



FEDERALISM IN INDIA AND AUSTRALIA: CONSTITUTIONAL AMENDMENT

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ABSTRACT

A constitution is the heart of a nation. It codifies the fundamental theories and definitive laws that a nation has accepted as the ultimate expression of national identity. Due to its unique nature and complete and overriding authority it is logical that a Constitution must not be easily amendable. This is not to say that amending or even rewriting a Constitution must be placed outside the realm of thought, but merely that such editing should follow a strict and formal procedure to ensure that mere dictatorial whim or frantic mob rule can't dominate the legal proceedings.

If the constitution is the heart of a nation, then it follows that an amendment process be a triple bypass surgery. It is not a process that should be entered into lightly, but when it does occur it must be executed with the skill and precision of a master surgeon to keep the patient from dying. The reason is that a stable constitution leads to a stable government, and

that a stable government is the best bulwark against tyranny and oppression.

INTRODUCTION

“Federal systems of government are common in modern world because federalism has often seemed an appropriate means of welding potentially incompatible communities into a nation state.”¹ Although only 30 out of the total 195 countries in the world are federations, together these 30 countries represent 40% of the world's population i.e., almost half of the world's population is governed by federal governmental structure.² There are basically two kinds of federal systems, namely, Coming-Together Federalism and Holding-Together Federalism. ‘Coming-Together Federalism’ refers to the system wherein different ‘contracting’ states come together and form a commonwealth, these states give up the certain powers to the commonwealth which are of national importance but retain control over matters of state importance, for e.g., the federal structure of Australia, USA etc. On the other hand, ‘Holding-Together Federalism’ refers to the federal structure wherein a large country decides to divide its power between the centre govt. and the state govt. for e.g., the federal system adopted in India, Belgium, Spain, etc.

Federal system of government performs basic functions of promoting unity and at the time recognising regional diversity. It has been rightly said that, “Federation does not create unity out of diversity; rather, it enables the two to coexist.”³ As, India and Australia both

¹ Ian copland and John Rickard, Federalism Comparative perspectives from India and Australia, 11 (Manohar 2001)

²International IDEA, What is federalism? <https://www.idea.int/news-media/media/what-federalism>

³ K. W. Robinson, Sixty years of federation in Australia, 51(1) Geographical Review, 1-20 (1961) <https://www.jstor.org/stable/212483>



are major polyglot States and federalism is the most appropriate form of governmental structure for these States as it not only promotes unity but recognises the cultural diversity. Here we will analyse the federal structure of the Republic of India and the Commonwealth of Australia, inter alia, with respect to the constitutional amendment process.

INDIA AND AUSTRALIA: FEDERAL STRUCTURE

India and Australia are two prominent federations of the world, Australia adopted federal structure in 1901⁴ while India adopted the same in 1950.⁵ Despite both being federations, they stand in stark contrast to one another in many ways, some of the differences between the two are:

- Australian Constitution is a product of Imperial Statute enacted by the UK parliament whereas Indian Constitution is a product of independent nation i.e., by the people of India.
- India is a republic State whereas in Australia Queen of England is the monarch.
- Australian Constitution does not have express comprehensive set of provisions for emergency and on the contrary, in Indian Constitution express provisions are there for the proclamation of emergency under part XVIII.
- Australian Constitution had no provision with respect to citizenship and the people were considered 'British Subjects'. The

first mention of Australian citizenship appeared in a 1948 federal statute,⁶ whereas Indian constitution has specific provisions regarding citizenship under Part II.

- Australia has 1 official language whereas India has thirteen official languages.⁷
- In Australian federal structure the residuary power vests in the contracting states whereas in India the residuary powers vest in the centre.
- In Australia each contracting state has its own Constitution also which is not the case with India.

With these differences, Australian and Indian federal structures appear to be at the opposite ends of the spectrum of federative states but despite these stark differences there are a lot of similarities in the federal structure of the two States,

- India has adopted the concept of 'Finance commission' from the Australian Model of Commonwealth grants commission.
- Both India and Australia are Parliamentary democracies. Their national governments are elected by direct popular vote.⁸
- Both India and Australia have representative form of government with Prime Minister being appointed by the head of the state.

⁴ Commonwealth of Australia Constitution Act, 1901

⁵ Constitution of India, 1950

⁶ Australian Citizenship Act 1948

⁷ Supra note 1

⁸ The Hon. Michael Kirby AC CMG, *The Australian and Indian Constitutions, Similarities, Differences*

and the Challenge of Constitutional choice, 30

Denning Law Journal, 17-49 (2018)

<http://www.ubplj.org/index.php/dlj/article/view/1697/1517>



COMPARATIVE ANALYSIS OF CONSTITUTION AMENDMENT PROCEDURE

Different nations take different approaches to their constitution. Ulrich K Preuss stated that, “there are three different overarching constitutional paradigms which can point to three categories of constitutional states: those with a continuous tradition like Britain and the USA; a country with an erratic constitutional development like Germany, and finally the post-communist states of East and Central Europe which have to achieve that nation state, a civil society, and democratic structures at the same time.”⁹

As written rigid constitution is one of the features of a federal system of government, both Australia and India have adopted their constitution in 1901 and 1950 respectively. The backdrop in which the Australian Constitution and the India Constitution were enacted are way different, the federal compact in Australia was made in a setting of relative peace whereas Indian Constitution was drafted in a situation of partition, mass migration, bloodshed and threat of war.¹⁰ In other words, “Australian federation was born in centripetal way, the Indian federation in a centrifugal way.”¹¹ Because of different historical experiences, both countries have different procedures to amend the constitution.

⁹ James Julius Baber, An analysis of different constitutional amendments, Law School Student Scholarship, Seton Hall University (2014) https://scholarship.shu.edu/student_scholarship/435

¹⁰ Supra note 1

¹¹ Shibani Kinkar Chaube, Colonial context of regionalism: Australian and Indian experience,

AUSTRALIA

Amendment procedure in Australia is taken from the Switzerland model. Chapter VIII, S. 128 of the Constitution of Australia, deals with the mode of altering the Constitution.¹² Unlike regular Bills introduced in the Parliament, the short title of the Amendment proposing Bill, does not contain the word ‘Act’ during its various stages, for example, the short title for Constitutional Amendment proposed in 2013 was ‘*Constitution Alteration (Local Government) 2013*’.¹³

Constitution alteration bills passed by both the House

The bill for amendment to the Constitution can be introduced in either house, i.e., the Senate or the House of representatives. It must be passed by absolute majority in both the houses before being submitted to the electors for voting in referendum. Referendum is mandatory once a proposed law has been passed by the Parliament and it is to be done between 2-6 months from its passage in the parliament i.e., writs of holding referendum is to be issued by the Governor- General for each State.

Constitution alteration bills passed by only one House

In cases where the other house either rejects or fails to pass the bill or passes it with subject to certain amendments, the bill of proposed amendment is sent back to the

Federalism Comparative perspective of India and Australia, 31 (Manohar 2001)

¹² S. 128 Modes of altering the Constitution

¹³ Constitution Alteration, Parliament of Australia https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Constitution_alteration



originating house. Origination house can again pass the bill after a period of 3 months either with or without the suggested amendments. If the other house again rejects it, a situation of deadlock arises and in such a case the discretion lies with the Governor-General to submit the bill to electors in each territory and States.

Unlike the previous situation where the Bill was passed by both the houses, in this case there is no prescribed time period for issuing writ for referendum.

Referendum and the concept of Double Majority

The *Referendum (Machinery Provisions) Act, 1984* covers almost all the relevant issues with respect to the referendum. In referendum it is mandatory for each elector who is eligible to vote for the election of the House of Representatives in each State and, since 1977, in most territories, to cast their votes else it would attract liability.¹⁴ Further it has been provided that if convenient, a referendum should be held jointly with an election for the Senate and/or the House of Representatives.¹⁵

In referendum, the bill is to be approved not only by majority of electors in majority of states, i.e., 4 out of 6 states but also by majority of all the electors who voted. This is known as the concept of Double Majority wherein both state and national majorities are required in order to proceed with the amendment. However, if the proposed amendment is one which affects a particular

state the bill shall not become law unless the majority of electors voting in that State approve the bill.¹⁶ This requirement is there to ensure that those who are going to be affected by the said amendment must approve of the same, i.e., that particular State must be one of the four States which approve the bill.

If both the majorities are achieved, the bill containing the proposed amendment is presented to the Governor General representing the Queen, for the royal assent. Finally, the proposed amendment comes into operation as an Act from the day it receives the assent of the Governor-General, unless the contrary intention appears.

Thus we can conclude that formally amending the Constitution of Australia is extremely difficult, possibly next to the amendment procedure of US Constitution.¹⁷ Australia's amendment rate was 0.02 with the difficulty index of 4.65 for the period of 91 years from 1901-1992.¹⁸

INDIA

In India the detailed procedure to amend the Constitution is provided in Part XX, Article 368.¹⁹ In contrast to the Australian system, the amendment procedure in India is relatively simpler and flexible. In India there is no concept of referendum and amendment can be done by the Parliament only and in certain matters it requires the ratification by States. A Bill is to be introduced in either house of the Parliament for making the amendment and the same is to be passed by

¹⁴ Section 45 of the 1984 Act

¹⁵ Supra note 12

¹⁶ S. 128 para 5 of the Commonwealth of Australia Constitution Act, 1901

¹⁷ Supra note 8

¹⁸ Donald S. Lutz, Toward a Theory of Constitutional Amendment, 88(2) *The American Political Science Review*, 355-370 (1994)

<https://www.jstor.org/stable/2944709>

¹⁹ Power of the Parliament to amend the Constitution and procedure thereof



both the Houses by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. For introduction of bill there is no prior permission required and any minister or a private member can introduce the same. If it is passed in both the houses then it shall be presented to the President for his assent. Once, the assent is received it becomes an operative Act.

There are three ways in which the Constitution can be amended in India:

Simple Majority: There are certain provisions in the Indian Constitution which can be amended by simple majority as they do not disturb the federal structure per-se like A.343(3), A.221(2), A.172, A. 73(2), A.11 to name a few. These are outside the scope of A.368.

Special Majority: A.368 deals with amendment by special majority wherein the bill for amendment is to be passed by both the Houses by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. The special majority is required only for voting at the third reading stage of the bill but by way of abundant caution, the requirement for the special majority has been provided for in the rules of the Houses in respect of all the effective stages of the bill.²⁰ Most of the provisions of the Constitution, including the Fundamental Rights can be amended by this way.

²⁰ **Manshu Sharma and Nitin Sharma**, Amendment Procedure of Indian Constitution, All India Legal Forum, Nov. 2020

<https://allindialegalforum.in/2020/11/04/amendment-procedure-of-indian-constitution/>

²¹ Proviso to Art.368(2) Constitution of India

Ratification by States: For amendment to those provisions which affects the federal structure, amendment by Special majority would not suffice rather there must be acceptance of that Bill in at least half of the States i.e., after special majority in the Parliament, the same must be passed in half of the State Legislatures in India by simple majority.²¹ A.368 does not provide for any time limit within which the States must express their consent to the proposed amendment.

Thus we can conclude that in India amending the Constitution is not as rigid and amendment can be made by the Centre alone, with limited state involvement in certain cases.

RELEVANT ISSUES WITH RESPECT TO AMENDMENT POWERS AND PROCEDURE:

- **Do S. 128 or A.386 provide power to amend?**

If we interpret S. 128 literally, it nowhere gives power to amend to the parliament rather it only prescribes the procedure to be adopted, but it has been held that the power to amend is implied under S. 128.²² But, as far as A. 368 is concerned it explicitly provides the power to the Parliament to amend.

- **Can S. 128 or A.368 be used to amend the itself?**

S. 128 uses the words “this constitution” and not “this constitution other than S. 128” thus

²² James A Thomson , Altering the constitution: Some aspects of S. 128, 13(4) Federal law Review (June 1983)

<http://classic.austlii.edu.au/au/journals/FedLawRw/1983/7.pdf>



from the very wording of S. 128 it can be concluded that it is amenable. As amendment to S.128 would fall in the penultimate paragraph of S.128, S.128 can be amended with the consent of majority of voters in all the states.²³ Similarly, A.368 is also amenable and procedure for same is provided in A.368 itself i.e., by ratification by half of the state legislatures

- **Are these provisions subject to any express or implied limitations or restrictions?**

As per the semantic approach, S.128 gives unrestricted power to the Parliament to amend any provision of the Constitution till the time the procedure prescribed it followed. But there are certain provisions like Ss. 41, 99, 100, 105A (5) and 116 which cannot be amended by ‘any law’ of the Commonwealth, and thus they would invalidate any amendment which is inconsistent with them.²⁴

But in regard to S. 105A (5) it has been held that, “...As a matter of ordinary grammar words ‘anything contained in this Constitution’ are addressed to provisions in the Constitution as it stood in 1929 when S. 105A became part of the Constitution. Those words enable S.105A agreements and variations to prevail over the then existing sections of the Constitution, they are not, however, directed towards future

amendments which are not and cannot be said to be ‘contained in this Constitution.’”²⁵

But in India, the hon’ble Supreme Court has evolved the concept of Basic Structure Doctrine in *Kesavananda Bharati v. State of Kerala*²⁶ which limits the power of the Parliament to amend any provision which violates the essence of the Constitution. These systematic principles are not expressly written but they bind various constitutional provisions; they owe Constitution continuity and longevity.²⁷ Even Preamble can be amended²⁸ as it is no more a mere interpretive aid rather it is considered as a part of the Constitution until and unless the amendment do not violate the basic structure.

CONCLUSION

Both India and Australia adopted the federalism from the US Model, albeit, with necessary modifications as per their own needs. In words of John Mc Laren, “federations, to be successful, must mirror the sense of community that exists in the lived experience of their citizens.” We cannot adopt the copy-paste mechanism and impose a system which is not desired by that community, as doing so would not be acceptable by people and that system would fail.²⁹ A. 1 of the India Constitution describes India as a ‘Union’ and not as Federation.³⁰ Dr B.R. Ambedkar gave the reason for opting for Union instead of Federation and had said, “Though India was to be a federation, the federation was not the result of agreement by

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ (1973) 4 SCC225

²⁷ *M.Nagaraj v. Union of India*

²⁸ *Supra* note 22

²⁹ Mark Tushnet, *Returning with Interest: observations on some putative benefits of studying*

Comparative constitutional law, 1(2) Penn Law Journals, *Journal of Constitutional Law* (1988) <https://scholarship.law.upenn.edu/jcl/vol1/iss2/5>

³⁰ G. Parthasarathy, *Federalism and Constitutional Process in India, Federalism Comparative perspective from India and Australia*, 285 (Manohar 2001)



the states to join in a federation. The Federation is a Union because it is indestructible.”³¹

Both the States have adopted written constitution and their own amendment procedures, Australia on the one hand have a system of involving the people in amending the constitution and India on the other hand follow a system wherein major portion of the Constitution can be amendment solely by the Parliament.

Although there are no express or implied limitations in Australia, because of this stringent act of referendum and involvement of public in matters of constitutional amendments and the requirement of double majority, till date only 8 amendments have been made in the Constitution of Australia despite 44 referendums being submitted to the electors since its adoption. On the contrary, amending powers in India are subject to the ‘Basic structure doctrine’ as propounded by a 13 Judge Bench of the hon’ble SC in the case of *Kesavananda Bharati v. State of Kerala*,³² but because of the relatively simpler and easier amending procedure, the Indian Constitution has been amended more than 100 times since its adoption.

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³¹ Id.

³² Supra note 26