UNIT 5 CONSTITUTIONAL DEVELOPMENT – A HISTORICAL PERSPECTIVE

Structure

5.1 INTRODUCTION

The Constitution of the Commonwealth of Australia (referred to as the Constitution hereafter) came into effect on 1 January 1901. For students of political science, it is not enough to know simply the provisions of a country's constitution. For, it is only a formal document that establishes institutions and rules of governance. Equally important, they must know many of the unwritten conventions, rules, understandings and practices within which a country's Constitution operates. In other words, you should have a clear idea of the broader 'constitutional framework'. It is the 'constitutional framework', which expresses many things. For instance, the meaning of Australia as a nation, the inter-play between various institutions and levels of government (some of which are mentioned while others are not in the Australian Constitution) and the relationship between the government and the citizens; and, of course, the way political parties shape the functioning of Australian Constitution and many of its institutions-all these can be comprehended only by studying the constitutional framework of Australia.

5.2 OBJECTIVES

After reading this unit, you should be able to:

- identify the principles incorporated in the Australian Constitution of 1901;
- delineate the constitutional powers of the Australian senate;
- describe the constitutional crisis of 1975;
- give reasons for the declining role of the Australian parliament and revival of the senate; and
- analyse the failure of the referendum for a Republic in 1999.

5.3 MAKING OF THE CONSTITUTION AND CONSTITUTIONAL PRINCIPLES

It is important to note that the Australian Constitution is the result of many ideas and aspirations, interests and goals, which the six British colonies had had in 1890s. These self-governing and virtually independent colonies had their own constitutions, systems of law, practices of government and, above all, their own distinct economic interests. To serve better their interests and aspirations, they decided to form a national government and, at the same time, protect their autonomy and identity.

Those who drafted the Constitution were mostly politicians representing various colonies and their interests. They were influenced by two main ideas: (i) the parliamentary form of government, which is also called 'responsible' government, prevalent in Britain as well as in the Australian colonies. (ii) Australian constitution framers were also influenced by the example of federalism in the American constitution. Like in US, federalism was adopted since it establishes a national/ commonwealth government while maintaining, at the same time, the identity and autonomy of the constituent member-states.

In sum, the principles of both 'responsible' government and federalism are incorporated in the Australian Constitution. For this reason, Australia is referred to as a 'hybrid form of government'. As you are going to study in this Unit, it is the 'hybrid form of government' which, according to some constitutional experts, is the source of many constitutional challenges and crises in Australia.

5.3.1 Responsible Government

As you know, the parliamentary form of government is also called 'responsible' government because the elected lower house of parliament (for example the House of Commons in Britain or Lok Sabha in India) holds the executive (that is, the prime minister and the council of ministers/ cabinet) responsible and can remove the prime minister or any minister for whatever reason. In a parliamentary form of government, voters elect members of the lower house from constituencies on the basis of simple majority principle. The leader of the majority party/ coalition of parties in the lower house is appointed prime minister by head of the state; and the prime minister, in turn, constitutes a council of ministers from out of the members belonging to the majority party/ coalition of parties in both the lower and the upper house. The Australian Constitution provides for an elected lower House of Representatives, comprising of 148 members who are elected for a period of three years.

The council of ministers headed by the prime minister exercises the real executive powers, and is

responsible to the lower house. To remain in power, the prime minister and his council of ministers must enjoy the confidence and support of the majority of the members belonging to the lower house. The lower house also controls finances necessary to run the government. As the prime minister and his council of ministers are responsible to the elected house and are held accountable by it for all the expenditures, parliamentary government is called a 'responsible' and an accountable government.

As you all know, it is said that Britain has an unwritten constitution; and there are many unwritten conventions which have the force of a constitutional law. In the case of Australian Constitution too, many of these conventions remain unwritten; but these are to be fully observed, otherwise there would surely be a constitutional crisis. For instance, it is a convention that the leader of the majority party/coalition of parties is invited to become the prime minister; and this is how John Howard was confirmed as prime minister upon the electoral victory of Liberal-National coalition in the elections held in 2004.

5.3.2 Federalism

In the US, 13 independent countries had come together to form a national government without however desiring to relinquish either their identity or autonomy. This is how federalism was born in US. It was nearly the similar spirit in Australia when in 1890s, the existing colonies decided to come together to form a national government while maintaining, at the same time, their separate identity and autonomy. Security against external aggression and economic interests, especially the potential benefits of free trade and the need to have common tariff policy in their overseas trade, had convinced the colonies of the need for a national government. Besides, in agreeing to a national government, the colonies were also responding to the emergence of an incipient Australian nationalism.

On the other hand, states had wanted to protect their autonomy and identity. The issue of states' rights was particularly strong in small states such as South Australia, Tasmania and Western Australia who feared the domination by the larger and more populous states.

5.4 THE CONSTITUTIONAL STRUCTURE

The formal process of constitution making had begun in 1890 with the convening of Australasian conference, comprising of the six colonies and New Zealand, which had resolved in favour of a union of the colonies. Protracted negotiations and discussions had followed; and in 1897, a second convention-without New Zealand this time-met to consider a revised draft federal constitution and decided to send to colonial parliaments for approval. In the years of 1898 and 1899, various referendums were held and after some delay on the part of colonial parliaments, the draft constitution was finally accepted by all the six colonies in 1900.

The 1901 Constitution adopts a federal form of government with the national government being called the 'Commonwealth' government. As you will study in details in Unit 6, the Commonwealth Constitution, like all federal constitutions, has both centralising and decentralising features. There are provisions (Sections 90, 92 and 117) which are designed to create a single nation and a common market within the Commonwealth of Australia by removing barriers to the movement of goods and people across state/provincial borders. There are also provisions (Sections 106, 107 and 108) which protect the integrity and independence of the constitutions, laws and powers of the states. However, there are many subjects which do not find a place in the Constitution. They have emerged as Australia underwent economic, social and political changes over the past one century or so.

Federal constitutions are invariably difficult to alter or amend. It is so because a federal constitution is a sort of compact between and among the states and the federal government. Moreover, federalism in US was considered as a kind of guarantee against despotic and arbitrary rule. The Australian Commonwealth Constitution provides for a popular referendum in the case of amendment. Section 128 requires that a law to amend the Constitution must be passed in a referendum with the support of a majority of voters throughout the Commonwealth, and by a majority of voters in a majority of states. Indeed, it is a difficult and a complex process. So far, only 8 of the 44 attempts by referendum to change the provisions of the Constitutions have succeeded.

There are other federal features too in the Commonwealth Constitution. Most important, these include a Senate (upper house); an independent judiciary with powers of judicial review; and a constitutional division of power. You must know that there can be variations in federations in terms of the powers and functions of the upper house; the scope of judicial review; and the pattern of the division of powers.

The present Unit details and analyses the first two viz., the powers and role of the Senate; and the use of referendum in amending the Constitution. As for the pattern of division of powers and scope of judicial review, they have been dealt with in detail in Unit 6.

5.4.1 The Senate and the Constitution

The upper house of the parliament is called the Senate; and it is representative of the states. Section 7 states that Senate is 'directly chosen by the people of the states'. All the six states of Australian Commonwealth are represented equally in the Senate, irrespective of their size and population and the level of economic development. Originally, there were 6 senators elected from each state; the number was increased to 10 in 1949, and to 12 in 1983. Important for you to understand is that the Senate has the same legislative powers as the House of Representatives. For any law to be valid, both the houses must pass it. The only restriction is that the Senate cannot initiate or amend a money bill; but it can suggest amendments or reject any bill including the money bills.

You have been told earlier that the parliamentary system in Britain works on the basis of many unwritten conventions. The Australian Constitution specifies many conventions relating to the institutions of parliamentary government but there are still some conventions which remain unwritten. The Constitution establishes a Governor-General (who acts as the representative of British monarch). It specifies that there must be periodic elections (Sections 28 and 32); that ministers must be members of parliament (Section 64); that government cannot spend money without parliamentary appropriation (Sections 81 and 83); and that bills to raise and spend the money and amendments to money bill must originate in the House of Representatives (Section 53).

However, there are still many features of the Constitution and functions of the government that are based on conventions. For example, there is no mention of prime minister or of the cabinet; or that the prime minister must be a member of lower rather than the upper house; or that the government of the day needs to resign if its budget is defeated in the House of Representatives.

The Australian Constitution specifies that all executive power 'is vested in the Queen and is exercisable by the Governor-General', who also appoints ministers who 'hold office during the pleasure of the Governor-General' (Sections 61, 62, 64). Thus formally, the Governor-General is very powerful; but in reality the Governor-General is expected to exercise his/her powers in accordance with the unwritten convention viz., he calls on the leader of the majority party in the

House of Representative to form the government, and appoints ministers recommended by the leader of that party or coalition; and thereafter, works according to the 'advice' given by the prime minister.

As stated earlier, all the states directly elect 12 senators each. With two senators elected from each of the two National Territories, the total number of senators goes up to seventy-six. In fact, it was the idea of a senate representing and safeguarding the interests of the states in the Commonwealth government that had swung the debate in favour of a national government in 1890s. A century or so after, many in Australia now view the Senate as an 'undemocratic' house; and some even favour its abolition altogether.

The criticism against the Senate is on various counts. Some argue that a house of states does not fit easily with the principles of 'responsible' government. The principal reason is that the Senate has 'equal power with the House of Representatives in respect of all proposed laws' except for its inability to initiate or amend money bills (Section 53). Since the Senate has 'equal power', it can reject a bill passed by the House of Representatives. This invites the possibility of a legislative deadlock.

In a situation of a legislative deadlock, Section 57 allows for 'double dissolution' which means that the full membership of both the houses faces a new election. After the election, if it is still necessary, a joint sitting of the two houses is provided for the resolution of the deadlock. In case, if the same party or coalition of parties enjoys majority in both the houses, then it poses no problem. But if the party/coalition which enjoys majority in the House of Representatives does not have a majority in the Senate, then deadlocks occur. The latter happens more often since election to the Senate takes place on the basis of proportional representation which allows smaller parties also to gain some seats in the Senate.

A political party or coalition of parties that gains majority in the House of Representatives often claims that it has received a popular 'mandate' to implement the party programmes and the promises it had made during the electoral campaign. Therefore, the ruling party/coalition claims that the Senate should not stand in the way of popular 'mandate'. For instance, the Liberal-National coalition headed by John Howard had, in the 1998 election, campaigned that if re-elected, it would implement a new Goods and Services Tax (GST). Upon re-election, Howard claimed that his government has the 'mandate' to implement the GST. But the issue was not that simple. You must know that in the party-based politics of Australia, the issue of 'mandate' generates lots of political heat. The point is that Senate is also directly elected on the basis of proportional representation, which allows smaller parties and independents to gain some representation. As a result, more often than not, the ruling party/coalition which has a comfortable majority in the House of Representatives falls short of a majority in the Senate. In fact, since 1961, only for a period of five years in the late 1970s, the ruling party had the majority in both the houses. As a result, any government has to carefully work out its legislative strategy so as to get its bills passed by the Senate. This obviously involves lots of political negotiation, bargain, accommodation and compromise. When the governments claim that they have received a popular 'mandate' to implement the ruling party programmes, many in the Senate argue back by saying that they also have a 'mandate' from the Australian people. Sometimes, the small parties and independents argue that they represent the broad variety of specific and minority interests-economic, ethnic, regional-of the Australian people; and that they are there to act as a check on the government, and if necessary, to negotiate, amend and block the government legislation. This is how in 1998, the smaller parties had decided to negotiate certain changes in the proposed GST bill of Howard government as a condition for their support in the Senate.

The Constitutional experts explain such recurring legislative deadlocks on account of the 'hybrid' system of government, that is a government which combines features of the British parliamentary system and the US federalism. The root cause of the recurring deadlocks lies in the constitutional provision granting 'equal power' to the Senate. But this is not the sole reason. It is the rigid nature of the party system and the extraordinary domination of the political parties over the entire polity that frequently cause such constitutional and political crises.

5.4.2 Constitutional Crisis of 1975

In 1975, Australians faced the worst crisis of their constitutional system. Many attributed it to the 'hybrid' form of government provided in the Constitution. The crisis also illustrates how the written provisions of the Constitution create a constitutional crisis if the unwritten conventions are given a go-bye and political expediency takes over party behaviour.

There were three elements involved in the constitutional crisis of 1975-a prime minister and his cabinet enjoying majority support in the House of Representatives; a Senate enjoying 'equal power' with the House of Representatives; and the formal powers that the Constitution grants to the Governor-General.

In May 1974, the incumbent Labor Party government of Prime Minister Gough Whitlam had won a majority of seats in the House of Representatives after a 'double-dissolution' election. As per the parliamentary conventions, the Governor-General swore in Whitlam as prime minister. In the Senate however, Labour did not have a majority; the situation in fact was deadlocked with 29 Labour, 29 Liberal/ National coalition, and two independent senators. Subsequently, two Labour-held seats became vacant on account of the death of a senator and resignation of the other.

Such mid-term vacancies under Section 15 of the Constitution are to be filled by a nomination from a joint sitting of the state houses of parliament in the state from among whose senators the vacancy arose. An unwritten convention that had developed in Australia is that, no matter which political party/coalition of parties enjoyed a majority in the joint sitting of the state parliament at that moment, the replacement senator would be belonging to the party to which the departed senator had belonged. Such a convention had democratic spirit behind it; the idea was that it allows the maintenance of the pattern of party representation which the voters had determined in the previous election. In 1975, the two vacancies belonged to New South Wales (NSW) and Queensland. However, the state parliaments in both the states chose not to follow the unwritten convention and elect the Labor Party's nominees. This was mainly on account of the intense power plays between the political parties at the national level at that time. The opposition Conservative and National parties were highly critical of the policies of the Labour government of Prime Minister Whitlam; and hoped that in the event of fresh national elections, they would come to power. Be that as it may, as a result of the action of state legislatures in NSW and Queensland, the strength of the Labor Party in the Senate came down from the earlier held 29 to 27 seats.

As a result of political party power plays, the Whitlam government was now faced with a Senate which could block governmental legislations; and the Senate actually did it. Malcolm Fraser, who was the leader of the opposition in the House of Representatives, announced in 1975 that the Senate would reject the budget of Whitlam government. This was part of the opposition tactic to force a fresh national election which it was confident of winning. Fraser's argument was that the Senate enjoys 'equal power', and rejecting a money bill is within its constitutional powers. Besides, the opposition charged that under the given circumstances of financial mismanagement and Whitlam

government's effort to encroach upon state subjects, it is time that Senate asserted its constitutional powers. The Whitlam government cited the British parliamentary convention that upper house should not vote down a money bill; and if it does that, the Senate would be violating the principle of 'responsible' government on which the entire parliamentary edifice rests. The constitutional issue of importance that emerged was thus about the powers and role of the Senate. Could Senate reject the budgetary proposal of a government that has majority in the House of Representatives; and a budget that has already been passed by the lower house?

Another matter of constitutional importance arose in the action of the Governor-General. The Governor-General Sir John Kerr dismissed the Whitlam government, appointed Malcolm Fraser as the 'caretaker' prime minister on 11 November 1975, and announced a 'double dissolution' of both the houses. The main reason for the 'double dissolution' of the parliament, as Governor-General stated, was that as many 21 money bills of the Whitlam government had been twice rejected by the Senate. Be that as it may, the opposition majority in the Senate passed the budgetary proposal submitted by the 'caretaker' Prime Minister Malcolm Fraser. In the general elections held on 13 December 1975, the coalition of Liberal and National parties headed by Fraser won a comfortable majority in both the House of Representatives and the Senate.

Let us recapitulate the constitutional points and principles involved in the crisis: (i) The Governor-General, in exercise of the powers vested in him under Section 64 of the Constitution, had the right to dismiss Whitlam and install Fraser as prime minister. In appointing Fraser as the 'caretaker' prime minister however, the Governor-General broke the parliamentary convention that a person appointed as prime minister should have the support of the majority of the members of the House of Representatives, which Fraser certainly did not have at that time. (ii) The Governor-General refused to follow the 'advice' of prime minister Whitlam to explore other 'alternatives', which is a violation of the convention that the head of state is bound by the 'advice' rendered by the prime minister, especially a prime minister who still has the majority support in the lower house. (iii) The Senate's refusal to pass money bills was also in contravention of the parliamentary convention, that in financial matters it is the lower house which enjoys all powers and the upper house, at best, can delay the passage of financial bills. (iv) Critics of the Whitlam government were of the opinion that he should have resigned when his government's money bills were being rejected by the Senate. In refusing to resign, Whitlam government broke the parliamentary convention that a government must have parliamentary support for money bills in order to remain in office. (v) The two state governments also broke the convention that a casual vacancy in the federal Senate must be filled by members belonging to the same party to which the departed members had belonged to. In fact, the Fraser government in 1977 successfully brought an amendment to the Constitution to the effect that replacement senators must be members of the same party as the outgoing senators.

From the above, it is apparent that the main source of the constitutional crisis was the 'equal power' of the senate. Moreover, one can even blame the principle of proportional representation used in the election of the senate since 1949, which allows minor parties and independents to also get elected to the Senate. Australian scholars generally blame the 'hybrid' form of their government for the periodic deadlocks. But the manner in which the political parties conducted themselves both at the national and state levels is also to be blamed for the crisis.

It has been observed that since the crisis of 1975, political parties and Australian politicians have been somewhat restrained in their competitive games for power and pelf. The opposition and other minor parties holding the balance in the Senate have since then been generally inclined to pass money bills, which have already been passed by the House of Representatives. As mentioned

earlier, given the system of proportional representation in the election of senators, it is more likely that the ruling party will not have a majority in the Senate. As a result, after the crisis of 1975, governments have been more careful in preparing their legislative strategies to get bills approved by the Senate. However, every government still repeats after every general election the by-now familiar claim of having won a popular 'mandate'; and the Senate, on its part, also maintains that it too has its own popular 'mandate'. Deadlocks in future therefore cannot be ruled out. Such, in essence, is the flavour of the Australian constitutionalism and the functioning of its parliamentary federal democracy.

5.5 AUSTRALIAN PARLIAMENT AND THE CONSTITUTION

From the above, what emerges is that Australian Constitution establishes a 'responsible' government. Thus it is expected that parliament shall control the executive. At the same time, since parliamentary form is designed to work in a federal type of government, there are some typical Australian constitutional provisions and practices.

The Australian constitution establishes a parliament of two houses and gives it considerable powers. Section 1 vests parliament with the legislative powers of the Commonwealth, including power over financial legislation under Sections 81 and 83. Then, there are unwritten conventions too that assign parliament several functions. In reality, however, the Australian parliament does not perform many of its assigned functions and roles. These have gradually shifted to the prime minister and his cabinet or to the bureaucracy. The reasons, you would discover, are in fact fairly common to all parliamentary forms of government.

Seats in the 150-member lower House of Representatives are apportioned between states in proportion to their population, with a minimum of five seats for each of the states. As stated earlier, each of the state is represented on the principle of equality in the Senate. Section 24 requires that the House of Representatives should not be more than twice the size of the Senate. The total strength of Senate is 76 members. The term of the House of Representatives is three years, unless there are mid-term elections; the senators are elected for a fixed period of 6 years in such a manner that half the senators are elected every three years, thus making it a continuing chamber. Members to the House of Representatives are elected by a system known as preferential voting under which voters rank candidates in order of preference. The powers of both the houses are identical except in regard to financial matters: the Senate cannot initiate or amend a financial bill but it can request the House of Representative to amend the bill and, most important, can reject the bill.

In case the House of Representatives has passed a bill twice and Senate has rejected it, with an intervening gap of three months, twice, the prime minister can advice the Governor-General on 'double dissolution'. Following the 'double dissolution' elections, if the same legislation is again rejected by the Senate, then it calls for a joint sitting of the parliament. But this may still not resolve the deadlock. Since 1901, there have been only six 'double dissolution' elections and one joint sitting; but, in all, only three times, the government had gained majority in both the chambers.

5.5.1 Declining Role of the Parliament

Why does the Australian parliament fall short of the roles and functions assigned to it by the Constitution and the conventions?

One major reason is the nature of party system and the domination of the major parties viz., the Labour, the Conservative, and the National. In fact, within a decade of the promulgation of the Constitution, the parliament had come to be dominated by the political parties; which enabled the political executive to dominate the legislative agenda. Crossing the floor is very rare in the parliament. In fact, members of the Labor Party pledge themselves to vote in parliament in accordance with the decision of the parliamentary wing of their party. In essence, it is the prime minister and his cabinet-comprising all the important leaders of the ruling party-who decide the legislative agenda. In reality, therefore, it is not the parliament which is supreme and holds the government accountable. Rather, thanks to the disciplined nature of the party system, it is the leadership of the ruling combine which controls and directs the majority party MPs.

Thanks to the role of political parties, the legislative functions of the parliament and its power to scrutinize actions and hold the executive accountable have also declined considerably. Consider the following issues which demonstrate the declining role and functions of the parliament. In a parliamentary democracy, a bill passes through stages of three 'readings'. However, once the government has decided to enact a law, it passes through the 'readings' quickly without adequate scrutiny and debate. Of course, some discussion takes place at the second stage, or when the bill is referred to a parliamentary committee. There are many practices which allow the government to speed-up the passage of a bill: government uses its majority to apply closure motion or 'the gag' to end debate on any question; it uses 'guillotine' to break up a bill into sections and sets a time-table for discussion on the bill; and there are some provisions in the Standing Orders of the Parliament which allow the parliament to bypass the committee stage altogether.

Strengthening the committee system and the role of committees is considered an important measure in strengthening the legislative role of parliaments. The role and functions of the committees in legislative matters have also been enhanced in Australia with the establishment of a number of standing committees. In reality, however, committees also show the same partisan approach while considering the bills.

Similarly, 'private members' bills' are far and few. In other words, MPs who are 'back-benchers' normally do not introduce a bill. It means that legislation remains mostly the initiative of the government. Australia also has the same problem which all other parliamentary governments suffer from: parliaments have lost so much of their powers through 'delegated' legislation, i.e. parliament allows the ministries and department to make detailed rules and regulations to make effective a law that has been passed. Although, the Senate's Standing Committee on Regulations and Ordinances some times audits and scrutinises carefully such detailed rules and guidelines.

The financial powers of the parliament (Sections 81 and 83) also stand diluted. There are the joint Public Accounts Committee, the Expenditure Committee of the House of Representatives, and the Senate's Estimate Committee to look into the expenditures of the government, but their functioning admittedly needs to be strengthened.

Parliament also holds the executive responsible and accountable through Question Time, censure motions and 'urgency debates'. Since Question Times are televised, members and parties seem to be keener on scoring the brownie points than actually checking the executive. So many times, ministers are able to evade the questions asked or give irrelevant answers. Opposition members and parties are also seen in extremely combative mood, may be to gain some publicity. Still, notwithstanding these drawbacks, one cannot certainly deny the usefulness of the Question Time. Besides, the MPs can seek detailed information on an issue by submitting question with notice. Here, the answers are given in writing and printed in Hansard-the official written record of the

proceedings of the Australian Parliament. Censure motions can lead to the resignation of government; however the ruling party enjoying the support of its 'disciplined' members need not worry while the opposition may feel satisfied that its censure of the government has been widely and publicly debated. Similarly, with 'urgency debate', the opposition does focus on an issue of public importance and criticises the government.

The main point still however is that the legislature is not able to assert its supremacy over the executive; for such is the political party domination of parliamentary procedures and proceedings.

One parliamentary doctrine that has been altered considerably in practice is the principle of collective responsibility. The Prime minister and his cabinet are collectively held responsible while each minister also holds individual responsibility before the parliament. However, parliamentary sanctions of ministers, either individually or collectively, has so much been watered down by the functioning of parliamentary parties that the doctrine of collective responsibility has lost nearly all its meaning. So often, the 'tainted' ministers are able to escape responsibility for their deeds and misdeeds; at other times, the prime minister may use a junior minister as a 'sacrificial lamb' to save his government. Be that as it may, it is the parliament which can force information from the government on a specific issue and, if need be, demand the resignation of a minister. It is here that the role of the Senate also becomes important. Given the manner in which the Senate is elected and the likelihood of opposition majority, Senate is at times able to hold the individual ministers or the entire government responsible for their actions.

The trend towards executive domination and expansion of executive functions is seen in all democracies-parliamentary and presidential. The scope and scale of governmental activities have simply expanded, covering increasingly the aspects which were normally considered matters of private and personal life of individuals. Governments' role have-either as direct providers or regulator of services-increased particularly in the management of the economy, social welfare, and national security. This has often led to the complaints about the ever-expanding powers of the bureaucracy, and the resultant parliamentary inability to exercise check on the large administrative machinery. It is suggested that it may be on account of the very nature of parliamentary democracy. Once the political executive i.e., the prime minister and the cabinet are able to contrive a durable majority in the lower house (which in fact has been facilitated by the functioning of the party system), there is no stopping the prime minister and his government. So, one cannot simply blame the political parties; rather the very nature of parliamentary democracy entails a powerful executive; and this is true of Australian democracy as well.

5.6 'REVIVAL' OF THE SENATE

Here, one may appreciate the role of the Senate, which emerges not just as the chamber which represents the states but also as the house which is able to hold the political executive 'responsible' and 'accountable' mainly due to its composition. In the debates during the making of the constitution in 1890s, the issue of the powers and role of the Senate had proved to be most contentious and time-consuming a matter. Until 1949, the same party had normally held majority in both the houses, and the Senate's substantial powers were never used. In a sense, the 'revival' of the Senate began with the introduction of proportional representation system in the 1949 elections. Since only 6 senators are to be elected from each state (if it is a 'double dissolution' election, then all the 12 senators are to be elected), a minor party or an independent who is able to secure 14.3 per cent of the first-preference votes from the whole state (in the case of 'double dissolution election, it is only 7.7 per cent of the popular votes) gets elected to the Senate. Since the introduction

of the proportional representation principle, the number of senators belonging to minor parties or those who are independent has steadily increased. In fact, the role of Senate in scrutinising the governmental legislation and executive action has also increased; as did the number and tasks of the senate committees after 1949. The senatorial inquiries including public hearings, rules and procedures to scrutinise the bills, strengthening of the committee system have all increased. Some constitutional experts see it as an enhancement of the parliament's ability to check the executive including over the finances of government. Other experts however lament that the 'revival' of the Senate has not liberated it of party-based politics. When the same party holds majority in both the houses, Senate hardly looks 'revived'; though in practice, such a scenario is more unlikely to happen. Be that as it may, so long as minor parties and independents hold the balance of power, Senate is able to reassert legislative supremacy and hold the government accountable.

A second more important development is that, given the powers of the Senate, minor parties and independents are able to include some of their own policy priorities for legislation. At other times, they are able to suitably modify a government legislation so as to also benefit minor groups and specific interests in the society. These could be, for instance, environmental groups, women's movement and those representing the interests of the indigenous, small businesses, youth etc. For example, in 1993, the Labour government of Paul Keating had proposed a 'native title' legislation so as to provide a national mechanism for handling the land claims of the Aboriginals. In return for their support, the senators belonging to the Green and the Democratic parties were able to considerably modify the bill. It has been noted that often the government has to seek support of the minor parties and the independents on measures involving finances and the economic policies. John Howard's government's proposal to introduce the GST has been cited earlier. Government's claim that it had won the 1998 election on the issue of GST and therefore had the 'mandate' to introduce the tax was challenged by minor parties in the Senate. Particularly contentious was the proposal to introduce GST on food and other 'essential' items. Senate had initially rejected the proposal. It was only after a protracted negotiation with the Democrats, who held the balance of power in the Senate, that legislation was passed, but with the provision that 'basic foods' would be excluded from the GST.

Similarly, the Senate's ability to set up inquiries including public hearing-calling of witnesses and documents and confidential information from the government-is significant and goes beyond its legislative role. For instance, the partial sale of the Fairfax media company to overseas buyers was inquired into and the Senate inquiry committee had come up with a report which was very critical of the government's privatisation policies.

As Senate has become politically more important, it has drawn the attention of both the media and the academia; however, at the same time, its committees have also shown greater partisan attitude. In the 1970s, senate committee hearings were more non-partisan; and committee reports were generally unanimous on even contentious issues. But, by the late 1990s, debates and deliberations in the committees had begun moving more along party lines-with majority riding roughshod over the minority; and minority often adding its own separate dissenting note to the committee reports.

5.6.1 Reforming the Senate

Be that as it may, the important point is that the Senate has powers almost equal to the House of Representatives; and, as things stand, neither the ruling party nor the opposition controls it. Two views are predominant in regard to the role of the Senate. One perspective is that whatever be its limitations, it is able to provide some kind of an institutional check and balance in the relationship

between the parliament and the executive. In this view, Senate is a check on the arbitrariness of a government that enjoys majority in the lower house; it has thus strengthened the republican element of the Constitution. Parliamentary governments are called 'responsible' governments; and Senate has made governments somewhat responsible to the parliament.

Looking at it from the other perspective, it is argued that the actions of the Senate can create conditions of political instability, constitutional deadlock, and frustrate the popular 'mandate' given to a government. Since a government can be formed only when there is majority support for it in the House of Representative, Senate is seen as a dilution, often an obstruction, to the 'democratic' content in the government. In other words, what Senate seeks to produce is a 'limited' government, which is not necessarily a 'responsible' government. It is alleged to be a kind of 'handbrake on democracy'. Those who hold such a view strongly call for reform of the Senate.

The academic debate apart, the main political parties have had an opportunistic approach to the issue of Senate reforms. When in power, they swear by the popular 'mandate;' when in opposition, they use their number to frustrate governmental legislation in the Senate. The truth of the matter is that the two or three main political parties have dominated the Australian political scene since 1901; and there is increasingly a popular reaction against their power plays. The way the three political parties have dominated the Australian politics for more than a century leaves little scope for the emergence of another major popular party.

The Australian society has become more complex with new interests and groups-environmental and indigenous community groups-asserting their viewpoints and interests. Electorates are responding to many of these minor parties and independents by voting them into the Senate. Hence, mainstream political parties are less and less likely to secure a majority in the Senate; and Senate will therefore continue to both 'limit' and 'check and balance' the governments. After the elections held in October 2004, the party position in the Senate was as follows: Liberal-National coalition-39 seats; Australian Labor Party-28 seats; Australian Democrats-4 seats; Green Party-4 seats; and Family First Party-1 seat.

While minor parties are able to enter Senate owing to the provision of proportional representation, minor parties and independents find it difficult to get elected to the House of Representatives. After the October 2004 elections, the party position in the House of Representatives was as follows: Liberal-National coalition-87 seats; Australian Labor Party-60 seats; and independents-3 seats.

5.7 REFERENDUM AND THE DEBATE FOR A REPUBLIC

Amending/altering a federal constitution normally involves a long and complex procedure. Australian Constitution is even more difficult to alter. While making alteration process long and cumbersome, the idea was that the Constitution should be able to stand ephemeral demands and the momentary impulses of the politicians and the people. In creating a federal set-up, the primary intention of the constitution-framers was to safeguard the independence and identity of the states. Australian economy and society has however changed a lot over the last more than one hundred years. New issues and subjects calling for legislation have since emerged which demand some kind of a cooperation and coordination between the national and state governments. The Federation must, therefore, move beyond the simple idea of state rights and autonomy. At the

same time, some of the vested economic interests remain well-entrenched and political parties generally play a ruthless game for power, both in the process making constitutional change even more difficult.

Also, many institutions and their functions and roles were not mentioned in the Constitution. At the time of framing, the hope expressed was that the unwritten British conventions, more so since they have been observed for long in the self-governing colonies, will be observed alongside the written provisions of the Constitution. But this has not happened. Many of these Australian institutions and offices have changed their functions over the last one hundred years. Besides, the federal set-up does not allow the replication of many British conventions. Finally, there are some different kinds of conventions and practices that have evolved in Australia itself. For these reasons, there is a permanent debate in Australia about altering/amending certain provisions of the Constitution.

There are three ways in which the Australian Constitution can be altered, or amended:

The division of powers can simply be changed by a 'referral' of powers. A state can 'refer' matters to the Commonwealth, i.e., a state or states can cede their legislative powers; thus the federal division of powers can vary from state to state. For instance, in 1977, the governments of Tasmania and South Australia had 'referred' to the national governments the ownership of their state railways systems.

The Constitution permits the admission or creation of new states under such terms and conditions as the Commonwealth 'thinks fit'. Thus a new state may not have the same level of representation, for instance in the Senate. The Constitution guarantees equal representation in the Senate only to the 'original states'. The Northern Territory has been demanding for quite some time that it should become the seventh state but on the grounds of equality of representation in the Senate.

The Constitution has borrowed the Swiss method of altering the constitution which is direct and electorate-based. It is a complex procedure which is likely to result more in the failure rather than success of the proposed changes. There are two stages in the amendment process: (a) a bill for an amendment must first be passed by an absolute majority in both the houses of national parliament. If one house rejects the proposal (or passes it with less than an absolute majority), and the other house passes the bill twice, the Governor-General has the authority to declare the bill as 'available' for the next stage. (b) The second stage involves a referendum of all electors in the states and, since 1977, in the Northern Territory and the Australian Capital Territory. The proposed amendment requires a double majority: an overall majority vote in favour; and a majority in favour in a majority of states (not including the NT and ACT). It means, majority of electorate in at least four of the six states must clearly say 'Yes' or 'No' to the referendum questions.

5.7.1 The Referendum of 1999

Since the first referendum that was held in 1906, as many as 36 of the total 44 proposals to alter or amend the Constitution have been rejected. The 8 alterations that have been carried out so far have dealt with small, non-controversial matters only, e.g., fixing the retirement age of federal judges. Referendums which sought to bring some change in the division of powers or affected key economic and social groups have all failed. The Constitutional experts and political commentators generally opine that amendments have failed because the mainstream political parties have never been consistent in their positions on several key national issues and change their positions in response to political expediency and opportunism.

The last referendum, held on 6 November 1999, had also resulted in the rejection of the Constitution Alteration Bill. The bill had proposed to establish Australia as 'a republic with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament'. There was a second referendum question too which pertained to a new Preamble for the Constitution.

Since the making of the Commonwealth, the issue whether to retain the British crown, and its nominee the Governor-General, as the formal head of state has been hotly debated both at the political and popular level. At the time of the making of the Constitution, nationalist circles had opposed the retention of monarchy. A century after, many want to severe ties with British monarchy for it has only confounded the question of Australia's national identity and its place, or otherwise, in Asia Pacific.

At a theoretical level, to be a republic may mean many things. For some experts, a constitutional monarchy can be a republic. For others, a separation of power is enough to make a country republic; others cite the need for rule of law and a 'civic culture' as crucial to make a country republic. However, in the case of Australia, it simply means to have or not to have the crown or its representative as head of the state. There are republicans and the monarchists in Australia; for instance, Prime Minister John Howard is a self-confessed monarchist. For the so-called republicans, the Crown is no more an effective symbol; it disunites rather than unites the Australians. For the monarchists, Australians are basically 'monarchical' in their attitudes and in their expectations of the government.

In a sense, the republican spirit in Australia is as old as the colonies themselves. In 1890s, many nationalist republicans had entertained aspirations of greater independence from Britain; others were just hostile to the links with the monarchy for reasons of their working class background or socialistic ideas. However, in the end, the influence of such republicans on the constitution-making was minimal. In the twentieth century, as constitutional links with the monarchy gradually weakened, the republican debate had also ebbed. The issue, however, got revived strongly in the 1980s. In 1981, the Labor Party had included the goal of a republic in its party programme. The Liberal Party has had no formal position on the issue of republic; while the National Party maintains a pro-monarchical stance. In 1991, the Labour decided in favour of referendum for a republic, to be proclaimed on the eve of the centenary of the Federation on 1 January 2001. The Labour government of Paul Keating set up the Republic Advisory Committee to report on "the minimum constitutional changes necessary to achieve a viable Federal Republic of Australia" without, however, affecting the structure of the government or the federal system. In 1995, Keating announced his decision to hold a referendum to change the Constitution. It was made abundantly clear that the constitution alteration bill shall bring about the minimal constitutional change in declaring Australia a republic, and shall not affect the federal division of power or the powers and functions of the Senate etc.

The revival of republic issue saw the establishment of the Australian Republican Movement (ARM) in the early 1990s. Around the time of the 1996 national elections, which brought the pro-monarchical John Howard as the head of the Liberal-National coalition government, another group calling itself the Australians for a Constitutional Monarchy (ACM) had also joined the debate. ACM's position was that full independence and sovereignty are possible in a constitutional monarchy, and that Australia is effectively a republic already. Those who advocated a republic but with no alteration in the existing structures of the government and the federation agreed that Australia is sovereign but hinted towards unseen dangers in the future since the country is not yet formally sovereign. Moreover, for them, to have an Australian as head of the state had strong

symbolic and cultural reasons. Of course, there were some fringe groups who took a radical position, and had wanted a republic to include many things-goals of social justice and equality, a bill of rights, a directly elected head of state, etc.

According to the Constitution, the Governor-General is 'appointed by the Queen'; in practice, it is the prime minister who makes the choice and conveys his 'advice' to the Queen. The referendum in 1999 had been reduced to various alternatives of choosing the head of state. But did Australians want a republic; and if they did, what is the foremost principle of that republic for them? The Howard government decided to set up a constitutional convention with half the 152 delegates to be elected on a state basis (with number of delegates from each state to vary in proportion to the state population) and half to be appointed by the government from among the members of parliament and civil society. The method of election of the delegates was important: it was through postal and a voluntary vote. The final results showed a majority of pro-republic delegates for the convention, though the pro-republic delegates were divided between those who had wanted minimal constitutional change and those who advocated for a major overhaul of the Constitution. Be that as it may, the Constitutional Convention met in the Old Parliament House in Canberra for 10 days from 2 to 13 February 1998. The principal view that emerged out of the deliberations was an election of the head of the state by the two houses of the parliament in a joint sitting, with final choice of the candidate to be made by the prime minister and seconded by the leader of the opposition. At this moment, Prime Minister Howard announced that the convention had given a 'clear view', and therefore, the referendum would be held on the above-mentioned 'bipartisan parliamentary choice' model. A second act accomplished by the convention was the draft of a Preamble for the Constitution. Though the version of the Preamble that was finally put to referendum had many things, it did not mention the ideal of a republic.

The referendum took place on 6 November 1999. Overall, about 45 per cent voted for the republic. In none of the six states, the 'Yes' vote gained a majority. Only in the Australian Capital Territory (ACT), some 60 per cent voters favoured republic; but the vote in the Territories counts only in national tally and is not included in the count of the states. The other question, which related to the Preamble, won only 40 per cent of the popular support.

5.7.2 Failure of the Referendum

Many reasons have been proffered for the failure of the referendum. One explanation is that it failed because there was no bipartisan support for the idea of republic. Secondly, any proposal that seemingly looks like enhancing the powers of the Commonwealth government have always failed; and so did the referendum. Labour supporters were more likely to vote 'Yes' for the republic; still however many did not. Besides a republic had little enthusiasm in states, which all still have their own monarchical constitutions and a mind-set imbued with the traditions of 'states' rights'.

Others argue that the popular opinion had favoured a directly elected head of the state and not by the parliament in a bipartisan manner. Had the referendum question been framed suggesting a direct election of a president, people would have voted 'Yes'.

Another explanation is that the referendum reflected the divide between the 'elites' and the 'battlers'. Those in urban centres and from the larger states (possibly with higher levels of educational attainment and personal incomes) were supportive of the republic; while those in the countryside or belonging to smaller states have remained monarchist. More women appeared monarchical than men; in the same way, for indigenous, a republic and a Preamble would have been the first step to repair the historical injustices meted out to the indigenous communities. Non-English

speaking background (NESB) Australians were more likely to support the idea of a republic. For many immigrants and minority groups, the idea of allegiance to the British crown holds no meaning.

Above all these explanations, the more plausible reason for the failure of 1999 referendum and in fact for most referendums in the past, is the manner and wordings in which referendum questions were couched by the government. In other words, government also 'played politics' and presented ill-thought-out questions; like they have always done in the past referendums. For example, the 1944 referendum had asked the electorate to simply say 'Yes' or 'No' on an issue that had involved transfer of several powers to the Commonwealth government. In 1988, the Labour government of Bob Hawke had placed as many as three different issues into one single question: "To extend the right to trial by jury; to extend freedom of religion; and to ensure fair terms for persons whose property is acquired by any government." Obviously, the electorate had different views on each matter but were asked to give a single 'Yes' or 'No' on all of them, having been put together. Needless to say, it was the worst defeat for the referendum in 1999 also. The Liberal and National parties, in their loathsomeness for the Labour government, had launched a scorched-earth campaign against all the referendum issues, all of which until then had found a very prominent place in their party programmes and leaders' pronouncements. Likewise, the Howard government had somehow decided that the direct election of the head of the state is the key idea of republic, and therefore put it to referendum. How the government of the day had arrived at such a conclusion, only Howard knew better.

The first question in the referendum had also provided for the 'dismissal' of the 'President.' Given the over-all conservative bent of Australians, many found it unacceptable. The referendum question also failed to mention that the prime minister is the head of the government who commands majority support in the House of Representatives.It also remained ambiguous on the 'reserve' (emergency) powers of the head of state. It is suggested that many who supported the republic in principle were dissatisfied with the model offered in the referendum while others were acutely apprehensive of the possibility of constitutional crisis in case of 'dismissal' of the head of the state. In sum, the century-old inconclusive debate on republic once again conveyed the confusion that surrounds the idea of Australia as a nation and its national character.

5.8 SUMMARY

The Australian Constitution provides for a federal parliamentary form of government. As a result, Australian government is called a 'hybrid' form of government. In the case of Australia, constitutional deadlocks often arise because the upper house viz., the Senate has been granted 'equal power', which includes power to reject any bill including the money bills which may have already been passed by the Lower House of Representatives.

As the constitutional crisis of 1975 illustrates, the Senate is thus able to check and even challenge a prime minister who enjoys the majority support in the House of Representatives. In this regard, adherence to the conventions which have been borrowed from Britain or those that have evolved in Australia are very important. However, it has been noted that the mainstream political parties in Australia, in their power political games, go beyond these conventions and produce a constitutional crisis through their behaviour, as they did in 1975.

Due to the fact that election to the Senate takes place on the basis of proportional representation system, it is unlikely that the same party/coalition of parties that has majority in the lower house shall also be able to secure a majority in the Senate. One can safely say that minor parties and

independents shall continue to hold a balance of power in the Senate. Such a situation has led to what some experts call the 'revival' of the Senate. The Senate is a legislative body but due to its pattern of composition, it is able to scrutinise government's legislative initiatives and also keep a close watch on the government's expenditures. This is deemed important as the parliament in Australia, like in all other parliamentary democracies, has- for a variety of reasons- declined in its roles and functions.

Likewise, the process of altering/amending the Australian Constitution is very complex. It involves referendum. Any proposed amendment requires a double majority: an overall majority of popular votes in favour, and a majority in favour in a majority of states. It means that a referendum should be voted 'Yes' in at least four of the six states, excluding the NT and ACT.

The matter of declaring Australia as a republic is as old as the Constitution itself. The 1999 referendum had two issues: the direct election for a president who would be the head of the state in place of the Governor-General; and secondly, a preamble that would define and delineate the national identity and aspirations of Australia. The referendum had failed. Many reasons have been cited for the failure of the 1999 referendum and in fact of all the past referendums. This has made amendment to the Constitution extremely difficult. Many scholars are of the view that the Australian Constitution now contains many anachronistic provisions. So far, only 8 of the proposed 44 amendments have met success and have all been of minor nature. Inconsistent stands of political parties on crucial issues of constitutional importance, and the way, the governments present the proposed constitutional changes to the electorate are held responsible for both the periodic constitutional deadlocks and many archaic provisions that are still retained in the Constitution.

5.9 EXERCISES

1) What were the principles incorporated in the Australian Constitution of 1901 at the time it was drafted?

2) Describe the role and powers of the Australian Senate as stated in its Constitution.

3) Do you think that the Australian legislature is not able to assert supremacy over the executive? Why?

4) What was the referendum of 1999 in Australia about and why did it fail? Explain.

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