The Commonwealth's Use of the External Affairs Power

HON MR JUSTICE PETER HEEREY*

Federations as International Citizens

The governments of those nations that are democracies are necessarily subject to restraints in their conduct of foreign affairs, just as they are in all other activities. Federations are a sub-species of democracy. There can, of course, be autocracies which are nominally federations, such as the former Soviet Union, but the essence of a true federation is the division of power between national and provincial governments. Division of power is one form of restraint on power and hence a manifestation of the rule of law.

The paradigmatic federated nation, if not the earliest (that distinction probably goes to the Swiss Confederation), is the United States of America. Its Constitution imposes restraints on the conduct of foreign affairs by the national government. Article II Section 2 provides that the President '... shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur.' This limitation on treaty-making power operates both in favour of the legislature and in favour of the partners in the United States federation, the States acting through their representatives, the Senators. The restraint has been far from a 'dead letter'. Examples are the United States Senate's refusal to endorse the League of Nations despite (or, perhaps, because of) it being the 'brainchild' of President Woodrow Wilson, and the recent narrow victory of the Clinton Administration regarding the North American Free Trade Association Treaty.

The exercise by a federated nation of the power to conduct foreign affairs may change the domestic arrangement of power between national and provincial governments. This feature of federated structures has recently attracted much attention in Australia, especially since the *Tasmanian Dam* case in 1983.[1] The question over which debate has raged may be stated simply: Should the

---

* Federal Court of Australia. A paper presented at the Annual Conference of the Australasian Law Students Association at Hobart on 4 July 1995. The assistance of my former Associate, Mr David Brennan, is gratefully acknowledged.

1 *Commonwealth v Tasmania* (1983) 153 CLR 1.

Commonwealth legislature have power to make laws concerning matters not otherwise the subject of Commonwealth power merely because they possess an international element? Those who oppose the existence of such power sometimes raise images of a constitutional *Götterdämmerung* in which the 'Centralist hordes gallop in triumph over the crumpled ramparts of States' rights.' My thesis is that the affirmation of such power is compelled by features inherent in any federal structure and has been recognised for much longer than is generally believed. In this article I shall touch briefly on the historical connection between s 51(xxix) and the development of Australian sovereignty.

The External Affairs Power and National Adulthood

The Founding Fathers took as the major precedent for a federation of British Colonies the establishment of the Canadian federation by the *British North America Act* 1867 (Imp). Section 132 of that Act provided:

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any Province thereof, *as part of the British Empire,* towards foreign countries, arising under treaties made *between the Empire* and such foreign countries.[2]

This provision did not enable Canada to make treaties. International sovereignty was seen as remaining a prerogative of the Imperial Crown. As late as 1923, King George V is said to have 'flown into a rage' on hearing Canada had signed a halibut fisheries treaty with the United States.[3]

In Australia, provisions dealing with external affairs changed significantly in the course of the Constitutional Conventions leading to Federation (Sydney 1891, Adelaide 1897, and Melbourne 1898).[4]

The 1891 draft Constitution included a grant of legislative power with respect to 'External Affairs and Treaties'.[5] The draft Imperial Act provided that:

> The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of powers conferred by the Constitution, *and all Treaties made by the Commonwealth,* shall, according to their tenor, be binding on the Courts, Judges, and

---

2 Emphasis added.

3 PM McDermott 'External Affairs and Treaties - The Founding Fathers' Perspective' (1990) 16 *Uni of Queensland Law Journal* 123 at 134.

4 See generally McDermott, ibid.

5 Cl 52 (26).

> people, of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding ...[6]

The notion of the new Commonwealth of Australia entering into treaties as a sovereign nation was a radical step in the British imperial context and caused alarm at the Colonial Office.[7] Also somewhat novel was the concept of treaties operating of their own force as domestic law. In the following year, the Privy Council held in *Walker v Baird*[8] that in the absence of statute, the provisions of a treaty do not affect private rights.

In 1897, in the course of ratification of the draft Constitution by the Colonial legislatures, the external affairs provisions were modified by the NSW Legislative Council. The Council deleted the phrase 'and all treaties made by the Commonwealth' from the draft Act and the words 'and treaties' from the external affairs clause of the draft Constitution. In the words of one member, 'treaty making was outside the province of any but sovereign states'.[9] At the 1897 Convention in Adelaide, on the motion of Sir Edmund Barton, the delegates adopted the NSW Legislative Council amendment to the draft Act. Sir Edmund declared that 'the sole treaty-making power is in the Crown of the United Kingdom.'[10] In the following year the Convention in Melbourne deleted the phrase 'and treaties' from the external affairs clause.

Thus an observer at Federation might have been excused for thinking that by its Constitution the new Commonwealth had explicitly abandoned any claim to sovereign membership of the community of nations, and in particular the function of treaty making. Confirmatory of this view are the words of Sir Isaac Isaacs giving advice as Attorney-General in 1906:

> The Commonwealth has not - except so far as expressly sanctioned by the Imperial Parliament of the Crown - any power to make treaties. The Imperial Government can conclude treaties for the whole Empire.[11]

Moreover, the Constitution did not contain an equivalent to s 132 of the *British North America Act.* Thus on the face of it the Commonwealth Parliament lacked the power to legislate even to implement *Imperial* treaties. And the deliberate deletion of the words 'and

---

6 Cl 7; cf United States Constitution, Article VI Section 2. Emphasis added.

7 McDermott, note 3 above, at 124-125.

8 [1892] AC 491.

9 Dr HN MacLaurin, quoted in McDermott, note 3 above, at 129.

10 McDermott, note 3 above, at 130.

11 Id at 134.

treaties' from the grant of legislative power in respect of external affairs might be thought to make that conclusion even clearer.[12]

The First World War changed this situation. Australia, through Prime Minister WM Hughes, had a conspicuous presence at the Versailles Peace Conference. The Treaty of Versailles was a treaty between Heads of State and was ratified by King George V as 'King of the United Kingdom and Ireland and the British Dominions beyond the Seas' but Australia and the other Dominions were separately represented in the negotiations and signed and ratified the treaty through their own representatives.

By the time of the Imperial Conference of 1926, Great Britain and the self-governing Dominions were, in the terms of the Conference Declaration, 'equal in status, in no way subordinate one to another in any respect of their domestic or external affairs'.[13] The international standing of Australia, as one of the Dominions, had developed by virtue of international recognition and constitutional convention.[14]

In this setting the High Court in *R v Burgess; ex parte Henry*[15] had no difficulty in holding that the Commonwealth could become bound by the 1919 Paris Convention on Aerial Navigation[16] and that s 51(xxix) was a valid source of power for legislation implementing the Convention.[17]

Federation-based Limitations on Section 51(xxix)

> Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and ... the treaty making power ... [could not] bind the government to do that which the Constitution forbids ... When the power of the States over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

---

12 As to the use of Convention Debates as an aid to construction see *Cole v Whitfield* (1988) 165 CLR 360 at 385; *New South Wales v Commonwealth* (1990) 169 CLR 482 at 501. *Cf* the use of express refusal of proposed terms in a contract as an exception to the rule against recourse to pre-contractual negotiations: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 312-313.

13 *R v Burgess, ex parte Henry* (1936) 55 CLR 608 at 684 per Evatt and McTiernan JJ.

14 Id at 635 per Latham CJ.

15 (1936) 55 CLR 608.

16 Id at 636 per Latham CJ, at 683 per Evatt and McTiernan JJ.

17 Id at 636-645 per Latham CJ, at 687 per Evatt and McTiernan JJ. See also *Roche v Kronheimer* (1921) 29 CLR 329 at 339-340 per Higgins J.

This statement does not come from recent proceedings of the Samuel Griffith Society, but from unsuccessful argument on behalf of the State of Missouri before the United States Supreme Court in *Missouri v Holland*[18] in 1920. In 1916, the United States Government entered into a treaty with Great Britain for the protection of birds in their annual migrations across the United States and Canada. The US Congress then enacted legislation under which regulations were made providing for specified closed seasons and other forms of protection. An earlier Act of Congress to the same effect but not in enacting a treaty had been held bad because it was beyond federal power.[19] Justice Oliver Wendell Holmes, in delivering the majority opinion rejecting the challenge, said:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment.[20]
>
> The State, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that, as between a State and its inhabitants, the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another State, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the State borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty, the State would be free to regulate this subject itself ...
>
> As most of the laws of the United States are carried out within the States and as many of them deal with matters which, in the silence of such laws, the State might regulate, such general grounds are not enough to support Missouri's claim ... No doubt the great body of private relations usually falls within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition.[21]

---

18 252 US 641 (1920) at 643-644.

19 Id at 647.

20 'The Powers not delegated to the United States by the Constitution, nor protected by it to the States, are reserved to the States respectively, or to the people.'

21 252 US 641 at 648 (1920).

Justice Holmes then referred to authorities going back to *Ware v Hylton* in 1796[22] and concluded that: '[b]ut for the treaty and the statute, there soon might be no birds for any powers to deal with.'[23] In 1936 in *Burgess* the High Court's view was the same. For example, Latham CJ said:

> It has been argued that s 51(xxix) should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in s 51. Prima facie it would be as reasonable to argue that any other single power conferred by s 51 is limited by reference to all the other powers conferred by that section - which is really an unintelligible proposition. There is no reason whatever why placitum xxix should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power.[24]

It is true that the scope of subject matter of international treaties has extended vastly since the Second World War and particularly into areas affecting people as individuals, such as human rights and the rights of the child. But, even in 1936, treaties covered a diverse range of subjects including, as Latham CJ noted, joint stock companies, medical practitioners, sanitation, white slave traffic and the use of white phosphorous in manufacturing matches.[25] Chief Justice Latham concluded: '[i]t is, in my opinion, impossible to say *a priori* that any subject is necessarily such that it could never be properly dealt with by international agreement.'[26]

More fundamentally however, one could not contemplate with equanimity an international community where those members who were federated nations could only enter into treaties where the subject matter fell within the grant of power to the national government in each nation's constitution. In any given federal system there is nothing self-evidently determinative as to which power goes where. Obviously enough, defence is a national task but, for example, criminal law might with equal logic be dealt with at provincial level as it is in Australia or at national level as in Canada. So not only would members of the international community be severely limited, they would be limited in different and conflicting ways in their treaty-making powers.

---

22 3 Dall 199; 1 L Ed 497 (1796).

23 252 US 641 (1920) at 648.

24 (1936) 55 CLR at 639.

25 Id at 641.

26 Ibid.

Open Slather?

The discussion thus far has been confined to treaty implementation by Federal legislation since that perhaps focuses most clearly on what are said to be the proper boundaries of Federal and State power. Other limits on the external affairs power have reached varying stages of authoritative clarification in recent decisions of the High Court: *Richardson v Forestry Commission of Tasmania,*[27] *Queensland v Commonwealth* (the *Daintree Forest* case)[28] and *Polyukhovich v Commonwealth.*[29] Mr Donald Rothwell, in his article 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits',[30] identifies seven possible ways in which Commonwealth legislation may be based on s 51(xxix), that is to say when the law:

- Is with respect to a matter external to Australia;
- Is based on an international treaty to which Australia is a party;
- Is with respect to a matter the subject of international concern;
- Is with respect to a matter which Australia is under an international obligation to regulate;
- Is one which is generally regulated and subject to international law under either customary international law or under general principles of international law;
- Has been subject to recommendations by international bodies, agencies or organisations;
- Relates to matters which deal with Australia's relations with other states.[31]

I shall not expand further on these issues. For present purposes they all give rise to a common constitutional/legal/political issue: should Commonwealth power be limited and, if so, how?

In a paper delivered in April this year at a conference of the Samuel Griffith Society, Dr Colin Howard, formerly Hearn Professor of Law at Melbourne University and now of the Victorian Bar, proposed a constitutional amendment in the form of a proviso to s 51(xxix) as follows:

---

27 (1988) 164 CLR 261.

28 (1989) 167 CLR 232.

29 (1991) 172 CLR 501.

30 (1993) 15 *Adelaide Law Rev* 209.

31 Id at 212.

> ... provided that no such law shall apply within the territory of State unless:
>
> (a) the Parliament has power to make that law otherwise than under this sub-section; or
>
> (b) the law is made at the request or with the consent of the State; or
>
> (c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia.

It must be said that, as a matter of drafting, this amendment perfectly expresses, in effective and appropriate language, the objective of those who believe that s 51(xxix) has been interpreted too widely. In a sense that is also its weakness. It is a rather extreme position. But nothing else would seem to fulfil any useful purpose. It is hard to think of any 'half-way house' between s 51(xxix) in its present form and Dr Howard's amendment. To use an old Australianism, it is a case of Sydney or the bush.

As a matter of legal and constitutional power, if Australia is to be a fully sovereign member of the international community, as well as a federated nation, there is probably no practical or desirable alternative to the present form of s 51(xxix) as interpreted by the High Court. There are many federal states in the world but I have never heard of any such state which operates differently. Certainly the proponents of amendments like Dr Howard's have not pointed to any.

The present Australian position is not philosophically opposed to the concept of federalism. The following passage from the argument of the respondent's counsel in *Missouri v Holland* gives a revealing insight:

> The treaty-making power in the United States embraces all such power as would have belonged to the several States if the Constitution had not been adopted; in the exercise of that power the Federal government is the accredited agent of both the people of the United States and of the States themselves.[32]

The Americans have had a lot more experience with federation than we have. The American Civil War of 1861-1865, fought between the two largest armies in the world at the time (and in which Oliver Wendell Holmes served with distinction), was as much about federalism as it was slavery.[33] Between the Declaration of Independence on 4 July 1776 and the confederation of the thirteen former colonies in 1789, those American states were independent

---

32 252 US 641 (1920) at 252.

33 See Heerey, 'Away Down South in Dixie' (1994) 68 *ALJ* 641 at 643.

sovereign nations.[34] Yet despite this heritage of true international independence of American states, so different from our own, the full power of treaty implementation by the national legislature, States' rights notwithstanding, has been long accepted.

Conclusion

Section 51(xxix) is not a mandate for tyranny. It is subject to all the general restraints in the Constitution, both express and, presumably, those (discovered in recent times to be) implied. As Latham CJ pointed out in *Burgess*, the Commonwealth could not avoid s 116 by using s 51(xxix) to establish a religion.[35] If Australia were to enter into an International Convention for the Suppression of Political Speech, the same result would follow.

At a political level I suggest the Australian federation is safe for the foreseeable future. Many Australians may disagree with the merits of some legislation passed in reliance wholly or partly on the external affairs power but, I think, few would, on serious reflection, maintain that these laws were designed with the destruction of the Australian federation in mind. If a Federal government had such an objective the political sanction is obvious. People who live in the States, including the smaller States, also happen to vote at Federal elections. Federal governments of whatever persuasion usually prefer to keep seats and win more, rather than lose them, and will doubtless keep that in mind.

34 *Ware v Hylton* 3 Dall 199 (1796) at 224.

35 (1936) 55 CLR at 642.