Entrenchment

Entrenchment is the process by which statutory law (legislation) is protected against ordinary amendment or repeal by the bare majority of members of the legislature. Basically, entrenchment means that Parliament cannot amend the law which limits or controls its powers without undertaking special procedures. These can include a requirement for higher majority votes in one, or both Houses of Parliament, or obtaining the consent of the people - who are by convention the popular sovereign, and to whom Parliament is ultimately responsible.

Introduction

Entrenchment ordinarily occurs by stipulating the 'manner and form' of amendment or repeal of one or more parts of a statute in a separate section of that statute, or in a related statute. 'Double' entrenchment refers to manner and form restrictions for the amendment of the entrenching provision itself. This is the most effective and legitimate form of entrenchment; indeed some legal scholars argue that single entrenchment is meaningless.

So:

The entrenchment of terms of a written constitution in a Westminsterian system like Tasmania is of some importance to maintaining the rule of law. That is because, in Westminster systems the executive and legislative branches are largely fused; meaning that the Government necessarily has control over one house, and sometimes may have control or significant influence over both houses. Entrenchment ensures that a government cannot use its influence to remove constitutional safeguards without due process. Conversely entrenchment can be abused by an executive that has temporary dominance in both houses, to enact policies that future governments and parliaments are unable to remove.

The Commonwealth Constitution

The most significant constitutional entrenchment in Australia is found within the Commonwealth Constitution. Section 128 of the Commonwealth Constitution protects the entire Constitution from amendment or repeal by ordinary legislative means. At its simplest (the non deadlock procedure) section 128 requires a double majority plus (majority of electors and majority of States) referendum to alter any part of the constitutional document. This effectively 'entrenches' the provisions of the Federal Constitution against amendment by ordinary legislation, reflecting its status at the apex of the legal system, and the rule of law in the Commonwealth. It has also meant that the
Commonwealth Constitution has remained largely unchanged since it was first drafted. The high benchmark, the costs of referendum, the political divide, the conservatives of the electorate, amongst other things, have meant that attempts to reform the Federal Constitution have been largely unsuccessful. This lack of change might be seen to clash with the convention of popular sovereignty, insofar as a largely static constitution, written and expressed in one age, might not reflect the public interests in another.

The state constitutions, parliamentary supremacy (plenary power) versus the rule of law

The State Constitutions tend not to have general restrictions on amendment such as found in the Commonwealth Constitution. Instead State Constitutions are generally treated as ordinary acts of Parliament, subject to the ordinary rules of amendment. This reflects the Westminster (UK) view that parliamentary sovereignty is paramount, or, at the very least that parliamentary sovereignty is essential to the rule of law - by ensuring that the popular representative is capable of "translating the public will into public law" at any one time.

Consequently the British were 'unused to the notion of an entrenched constitution and, especially since the Reform Act, were imbued with a sense of the power of the Parliament to remould itself. While the subordinate colonial legislatures were certainly not so unfettered to make any laws regarding their own constitution, they did view the role of Parliament through the prism of British constitutionalism. Hence, colonial parliaments were generally considered to be 'plenary within their limits', those limits arising from superior imperial laws, such as the Colonial Laws Validity Act (see The Current Constitution). The shift from colonial dominions to federal states merely changed the source of those limits, not the assumption of parliamentary sovereignty. The primary limits on state legislative power are found within the two constitutional sources, the Commonwealth Constitution and Australia Act 1986 (Ch). Outside the inconsistency provisions in section 109 of the Commonwealth Constitution, those acts create two restrictions on the competency of State Parliaments to alter their own Constitutions. These are:

- **Limiting abolition of state constitutions.** Section 106 of the Commonwealth Constitution expressly envisions the continued existence of State Constitutions. It is therefore arguable that (practically unlikely) parliamentary legislation seeking to extinguish a State Constitution would be invalid. On the other hand, the extinguishment of a written document would be unlikely to effect the common law constitution of the States, so would be unlikely to be seen as an absolute extinguishment anyway. More problematic would be state legislation which would prevent a state from continuing to exist and function as such, something the Commonwealth is prohibited from doing by virtue of section 106. How section 106 affects the State legislatures capacity to undermine its core functions is less certain. Abolishing a House of Parliament has not infringed section 106 but it would seem that fundamentally altering a Parliament's capacity to legislate might. It has been suggested that the Crown cannot be eliminated nor can the office of the governor as representative of the Crown be abolished. Other questions (admittedly highly improbable) are the return to the non-representative character of the original colonial legislature of Tasmania - that is a single chamber appointed by the executive.

- **Embedding 'manner and form' requirements.** Section 106 of the Commonwealth Constitution requires that State Constitutions are 'altered in accordance with the Constitution of the State'. This provision is reflected in section 6 of the Australia Acts which requires states observe any 'manner and form requirements' for laws respecting the constitution, powers or procedures of their parliaments. The term 'manner and form' has been described as a compound conception.

Current arrangements (Tasmania)

Tasmania has no general restriction on amending its Constitution as is found in the Commonwealth Constitution. That means that the Constitution Act 1934 is an ordinary Act of Parliament which can be amended or overridden by subsequent Parliamentary legislation, directly or indirectly. Parliamentary legislation limiting religious freedom would be valid notwithstanding the protection for this right in section 11 of the Constitution Act. The only exception to this rule is section 41A which requires a two-thirds majority in the House of Assembly for any bill relating to the amendment of section 23. Section 23 provides that members of the legislative council will be appointed for four year terms. Except for this provision there are no other manner and form restrictions in the Constitution Act, making it the least entrenched of the Australian State Constitutions. Furthermore s 41A is only 'single entrenched', meaning that it is not protected itself from amendment by the ordinary means. Constitutional scholars disagree whether this means that the entrenchment is ineffective. One school has argued that an ordinary Act of Parliament could contain a provision both amending 41A and removing the Legislative Council, or even simply legislating for the removal of the Legislative Council would involve an implied amendment achieving the same ends.

### Issues

- A lack of double entrenchment for fundamental provisions.
- The status of the Legislative Council and whether it may be abolished by an Act of Parliament and also whether it may block its own abolition.
- External, non-constitutional entrenchment. There are manner and form requirements in other State Acts (which are arguably not part of the constitution, powers and procedures envisioned by section 106 or the Australia Acts 1986 s 6); it is unclear whether these are binding or can be overturned by an ordinary Act of Parliament, either expressly or impliedly.

### Questions

- Is entrenchment important?
- What are the legal and political problems with entrenchment?
- Should manner and form amendments themselves conform to super majority requirements? That is, should a manner and form provision, requiring any future entrenchment require the 3/4 majority approval by of both houses be double entrenched into the Constitution Act ('symmetric entrenchment').
- What are 'fundamental constitutional provisions' that might be entrenched?
Symposium Opinions/Recommendations:

### Expert Opinions

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| Mr Michael Stokes   | Entrenchment:  
  - Pressure to change basic provisions often arises in an emergency when passions run high and dispassionate argument is difficult.  
  - The constitutional position is that entrenching can be seen as inconsistent with the supremacy of Parliament. There is theoretical debate over whether entrenching positions is an addition or subtraction from legislative power.  
  - Australia Acts 1986 (Cth) s 6 authorises manner and form entrenchments with respect to laws on the constitution, powers, procedures of Parliament but not on other subjects. There are real doubts whether the Parliament can impose binding entrenchments on itself with respect to other subjects.  
  - Entrenchments should only be imposed by the proposed method of amendment or repeal.  
  - However, there may be difficulties in legally validating entrenchment provisions other than those authorised by section 6 of the Australia Act by means of a constitutional convention or referendum.  
  - If the people of Tasmania were sovereign, a referendum or constitutional convention could give legal validity to such entrenchments just as the conventions and referenda of the 1890's are now seen as validating the Australian Constitution. However, the Parliament is not a sovereign Parliament, being subject to the Constitution and the Australia Act. In my opinion there is no residual sovereignty in the Tasmanian people. |
| Professor Anne Twohey | Manner and form entrenchment provisions:  
  - Do not entrench if provision is detailed. WA entrenched ‘directly chosen by the people’ and accidentally gave themselves implied freedom. Victoria accidentally entrenched references to Monarchy in their constitution. Shouldn’t entrench by anything other than the same mechanism by which you would repeal a law. |
| Mr Leigh Sealy      | Community values:  
  - Entrenchment should reflect community values. |
| **General discussion** | Entrenchment:  
  - Should we entrench minimum numbers for parliament and the judiciary to ensure they can continue to function effectively?  
  - Automatic sunset clauses and mandatory reconsideration of entrenching provisions could help solve many of the foresight issues.  
  - There are other procedures to change these provisions, parliament special majorities not just referendum – what about implied appeal? |

### Expert Recommendations

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| Professor George Williams | Partial solution:  
  - Issues with bipartisan consensus and importance should be entrenched, such as judicial independence. |

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**Footnotes**

Attorney-General (NSW) v Trethowan (1931) 44 CLR 394. 
Source?
Initially the High Court found the opposite, specifically that a Parliament was bound to its statutory constitution until amended, so that it could not pass indirectly inconsistent legislation: see *Cooper v Commissioner of Income Tax (QLD)* (1907) 4 CLR 1304, in which Griffiths CJ concluded that a 'legislature could not ... disregard the provisions of the [a state constitution act] as existing for the time being, so as to be able to pass a law inconsistent with them, without first altering the Constitution itself. That is to say, their power was no more plenary than it was before. The distinction between an authority to alter or extend the limits of their powers, and an authority to disregard the existing limits is clear'. This position was upheld by a 4:3 majority of the High Court followed in *McCawley v R* (1918) 26 CLR 9, but subsequently overturned on appeal to the Privy Council in *McCawley v R* (1920) 28 CLR 106. The Privy Council concluded that the Constitutional Act of Queensland was not paramount or fundamental. Rather the source law of the State was Imperial in nature; specifically, the order in council establishing the Colonial Parliament; the *Colonial Laws Validity Act* and the *Commonwealth Constitution*. These Imperial Acts allowed the State Parliament to amend its own Constitution subject to certain limitations. The result was that the Parliament was not otherwise constrained and any Constitution Act is an ordinary Act of Parliament which can be overridden by subsequent inconsistent legislation (see 112, 121-126).

*McCawley v R* (1918) 26 CLR 9, 64 (Isaacs and Rich JJ) (affirmed by Birkenhead LJ, 28 CLR 106, 115). See also: Australia Acts 1986 (Cth) ss 2; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9.

*Western Australia v Wilmot* (1982) 149 CLR 79, 84 (Gibbs CJ).

*South Australia v Commonwealth ('First Uniform Tax case')* (1942) 65 CLR 373, 422 (Latham CJ).


*Queensland Electricity Commission v Commonwealth* (1987) 159 CLR 192, 206 (Gibbs CJ): 'A general law ... will be invalid if it would prevent a State from continuing to exist and function as such. Clearly the Act is not a law of that description and it is unnecessary to consider further that aspect of the principle. A Commonwealth law will also be invalid if it discriminates against the States in the sense that it imposes some special burden or disability on them.' See also: *West Lakes Ltd v South Australia* (1980) 25 SASR 389; *Re Initiative and Referendum Act* [1919] AC 935.

*Clayton v Heffron* (1960) 105 CLR 214, 252 (Dixon CJ, McTiernan, Taylor & Windeyer JJ): 'There are many reasons for assuming that the assent of the Crown must always remain necessary but what ground is there for supposing that the Legislature must always remain defined in terms of two Houses? The purpose of the provision is to express the full legislative power of a State the authority of which is continued under ss. 106 and 107 of the Constitution of the Commonwealth.'

Other States have Constitutions which require a majority of both Houses, or referendum, to amend. See:

- Peter Congdon, 'History, Scope and Prospects of Section 73 of the Constitution Act 1889 (WA)' (2012) 36 University of Western Australia Law Review 83; and


Relating to majorities required for amendment within legislation - forestry reserves legislation? Brendan Gogarty

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<th>Current Section of the Constitution Act 1934</th>
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<th>Workshop Conclusion/Follow-up</th>
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<tr>
<td>Entrenchment generally</td>
<td>Prof Anne Twomey: Entrenchment is acceptable as long as we are careful about how we go about it. For example: ensure that a facility to entrench embedded in the Tasmanian Constitution ensures that it is as difficult to entrench something as it is to un-entrench something. Note: The draft NT Constitution has an entrenchment facility.</td>
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<td>Prof George Williams: Entrenchment may be too much of a political / policy issue to address at this point. Simple re-drafting might be ideal.</td>
<td>No consensus on whether to entrench anything in particular</td>
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References