a amending bill.

In constitution of U.S.A. Switzerland and Canada initiative power has been given in the hands of Federal as well regional units, when in the constitution of West Germany, South Africa, Malaysia, Nigeria, Australia, U.S.S.R and India initiative power of amendment has been given in the hands of Federal legislative body exclusively.

In the constitution of U.S.S.R, South Africa and West Germany power of Ratification in the amending process has vested in the federal legislative body Exclusively. When constitution of U.S.A, Canada, India and Malaysia power of ratification is vested in the federal as well as in the Regional States. Then in the constitution of Switzerland, Australia and Nigeria with the federal and Regional units, people are also associated in the power of ratification through the provision of referendum.

In the constitution of Switzerland, Australia and Nigeria Sovereignty of people is directly protect through the provision of referendum. When in other constitution it is protected indirectly through the representatives of their elected member.
In the federal constitution Executive Head has nothing to do with the amending process. In the Constitution of West Germany, Malaysia, U.S.A, Switzerland there is no role of Executive head in this concern when in the constitution of Canada, Australia, U.S.S.R. and India consent of Executive Head is necessary but in reality this consent has no meaning, it is only a formality.

Broadly speaking, federal constitutions may have any one or more methods of amending process or have a combination of two or more of the above methods in order to make process somewhat rigid.