External Affairs Power and the Constitutions of British Dominions

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Perhaps no other aspect of constitutional arrangements in the so-called British Commonwealth States demonstrates the existence of British influence with such vigour than the one that regulates the exercise of external affairs power. Similarly, the dominating impact of British practice is clearly manifested in the attitudes and postures of Commonwealth States in the domestic application of rules of customary international law, making of treaties and their implementation by domestic courts. Traditionally British practice, is the outcome of influences exerted by the forms and conventions emerging out of the principles of English Common Law, under which power of conducting external affairs is vested in the Crown in the exercise of royal prerogative.[1] Conventions and judicial dicta entrenched these principles in British constitutional systems and firmly established the authority of the executive to conduct external affairs.

In a conventional sense United Kingdom has no written constitution, but this simply denotes that all of its constitutional arrangements are neither incorporated in a single constitutional instrument nor in a number of such instruments. Existing constitutional legislation is fragmentary and even if put together is not exhaustive. Conventions of the Constitution thus have a significant place in the constitutional system. However, a similar situation does not exist in the former colonies. Grant of representative, responsible and independent status to the overseas British territories necessitated the definition in an instrument or instruments powers and procedures intended to be operative there. Consequently, unlike the United Kingdom, in the constitutional systems of the Commonwealth States the traditional British practice merely supplements the provisions of the constitutional instruments. Moreover, as far as the older Dominions are concerned, the understandings and agreements arrived at the Imperial Conferences, "a mechanism for adopting or crystallising constitutional conventions," exert yet another influence. Even in the case of those new Commonwealth States that have enacted constitutional instruments following independence, the impact of these traditional influences has not been completely obliterated. Enactment of new constitutional instruments merely aims at severing remaining constitutional links with the United Kingdom but these instruments do not purport to demolish the existing legal structures. On the contrary, continuity of existing law, which without doubt comprehends the principles of Common Law also, has been meticulously secured in the successive constitutional instruments of new Commonwealth States.

Before an examination of relevant provisions of the constitutional instruments of the older British Dominions, which is the scope of the present investigation, is taken up, it is therefore necessary to examine the traditional constitutional arrangements pertaining to the conduct of external affairs power under the constitutional practice of the United Kingdom even though it is not

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1. Fawcett, The British Commonwealth in International Law (1963), pp. 19-20.

contained in a formal constitutional instrument or instruments in the conventional sense.

The ancient constitutional practice of the realm in the conduct of foreign relations was stated by Blackstone in these terms—

> With regard to foreign concerns, the King is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and the strength to the execution of their counsels. In the King, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour and power that make him feared and respected by foreign potentates; who would scruple to enter into any engagement that must afterwards be revised and ratified by popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of whole nation what is done without King's concurrence, is the act only of private men.[2]

Thus, under the English constitutional practice, the Crown as the representative of the people, conducts the foreign relations in the exercise of its "prerogatives"[3]. In the exercise these prerogative powers—

> The king therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.[4]

Similarly,

> It is also the King's prerogative to make treaties, leagues and alliances with foreign states and princes.[5]

and,

> Upon the same principle, the King has also the sole prerogative of making war and peace.[6]

It is therefore manifestly clear that by ancient practice the foreign relations powers are exerciseable by the sovereign in his discretion, but by convention of the constitution, the sovereign acts

> through recognised constitutional channels upon the advice of the Cabinet or the Secretary of State for Foreign Affairs, unfettered by direct supervision, parliamentary or otherwise.[7]

An indirect control, however, is exercisable by the Parliament through the usual constitutional convention of ministerial responsibility and also necessitates in accordance with customs and conventions that the wishes of the Parliament with regard to declaration of war, making of peace and certain treaties of a specified nature, should not be disregarded.[8] These considerations are however not derogatory of the Crown's prerogative powers which in the conduct of foreign relations unquestionably remain intact and unimpaired.

As a consequence of the foregoing in the first place statutes and instruments that enshrine the English constitutional practice in Commonwealth States are conspicuous by lack of "express references to international law"[9] and contain

2. Blackstone, Commentaries on the Laws of England (ed. Sharwood), Vol. I, Bk. II, (1908), p.252.
3. *Ibid.*, p.260.
4. *Ibid.*, p.252.
5. *Ibid.*, p.257.
6. *Ibid.*, p.259.
7. Halsbury, Laws of England, Vol. 7, (3rd ed., 1954), p.263.
8. *Ibid.*, p.264.
9. Fawcett, *op. cit. supra.* note 1, p.20.

inadequate provisions regarding the exercise of external affairs power. Moreover even these inadequate provisions that have infilterated into these instruments in many cases have resulted in generating domestic constitutional controversies in the case of older Dominions or have served a purely "hortatory" purpose in the constitutional instruments of new Commonwealth States.

Primarily, constitutional problems of this nature which arose on account of inadequate provisions in the constitutional instruments of the older Dominions were on account of the federal structure established under their Constitutions and involved disputes between federal and unit governments on division of power between them. Evolutionary nature of constitutional development also had a very significant effect on ultimate constitutional arrangements in the older Dominions. The process in some respects resulted in the creation of a system which indicated a measure of reticence on the part of the Imperial Government in investing the Dominion Governments with clearly defined powers, with the result that the Dominion constitutional instruments are replete with vague generalisations and are more or less dependent upon constitutional practice and convention. It is, therefore, not surprising to note that in order to surmount these difficulties and to erect a viable and pragmatic edifice suitable for the emerging sovereign entities out of this labyrinth of law, lore and tradition, the Courts had to struggle hard in the course of succeeding decades. Perhaps this could have been avoided if the peculiarities of British Constitutional theories and conceptual idiosyncrasies had not completely inhibited the jurists and legislators, imperial and colonial alike. In a unitary system of government, like New Zealand, such an approach did not result into creation of problems as formidable as those that arose in federal systems of Canada and Australia. The basis of these difficulties would be more readily comprehended, if it is evaluated in the light of Sir Ivor Jenning's observations that—

> The British Constitution is rightly admired by the peoples of the colonies, and a citizen of the United Kingdom must acknowledge the compliment to the wisdom of his forebears and contemporaries when others are so anxious to copy it. It must, however, be remembered that it has been adapted over centuries to meet the peculiar conditions of the United Kingdom, and that its principles are not of universal validity.[10]

CANADA: The British North America Act, 1867[11] contains no express provision regarding the exercise of external affairs power. Though the exercise of many enumerated federal legislative powers under Section 91 may extend to international relations and involve activity of an external nature, lack of an express provision regarding external affairs power and the competence of the federal government to make treaties could be attributed to historical reasons. It has been suggested that in 1867 when the British North America Act was enacted, it was unthinkable that the Dominion will ever enjoy the treaty-making power and consequently conduct its external affairs, independent of the Imperial Government.[12] External Affairs power, therefore, continued to vest in the Imperial Government even after the enactment of the Act; to be exercised in accordance with the rule of Common Law under the royal prerogative. It seems

10. Jennings, The Approach to Self-Government (1956), p.121.
11. 30 & 31 Vict., C.3.
12. *In re the Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, at 312 per Viscount Dunedin; *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326 at 350 per Lord Atkin.

there had not been a general delegation of the authority to the Governor-General of Canada to exercise the power in the name and on behalf of the King as his powers were strictly confined to those explicitly mentioned in constitutional instruments like the Letters Patent. Absence of a provision regarding the exercise of executive authority in Canada by an instrumentality within the Dominion itself together with the incorporation of section 9, reciting that it continues to vest in the Queen, confirms this assumption. Judicial authority further strengthens it. In *Bonoza Creek Gold Mining Company* v. *The King*,[13] Lord Haldane characterised this omission as of great significance and more than sufficient "to negative the theory that the Governor-General of Canada is made a Viceroy in the full sense"[14] and affirmed that he is capable of exercising only those powers vested in the Crown that stand delegated to him for being exercised in the name of and on behalf of the Crown and not all powers of the Crown.

The external relations of the Dominion continued to be conducted by the imperial executive, responsible to the Imperial Parliament and consequently British treaties continued to apply to Canada. Nevertheless, to give effect to the treaties internally, implementing legislation was required to be enacted by local legislative authority. In view of the apportionment of the legislative powers between the federal and provincial legislatures, under the federal scheme of the British North America Act, even if so desired, it was not possible to leave the authority to exercise the legislative power to implement treaties internally undesignated and undefined. The result was, the incorporation of section 132, which spells out the legislative competence to implement the treaties so made by the imperial authority. The section in unmistakeable terms allocates these powers to the federal legislature—

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under treaties between the Empire and such Foreign Countries.

Initially, it will be noticed, that this was a comprehensive provision as the treaties made by the Empire were the only treaties, that required internal implementation and performance of "the obligations of Canada or any Province thereof". The powers of the Dominion Parliament to legislate were, therefore, deemed to be unrestricted.[15] However, in view of gradual delegation of treaty-making power to the Dominion and the enactment of the Statute of Westminster, 1931 Empire treaties gave way to treaties negotiated, signed and ratified by Canada itself. This naturally raised the question of the competence of the Dominion Parliament to enact implementing legislation and required an examination of the nature and extent of section 132, the sole provision in the British North America Act concerning performance of treaties.

The statute enacted by the Dominion Parliament for the regulation and control of aeronautics on the basis of the Convention relating to the Aerial Navigation signed at Paris in 1919 and designed to give effect internally to the Convention came up for review before the Judicial Committee of the Privy Council in the *Aeronautics Case*.[16] Though the Convention had been signed by the Cana-

13. [1916] 1 A.C. 566.
14. *Ibid.*, at p. 586.
15. See *the Attorney-General of British Columbia* v. *The Attorney-General of Canada*, [1924] A.C. 203; Also see *Brooks-Bidlake and Whittal* v. *Attorney-General of British Columbia*, [1923] A.C. 450; *Reference re Waters and Water-Powers*, [1929] 2 D.L.R. 481; *The King* v. *Stuart* [1925] 1 D.L.R. 12; *In re Nakane and Okazake*, (1908), 13 B.C.R. 370.
16. *In re Regulation and Control of Aeronautics* [1932] A.C. 54.

dian representatives, it was ratified by 'His Majesty on behalf of the British Empire' which was deemed sufficient to hold that it was an "Empire treaty" within the meaning of section 132.[17] The scope of section 132, therefore, came to be defined by Lord Sankey—

> It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out.[18]

Though in the *Aeronautics Case* the Privy Council construed the manner of ratification[19] as important, in order to determine the nature of the Convention, the International Radio-telegraph Convention of 1927 which was the basis of the enactment of the offending Statute and regulations in the *Radio Case*[20] was on the other hand ratified by the Dominion Government itself and therefore could not lend support to the argument that it was an Empire treaty. Nevertheless, the Privy Council conceded wide amplitude of power to the Dominion.[21] Viscount Dunedin observed—

> This idea of Canada as a Dominion being bound by a Convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-a-vis to the mother country Great Britain which is found in the later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided by s. 132.[22]

Their Lordships, therefore, thought that the Dominion competence could be construed from the general words at the beginning of section 91.[23] In view of this liberal construction,

> In fine, though agreeing that the convention was not such a treaty as defined in s. 132, their Lordships think that it comes to the same thing.[24]

It seems that the pragmatic consideration that swayed their Lordships to this course was the realisation that—

17. For a critical review of the decision see Fawcett, *op.cit. supra* note 1, pp.21-22.
18. *Aeronautics Case*, *supra*, p.74.
19. It may be noted that the Convention of 1919 was denounced by Canada later and the new Convention in Canada came into operation in 1947. By then the implications of section 132 have been clarified but even then the Supreme Court upheld the jurisdiction of the Dominion Parliament in aeronautics in *Johannesson* v. *Municipality of West St. Paul*, [1952] 1 S.C.R.292.
20. *In re Regulation and Control of Radio Communication in* Canada, [1932] A.C. 304.
21. See *Edwards* v. *Attorney General for Canada*, [1930] A.C. 124 where the reason for this has been attributed to the fact that Canada is now "mistress in her own house". Also see *British Coal Corporation* v. *The King* [1935] A.C. 500 where it was emphasised that "most beneficial to the widest possible amplitude of its powers must be adopted." In *the Privy Council Appeals Reference*, [1947] A.C. 127, again it was pointed out that it would be against the spirit of the constitution "to concede anything less than the widest amplitude of power to the Dominion legislature under s. 101 of the Act."
22. *Radio Case*, *supra*, p.312.
23. See the observation of Viscount Haldane in *Toronto Electric Commissioner* v. *Snider*, [1925] A.C. 396 where an indiscriminate reliance on the general words at the opening of s.91 has not been approved and a cautious approach has been required. Also see the earlier case of *Russell* v. *The Queen*, (1881) 7 App. Cas. 829.
24. *Radio Case*, *supra*, p.312.

> It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.[25]

Finally in the *Labour Conventions Case*,[26] which arose from the statutes designed to implement the I.L.O. conventions ratified by Canada in 1935, the question of the legislative competence of the Dominion Parliament to implement the treaties signed by Canada once again came up before the Courts for determination.

On the question of the validity of the statutes and the extent of invalidity of provisions, if any, the Supreme Court of Canada appears to be equally divided. Duff, C.J. said that the constitutional development of the past three decades and specially the resolutions of the Imperial Conferences "must be recognised by the Courts as having force of law." He considered "the jurisdiction of the Dominion Parliament exclusive" in view of the plenary power of the general words at the beginning of Section 91 of the Act. "The jurisdiction of the Parliament", consequently "to enforce international obligations under agreements which are not strictly 'treaties' within section 132 is co-ordinate with the jurisdiction under the last named section"[27] Davis and Kerwin JJ. concurred with the views of the learned Chief Justice. In spite of agreeing with him regarding the desirability of considering the Dominion as "the proper medium for the conclusion of international conventions whether they affect the Dominion as a whole or any of the Provinces separately",[28] Crocket J. joined Rinefret and Cannon JJ. in holding the legislation as invalid. Rinefret J. considered the exercise of the treaty-making power by the King or the Governor-General on the advice of the federal ministers in matters reserved for the Provinces under section 92 as "directly against the intendment of the B.N.A. Act."[29] Cannon J. held the failure to secure the approval of the Provinces as "fatal".[30]

The matter was, thereupon, carried to the Judicial Committee of the Privy Council.[31] With regard to the application of section 132, Lord Atkin maintained that—

> So far as it is sought to apply this section to the Conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision of the *Radio* case, and their Lordships do not think that the proposition admits of any doubt.[32]

His Lordship outlining the problems that confront a federal state in the implementation of treaty obligations explained that—

> In a unitary State whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive ... But in a State where the Legislature does not possess absolute authority, in

25. *Ibid.*, p.313.
26. *Re Weekly Rest in Industrial Undertakings Act*, [1936] 3 D.L.R. 673.
27. *Ibid.*, pp.678-679, 690-691.
28. *Ibid.*, p.734.
29. *Ibid.*, p.711.
30. *Ibid.*, p.720. The need for approval by the Provinces was emphasised by the Supreme Court in an earlier reference, *In the Matter of Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505.
31. *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326.
32. *Ibid.*, p.349.

> a federal State where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the class of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation.[33]

His Lordship, therefore concluded—

> that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions ... There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s.92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s.91 and existed *ab origine*. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.[34]

The consequence of this "narrow construction" was that though Canada came to acquire "exclusive authority to conclude treaties" the legislative competence of the Dominion Parliament "was paradoxically diminished" and "section 132, strictly construed as it was by the Judicial Committee", was in course of time "for practical purposes exhausted".[35] The result of this is that in order to insure the implementation of a treaty dealing with a matter enumerated in section 92 the need for a Dominion-Provincial co-operation in the conclusion of such a treaty is essential.

A suggestion is sometimes made that since section 132 is now absolete, a province is now capable of entering into a treaty directly.[36] This seems to be completely without any foundation whatsoever as under section 9 the Executive Authority which comprehends conduct of external affairs and treaty-making vests in the Queen and together with external prerogatives is now exercisable by the Governor-General[37] and not the Governors of the Provinces. Practice confirms[38] it and the Provinces not being in possession of international personality, even rules of international law will not accord recognition to such claims.[39]

AUSTRALIA: In comparison with the Canadian constitutional provisions, the Constitution of the Commonwealth of Australia[40] appears more explicit and the exercise of all three powers, legislative, executive and judicial touch upon matters relevant to external affairs. Provisions for the exercise of external affairs

33. *Ibid.*, p.348.
34. *Ibid.*, p.352. Also see *Francis* v. *The Queen*, (1956) 3 D.L.R. (2d) 641 and *Mastini* v. *Bell Telephone Co. of Canada*, (1971) 18 D.L.R. (3d) 215 at p. 217 on the requirement of implementing legislation needed to enforce provisions of a treaty domestically.
35. See Fawcett, *op.cit.supra* note 1, pp. 22-23.
36. Varcoe, The Constitution of Canada, (1965), p. 184.
37. Letters Patent dated September, 8, 1947, S.R. & O. Rev. 1948, Vol.III, p.420, C1.II; Seals Act, (1939, C.22) (Can.), s.3. Also see Halsbury, Laws of England, Vol.5, (3rd ed., 1953), p. 465.
38. Castel, International Law Chiefly as interpreted and applied in Canada (1965), pp.823-824.
39. Agreements between provinces and foreign governments in the field of education and culture with the co-operation of the Dominion Government are made under the Canadian practice but these are neither treaties nor made without the co-operation of the federal government. See *Ibid.*
40. The Commonwealth of Australia Constitution Act, 1900, (63 & 64 Vict. C.12).

power have been expressly incorporated in the Constitution. Besides, section 51 (xxix) which deals with external affairs, other powers capable of having a bearing externally have also been enumerated[41] and the Commonwealth Parliament has been conferred with competence to legislate in respect of all these matters. Though the executive power vests in the Queen, yet unlike the British North America Act, it is expressly provided that the power "is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance" of the Constitution and the Commonwealth laws.[42] Under section 75(i) and (ii) judicial competence in matters "arising under any treaty" and those "affecting consuls or other representatives" of foreign countries is vested in the newly established "Federal Supreme Court", the High Court.

It is noteworthy that the grant of legislative power to the Commonwealth Parliament in respect of matters enumerated in section 51 is not exclusive but concurrent with state legislatures and its exercise is subject to the prohibitions, contained in other provisions of the Constitution. An examination, therefore, of not only the nature and extent of "external affairs" power as laid down in section 51(xxix), is essential, but it is also necessary to take into account the prohibitions that fetter its exercise. The federal structure and the concurrent nature of legislative powers makes a probe in state competence inevitable. Similarly an examination of the nature of section 75(i) and (ii) also seems unavoidable.

An eminent authority on the Australian Constitutional Law has pointed out that in the past occasional attempts to give "a limited denotation" to the term "External Affairs" as used in section 51(xxix) having failed, now "the primary meaning of the two words is as wide as their popular usage would suggest."[43] Presumably another factor responsible for the widening of the scope of external affairs power by judicial interpretation is attributable to the gradual, though unwilling, progress of Australia towards sovereign autonomous status. This is on account of the reason that

> the *application* of the external affairs power—S.51(xxix)—is today wide or narrow in proportion to which the Commonwealth enters into arrangements with other countries and the kind of arrangements it makes.[44]

The attainment of independent sovereign status by Australia, naturally led to an increasing participation in international affairs, though neither at the time of the framing of the Constitution nor even much later it was anticipated that Australia would play any significant role in treaty-making or in the conduct of its own external affairs, independent of the Imperial Government. Initially this role was confined purely to matters of a fiscal and commercial nature. Consequently, the inclusion of even "External Affairs" in the enumeration of legislative powers in section 51 in this context seems to be quite extravagant. In fact, traces of American constitutional influences are clearly evident in the earlier drafts of the Constitution Bill, as they contained the term "External Affairs and Treaties" instead of "External Affairs" alone and one of the Covering Clauses on the lines of Article VI of the Constitution of the United States provided for the enforcibility of treaties by Courts and their supremacy over State laws. Subsequently when it was realised that treaties were not within the

41. *Ibid.*, s.51(i), (iv), (x), (xvii), (xx), (xxvii), (xxviii), (xxx) and (xxxix).
42. *Ibid.*, s.61.
43. Sawer, "Australian Constitutional Law in relation to International Relations and International Law" in International Law in Australia (ed. O'Connell), (1965), p.40.
44. Sawer, Australian Federalism in the Courts (1967), p.105.

competence of colonial governments, at the time of the adoption of the final Draft Bill in 1898 by the Australian Federal Convention, the Covering Clause was modified by the deletion of the reference to treaties and the expression "External Affairs" replaced "External Affairs and Treaties".[45]

In spite of the deletion of the words "and Treaties", even in its early years the High Court appears inclined towards a liberal construction of the phrase and clearly indicated that the term was comprehensive enough to include treaties and matters like deportation and fugitive offenders.[46]

In an atmosphere still charged with the *inter se* doctrine, it is no little surprise that its broader application made incursions in yet another direction and directly in the domain of the concept itself. In *The King* v. *Burgess: Ex parte Henry*,[47] Latham C.J. while delineating the scope of "external affairs" pointed out that it comprehended the "regulation of relations between Australia and other countries, including other countries within the Empire".[48] Similarly Dixon J. observed that the purpose of section 51(xxix)

> was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth,[49]

Evatt and McTiernan JJ. while drawing a distinction between the phrases "foreign affairs" and "external affairs" explained that

> in sect. 51 of the Constitution the phrase "external affairs" was adopted in preference to "foreign affairs" so as to make it clear that the relationship between the Com-

45. See Official Report of the National Australasian Convention, Debates, Sydney, 1891, pp.558-559, 944 and 952; *Ibid.*, Adelaide, 1897, pp. 626-628, 1222 and 1230; Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney, 1897, pp.239-240; *Ibid.*, (Third Session), Melbourne, 1898, Vol. I, p.30 and Vol. II, p.2531.
46. See *McKelvy* v. *Meagher*, (1906) 4 C.L.R. 265 at p.286; *Robtelmes* v. *Brenan*, (1906) 4 C.L.R. 395 at p.415; *McArthur* v. *Williams*, (1936) 55 C.L.R. 324 at p. 339; *Roche* v. *Kronheimer*, (1921-22) 29 C.L.R. 329 at pp. 338-339. Reticence in relying on the external affairs power can be noticed from the limited number of cases. It seems that the Courts too were conscious of this reluctance as in a much later case, *Sloan* v. *Pollard*, (1947) 75 C.L.R. 445, in which main reliance was on the defence power, section 51 (vi), though external affairs power was relied upon, Dixon J. noted, "The power with respect to external affairs was faintly mentioned". The Courts on the other hand do not appear disinclined to its use. In *Jolley* v. *Mainka* (1933) 49 C.L.R. 242, Evatt J. while discussing the "Legislative power over External Affairs", (at pp. 284-288) found the source of legislative competence for New Guinea Mandate in section 51(xxix), (at p.286), while Starke J. (at p.250) and Dixon J. (at p.256) considered it to be section 122 of the Constitution. In *Ffrost* v. *Stevenson*, (1937) 58 C.L.R. 528, this attempted extension of the scope of section 51(xxix) by Evatt J. was criticised by Latham C.J. who concurred with Starke and Dixon JJ. (at p.556). Evatt J. however restated and elaborated his opinion (at p.579ff.) again in this case. Whatever might be the real source, all the justices (Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.) agreed that New Guinea was a place outside His Majesty's dominions in which His Majesty had jurisdiction. In *Wong Man On* v. *The Commonwealth*, (1952-53) 86 C.L.R. 125, Fullager J. found this conclusive in connection with nationality matters and disregarded the interpretation of Isaacs J. in *Mainka* v. *Custodian of Expropriated Property*, (1924) 34 C.L.R. 297 at pp.300 and 301. Also see Quick and Garran, Annotated Constitution of the Australian Commonwealth (1901) pp. 635-637, Harrison Moore, Commonwealth of Australia (2nd ed., 1910), p.461 and Joske, Australian Federal Government (1967), pp.213-215. With regard to the view of commentators on the nature of the legislative power in connection with External Affairs in the early years see Lefroy, 'The Commonwealth of Australia Bill' (1899), 15 L.Q.R., pp.155 and 281, at p.291; Brown, 'The Australian Commonwealth Bill' (1900), 16 L.Q.R. p.24 at p.26 and Harrison Moore, 'The Commonwealth of Australia Bill', *Ibid.*, p.35 at p.39.
47. (1936) 55 C.L.R. 608.
48. *Ibid.* at p.643.
49. *Ibid.* at p.669.

monwealth and other parts of the British Empire as well as the Commonwealth and foreign countries, was to be comprehended.[50]

In a recent case *N.S.W.* v. *Commonwealth*[51] Barwick CJ. further explained these expressions—

> External affairs is a larger expression than foreign affairs, though the expressions are often used interchangeably. In my opinion, the description "external affairs" covers a larger area of legislative power than would the description "foreign affairs". The description of the subject matter of the power and the preference for external affairs rather than foreign affairs in the Constitution was doubtless designed to include within the subject matter intercolonial matters which in Imperial days may not have been regarded as foreign affairs. But the motive of the choice of the description will not govern the content of the legislative power. That is not limited, in my opinion, to the making of arrangements with other nations or the implementation of such international arrangements as may properly be made in Australia's interest with other nations, though doubtless these may be the most frequent manifestations of the exercise of the power. The power extends, in my opinion, to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole.[52]

The Chief Justice further explained—

> Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognised as such and independent. The progression from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood which the enactment of the Constitution provided. That prospect in due course matured, aided in that behalf by the Balfour Declaration, and the Statute of Westminster and its adoption.[53]

Evaluating the constitutional arrangements made under the British North America Act and the Commonwealth of Australia Constitution Act, Evatt J. in *Ffrost* v. *Stevenson* rightly points out[54] that section 132 in Canada is limited to the treaties entered by Canada as part of the Empire, but section 51(xxix) in Australia imposes no such limits and "extends to all treaties and conventions entered by Australia". His Honour further suggests that both provisions "contain no limitations as to the subject matter of such treaties".[55] With respect, it is submitted that it cannot be denied that the exercise of legislative power under section 51(xxix) is subject to two restrictions even though the ultimate effect of these limitations in a practical sense might prove insignificant. In the first place, like any other power in section 51, it is subject to the "prohibitions" in other provisions of the Constitution. Secondly, that it is exercisable by the Commonwealth Parliament in strict conformity with the scheme of the distribution

50. *Ibid.* at p.684. Also see similar remarkes by Evatt J. in *Ffrost* v. *Stevenson* (1937) 58 C.L.R. 528 at p. 598.
51. (1976) 8 A.L.R. 1.
52. *Ibid.* at pp. 5-6.
53. *Ibid.* at p.16. Mason J. similarly pointed out "that the power conferred by s.51 (xxxix) extends to matters or things geographically situated outside Australia", *Ibid.* at p.92. Also see observations of Jacobs J. *Ibid.* at pp. 112-113.
54. *Ffrost* v. *Stevenson, op. cit. supra* note 50 at p. 599.
55. *Ibid.*

of powers between the Commonwealth and the States as provided in the Commonwealth Constitution. It hardly needs to be emphasised that within the prescribed limits mentioned earlier, section 132 of the British North America Act is not fettered in this or in any other manner.

It is no doubt true that the limitations imposed by the so-called "prohibitions" in the Australian Constitution, are not very many,[56] However, irrespective of whether there are too many or too few constitutional prohibitions and guarantees, these invariably serve as "limitations upon the power of the Commonwealth to make and give effect to international agreements."[57] It is argued with ample justification that non-observance of these limitations would result in the exercise of powers not warranted by the Constitution or in other words would amount to an amendment of the Constitution by an extra-constitutional procedure.

> Constitution cannot be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament.[58]

It is, in fact a universally acknowledged principle, irrespective of whether international agreements are directly enforceable by the domestic Courts or otherwise, that the primacy of constitutional provisions ought to be upheld within the municipal legal system.

Once again, the Paris Convention of 1919 for the regulation of aerial navigation provided the occasion for the determination of the extent of federal legislative competence under the Australian Constitution as it had done so, previously in Canada.[59] In *The King* v. *Burgess* the question of possible limitations on the Commonwealth legislative competence arising from the federal nature of the polity came up for consideration before the High Court. Though the existence of absolute restrictions so as to eliminate all or any possibilities of intrusion in the state field did not find favour generally, yet various opinions are clearly indicative of the existence of variations in the determination of the extent of the power enjoyed by the Commonwealth. Evatt and McTiernan JJ. suggested that—

> the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by agreement.[60]

Thus, according to them, apart from the constitutional prohibitions, there seems to be no other limitation on the Commonwealth legislative power under "External Affairs". Starke J. subscribed[61] to Willoghby's formulation[62] regarding United States and adopted it in defining the Commonwealth legislative competence. His Honour thought that the subject-matter ought to be "of sufficient international significance to make it a legitimate subject for international co-operation and agreement." Criticising the formulation of Evatt and McTiernan JJ., Dixon J. pointed out—

56. See Sawer, *op. cit. supra* note 43, p.41.
57. *The King* v. *Burgess*, *op. cit. supra* note 47 at p.642, per Latham C.J. Also see, p. 687, per Evatt and McTiernan JJ. and pp.658, per Starke J.
58. *Ibid.* at p.642, per Latham, C.J. Also see *Ffrost* v. *Stevenson*, *op.cit.supra* note 50, pp.599-600, per Evatt J.
59. See *supra* note 16.
60. *The King* v. *Burgess*, *op.cit.supra* note 47, p.681.
61. *Ibid.*, p.658.
62. Willoughby, The Constitutional Law of the United States (2nd ed., 1929), p.519 cited by Starke J., *supra*.

> it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as matter of external affairs.[63]

Consequently His Honour felt that—

> If a treaty were made which bound the Commonwealth in reference to some matter *indisputably international in character*, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens.[64]

More or less the implications of "indisputably international in character" places the formulation of Dixon J. alongside the tests accepted by Starke J. that the subject should be "of sufficient international significance" or a "legitimate subject" in order to constitute a proper exercise of "External Affairs" power under section 51(xxix). As to where, after all, the boundaries between those that are matters "indisputably international in character" and those that are not, should be drawn, His Honour was disinclined to be more definitive—

> The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example.[65]

Latham C.J. followed a moderate course and neatly summed up the issues—

> ... it is argued that the power to legislate with regard to external affairs is limited to matters which *in se* concern external relations or to matters which may properly be the subject matter of international agreement. No criterion has been suggested which can result in designating certain matters as *in se* concerning external relations and excluding all other matters from such a class. It is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement. It appears to me that no absolute rule can be laid down upon this subject.[66]

From the progress made in different directions and in view of the instatic nature of the changes in the scope and functions of international relations and agreements, the learned Chief Justice emphasised on the impossibility of determination "a priori that any subject is necessarily such that it could never properly be dealt with by international agreement."[67]

In view of the decision of *Attorney-General for Canada* v. *Attorney-General for Ontario*[68] by the Privy Council, almost instantly in *Ffrost* v. *Stevenson*, Evatt J. re-emphasised the Latham-Evatt-McTiernan approach and asserted the inapplicability of the Privy Council decision in the Canadian case to Australia on account of the varying nature of section 132 of the British North America Act and section 51(xxix) of the Commonwealth Constitution Act.[69] Not long after, the High Court once again applied precisely the same principles in *The King* v. *Poole and another; Ex parte Henry (No.2)*[70], a sequel to the *Henry Case*.

In a subsequent case, *Airlines of New South Wales Pty. Ltd.* v. *The State of New South Wales (No.2)* Barwick C.J. in *dicta* commented—

63. *The King* v. *Burgess*, *op.cit.supra* note 47, p.669.
64. *Ibid.*, (Emphasis added).
65. *Ibid.*
66. *Ibid.*, p.640.
67. *Ibid.*, p.641.
68. See *op.cit.supra* note 31.
69. See *op.cit.supra* note 50, at pp.596-599.
70. (1938-39) 61 C.L.R. 634.

> ... I would wish to be understood as indicating that in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament. What treaties, conventions, or other international documents can attract the power given by s.51(xxix) can best be worked out as occasion arises.[71]

With the exception of this observation the wide application given to the external affairs power in the *Henry Case* appears firmly entrenched. Facts of ever-increasing international activity since then, as a distinguished Australian jurist has aptly said,

> reinforced the Latham-Evatt-McTiernan view and it has become increasingly difficult to limit the power by reference to supposed inherent quality of topics fit for international agreement.[72]

The learned author has also suggested two other possible limitations. Firstly, the requirement, that international agreements should be entered into in good faith. It has been pointed out by him that in view of the federal nature of the Constitution "faint" indications exist in dicta in *Henry Cases* "suggesting that the Court could investigate such an issue", but he feels

> sceptical about the possibility of establishing executive *mala fides*, in the sense indicated, under the existing rules of evidence and assumptions [are bound to be made] as to good faith of the Crown and its representatives, at any rate where (as will now usually be the case) some substantial international interest in the topic can be shown.[73]

Under the second possible limitation suggested by him,[74] a distinction between international agreements which "impose an *obligation* or at least an *authority* to act" and those which merely make recommendations might become necessary. This might be essential in order to restrict the legislative process intruding upon the state field under section 51(xxix) to only those matters that require legislation in furtherance of an obligation or under an authority to act and are not merely recommendatory. In the *Henry Case*, it is suggested, the language of Latham C.J. and Starke and Dixon JJ. is consistent with such an approach without, however, making it obligatory, while Evatt and McTiernan JJ. in *dicta* expressly said "that the power would enable Commonwealth to carry out a treaty which merely made recommendations". In view of the decision in *R.* v. *Sharkey*[75] where the basis was "the preservation of friendly relations with other Dominions" and in the light of the literal requirement of section 51(xxix) that "the relevant law should be 'with respect to ... external affairs' ... no linguistic basis for the suggested restriction" exists.[76]

Observations of Barwick C.J., in *Airlines of New South Wales Pty. Ltd.* v. *The State of New South Wales (No.2)*,[77] noted earlier, though *obiter* and not expressly supported by other justices are however indicative of the fact that there are still avenues open through which the controversy is capable of making an appearance.

In the recent decision of the High Court in *N.S.W.* v. *The Commonwealth*[78] it

71. (1964-65) 113 C.L.R. 54 at p.85.
72. Sawer, *op.cit.supra* note 43, p.42.
73. *Ibid.*, In *Ffrost* v. *Stevenson*, *op.cit.supra* note 50, Evatt J. has similarly alluded to the "obligation bonafide entered into", at p.599.
74. Sawer, *op.cit.supra* note 43, pp.42-43.
75. (1949) 79 C.L.R. 121.
76. See *supra* note 74. Also see generally Lane, 'External Affairs Power' (1966) 40 Aust. L.J., p. 257, specially at pp.264-265.
77. *Op.cit.supra* note 70.
78. *Op. cit. supra* note 51.

however appears that the learned Chief Justice somewhat modified his views expressed in the *obiter* in *Airlines of New South Wales Pty. Ltd.* v. *The State of New South Wales (No. 2).*[79] The Chief Justice observed—

> The ambit of the power with respect to external affairs cannot be restrained by any reserved powers doctine.[80]

McTiernan J. appears consistent and followed the line he had adopted in earlier cases and reiterated—

> The rules of international law are matters that concern the Crown and fall within its prerogative in relation to foreign affairs. This prerogative could not be used in any way that would conflict with the articles of either of these international conventions if validly carried into effect by this Act. The power to make laws with respect to external affairs authorized Parliament to incorporate the articles in the Act, thus giving to them the force of laws of the Commonwealth.[81]

Mason J. adopted a similar approach. On the question of the Commonwealth's "plenary power to legislate upon the topic of the territorial sea and its solum" he held—

> There is abundant authority for the proposition that the subject matter extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries, *provided at any rate that they are truly international in character.*[82]

On the other hand Murphy J. attributed to external affairs a very wide scope—

> External affairs extend over a whole range of economic, social and political subjects of international concern, some of which were probably not conceivable at the time of federation; they are generally, but not necessarily, of international concern and include but are not limited to the subject matters of treaties and conventions to which Australia is a party, and to the affairs of international bodies (such as the United Nations Organization) of which Australia is a member.
>
> External affairs may also be internal affairs; they are not mutually exclusive. For example, control of traffic in drugs, of dependence, diplomatic immunity, preservation of endangered species and preservation of human rights may be external affairs as well as internal.
>
> External affairs are conducted under the executive power contained in s.61 of the Constitution. Discussion and negotiation of treaties and other arrangements on a wide range of subjects is the daily business of the Australian Government, generally through the Department of Foreign Affairs, but increasingly through other departments of State as Australia's internal affairs become more and more involved with those of other countries. This reflects the impracticability of dealing with many aspects of Australia's internal affairs, for example, minerals and energy, primary industry, environment and general management of the economy, other than in the context of international arrangements.[83]

Moreover, according to Murphy J. Commonwealth Parliament's plenary powers to legislate in order to implement its international obligations are not confined to making of laws for implementation of treaty obligations alone. These are wider—

79. *Op. cit. supra* note 71.
80. *N.S.W.* v. *The Commonwealth, op. cit. supra* note 51 at p. 10. Also see pp.5-6 and p.16 quoted at notes 52 and 53 above.
81. *Ibid.* at p.19.
82. *Ibid.* at p.91. (Emphasis added).
83. *Ibid.* at p.117.

> The Parliament has power, subject to the Constitution, to make laws with respect to "external affairs". The power authorizes, but is not limited to, the making of laws for implementation of treaties or conventions to which Australia is a party. From these, benefits flow to Australia either directly or as part of the community of nations. Under these, Australia has often assumed obligations which can only be implemented by legislation. The practical experience of our Constitution is that this can only be done effectively by the national Parliament.[84]

His Honour therefore suggested that—

> When legislation based on the external affairs power is considered, the presumption of validity should be applied as with other enactments. The use of the external affairs power may be novel, but this is no excuse for adopting a narrow, cautious or suspicious approach to Acts which are said to be supported on that power. The Constitution, particularly s.51(xxix) is intended to enable Australia to carry out its functions as an international person, fulfilling its international obligations and acting effectively as a member of the community of nations. If not, Australia would be an international cripple unable to participate fully in the emerging world order.[85]

Accordingly he held The Seas and Submerged Lands Act, 1973, validity of which was being questioned, valid not only because it purported to implement conventions to which Australia was a party but for reasons other than that. He held that—

> The Act deals directly with aspects of external affairs and is particularly directed towards the carrying out of the provisions of the two conventions. It was suggested that the Act departs from the conventions. If it does, it is still on subjects of external affairs. If there were no such conventions, an Act in substance the same as this would still be a law with respect to external affairs.[86]

As has been mentioned earlier the basic grant of the executive power was accomplished by section 61 of the Constitution, which was strictly construed by Higgins J. in the *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.*[87] With reference to the Constitution Act, His Honour observed—

> The Executive Government has no power except such as are conferred by or under the ... Act, expressly or by necessary implication ... The instructions issued under Royal Sign Manual and Signet, 29th October 1900, contain no additional relevant powers, though they vest in the Governor-General some of the Royal prerogative of pardon of offenders. In short, the Governor-General is not a general agent of His Majesty with powers to exercise all His Majesty's prerogatives; he is special agent with powers to carry out the constitution and the laws and such powers and functions as the King may assign to him.[88]

However, by an evolutionary process in due course the Governor-General came to occupy in relation to the Dominion the same position as the King holds in relation to Great Britain.

In *Jolley* v. *Mainka*,[89] Evatt J. while discussing the nature of the "Executive Power of the Commonwealth" of Australia and the prerogative powers of the Crown noted

84. *Ibid.*
85. *Ibid.* at p.118.
86 *Ibid.*
87. (1922) 31 C.L.R. 421 at p.453.
88. *Ibid.* See observations of Barwick C.J. forty-four years later quoted at note 53 above in marked contrast to these observations.
89. (1933) 49 C.L.R. 242.

> the adaptability of the common law (of which the prerogative of the Crown forms a part) to new circumstances and conditions which allowed the royal prerogative to be exercised so as to ... enable the King to enter into binding arrangements with foreign Powers, in his capacity as head of, and with respect solely to, any one or more of the self-governing Dominions.[90]

By analogy, in the light of these changed circumstances, Latham C.J. in the *Henry Case* deemed it proper not only to identify the source of the executive power in relation to the conduct of external affairs in section 61, but to extend it further in order to comprehend treaty-making—

> Under sec.61 of the Constitution the Executive Government of the Commonwealth can deal administratively with the external affairs of the Commonwealth. Sec. 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution and the laws of the Commonwealth ... The execution and maintenance of the Constitution and, particularly when considered in relation to other countries, involves not only the defence of Australia in time of war but also the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane. The most obvious example of such action is to be found in the negotiation and making of treaties with foreign countries. The action, when taken, is the action of the King ...[91]

Nevertheless, as far as the treaty-making power itself is concerned, it appears that the extension of the scope of section 61 by the learned Chief Justice lacked general acceptance. According to the authoritative statement regarding the state practice in treaty-making, it has been clearly stated that—

> (b) The Constitution does not deal expressly at all with the making of treaties. The Queen is in contemplation of law the Head of the State in Australia, and the power to make treaties is by virtue of the common law part of the Queen's Prerogative. The power to make treaties in Australia, is, therefore, exercisable by the Executive Government of the Commonwealth, at common law and without express statutory provision.
> (c) Although the Queen is the Head of the State in Australia her executive powers in Australia are exercisable by the Governor-General ... [because] ... the constitutional conventions of the British Commonwealth of Nations have altered by reason of the increased international status of member nations ...[92]

The exercise of legislative power under section 51(xxix), or for that matter in respect of any of the subjects mentioned in section 51 is enjoyed without doubt by the states concurrently with the Commonwealth, unless made exclusive by other provisions of the Constitution.[93] Since External Affairs power is not made exclusive the State legislative competence, in a strict legal sense remains concurrent, subject, of course, to the proviso that the Commonwealth Law prevails in case of a conflict between it and the State law as stipulated by section 109. On the other hand, the position with regard to the exercise of executive power is not

90. *Ibid.* at pp.281-282.
91. *The King* v. *Burgess, op. cit. supra* note 47, p.644.
92. Memorandum of 26 July 1951 from the Australian Mission to the United Nations, United Nations, Laws and Practices concerning the conclusion of Treaties (1953), pp. 5-6. Also see Cowen, Federal Jurisdiction in Australia (1959), p.27 where the learned author terms the conclusions of Latham C.J. as "hindsight" and points out that the Australian Founding Fathers never envisaged that section 61 will be the source of treaty-making power and did not even contemplate that the Imperial Government will ever vest the colonial Government with treaty-making capacity.
93. For example section 51(vi), the defence power is made exclusive by sections 52(ii), 69 and 114.

so simple and whether the Commonwealth is invested with concurrent or exclusive executive competence is not easy to answer. Professor Sawer has rightly asserted 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 ...[94]

The observation, it is respectfully submitted, does not resolve all doubts. It is indeed clear that the position with regard to the Crown prerogatives concerning "international competence" is that the Governor-General alone is vested with these and the Governors are not. It is however not clear whether the States, in the very first place, had any such competence. If the answer is in the negative, no further problem arises. On the other hand in case the colonies and later the states did possess such competence, then a further question arises with regard to its exercise. The learned author later clarified the position to some extent by pointing out that—

> as a matter of bare legal power, the conclusion is inescapable that the States continued to have some concurrent competence in the field of external affairs.[95]

If as a "bare legal power" it is dormant and incapable of being exercised by the states through their Governors as they have not been vested with the crown prerogatives concerning "international competence" then from a pragmatic point of view, that resolves the situation. However even then, theoretically, power in relation to this "some concurrent competence in the field of external affairs" vests in some authority. Obviously there is no question of any part of this having been vested in the Governor-General, since that would negate its very separate existence. An investigation of how much of this continues to remain in London and to what extent has it descended upon the State capitals, and its impact on sovereign independent status of the Commonwealth of Australia, though fascinating, is bound to prove too burdensome for the present study. Moreover,

> As the scope of international agreement extends, so must any concept of "inherent" limitations in the concept of external affairs retract, and so also will any temptation to Governments to "*mala fide*" agreements as a prop for constitutional power become less pressing.[96]

It might however be noted that internationally in any case the continued existence of the competence of the States has to be construed in the light of factors like the imperial[97] and later Commonwealth[98] practice, acquiescence by the

94. Sawer, 'Execution of Treaties by Legislation in the Commonwealth of Australia' (1952-1955), 2 University of Queensland Law Journal, p.298.
95. Sawer, *op. cit. supra* note 43, p.40.
96. *Ibid.*, p.45.
97. For example in the correspondence resulting from "Vondel" affair, the Colonial Secretary, Mr. Joseph Chamberlain made it clear that the competence of the Commonwealth Government was extensive and not merely confined to those matters in respect of which the Commonwealth had the right to legislate. See Correspondence respecting the Constitutional Relations of the Australian Commonwealth and States in regard to External Affairs (1903), Cd. 1587, p.13. Also see *The King* v. *Burgess, op. cit. supra* note 47, p.685.

    When the South Australian Premier asserted that the Commonwealth Government derived its authority from the same source as the States—"legally from the Imperial Parliament; politically from the will of the people" and therefore the Australian States demanded separate representation at par with the Commonwealth at the Colonial Conference of 1907, it was

States themselves in its denial to them,[99] judicial *dicta*[100] and above all lack of recognition by the international community.[101]

In the *Henry Case*, Latham CJ pointed out that at the time of the advent of "a new political entity", Australia, in order to invest it with competence in the conduct of its external affairs, not only executive and legislative powers under sections 61 and 51(xxix) were conferred, but it was also granted judicial powers under section 75(i) and (ii) in respect of matters touching upon its exercise.[102] As has been submitted, section 75(i) deals with matters "arising under any treaty" and section 75(ii) with those affecting foreign representatives and in both matters the High Court has been invested with original jurisdiction. Eminent writers on the Australian Constitutional Law[103] have expressed doubts with regard to the purpose section 75(i) is intended to serve. Since section 75 conferred on the High Court original but not exclusive jurisdiction, it has been accomplished by section 38(a) of the Judiciary Act which invests the High Court with exclusive jurisdiction in respect of "matters arising directly under any treaty".

In the very first place, it has been pointed out, the difference between matters "arising under any treaty" and those "arising directly" under it are not easily discernible.[104] This becomes still more incomprehensible when it is realised that without enabling legislation it is not conceivable to envisage a matter that could arise before a court under a treaty. Since a matter arises before a Court only as a result of enabling legislation, it is the statute, rather than the treaty which has relevance. In such an eventuality, it is governed not by section 75(i) but by section 76(ii) which deals with matters arising under the laws made by the Parliament and in respect of which exclusive jurisdiction has not been conferred upon the High Court.[105] It may also arise under section 76(i) in which the High Court has original jurisdiction under section 30 of the Judiciary Act, if it raises the constitutional question of the validity of implementing legislation enacted under

denied in unmistakable terms by the Colonial Secretary, Lord Elgin, See Correspondence Relating to the Colonial Conference, (1907), Cd. 3340.

In the year following the Conference the Imperial Government declared: "His Majesty's Government are pledged to the view that, so far as the relations of Australia with foreign nations are concerned, the Government of the Commonwealth *alone* can speak, and that for everything affecting external communities the Government of the Commonwealth alone are responsible to the Crown". Cited by Evatt in 'The British Dominions as Mandatories', Australian and New Zealand Society of International Law, Proceedings, (1935), Vol. I, pp. 47-48, Also cited in *The King* v. *Burgess, op. cit. supra* note 47, pp. 685-686.

98. The Australian Mission to the United Nations in its Memorandum of 26 July 1951 concerning treaty-making practice clearly stated *inter alia*: (d) Although Australian Constitution is federal in character, the component States have no international status, and the making of treaties is a function of the Federal Executive alone". See *op. cit. supra* note 92, p.6.
99. See Sawer, *op. cit. supra* note 43, p.42.
100. For example in *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales*, (1908) 5 C.L.R. 818, O'Connor J. said that the provisions of the Constitution "vest in the Commonwealth the power of controlling in every respect Australia's relations with the outside world", (at p.842). In *The King* v. *Burgess*, *op. cit. supra*, note 47, Latham C.J. cited this with approval and pointed out the international practice, whereby "other countries deal with Australia and not with the States of the Commonwealth and this practice follows the evident intention of the Constitution", (at p.645), or perhaps the Constitution underlines the international practice.
101. A claim of competence alone is not sufficient internationally. Recognition of such a claim, by the international community if not more, is at least equally significant.
102. *The King* v. *Burgess*, *op. cit. supra* note 47, pp.643-644.
103. Cowen, *op. cit. supra* note 92, pp.24-32; Howard, Australian Federal Constitutional Law (2nd. ed., 1972), pp.224-226; Wynes, Legislative, Executive and Judicial Powers in Australia (5th ed., 1976), pp.451-453.
104. Cowen, *op. cit. supra* note 92, p.28.
105. Cowen, *op. cit. supra* note 92, p.28; Howard, *op. cit. supra* note 103, pp.224-225.

section 51(xxix),[106] but in any case it is difficult to foresee a matter arising under a treaty, directly or otherwise, even if a difference can be drawn out between the two formulations. The Supreme Court of New South Wales endeavoured to overcome these arguments in *Bluett* v. *Fadden*,[107] by pointing out that jurisdiction under section 75(i) arises when the provisions of a treaty are before the Court for interpretation, even though the source of their applicability by the Courts may be rooted in an enabling legislation. Professor Cowen rightly doubted the correctness of this contention on the ground that, in any case, when the treaty is reproduced in any part of the Statute, it is the Statute and not the treaty which is before the Court.[108] Both Howard and Wynes concur in this view and doubt the correctness of the decision.[109]

Professor Cowan, later followed by Dr. Wynes, suggests[110] that section 75(i) was inspired by the corresponding provision of the United States Constitution, Article III, section 2, which conferred federal jurisdiction upon all cases arising under treaties and in all matters involving ambassadors, ministers and consuls. This had "some meaning" as the treaties are applied by the Courts in the United States, since these are "supreme law of the land" under Article VI. It has been submitted that in the earlier drafts of the Constitution Bill in Covering Clause 7, treaties were made binding along with the Constitution Act and the Commonwealth laws and in the enumeration of Commonwealth legislative powers instead of "External Affairs", "External Affairs and Treaties" figured. It was only in the final draft of 1898 that Covering Clause 7 appeared free of all references to treaties and in the terms similar to those of its present formulation, Covering Clause 5, having been amended earlier on account of the realisation that the treaty-making power vested exclusively in the Imperial Government and that the United States practice, therefore, could not be emulated.[111] Following the amendment of Covering Clause 7, the words, "and Treaties" were omitted from the enumeration of legislative powers in section 51(xxix). The argument used in favour of the omission of the words "and Treaties" was that it was a consequential change necessary with a view to maintain consistency and accordingly, was accepted by the Convention without much persuasion.[112] A similar effort was made to delete section 75(i), but as it was considered a "harmless" provision likely to be useful later, it was left unaltered.[113] Deleting two similar "harmless" provisions on the basis of an argument that they were meaningless in view of the lack of treaty-making competence and violated the principle of consistency and leaving only the third one, in spite of this, though all three together formed part of an integral and consistent scheme, is just beyond comprehension. It seems, that there is perhaps some truth in the assertion, at least in this case, that "the Founding Fathers were not very sure of what they were doing" and in their enthusiasm to adopt the American precedent relating to the exercise of federal judicial power they acted "without any awareness of any specific purpose that this grant of original jurisdiction to the High Court might serve", once they had decided to strike out the other two provisions.[114]

106. Cowen, *op. cit. supra* note 92, p.28.
107. (1956) 56 S.R. (N.S.W.), 254.
108. Cowen, *op. cit. supra* note 92, pp.29,30.
109. Howard, *op. cit. supra* note 103, pp.224-225; Wynes, *op. cit. supra* note 103, p.452.
110. Cowen, *op. cit. supra* note 92, p.24; Wynes, *op. cit. supra* note 103, p.452.
111. See Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney, 1897, pp. 239-240.
112. See *Ibid.*, (Third Session), Melbourne, 1898, Vol. I, p.30.
113. See *Ibid.*, p.320.
114. See Cowen, *op. cit. supra* note 92, pp.27 and 31.

With regard to section 75(ii)[115] the only objection seems to be the omission of ambassadors, ministers and other representatives of foreign countries, though consuls were specifically mentioned. In the first place, it was truly not possible to foresee the possibilities of their accredition. Moreover, it is submitted, that the expression 'other representatives of other Countries' is capable of a construction comprehensive enough to include all categories of foreign representatives. Since words used are matters "affecting consuls ... ", it raises the question, whether that comprehends both private and official capacity or only the latter. Though the matter is not explicitly clear in the Constitution itself, yet there seems to be no reason why it cannot be defined authoritatively by statute.

It will thus be observed that judicial interpretation has assigned to the Commonwealth of Australia much wider powers than appear from the face of the constitutional instrument, a process which in the case of Canada by a narrow construction placed on the British North America Act makes it incumbent upon the federal government, unlike Australia, to depend entirely upon the goodwill of its constituent units. However in either case, though the interpretation of the Constitutions have a decisive influence on the application of international law and the exercise of external affairs power, it is submitted, it is a matter that pertains directly to an allocation or apportionment of competence between the federal and unit governments under municipal constitutional law.

NEW ZEALAND: Since New Zealand does not have a federal system, it is free from such implications as have been considered in relation to Canada and Australia.

The only relevant section that calls for a brief consideration is section 61 of the New Zealand Constitution Act, 1852, which lays down a restrictive provision, limiting the competence of the New Zealand Parliament to legislate in contravention of a certain class of British treaties. It provides that—

> It shall not be lawful for the said General Assembly to levy any duty upon articles imported for the supply of Her Majesty's land or sea forces, or to levy any duty, impose any prohibition or restriction or grant any exemptions, bounty, drawback, or other privilege upon the importation or exportation of any articles, or to impose any dues or charges upon shipping, contrary to or at variance with any treaty or treaties concluded by Her Majesty with any foreign power.

As long as the power to amend the Constitution Act vested exclusively in the Imperial Parliament the restrictive nature of the provision was in no doubt, but since the unfettered powers of the amendment of the Constitution now vest in the New Zealand Parliament itself,[116] the significance of the provision as a restriction has disappeared. Though the provision still remains incorporated in the Constitution Act, the Parliament of New Zealand is capable of altering or repealing it whenever it deems fit, like any other section of the Constitution Act or of any New Zealand statute. Thus the legislative competence of the New Zealand Parliament, in matters constitutional or statutory, is ample and unrestricted.

On the other hand the exercise of executive power on behalf of and in the name of the Queen is exercised by the Governor-General under the Letters Patent relating to the Office of the Governor-General of April 17, 1919. Neither

115. See Cowen, *op. cit. supra* note 92, pp.31-32; Howard, *op. cit. supra* note 103, pp.225-226; Wynes, *op. cit. supra* note 103, pp.452-453. Also see Quick and Garran, *op. cit. supra* note 46, p.772.

116. New Zealand Constitution (Amendment) Act, 1947 (11 & 12 Geo. 6, C.4).

under the Constitution Act nor under the Letters Patent there has been a general grant of prerogative powers of the Crown to the Governor-General. In the authoritative Memorandum on treaty-making practice it was indicated that since the authority from the Queen for the Head-of-States form of treaties is required, usual practice is to enter into intergovernmental agreements for which this is not essential.[117] It, therefore, appears that there exists no disparity between the constitutional conventions relating to treaty-making observed in New Zealand from those observed in Australia and noted earlier.

CONCLUSION: The inadequacy of constitutional provisions dealing with external affairs power is abundantly clear from the above analysis. It is only the exigencis of a federal system that resulted in the incorporation of references to the exercise of external affairs power in the Dominion Constitutions which were endowed with a federal system. The establishment of federal systems obviously necessitated the problem of a distribution of powers between the governments of the federation and the constituent units. The need for procedural distribution of legislative power rendered unavoidable the resolution of such problems, as, the question of the exclusive competence of the federal government in the exercise of external affairs power, the making and implementing of treaties and other international obligations and the consequent need and authority to intrude upon the legislative field reserved for the constituent units. But as has been noted these references have at times proved inadequate and resulted in conflicting dicta incapable of resolving intricate issues in a realistic manner in a rapidly changing world order.

The reticence of the Commonwealth Constitutions in spelling out the exercise of external affairs power, however, appears to be for reasons, both conceptual and historical. Since the basis of the exercise of external affairs power under the English common law is identified in the prerogative powers of the Crown and draws its sustenance primarily from tradition and convention as acknowledged and recognised by juridical dicta; its regulation by statute, constitutional or otherwise in systems operating under these influences is inconceivable. Statutory regulation or recognition of the exercise of power, it is submitted, would mean identification of a new source of authority and would tantamount to the creation of a new conceptual basis, less flexible and more static.

117. See Memorandum of 29 April 1952 from the Government of New Zealand, United Nations, Laws and Practices concerning the conclusion of Treaties (1953), p.90.