SOME ASPECTS OF THE COMMONWEALTH PARLIAMENT'S DEFENCE POWER UNDER THE CONSTITUTION.*

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One problem that confronts the student at the very outset of his analysis of the defence power is the meaning to be given to the phrase "naval and military defence" in s. 51 (vi) of the constitution. The words have obviously been used with great deliberation. They seem to indicate an intention to circumscribe completely the power of the Commonwealth to make laws with respect to defence and yet, not unnaturally when one considers that the constitution was drafted before the termination of the last century, they make no reference to aerial defence. Is one to apply the maxim "*expressio unius est exclusio alterius*" and say that the Commonwealth has no power to legislate with respect to this means of defence, with the result that it must be left to the individual States under s. 107, which saves the power of the States as to all matters which are not exclusively vested in the Commonwealth or withdrawn from the States? Such a position would of course be completely absurd from a practical point of view. The matter arose for consideration in the leading case during the war of 1914-1918, *Farey v. Burvett.*[1] But the difficulty was very summarily disposed of, Griffith C.J. describing the adjectives "naval and military" as "words not of limitation but rather of extension, showing that the subject-matter includes all kinds of warlike operations." The conclusion is no doubt very satisfactory. But on what grounds can it be supported?

While I do not desire to deal with the well-established principles of interpretation at any great length, nevertheless in considering this question some references to those principles must be made in order to determine whether the Commonwealth is to be limited to the seemingly narrow wording of this most important placitum. The question does not, I think, involve any consideration of State rights, even if such were relevant. It is one of those matters which the States would, I believe, without hesitation desire to be left in the hands of the Commonwealth. Of course this could be done by the States referring the matter to the Commonwealth under s. 51 (xxxvii) of the constitution, as most of the States in fact did in the case of the Air Navigation Act, but, for fairly obvious political reasons, this is undesirable and would, if it were necessary, leave the Commonwealth's own power under the constitution to legislate for defence very incomplete. My purpose therefore is to see whether by any principle of interpretation the Commonwealth has power, without reference to it by the States, to legislate for aerial defence. It might, of course, be argued that it is part of the naval and military defence; but in order to sustain such an argument it would, I think, be necessary to abolish the Air Force as such and attach an air arm to the Navy and the Army. Such a procedure would possibly be very awkward and consequently undesirable from a military point of view, using the word military in a broad sense,

* This article consists of selected passages from the valedictory address delivered to the Law Students' Society of Victoria by the President for the year 1940. It is regretted that the length of the address precludes its inclusion in this magazine in the form in which it was delivered, but it is hoped that the following extracts, together with the note on the recent case of *Andrews v. Howell*, may serve to illuminate a subject of vast importance at the present time.—(EDITOR).

1. 21 C.L.R. 433.

apart from the fact that it might be considered merely a colourable device to obtain a legislative power which does not in fact exist.

The problem, of course, arises from the developments made in the means of waging war since the constitution was framed at the end of the last century. At that time only land and sea warfare was known. Accordingly, the grant of power to make laws for the peace order and good government of the Commonwealth with respect to naval and military defence was intended to give to the Commonwealth Parliament power to make laws with respect to all the then known forms of warfare, and it is submitted that effect should be given to this intention, even though it results in an extension of the meaning of the actual words used beyond that which is plain and natural to them. The principle suggested, therefore, is this :—That where the grant of power to the Commonwealth with respect to any particular field of legislative activity covered, at the time of the coming into operation of the constitution, all the known means of giving effect to that activity, the grant of power must be deemed to extend to all developments made since the inception of the constitution in the means for carrying that activity into effect. The activity here referred to, when related to the words of s. 51 (vi), means not merely the naval and military defence of the Commonwealth but defence by all the then known means. Thus in determining what is intended to be covered it is necessary to go behind the actual words used and to consider whether the words of the particular section did in fact at the time of the coming into operation of the constitution cover the then known means of effectuating or dealing with the particular subject. Such a canon of interpretation may seem to be dangerously wide and therefore possibly in some cases leaving the Court power to add to or vary the constitution at will. However, it must be borne in mind that to include the aerial defence of Australia within the legislative power of the Commonwealth with respect to defence some principle of interpretation must be called in aid. Exceptions cannot be made merely as a matter of convenience. Indeed, to do so would most certainly be dangerous both from the point of view of possible abuses but far more so because of the uncertainty in which the law would be left.

It is submitted, however, that not only is it a convenient canon of interpretation to cover what would otherwise be such a deficiency in the legislative power of the Commonwealth as those who framed the constitution could never have intended, but also that it is, on examination, a thoroughly reasonable and proper one when dealing with the written constitution of a fully sovereign legislature, the only power of amendment of which lies in the cumbersome and unsatisfactory procedure of a referendum on the basis of universal suffrage. So long therefore as the legislature is confined to powers which were, at the time they were granted, as full as reasonable foresight could make them then, it is submitted, some such principle as that here suggested is the correct one.

Another problem, which arises frequently in considering the validity of Commonwealth laws, is the relative function to be discharged by Parliament and the Courts respectively in deciding whether the relation between a particular law and a particular subject-matter is sufficiently close to justify the classification of the law as a law " with respect to " that subject-matter. The special circumstances of the defence power bring

this question into greater prominence than it occupies in relation to other powers. The question has been considered in a number of war-time cases in the High Court, and it may be useful to examine here two or three of them.

The leading case, on this as on other points, is *Farey v. Burvett.*[2] The facts were, briefly, that the War Precautions Act empowered the Governor-General to make such Regulations as he thought desirable for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth, prescribing and regulating, *inter alia*, the conditions (including times, places and prices) of the disposal or use of any property, goods, articles or things of any kind. The Governor-General accordingly, by Regulation, fixed the maximum price of bread. Both the section of the Act, which is in almost identical terms with a section of the present National Security Act, and the Regulation made under it, were upheld.

Counsel for the defendant contended, *inter alia*, that the state of the war did not justify regulating the price of bread, and invited the Court to determine this as a question of fact. This the Court refused to do, being of opinion that, unless the particular measure was clearly not connected with defence, it was not its duty to inquire whether or not the war situation justified the employment of that measure, as the judges were not in possession of the necessary facts, nor were they in a position to acquire such facts, and in any case such action would be overstepping the judicial function and infringing on that of the legislature. Griffith C.J. puts it thus: "The Court is invited to assume the function of determining whether the facts were at the time when the Act was passed such as to warrant the Parliament in exercising the defence power by passing it. Whether it was or was not authorized to do so must, so far as the authority depends upon facts, depend upon the facts as they appeared to it, of which we have not and cannot have any knowledge. In my opinion there is no principle, and there is certainly no precedent, which would justify a court in entering upon such an inquiry if upon any state of facts the exercise of the legislative power in the particular way adopted could be warranted. If it appeared on the face of the Act that it could not be substantially an exercise of the defence power different questions would arise."[3]

In *Pankhurst v. Tiernan*[4] the Court held that this principle was by no means confined to legislation affecting food supply. The question there at issue was whether legislation making it an offence during the war to encourage the destruction of, or injury to property was a valid exercise of the defence power conferred by s. 51 (vi) and the incidental powers placitum—though the Act made no reference to the words of those sections, purporting merely to make the law for the effective prosecution of the war. The Court confirmed what had been said by the majority of the judges in *Farey's* case and once again reiterated the view that so long as the legislation could be for the defence of Australia it was not necessary, desirable, or even possible for it to inquire into the facts, as they appeared

2. 21 C.L.R. 433.
3. *ibid.*, at p. 443.
4. 24 C.L.R. 120.

to Parliament at the time of passing the Act, for the purpose of determining whether or not the state of the war justified the legislation. The judgment of Barton J. indicates the extent of the principle enunciated in the earlier case: "Now, I take it that the principle laid down in *Farey v. Burvett* is not confined to questions of food supply. It extends to all the resources of a people, and all those resources may upon need in time of war be placed by Parliament at the disposal of the Government for purposes of defence if they are capable of subserving those purposes. More, it is competent to Parliament to pass such legislation as may prevent any hampering or dislocation of the work of effectively prosecuting the war, that is, the defence of the country. It is not difficult to see that internal disorder may have such results, and that the destruction of property may diminish the resources of the people applicable to their defence. The wilful taking or endangering of human life is of course in the same category."[5] The learned Justice then went on to say that the association in question was clearly capable of hampering the proper conduct of the defence of Australia and that the Court was therefore not entitled to inquire whether or not it did in fact do so.

It is suggested, however, that Barton J.'s judgment is open to the criticism that he considered the question of the validity of the statute rather on the grounds of whether the particular facts—i.e., the association of which Mrs. Pankhurst was a very active worker—were such as to be capable of hampering the country's defence than on the grounds of whether the wording of the Act was so wide as to be capable of covering matters which had no relation to defence. The Act had made it an offence to encourage the destruction or injury of property, irrespective of whether that property could or could not be in any way related to the defence of Australia.

This distinction is brought out in the judgments of Isaacs and Higgins JJ., who nevertheless arrive at different conclusions on the validity of the legislation. Isaacs J. puts it thus: "It was said that some property might be unsuitable for war purposes, and yet such property is covered by the section. The answer is twofold. First, no one can ever say that anything is useless for war purposes, even in the narrowest sense; but next, and chiefly, all property in Australia is part of our national resources, or, in the language of Lord Stowell, part of the "common stock" to which the Australian people—one people in war, and for the purpose knowing no State divisions—have a right to regard collectively as its means of support in every way for the purposes of this war, both in the lines and behind them."[6] Again he says: "Reading the section in the way indicated" (i.e., interpreting it by the general intent of the whole instrument, by what precedes and what follows it) "it is clearly designed for the preservation of Australian life and property generally, and, as these are obviously essentials for national defence, the objection must fail."[7]

There are two points of difference between Isaacs and Higgins JJ. Firstly, the former regarded the effective prosecution of the war as synonymous with the defence of Australia whereas the latter did not, and

5. *ibid.*, at p. 129.
6. *ibid.*, at p. 132.
7. *ibid.*, at p. 133.

secondly, Higgins J. conceived the possibility that certain property might have no connection with defence, while according to Isaacs J. "No one can ever say that anything is useless for war purposes."

The more critical view adopted by Higgins J. can be seen from the following: "At first sight, the argument is startling to common sense. How can an Act providing for the protection of private windows from unruly citizens be treated as an Act "with respect to" the defence of the Commonwealth—defence from the foreign enemy and his adherents? The property in question is not even property of the Defence Department. No doubt every good thing that we get under our internal policy contributes to the strength of the nation against aggression. Civic peace contributes; but so do good sewerage, good education and a good tramway system. But Acts on these subjects are surely not Acts "with respect to . . . the naval and military defence of the Commonwealth." The connection is too indirect and remote."[8]

Although of course in time of war it is difficult to foresee what may become of importance in the successful prosecution of the war, it is submitted that the wider view of Isaacs J. would remove all questions of constitutional validity from the consideration of the Courts and thus leave Parliament the sole arbiter of what it may do. While from a practical point of view this may at certain times be desirable, the result would be that considerations of constitutional limitation would cease to be of any value and the safeguards which the constitution was designed to create would in consequence be swept aside.

There are numerous problems which arise out of the termination of such vast conflicts as the 1914-1918 war and the present war and which must be faced by the Government. These problems, if they are to be solved, must frequently invoke the exercise by Parliament of the defence power. An interesting example is the case of *A.-G. for Commonwealth and the Minister for Repatriation v. Balding.*[9] The Australian Soldiers Repatriation Act, 1917-18 provided that claims in respect of moneys advanced by the trustees of the A.S.R. Fund or certain other repatriation organizations should have the same priority with respect to payment of debts as money advanced by the Crown. Knox C.J., Isaacs, Gavan Duffy, Powers and Rich JJ., with whom Higgins J. expressed agreement,[10] decided that the defence power authorized the Commonwealth Parliament to enact such a provision. "It is a provision for the re-establishment in civil life of persons who have served in the defence forces of the Commonwealth when they are discharged from such service. That is a matter so intimately connected with the defence of the Commonwealth as manifestly to be included within the scope of the power."

I have cited this case not as one giving rise to any real problem, but merely as an illustration of the kind of situation which can only be solved in peacetime by an exercise of the defence power.

Mr. Justice Higgins in *Roche v. Kronheimer*[11] expresses the opinion that to punish an enemy so severely for having attacked one that he will

8. *ibid.*, at p. 133.
9. [1920] 27 C.L.R. 395.
10. at p. 398.
11. [1921] 29 V.L.R. 329.

not do it again is a legitimate form of defence for the future and therefore within the defence power. Alas, things did not work out quite as the learned Justice would have had them do. The question there was whether the Treaty of Peace could be for the naval and military defence of the Commonwealth, and arose in this way. The Treaty of Peace Act was passed by the Commonwealth to carry the Treaty of Peace into operation, but Regulations passed under the Act vested property to which the respondent would otherwise have been entitled in the Public Trustee for the payment of German debts due to Australians. The Court applied *Farey v Burvett* and the cases which followed it, and accordingly held that the Act and therefore the Regulations were a valid exercise of the defence power, apart from the Commonwealth power to legislate with respect to external affairs. The following passage is from the judgment of Higgins J. : " Such a law can be upheld, in my opinion, under the power as to naval and military defence ; for, though there may be other reasons also, the weakening of an enemy and enemy subjects may contribute as effectively to defence as the increasing of our own fighting forces ; and to punish an enemy severely may be reasonably regarded as a deterrent against future attacks, on Polonius's principle as to a quarrel : ' Bear't that the opposed may beware of thee.' It is not for this Court to consider the wisdom of the Treaty ; it has merely to find whether these provisions are within the Commonwealth powers."[12]

You will perhaps remember my earlier references to the Commonwealth Clothing Factory making uniforms for the Tramways Board during peacetime. I must now confess, in case you thought it was an original example, that it was in fact the subject of litigation before the High Court in 1935. Before, however, referring to that case any further, I propose to cite the case of *The Commonwealth and the Attorney-General for the Commonwealth v. The Australian Commonwealth Shipping Board*,[13] which was distinguished in the Clothing Factory case. The Shipping Board contracted to supply the Municipal Council of Sydney with certain turbo-alternator sets and sought to justify its power to do so under the Commonwealth Shipping Act, authorized by s. 51 (vi) and (xxxix) of the constitution.

Knox C.J., Gavan Duffy, Rich and Starke JJ. held that the Act conferred no power to enter into such a contract or that if it did the Act was beyond the power conferred on the Commonwealth Parliament by the constitution. Isaacs J. held that the Act did not authorize the making of the contract and also that there was no constitutional power to authorize the agreement merely because it would or could be assistant to the Board's works, while Higgins J. relied on the first ground alone. The following paragraph is from the joint judgment of Knox C.J., Gavan Duffy, Rich and Starke JJ. : " The naval and military defence power coupled with the incidental power conferred by s. 51 (xxxix) was also relied upon. Extensive as is that power, still it does not authorize the establishment of businesses for the purpose of trade and wholly unconnected with any purpose of naval or military defence. It was suggested, however, that the dockyard and workshops on Cockatoo Is. were required for the

12. *ibid.*, pp. 339-340.
13. [1926] 39 C.L.R. 1.

purposes of the naval defence of the Commonwealth, and that it was impracticable to maintain them efficiently for that purpose unless the managing body—the Shipping Board—was authorized to enter upon general manufacturing and engineering activities, because the cost of maintenance of the works would be excessive and the working staff would be unable to obtain proper experience. Despite the practical difficulties facing the Commonwealth in the maintenance of its dockyards and works, the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war or in conditions arising out of or connected with war."[14]

In *A.-G. (Victoria) v. The Commonwealth*,[15] the Clothing Factory case, Gavan Duffy C.J., Evatt and McTiernan JJ. delivered the majority judgment of the Court and succeeded in distinguishing the Shipping Board case. Evatt and McTiernan JJ. had not, of course, been elevated to the Bench at the time of the Shipping Board case. Rich J. did not refer to the latter case, and Starke J., dissenting, applied the Shipping Board case. In the course of their joint judgment, Gavan Duffy C.J., Evatt and McTiernan JJ. said: "It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organization in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular the retention of all members of a specially trained and specially efficient staff might well be considered necessary, and it might well be thought that the policy involved in such retention could not be effectively carried out unless that staff was fully engaged. . . . Much must be left to the discretion of the Governor-General and the responsible Ministers."[16]

That of course was the same reasoning which had been rejected in the Shipping Board case; with this difference, that the discretion was there placed in the hands of the Board which had been set up to manage the Cockatoo dockyard whereas here the Government had retained a more direct connection with the activities of the factory, the discretion being left in the hands of the "Governor-General and the responsible Ministers."

The grounds for distinguishing the two cases appear, rather by implication than express words, to be that the clothing factory had in fact operated in time of war whereas the dockyard had apparently not; "with the result," to use the words of the learned Justices, "that the purpose of naval and military defence has been impressed upon the operations of the clothing factory from the very commencement." Unfortunately I have been unable to discover whether or not those were the facts, but if they are not then I confess I fail to see any shred of distinction between the two cases—apart from the decisions of the Court.

With respect I submit that the decision in the Shipping Board case was wrong, and that present events show how necessary it is for the defence of a country to maintain efficiently in time of peace industries for supplying defence requirements, in order that they may have both the necessary machines and skilled workers for producing the vastly increased quantities

14. *ibid.*, at p. 9.
15. 52 C.L.R. 533.
16. *ibid.*, at p. 558.

of material required in time of war. No doubt, had the Shipping Board been permitted, as was the Clothing Factory, to continue its activities, this country might now be able to assist to an even greater extent than it is in supplying England with the ships which she so sorely needs and upon which the whole result of this war and the safety of this country may depend. However it is submitted that some restriction must be placed upon the extent of governmental indulgence in ordinary trade and business in order to be in a position to meet the extraordinary demands placed on industry in wartime. This is a very difficult question and it is accordingly suggested with great diffidence that the defence power should be construed as only extending to enable Parliament during peacetime to engage in such ordinary business activities as will enable it to have at its disposal during wartime industries and factories for the manufacture of such essential war materials as could not reasonably be obtained in wartime in sufficient quantities, and sufficiently speedily and economically, from ordinary trading and business organizations. This would not, of course, prevent Parliament from commandeering, with compensation, such factories in wartime.

Such a limitation as this is admittedly capable of a very elastic interpretation but it is further submitted that elasticity is the very attribute which such a limitation must possess. How else is one to determine whether the manufacture of underclothing or motor cars during peacetime for sale in the ordinary course of business is or is not necessary for the naval and military defence of the Commonwealth in order to obtain the requisite supplies of these commodities during wartime? Certainly a soldier needs underclothing just as much as a uniform. There are a number of other cases which I could, but will not, cite, primarily because they do not lay down general principles but are concerned only with the application of the law to particular facts, of which type of case I consider I have given a sufficient number of examples already.