Amending procedure under the Constitution of Australia: A Critical Analysis

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ABSTRACT

The Constitution of any country deals with the fundamental framework of a government and lays down the basic guarantees of certain unalterable rights for the people. A Constitution represents the quintessence of the national wisdom. It embodies the social, economic and political norms of the generation that drafts the Constitutions. It also reflects that generations visualizations regarding the future generations in so far as it is humanly possible to do so. It is the catalogue of fundamental postulates of its national philosophy. In common political usage, the term Constitution is used to designate a written fundamental law of special sanctity outlining the structure of governmental system, fixing the powers of legislature and officers and courts, guaranteeing liberties of person and property, laying down more or less extensive and detailed principles and procedures to be observed in managing the affairs of the state. In narrow sense of the term Constitution, it is a selection of the legal rules which governs the government of a country and which have been embodied in a document. These rules which are considered to be important for the governance of any country. The fact of existence of a Constitution generally implies one important characteristics i.e. the Constitutions are usually endowed with a higher status, in some degree, as a matter of law, than other legal rules in the system of government. The reason behind treating Constitution as a higher law has been that in many countries a Constitution is thought of as an instrument by which government can be controlled. Constitutions spring from a belief in limited government countries differ. However, in the extent to which they wish to impose limitations on the government. To what extent limitations are imposed on a government depends upon the objects which the framers of the Constitution wish to safeguard, as for example, they may like that judiciary should be independent, government should not be allowed to interfere with certain basic individual liberties, etc. All these things taken together signifies only one conclusion and that is that the Constitution of any country is the fundamental law of land. Therefore, for a proper and smooth functioning of country’s government a Constitution has to work not only in the environment in which it was drafted but also centuries later, it means that it should be capable of adoption to changing conditions. In a word, Constitution is a living document and must change according to the changed needs of the society. Being a document of fundamental nature, a Constitution has to make provision for its own Amendment, which has to be of different character than ordinary legislative procedure. Therefore, it is usually laid down that the Amendment of the Constitution can take place only through a special procedure different form that by which the ordinary law is altered. The higher status of the Constitution is also seen from the fact that ordinary laws are declared to be void, if they are in conflict with the provisions of the Constitution or in other words the Constitution being given the status of a higher make its necessary that it should not be changed by the ordinary procedure of law making. This is essential in the interest of stability and protection of different interests. That is why, generally in most of the Constitutions, which are in the form of written document, a special procedure for their Amendment is provided which is ordinarily more difficult than the ordinary law making procedure. Incidentally it can be mentioned that the classification of Constitutions as ‘rigid’ and ‘flexible’ by Lord Bryce is dependent upon the criteria of the Amending procedure. A Constitution is called to be flexible where it can be Amended by the ordinary law making procedure. It is called rigid when a special procedure is required for Amendment. The degree of rigidity depends on the number of obstacles which are placed in any Amending procedure. This is not the absolute test in the sense that in a Constitution there may be placed many obstacles in the Amending procedure and even then it may be possible that it is Amended easily. What obstacles in the procedure has come will depend upon so many other factors like the majorities of different political parties in legislatures and other political
factor. But in any case the Amending procedure at least theoretically shows the extent of rigidity in the Constitution. A formal Amending procedure is more important in a federal Constitution because the federal states have generally emerged out of the compromise between people and communities of different races and religions, so their rights and interests are to be given sufficient protection against interference. Moreover, a federal Constitution seeks to achieve a balance of powers between the centre and the states and this balance should not be disturbed lightly or unilaterally. Therefore, the necessity of an Amending procedure is felt more deeply in a federal set up of government in order that the component units may also participate and exercise their rights in guiding the policy of the nation and at the same time protect their own rights. The Amending procedures in different federal Constitutions though not identical follow certain common principles. The variations in degree of rigidity in the Amending procedure may be explained on historical and sociological grounds, where difficulties were encountered in unifying the different components together with the idea of forming a federation, generally, detailed and rigid procedures were provided. This is true at least about the four important Constitutions of the world i.e. U.S.A., India, Canada and Australia. Out of these four, the Amending Procedure of U.S.A. and Australia are the subject matter of study of the present chapter. In this chapter, an attempt has been made to discuss the Amending procedure in these two Constitutions of the world namely United States of America and Australia.

Amending Procedure under the Constitution of Australia

The provisions of the Australian Constitution, which is contained in Clause 9 of the Commonwealth of Australia Constitution Act, 1900 can be changed in four different ways: (1) by an Act of the British Parliament; (2) by an Act of the Commonwealth Parliament; (3) by use of the reference procedure under section 52, paragraph XXVII of the Constitution; (4) by the formal Amending procedure under section 28 of the Constitution.

Section 128 reads thus, “the Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each state to the electors qualified to vote for the election of member of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any Amendment to which the first mentioned House will not agree, and if after an interval of three months the first mentioned House in the same or next session again passes the proposed law by an absolute majority with or without any Amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any Amendment to which the first mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first mentioned House, either with or without any Amendment subsequently agreed to by both Houses, to the electors in each state qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such a manner as the Parliament prescribes. But until the qualification of electors of member of the House of Representatives becomes uniform throughout the Commonwealth, only one-half of the electors voting for the against the proposed law shall be counted in any state in which adult suffrage prevails.

And if in a majority of the states a majority of the electors voting approve the proposed law and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen assent.

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, or increasing, diminishing, or otherwise altering the limits of a state, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that state approve the proposed law.

Out of the four methods of constitutional change in Australia, wording of the basic document can be changed by the formal procedure of section 128. The other methods (except change in the
British Parliament) can change only the law contained in the different provisions of the Constitution, which cannot be called ‘Amendment’ as such here it is proposed to discuss mainly the formal procedure under section 128.

(B) The procedure of Amendment

Section 128 begins with the words “this Constitution shall not be altered except in the following manner.” The manner involves three states: (1) initiation and proposal; (2) reference to electors; (3) Governor.

(C) The procedure for initiation

The power of initiation is with the Commonwealth only. Amendments can be formulated and passed to the electors after it is approved by absolute majority of both Houses of the Commonwealth Parliament. The proposal might be initiated in either of the Houses (i.e. House of Representatives and the senate) because of the existence of responsible Parliament government system in Australia, alteration proposals have normally originated in the House of Representatives proposals have a party origin.

In case an alteration is proposed by an absolute majority by one House and it is rejected by the other House, on fulfillment of certain conditions the Governor-General may submit such proposal to the electors, under section 128. The conditions are (1) that the first House must have been again passed the proposed Amendment by an absolute majority in the same of the next session. (2) After an interval of three months from the date of first passing by the first House with or without any Amendment made or agreed to by the other House. (3) And the House does not agree with that again. In such a case the Governor-General can submit the proposal to the electors in the shape it was last proposed by the first House.

In case there has been, subsequently, any agreement between the two Houses, on any Amendments, it may or not be included in the proposal, before it is submitted to the electors. Generally such situation would not arise because senate is elected by the same suffrage as the House of Representatives. But since the senate is elected for longer term and at different times there is a possibility that at some point both Houses may not represent the same shade of opinion. There have been occasions when the two Houses have been controlled by opposing political parties. In such a situation there may be a disagreement between the two Houses. The power of Governor-General to submit such proposal is discretionary, because the word used in the text is ‘may’. But the Royal Commission 1929 pointed out that in exercising this apparent discretion the Governor-General must act on advice.

(D) Reference to Electors

When the proposed alteration has been passed the both Houses or twice by one House as the case may be. It becomes the duty of the executive branch to submit the proposed Amendment to the popular vote throughout the Commonwealth. It must be done in not less than two or more than six months after its passage through both the Houses. The people who are qualified to vote are those who can vote for the election of members of the House of Representatives.

(E) Governor-General Assent

If the proposed Amendment is approved by a majority of the electors voting in a majority of the states and also by a majority of all the electors voting in the Commonwealth, it is presented to the Governor-General for the Queen’s assent, she being a part of the Federal Parliament under the Constitution. It means that a double majority is required, i.e. it requires a majority of all the electors and separate majority in more than half of the states.

1 The terms used in section 128 are: “The other House rejects or fails to pass it or passed it with any Amendment to which the first mentioned House will not agree.”

2 The Report, 228
In the Amendment procedure initiation is a preliminary act. The important state is the submission of the proposal to the electors i.e. referendum. This state “is an undoubted recognition of the qualified electors as the custodian of the delegated sovereignty of the Commonwealth. The qualified electros represent the people of the Commonwealth as quasi-sovereign state, in quasi-sovereign organisation. This stage in the procedure ascertains the will of the people as a whole. The requirement of majority of states emphasis the federal element in the structure of the Commonwealth. Its purpose is to protect the smaller states from being overwhelmed by the larger ones. So far as the Governor-General’s assent is concerned, since the system of Government at work is the Cabinet form, he is only a nominal head. As such he will not refuse to assent to the proposed alteration, unless advised to do so by the Australian Cabinet.

VII. Scope of the Amending Power

The power of Amendment extends to whole of the Constitution including section 128 itself. The last para of section 128, in certain cases, requires an Amendment to be passed by a majority of all the states which are going to be affected. These cases are the Amendments- (1) Diminishing the proportionate representation of any state in either House of the Parliament (sections 7 and 24 of the Constitution), or (2) Diminishing the minimum number of representatives of a state in the House of Representatives (section 24) or (3) increasing, diminishing, or otherwise altering the limit of a state (section 123), or (4) in any manner affecting the provisions of the Constitution in relation thereto.

Hence, an original state cannot, without its consent, be deprived of equal representation in the national chamber. No state, without its consent, can suffer an increase, diminution or alteration of its limits.

VIII. Methods of Amendment apart from Section 128

Now a brief reference may be made to some other methods by which the Constitution of Australia can be changed.

Amendment by the British Parliament section 2 of the Statute of Westminister, 1931 conferred on the Dominion Parliament wide power of legislation including power to repeal and Amend the imperial Acts. Thus, according to the practice with regard to British Legislation for the Dominions, British Parliament can pass an Amendment to the Australian Constitution, provided there is a request to that effect from the Commonwealth, whether the British Parliament will pass a law on the request of the Commonwealth would depend on different factors.

(A) Amendment under Section 51 of the Constitution

It is sometimes suggested that under section 51, paragraph XXVII, the terms of the constitution can be changed. It is to be mentioned that this method cannot be strictly called Amendment in the sense that the wordings of the Constitution do not change. It is procedure for the benefit of those states which want Commonwealth. Legislation for the purpose of uniformity the law would apply to only those states who have consented and not to others. In case all the states agree and Amendment can be easily passed. This procedure will only bring a constitutional change and cannot be called Amendment.

3 Quick, Sir John and Garram, Sir Robert, The Annotated Constitution of the Australian Commonwealth, 993 (1901)
4 Section 7, of the Constitution guarantee equal representation of all states in the senate. Section 24 guarantees a minimum of five representatives from each state for the House of Representatives. Section 123 is a provision dealing with alteration of the physical limits of a state.
5 This section authorizes the Commonwealth Parliament to make laws with respect to “matters referred to the Parliament of Parliaments or any state or statutes, so that the law shall extend only to states by whose Parliament the matter is referred or which afterward adopt the laws.”
IX. Criticism

Several writers\(^6\) have analysed the cause of failure of the proposed Amendment. In general the reason are – firstly, the issue involved have been complicated and they are not understood by the electors. Secondly, there has always been antagonism to the increase of federal power among the substantial group of Australian voters, thirdly the matter takes political shape and faces great opposition; fourthly sometime it is feared that if the power is granted it may be abused. The above reasons are generally responsible for the failure of the Amendments and not the rigidity of the procedure.

The Amending procedure in Australia provides sufficient safeguards for the federal nature of the Constitution. It has been seen earlier that a number of obstacles are therefore, an Amendment is passed. In the words of Henry B. Higgins “not a section, not a phrase, not a word in this Constitution can be changed by the Federal Parliament, no matter how urgently the change may be required, and even though every member in each House of Parliament may vote for the change.”\(^7\)

This means that important federal provisions of the Constitution cannot be changed by the Federal Parliament alone. The important state of the procedure (referendum) is to be controlled by the states and the people. Sir, F. Eggleston made a suggestion to the effect that the different provisions of the Constitution should be classified; some being Amendable by the Parliament alone and some being subject to a more difficult procedure.\(^8\) The classification may be done keeping in view the federal nature of the Constitution. What Amending procedure would be the best would depend upon various factors. As Amending procedure in Australia seems to have worked quite satisfactorily, and the difficulties of adapting to new situations have been generally solved by the court, by their procedure of judicial interpretation.

Conclusion

After discussing the amending procedure of Australia it is observed that the Constitution of Australia is federal in nature and generally it is stated that federalism requires not only a written Constitution but also rigid Constitution. It should be written in order that the powers and functions demarcated for the centre and the states may be laid down in clear terms and thus provide a frame of reference within which all questions concerning their exercise may be decided. It must be rigid so that the states may be secured, to some extent at least in the functions assigned to them by the distribution of power.

The Constitution Amending procedure in Australia has proved to be very rigid in practice. Many Amendments deemed essential by the Commonwealth Government have been rejected at the referendum. A learned author has said, “Constitutionally speaking Australia is the frozen continent.”\(^9\)

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\(^7\) Quoted by L. F. Crisp, *The Parliamentary Government of the Commonwealth of Australia*, at 139

\(^8\) *Id.*, at 727

\(^9\) Sower, *Australian Federalism in Courts*, 208