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October 17, 1980

MEMORANDUM FOR THE PRIME MINISTER

The Constitution Act, 1980: Options  
for tying s.42 (referenda) to s.41  
(the Victoria amending formula)

In the light of public criticism of s.42 (the use of referenda for constitutional amendment), the government may wish to propose an alternative that would curtail the power granted to Parliament by this section. S.42 would allow Parliament to hold a referendum either as a deadlock-breaking device or as an alternative procedure of amendment to that set out in s.41. A copy of s.41 and s.42 is attached.

If it were decided that s.42 should only be used to break a deadlock, resort to this section could be tied to a prior attempt to secure an amendment under s.41. This could be done by reference to the formal provisions of s.41 or by reference to the consultative process implied by the provisions of s.41.

1. A link to the formal provisions of s.41

Resort to s.42 could be tied to the formal requirements for securing agreement with the provinces under the provisions of s.41. This could be done by prefacing s.42(1) with words along the following lines:

"s.42(1) If, within ten months of the adoption of resolutions by the Senate and the House of Commons under the terms of s.41(1)(a), an insufficient number of legislative assemblies of the provinces have also adopted resolutions under the terms of s.41(1)(b) authorizing the issuance of a proclamation of the Governor General under the Great Seal of Canada to amend the Constitution of Canada, an amendment to the Constitution of Canada may be made, etc. (referendum procedure), but the Senate and the House of Commons may not

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authorize such a referendum after two years have elapsed from the expiry of the ten month period referred to in subsection (1)."

Comments

- A time-frame for the approval procedure under s.41 is essential to prove that a resort to the Victoria procedure was not, finally, successful and that, therefore, a deadlock exists.
- The delay of ten months may seem a trifle long, but in some of the smaller provinces where sessions are short and infrequent, a shorter period for the time written which they would be required to act might appear unreasonable. *within*
- The final qualification of s.42(2) respecting the two year time-frame for holding a referendum establishes a "sun-set" clause on the power of Parliament to use s.42 after failure to secure amendment of the Constitution under the provisions of s.41.

Advantages

- Such changes in s.42 would overcome criticisms that s.41 could be used to by-pass the provinces completely. The changes would make it clear that a referendum could only be held in the event of a deadlock.

Disadvantages

- Nothing in the proposed qualification of s.42 would oblige the government of Canada to consult the provinces prior to the presentation of the initial resolution in the House of Commons or to consult (or negotiate with) the provinces during the ten months preceding the second resolution authorizing a referendum. The qualification might then appear to be a mere time impediment before Parliament could pursue its preferred course of holding a referendum.

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N.B.: Officials from Saskatchewan have developed a revised s.42(2) that would have approximately the same effect. The Saskatchewan proposal follows:

"42(2) A referendum to in subsection (1) shall be held by proclamation issued by the Governor-General under the Great Seal of Canada in the following case and no others:

- a) where the requirements respecting resolutions in paragraph 41(1) (a) have been satisfied for one year with respect to a proposal for amendment;
- b) the requirements of paragraph 41(1) (b) have not been satisfied at the expiration of the year mentioned in subparagraph (a); and
- c) the issue of the proclamation is authorized by resolution of the Senate and House of Commons."

2. A link to the consultative process implied by the provisions of s.41

It might be argued that the government of Canada would be unlikely to submit a resolution to Parliament under the terms of ~~s.41~~, seeking an amendment of the Constitution, without having previously ascertained that a number of provinces favoured such an amendment. The assumption would be that some form of federal-provincial consultation had occurred prior to presentation of the initial resolution under s.41. This implicit link might be strengthened by a qualification of s.42 respecting the consultative process between the federal and provincial governments prior to presenting a resolution to amend the Constitution.

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This link might be done by prefacing s.42 with words along the following lines:

"If, within ten months of

- a First Ministers Conference or
- a meeting of Ministers of Justice and Attorneys General

at which an amendment of the Constitution of Canada was discussed, the Senate and the House of Commons have adopted resolutions authorizing the issuance of a proclamation of the Governor General under the Great Seal to make that amendment to the Constitution and if an insufficient number of the legislative assemblies of the provinces have adopted like resolutions to authorize the issuance of a proclamation by the Governor General under the terms of s.41(1)(b), an amendment to the Constitution of Canada may be made, etc. (referendum procedure) but the Senate and the House of Commons may not authorize such a referendum after two years have elapsed from the expiry of the ten month period referred to in subsection (1)7."

Comments

- This approach requires federal-provincial consultation prior to the initial presentation of a resolution in Parliament, something that may be implicit in s.41 but is not formally required.

Advantages

- It not only ties the deadlock-breaking mechanism to provincial actions or lack thereof, but also recognizes consultation between the provinces and the government of Canada as a necessary part of the amending process.

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The "deadlock" would appear more "genuine" since it would be seen to result from a failure in the consultative process rather than a failure of legislative assemblies to accede to an initial resolution adopted "unilaterally" by Parliament without any prior attempt to secure agreement.

Disadvantages

- It places more stringent limits on the power of Parliament than those outlined under the first proposal (the link to the formal provisions of s.41). There may be occasions when the government of Canada might not wish to be constrained by the requirement of formal and perhaps fruitless consultations with the provinces (i.e., an amendment respecting the rights of Native peoples).

You may wish to consider both of these options. If, however, Saskatchewan is willing to give strong public support to a revised s.42(2) along the lines suggested by their officials, that option would appear preferable.

Michael Kirby

James Ross Hurley/rr