EXECUTION OF TREATIES BY LEGISLATION IN THE COMMONWEALTH OF AUSTRALIA

Since Australia is a federal country in which the distribution of powers between the Commonwealth and States follows principles similar to those of the Constitution of the U.S.A., the problem arises whether the execution of an international agreement requiring domestic legislation can be carried out entirely by the Commonwealth Parliament, irrespective of the subject of the agreement, or whether the required legislation must be enacted by the State Parliaments in those cases where the general subject of the agreement falls outside the ordinary sphere of Commonwealth power. This is a problem common to several federations, and the general literature dealing with it is voluminous,[1] but very little of it deals specifically with the position of the Commonwealth of Australia.

Australian judicial decisions bearing directly on the problem are few.[2] There is only one institutional treatise of recent date on the Australian Constitution (Nicholas, *The Australian Constitution*),[3] and in it the learned author, while giving an excellent survey of the extent to which Australia has entered into international agreements of all kinds and quoting numerous judicial and other expressions of opinion on the instant problem, expressed no concluded personal view.[4] The most important survey of the Australian problem is that by the present Solicitor-General of the Commonwealth, Professor K. H. Bailey, in (1946) 54 International Labour Review, pp. 285 ff. The present article draws heavily on Professor Bailey's article, with some additional notes on developments since he wrote.[5]

1. Recent important examples are : K. C. Wheare, *Federal Government*, Chap. IX (O.U.P., 2nd. ed. 1951; 3rd. ed. 1953 not available at this writing); J. P. Nettl, *Treaty Enforcement Power in Federal Constitutions*, (1950) 28 Canadian Bar Review 1051; M. Sorenson, *Federal States and the International Protection of Human Rights*, (1952) 46 American Journal of International Law 195.
2. The main ones are dealt with *post*.
3. Law Book Co. of A'sia, 2nd ed. 1952. The author, the late Mr. Justice Nicholas, was a Judge of the Supreme Court of New South Wales and had been Secretary of the Royal Commission on the Constitution in 1928-9.
4. In conversation with this writer, Mr. Justice Nicholas expressed the view that limits must be found for the External Affairs power in sec. 51 (xxix) of the Constitution if it is not to swallow up the Constitution in peace as the Defence power—51 (vi)—tends to do in war. J. G. Starke in *Essays on the Australian Constitution*, 287 (Law Book Co. of A'sia, 1952), similarly gives an excellent survey of the development of Australia's international status and refers briefly to the present problem, but gives no concluded opinion as to the trend of judicial doctrine.
5. See also Professor Bailey's paper *Fifty Years of the Australian Constitution* in (1951) 25 Australian Law Journal at 321-2.

The Commonwealth of Australia has unlimited power to negotiate and to ratify international agreements and understandings of all descriptions. As a matter of formal law, the States of the Commonwealth may have some powers in relation to external affairs; in particular they maintain direct relations with the government of the United Kingdom through Agents General in London, and have at times negotiated with the U.K. government on immigration questions, but since 1907 the States have ceased to assert any general authority in the field of external affairs. It may be that even as a matter of formal law, the State Governors have received no share of the Crown prerogative powers of negotiating and ratifying international agreements which form the legal basis of international competence within the British Commonwealth, such prerogatives being vested solely in the Federal Governor General.[6] Hence the authority of the Federal Government in this sphere is both unrestricted and virtually exclusive.

No international agreement can of its own force establish rights or alter any existing law within Australia. Hence an international undertaking which requires for its performance an alteration in Australian law can be carried out only by legislation of an appropriate Australian parliament.

The Federal Parliament has specific and implied powers sufficient to enable it to carry out a wide range of international agreements; in particular, its power to legislate with respect to "naval and military defence"[7] gives it very extensive powers in time of war. But nevertheless a wide range of domestic matters falls outside Federal and within State power; important examples falling within current international negotiations include the general regulation of conditions of employment and the protection of fundamental liberties such as freedom of speech and of association; restricted aspects of these topics come within Federal power, but no general guarantees as to such matters would do so. The Federal Parliament and Government have some capacity for influencing State legislative action, because of State financial dependence upon Federal grants, but no Federal Government has been prepared to use its financial and political authority in order to induce State Parliaments to legislate to give effect to an international agreement, and the likelihood of any

6. Federal executive power to negotiate and ratify international agreements could be derived from the joint operation of secs. 51 (xxix) and 61 of the Constitution, but a prerogative basis is more flexible and requires no legislation.

7. Constitution sec. 51 (vi).

direct pressure for such a purpose is slight. Hence so far as the execution of such an agreement may require State action, the Federal Government has to rely upon persuasion and good will in order to produce the desired result.

But the Federal Parliament has express power to legislate with respect to "external affairs".[8] If this power extends to the making of laws to give effect to any aspect of any international agreement on any topic, then the distribution of powers between the Federal and State Governments otherwise secured by the Constitution becomes irrelevant for present purposes. In *R. v. Burgess, ex. p. Goya Henry*,[9] and *R. v. Poole (No. 2), ex. p. Goya Henry*,[10] the High Court of Australia held unanimously that sec. 51 (xxix) enabled the Commonwealth to legislate so as to give effect to an international convention (the Paris Air Navigation Convention of 1919) even though the result was that the Commonwealth thus gained power to make laws on subjects not otherwise within Federal power (in this case, the regulation of intra-State air navigation).[11] But none of the Justices suggested that the External Affairs power was without limits. Two limits accepted by all the Justices were : firstly, such legislation must be reasonably relevant to the carrying out of an international agreement;[12] secondly, the international agreement must have been entered into bona fide as such, and must not be merely a colourable device for securing additional legislative power to the Commonwealth.[13] On a third suggested restriction, the Court was divided: Starke and Dixon JJ. suggested that an international agreement must relate to subjects which in their nature properly fell within the sphere of international negotiation before the Federal Parliament could give it legislative effect; Evatt and McTiernan JJ. denied that any such narrowing of the range of international negotiation was required by the Constitution; while Latham C. J. did not flatly reject such a limitation but suggested that the facts of international life were making it meaningless.

8. Constitution sec. 51 (xxix).
9. (1936) 55 C.L.R. 608.
10. (1939) 61 C.L.R. 634.
11. Apart from sec. 51 (xxix), the Federal Parliament would have power to regulate air traffic only in relation to interstate trade and commerce and defence.
12. So that in the *Burgess Case*, regulations which in some respects departed from those specified in the Paris Convention were held invalid.
13. This restriction seems largely academic. In any event, it would probably be a task of remarkable difficulty to prove within the limits of the ordinary rules of evidence as applied in Australian courts that the Governor-General in Council had negotiated an international agreement *mala fide* in the sense indicated. There is strong authority for the view that the King's representative must always be presumed to have acted in good faith; see per Dixon J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. at 179.

Since the Air Navigation cases the High Court has given two further decisions having a direct bearing on the External Affairs power. The more important of these is *R. v. Sharkey*,[14] in which the Court had to consider the validity of sec. 24A of the Commonwealth Crimes Act, defining sedition. The definition included the exciting of disaffection against the government or constitution of "any of the King's Dominions." The Court held unanimously that this provision was valid under the External Affairs power, because the relations between Australia and the other nations of the Commonwealth, though not embodied in formal agreements of any kind, were of such importance to the Australian Commonwealth that the protection of the constitutional structure of all the Dominions was a proper matter of interest to the Federal Parliament; the Court held that this interest could properly be described as falling within the sphere of "External Affairs". This decision could be given quite a narrow application as depending wholly upon the peculiar structure of the British Commonwealth, in particular its possession of a symbol of unity in the Crown. However, the reasoning suggests wider applications. Certainly the general principle of the *Burgess Case* was confirmed, since the general field of maintenance of law and order falls within State rather than Federal authority. The case also provides a basis for contending that in order to support Federal legislation, an international agreement or understanding need not be in the precise and detailed form of a treaty or convention, and that the Federal Parliament can honour obligations of conscience or of international solidarity which are conducive to an international relationship although not distinctly required by its terms.

In *Sloan v. Pollard*, [15] the Court upheld a Commonwealth butter rationing regulation, a subject normally within State power, on the basis of the defence power alone. The scheme was entered into in order to discharge agreements for the supply of food to the United Kingdom made in the closing stages of the Second World War and so could have been related to the External Affairs power; but Dixon J. observed that "the power with respect to external affairs was faintly mentioned". It is difficult to understand why the Commonwealth was so reluctant to rely on the external affairs power in this case, unless, with the *Goya Henry Cases* in mind, the Commonwealth's advisers were afraid that the "agreements" in question were so vague that they would hardly justify *any* legislation. There is some reason for suspecting that the agreements were indeed mere gentlemen's

14. (1949) 70 C.L.R. 121. 15. (1947) 75 C.L.R. 445

understandings, but if so, should the regulations have been upheld under the defence power any more than under the external affairs power ? Perhaps if *Sharkey's Case* had been decided by this time the Crown would have been more willing to risk an "external affairs" argument, even on a somewhat nebulous obligation. As it was, the case illustrated a common tactic of constitutional litigation in this field, to be mentioned later.

The only other judicial development since the Air Navigation cases relevant to this problem has been the revival in a modified form of implications from the nature of federalism as a ground for restricting Federal powers. The complex history of this subject has been dealt with elsewhere. [16] It is sufficient here to say that although the revived doctrine was laid down in emphatic terms and acted upon in the *State Banking Case* in 1947,[17] it has not been clearly applied in any subsequent case and its potential application is disputable. At its narrowest, it could operate to restrict only direct interference by Federal law with the activities of State governmental agencies. At its widest, it could be used to inhibit Federal interference with what might be regarded as a minimum essential sphere of operation for State law. In dealing with any Federal constitution, a court exercising judicial review must be impressed with an argument that if the constitution carefully delimits the power of one unit in the federation, it is unlikely that any one of its powers is intended to have so wide an operation that the recital of other powers is unnecessary. If the court allows itself to consider the general political understandings at the time when the constitution was enacted, it is also likely to be influenced by the different though analogous argument that a residual gift of power, even though technically incapable of measurement until the specific powers have been delimited, is usually expected to operate so as to give the residual powers a reasonably ample field of operation.

In Australia, both of these conceptions have influenced individual Justices of the High Court at different times. By 1947, there were at least four Justices (Rich, Starke, Dixon and Williams JJ.) who had expressed at various times and with various degrees of vigour the necessity for reading broader Commonwealth powers in some such fashion. Of these only Sir Owen Dixon, now Chief Justice, and Williams J. remain. However, the present Court is probably rather more likely than the Court as it existed from 1920 to 1942 to apply such conceptions in an appropriate case. The External Affairs power is certainly

16. (1948-9) IV Res Judicatae, pp. 15, 85.
17. *Melbourne Corporation v. Commonwealth*, 74 C.L.R. 31.

such a case, since with the rapid extension of the scope of international legislation, the general balance of constitutional power as between Commonwealth and States could be seriously modified if the Federal Parliament can legislate on any subject of international understanding. The fact that Dixon C.J. has favoured both restrictions on the External Affairs power and regard for the general structure of federalism in interpretation leads one to think that the present Court may not be willing to accept in its entirety the interpretation of the External Affairs power given by Evatt and McTiernan JJ. in the *Burgess Case*. However, five members of the Court have had no opportunity for expressing any strong opinion either on federal implications or on the scope of the External Affairs power, so that no "prediction of what the Courts will do in fact" can be made on this subject with any confidence.

The state of judicial doctrine both explains and justifies the caution which the Australian Federal Government has shown in its approach to the courts on this question. In the *Burgess Case*, Dixon J. said : "The limits of the power could only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example."[18] The Federal Government has pursued, even under Labor Governments whose Attorneys-General thought that the "expansive" interpretation of the power was correct, a policy of avoiding entanglement with the courts on issues which might invite unfavourable judicial treatment. This process of letting the cases multiply in a manner which does not produce unfortunate precedents is quite likely to lead to the ultimate adoption of the expansive interpretation, since in the meantime daily experience accustoms people, including Judges, to a world in which few subjects are excluded by any "essential characteristics" from international discussion and ultimately agreement.

Developments in Australian politics are also favourable to a steady expansion of the generally accepted scope of the External Affairs power. Before 1950, there had been a tendency for the "expansive" view to be associated particularly with the Labor Party, and Dr. H. V. Evatt was sometimes accused of favouring international commitments such as the "full employment" pledge in Article 55 of the United Nations Charter in order to provide the basis for expanded Federal powers. The non-Labor parties have since had an opportunity for experiencing the value of increased Federal powers in certain directions: for example, in a political dispute in the State of New South Wales

18. 55 C.L.R. at 669.

over the introduction of compulsory membership of trade unions, the Federal Government was urged to ratify an international declaration of human rights as soon as possible so as to invalidate the State law as an interference with freedom of association.

It should be noted that a cautious attitude towards commitments to Federal action is justified in Australia (and in other federations) not only by doubts as to the constitutional position, but also by administrative considerations. I.L.O. Conventions and commitments such as those contemplated by the Human Rights Commission require not merely legislation, but also effective administration and inspection. It would be most uneconomical for the Federal Government to set up the official apparatus required for such purposes when supervisory administrative bodies for similar domestic purposes already exist in the State governments, with a long experience of the relevant problems and with the advantage of de-centralised administration. While considerations such as this are not strictly speaking directly relevant to the legal issues involved, there is ground for thinking that they have played their part in influencing those High Court Justices who have adopted a cautious approach to the interpretation of the External Affairs power. They have certainly played a part in influencing the successive Commonwealth governments which have sponsored "federal reservation clauses" in international treaties, particularly International Labor Organisation conventions, to which Professor Bailey gives special attention in his article mentioned above.

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