

CONSTITUTIONAL AMENDMENT WITHIN FEDERATIONS: THE ROLE AND INFLUENCE OF SUB-NATIONAL STATES

By Anne Twomey*

Introduction

The key to a Constitution is the mechanism by which it may be amended or repealed. The body in which this power is vested is the body in which sovereignty is ultimately held. In most countries, this body is claimed to be the people. While in a few countries the people are directly consulted about constitutional reform through referenda and may even initiate it themselves, in most countries the role of the people in constitutional reform is exercised indirectly through their elected representatives.¹ Further, in most countries, it is not the will of the majority of electors that prevails with regard to constitutional amendments. Instead, special majorities are required either in referenda² or in parliamentary votes in order to protect the interests of minorities, be they ethnic or linguistic minorities, or territorial minorities.

Federations protect the interests of territorially-based minorities within a nation by establishing sub-national polities with a level of independent legislative and executive power. As it is the national Constitution which establishes the federal system and distributes and limits power within that system, sub-national units have a vital interest in the means by which it is amended. In particular, sub-national units have a vested interest in:

- the preservation of their role in the process of amending the national Constitution;
- the maintenance of the federal structure;
- the protection of their representation in the upper House of the national Parliament;
- the maintenance of the integrity of their boundaries; and
- the distribution of legislative and executive powers between the different levels of government.

* Professor of Constitutional Law, University of Sydney. [Note: This paper was written in 2007 for presentation at a conference and has not since been updated. At the time it was written, there was significant difficulty in obtaining English translations of current constitutional provisions, so some descriptions may be inaccurate and should be checked.]

¹ Note, for example, the decisions that the direct approval of the people in a referendum was not needed to approve the new South African Constitution in 1996 or the German Basic Law upon the reunification of Germany: Nico Steytler, 'Republic of South Africa' in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries* (McGill-Queens Uni Press, Montreal, 2005), p 317; and Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed, Duke Uni Press, 1997), p 30.

² See, for example, the double majority required for the passage of constitutional referenda in Australia and Switzerland.

Where national Constitutions also incorporate sub-national Constitutions or dictate the primary provisions of sub-national Constitutions, then sub-national units have an even greater interest in playing a significant role in the amendment process.

The extent to which national Constitutions control or simply recognise sub-national Constitutions varies considerably. Some federations, such as Belgium, Brazil, Canada, India, Malaysia, Mexico, Nigeria and South Africa, set out the primary constitutional requirements for their sub-national units in the federal Constitution. This is not to say that all aspects of their respective sub-national units are dealt with in the national Constitution. In Canada, for example, there are provincial statutes that deal with the composition and operation of provincial legislatures, executives and courts,³ while the South African Constitution permits its Provinces to establish their own Constitutions, although only one has successfully done so.⁴

In other federations, particularly those where the constituent units existed prior to federation, such as Australia, Germany, Switzerland and the United States, the national Constitution will often give continuing recognition to existing Constitutions of sub-national units,⁵ but impose few if any limits upon what those Constitutions must contain.

This paper considers the way in which sub-national units are involved in constitutional amendment at the national level and the way their particular interests in maintaining the federal structure, their representation in the national Parliament and the integrity of their borders are protected by federal Constitutions. It also addresses the means by which the distribution of both legislative and executive powers can be changed under federal Constitutions without making formal constitutional amendments. Finally, it briefly addresses how sub-national Constitutions may themselves be amended, in contrast to the amendment process at the national level.

The involvement of sub-national units in national constitutional amendment

The initiation of constitutional amendments

In most federations, it is the national Parliament which has the power to initiate constitutional reforms. This ‘contributes to the centralist bias built into most

³ See for example: the *Legislative Assembly Acts* of Alberta, Manitoba, New Brunswick, Newfoundland, Ontario, and Prince Edward Island; the *House of Assembly Act* of Nova Scotia; the *Act Respecting the National Assembly* of Quebec; the *Executive Council Acts* of New Brunswick, Newfoundland, Nova Scotia, Ontario and Prince Edward Island; the *Executive Power Act* of Quebec; the *Constitution Act* of British Columbia; the *Legislative Assembly and Executive Council Act* of Saskatchewan; and the various Acts establishing and regulating courts in the Provinces. Note, however, the comment by Elazar that these are ‘Constitutional Statutes’ rather than Constitutions per se: Daniel Elazar, *Exploring Federalism*, (University of Alabama Press, 1987), p 178.

⁴ Western Cape Province. See generally: Dirk Brand, ‘The Western Cape Provincial Constitution’ (Summer, 2000) 31 RULJ 961; and Robert F Williams, ‘Comparative Subnational Constitutional Law: South Africa’s Provincial Constitutional Experiments’ (1999) 40 *South Texas Law Review* 625.

⁵ See, for example, s 106 of the Commonwealth Constitution (Australia).

federations'.⁶ There are some exceptions. For example, in Brazil constitutional amendments may be initiated by more than half the legislative assemblies of the States.⁷ In Spain the legislatures of the Autonomous Communities have the power to initiate constitutional amendment.⁸ In Russia, the legislative bodies of the constituent units of the Federation may initiate constitutional amendments.⁹ In the United States two-thirds of State legislatures may petition the Congress to convene a constitutional convention, but it is up to Congress as to whether to call a Convention into being.¹⁰ In Switzerland, of course, amendments may be initiated by the people.¹¹

The right of sub-national units to initiate constitutional change is not a significant right if the national Parliament can still veto the passage of any such amendment. In Australia, a Constitutional Commission recommended that the Constitution be amended to provide that if at least half the State Parliaments, representing a majority of Australians overall, proposed a constitutional amendment, it be put directly to the people for approval by way of a referendum.¹² Unsurprisingly, the Commonwealth Parliament has never agreed to put such a referendum proposal to the people.

Constitutional amendment primarily by national Parliaments

In some federations, the amendment procedure is left to the national Parliament with no additional involvement of sub-national units or the people. Special majorities of three-fifths or two-thirds are required to ensure that there is wide cross-party political support for constitutional amendments and adequate protection for minorities. However, special majorities are not effective constraints in countries where there is a dominant political party,¹³ as in Malaysia and South Africa, or where it is customary, as in Austria, to govern in broad coalitions that hold two-thirds of the votes in the Parliament.¹⁴

On its face, such a system is not consistent with federalism as it grants one party to a federal compact the power to change the terms of that compact.¹⁵ However, if the national Parliament is truly federal in its nature, with an upper House representing the interests of sub-national units, and a lower House representing national interests, then an appropriate balance may still be maintained. Much will depend upon whether the upper House is an effective forum for protecting sub-national interests. This, in turn, will

⁶ Thomas Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (Broadview Press, Ontario, 2006), p 250.

⁷ Constitution of Brazil, art 60.

⁸ Constitution of Spain, s 166 and s 87.

⁹ Constitution of Russia, art 134.

¹⁰ Constitution of the United States, art V.

¹¹ Constitution of Switzerland, arts 138-9.

¹² *Final Report of the Constitutional Commission 1988* (Vol 2), (AGPS, Canberra, 1988), pp 856-872.

¹³ For a discussion of the problems with the use of special majorities to constrain constitutional reform in Africa, see: J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth* (CUP, 2004), pp 45-51.

¹⁴ Roland Sturm, 'Austria', in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) p 48.

¹⁵ Thomas Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (Broadview Press, Ontario, 2006), p 249.

depend on factors such as the way those representatives are chosen and the dominance of political parties at the national and sub-national level.¹⁶

There are three basic models for constitutional reform by national Parliaments in federations. The first model gives virtually no effective input to the sub-national units and all power to the national Parliaments. For example, art 159 of the Malaysian Constitution provides that constitutional amendments may be made by a majority of two-thirds of the total members of each House.¹⁷ No additional State involvement is required, except in relation to certain constitutional amendment affecting the constitutional position of the States of Sabah and Sarawak, where the consent of the Governor of the State is also required.¹⁸

Although the Malaysian upper House is comprised in part of persons chosen by the State Legislatures, it is dominated by persons appointed upon the advice of the federal Cabinet.¹⁹ Further, voting is dominated by party politics rather than the representation of State interests.²⁰ Thus the Senate is not truly a State's House and does not in practice protect the interests of the States with regard to constitutional amendments. As the Government has traditionally held a two-thirds majority in the Malaysian Parliament, constitutional amendments have occurred frequently and often with little scrutiny, some having passed all legislative stages and come into effect in a matter of hours. From 1957 to 2003 the Malaysian Constitution was amended 43 times, giving rise to 643 amendments to individual articles.²¹

In Brazil, although a majority of States may collectively initiate proposals for constitutional amendments, when it comes to approving the amendments, this must be done by three-fifths of members in each House of the National Congress on each of two readings of the Bill.²² While the Senate is comprised of three representatives from each State, they are directly elected by the people, rather than by State governments or legislatures. The only influence the States have on the process is through the State-based strength of political parties and the role of State Governors as political power-brokers.²³

Theoretically, Belgium also falls within this first model. Its formal constitutional amendment mechanism was not changed when it transformed from a unitary to a federal

¹⁶ See the discussion of upper House representation, below.

¹⁷ Note that certain provisions also require the approval of the Conference of Rulers, and others are expressly excluded from the constitutional amendment procedure and can be amended by ordinary legislation: Constitution of Malaysia, art 159.

¹⁸ Constitution of Malaysia, art 161E. This provision applies to amendments including those concerning the legislative and executive power of the States in question.

¹⁹ Constitution of Malaysia, art 45. See also: Abdul Aziz Bari and Farid Sufian Shuaib, *Constitution of Malaysia – Text and Commentary* (Revised edition, Prentice Hall, Malaysia, 2004), p 339.

²⁰ Gordon P Means, 'Malaysia' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), p 185, at p 188.

²¹ Gordon P Means, 'Malaysia' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), p 185 at p 189.

²² Constitution of Brazil, art 60.

²³ V M F Costa, 'Brazil' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) p 91, at p 93.

state. It therefore only involves the national Parliament, requiring one Parliament to identify the provisions needing reform, a dissolution, and then the newly elected Parliament to approve those amendments with a two-thirds majority in each House.²⁴ However, most of the detailed provisions concerning federalism, including the distribution of powers and financial arrangements, are to be found in ‘special laws’ rather than the Constitution itself. The amendment of special laws requires not only the approval of a two-thirds majority in each House of Parliament, but also a majority in each language group. ‘In practice this means that the governments of the regions and communities must accept the proposal.’²⁵

The second model is the German model, where sub-national units have far more effective representation in the upper House giving them genuine involvement in constitutional reform. In Germany, the Basic Law is amended by a special majority of two-thirds in both the Bundestag (lower House) and the Bundesrat (upper House).²⁶ The Bundesrat, however, is composed of representatives chosen by the Länder, who vote in a bloc upon the instructions of the Länder. The Länder therefore have a direct voice in constitutional reform.

The German model was largely adopted in South Africa, where the representatives of the Provinces in the National Council of Provinces (upper House) vote as a bloc on matters affecting the Provinces. The level of approval required, however, varies depending upon the nature of the constitutional amendment. The highest threshold is set for amendments to s 1 (the founding provision) and s 74 of the South African Constitution (the constitutional amendment procedure). It requires the approval of 75% of members of the National Assembly (lower House) and 6 of the 9 Provinces in the National Council of Provinces (upper House). Amendments to Chapter 2 of the South African Constitution (Bill of Rights) require the support of two-thirds of members of the National Assembly and 6 provinces in the National Council of Provinces. Other constitutional provisions just require the support of two-thirds of members of the National Assembly, unless they relate to matters that affect the National Council of Provinces, alter provincial boundaries, powers, functions or institutions or amend a provision that deals specifically with a provincial matter, in which case the approval of 6 Provinces in the National Council of Provinces is also required.

The third model combines a system of parliamentary approval with a compulsory referendum where a total revision of the Constitution is proposed, or an optional referendum for partial revisions, which can be initiated by a minority in either House. Although the element of a referendum does not necessarily result in the protection of the interests of sub-national units, it dilutes the power of the national Parliament and forces it to put the case for change to the public. The two examples of this model are Austria and Spain.

²⁴ Constitution of Belgium, art 195.

²⁵ Kris Deschouwer, ‘Kingdom of Belgium’, in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen’s University Press, 2005) p 72.

²⁶ Basic Law (Germany), art 79.

In Austria, constitutional amendments must be approved by two-thirds of members voting in the Nationalrat (lower House), as long as at least half its members have participated in the vote.²⁷ In the ordinary case, the Austrian Bundesrat (upper House) only has a suspensive veto of such amendments.²⁸ If, however, the amendment restricts the competence of the Länder in legislation or its execution, then the same special two-thirds majority is required in the Bundesrat. Although the Austrian Bundesrat is comprised of delegates elected by the legislatures of the Länder,²⁹ they tend to vote according to party affiliation rather than in the interests of their respective Länder.³⁰ A further difference from Germany is that a referendum may be held in relation to partial revisions of the Austrian Constitution if one third of either House so requires, and a referendum is compulsory for total revision.³¹

In Spain, although the legislatures of the Autonomous Communities have the right to initiate constitutional amendments, the passage of those amendments is through the *Cortes Generales* (national Parliament). Constitutional amendments must be approved by a majority of three-fifths in each House. The Senate (upper House) represents territorial provinces as well as the Autonomous Communities.³² The Autonomous Communities have a degree of influence in the Senate, but not control. If a majority of three-fifths of the Senate is not achieved but the amendment is approved by a majority in the Senate, it will pass if the Congress (lower House) adopts the amendment by a two-thirds majority.³³ If, after the passage of the amendment, one tenth of the members of either House so request, a referendum upon the amendment is held.

The total revision of the Spanish Constitution, or the revision of certain parts of it (such as those concerning fundamental rights and freedoms and the Crown) require two-thirds majorities in each House, the dissolution of the Parliament, the passage of the Bill by two-thirds majorities in the newly elected Houses and a compulsory referendum.³⁴ A referendum is held in relation to ordinary amendments if requested by one tenth of the members of either House.

Amendment by a combination of the national Parliament and sub-national units

A more common method of constitutional amendment in federations is to require the approval of both the national Parliament and a proportion of sub-national units in relation to all amendments or those of particular importance to sub-national units. The United States Constitution, as the first modern federal Constitution, has been a significant influence on other federations.

²⁷ Constitution of Austria, art 44.

²⁸ Constitution of Austria, art 42.

²⁹ Constitution of Austria, art 35(1).

³⁰ Roland Sturm, 'Austria', in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) pp 49-50.

³¹ Constitution of Austria, art 44(3).

³² Constitution of Spain, s 69.

³³ Constitution of Spain, s 167.

³⁴ Constitution of Spain, s 168.

Article V of the United States Constitution gives a role to the national Congress at the initiation stage and a role to the States at the ratification stage. Constitutional amendments may be initiated by the Congress itself by being passed by a two-thirds majority in each House of the Congress. Alternatively, the Congress may call a Convention for the consideration of proposed amendments if petitioned by the legislatures of two-thirds of the States. This second alternative has not been utilised. Once proposed, amendments must be ratified either by the legislatures of three-fourths of the States or by Conventions in three-fourths of the States. State Conventions have only been used once for this purpose.³⁵ In practice, the primary procedure is passage by two-thirds of each House of the Congress and by the legislatures of three-fourths of the States.

The United States system has influenced those in Mexico and Nigeria. In Mexico, constitutional amendments require the approval of a special majority of two-thirds of those present and voting in each chamber of the national Congress and approval by more than half the State legislatures.³⁶ In Nigeria, constitutional amendments also require the approval of two-thirds majorities in each House of the National Assembly, but must reach the higher standard of approval of two-thirds of the State Houses of Assembly.³⁷ However, changes to the amending provision and provisions concerning State borders and fundamental rights must receive the support of four-fifths of all the members of each House in the Nigerian National Assembly as well as majorities in Houses of Assembly of two-thirds of the States.

In India, Canada and Russia the level of involvement of the sub-national units depends upon the nature of the provisions that are proposed to be changed. The different amendment procedures for different types of amendments become increasingly more complicated.

In India, changes to some constitutional provisions are deemed not to amount to constitutional amendments, and may therefore be implemented by ordinary legislation. Most constitutional amendments, however, require approval by a two-thirds majority of each House of the Indian Parliament. The Council of the States (upper House), primarily comprises representatives of the States who are elected by the Legislative Assembly of each State.³⁸ Hence, the States retain an influence upon constitutional amendment through their representation in the upper House.³⁹

Certain provisions of the Indian Constitution, however, require additional State approval. They mainly concern federal matters, being: (a) the election of the President (arts 54-5); (b) the extent of the executive power of the Union (art 73); (c) the extent of the executive power of the States (art 162); (d) the Union judiciary (Ch IV of Part V); (e) high courts in the States (Ch V of Part VI); (f) the distribution of legislative power (Ch I of Part XI) and

³⁵ See the ratification of the 21st amendment to the United States Constitution.

³⁶ Constitution of Mexico, art 135.

³⁷ Constitution of Nigeria, s 9(2).

³⁸ Constitution of India, art 80.

³⁹ This influence is strengthened because political parties tend to be locally or State based, and coalitions of parties are often required to form governments: George Matthew, 'India', in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) p 166, at p 174.

the lists in the 7th Schedule setting out those powers; (g) the representation of the States in Parliament; and (h) provisions dealing with amendment of the Constitution. Amendments to these provisions must be passed by a two-thirds majority each House of the Indian Parliament and must then be ratified by the legislatures of not less than half the States before being presented to the President for assent.⁴⁰

Since 1982, Canada has had an even more complex system of constitutional amendment.⁴¹ Some amendments, such as those concerning the office of the Queen, and the amendment process itself, require support by majorities in both Houses⁴² of the national Parliament and the legislative assembly of each Province.⁴³ Provisions concerning the executive government of Canada or the Senate and House of Commons can be amended by the Canadian Parliament alone,⁴⁴ just as amendments to the constitution of a Province can be made by the legislature of the Province.⁴⁵ Where an amendment concerns one or more, but not all, Provinces, it must be approved by both Houses of the Canadian Parliament and the legislative assemblies of the Provinces to which it applies.⁴⁶

The general procedure for amending the Canadian Constitution requires the approval of majorities in both Houses of the Canadian Parliament and in the legislative assemblies of at least two-thirds of the Provinces (currently seven Provinces) having in aggregate at least fifty percent of the Canadian population (known as the 7/50 procedure).⁴⁷ An amendment will ordinarily bind all Provinces, including those that do not support it. However, in relation to some types of amendment, one or more of the non-supporting Provinces may formally 'dissent' from the amendment, in which case it will not apply to the dissenting Provinces.⁴⁸

The Russian Constitution wins the prize for the most diverse constitutional amendment procedures. It utilizes the mechanisms of parliamentary special majorities, sub-national approval, constitutional assemblies and referenda. Constitutional amendments to Chapters 3 to 8 of the Russian Constitution require the approval of three-quarters of the members of the Federation Council (the upper House of the Federal Assembly) and two-thirds of the members of the State Duma (lower House). They must then be approved by at least two-thirds of the constituent units of the federation.⁴⁹

⁴⁰ Constitution of India, art 368.

⁴¹ *Constitution Act* 1982 (Canada), ss 38-48. See generally: Peter Hogg, *Constitutional Law of Canada*, (Loose-leaf edition, Vol 1, Thomson Carswell), Chapter 4; and James Ross Hurley, *Amending Canada's Constitution* (Canada Communication Group, 1996).

⁴² There is a procedure in s 47 of the Canadian Constitution for the House of Commons to override the Senate if it does not adopt a resolution for a constitutional amendment within a specified time.

⁴³ Constitution of Canada, s 41.

⁴⁴ Constitution of Canada, s 44.

⁴⁵ Constitution of Canada, s 45.

⁴⁶ Constitution of Canada, s 43.

⁴⁷ Constitution of Canada, ss 38 and 42.

⁴⁸ Constitution of Canada, ss 38 and 40.

⁴⁹ Constitution of the Russian Federation, arts 108 and 136.

Proposals to amend Chapters 1, 2 or 9 of the Russian Constitution (which deal with the fundamentals of the constitutional system, human rights and constitutional amendment) are dealt with differently.⁵⁰ They must be sent to a constitutional assembly, which can only be convened by a special majority vote of three-fifths of both the Federation Council and the State Duma. The constitutional assembly can confirm that these provisions are inviolable or propose a new draft constitution, which must be approved by a two-thirds majority of the constitutional assembly or submitted to the people in a referendum. The referendum is deemed to have passed if it is approved by a majority of those participating, as long as at least half the electorate takes part.

Constitutional Assembly or Convention

The use of elected constitutional assemblies or conventions tends to occur more commonly in constitutional reform at the sub-national level. However, they may play a role in constitutional amendment in both the United States and Russia, as discussed above.

Constitutional assemblies play a more significant role in national constitutional amendment in Argentina. There, the Constitution may be amended or totally revised pursuant to a two-stage procedure.⁵¹ First, two-thirds of both Houses of the Congress must vote in favour of reform. This is most commonly done through the enactment of a law.⁵² Secondly, a Constituent Assembly must be elected to make the reforms. It is elected by popular vote according to an electoral system established by the Congress. While the Constituent Assembly does not itself represent the views or interests of the Provinces, it does have the effect of diluting the power of the national Congress over constitutional reform to some extent.

Referenda and direct democracy

In Australia, constitutional amendments must be passed by an absolute majority of each House⁵³ of the national Parliament and then submitted in each State and certain Territories to electors in a referendum. The amendment must be approved by a majority of electors voting in a majority of the States, and a majority of electors overall.⁵⁴ Australia has had a low success rate in constitutional reform at the national level. Only eight out of 44 proposals have succeeded in over 100 years. Many have theorised as to

⁵⁰ Constitution of the Russian Federation, art 135.

⁵¹ Constitution of Argentina, s 30.

⁵² V Patroni, 'Argentina' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) p 17, at p 23.

⁵³ If one House passes a proposed constitutional amendment and the other House rejects or fails to pass the proposed amendment or amends it in a manner unacceptable to the first House, and this process is again repeated with the same result, the Governor-General may put the proposed amendment to a referendum without the approval of the second House. In practice, this procedure allows the House of Representatives to override the Senate but not vice versa, because the Governor-General acts upon the advice of Ministers who control the House of Representatives.

⁵⁴ Commonwealth Constitution (Australia), s 128. Note that in certain circumstances the approval of a majority in each affected State may also be required.

why this is so.⁵⁵ Some have criticised the use of referenda, arguing that the people tend to vote ‘no’ if they do not understand or are uncertain about the potential impact of a constitutional proposal. However, other elements have played a role. Referenda may only be initiated by the Commonwealth and must be passed by the Commonwealth Parliament before they can be put to the people. The consequence is that most referenda have proposed an increase in Commonwealth power at the expense of the States and the people.⁵⁶ This too may be a reason why they tend to fail. In contrast, referenda at the State level tend to be more successful. For example, in New South Wales the success rate for constitutional referenda has been approximately 85%.⁵⁷

Hueglin and Fenna have also noted that the absence of a requirement for special parliamentary majorities in relation to proposed constitutional amendments, means that they do not necessarily have the cross-party consensus and wide community support needed to sustain a referendum. They commented:

Comparing the Australian experience with the American, we might also note that the very high success rate for referendums in the United States [at the State level] reflects the impact of a bicameral super-majority legislative process for generating amendments while the very low success rate in Australia reflects the impact of an executive-driven simple-majority process for generating amendments. To get through both Houses of Congress with a two-thirds vote, any proposal has achieved a breadth of support far beyond that required in the Australian process.⁵⁸

In Switzerland, constitutional amendments must be put to the people and the Cantons in a referendum and must be approved by a majority of people overall and a majority of the people in a majority of Cantons.⁵⁹ In Switzerland, however, the popular initiative of constitutional amendment is permitted. The people may initiate a partial or complete revision of the Constitution by collecting 100,000 signatures. If the Parliament disagrees with a popular initiative, it may submit its own counter-proposal to a referendum at the same time as the popular initiative. It cannot, however, prevent the people from voting on the popular initiative. In practice, the success rate of constitutional amendments proposed by the Swiss Parliament is relatively high (around two-thirds), whereas most popularly initiated referenda fail.⁶⁰

⁵⁵ See, for example, J G Starke, ‘The Failure of the Bicentennial Referendum to Amend the Constitution, 3 September 1988’ (1988) 62 *Australian Law Journal* 976; E Campbell, ‘Changing the Constitution – Past and Future’ (1989) 17 *Melbourne University Law Review* 1; and B Galligan, *A Federal Republic* (CUP, Melbourne, 1995), pp 110-32.

⁵⁶ J McMillan, G Evans and H Storey, *Australia’s Constitution – Time for change?* (Allen & Unwin, Sydney, 1983) pp 24-9.

⁵⁷ A Twomey, *The Constitution of New South Wales*, (Federation Press, Sydney, 2004), pp 320-1.

⁵⁸ Thomas Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (Broadview Press, Ontario, 2006), p 269.

⁵⁹ Constitution of Switzerland, art 140.

⁶⁰ Nicolas Schmitt, ‘Swiss Confederation’ in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries* (McGill-Queens Uni Press, Montreal, 2005), p 375. Note that a similar phenomenon arises in those US States that allow popular initiatives for constitutional reform: *The Book of the States 2004* (Council of State Governments, Kentucky, Vol 36, 2004), p 3.

Although the outcomes of referenda do not necessarily reflect the interests of sub-national units, if a referendum proposal is disadvantageous to sub-national units generally or to some in particular, it is likely to fail, especially where there is a requirement that it be passed by majorities in a majority of sub-national units.

In addition to Australia and Switzerland, referenda may be used on occasion at the national level in Austria, Russia and Spain, as discussed above. Referenda are used more commonly at the sub-national level for constitutional amendment. Some or all of the sub-national units in Australia, Germany, Mexico, Russia, Spain, Switzerland and the United States require the passage of a referendum before some or all amendments to sub-national Constitutions may be made.

While some form of popular initiative is permitted in Argentina, Austria, Brazil and Spain at the national level,⁶¹ it is not permitted for constitutional reform. Switzerland is rare in allowing its Constitution to be amended by popular initiative. Again, popular initiative is more common at the sub-national level.

Indicative plebiscites may also be used at the national level in other federations. For example, although there is no national requirement for a referendum in Canada, a referendum was held to seek public approval of major constitutional reforms agreed in the Charlottetown Accord in 1992. The failure of the referendum led to reforms being dropped. Austria may also hold voluntary plebiscites to consult the people on matters of fundamental national importance.⁶²

The level of difficulty in amending the national Constitution

The involvement of sub-national units in the constitutional amendment process helps ensure that the federal balance is not tipped too far in favour of national power and protects the special interests of sub-national units. It may also have the advantage of preserving liberty by checking the power of the national government. The ease with which national constitutions can be amended in countries such as Zimbabwe has contributed to their social and economic problems.⁶³

However, other types of problems arise if the constitutional amendment procedure is so difficult to satisfy that formal constitutional reform rarely, if ever, takes place. In such cases other less legitimate means may be found to achieve constitutional change. The people or legislatures might take it upon themselves to achieve change through extra-constitutional means.⁶⁴ Alternatively, judges may become more inclined to take upon

⁶¹ See: Constitution of Argentina, s 39; Constitution of Austria, art 41(2); Constitution of Brazil, art 61; and Constitution of Spain, s 87.

⁶² Constitution of Austria, art 49b(1). Note that such plebiscites must not apply to elections and matters subject to a decision by a court or an administrative authority.

⁶³ J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth* (CUP, 2004), p 47.

⁶⁴ For examples in American States see: Robert F Williams, *State Constitutional Law – Cases and Materials* (Lexis Law Publishing, Charlottesville, 1999), pp 1074-8; and for criticism of such behaviour,

themselves the task of updating the Constitution in the absence of any prospect of formal change. This issue has recently been the subject of debate in Australia. The Commonwealth Constitution does not on its face grant the Commonwealth Parliament a full power to make laws with respect to industrial relations. It only expressly grants the Commonwealth Parliament power to make laws with respect to the conciliation and arbitration of inter-state industrial disputes.⁶⁵ Referenda were held on four occasions to amend the Constitution to give the Commonwealth an expanded power with respect to industrial relations and on each occasion the people rejected the proposal. In 2006 a majority of the High Court of Australia interpreted a separate Commonwealth power to make laws with respect to trading and financial corporations⁶⁶ so broadly that it encompassed the power to make laws with respect to the industrial relations of such corporations, despite the previous rejections of such an outcome by the people in referenda.⁶⁷

The majority of the Justices of the High Court stressed that few referenda had succeeded in Australia. They did not consider that the rejection of referenda could be treated as the ‘informed choice of electors’. They suggested that party politics and the framing of the question may affect the outcome. Their Honours concluded that the formal mechanism of constitutional amendment in s 128 of the Constitution ‘must be read with’ the provision that confers on the Court the power to interpret the Constitution.⁶⁸ They seemed to imply that this was a legitimate alternative means of amending the Constitution.

In contrast, Justice Kirby in his dissenting judgment argued that if the ultimate foundation of the legitimacy of the Constitution is derived from its acceptance by the Australian people, then their continued refusal to approve the creation of a general power of industrial relations by constitutional amendment remains a relevant factor.⁶⁹ Justice Callinan, also dissenting, argued that to ignore the history of these failures to achieve constitutional amendment would be to treat s 128 as irrelevant and to subvert the democratic federalism required by the Constitution. He rejected the notion that the people are uninformed and the suggestion that ‘the failure of most referenda in some way justifies the taking by this Court of an activist expansive or different view of the meaning of the Constitution from that which prompted the Parliament’s attempt to change it...’⁷⁰ He concluded that if ‘Parliament cannot persuade the people to change, it is not for this Court to treat the people’s will as irrelevant by making the change for them.’⁷¹

see: Michael Colantuono, ‘The Revision of American State Constitutions: Legislative Power, Popular Sovereignty and Constitutional Change’ (1987) 75 *California Law Review* 1473.

⁶⁵ Commonwealth Constitution (Australia), s 51(xxxv).

⁶⁶ Commonwealth Constitution (Australia), s 51(xx).

⁶⁷ *New South Wales v Commonwealth* (2006) 81 ALJR 34.

⁶⁸ (2006) 81 ALJR 34, per Gleeson CJ, Gummow, Hayne, Heydon, and Crennan JJ at [132] – [134].

⁶⁹ (2006) 81 ALJR 34, per Kirby J at [468].

⁷⁰ (2006) 81 ALJR 34, per Callinan J at [732].

⁷¹ (2006) 81 ALJR 34, per Callinan J at [735].

In the United States, it has been argued at the State level that a more flexible amendment procedure may influence judicial behaviour by permitting judges to play a reduced role in updating the Constitution and allowing them to leave it to the legislature and the people.⁷²

Inviolable protection of the federal structure

Some federal Constitutions refer to their federation as ‘indissoluble’⁷³ or ‘indivisible’,⁷⁴ or otherwise expressly prohibit its dissolution.⁷⁵ It is not always clear whether such statements are simply aspirational in nature, or whether there is an intention to prohibit constitutional amendments that would abolish sub-national units and the federal system.

Some federal Constitutions expressly include provisions that are said to be ‘inviolable’ while some state that certain principles or constitutional features may not be breached or altered, even by constitutional amendment. In Brazil, amendments to the Constitution may not be considered if they propose the abolition of the federal system, direct secret universal periodic votes, the separation of powers or human rights.⁷⁶ The immutability of the federal system was first included in the Brazilian Constitution in 1891 and has been maintained in all Constitutions since.⁷⁷ Such a provision, however, does not prevent a new Constitution being brought into effect which is unitary in nature.

Germany has a constitutional provision known as the ‘eternity clause’ which prohibits amendments to the Basic Law that would remove the federal system or impinge on the basic principles set out in Articles 1 and 20 (which include human rights, the separation of power, a republican system of government, democracy, the welfare state and the federal order).⁷⁸ The German Constitutional Court has therefore held that constitutional amendments may be null and void if they are contrary to these fundamental constitutional provisions.⁷⁹ In Switzerland, in contrast, all provisions of the Constitution may be amended, but initiatives for constitutional revision or amendment cannot proceed if they would breach mandatory international law.⁸⁰

The position in India is the most interesting. On its face, the Indian Constitution permits the amendment of all provisions. However, in a series of cases, the Supreme Court of

⁷² John J Dinan, *The American State Constitutional Tradition*, (Uni Press of Kansas, 2006), pp 50-1.

⁷³ For example: Constitution of Brazil, art 1; Constitution of Nigeria, s 2; and *Commonwealth of Australia Constitution Act* 1900, preamble.

⁷⁴ Constitution of Mexico, art 2.

⁷⁵ Basic Law (Germany), art 79(3).

⁷⁶ Constitution of Brazil, art 60(4).

⁷⁷ Luciano Maia, ‘The Creation and amending Process in the Brazilian Constitution’, in M Andenas (ed), *The Creation and Amendment of Constitutional Norms*, (BIICL, London, 2000) p 54, at 58-9.

⁷⁸ Basic Law (Germany), art 79(3).

⁷⁹ *Southwest State Case* (1951) 1 BverfGE 14, extracted in: Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997), p 63.

⁸⁰ Constitution of Switzerland, arts 139, 193 and 194. There is significant difficulty, however, in identifying the content of international law for this purpose: Nicolas Schmitt, ‘Swiss Confederation’ in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries* (McGill-Queens Uni Press, Montreal, 2005), p 375.

India has imposed limits on this power.⁸¹ At first, in *I C Golak Nath v State of Punjab*,⁸² the Supreme Court held that fundamental rights under the Constitution could not be amended. This was later overturned by the Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala*,⁸³ where a majority held that although any provision of the Constitution could be amended, this could not be done in such a manner as to alter the ‘basic structure and framework’ of the Constitution. This includes the federal character of the Constitution, as well as the rule of law, the separation of powers, the democratic and secular character of the Constitution. The Supreme Court’s judgment in *Kesavananda* has since been affirmed upon a number of occasions and is now well accepted in India. The attempt of the Indian Parliament to remove the jurisdiction of the Court and restore its full power to amend the Constitution, through the enactment of the forty-second amendment, was rejected by the Supreme Court in *Minerva Mills Ltd v Union of India*.⁸⁴ The Court held that the 42nd amendment was invalid because the Parliament could not use its limited power of amendment to expand it into an absolute power.

Interestingly, the same argument has been rejected a number of times by the Malaysian courts, despite the fact that the Malaysian Constitution follows the Indian Constitution in some regards. In *Phang Chin Hock v Public Prosecutor*, Suffian LP confirmed that the Parliament may amend the Constitution in any way it decides as long as it complies with the manner and form conditions prescribed by the Constitution itself.⁸⁵ In *Teo Soh Lung v Minister for Home Affairs*, Chua J noted that if the framers of the Constitution had intended such limitations, they would have expressly provided for them and that if the courts were to impose them they would be usurping Parliament’s legislative function.⁸⁶

The provisions of Chapters 1, 2 and 9 of the Russian Constitution cannot be amended by the Federal Assembly and may be declared inviolable by a constitutional assembly. Alternatively, they may be amended if a special majority of two-thirds of the constitutional assembly agrees or if the proposed amendment is approved by the people in a referendum. In the absence of a federal law to convene a constitutional assembly, however, these provisions are in effect inviolable.⁸⁷

In Australia there is a division of opinion as to whether the formal constitutional amendment mechanism could be used to abolish the federal system. Some argue that s 128 of the Commonwealth Constitution gives a full power to amend the terms of the

⁸¹ See generally: D G Morgan, ‘The Indian Essential Features Case’ (1981) 30 *International and Comparative Law Quarterly* 307; Dr R C Bhardwaj, *Constitutional Amendment in India* (6th ed, 1995, Northern Book Centre, New Delhi), pp 10-12; and Dr Mathew Abraham, ‘Judicial Role in Constitutional Amendment in India: The Basic Structure Doctrine’ in M Andenas (ed), *The Creation and Amendment of Constitutional Norms*, (BIICL, London, 2000) p 195.

⁸² AIR 1967 SC 1643.

⁸³ AIR 1973 SC 1461.

⁸⁴ AIR 1980 SC 1789.

⁸⁵ [1980] 1 MLJ 70, at 75. See also: *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, per Raja Azlan Shah FJ at 190.

⁸⁶ [1989] 2 MLJ 449, at 456.

⁸⁷ Marat Salikov, ‘Russian Federation’ in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries* (McGill-Queens Uni Press, Montreal, 2005), p 307.

Constitution, thereby permitting the termination of the federal system and the abolition of the States.⁸⁸ However, formidable difficulties would arise if any such attempt were made. Section 128 requires the passage of amendments by the Commonwealth Parliament, as well as approval by a majority of electors across Australia, and a majority of electors in a majority of States. Paragraph 5 of s 128 adds the additional requirement that where a proposed alteration would diminish the proportionate representation of any State in either House or its minimum number of representatives in the House of Representatives, or alter the limits of the State, then a majority of electors voting in that State must also approve the proposed law. This suggests that any attempt to abolish the States, which would necessarily affect their territorial limits and representation in the Parliament, would require approval by the electors in every State.

Others in Australia have argued that the references to the States and to an 'indissoluble Federal Commonwealth' in the preamble and covering clause of the *Commonwealth of Australia Constitution Act 1900* (which was the British Act that brought the Commonwealth Constitution into being), cannot be amended by s 128 of the Commonwealth Constitution, because it only permits the alteration of 'this Constitution', rather than the Act in which it is contained.⁸⁹ These provisions could, however, be amended by the means set out in s 15 of the *Australia Acts 1986*,⁹⁰ which permits amendments to certain fundamental constitutional documents by Commonwealth legislation enacted at the request or with the concurrence of all the States.⁹¹ State Parliaments would therefore be required to sign their own death warrants.

There is a third argument in Australia, that the power of amendment in s 128 of the Commonwealth Constitution extends only to the 'alteration' of the Constitution, and that this does not permit changes to the fundamental or essential nature of the Constitution itself.⁹² It is therefore argued that to change a federal Constitution into a unitary Constitution would be to replace one Constitution with another essentially different Constitution, rather than mere alteration. Similar questions have from time to time arisen in the United States as to whether the power to make 'amendments to this Constitution'

⁸⁸ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1910, 2nd ed) p 623 (albeit with some hesitation); G Sawyer, 'Some Legal Assumptions of Constitutional Change' (1957) 4 UWALR 1, at 4; and M Coper, *Encounters with the Australian Constitution* (1987) 395-7.

⁸⁹ See, for example, P H Lane, *Lane's Commentary on the Australian Constitution*, (LBC, Sydney, 2nd ed, 1997) pp 2 and 853; and S Gageler and M Leeming 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review* 143 at 148-9.

⁹⁰ The *Australia Acts* are two substantially identical Acts, one enacted by the Commonwealth Parliament at the request of all the States, and the other enacted by the Westminster Parliament at the request of the Commonwealth and State Parliaments. These Acts terminated Australia's constitutional relationship with the United Kingdom (except for the role of the Queen, who now acts in all Australian matters on Australian advice).

⁹¹ For a discussion of this method and proposals for its use in relation to the 1999 republic referendum, see: A Twomey, *The Constitution of New South Wales* (Federation Press, NSW, 2004) pp 780-6.

⁹² Gregory Craven, 'Would the Abolition of the States be an Alteration of the Constitution under Section 128?' (1989) 18 *Federal Law Review* 85.

in Article V of the United State Constitution includes the power to abolish the States.⁹³ Some Constitutions distinguish expressly between revisions and amendments (or partial and total revisions), establishing different procedures for each.⁹⁴ Where, however, a Constitution simply confers a power to ‘amend’ or ‘alter’ a Constitution, questions arise as to whether a change that is so fundamental that it destroys or reconstitutes the constitutional structure of a nation can be described as ‘amendment’.⁹⁵

As a general principle, the inclusion of inviolable provisions in a Constitution is anti-democratic and denies ultimate sovereignty to the people. In contrast, art 39 of the Mexican Constitution expressly states that sovereignty resides in the people, and as a consequence the people at all times have the inalienable right to alter or modify their form of government. However, even if certain provisions of a Constitution may not formally be amended according to the terms of that Constitution itself, this does not prevent the repudiation of that Constitution and the bringing into being of a new Constitution that represents the will of the people.⁹⁶ In reality, inviolability provisions tend to be both symbolic, expressing in constitutional form the principles that are most important to the people, as well practical in discouraging constitutional change on certain fundamental matters without the overwhelming support of the people.

Representation in the upper House of the national Parliament

Most federations have bicameral national Parliaments with the upper House of that Parliament representing to some extent the interests of sub-national units.⁹⁷ Sub-national representation in upper Houses is important both in relation to the passage of national legislation which may affect sub-national units, and in relation to constitutional amendment.

Three factors tend to influence the effectiveness of sub-national representation in national upper Houses. The first is the extent of sub-national representation. In most cases each sub-national unit is given equal representation regardless of size or population (eg Argentina, Australia, Brazil, Malaysia, Mexico, Nigeria, Russia, South Africa and the

⁹³ For earlier debate, see G D Skinner, ‘Intrinsic Limitations on the Power of Constitutional Amendment’ (1920) 18 *Michigan Law Review* 213; and W L Marbury, ‘Limitations on the Amending Power’ (1920) 33 *Harvard Law Review* 223.

⁹⁴ See for example the Constitutions of Austria and Spain, and those of some US States, such as California. On the significance of this distinction, see the Californian case: *Raven v Deukemejian* 801 P2d 1077 (1990).

⁹⁵ See the more recent debate upon this point in the essays by: Walter F Murphy, ‘Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity’; John R Vile, ‘The Case against Implicit Limits on the Constitutional Amending Process’; and Mark E Brandon ‘The “Original” Thirteenth Amendment and the Limits to Formal Constitutional Change’; in S Levinson (ed), *Responding to Imperfection – The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995).

⁹⁶ This may be done peacefully or by the overthrow of the government. On the latter course, see J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth* (CUP, 2004), p 44.

⁹⁷ An exception is Venezuela, which abolished its upper House and since 1999 has had a unicameral national Parliament: Allan R Brewer-Carías, ‘Venezuela’ in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen’s University Press, Montreal, 2005) p 393 at 396.

United States). This can lead to significant over-representation of smaller States. For example, California has 66 times the population of Wyoming, but both have two Senators in the Senate.⁹⁸

In some cases a basic level of equal representation is given with additional weighted levels of representation for those sub-national units with greater population (eg Austria, Germany and Spain), or sub-national units are given different levels of representation, largely based upon population or regional representation at particular points of time (eg Canada and India). Additional elements may also be represented in national upper Houses, such as appointees with experience in different fields (eg Malaysia and India) or representatives of other territorial areas (eg Spain), language communities (eg Belgium), or the nation as a whole (eg Mexico).

The second factor is the system used for choosing sub-national representatives in the upper house. Where representatives are appointed by the federal government, then party politics tends to prevail (eg Canada). Where the system is one of direct popular election, representatives also tend to regard themselves as being beholden to party interests rather than the interests of the sub-national unit which they formally represent. This is particularly the case where a party list system is used (eg Australia and Argentina). Where representatives are chosen by the legislature or government of the sub-national unit (eg Austria, Germany, India, Malaysia, Russia and South Africa), they are more likely to regard themselves as representing the interests of that sub-national unit,⁹⁹ although party interests may still play a significant role (eg Austria, India and Malaysia). Where, however, representatives must vote in blocs upon the instructions of the government or legislature of the sub-national unit (eg Germany and South Africa), then the upper House is more likely to represent the interests of the sub-national units.

To complicate matters further, electoral systems may be mixed. In Belgium the upper House is comprised of a number of directly elected members, a second category of members drawn from Community Councils, and a third category of members chosen by the members in the first two categories. In Spain, the representatives of the provinces are directly elected, whereas the representatives of the Autonomous Communities are chosen by their legislatures.

The third important factor is the manner in which political parties are organised and whether party power is found in national organizations or different sub-national organizations. For example, in Malaysia and Mexico, there have been very strong centrally organised parties which dominate politics at both the national and sub-national

⁹⁸ Thomas Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (Broadview Press, Ontario, 2006), p 181.

⁹⁹ Note the effect of the 17th amendment to the United States Constitution in making Senators directly elected, rather than chosen by State legislatures. Although the Senators chosen by State legislatures did not feel bound by State instructions and the Senate was never a true States' House, some have argued that the change to direct election heralded the demise of the Senate as a guardian of federalism. See: Thomas Hueglin and Alan Fenna, *Comparative Federalism – A Systematic Inquiry* (Broadview Press, Ontario, 2006), pp 188-90; and William H Riker, 'The Senate and American Federalism' (1955) 49(2) *American Political Science Review* 452.

level. The consequence is that the sub-national representatives in the upper House tend to vote on party lines and do not defend sub-national interests.¹⁰⁰ In contrast, in Argentina, Brazil, India, and Switzerland, party-politics at the sub-national level has a much stronger influence upon representatives in the national Parliament who need to retain patronage from sub-national power-brokers and are therefore more likely to pay heed to and protect sub-national interests.¹⁰¹

As the level and nature of sub-national representation in national upper Houses is so crucial to the interests of sub-national units, it is sometimes given special constitutional protection. For example, art V of the United States Constitution includes a proviso that no State, without its consent, shall be deprived of its equal suffrage in the Senate. This is a qualification upon the general amending formula. Similarly, in Australia, the fifth paragraph of s 128 of the Commonwealth Constitution provides that no alteration 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 Representatives shall become law unless the majority of the electors voting in that State approve the proposed law. Special protection is also given to the representation of the Austrian Länder in the Bundesrat (upper House). It cannot be altered by way of constitutional amendment unless, in addition, a majority of representatives in the Bundesrat from at least four Länder approve such amendments.¹⁰²

In Canada, any amendment concerning the principle of proportionate representation of the Provinces in the House of Commons, the method of selecting Senators and the number of Senators to represent a Province must meet the 7/50 procedure, and no dissent is allowed.¹⁰³ The unanimous consent of the Provinces and the Canadian Parliament is required for any amendment concerning the right of a Province to a number of members in the House of Commons that is not less than its representation in the Senate.¹⁰⁴

Special protection in relation to subnational borders and new states

Another special interest of sub-national units is the integrity of their borders and the admission of new sub-national units, which may involve removing part of their territory or diluting their national representation. The consequence is that most federal Constitutions specifically provide for such possibilities, and usually give a form of special protection to existing sub-national units.

¹⁰⁰ Gordon P Means, 'Malaysia' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), p 185, at p 188; and Yemile Mizrahi, 'Mexico', in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), p 199 at p 204.

¹⁰¹ V Patroni, 'Argentina' in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005) p 17, pp 24-5; V M F Costa, 'Brazil', *ibid*, p 93; G Matthew, 'India', *ibid*, p 174; and T Stauffer, N Töpferwien and U Thalmann-Torres, 'Switzerland', *ibid*, p 347.

¹⁰² Constitution of Austria, arts 34-5.

¹⁰³ Constitution Act 1982 (Canada), ss 38 and 42.

¹⁰⁴ Constitution Act 1982 (Canada), s 41.

While some federations, such as India and Malaysia,¹⁰⁵ have relatively low levels of protection, most require the consent of the sub-national units affected by such border and territorial changes (eg Argentina, Austria, Canada, Mexico, Russia, South Africa and the United States)¹⁰⁶ and some in addition or as an alternative require the consent of the people affected by way of a plebiscite or referendum (eg Australia, Brazil, Germany, Nigeria and Switzerland.¹⁰⁷

It is therefore commonly the case that the territorial integrity of sub-national units is guaranteed by the national Constitutions and that consent of sub-national units, through their Parliament, Government or their population, is required before significant changes can be made to it.

Special protection of the amending formula

In those federal countries where different types of constitutional provisions are afforded different levels of protection, the amendment provision itself is usually granted the highest level of protection available. If not, the less stringent amendment procedures could be used to remove the more stringent amendment procedures by way of altering the amendment formula itself. The amendment procedure therefore needs to be entrenched by the highest level of protection available.

For example, the constitutional amendment procedure in s 368 of the Indian Constitution can itself only be amended by special majorities of two-thirds of the members of each House present and voting, and by resolutions of the Legislatures of not less than half of the States. In South Africa, the amending formula is subject to the highest level of constitutional entrenchment, being the approval of 75% of the members of the National Assembly and the approval of six of the nine Provinces in the National Council of Provinces.¹⁰⁸ In Canada, the unanimous agreement of the Canadian Parliament and the legislative assembly in each Province is required to make any amendment to the amending formulae.¹⁰⁹

In Nigeria, the amendment provision is protected by the requirement for a higher special majority of four-fifths in each chamber of the National Assembly, as well as the approval of two-thirds of the State Houses of Assembly, before it may be amended.¹¹⁰ In Russia, the amendment procedure cannot be amended at all by the Federal Assembly. If an

¹⁰⁵ Constitution of India, arts 2-3; and Constitution of Malaysia, art 2.

¹⁰⁶ See: Constitution of Argentina, ss 13 and 75; Constitution of Austria, art 3(2); Constitution Act 1871 (Canada), ss 2 and 3 and Constitution Act 1982 (Canada), s 42; Constitution of Mexico, arts 73 and 46; Constitution of Russia, arts 65, 66, 67(3), 102(1) and 137; Constitution of South Africa, s 74; and Constitution of the United States, art IV, s 3.

¹⁰⁷ Commonwealth Constitution (Australia) ss 123, 124 and 128; Constitution of Brazil, arts 18(3) and 69; Basic Law (Germany), art 29; Constitution of Nigeria, s 8; Constitution of Switzerland, art 53. Note also that recent mergers of constituent units in Russia have been held after the consent of the people has been gained by referenda: Alexander Domrin, 'From Fragmentation to Balance: The Shifting Model of Federalism in Post-Soviet Russia' (2006) 15 *Transnational Law and Contemporary Problems* 515, at 549.

¹⁰⁸ Constitution of South Africa, s 74(1).

¹⁰⁹ Constitution of Canada, s 41.

¹¹⁰ Constitution of Nigeria, s 9(3).

amendment is proposed to it by three-fifths of the total number of deputies of the Federation Council and State Duma, a constitutional assembly must be convened to determine whether the provisions are inviolable or may be amended. A constitutional change to these provisions can then only be approved by a two-thirds majority of the constitutional assembly, or a popular vote where at least half the electorate takes part.¹¹¹

It is unclear whether the amending formula in s 128 of the Constitution of the Commonwealth of Australia is itself entrenched to a higher degree than other provisions. It may indeed be the case that the framers of the Constitution assumed that s 128 could not itself be amended.¹¹² However, as s 128 was not expressly excluded from the potential application of the amending formula that it contains, it has been generally accepted that the provision may itself be amended,¹¹³ and it was indeed amended in 1977 to give the voters of any Territory represented in the Commonwealth House of Representatives the right to vote in constitutional referenda.

It is likely, however, that paragraph 5 of s 128 (which requires a successful referendum in each affected State if a constitutional amendment affects state boundaries or diminishes proportionate representation in the Parliament) is doubly entrenched because it also extends to alterations ‘in any manner affecting the provisions of this Constitution in relation thereto’.¹¹⁴ Its procedure would therefore apply not only to any amendment that diminished the proportionate representation of any State in either House of the Commonwealth Parliament or altered the limits of a State, but also to any amendment to s 128 which removed this special requirement.

Alternative means of changing the legislative distribution of powers

Where federal Constitutions are difficult to amend, there is often an alternative mechanism included to provide for adjustments to the distribution of legislative powers between the national Parliament and sub-national legislatures. Constitutions may provide for a voluntary inter-change of legislative powers. While in federations it is usual for national legislative power to be binding in all sub-national units, provisions permitting the readjustment of the distribution of legislative powers may in some cases permit such exchanges to apply in relation to particular sub-national units only. This may result in the

¹¹¹ Constitution of Russia, s 135.

¹¹² Geoffrey Sawyer, ‘Some Legal Assumptions of Constitutional Change’ in (1957) 4 UWALR 1 at 4; and J Richardson, ‘In the Matter of Section 128 of the Commonwealth Constitution’, *Proceedings of the Australian Constitutional Convention* (C H Rixon, Government Printer, Melbourne, 1975), Report to Standing Committee B, Appendix A, p 27.

¹¹³ *Buzzacott v Gray* [1999] FCA 1525 at [24]; J A Thomson, ‘Altering the Constitution: Some Aspects of Section 128’ (1983) 13 *Federal Law Review* 323, at 339; P Hanks, *Constitutional Law in Australia* (Butterworths, Sydney, 2nd ed, 1996) p 29; and P H Lane, *Lane’s Commentary on the Australian Constitution*, (LBC, Sydney, 2nd ed, 1997) p 854.

¹¹⁴ W Harrison Moore, *The Constitution of the Commonwealth of Australia*, (2nd ed, 1910) pp 604-5; Geoffrey Sawyer, ‘Some Legal Assumptions of Constitutional Change’ in (1957) 4 UWALR 1, at 5; J Richardson, ‘In the Matter of Section 128 of the Commonwealth Constitution’, *Proceedings of the Australian Constitutional Convention* (C H Rixon, Government Printer, Melbourne, 1975), Report to Standing Committee B, Appendix A, p 32; and P H Lane, *Lane’s Commentary on the Australian Constitution*, (LBC, Sydney, 2nd ed, 1997) pp 857-8.

national Parliament being able to enact laws on certain subjects that only apply in particular sub-national units, or in some sub-national units having greater legislative powers than others. This result is sometimes described as chequerboard federalism.

This kind of adjustment of the distribution of legislative power without formal constitutional amendment can give rise to a number of questions about how such an exercise of legislative power fits in with the rest of the Constitution. Unfortunately, few Constitutions spell out in any detail the consequences of a transfer or delegation of powers, with the consequence that these mechanisms are often not used because of the uncertainty as to their application. An initial question is whether there is a complete and irrevocable transfer of power or a delegation of power which may be revoked or otherwise controlled by the delegating legislature. Questions may also arise as to the status of laws enacted under these powers, the ability to amend or repeal such laws in the future, and whether compensation is payable for those jurisdictions that do or do not participate in a transfer of powers.

Transfer of legislative powers from the national Parliament to sub-national legislatures

The transfer or delegation of powers may go in either direction. This will depend, of course, upon the extent to which exclusive, concurrent and residual powers have been initially conferred upon the different levels of government by the national Constitution.

In the absence of an express provision permitting such a transfer or delegation, there may be difficulties in implying such a power. In Canada, the Supreme Court has held that the Canadian Parliament cannot delegate any of its legislative powers to the provincial legislative assemblies or vice versa. In *Attorney-General of Nova Scotia v Attorney-General of Canada*, the Court expressed concern that the inter-delegation of legislative powers between the national and provincial Parliaments would undermine the constitutional distribution of powers.¹¹⁵ Rinfret CJC saw the constitutional distribution of powers as protection for the rights of citizens and did not consider that the Canadian and provincial legislatures could strip away that protection by agreement.¹¹⁶ Fauteux J noted that legislative jurisdiction cannot be assumed or given by consent. Such changes could only be made by a constitutional amendment.¹¹⁷

Express provisions in national Constitutions, however, may permit national Parliaments to confer part of their exclusive legislative powers upon sub-national legislatures, or enact 'framework' legislation, the detail of which is filled in separately by sub-national legislatures.

¹¹⁵ [1951] SCR 31; [1950] 4 DLR 368. Cf the position of the US Supreme Court that Congress may allow the States to regulate aspects of inter-state trade and commerce: *Leisy v Hardin* 135 US 100 (1890); and *Prudential Insurance Co v Benjamin* 328 US 408 (1946).

¹¹⁶ [1950] 4 DLR 368, at 371.

¹¹⁷ [1950] 4 DLR 368 at 394.

In Brazil, the national Congress may pass a ‘supplementary law’ (by absolute majority) that authorises the States to legislate upon specific questions in relation to the matters listed as exclusive legislative powers of the national Congress.¹¹⁸ Similarly, the South African Constitution confers on the National Assembly the power to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.¹¹⁹ Provincial legislatures are also expressly empowered to exercise such an assigned power.¹²⁰

The power of the Malaysian Parliament to make laws regarding matters in the Federal List, includes the power to authorise one or more State legislatures, subject to such conditions or restrictions as the Parliament may impose, to make laws regarding the whole or any part of that matter.¹²¹ Here, at least, some consideration is given to the status of such a law with respect to the rest of the Constitution. The Malaysian Constitution provides that a State law made under the authority conferred by such a national Act may, if and to the extent that the Act so provides, amend or repeal (as regards the State in question) any federal law passed before that Act.

The Spanish *Cortes Generales* may in matters of national jurisdiction, confer upon all or any of the Autonomous Communities the power to pass legislation for themselves within the framework of the principles and guidelines laid down by a national law. Each enabling law is required to set out the method of supervision by the *Cortes Generales* over the Communities’ legislation.¹²²

The German Basic Law provides that the Federation may legislate to permit the Länder to exercise any of the Federation’s exclusive legislative powers.¹²³ In addition, the German system provides for the enactment of framework laws at the national level, which are given greater detail by laws enacted by the Länder, and implemented by the Länder.¹²⁴ Similar systems apply in Austria¹²⁵ and Switzerland.¹²⁶ In Austria, the Federation and the Länder may also conclude agreements among themselves about matters within their respective spheres of competence which may bind the federal legislature if approved by the Nationalrat (lower House).¹²⁷

¹¹⁸ Constitution of Brazil, art 22.

¹¹⁹ Constitution of South Africa, s 44(1).

¹²⁰ Constitution of South Africa, s 104.

¹²¹ Constitution of Malaysia, art 76A. For a list of examples of such laws, see L A Sheridan and H E Groves, *The Constitution of Malaysia*, (Malayan Law Journal, Singapore, 4th ed, 1987) p 203.

¹²² Constitution of Spain, s 150(1).

¹²³ Basic Law (Germany), art 71.

¹²⁴ Basic Law (Germany), art 75.

¹²⁵ Constitution of Austria, arts 11 and 12.

¹²⁶ Constitution of Switzerland, arts 42 and 46.

¹²⁷ Constitution of Austria, art 15a.

Transfers of legislative power from sub-national legislatures to the national Parliament

Australia, India and Malaysia have relatively similar systems for sub-national units to request the enactment of uniform legislation by the national Parliament concerning matters of sub-national jurisdiction.

In Australia, the Commonwealth Parliament may legislate with respect to ‘matters’ referred to it by the Parliament of any State or States.¹²⁸ Such a law can only extend to those States that referred the matter or whose Parliaments afterwards adopt the law.¹²⁹ The State Parliaments make the referral by enacting a law (rather than simply passing a resolution). Few references were attempted in the early years of federation because of uncertainty as to whether the referral would be permanent or could be revoked. Although there is limited jurisprudence in relation to this provision, the High Court of Australia has accepted that a matter may be referred for a limited period of time only.¹³⁰ As a consequence, State referrals often include an automatic termination after a number of years, with a power conferred upon the State Governor to renew the referral for a further term. In this manner, States can retain control over their referrals.

There is no authoritative determination in Australia as to whether a referral can be revoked by State legislation, but it appears likely that it could be revoked as this is consistent with the principle that a State Parliament cannot bind future Parliaments by passing an unrepealable law.¹³¹ There is a potential difficulty, however, if the reference is revoked by the enactment of State legislation, as it might be held to be inoperative on the ground that it is inconsistent with the Commonwealth law enacted pursuant to the referral.¹³² Consequently, references often provide that they may be revoked by an executive act, such as a proclamation issued by the State Governor.

Where a State does not refer a matter but simply adopts a Commonwealth law that was enacted based upon a referral from another State, there is an even stronger argument that a State can also terminate its adoption. This is because the termination of the adoption of the Commonwealth law has no effect upon Commonwealth legislative power or the validity of the Commonwealth’s law. However, if a State reference is revoked or otherwise expires, then not only will the Commonwealth law enacted pursuant to it cease to operate with respect to that State, but it may become completely inoperative if there is no other State referral to support it.

The referral of a matter by a State to the Commonwealth does not amount to a transfer of power. The Commonwealth’s power to enact a law with respect to the matter referred is a concurrent power, so that the State may still legislate with respect to the matter but its

¹²⁸ For a more detailed analysis, see: A Twomey, *The Constitution of New South Wales* (Federation Press, Sydney, 2004), pp 806-15.

¹²⁹ Commonwealth Constitution (Australia), s 51(xxxvii).

¹³⁰ *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, at 226.

¹³¹ *Graham v Paterson* (1950) 81 CLR 1, at 18.

¹³² Commonwealth Constitution (Australia), s 109.

laws will be inoperative to the extent of any inconsistency with a Commonwealth law. When the Commonwealth enacts a law with respect to a referred matter, it has the full status of a Commonwealth law and is subject to any other constitutional limitations on Commonwealth legislative power, be they express or implied. Where the matter referred to the Commonwealth is the enactment of a law in a particular form, a question arises as to whether the Commonwealth Parliament has the power to amend or partially repeal it without a further State referral. Due to the uncertainty on this point, referrals of matters will often deal expressly with the question of amendment. The referral may include a power to amend as long as amendments are approved in advance by a designated person (such as the State Governor) or the power to amend may be governed by an inter-governmental agreement, giving the States and the Commonwealth voting rights to determine whether an amendment is acceptable before it is made.

Similarly, the Indian Parliament may legislate with regard to matters in two or more States (otherwise outside its legislative power) if both Houses of the legislatures of those States pass resolutions requesting it to do so.¹³³ The federal law then applies only to those States and to any other State that adopts it later by resolution. In this case the Constitution makes it clear that the federal law may only be amended or repealed by a federal law passed or adopted in the same manner. It cannot be repealed or amended by a State law.

The Malaysian Parliament may also make laws regarding matters in the State list for the purpose of promoting the uniformity of laws of two or more States or 'if so requested by the Legislative Assembly of any State.'¹³⁴ Such laws may not come into operation in any State until they have been adopted by a law made by the Legislature of that State. In contrast to Australia and India, once adopted the federal laws are deemed to be State laws, and may accordingly be amended or repealed by a law made by the State legislature.

The Canadian Parliament may provide for the uniformity of laws relating to property and civil rights in certain Provinces, but such laws have no effect in any Province unless adopted and enacted as a law of the legislature of that Province.¹³⁵ As this method appears to require a permanent transfer of power to the Canadian Parliament, it has not been used.¹³⁶

When new procedures for amending the Canadian Constitution were enacted in 1982, provision was made for constitutional amendments that only apply to particular Provinces.¹³⁷ Although formally styled as a constitutional amendment, the substantive procedure is similar to that outlined above for Australia and India. The consent of the legislative assembly of each affected Province is required before the Canadian Parliament

¹³³ Constitution of India, art 252(1).

¹³⁴ Constitution of Malaysia, art 76(1).

¹³⁵ Constitution Act 1867 (Canada), s 94.

¹³⁶ Peter W Hogg, *Constitutional Law of Canada* (2004 Student Edition), (Thomson Carswell, Ontario, 2004) p 347, fn 64.

¹³⁷ Constitution Act 1982 (Canada), s 43.

can enact a law that applies to them. The ordinary requirement that at least seven Provinces agree to a constitutional amendment does not apply where the amendment only applies in relation to specific Provinces.

Provision was also made under the general amendment procedure (the 7/50 procedure) for up to three Provinces to ‘dissent’ from constitutional amendments. The effect of ‘dissent’ (as opposed to simply not supporting the amendment) is that the amendment does not apply to the dissenting Province.¹³⁸ Where an amendment transfers provincial legislative powers relating to education or other cultural matters to the Canadian Parliament, reasonable compensation must be provided to any Province to which the amendment does not apply.¹³⁹

Involuntary transfer – the exercise of coercive powers

A number of federations, to a greater and lesser degree, permit federal intervention in areas of exclusive sub-national power if certain conditions are satisfied. For example, the Indian Parliament may exercise exclusive State powers if the upper House, by a two-thirds majority, resolves that it is necessary or expedient in the public interest to do so or where there is a Proclamation of Emergency.¹⁴⁰ While the exercise of this power on public interest grounds is limited in its application to a period of 1 year (which can be renewed), emergencies may extend for longer periods. An emergency declared in 1962 lasted for six years, as did another emergency declared in 1971.¹⁴¹

The South African Parliament may also legislate in areas of exclusive provincial power when national legislation is deemed necessary: (a) to maintain national security; (b) to maintain economic unity; (c) to maintain essential national standards; (d) to establish minimum standards required for the rendering of services; or (e) to prevent unreasonable action by a Province which is prejudicial to the interest of another Province or the country as a whole.¹⁴² In other federations, the national Parliament may intervene in the States to ensure compliance with fundamental constitutional principles,¹⁴³ harmonize the laws of sub-national units,¹⁴⁴ or for the purpose of implementing any treaty.¹⁴⁵

Alternative means of altering the distribution of executive powers

There is often a need within a federation to be flexible with the operation of executive powers. Some federations are based upon the principle that the implementation of federal laws is primarily undertaken by sub-national units. In others, where uniform legislative

¹³⁸ Constitution Act 1982 (Canada), s 38.

¹³⁹ Constitution Act 1982 (Canada), s 40.

¹⁴⁰ Constitution of India, arts 249 and 250.

¹⁴¹ George Matthew, ‘India’, in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen’s University Press, Montreal, 2005) p 166 at p 169.

¹⁴² Constitution of South Africa, s 44(2).

¹⁴³ Constitution of Argentina, s 6; Constitution of Brazil, art 34; Basic Law (Germany), arts 28 and 37; Constitution of Malaysia, art 71(4); and Constitution of the United States, 14th amendment.

¹⁴⁴ Constitution of Spain, s 150(3).

¹⁴⁵ Constitution of Malaysia, art 76.

schemes are established, it is often desirable that they be administered by one body, be it a joint body representing the federal and sub-national units, or a governmental body of one level of government in which is vested the powers of the other(s).

In some cases, the ability to confer executive power on another government must be implied from the Constitution. For example, in Canada, the Supreme Court has accepted that there may be inter-delegation of administrative powers. The Canadian Government may confer administrative power upon provincial bodies, as long as the Provinces permit their bodies to exercise those functions.¹⁴⁶ In Australia, in contrast, greater difficulties have arisen. The High Court of Australia has held that the States do not have the power to vest functions unilaterally in Commonwealth officers. However, if a State enacts a law which confers some of its executive powers on Commonwealth officers and the Commonwealth Parliament legislates to permit its officers to fulfil such functions, then this will be effective.¹⁴⁷ Problems may arise if the Commonwealth law imposes on Commonwealth officers a duty to perform State functions or exercise powers conferred by a State law, rather than simply permitting such actions. The High Court has raised doubts as to whether the Commonwealth Parliament can impose such duties unless the subject matter of the law falls under an express head of constitutional power.¹⁴⁸ This has led to concern as to the validity of many co-operative Commonwealth-State schemes where enforcement or administration is vested in Commonwealth officers.¹⁴⁹

In Germany, the Länder implement federal laws and in doing so, the Länder may establish the authorities needed to implement those laws (unless the federal Parliament otherwise provides).¹⁵⁰ There are also explicit provisions in the Basic Law concerning cooperation.¹⁵¹ In South Africa too, the National Parliament may confer upon the Provinces the executive power to implement particular national laws.¹⁵² The South African Constitution also includes principles of cooperation.¹⁵³ Likewise, in Austria, the Governor of a Länder may execute federal executive power where there are no federal authorities in existence in a Länder to do so.¹⁵⁴ The Federation may delegate to the Governor its executive power in certain matters which would otherwise have to be performed directly by federal authorities.¹⁵⁵ The Austrian Länder sometimes also use private companies as vehicles for action in areas such as regional economic policy, labour

¹⁴⁶ *PEI Potato Marketing Board v Willis* [1952] 2 SCR 392.

¹⁴⁷ *R v Hughes* (2000) 202 CLR 535, at [31].

¹⁴⁸ *R v Hughes* (2000) 202 CLR 535, at [34].

¹⁴⁹ Graeme Hill, 'R v Hughes and the Future of Co-operative Legislative Schemes' (2000) 24 *Melbourne University Law Review* 478; and Dennis Rose, 'Commonwealth-State Co-operative Schemes After Hughes: What Should be Done Now?' (2002) 76 *Australian Law Journal* 631.

¹⁵⁰ Basic Law (Germany), arts 84 and 85.

¹⁵¹ Basic Law (Germany), arts 91a and 91b.

¹⁵² Constitution of South Africa, s 125(2)(c). See, however, the difficulties arising from a delegation under the interim Constitution in *DVB Behuising Pty Ltd v North West Provincial Government* 2000 (4) BCLR 347 (CC).

¹⁵³ Constitution of South Africa, s 41.

¹⁵⁴ Constitution of Austria, art 102.

¹⁵⁵ Constitution of Austria, art 102(3).

market policies, health and culture policies, which would otherwise fall within national jurisdiction.¹⁵⁶

The Indian Constitution expressly allows the executive powers of the Indian government to be conferred on the States and vice versa.¹⁵⁷ The President of India, with the consent of a State government, may entrust functions within the Indian government's executive power to the State government or its officers. Federal laws applying in a State may also confer powers and impose duties upon the State or its officers or authorities, or authorise such a conferral or imposition. Where this is done, the Indian Government must pay to the States an amount in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

On the other side, a State Governor, with the consent of the Indian Government, may entrust to the Indian Government or its officers functions within the executive power of the State. In this case there is no ability to impose duties nor any consequential liability to pay compensation.

The Spanish Constitution provides that the national government may transfer or delegate to the Autonomous Communities, through an organic act, some of its powers which by their very nature can be transferred or delegated. In each case, the law must provide for the appropriate transfer of financial means, as well as specify the forms of control to be retained by the national government.¹⁵⁸

Another country where compensation is an issue is Malaysia. The Malaysian Constitution expressly permits the redistribution of executive powers between the States and the Federation. Federal laws may confer executive authority on a State to administer specified provisions of federal law, and in doing so may confer powers and impose duties on any authority of the State.¹⁵⁹ The Federation is required to reach an agreement with the State on payment for fulfilling these functions. Arrangements may also be made between the Federation and a State for the performance of functions of one by the authorities of the other, which may include the making of payments with respect to the costs incurred under the arrangement.¹⁶⁰

The most unique way of dealing with the delegation of executive power has been exercised in Russia. The Russian Constitution allows the federal executive, by agreement, to delegate part of its executive power to the executives of constituent units of the federation, provided that this does not contravene the Russian Constitution or federal laws.¹⁶¹ The executives of constituent units may also delegate part of their executive power to the federal executive.¹⁶² This may be done by treaty.¹⁶³ This mechanism was

¹⁵⁶ Roland Sturm, 'Austria', in A L Griffiths (ed) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), p 53.

¹⁵⁷ Constitution of India, ss 258 and 258A.

¹⁵⁸ Constitution of Spain, s 150(2).

¹⁵⁹ Constitution of Malaysia, art 80(4).

¹⁶⁰ Constitution of Malaysia, art 80(5).

¹⁶¹ Constitution of Russia, art 78(2).

¹⁶² Constitution of Russia, art 78(3).

frequently used in the 1990s by President Yeltsin to adjust the allocation of power between the constituent units and the federal government. Treaties were entered into with more than half of the constituent units.¹⁶⁴ It is no longer a method commonly utilised in Russia.

Tarr has speculated upon the reason for the use of treaties rather than a fixed constitutional allocation of powers. He observed:

First, because bilateral treaties are easier to change than the Federation Constitution, this arrangement adds flexibility to Russian federalism. It also avoids a premature constitutionalization of the distribution of powers between the federal government and the subjects of the Federation, thereby permitting experimentation as to the appropriate division of responsibility. Second, this arrangement permits an accommodation of specific problems or special circumstances within particular regions. Third, it recognizes the substantial differences among subjects of the Federation, permitting those with greater administrative and fiscal capacity to shoulder more responsibilities without imposing the same burdens on those that lack such capacity.¹⁶⁵

Similar points may be made about the other means of transferring or delegating executive power, discussed above. They support inter-governmental co-operation and provide the flexibility needed to deal with changing national and local interests.

Different procedures for the amendment of subnational constitutions

Where sub-national constitutional matters are largely or completely incorporated in national Constitutions, then the mechanism for national constitutional amendment, as discussed above, is of vital importance.

Where sub-national units have their own Constitutions, the means of amending them sometimes mirrors the means of amending national Constitutions, especially when this method is dictated by the national Constitution (eg Austria¹⁶⁶, Malaysia,¹⁶⁷ and South Africa¹⁶⁸). However, the mechanism for amending the national Constitution of a federation tends to take the form that it does in order to provide a degree of protection for the autonomy of sub-national units within the federation. This rationale is not relevant at the sub-national level, unless the interests of local government are represented and protected in the amendment process at the sub-national level in the same way that sub-national interests are protected at the national level. For example, in some Mexican

¹⁶³ Constitution of Russia, art 11.

¹⁶⁴ 'Constitution Watch – Russia', (1998) 7(3) *East European Constitutional Review* 32.

¹⁶⁵ G Alan Tarr, 'Creating Federalism in Russia' (1999) 40 *South Texas Law Review* 689, at 705.

¹⁶⁶ Constitution of Austria, art 99.

¹⁶⁷ Constitution of Malaysia, Eighth Schedule.

¹⁶⁸ Constitution of South Africa, s 142. Note the requirement that Provincial Constitutions and any amendment to them be certified by the Constitutional Court. Note also that s 10 of the Constitution of Western Cape Province adds further requirements concerning the publication of proposed amendments and the seeking of submissions on them.

States the approval of more than half the *ayuntamientos* (municipal councils) is required before a change may be made to the State Constitution.¹⁶⁹ Local government is also given a role, albeit more minor, in the amendment of some other sub-national Constitutions.¹⁷⁰

Otherwise, the reasons for making a Constitution difficult to change relate to other matters, such as ensuring that change is not precipitous or ill-considered and ensuring that fundamental change has the support of the people. It is therefore often the case that the mechanism for constitutional amendment at the sub-national level is easier to satisfy than at the national level. For example, in Australia¹⁷¹ and Canada,¹⁷² most provisions of sub-national Constitutions can be amended by ordinary legislation. In the United States the history of State constitutional amendment provisions has shown a trend towards the removal of many impediments to constitutional reform (such as requirements that amendments be passed by a legislature in consecutive sessions, and special majorities both within the legislature and in referenda) as well as an increase in the involvement of the people through popular initiative.¹⁷³

The means of amending sub-national constitutions are far more diverse than those for amending national Constitutions and cannot be described in detail in this paper. Three observations, however, may be made. First, it is interesting to note that within a federation, sub-national units may choose widely different mechanisms for amending their constitutions.¹⁷⁴ There is no necessity for uniformity. Secondly, sub-national units tend to make greater use of different mechanisms of constitutional reform such as conventions or constituent assemblies (eg Argentina, Mexico, United States and Switzerland) and referenda (eg Australia, Germany, Mexico, Russia, Spain, Switzerland, United States).¹⁷⁵ Thirdly, there is a greater tendency in sub-national units to involve the

¹⁶⁹ Juan Marcos Gutiérrez González, 'United Mexican States' in J Kincaid and G Alan Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries* (McGill-Queens Uni Press, Montreal, 2005), p 215.

¹⁷⁰ For example, in some of the Spanish Autonomous Communities constitutional amendments may be initiated by a two-thirds majority of municipalities representing at least half the voters nationally. Similarly, in Brazil, amendments to some State Constitutions may be initiated by one-third or half of the local councils in that State. In South Africa, s 10 of the Constitution of Western Cape Province requires that submissions be sought from municipalities on proposed amendments and tabled in the legislature.

¹⁷¹ Some Australian States have entrenched some provisions of their Constitutions which require a referendum for change, but most provisions (and in some States all provisions) can be amended by ordinary legislation.

¹⁷² S 45 of the *Constitution Act* 1982 (Canada) permits provincial legislatures to amend provincial constitutions, but s 41 requires the unanimous agreement of all provincial legislatures and the Canadian Parliament before amendments can be made to the office of the Lieutenant-Governor of a Province.

¹⁷³ John J Dinan, *The American State Constitutional Tradition*, (Uni Press of Kansas, 2006), pp 29-61.

¹⁷⁴ For example, there is no consistency in constitutional amendment mechanisms used by the different Australian States, the German Lander, the Mexican States, the Russian subjects of the federation, the Spanish Autonomous Communities or the States of the United States.

¹⁷⁵ On the variety of mechanisms used in the US States, see: G Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 1998); and *The Book of the States 2004* (Council of State Governments, Kentucky, Vol 36, 2004). On those used in Switzerland, see: Hanspeter Tschaeni, 'Constitutional Change in Swiss Cantons: An Assessment of a Recent Phenomenon' (1982) 12 *Publius*

people directly in constitutional reform through popular initiative (eg Brazil, Mexico, Switzerland, United States). This may be because sub-national governments are closer to the people or perhaps because such a system is more manageable on a smaller scale. Another factor may be that because sub-national Constitutions are to some degree subordinate to a national Constitution which is likely to provide overriding protection for fundamental constitutional principles and human rights, there is a significantly reduced risk that popular initiative will result in the oppression of minorities by the majority.

Conclusion

Constitutional amendment provisions must strike a fine balance between stability and flexibility, popular sovereignty and the protection of minorities. In a federation, this balancing act is made even more difficult by the need to ensure that one level of government cannot destroy or subordinate the other through control over constitutional reform and that the special interests of sub-national units can be adequately protected. Federations can learn much from the innovations and experiences of each other as to which mechanisms are successful and which are ineffective. A successful constitutional amendment mechanism will not only protect the interests of the sub-national units, but will preserve the will of the people, protect individuals through the dispersal of power away from a central government, and permit the reforms necessary to meet the needs of our changing times.

113. On those used in Germany, see: Arthur B Gunlicks, 'State (Land) Constitutions in Germany' (Summer 2000) 31 *Rutgers Law Journal* 971.